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CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

OCTOBER TERM, 1873.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. XIX.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. MORRISON R. WAITE.*

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.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

---

* Chief Justice Chase died on the 7th of May, 1873. The commission of Chief Justice Waite bears date of the 21st of January, 1874. He took his seat upon the Bench on the 4th of March following. All the cases in this volume up to the case beginning on page 490 were argued before that day, and while the office of Chief Justice was vacant. Chief Justice Waite, it will be therefore understood, did not take part in the judgment given in any of these cases.

ALLOTMENT, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE APRIL 1 1874, UNDER THE ACTS OF CONGRESS OF JULY 23, 1866, AND MARCH 2, 1867.

NAME OF THE JUDGE, AND STATE WHENCE COMING.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE AND AUTHOR OF THE JUDGE'S COMMISSION.
CHIEF JUSTICE.		
HON. M. R. WAITE. Ohio.	FOURTH. MARYLAND, WEST VIRGINIA, VIRGINIA, NORTH CAROLINA, AND SOUTH CAROLINA.	1874. January 21st. PRESIDENT GRANT.
ASSOCIATES.		
HON. WARD HUNT, New York.	SECOND. NEW YORK, VERMONT, AND CONNECTICUT.	1872. December 11th. PRESIDENT GRANT.
HON. WM. STRONG, Pennsylvania.	THIRD. PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	1870. February 18th. PRESIDENT GRANT.
HON. N. CLIFFORD, Maine.	FIRST. MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	1858. January 12th. PRESIDENT BUCHANAN.
HON. J. P. BRADLEY, New Jersey.	FIFTH. GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	1870. March 21st. PRESIDENT GRANT.
HON. N. H. SWAYNE, Ohio.	SIXTH. OHIO, MICHIGAN, KENTUCKY, AND TENNESSEE.	1862. January 24th. PRESIDENT LINCOLN.
HON. S. F. MILLER, Iowa.	EIGHTH. MINNESOTA, IOWA, MISSOURI, KANSAS, ARKANSAS, AND NEBRASKA.	1862. July 16th. PRESIDENT LINCOLN.
HON. DAVID DAVIS, Illinois.	SEVENTH. INDIANA, ILLINOIS, AND WISCONSIN.	1862. December 8th. PRESIDENT LINCOLN.
HON. S. J. FIELD, California.	NINTH. CALIFORNIA, OREGON, AND NEVADA.	1863. March 10th. PRESIDENT LINCOLN.

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DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1873.

BARINGS *v.* DABNEY.

1. Though the stock of a bank be altogether owned by a State, if the bank is insolvent its assets cannot be appropriated by legislative act or otherwise to pay the debts of the State, as distinguished from the debts of the bank. Those assets are a trust fund first applicable to the payment of the debts of the bank.
2. An act of the legislature requiring the managers of an insolvent bank belonging to the State to hold its assets appropriated to the payment of certain specified debts, creates a trust in favor of the creditors holding said debts, and, if assented to by them, amounts to a contract with them to carry out said trust.
3. If such an act, however, has the effect to appropriate the assets of the bank to pay the debts of the State, to the prejudice of billholders and other creditors of the bank, it is repugnant to that clause of the Constitution which prohibits a law impairing the obligation of contracts, and is void.
4. Such an act passed by the legislature of South Carolina in reference to the assets of the Bank of the State of South Carolina, declared to be void.

ERROR to the Supreme Court of South Carolina; the case being thus:

In 1812, the legislature of South Carolina, by a legislative act, created a bank by the name of the Bank of the State of South Carolina. The capital was to consist of various stocks, bonds, and securities specified, then belonging to the State; the same being in fact all the stocks, bonds, and se-

curities which the State owned. The bank thus belonged to the State. The president and directors were to be elected by the legislature, and were made a corporation and body politic. The faith of the State was pledged for the support of the bank, for the supply of any deficiency in the funds specially pledged, and for making good all losses arising from such deficiency. The usual powers were conferred upon the corporation; to purchase, hold, and transfer property of all kinds; to sue and be sued; to adopt its own rules and by-laws; to issue notes, and to make loans by way of discount, secured by mortgage; and to do all acts which might appertain to its functions as a bank.

In December, 1821, by another legislative act, the future profits of the bank were pledged and set apart for the payment of a certain 6 per cent. stock, which the State had previously issued.

In 1838, the city of Charleston suffered from an extensive fire, and the legislature passed, in that same year, an act entitled "An act for rebuilding the city of Charleston."

By the first section of this act the governor was directed and required, in the name of the State, to issue bonds or other contracts not exceeding $2,000,000, for the purpose of procuring a loan on the credit of the State to rebuild the burnt portion of the said city; and the faith and funds of the State were pledged for the punctual payment of the bonds or contracts, with interest.

By the third section the money, when obtained in Charleston, was to be deposited in the bank, and become a part of its capital.

By the tenth, eleventh, and twelfth sections it was enacted as follows, to wit:

"SECTION 10. It shall be the duty of the president and directors of the Bank of the State of South Carolina to make proper provisions for the punctual payment of the interest of such loan, and also for the ultimate payment of the principal thereof.

"SECTION 11. It shall be the duty of the president and directors of the Bank of the State of South Carolina to cause to be opened in the books of said bank an account in which they shall

debit themselves with the *profits* arising out of the additional *capital* created out of the two millions loan aforesaid, for the year ending October 1st, 1839, and with *all the future profits* of the said loan as the same shall hereafter be annually declared; which said fund, with its annual accumulations, shall be considered solemnly pledged and set apart for the payment of the interest on said loan and the final redemption thereof; and it shall be the duty of the president and directors of the said bank annually to report to both branches of the legislature the exact state of that fund.

"SECTION 12. When the *profits* of the said Bank of the State of South Carolina shall have paid the interest of certain stocks for which they have been heretofore pledged and set apart, the said *profits* shall also be considered solemnly pledged and set apart for the payment of the interest on the said loan and the final redemption thereof."

Under this act a large amount of *bonds*, known as "Fire Loan *bonds*," were issued and negotiated, of which £109,000 payable in London, and due in 1868, were still outstanding in the hands of Baring Brothers & Co. These bonds, by an indorsement thereon, were guaranteed by the bank.

Certificates of State *stock*, known as "Fire Loan *stock*," were also issued under the act, payable at the State treasury, and not expressly guaranteed by the bank; of which $318,000 were still outstanding in the hands of a few persons in South Carolina.

Notwithstanding the directions of the eleventh section of the act of 1838, to keep a distinct account of the profits arising out of the additional capital created by the two millions loan, no such account was ever kept; and though the net profits of the bank were annually ascertained, the particular sources from which they arose could not be distinguished, so that at the close of the rebellion in 1865, during which the resources of the bank had been enormously drawn on by the State, the assets which remained were a product made up of capital increased by profits, and the sum diminished by losses till insolvency had supervened.

The bank being thus, at the close of the war, insolvent,

the General Assembly, on the 21st of December, 1865, passed an act, entitled "An act to raise supplies for the year," &c.; by the eleventh section of which it was enacted,

"That the president and directors of the Bank of the State of South Carolina be, and they are hereby authorized and required to close the branches and agencies of said bank, and that the principal bank at Charleston shall cease to be a bank of issue, but shall continue to act as a bank of deposit until further action of the legislature; and the said president and directors are hereby authorized and *required* to collect the assets and property of the bank, and hold the same especially appropriated,

"*First.* To the payment of the principal and interest of the bonds known as the Fire Loan bonds, payable in Europe.

"*Second.* To the payment of the principal and interest of the Fire Loan bonds, payable in the United States; and,

"*Third.* To the redemption of outstanding notes hitherto issued by said bank."

In October, 1867, before the scheme provided in this act was carried out, Dabney, Morgan & Co., holding bills of the bank, filed the bill in this case in the Chancery Court of First Instance of the State for the Charleston District, on behalf of themselves and all other billholders of the bank, against the Baring Brothers & Co. (the holders of £109,000 Fire Loan *bonds*), and the persons in South Carolina holding the $318,000 of the Fire Loan *stock*.

Dabney, Morgan & Co. insisted that the Fire Loan bondholders and Fire Loan stockholders were not creditors of the bank, and that the act of 1865 was unconstitutional in that, by directing the property of the bank to be applied to the payment of the debts of the State, which were not debts of the bank, it impaired the obligation of contracts. The bill prayed that the bank might be restrained from carrying the act into effect, and that the complainants and other billholders might be decreed to be paid out of the property and assets of the bank.

The Barings, as Fire Loan bondholders, and the other defendants, as Fire Loan stockholders, answered, each relying largely for himself on the clauses already quoted of the act

of 1838; appropriating the *profits* of the loan (after the payment of the interest on the earlier 6 per cent. stock which had confessedly long since been paid off) to the payment of the Fire Loan; and the argument of their counsel, in view of the fact that no separate account had been kept of the profits, being that a pledge of *profits* carried the capital from which the profits came; in the same way as the bequest of the interest of public funds, or of the dividends of stock, or a devise of the rents and profits of an estate, is a bequest of the funds or stock themselves, or a devise of the estate from which the rents and profits sprung.*

The Barings especially (rather than the Fire Loan stockholders) relied on the act of 1865. They said in their answer:

"If it was apparent in 1865 that, from the force of circumstances, the State would be unable to meet its obligations at the maturity of the bonds in July, 1868, this was in itself good ground for legislative interference to confirm the appropriation of funds as originally pledged.

"Nor was the act of 1865 either unconstitutional, as impairing the obligation of contracts, or contrary to good faith, equity, or conscience.

"The bank had long suspended its payments, and, from the events of the war, was not in a condition to pay at once all its creditors. No bankrupt law existed at the time of the passage of the act. The legislature represented the sole stockholder. Its power and control over the bank was, at least, equal to that of the united stockholders of a private bank. The bank was but its servant. The legislative will was supreme. This paramount power, exercising for the corporation the ordinary privileges accorded, as defendants are advised, by the then existing law, undertook to prefer certain named creditors, while the whole of the assets were appropriated to the payment of debts, nothing being reserved to the corporation or stockholder controlling. The defendants submit that the preferences made were not only in conformity with the then existing law and with good faith, but in accordance with the strictest equity and most

* Philipps *v.* Chamberlain, 4 Vesey, 51; Legard *v.* Hodges, 3 Brown's Chancery, 531; Stewart *v.* Garnett, 3 Simons, 398.

enlightened conscience. They aver that the act was a statutory assignment of assets for the benefit of creditors, and that the said assignment was executed by the highest power known to the corporation, and in form the most solemn."

During the pendency of this suit the legislature of South Carolina, by an act passed September 15th, 1868, entitled "An act to close the operations of the Bank of the State of South Carolina," amongst other things repealed the eleventh section of the act of December 21st, 1865, above referred to.

On the 7th of May, 1870, the Court of First Instance, where the bill was filed, decreed that the Fire Loan bondholders and Fire Loan stockholders be first paid *pari passu*, out of the assets of the bank, and that any surplus be applied *pro rata* to the billholders, depositors, and other creditors, after adjusting the claims that arose during the war to the value thereof in United States currency. This decree disregarded the eleventh section of the act of 1865 altogether, as being unconstitutional, on two grounds: first, as disposing of property which the State did not own, and violating a solemn contract, on the faith of which the loan was taken; and secondly, as having no relation to the other matter of the act, and the subject of it not being expressed, as the constitution of South Carolina requires that each subject of an act should be, in its title. The contract which the court held to have been violated by this section, was the pledge of profits contained in the eleventh and twelfth sections of the act of 1838, authorizing the Fire Loan. The court held not only that the pledge of the profits was a pledge of the capital, but that the capital had all been drawn out by, and returned to, the State, and that the resulting fund now remaining consisted only of profits. The court further held that this pledge of profits related to both branches of the Fire Loan alike, and that the Fire Loan *stock* stood on an equal footing with the Fire Loan *bonds*, although the latter only had been guaranteed by the bank.

The Supreme Court of South Carolina, on appeal, reversed this decree, placing the Fire Loan *bond*holders on an equality with the other creditors, and holding that the Fire

Loan *stock*holders were not creditors of the bank at all, and not entitled to any participation in the fund; and directed the assets to be distributed among all the creditors of the bank, in proportion to the amount of their claims, reducing those arising during the war to their value in National currency.

The grounds on which this decree was made were:

First, that the pledge of profits in the act of 1838 expressly related to profits as distinguished from the capital; that no separate account of such profits had ever been kept; and that the result was, in fact, a loss instead of profit, the small residue of assets yet subsisting being the joint result of capital, deposits, and moneys received from loans and discounts; and, therefore, that the pledge relied on by the Fire Loan bondholders and stockholders had nothing specific and distinct on which to attach; and that, in fact, nothing was in existence on which it could attach.

Secondly, that the Fire Loan bondholders were to be admitted as creditors only by virtue of the express guarantee of the bonds of the bank; and that the Fire Loan stockholders were to be excluded because the bank had never guaranteed said stock.

Thirdly, that no claim could be sustained by either under the eleventh section of the act of 1865, because that act did not amount to an assignment (which could only be made by the bank), but amounted only to a direction which was never carried into effect, which the State, as sole stockholder of the bank, could, at any time before its execution, revoke, and which, by the act of September, 1868, repealing the said section, it did revoke; and that if the act of 1865 had amounted to an assignment, it could not have been sustained as to the Fire Loan *stock*holders, because they were not even creditors of the bank.

This decree was brought here by a writ of error, under the second section of the act of the 5th of February, 1867.*

* See the act (re-enacting or amendatory of or a substitute for the twenty-fifth section of the Judiciary Act), 17 Wallace, 681. Appendix.

The interposition of this court was invoked on the ground that the eleventh section of the act of 1865 became a contract with the Fire Loan bondholders and Fire Loan stockholders, and that the validity of the said contract was impaired by the act of 1868, which repealed the said section, and which repealing act was sustained by the decree of the Supreme Court of South Carolina.

Messrs. I. W. Hayne and W. W. Boyce, for the plaintiffs in error; Mr. D. H. Chamberlain, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The first question for us to decide is whether the eleventh section of the act of 1865 did, as alleged, amount to, or did become, a contract with the appellants.

When that act was passed the bank was hopelessly insolvent. The section referred to was intended to prescribe the manner in which its assets were to be distributed and its affairs wound up. The State was the sole stockholder, and the bank, as a corporation, could not complain of any course of action which the legislature saw fit to adopt or prescribe. In relation to the State, it was *alter et idem*. In this respect its position was very different from that of private corporations. The action of the legislature could only be questioned by the creditors of the bank. As to the bank itself, the wishes of the legislature were commands. When, therefore, the legislature, by the eleventh section of the act of 1865, declared that "the president and directors [of the bank] are hereby authorized *and required* to collect the assets and property of the bank, and hold the same specially appropriated, first, to the payment of the principal and interest of the bonds known as the Fire Loan bonds, payable in Europe; second, to the payment of the principal and interest of the Fire Loan bonds, payable in the United States; and third, to the redemption of outstanding notes hitherto issued by the bank," this declaration, if valid, was not only a direction, but a law. It was a law which the bank could not question; only creditors, whose interests were in conflict

with it, could question it. As an enactment, it created *ipso facto*, a trust, and made the bank a trustee for the parties provided for by it. It was a trust on which the bondholders, when made acquainted with its terms, had a right to rely. They became, if they assented to it, *cestuis que trust* with vested rights. Being made for their benefit, it will be presumed that they did assent to it, if they expressed no dissent.

It is unnecessary to go into the learning of voluntary assignments for the benefit of creditors. It is clear law that such an assignment, if assented to by the creditors, or a considerable portion of them, becomes irrevocable; and in this country assent will be presumed if dissent is not expressed.*

In this case, it is true, no actual assignment was made. But for the purpose of creating a trust it was not necessary. The act was a law of the State making the corporation a trustee. What special rights were thus created in favor of the *cestuis que trust* will be noticed hereafter.

The creation of this trust in favor of the bondholders, if valid, was a contract with them. Confiding in it, they would desist from further efforts to secure the payment of their claims by adverse proceedings. It would be unjust to them to abrogate it, and place them where they stood when the trust was created. The repeal of the section in question, therefore, did impair the validity of this contract, and, if the latter was valid, was a violation of the Constitution.

This conclusion, however, is based on the assumption that the law itself, namely, the eleventh section of the act of 1865, was a valid law. If it was not valid its repeal cannot be questioned. It is contended before us that it is invalid because it appropriates the assets of the bank to persons who are not creditors of the bank, but creditors of the State only. The objection taken, if valid in fact, is a good one. It was expressly decided in *Curran* v. *The State of Arkansas*,† that if the capital of a State bank, like the one in question, be

* The cases on this subject will be found collected in Burrill on Assignments, 84, 309, 418.

† 15 Howard, 304.

withdrawn by the State, either for the payment of its own debts or for deposit in the State treasury, it is a violation of the pledges by which the capital of the bank, though derived from State resources or State obligations, was set apart and appropriated as the basis of the independent credit of the bank; and that a law passed to effect such a withdrawal or misappropriation impaired the validity of the contracts held by the creditors of the bank.

That case had in it many features of the present one. The legislature of Arkansas, amongst other things, required the bonds of the State held by the Bank of Arkansas to be given up and cancelled; and authorized the bank officers to receive in payment of debts due the bank bonds of the State issued to raise capital stock for the bank, notwithstanding the bills of the bank might not have been taken up. "We cannot attribute to this provision of the law," says the court,* "any other meaning or effect than what is plainly apparent on its face. It authorizes and requires the assets of the bank to be appropriated to pay debts of the State; and we cannot conceive how this can be reconciled with the rights of creditors to those assets." The bank in that case, as in this, was insolvent, and the court held that all its assets formed a trust fund for the payment of its creditors; and that a stockholder could not lawfully withdraw any part of this fund from appropriation to that object; and that a law passed for that purpose was unconstitutional. The majority of the court was clearly of opinion that a right on the part of the State to withdraw the funds of the bank for the uses of the State, or to pay the debts of the State, would render the bank itself obnoxious to the tenth section of the first article of the Constitution, which prohibits a State from emitting bills of credit, inasmuch as it would destroy the distinctive existence and independent credit of the bank, which independent credit is founded on the inviolability of the capital pledged for the payment of its debts.

Now, in this case, the assets of the Bank of the State of

* 15 Howard, 317.

South Carolina, which still remained in 1865, were the resultant of all its capital and operations. We hold with the Supreme Court of the State that they were not profits, nor the subject of any previous pledge of profits to any specific class of debts. Any question, therefore, arising upon any such previous pledge may be laid out of the case. The only question is, whether the appropriation by the State legislature of these assets to the payment, first, of the Fire Loan bonds, and, secondly, of the Fire Loan stock, was valid and effectual.

As to the latter, we think the Supreme Court was clearly right. The Fire Loan stock was clearly not a debt of the bank, but a debt of the State alone; and the appropriation of the assets of the bank to its payment was directly within the case of *Curran* v. *The State of Arkansas.*

As to the Fire Loan bonds, there is more room for doubt. These bonds were the debts of the State, and not of the bank, it is true, but their payment was guaranteed by the bank; and it is strenuously insisted that this circumstance rendered them so far obligations of the bank that the latter might be justified in providing for their payment in preference to their other creditors. Had the bank done this, the question as thus presented would have fairly arisen. But the bank, as a distinct entity, never did make such an appropriation of its assets. The appropriation which was made was an appropriation by law; and that law was made by the State itself—the principal debtor. The case was the same, in principle, as the Arkansas case. The legislature of South Carolina, by law, appropriated the assets of the bank to pay the debts of the State. This it could not do without violating the pledges made to the creditors of the bank, even though the particular debts thus preferred were guaranteed by the bank. The Fire Loan bonds were not due by several years when this act of appropriation was attempted to be made. No claim had yet accrued thereon against the bank. So far as appears, there were not even any arrears of interest due. It did not then appear that the bank ever would be liable for the debt. It was the duty of the State to prevent

such liability from ever arising. These special circumstances under which the law of 1865 was passed bring it still more clearly within the decision of *Curran* v. *The State of Arkansas.*

The decree of the Supreme Court of South Carolina must be

AFFIRMED.

Mr. Justice STRONG: I concur in the judgment given in this case, but not in all the positions taken in the opinion of the majority of the court. I cannot regard the eleventh section of the act of the General Assembly of South Carolina, passed December 21st, 1865, as amounting either to an assignment or a declaration of trust of the property of the bank in favor of the holders of the Fire Loan bonds. In my opinion it effected no transfer, either legal or equitable, and vested no interest in the creditors. Hence the repeal of the act by the legislature, in 1868, was no disturbance of any vested rights, and it is not obnoxious to the objection that it impaired the obligation of any contract. For this reason, and for this reason alone, I think the judgment should be affirmed.

Justices MILLER and DAVIS expressed their concurrence in what was said by Mr. Justice Strong.

HODGES *v.* VAUGHAN.

When the only defect in a transcript sent to this court is that the clerk has not appended to it his certificate that it contains the full record (there being no allegation of contumacy), a *certiorari* is not the proper remedy for relief to the plaintiff in error. He should ask leave to withdraw the transcript to enable him to apply to the clerk of the court below to append thereto the necessary certificate.

THIS was a motion made on behalf of the plaintiff in error for a certiorari upon suggestion of a diminution of a record coming on error from the Circuit Court for the

Eastern District of Arkansas. The diminution alleged was that the clerk of the court below had not appended to the transcript his certificate that the transcript contained the whole record.

Mr. Justice CLIFFORD delivered the opinion of the court.

A motion for certiorari is founded upon a suggestion of diminution, and is designed to bring up some part of the record left back and not included in the transcript. When first presented, and without explanation, the court was inclined to grant the motion, but upon further consideration, we are all of the opinion that it must be denied, as the writ of certiorari is not a proper remedy for the alleged defect. Nothing is omitted from the transcript which is a part of the record in the court below. On the contrary, the only complaint is that the clerk has not appended to the transcript his certificate that it contains the full record. Such a defect, in a case of contumacy, might be remedied by a mandamus, but no application of that sort is made nor is it suggested that there are any grounds for such an application. Under the circumstances the motion for certiorari is denied, and leave is granted to the plaintiff in error to withdraw the transcript to enable him to apply to the clerk of the court below to append thereto the necessary certificate.

STOWE v. UNITED STATES.

Where a party gives to another a power of attorney, in blank, and defectively witnessed, authorizing ——— "to collect and receive any and all moneys due to him" from the government under an agreement specified, "and to make a good and sufficient release, acquittal or receipt for the same," and generally to do any and all things necessary in the premises—this power being by statute "null and void" from the defective execution—and the person to whom the power is thus given fills the blank with the name of an attorney at law, and instructs him to sue the government, and the attorney files a petition in the Court of Claims in the name of the principal in the power, "to the use and

Statement of the case.

benefit" of the person to whom the power was delivered, the petition representing that such person is the person beneficially interested, and the principal—though not authorizing the suit—subsequently, with knowledge of the facts, suffers the suit to proceed and co-operates in its prosecution, and while the action is pending, a settlement is effected between the person to whom the power was delivered and the government (the principal to the power being no party to the settlement, but allowing it to proceed without objection), and the money is paid under the settlement, but owing to the law officers of the government not being advised of the settlement, the suit is not formally withdrawn—the principal in the power cannot, afterwards, file an amended petition alleging that the power was not intended to, and did not confer any power or authority on anybody to do more than to prosecute the claim to settlement, and to receive any draft in the name of the principal; and so claim payment under the contract himself. He is estopped by his own action from disputing the validity of the settlement.

APPEAL from the Court of Claims, the case as found by that court being this:

In October, 1863, the quartermaster's department entered into a written contract with one Stowe, to deliver mixed grain at certain prices agreed on. The contract was fulfilled, and a balance found due upon it to Stowe. The government having neglected to pay a portion of this balance, Stowe, at the request of one White, executed a power of attorney—in blank as respected the name of the attorney—to get the balance yet claimed as due. The power authorized ——— for the principal, Stowe, to collect and receive any and all moneys due and coming due to him the said Stowe, "and to make, execute, and deliver to any officer or person authorized by the government to pay said moneys a good and sufficient release, acquittal or receipt for the same, or any part that may be paid to my said attorney, and generally to do any and all things necessary in the premises." This power in blank Stowe delivered to White. It was not executed before two witnesses, but was acknowledged before and witnessed by a notary public.

An act of Congress of February 26th, 1853,* in force at the time of these transactions, enacted:

* 10 Stat. at Large, 170.

Statement of the case.

"That all transfers and assignments of any claim upon the United States, . . . and *all powers of attorney* . . . for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses."

The government still declining to pay the balance, White filled the blank in the power with the name of two attorneys, one being Mr. Fuller, and instructed him to bring suit in the Court of Claims against the government. Mr. Fuller appearing as the attorney did accordingly file a petition in the name of Stowe, "to the use and benefit of White," and in it he represents that "White furnished the grain delivered to the United States." Stowe did not communicate with Mr. Fuller, the attorney of record, until after the suit was brought, nor did he authorize its institution, unless such authority was conferred by the power of attorney. Subsequently, with knowledge of the facts, he suffered the suit to proceed and co-operated with White in its prosecution. While the action was still pending, a settlement was effected between White and the government; and the money agreed on by the settlement to be paid, was paid to White. Stowe was not a party to this settlement, but he allowed it to proceed without objection or disclosure of any adverse interest. The suit was not formally discontinued, because the law officers of the government were not advised of the settlement.

Stowe afterwards, by leave of the court, filed an amended petition, in which he represented that *he*, Stowe, had furnished the grain; and that though he had given to White a power of attorney in blank, yet that the power was not intended to, and did not, confer any power or authority on White or any attorney to do more than prosecute the claim to settlement, and to receive any draft in the name of him, Stowe, for any amount that should be admitted as due. He now accordingly prayed payment to himself for the grain already paid for to White, in the way abovementioned.

The Court of Claims on hearing the case dismissed it on

the ground of the conclusiveness of the settlement with White, and from this, its action, Stowe took this appeal.

Mr. Reverdy Johnson, for the appellant, argued that under the act of Congress of 1853 the power of attorney, not being attested by two witnesses, was "absolutely null and void," and that this being so, the right of Stowe to receive the sum was absolute, and could not be destroyed by the doings of the counsel who prosecuted the claim, and misrepresented (unintentionally it was conceded) the relation of White to the matter.

Mr. S. F. Phillips, Solicitor-General, contra.

Mr. Justice DAVIS delivered the opinion of the court.

We think that the claim was rightly dismissed on the ground of the conclusiveness of the settlement with White. Stowe, by his own action, is estopped from disputing the validity of the settlement. If it be conceded that the power of attorney was not an effective instrument for any purpose, because not executed in conformity with law, the concession cannot operate to the advantage of Stowe, because he acted in such a way *after* the suit was brought as to preclude him from assuming the position he took in his amended petition. This action has induced the accounting officers of the government to treat White as the only party in interest, and if loss is suffered on this account, it should not be borne by the defendants. Stowe, in suffering the suit to proceed, and co-operating with White's attorney in its prosecution, cannot be heard to say that the statements contained in the petition are not true. It would be wrong to allow him to stand by and see the suit settled on the basis of the truth of those statements, and then to turn round and take a new position because the partial interest which he held in the claim was left unprotected by the settlement. If there be cause of complaint against any one for the failure to protect this interest, it is not against the defendants whose officers conducted and completed the negotiation, on the faith that

Statement of the case.

White, as declared in the petition, was the real owner of the claim, and that the suit was prosecuted for his benefit. In assisting to carry on this suit, Stowe adopted the proceeding on which it was based, and in effect notified the defendants that they could safely settle the cause of action with the attorney of record. Besides, in taking charge of it after the settlement and asking leave to amend the petition, he recognized the authority of the counsel who instituted it; and it is very clear, that the amendment which he was permitted to file, could not affect rights acquired while the suit as originally framed was pending.

JUDGMENT AFFIRMED.

SALOMON *v.* UNITED STATES.

1. The act of June, 1862, requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter accepting delivery of such supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid.
2. When, under a written contract, made by a person to deliver such supplies as, *ex. gr.*, corn at one time fixed, the quartermaster in charge receives part of the corn from such person for the government, and then at a later date, no objection being made to the delay, receives the rest, and gives a receipt and voucher for the amount and the price, and the government uses such part of it as it wants, and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may, in the absence of other testimony, be presumed to be the price fixed in the voucher by the quartermaster.

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

A statute of June 2d, 1862,* thus enacts:

"It shall be the duty of the Secretary of War, Secretary of the Navy, &c., to cause and require every contract made by them severally on behalf of the government, or by their officers under them appointed, to be reduced to writing, and signed by the contracting parties with their names at the end thereof."

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* 12 Stat. at Large, 411.

This statute being in force, Salomon entered into a written contract, on the 28th of July, 1864, with the quartermaster's department, to deliver at Fort Fillmore, 12,000 bushels of corn, at such times and in such quantities, of not less than 1000 bushels per month, as the assistant quartermaster should direct, 9000 bushels before the 1st day of January, and the whole amount by the 1st day of May, 1865. The 9000 bushels were delivered and paid for before the 1st day of May, and about this there was no dispute. Some negotiations took place afterwards between Salomon and the quartermaster of that military department, concerning the delivery of the remainder, the finding in regard to which was not very clear. Salomon did, however, deliver the remainder of the corn at Fort Fillmore, October 15th, 1865, by depositing it in the military storehouse at that place. The chief quartermaster's clerk afterwards examined this corn, weighed some of the sacks, counted the remainder, and gave to Salomon a receipt for the amount, stating that it completed his contract. This clerk then and there accepted and took actual possession of the corn, and the chief quartermaster gave to Salomon the usual voucher for the sum due. The corn was sound when delivered, but was injured by reason of the defective and leaky condition of the storehouse at Fort Fillmore.

The government declining to pay the amount of the voucher, Salomon filed a petition in the court below for payment. The court decreed that he should be paid for a part of what he had finally delivered, and which the government used, but not for the residue, which had proved unserviceable and been lost by decay arising from the defective and leaky condition of the storehouse. Salomon took this appeal.

Mr. T. J. D. Fuller, for the appellant:

No complaint is made by the government of the non-delivery of the whole amount by the 1st of May, nor does it appear in any manner that the contract was closed, or treated as closed. For aught that appears, the United States

received all they wished, up to the 1st of May. Certain it is that they accepted the residue when it was tendered; and if, through *their* fault, a part has been lost by bad storage the appellant should not suffer.

Mr. C. H. Hill, Assistant Attorney-General, contra:

The claimant cannot recover for the corn for which this suit is brought under the original contract, as that was ended by his failure to deliver the corn mentioned therein within the time specified.

If, therefore, there was any agreement by the quartermaster to buy the grain mentioned in the claimant's petition, it was an oral contract, and contrary to the act of 1862, requiring all such contracts to be in writing.

Reply: The contract, so far as the corn in question is concerned, was an entire one, and the acceptance and use of a part was an acceptance of the whole. There was no *new* contract. Parol evidence of the enlargement of the time of performance, in a written contract, is admissible in evidence.* By implication, or necessary intendment, here was an extension of time for the delivery of the corn. The decree of the court below is in conflict with *Lyon* v. *Bertram.*†

Mr. Justice MILLER delivered the opinion of the court.

Whether we regard the delivery made in October as made under a verbal extension of the time stipulated in the original contract, or consider it as a new transaction in which the government received and took possession of the corn, and used part of it and permitted the remainder to be injured in its hands, we think the claimant is equally entitled to be paid for it.

The act of 1862, requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter, accepting delivery of such supplies

* Emerson *v.* Slater, 22 Howard, 42.

† 20 Id. 149.

after the day stipulated, nor is a verbal agreement to extend the time of performance invalid.

And if this were not so, when the quartermaster in charge receives of a person corn for the government, gives a receipt and voucher for the amount and the price, and the government uses such part of it as it wants, and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may, in the absence of other testimony, be presumed to be the price fixed in the voucher by the quartermaster.

Judgment reversed, with directions to enter a judgment for claimant for the

Amount of the said voucher.

McCarthy *v.* Mann.

A., on the 13th of February, 1850, made an entry and location, which proved to be wholly void, of a land warrant on public land; and then conveyed to B. by deed with full covenants. B. conveyed to C. by a similar sort of deed; and C. conveyed to D., not by deed like the two just mentioned, but by a mere quit-claim; quit-claiming, however, all his right, title, &c., "both in law and equity, and as well in possession *as in expectancy*." The Commissioner of the General Land Office cancelled the entry, &c., and set it aside as void; and A. took back his money. C. conveyed to D., and he to E., &c.

Congress now passed an act, enacting—

> "That the entry of A., &c., be and the same is hereby allowed and reinstated as of the date of said entry, so that the title to said lands may enure to the benefit of *his grantees as far as he may have conveyed the same:* Provided, that the money . . . shall be again paid at said land office, and that thereupon a patent shall issue in the name of said A. for said lands."

A. paid the money again, and got a patent reciting the act of Congress conveying the lands to him in fee.

C., after the passage of this act of Congress, conceiving that the two deeds with full covenants had by the process of estoppel vested him with a good title, but that his own deed of mere quit-claim had not vested his grantee, D., with any title through that means, or in any way, conveyed *de novo* to F. *Held*, That the act of Congress did vest him, through

the process of estoppel, with a full title, and that this title had passed by his conveyance, though but a quit-claim, to D.; and, of course, that this subsequent deed (the one to F.) passed nothing.

Appeal from the Circuit Court for the District of Minnesota.

McCarthy filed a bill in the court below against Mann (under a statute of Minnesota which enables any person claiming title to unoccupied land the title of which is claimed adversely to proceed in that way) to have the question of title to a piece of unoccupied land settled by the said court.

Both parties claimed under one French, in different ways, now to be mentioned.

The act establishing, in 1849, the Territory of Minnesota reserved certain sections of the public lands, to be surveyed, to the use of the public schools.

In 1850, one Peter Poncin, owning a warrant, caused the same, with the consent of the proper officers, to be located on a tract of the land thus reserved, and soon afterwards conveyed it by deed to one Pepin, his heirs and assigns, the deed being a deed of warranty, with the usual covenants "with the said Pepin, his heirs and assigns," and, among them, covenants that he, the said Poncin, was well seized in fee of the premises and had good right to sell and convey the same in manner and form aforesaid, and that he, the said Poncin, his heirs and assigns, would forever warrant and defend the said Pepin, *his* heirs and assigns, in the peaceable and quiet possession and enjoyment of all the said lands against any and all persons claiming, or who might claim, the same.

Pepin not long afterwards conveyed the land in fee to one French by deed of the same full, formal, and technical character as that just above described, by which Poncin had conveyed it to him, Pepin.

Soon after this, again, French made a deed of the land to one Elfelt. But the deed was not a deed like the preceding deeds; a deed with covenants, such as abovementioned, but

was a deed by which French "remised, released, and forever quit-claimed," and by the same did "remise, release, and forever quit-claim" to Elfelt, and "to his heirs and assigns forever," all his "right, title, interest, estate, claim, and demand, both in law and equity, and *as well in possession as in expectancy*," to the land now in suit. The deed was, therefore, a deed commonly known as a "quit-claim," with, however, the special clause above italicized.

The warrant of Pepin, under which all these conveyances had been made, having been located on land reserved by the organic act of the Territory for schools, was of course void; and on the 10th of March, 1852, the Commissioner of the General Land Office set it aside.

Notwithstanding this, however,—and after the commissioner had set the location aside—Elfelt, the grantee last abovementioned, conveyed to one Van Etten; this deed, like French's deed to Elfelt himself, being a deed of quit-claim.

Whatever title, or other thing capable of being made into a title — if anything of either — was thus vested in Van Etten, became afterwards vested by sufficient deeds in Mann.

In this state of things—these different deeds of different sorts having been made, and the location on which they all rested having been void, and been set aside—Congress came in, and in July, 1854, by "An act authorizing a patent to be issued to Peter Poncin for certain lands therein described," enacted:

> "That the entry by Peter Poncin of . . . [the land now in question, describing it], cancelled by the Commissioner of the General Land Office, *be, and the same is hereby, allowed and reinstated as of the date of said entry, so that the title to said lands may enure to the benefit of his grantees as far as he may have conveyed the same.*"

The act contained a proviso, that the money paid for said lands should not have been withdrawn, or, if withdrawn, should be again paid at the land office; and enacted that

thereupon a patent should issue *in the name of said Peter Poncin* for said lands.*

After the passage of this act Elfelt executed to Van Etten a further deed, the same being a deed of quit-claim.

And subsequently to this again, Poncin having paid into the land office the price of the lands which he had attempted to locate in 1850 with his warrant already mentioned, the United States (March 24th, 1855) issued to him a patent. The patent, reciting the act of Congress, proceeded thus:

"Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant *unto the said Peter Poncin, and to his heirs*, the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Peter Poncin, and to his heirs and assigns forever."

In this state of things French, who, it will be remembered, had received a deed with full covenants from Pepin—the said Pepin having himself previously received a similar deed from Peter Poncin—and which said French, thus, of course—if he had never made any conveyance of the land, would, on the issue of the abovementioned patent, have been invested with all Poncin's title, on the well-known common-law principle of estoppel—conceived that there was such a difference in the nature of the two deeds, with full covenants, just mentioned, which brought the title *to* him and the deed of simple *quit-claim*, which he had given to Elfelt, and which was the only deed that he had executed to pass any title *out* from him, that while the said doctrine of estoppel would apply to the former and vest him with the title given to Poncin, by the act of Congress and the patent, it would *not* apply to the latter, and therefore would *not* vest Elfelt or

* By the same act the superintendent of the public schools, in Minnesota, was authorized to select other lands in lieu of the section now as abovementioned disposed of.

anybody claiming under him with the title of Poncin, or, in other words, with the title of him, French.

He thereupon executed a second deed of quit-claim to an entirely distinct person, one Furber.

Under Furber, and through this last-mentioned deed of French, the complainant McCarthy claimed.

Under the previous one, to Elfelt, claimed, as already said, the defendant Mann.

The court below dismissed the bill and the complainant took this appeal.

Mr. W. P. Clough, for the appellant:

Of course neither Poncin, nor any person claiming under him, had any interest whatever in the lands until Poncin's entry of them under provision of the act of 1854, and at the date of the passage of that special act, the United States continued to have as absolute ownership as it ever had. This being so, our position is that upon the entry of the lands by Poncin, under the special act, the title immediately passed from him to Pepin, and from Pepin to French; and remained in the latter until conveyed to Furber in 1856.

At the time of the entry by Poncin, under the act of 1854, Pepin was owner of the covenant of warranty contained in his deed from Poncin, and French was owner of that contained in his deed from Pepin. Neither of such covenants ever became annexed to the land; that is to say, never ran with it; because to run with lands, that is, to pass under bare mention in the deed of the land itself, the covenants must be made by or with persons who are owners of the land, or of some estate therein. This is very ancient law; the leading case being from the Year-book of 43d Edward III, 3, cited in *Spencer's Case*.* The existence of the same rule was affirmed in *Noke* v. *Awder*,† which has usually been cited as the leading case upon the point that only covenants made with the owner of the land run with

* 5 Coke, 16; 1 Smith's Leading Cases, 116. † Croke Elizabeth, 373.

it; but erroneously, for the case from the Year-books had established the doctrine two centuries before.

Nor will this case fall within *Slater* v. *Rawson** and *Beddoe* v. *Wadsworth*,† which have introduced into this country a rule not recognized by the English courts, that when the covenanter has *actual possession* of, though no valid title to, the lands to which the covenant relates, and acting under the deed containing such covenant, transfers actual possession to the covenantee, then the covenant will pass to a subsequent transferee of the land by the covenantee. For here any occupation of the lands in question, prior to their entry under the act of 1854, would have been in direct and inexcusable violation of law. Independently of which, possession by any one from whom either of the parties derives title, is not pretended to have existed prior to the entry of Poncin in 1854.

Neither Poncin, Pepin nor French was under any manner of obligation to Elfelt, nor to any one claiming under him, in regard to the lands, for French's deed was a mere release, operating only upon his then present interest, which was zero. It contained no averment of title, and no covenant, whereby French became bound as to the future.

What then became of the title after its passage from government?

That it went to Poncin is clear. That it did not remain *in* him is equally clear. In whom then did the law, by its own operation, immediately vest it?

The ordinary legal effect of the covenants of warranty which Pepin and French respectively held, cannot be open to dispute. By virtue of their operation, Poncin's estate at once enured to, and vested in, Pepin; and Pepin's estate, so received from Poncin, at once enured to, and vested in, French. This is the old common-law rule of estoppel.

But, when the title had thus arrived in French, it remained in him, from want of any relations to Elfelt upon which the law could operate to carry it to him. As has

* 1 Metcalf, 450.

† 21 Wendell, 120.

been before remarked, French was under no obligation as to Elfelt's title in the land. He had not covenanted to protect Elfelt's title, and he had not professed, in his deed to Elfelt, either to have or to transfer any interest whatever in the lands. Now no rule of law is better settled than that subsequently acquired interests are wholly unaffected by deeds of mere release without covenants, or without recitals of estate in the grantor.*

Since, then, the operation of ordinary legal principles failed to carry the title any further than to French, it must have remained in him until he granted it away, by sufficient deed of conveyance; such deed he did not make till he made his deed to Furber, in 1856.

"But," it may be asked, "did the ordinary rules of law, in fact, govern in this case?" Certainly they did; for the statute gave no direction whatever to the passage of the title, after its arrival in Poncin. Even the clause of the statute providing that "the entry of Peter Poncin," be allowed and *reinstated as of the date of said entry*, cannot be made the basis of a contrary argument. Ordinary legal principles were left even by this clause free to accomplish their usual results, unless Congress not only meant the proposed transfer to relate back to the time of the location in 1850, but by the clause actually did make it relate back to that very time and be of the very same effect in law, for every purpose, and as between all persons, as if the location had been legally perfected at that date; in other words, unless by the clause all parties interested and the courts were estopped from saying that title did not *in fact* pass to Poncin in 1850.

The act did not purport to burden Poncin's title with equities or trusts in favor of any specified person. The statement that allowance of the entry is made so that the title may enure to the benefit of Poncin's grantees, does not declare a use in favor of any particular claimant of the land, in preference to any other.

* Van Rensselaer *v.* Kearney, 11 Howard, 322; Rawle on Covenants for Title, 4th edition, 390, 391, and cases cited.

The clause did not have a literal and retroactive operation. If it had, its effect would have been to clothe the patent issued under it in 1854 with the same legal consequences that would have attended one lawfully issued in 1850. Such a result could have been accomplished only,

1st. By the statute acting by way of ratifying a void act done in the name of the United States by one having no authority at the time; or,

2d. By the statute acting by way of saying that the rights of *all* persons should be under this patent precisely what they would have been if the attempted location had been effectual, and a patent had issued upon it.

But Congress is powerless to enact, with effect, that title to any property at the time actually vested in the United States was transferred by the latter years before; and to argue that it could, would be to propound a manifest absurdity. Congress is equally powerless to enact with effect, to-day, that a designated person may have a patent of some parcel of land in which none but government has any spark of interest, and that upon the issue of such patent to-morrow the land shall have been the property of the patentee for the four years past. Therefore the statute produced no retroactive results by virtue of its operating upon facts themselves, and changing them from what they really were.

It did not operate by way of ratifying any previous void act of Poncin and of the land officers. The act did not propose to allow or to reinstate the only thing which had actually been done. It was not designed nor permitted that the location of the land warrant should now be made, which the law had before rejected. If Poncin had, after the passage of this special statute, repossessed himself of his old land warrant, and offered to locate it upon these lands, he could not have done it. The only thing which the act did authorize, was an entirely new and original transaction, wholly unconnected with anything that had been essayed in the past. The dissent, therefore, by the United States to all that had been done by Poncin and its officers, in rela-

tion to these lands, was continued by the act, in full and unmodified force.

The act did not operate by way of making the rights of the parties, other than Poncin, what they would have been at the date of the passage of the law, if the attempted acquirement of the lands by Poncin in 1850 had been consummated at that date.

Congress was prohibited by the Constitution from granting the lands to Poncin, and then saying that the rights of the other parties should be what they would have been had the location in 1850 been effectual. For, with the covenants in full force, the title, when vested in Poncin, would instantly pass through Pepin to French; and to take it from the latter by statute, would be to deprive him of his property in a way not permitted by the rules of constitutional law.

It will be no answer to these positions to argue that the lands were government's, and that therefore it was free to grant them to whomsoever it should choose. For although the government by its statute declared that it exercised its proprietary right of disposition of the lands, so that the title vested by it in Poncin might enure to the benefit of his grantees, in so far as he might have conveyed the same, it omitted to state which of the several parties claiming to stand in that relation was the one intended. It did not even undertake to say that any part of the land had been conveyed, much less to decide whether French with his covenants, or Elfelt without any, and holding a mere release applying to no future interests, was the person to whom the title, with which it was parting, should ultimately move. Congress plainly meant that whoever should get title after Poncin, should get it by the laws of the land, and did not mean to assume the task of itself settling and adjusting the conflicting claims of those deriving title from him.

The insurmountable difficulty with the defendant's title is, that it would force a construction upon this act that would give to a mere quit-claim deed, having no covenants nor averments of title, equal efficacy with a deed having

covenants, to pass subsequently acquired estates. To add to such a deed by special statute, the quality which it did not possess when made, of passing after-acquired interests, would not only be in conflict with the constitutional provisions protecting vested rights of property, but would be unjust and oppressive.

No estoppel has arisen to bar or conclude French, or any claiming under him through the Furber deed, from averring the truth. The essence of estoppel is, that the person estopped has done some act, or made some assertion, which good conscience or fair dealing would prevent him from afterward denying. If the complainant was estopped from asserting anything, it was either that Poncin had not title in 1850, or that he had not title in 1851, when he quit-claimed to Elfelt. And if such estoppel arose at all, it was upon his deed to Elfelt, because that is the only transaction between them of any consequence in determining that question. That deed, however, contained no averment of title, and no covenant, and consequently no statement capable either of being denied or affirmed. It is settled that a deed of that character works no estoppel whatever upon the grantor.*

The only other act which French ever did in relation to the land, before Elfelt took his deed, was his acceptance of the deed from Pepin. But that did not conclude him from denying, even as between himself and Pepin, that Pepin had nothing at the date of the deed in the lands, although that instrument contained full covenants.†

But, in addition to there having been nothing in law to estop the complainant, there was not even anything in his asserting title inconsistent with the highest degree of good conscience and fair dealing, as a mere moral question. Those who have dealt in the title here set up by the respondents have done so with all the facts upon which the appellant relies to sustain his title, spread out upon the stat-

* Van Rensselaer *v.* Kearney, 11 Howard, 322.

† Sparrow *v.* Kingman, 1 New York, 242.

ute-books of the United States and upon the records of the county where the lands are situated.

Mr. H. J. Horn, contra.

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

The appellant, under a remedial statute of the State, filed the bill to enforce his claim of title to the real estate in controversy. The court below decreed against him, and he thereupon brought the case to this court by appeal for review. The facts, so far as it is necessary to state them, are as follows:

The premises were a part of the public domain of the United States. On the 13th of February, 1850, Peter Poncin entered at the proper land office a tract of a hundred acres. The premises are a part of that tract.

On the 28th of March, 1850, Poncin conveyed the entire tract to Pepin, by deed of warranty. On the 19th of April, in the same year, Pepin conveyed with warranty to French. On the 19th of March, 1851, French, by deed of quit-claim, conveyed all his right, title, and claim, "both in law and in equity, as well in possession as expectancy," to Elfelt.

On the 10th of March, 1851, the Commissioner of the General Land Office set aside Poncin's entry, upon the ground that the section in which the land was situated was reserved by the act of March 3d, 1849, for school purposes.

On the 15th of October, 1853, Elfelt conveyed, by deed of quit-claim, to Van Etten.

On the 27th of July, 1854, an act of Congress was passed whereby the entry of Poncin was reinstated, and it was enacted that upon the payment of the purchase-money a patent should issue to him.

On the 19th of October, 1854, Elfelt executed to Van Etten a further deed of quit-claim. On the 24th of October, 1854, Van Etten, by deed of quit-claim, conveyed the undivided half of the tract to Robertson. On the 31st of the same month, Poncin paid into the land office the price of

Recapitulation of the case in the opinion.

the land, and on the 24th of March, 1855, the United States issued to him a patent for it. On the 22d of July, 1855, Robertson and Van Etten laid the tract out into lots and platted them as an addition to the city of St. Paul. This addition is now worth more than half a million of dollars. The lots and blocks of lots in controversy are parts of this addition. All the deeds beforementioned were duly executed and recorded.

On the 14th of January, 1856, French conveyed, by deed of quit-claim, the entire tract to Furber. On the 28th of June, 1856, Furber conveyed by a like deed to Dunn. On the 31st of July, 1856, Dunn executed a like deed to Hammond, and on the 20th of September, 1862, Hammond a like deed to McCarthy, the appellant. The deeds to Furber and Dunn were duly recorded. Those to Hammond and the appellant have never been recorded.

The act of Congress under which the second entry of Poncin was made, is as follows:

"An act authorizing a patent to be issued to Peter Poncin, for certain lands therein described.

"Sec. 1. *Be it enacted*, That the entry by Peter Poncin of the north half of the southeast quarter and the south half of the northeast quarter of section thirty-six, in township number twenty-nine, of range twenty-three, in Stillwater land district, Minnesota, cancelled by the Commissioner of the General Land Office, *be, and the same is hereby, allowed and reinstated as of the date of said entry, so that the title to said lands may enure to the benefit of his grantees as far as he may have conveyed the same;* provided, that the money paid for said lands shall not have been withdrawn, or, if withdrawn, shall be again paid at said land office, and that thereupon a patent shall issue in the name of said Peter Poncin for said lands.

"Sec. 2. *And be it further enacted*, That the superintendent of public schools in said Territory of Minnesota, be, and he is hereby, authorized to select other lands in lieu of said section thirty-six, as far as the same have been granted or sold."

Syllabus.

The first entry by Poncin was clearly void, and the commissioner was right in setting it aside. When the act in question was passed, the United States held the land as if no entry had been made. Being the absolute owners, they could grant it upon such terms and conditions as Congress might prescribe. The government united the powers of ownership and legislation, and both were exercised in passing the act. The act declared, first, that the entry should be reinstated as of its original date, and that a patent should issue to Poncin; second, that the title should enure to the benefit of his grantees as he should have conveyed the land. The law is explicit and there is no difficulty in carrying out its provisions. It must be liberally construed to effect the purposes of its enactment. By Poncin's grantees was meant those claiming title under him. Those to whom he might have conveyed were no more intended to be beneficiaries under the act, than those holding remoter links in the same chain of title. When he paid his money and procured a certificate of entry pursuant to the act, an equity vested in each of those who would have held it, if the original entry had been valid, and when the patent issued, the legal title vested in the same parties. The act applied the doctrine of relation. It made no distinction between grantees with warranty and those without it. If there had been outstanding title-bonds, they also would have been within the equity of the act, and the holders could have enforced them accordingly. The law and equity of the case are with the appellees, and the decree of the Circuit Court is

AFFIRMED.

ZANTZINGERS *v.* GUNTON.

1. Although a bank by statute, or the trustees, on the expiration thereof, who liquidate its affairs, may be deprived of power to take or hold real estate, this does not prevent either's making an arrangement through the medium of a trustee, by which, without ever having a legal title,

Statement of the case.

control, or ownership of such estate, they yet secure a debt for which they had a lien on such estate, and have the estate sold so as to pay the debt.

2. A bill against a trustee for an account dismissed on a case stated.

APPEAL from the Supreme Court of the District of Columbia; the case as assumed by this court on the evidence being thus:

In the year 1844, the charter of the Bank of Washington, in the city of that name, being about to expire, and its affairs to pass into the hands of William Gunton, its late president, and certain other persons as trustees, to wind them up to the best advantage, and the bank having a debt of some amount due to it from Daniel Carroll, for which it had a lien on several lots in Washington already previously incumbered, Gunton, in behalf of the bank, requested a certain William Fisher there, with whom he was on terms of much intimacy, to become the purchaser, as agent of the bank, of the lots; Gunton promising to save him from any loss. Fisher consented to become the purchaser in the way mentioned. The bank accordingly furnished the requisite funds, about $6065.84, to Fisher, who gave his note therefor, and he bought the lots, a conveyance of them being made to him. Subsequently to this, the charter of the bank having now expired, Fisher and wife made a conveyance of them by deed to Gunton. This conveyance was declared to be in trust to secure the payment of the note of William Fisher for $6065.84 at sixty days, payable to his own order; and it authorized a sale of the property for that purpose, and directed the trustee to pay the balance, if there should be any, as the grantor might by further instrument in writing direct. Fisher afterwards did by a formal instrument, under seal, direct that after the sale of all the lots, and the payment of the note and interest and the costs of the trusts, including compensation to the trustee, any remainder should be paid to the trustees of the bank.

In this state of things, certain persons of the name of Zantzinger, related to Fisher, and who had become through

the dispositions of his will owners of all real estate which he left at his death, filed a bill against Gunton setting forth that Fisher had given a note for $6065.84 to the bank, and had conveyed these lots to Gunton, the president of its trustees, to secure it; that Gunton had never settled any account, and that they had no knowledge whether the note had been paid or what disposition had been made of the lots conveyed as security; and praying an account, &c.

The bill made no kind of reference to the instrument of appointment abovementioned as having been executed by Fisher, by which he directed that after the sale of the lots and payment of the note, &c., any remainder should be paid to the trustees of the bank.

The answer set up as defence the history of the matter as above given, and especially that Fisher had by formal instrument of appointment, produced, directed that any surplus left after paying his note should be paid to the trustees.

Proof was taken, including testimony of Gunton himself, which if believed established, of itself, the defence. The court below dismissed the bill, and from that, its action, the complainants took this appeal.

Messrs. F. Miller, R. T. Merrick, and T. J. Durant, for the appellant, referred to certain acts of Congress,* arguing from them that the bank had no power to hold real estate except for certain specified purposes, for which they did not hold these lots, and that the trustees had no power to take and hold it at all.

Messrs. J. D. McPherson and W. D. Davidge, contra, were relieved by the court.

Mr. Justice MILLER delivered the opinion of the court.

The complainants in their bill, omitting any statement of the formal instrument of appointment made by Fisher, and treating the deed of trust as a mere security for his note,

* 2 Stat. at Large, 625; 3 Id. 618; 5 Id. 451.

allege that there is a balance in the hands of the trustee, Gunton, to which they are entitled, and call upon him for an account.

The answer of the defendant, which is fully sustained by the proof, sets up two defences, either of which is in our opinion sufficient:

1. It sets up and relies upon the instrument which appointed and directed that he should pay any balance remaining of the proceeds of the sale of the lots, after satisfying the note, to the trustees of the Bank of Washington.

As these instruments are all under seal and by the common law imply on their face a good consideration, they show that the grantor had parted with all his interest in the property. The legal title was in the trustee, and the equitable interest in the trustees of the bank. His direction to the trustee to sell, and his subsequent direction to pay the proceeds to these trustees, carried all the interest he ever held. Of course, no interest in these lots or in the proceeds of their sale passed either by his will or by inheritance to the complainants.

2. But the answer and the evidence further show very fully that William Fisher only held the legal title as naked trustee without interest, for the use of the trustees of the Bank of Washington. About the period of the expiration of the charter of that institution, it became necessary, in order to secure payment of a debt due to it from Daniel Carroll, to have the lots in question, on which they had a lien, placed in a situation where the money could be realized. The lots were accordingly purchased by Fisher, at the request of the trustees of the bank, who furnished the money, and the note and trust deed to Gunton (who was one of the trustees of the bank) were devices by which the lots were divested of other liens and placed in the hands of Gunton, so that on sales to be made, at convenient times and fair prices, the proceeds in the shape of money could be paid to the trustees who had the management of the bank. Fisher never paid any money, nor was it intended that he should. His note was placed in the bank, and was by it protected and

cancelled in due time. It was on his part a mere act of friendship to accept the trust and confidence reposed in him by the trustees of the bank, and he carried out faithfully the requirements of that trust. The efforts of the present complainants to take advantage of this confidence, and to assert an interest which he never thought of claiming, do not commend themselves to a court of equity, and the technical rules of the law on which they are based should be very clearly in their favor to enable them to succeed. We are of opinion they have no place here.

It is said that neither the bank, whose charter had expired, nor the trustees who were authorized to wind up its affairs, could purchase or hold real estate.

As a general proposition this may be true. And if the transaction here was in its effect to vest in the bank the real estate in question, either by its legal title or the absolute equitable ownership and control of it, the question presented and argued by counsel would arise if complainants were in position to raise it. But it is very clear that no such effect can be given to the transaction we are considering. The bank had a debt due to it and a lien on this property. The right of the bank, or its liquidating trustees, to have this property so sold as to pay this debt is undoubted. If in doing this they were compelled, for their own protection, to buy off other incumbrances, so that when sold and converted into money all of it should be paid to them, no principle of law or justice was violated. Neither the bank nor the trustees of the bank ever had the legal title, or the power of sale, or the right to control the time or the terms of the sale. If Gunton, the trustee, had failed or refused to sell, or died without a sale, no power lay in the trustees of the bank to make a sale or to receive the title. Their only remedy would have been to assert their right to a sale and to the proceeds of it in a court of chancery.

It cannot be said, then, that the trustees of the bank ever had the legal title, the control, or the ownership of the land, and their only interest was a right to the proceeds when the lots should be sold under the deed of trust. This was not

General statement of the case.

in our opinion forbidden by any law of the District, statutory or otherwise. Nor do we think it worth any consideration that Fisher's note was given in the transaction. He incurred no risk; he acquired no real interest in the property and claimed none; and if he ever had a technical legal interest he parted with it when he gave the deed of trust and the subsequent authority to pay the proceeds of the sale to the trustees of the bank.

DECREE AFFIRMED.

BULKLEY *v.* UNITED STATES.

A. contracted with the government to transport a large quantity of army supplies, the government agreeing that in order that he should be in readiness to meet its demands for transportation due notice should be given to him of the quantity to be transported at any one time. The government gave him notice that transportation would be required at a time named for a certain large amount of supplies specified, and inquired if he would get ready. He replied affirmatively, and did get ready. The government at the time named furnished a small part of the supplies of which they had given notice to the contractor, but not needing transportation for the much larger residue did not furnish that. On suit by the contractor against the government for profits which he would have made had the supplies been furnished as he received notice that they would be, *Held*, that the notice did not amount to an agreement to furnish the amount of supplies specified, and therefore that the contractor could not recover the profits which he would have made had the freights withheld been furnished to him.

Held, further, that the government having thrown upon him needless expense by requiring him to make ready for the transportation of freights under the contract, which they did not in the end require to be transported, he was entitled to recover for the expense to which he was thus subjected.

APPEAL from the Court of Claims, in which court H. S. Bulkley filed a petition against the United States to recover damages on a contract for the transportation of army supplies in the West, by which, as he alleged, the government, after having given him notice that it would furnish to him certain supplies for transportation, and not having furnished

Statement of the case in the opinion.

them (he having made his preparations to transport them), became bound to pay to him the profits which he would have made had the supplies been so furnished and transported.

The Court of Claims decreed against the claim, and he took this appeal.

Messrs. Durant and Horner, for the appellant; Mr. C. H. Hill, Assistant Attorney-General, contra.

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

The result of the case here depends upon the construction to be given to the fourth article of the contract between the parties.

Bulkley agreed to transport any quantity of such supplies —between 100,000 and 10,000,000 pounds—that might be turned over to him for that purpose, from April to September, 1865. The fourth article provided—

"That in order that the said H. S. Bulkley shall be in readiness to meet the demands that shall be made upon him for transportation under this contract and agreement, due notice shall be given him or his agent of the quantity and kind of stores to be transported at any one time, at what points the stores will be ready for delivery to him, and the place of their destination, subject to such changes as shall be decided upon while *in transitu*, as herein provided for, that is to say," &c.

The period of the notice before the time of performance in each case was then prescribed, being twenty-five days for 300,000 pounds, and increasing according to the increased quantity of the stores specified. On the 4th of June, 1865, an officer of the government advised Bulkley that transportation from Fort Leavenworth to the extent of 1,700,000 pounds was needed, and inquired whether, as he had been notified already to the extent of his contract, he was prepared to transport that additional quantity of freight. He assented. This enlarged so far the maximum quantity covered by the contract.

The Court of Claims found, that of the freights notified under the fourth article, the United States did not need transportation for 1,690,074 pounds, and to that extent, therefore, did not offer any to him. It was further found that Bulkley, on his part, was prepared and ready to transport all such freights, and so notified the proper officers of the United States. The court held as a conclusion of law that he could not recover the profits he would have made had the freights withheld been furnished to him, but that the United States having thrown upon him needless expense by requiring him to make ready for the transportation of freights which they did not in the end require to be transported, he was entitled to recover for the expense to which he was thus subjected. Bulkley, insisting upon profits as the measure of his damages, declined to furnish proof of the expense incurred. The Court of Claims thereupon dismissed his petition, and he has removed the case to this court for review. Here the claim for profits, as the rule of compensation, is renewed.

It is insisted that every notice was a specific agreement within the original contract on the part of the government that the freights specified should be furnished, and that the United States are liable accordingly.

We think this theory cannot be maintained, and that the Court of Claims came to the right conclusion.

Outside of the fourth article there is nothing in the contract which gives the slightest support to the claim. The other stipulations are that Bulkley should transport in the manner provided, and within the times mentioned, all the freights between the *maximum* and *minimum* quantities specified that should be offered to him. If none had been offered he would certainly have had no claim upon the government for anything. The fourth article provides that in order that he might be in readiness to meet the demands of the government, due notice should be given him of the time, place, quantity, and kind of stores to be transported and their place of destination. There is still no *agreement* to furnish such

freights, or any freights. The effect of the notice was to signify a purpose on the part of the government, and that purpose was liable to be changed at any time before it was executed. Indeed, it is expressly stipulated that it might be altered while the stores were *in transitu*, and there is no limit prescribed as to the extent or character of the changes that might be made. If, the day after the transportation commenced, the wagons had been ordered back to their place of departure, unloaded, and the transportation abandoned, there would have been no breach of the contract. The change would have been within its letter and meaning. *A multo fortiori* might such a change be made and carried out before the transportation began. If it were intended that after the notices were given the government should be bound as claimed, that intent should have been expressed in the contract. It is neither expressed nor implied. It was doubtless known to the officer who entered into the contract on behalf of the United States, that in the exigencies of the public service, more or less transportation, or none, might be required at any given time or place contrary to what had been anticipated and intended down to the last moment. Hence while it was stipulated that actual transportation should be paid for at the rates specified, an unfettered discretion was reserved to the government as to everything beyond that point. It is to be presumed that with this view the contract was framed as we find it. It commits the government to nothing but to pay for service rendered. It is partly printed and partly written, and is according to the formula used by the government in all such cases. In making ready to meet the requirements of the notices, Bulkley was subjected to the loss of time, to trouble, and expense. He is entitled to be paid accordingly. Such is the implication of the contract, and what is implied in a contract, deed, will, or statute is as effectual as what is expressed.* Human affairs are largely conducted upon the principle of implications.

* United States *v.* Babbit, 1 Black, 61.

Statement of the case.

In relation to the large amount of stores transported there is no complaint. It is to be presumed that everything in relation to them has been satisfactorily adjusted. This claim is confined to stores not transported.

Although we concur entirely with the Court of Claims in their view of the case, yet as the appellant acted in that court upon a mistaken notion of his rights, the judgment will be reversed and the cause remanded that he may have another opportunity to produce the proof which he before declined to give. If he shall again refuse, the petition must be finally dismissed.

CAUSE REMANDED.

THE WENONA.

A steamer condemned for a collision with a sailing vessel, the wheelsman, mate, captain, and other witnesses on the sailing vessel swearing positively to courses and distances and times immediately prior to the collision, and these showing that the steamer was in fault; while though there was strong evidence on the steamer's side to show that these courses, distances, and times could not have been truly stated by the witnesses in behalf of the sailing vessel, this evidence was inferential chiefly; consisting of conclusions or arguments drawn from other facts sworn to, as *ex gr.*, the lights which the steamer saw and the lights which she did not see on the sailing vessel; and the effect of giving credence to this inferential or argumentative testimony being to convict as of necessity the witnesses for the sailing vessel of perjury.

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

About nine o'clock in the evening of the 29th of November, 1869, heading east by north half north, the steam propeller Wenona was on her course down Lake Erie; her rate about ten miles an hour. The evening was somewhat dark and it was raining. There was a little mist on the water, but not enough to make what is called a fog. The wind was south, or south by east.

Going up the lake at the same hour, then, and for a half hour before, heading southwest by west half west, was the

schooner Frémont; her rate five or six miles an hour, all her canvas set, closehauled, though making some leeway.

Both vessels were well officered and had their proper lights properly stationed.

The vessels as they approached saw each other. The steamer saw that the vessel coming up was a sailing vessel, and the schooner before long saw that the vessel coming down was a steamer. The schooner kept on her course till a certain moment, when she changed her course. The steamer kept on *her* course till a certain moment, when she changed hers also. A collision took place, and the schooner with her cargo went to the bottom of the lake; her officers and crew having barely time to escape with their lives.

Her owner hereupon libelled the steamer in the admiralty. The question in the case was a pure question of fact. Did the steamer change her course, as she was bound by the rules of navigation to do, in time to enable the schooner safely to keep on *hers?* Did the schooner, when she changed *her* course, change it because the vessels had got so near that a collision seemed inevitable if she did not do so?

The question, of course, was to be decided by the evidence.

The LOOKOUT, on duty at the time, was examined; a man who had been a sailor for fifteen years, eleven of them on the ocean, and the rest upon the lake. He said:

"I was forward on the vessel. Our course was southwest by west half west. I saw the propeller's light; at first a bright light, right ahead. I reported it to the officer of the deck. He answered, and said 'I see it.' A minute or two afterwards I saw green and red lights; and I reported to the mate that there was a steamer ahead. The mate lit the torch and made a flash light. It was lit twice. It was a turpentine torch, and made a flash for two or three seconds. I watched the lights on the steamer; they appeared to me dead ahead, and seemed, if anything, to be gaining a little to the windward, until they opened out to our port bow, which was our weather bow. I could then see the red and bright light but not the green. The next thing I could see was that her green light shut in for a short time;

and I saw the red and bright light but not the green. Then both green and red opened out brightly, and the vessel seemed to be coming down on us; and to be not more than three times her own length from us, perhaps not that. I called the men below, to come on deck and to look out for themselves. In four or five minutes from the time I saw the bright light as near as I can give it—it might have been more or less—it could not have been many minutes more—the steamer struck us between stem and cathead; at an angle of something more than forty-five degrees. She was under way and came stem on."

The MATE, whose business for twenty-eight or twenty-nine years had been sailing, said:

"The captain came on deck as the second torch was lit; whether he or the cook lit it I can't say; one or the other. The propeller was then pointed right to us. The schooner's course had not been changed. Her course was southwest by west half west. I know that from the compass, and I am swearing from what I know of the compass course. She had been on that course since a little after eight o'clock. She kept on that course till the time the captain came on deck. When the propeller was standing right over us the captain gave order to the man at the wheel to 'hard aport.'"

The WHEELSMAN, who had been for three years on the ocean, for ten upon the lakes, and for the last-mentioned term in the habit of steering, said:

"After the lookout reported a light, I saw the light of the propeller; a bright masthead light. Our course—southwest by west half west—was taken before we saw that light. After I saw the three lights the propeller put off suddenly to the windward three or four points or more. It took her five seconds to go off to windward; I could not tell the time; it was sudden. I first saw her dead ahead, and then to windward. She shot to windward. When the vessels came together our course might have been west by south half south. The captain sang out, 'Put the helm hard up,' and the change was made. The propeller was then off our port bow, heading about midships for us, and our vessel was then perhaps half her own length from her. If I had not put the helm hard up, the propeller would

have struck us at the fore-rigging. I put the helm hard aport. *No other change was made in the course of our vessel from the time the white light was reported down to the collision.*

"I saw the bright light about eight minutes before the collision. The propeller must have then been a mile and a half from us. When I first saw her three lights I judge she might have been a quarter of a mile from us. She got three or four points off our port bow or more. This was not many minutes before the collision. It may have been two."

The MASTER, who was also the owner of the vessel, and had been sailing on the lakes for twenty years, said:

"I was in my cabin reading a newspaper. I heard through the windows the lookout report, 'Light ahead.' The mate said, 'Steady. Don't let her fall off.' The mate then said to me, 'Light this torch,' handing it to me. I dropped my paper and lit it. In about a minute I heard another report in the cabin, 'It's a steamer; she is coming right for us.' The torchlight would only burn two or three seconds. The mate asked me to light the torch again. I said, 'I have no time; the cook will do it.' I jumped on deck and got on the cabin top. I watched the lights for a few seconds. When I first saw them they were about half a mile off, probably less. I watched till the lights got pretty close to and the green light almost shut in. At this time I could see the port side of the hull, a kind of glance of it. The boat seemed to come in that style till within about four times her length of us, and then she straightened up and came towards us. I asked the man at the wheel how our vessel was heading. He said she was on her course. The propeller seemed to starboard her wheel suddenly, when she was perhaps one hundred feet or more from us. I then ordered our wheel hard aport, hard up. The propeller struck us. The collision took place in two or three minutes after I got on deck; I can't tell well about the time. It was not more than five or six minutes after the first report of 'Light ahead.'"

The COOK, who was also steward, one Clements, gave his account of what part of things fell under his observation, as follows:

"At the time of the collision I was on deck. Before that I had been below. I heard the lookout report light ahead. The

mate answered, 'All right,' or something to that effect. Then I heard the mate report to the captain that the light did not appear to alter its course. The mate was standing on deck looking down in the cabin. Then the captain got up and looked out of the companion-way, and told the mate to light the torchlight. I got the matches to light the torch, and gave them to the captain. He lit the torch. Then the mate swung it under the leeside of the boom. Then, while he was swinging the light I looked up the scuttle to see if I could see the propeller-light myself. I did see a bright light. It was right ahead; might be half a point on the weather bow. Then I heard the captain say, 'Light the torchlight again,' and I went to the cabin and gave some matches again to the captain and he lit the torch. The mate showed the torch lighted at the same place as before. Then I went to look up through my scuttle again, and I could make out the whole three lights of the propeller bearing right down upon us. I could then just begin to see the hull loom up. In hazy weather like that, I cannot give any estimate of distance. I see the captain then jump atop of the house and hail the propeller. He sung out two or three times, but what words he said I cannot say. Then the vessels came together."

There was no lack of testimony on the other side.

It tended to show, and some of it positively enough, that the first light which the steamer saw on the schooner was the torchlight, dead ahead, or, if anything, a quarter or half point on her port bow; that this light was seen *eight or ten minutes before the collision;* that in a short time afterwards the green light of the schooner was seen, dead ahead, or, if anything, on the propeller's *starboard* bow; this, of course, indicating that the schooner was passing to the starboard, so that the vessels would pass starboard to starboard—"green to green;" that the second torchlight was then seen, and still the green light alone, opening on the propeller's starboard bow, from dead ahead to one or two points on that bow. So that whatever might be thought about "leeway," there was still no danger, nor appearance of danger; that after the green light had been thus opened until it was about a point and a half or two points on the propeller's

starboard bow the green light suddenly became invisible, and the red one shot in sight a minute or two before the collision, and appearing about one and a half or two points off the propeller's starboard bow, appearing as soon as the green one became invisible; that the schooner was estimated by those on the propeller to be then from an eighth to a half of a mile on the propeller's starboard bow; that they conceived that this indicated that the schooner had changed her course and was crossing the propeller's bow; that the propeller then put her wheel hard astarboard, stopped and backed her engine.

All this part of the case was made out by the statements of witnesses who, as to exact times and distances, were in opposition to the witnesses of the other side, and were in certain particulars not absolutely consistent with each other.

So at least the District Court thought, and it therefore decreed for the libellants, condemning the Wenona for the loss of the schooner and her cargo.

The Circuit Court, on a more favorable view of the evidence of the respondent, reversed that decree, and the owners of the schooner brought the case here to re-establish, if they could, the decree of the District Court.

There was no denial that the propeller was well officered, with a good watch, &c., &c.; the chief allegation being that they had wholly mistaken distances, and so committed fault.

Mr. J. Ganson, for the appellant:

The mate and wheelsman testify positively that the schooner did keep her course until the propeller was coming on her, and was only a short distance off, when her wheel was put hard aport under the captain's order, to ease the anticipated blow. The respondent offers no evidence of a positive character in opposition to this affirmative testimony. His evidence conveys *opinions* rather than facts, in opposition to the positive evidence on the part of the libellant. That kind of evidence cannot weigh against positive proof.

The burden is on the propeller to show that it did everything in its power to keep out of the way of the schooner.

This it had a right to do, as it was in the open lake, by either porting or starboarding its wheel, or by slackening its speed, or by stopping and reversing its engine, if there was risk of a collision. If a steamer makes the light of a sailing vessel at a sufficient distance to avoid coming in contact with the vessel, and a collision ensues, *primâ facie* the steamer is chargeable with fault, and the steamer must exculpate itself by clear and satisfactory evidence, or she will be held liable.*

If the approach of the vessel is such "as to involve the risk of a collision," and such risk *is ascertained*, then the measures "to keep out of the way" are to be taken. If doubt exists in the case of a steamer as to the proper course to be taken when nearing a sailing vessel, arising from difficulty in determining the course of the sailing vessel, then the steamer should "slacken her speed, or, if necessary, stop and reverse."†

The evidence on the part of the libellant shows great care, caution, and attention. The mate and captain of the schooner, seeing that the propeller was steering directly for the schooner, so as to involve risk of a collision, ordered a torch lighted to attract the attention of the propeller and warn it of the danger. The first light from the torch did not apparently attract the attention of the propeller, for it continued to bear for the schooner. A second flash-light from the torch was made. The man at the wheel was cautioned at the same time to keep the schooner steady on her course. He testifies that he did so. This shows that the persons in command of the schooner were on the alert, and taking unusual pains to warn the propeller of the danger.

There is not any dispute as to the fact that the propeller starboarded its helm, but the libellant's and respondent's witnesses differ considerably as to the then relative position

* The Carroll, 8 Wallace, 302, 304.

† 13 Stat. at Large, 61, art. 16; The Cleopatra, Swabey, 135; Lowndes on Collisions, 27; Holt's Rule of the Road, 200, The Joseph Straker *v.* The Karla.

of the two vessels, and as to the distance there was then between them.

The libellant's witnesses testify that when the second torchlight went out the vessels were very near each other. It was at this time the libellant himself stepped on top of the cabin. The vessels were then, as the libellant testifies, from one-quarter to half a mile apart.

The respondent's testimony would go to show that the propeller made the red light of the schooner after the second torchlight went out, and that when it made the red light the vessels were apart not less than a quarter of a mile, and that some little time elapsed between the disappearance of the second torchlight and the appearance of the red light of the schooner.

It is evident that the distance between the two vessels when the propeller put her helm hard astarboard and swung to port was about as the libellant's witnesses state, and not so great as that given by the respondent's witnesses.

It is obvious that there was haste in the manœuvre of the propeller, and that before it was made the vessels were in a dangerous proximity. The blame rests with the propeller for getting the vessels into that position, and it must be held liable.*

It is evident that the propeller's headway was not materially checked when the vessels collided, and that the propeller was going ahead.

So far as the decision of this court as an appellate tribunal is concerned, it will, on the disputed evidence, give great weight to the decision of the District judge, who had the advantage of seeing the witnesses as they testified and could form a good judgment of their probity and intelligence.

Mr. G. B. Hibbard, contra:

To commit a *fault* is to violate some statute, some rule, some custom, and not merely to err.

* The Lucille, 15 Wallace, 676; Bentley *v.* Coyne, 4 Id. 512; The Carroll, 8 Id. 304; The Fairbanks, 9 Id. 420.

Argument for the steamer.

The propeller violated no law, rule, or custom. She conducted herself with ordinary care, skill, and judgment, under the then circumstances, and with reference to appearances which should then have guided her.

That she was well officered, that her watch was perfect, her master, second mate, wheelsman, lookout, and engineer at their places, is not denied. That they were each and all competent is not questioned. That they saw the schooner about one and a half or two miles off is shown. That they continued vigilantly to watch the schooner, doing nothing else from that time to the collision, each devoting himself to the performance of his duty, is not to be doubted. Is it to be determined that such abundantly competent men, properly placed, altogether vigilant, occupying places for the proper exercise of judgment infinitely better than any other, are in fault; and that the damages for such a loss as this should fall upon the propeller, when fault, as will be shown, was committed by the other vessel?

Seeing the green light dead ahead, as it is plain that the propeller did see it, and no other light, what was the rule? "Starboard the helm." Seeing the green light on the starboard bow, what again was the rule? "Starboard the helm."*

The very doggerel states it:

> "Green to green, or red to red,
> Perfect safety. Go ahead."

Why, during the time that the green light continued to be seen, should the propeller have done any more than continue to open it on her starboard bow?

When the light of this schooner could be and was seen about two miles (the statutory distance at which they should be visible) there was no fault to be found with the speed of the propeller. There was every opportunity for avoiding a collision necessary in such a case. When vessels are seen

* American Rule of the Road, 127, 228.

that distance apart the absence of a lookout even is not considered a fault.*

Without fault down to the time the green light continued to be solely visible off the propeller's starboard bow, the propeller cannot be in fault at all, unless she afterwards committed it; and committed it when, having thus seen the green light opening on her starboard bow, she had a right to conclude that the vessels were going clear of each other.

The propeller had kept swinging steadily to port. She did not put her wheel aport. Down to the period of the propeller's progress so far considered *not one indication of danger*. At this time, and when the green light had opened until it was about one point and a half or two points on the propeller's starboard bow, the green light suddenly became invisible and the red was seen. Estimates of time and distance, in collision cases, are of course uncertain, but this red light is estimated by those on board the propeller to have been visible a minute or two before the collision. The red light first appeared about one and a half or two points off the propeller's starboard bow, appearing as soon as the green light became invisible. The schooner was estimated by those on the propeller to be then from an eighth to half a mile off, on the propeller's starboard bow, and, as has been seen, from one and a half to two points off the starboard bow. The schooner was seen running in a direction to cross the propeller's course, with her sails full, well before the wind. When this red light was seen thus alone on the starboard bow, it at once indicated that the schooner had changed her course and was crossing the bows of the propeller. The propeller was then swinging to port under her starboard wheel. The schooner had suddenly changed her course, but was still off the starboard of the propeller. What should the propeller do in this sudden emergency, this sudden change from safety to peril, produced by the fault of the schooner? Precisely what she did do: put her wheel hard astarboard, and, as was done, stop and back her engine.

* The Maria Martin, 12 Wallace, 31, 42; The Fannie, 11 Id. 238.

Should the propeller then have put her wheel aport, when she was swinging to port at the time, when she would have had to overcome that swing before her port wheel would be felt?

Suppose the propeller, under the circumstances of sudden peril produced by the fault of the schooner, then committed an error (which she did not do), yet she was not responsible under familiar rule.

The conduct of the propeller was faultless, upon authority. A steam vessel is required to take no precautions when there is no apparent danger.*

The schooner was in fault; she caused the collision. The proof given by the propeller as to the opening of the schooner's green light, and the suddenly exhibited red, shows that the wheelsman of the schooner *must* have changed her course before her master gave the order to put her wheel hard up. It may have been done without his knowledge. It may have been done without the knowledge of any one except the wheelsman. It is true the wheelsman asserts he did not do it, as is always the case in collision causes. But both he and the captain, and others on the schooner, *swear to things absolutely, which could not have existed had not this change taken place.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Sailing vessels, when approaching a steamer, are required to keep their course, and steamers, under such circumstances, are required to keep out of the way. Vessels propelled by sails are required to keep their course on account of the correlative duty imposed upon the steamer to keep out of the way, in order that the steamer may know the position of the object to be avoided and may not be led into error in her endeavor to comply with the requirement. Under the rule that the steamer must keep out of the way she must of necessity determine for herself, independently of the sailing vessel, whether it is safer to go to the right or

* The Potomac, 8 Wallace, 590; The Scotia, 14 Id. 170, 181.

to the left or to stop, and in order that she may not be deprived of the means of determining the matter wisely, and that she may not be defeated or baffled in the attempt to perform her duty in the emergency, it is required by the rules of navigation that the sailing vessel shall keep her course and allow the steamer to pass either on the right or left, or to adopt such measures of precaution as she may deem best suited to enable her to perform her duty and fulfil the requirement of the law to keep out of the way. Rules of navigation, such as have been mentioned, are obligatory upon such vessels, when approaching each other, from the time the necessity for precaution begins, and they continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain. They do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable, and are equally inapplicable to vessels of every description while they are yet so distant from each other that measures of precaution have not become necessary to avoid a collision.*

Injuries of a serious character were received by the schooner Frémont, owned by the libellant, on the twenty-ninth of November, 1869, in a collision which occurred on Lake Erie, about nine o'clock in the evening of that day, between the schooner and the propeller Wenona, in consequence of which the schooner sunk in the middle of the lake, and, with her cargo of salt, became a total loss. Damages were awarded to the libellant, as the owner of the schooner, by the decree of the District Court, in the sum of thirteen thousand nine hundred and seventy-nine dollars and fifty-two cents, and costs of suit, from which decree the respondents appealed to the Circuit Court, where the parties were again heard, and the Circuit Court reversed the decree of the District Court and entered a decree dismissing the libel, holding that the collision occurred solely through the fault of the schooner. Whereupon the libellant appealed to this court.

* Mail Steamship Co. *v.* Rumball, 21 Howard, 384; 13 Stat. at Large, 60, 61.

Opinion of the court.

Briefly stated, the facts of the case, as they appear to the court here, were substantially as follows: Bound on a voyage from the port of Oswego to the port of Sandusky, the schooner, just before the collision, was proceeding up the lake, heading southwest by west half west, and moving about five or six miles an hour. On the other hand, it appears that the propeller was bound on a voyage from Chicago to Buffalo, and was proceeding down the lake ten miles an hour, heading east by north half north. They were, therefore, sailing in nearly opposite directions, there being only a single point of variance, and the leeway which the schooner was making, as appears by the evidence, made the lines of their actual progress more nearly parallel. None of these facts are much disputed, and it is quite certain that the wind was south or south by east, and that the schooner, though making some leeway, was nearly closehauled. It was raining, and the night was somewhat dark, but the witnesses agree that there was no fog and not much mist on the water. Both vessels were seaworthy and well manned, and the evidence furnishes no reason to doubt that they both had good and sufficient lookouts properly stationed. Both vessels also showed signal lights, but it is insisted by the respondents that the signal lights of the schooner were not properly located on the vessel. Much discussion upon that subject, however, is unnecessary, as it clearly appears that the lights were burning brightly, and that they were seen by the propeller in ample season to have enabled her to adopt any and every proper precaution to have avoided a collision.

Two faults are ascribed to the schooner by the respondents, as follows: (1.) That she did not have good signal lights properly displayed, as required by law. (2.) That she changed her course, in violation of the fifteenth rule of navigation for preventing collisions on the water.

1. Enough has already been remarked to show that the first defence is not supported, without further discussion, and it is accordingly overruled.

2. More difficulty arises in disposing of the second, as

there is considerable conflict in the testimony upon that subject, which, doubtless, led to the difference of opinion between the District and Circuit Courts. Where there is no material conflict in the testimony of the witnesses, it is seldom difficult to decide such a controversy, as the rules of navigation are very plain and may be readily applied without much danger of mistake.

Errors committed at the moment of collision are to be regarded with less strictness than those committed when the vessels are more distant from each other, as such an error is often superinduced by an error of the other vessel committed at an earlier moment. In such a case much depends upon time and distance, as all experience shows that measures of precaution, in order to be effectual, must be seasonable, and it is well-settled law that if they are not so and a collision ensues in consequence of the delay, it is no valid defence on the part of the delinquent vessel to aver that nothing could be done at the moment to prevent the disaster. Inability to prevent a collision usually exists at the time it occurs, and in order to determine where the fault lies it usually becomes necessary to examine with care the conduct and orders of those in charge of the respective vessels from the time the vessels came in sight of each other to the time they came together, and such an examination frequently discloses the fact that the cause of the collision is to be found in some negligence or mismanagement of one or both vessels when they were at some distance from the theatre of the actual collision.* Difference of opinion as to the true state of the facts doubtless led to the contrariety of decision in the lower courts, and it is the same difference of opinion between the parties which makes each claim with confidence the favorable decision of this court. All agree that it was the duty of the propeller to adopt the necessary precautions to keep out of the way, and the respondents insist that they complied with that requirement, but the libellant denies that proposition and contends that they did not adopt any pre-

* The Merrimac, 14 Wallace, 203.

cautionary measure for that purpose in season to render it effectual. Perfect concurrence of views is also entertained by the parties that it was the duty of the schooner to keep her course, but the respondents contend that the schooner violated that requirement, and that the charge made in argument against the propeller, that she did not adopt proper and seasonable precautions, is not supported by the evidence. Evidently, therefore, the decision of the court must turn upon the view taken of the evidence. Such being the state of the case the court has looked carefully into the evidence and is of the opinion, after a deliberate consideration of the same, that the theory of fact assumed by the libellant is correct.

Proper signal lights were displayed by the schooner, and in addition to that requirement it appears that the mate, when the two vessels were a mile and a half apart, exhibited a torchlight. Report was first made to him by the lookout that he, the lookout, saw a bright light ahead, but presently he saw both a red and green light, and thereupon reported to the mate that there was a steamer ahead, and he testifies that the mate immediately lighted the torch. He states that he watched the approaching lights and that they appeared to be nearly ahead, gaining a little to the windward, until they opened out "to our port bow," which was their weather bow; and continuing the narrative he says that the next thing that he saw was the propeller seemed to be coming down on to the schooner, when he called to the men below to come on deck and look out for themselves. He went on duty at eight o'clock, and he states that just after that, the schooner was put upon a course of southwest by west half west, that she had been on that course a half hour or more before the collision, and that she was kept on that course to the time it was changed by the master, which was after the master came on deck, just before the propeller struck the schooner.* No one could have better means of

* As the Reporter read the record it was the mate, not the lookout, who testified to this last fact (see *supra*, 43). This difference is, however, unimportant.—REP.

knowledge than the lookout enjoyed, as he was on the deck when the propeller was first discovered and continued there until the collision occurred, and he testifies in the most positive terms that he knows what the compass course of the schooner was, and that it was not changed before the order was given by the master, as before stated, and that he heard the order when it was given by the master to the wheelsman to make that change.

Equally positive testimony to the same effect is given by the man at the wheel, who testifies that no change was made in the helm of the schooner from the time she was put upon the course of southwest by west half west until the master sung out, put the helm up, when the schooner was not more than half her length from the propeller, that the propeller at that time was off the port bow of the schooner heading about midships of the latter vessel; and he adds, with emphasis, that "no other change was made in the course of our vessel from the time the white light was reported down to the collision."

Until just prior to the colllsion the master was in the cabin, which was on deck, but he heard the report of the lookout to the mate that there was a light ahead, and heard the order of the mate to the man at the wheel to keep the vessel steady and not to let her fall off. He lighted the first torch for the mate, but when he heard the lookout say it is a steamer coming right towards the schooner, he, the master, jumped on deck and got on the cabin roof, where he could see the approaching lights about a half point on the weather bow and probably one-fourth of a mile distant. Inquiry was made by him of the man at the wheel how the schooner was heading, and he replied that she was on her course, and the master testifies that at one time as he stood on the cabin watching the lights of the propeller he caught a glance of the port side of her hull, and he states that she seemed to advance in that way until she came within about a hundred feet of the schooner, when she suddenly changed her course, and that when he saw that change he gave the order to the wheelsman to put the helm hard up. Such a

change cannot be regarded as a culpable act, as it is clear that the collision was then inevitable, and it is highly probable that if it had not been given the destruction of the schooner would have been so sudden as to have prevented the master and crew from escaping from the wreck.

Clements, the cook and steward, was also examined, and his testimony accords in all substantial respects with the other witnesses called by the libellant.

Witnesses, it is true, were examined by the respondents, whose accounts of the circumstances preceding the collision differ in many respects from the statements made by the witnesses of the libellant, but their testimony is not of a character to warrant the court to impute wilful false-swearing to the witnesses who were on the deck of the schooner, and the court is of the opinion that it is scarcely possible to adopt the theory of the respondents without coming to the conclusion that the libellant's witnesses have committed wilful perjury.

Several theories are suggested which it is argued show that it is highly improbable that the collision would have occurred if the schooner had kept her course, as the libellant insists she did, but it is clear that the schooner was sunk by a blow from the propeller, and in the opinion of the court the evidence to show that the schooner did keep her course until the collision was inevitable is too strong to be overcome by any or all of the theories suggested in argument by the respondents. Most of the theories suggested by the respondents as tending to show that the schooner did not keep her course, as assumed by the libellant, are based upon the estimates of time and distance made by the witnesses who were on board the propeller, which, in the judgment of the court, are far too liberal and quite unreliable; as, if admitted to their full extent, they would show that the collision could not have occurred. Doubtless the helm of the propeller was put to starboard when the first torchlight was displayed on the schooner, but it is highly probable that the two vessels were much nearer together than is supposed by the witnesses, as it is evident if they

were two miles apart at that time and much change was made in her wheel, that the collision would have been avoided unless a counterchange was made in the wheel before the distance between the two vessels was overcome. Carefully examined, it will be seen that the testimony of the respondents does not show that the schooner changed her course but once after her signal-lights were first seen, and that change is admitted by the witnesses of the libellant. But they differ widely in one respect from the respondent's witnesses, as the latter assume that the collision would have been avoided if that change of course had not been made, whereas the libellant's witnesses testify to the effect that it was not made until the collision was inevitable, and the court is of the opinion that the latter theory is satisfactorily proved. Inferences from circumstantial facts may frequently amount to full proof of a given theory, and may even be strong enough to overcome the force and effect of direct testimony to the contrary, but the circumstances invoked in argument by the respondents in this case are not sufficiently persuasive and convincing to justify the court in adopting a conclusion directly opposed to the positive testimony of all the witnesses who were on the deck of the schooner just before and at the time the disaster occurred. Beyond doubt they must know what the circumstances were, and the record furnishes no sufficient reason to warrant the court in imputing to them wilful falsehood.

DECREE OF THE CIRCUIT COURT REVERSED, and the cause remanded with directions to

AFFIRM THE DECREE OF THE DISTRICT COURT.

KNOWLES v. THE GASLIGHT AND COKE COMPANY.

1. A return to a summons by the sheriff that he has served the defendant personally therewith is sufficient, without stating that the service was made in his county. This will be presumed.

Statement of the case.

2. But, in an action on a judgment rendered in another State, the defendant, notwithstanding the record shows a return of the sheriff that he was personally served with process, may show the contrary, namely, that he was not served, and that the court never acquired jurisdiction of his person. The case of *Thompson* v. *Whitman* (18 Wallace, 457), affirmed and applied.

ERROR to the Circuit Court for the District of Minnesota.

The Logansport Gaslight and Coke Company brought an action in the court below, against Alfred Knowles, on a judgment recovered by it against the said Knowles and one Thomas Harvey, in the Circuit Court for Cass County, Indiana. The defence to the action now brought was that that court did not have jurisdiction of the person of the defendant. The record of the former judgment was produced on the trial and was somewhat anomalous. Three defendants were sued in the Cass County Court—a certain J. W. Bain, Knowles, and Harvey—none of whom resided in Indiana. Bain was served with process in New York, and after a long struggle to get the proceedings dismissed as to himself, removed the cause into the Circuit Court of the United States, under the act of 1866,* and obtained a judgment in his favor. The cause was then remanded to the Cass County Court, and judgment by default was rendered against Knowles and Harvey. In some respects the proceedings seemed to have been conducted as a suit on attachment, the property of the defendants (who resided in Minnesota) being attached, and other creditors being allowed to come in to participate in the proceeds. Nevertheless the record of the proceedings contained, amongst other things, the copy of a summons in the case, issued to the sheriff of Cass County, against all the defendants, and a return thereto in the following words:

"I do hereby certify that I served the within writ, on the 14th day of September, 1865, upon Alfred Knowles and Thomas Harvey, personally, by reading the same to them. And I further certify that J. W. Bain cannot be found in my bailiwick."

* See it quoted, Case of the Sewing Machine Companies, 18 Wallace, 553.

The return was signed by the sheriff's deputy. This was all that appeared in the record on the subject of service of process on Knowles and Harvey, or in reference to their appearance or non-appearance to the action. The defendant, on the trial of the present action, contended that the return of the sheriff was insufficient to charge him personally in the former action, inasmuch as it did not show that service had been made in the proper county, or where it was made; and, being overruled on this point, he offered to prove by himself and Harvey that neither of them had in fact been served with process, and that the return was false; the purpose of this proof being to show that the Cass County Court, which rendered the judgment on which this action was brought, never had jurisdiction of the person of either. The court below (the case of *Thompson* v. *Whitman*,* in this court, not having then been adjudged) excluded the testimony, on the ground that the record could not be contradicted in a collateral proceeding.

The case was brought here on a bill of exceptions.

Mr. R. H. Bigelow, for the plaintiff, relied—

As to the first point, on *Allen* v. *Blunt*,† ruled in the circuit by the late Mr. Justice Nelson; and,

As to the second, on *Christmas* v. *Russell*,‡ and *Cheever* v. *Wilson*,§ adjudged in this court.

Mr. F. R. E. Cornell, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

Upon the first point, that the return was insufficient, the plaintiff in error relies on a decision of Mr. Justice Nelson at the circuit, in the case of *Allen* v. *Blunt*, in which it is supposed to have been held that a return of service by the United States marshal, without showing that the service was made in his district, was insufficient to give the court

* 18 Wallace, 457.

† 1 Blatchford, Circuit Court, 480.

‡ 5 Wallace, 290.

§ 9 Id. 108.

jurisdiction of the person. What Justice Nelson held in that case was this: that inasmuch as the eleventh section of the Judiciary Act declares that "no suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ;" therefore, the jurisdiction of said courts depends on service or inhabitancy in the district, one of which should appear of record; and inasmuch as the record in that case contained no allegation on the subject, and the jurisdiction of the court depended entirely on the marshal's return to the process, the return was insufficient to give it. This authority, therefore, is not in point. The case was in the United States court, and depended upon the peculiar phraseology of the act of Congress referred to therein; whereas the case in Cass County, now under consideration, was in a State court; and it is familiar law that a court of general jurisdiction will be presumed to have had jurisdiction of the cause and the parties until the contrary appears. In our judgment, therefore, the return, on its face, shows no ground of error. It will be presumed that the service was made in the proper county.

But the defendant also offered to prove by himself and Harvey that neither of them had ever in fact been served with process, and that, in consequence, the court had never, as to them, acquired jurisdiction of the person.

As this subject has been lately considered by us in the case of *Thompson* v. *Whitman*, it is unnecessary to go over the subject again. In our opinion the defendant had a right to show by proof that he had never been served with process, and that the Circuit Court of Cass County never acquired jurisdiction of his person. As this was refused him on the ground that the evidence was inadmissible, the judgment must be reversed. We do not mean to say that personal service is in all cases necessary to enable a court to acquire jurisdiction of the person. Where the defendant resides in the State in which the proceedings are had, service at his residence, and perhaps other modes of constructive service,

may be authorized by the laws of the State. But in the case of non-residents, like that under consideration, personal service cannot be dispensed with unless the defendant voluntarily appears.

JUDGMENT REVERSED, and a

VENIRE DE NOVO AWARDED.

RAILROAD COMPANY *v.* CHURCH.

1. A writ of error lies from this court to the Supreme Court of the District of Columbia on a judgment confirming an assessment for damages by the use of the street in front of the church of defendants in error, although the proceedings before the jury and the marshal, and in the Supreme Court, are governed by a statute of Maryland, which, by the construction of the courts of that State, does not allow an appeal or writ of error.
2. The early decisions of this court held that the right to the writ exists in such cases by virtue of the appellate power of this court as defined in the act of 1801, creating the Circuit Court of the District; and we are governed by the same act.

ERROR to the Supreme Court of the District of Columbia.

The trustees of the Sixth Presbyterian Church, in the city of Washington, instituted proceedings before the marshal and a jury of the District of Columbia against the Baltimore and Potomac Railroad Company, to recover from it damages which the church had sustained by reason of the road of the company having been run through a street in front of their church. The jury assessed the damages at $11,500, and on the return of this inquest into the Supreme Court of the District of Columbia, the inquisition was confirmed, and a judgment rendered that the trustees of the church recover of the railroad company that sum, with costs. The company having brought the case to this court on writ of error, a motion was now made by the trustees of the church to dismiss it for want of jurisdiction in this court.

This want of jurisdiction was based on two propositions:

1. That the proceeding is in its nature summary and special, and is of that character in which the action of the court confirming or quashing the verdict of the jury is conclusive, and admits of no appeal.

2. That the proceeding in this case is governed, both before the jury and in the Supreme Court of the District, by a statute of Maryland, which, by the uniform construction of the courts of that State, does not allow an appeal or writ of error to any other court.

Messrs. J. A. Garfield and R. D. Mussey, in support of the motion; Messrs. D. Clarke and S. T. Phillips, contra.

Mr. Justice MILLER delivered the opinion of the court.

It is certainly true that the proceeding is of the character asserted in the propositions on which the want of jurisdiction is based, and that, as a general rule, no appeal or writ of error lies in this class of cases.

But the appellate jurisdiction of this court over the doings of the Supreme Court of the District is established and regulated by act of Congress, and a reference to the statutes on this subject is necessary to the decision of the question before us. The act which created the Supreme Court of the District of Columbia vested in it the same powers and jurisdiction that had previously belonged to the Circuit Court, which it superseded, and the appellate power of *this* court was declared to be the same as that which it had, by law, over the Circuit Court. The act of February 27th, 1801, organizing the Circuit Court, declares that any final judgment, order, or decree in said Circuit Court, where the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined and reversed or affirmed in the Supreme Court of the United States by writ of error or appeal, and though the sum limiting this jurisdiction has been increased to $1000, this statute remains the sole rule governing the right of appeal in all other respects.

We are of opinion that both the questions raised by the motion to dismiss have been explicitly decided by this court.

In the case of *Custiss* v. *Turnpike Company*,* an assessment for land taken for the use of the company was quashed by the Circuit Court, and a writ of error was sued out by Custiss from this court. A motion was made to dismiss this writ on the same ground taken in the present case, namely, want of jurisdiction; to which Marshall, C. J., replied, that "at the opening of the case some doubt was entertained as to the jurisdiction of the Supreme Court; but that doubt is removed by an inspection of the act by which the Circuit Court of the District of Columbia is constituted. The words of that act, descriptive of the appellate jurisdiction of this court, are more ample than those employed in the judicial act." He then quotes them as we have given them above.

So in the case of *Young* v. *The Bank of Alexandria*,† the court uses this emphatic language in regard to the same statute: "The words of the act of Congress, being as explicit as language can furnish, must comprehend every case not completely excepted from them."

It is to be observed also that in this latter case the rights of the bank and the jurisdiction of the court over it were said in argument to be controlled by an act of the legislature of Virginia. But the court held that whatever might be the extent to which that statute affected the rights of the parties, the appellate jurisdiction of the Supreme Court depended solely on the act already quoted.

But perhaps the most conclusive case in this branch of the discussion, namely, the proposition that the statute of Maryland governs the right of appeal in the present case, because by the act of Congress it is adopted as the mode of proceeding in assessing damages and in defining the power of the Supreme Court of the District in the matter, is that of *Carter's Heirs* v. *Cutting*.‡ That was a case in which an order of the Orphans' Court of Alexandria County, being affirmed in the Circuit Court, an appeal was taken to this court, and a motion was made to dismiss that appeal. This

* 6 Cranch, 233. † 4 Id. 384. ‡ 8 Id. 251.

motion was based upon the twelfth section of the same act of February 27th, 1801, by which it was declared that the Circuit Court, in appeals from the Orphans' Court, shall therein have all the power of the chancellor of the State of Maryland; and by the laws of Maryland the decree of the chancellor in such case was final.

It will be observed that the analogy between that case and the present is perfect. But the court said in that case that the conclusiveness of the sentence formed no part of the essence of the powers of the court. Its powers to act are as ample, independent of their final quality, as with it. And referring to the language so often cited already, they say: "We cannot admit that construction to be a sound one which seeks by remote inferences to withdraw a case from the general provisions of a statute which is clearly within its words and perfectly consistent with its intent."

We do not feel at liberty to disregard these contemporaneous expositions of an act of Congress which has furnished the criterion of our jurisdiction ever since the courts of the District were established, and they are so directly in point that we cannot dismiss the writ without overruling them. The motion is, therefore,

DENIED.

COOPER, EXECUTOR, *v.* OMOHUNDRO.

The case of *Folsom* v. *The Insurance Company* (18 Wallace, 237), and the numerous cases there cited, p. 244, affirmed, and the doctrine again declared, that where a jury is waived and the issues of fact submitted to the Circuit Court, under the act of March 3d, 1865 (quoted in the report of the case cited, p. 238), this court will not review the finding of the court where it is general and unaccompanied by any authorized statement of facts; and that in the case of such general finding, "nothing is open to review by the losing party under a writ of error except the rulings of the Circuit Court in the progress of the trial, and that the phrase, 'rulings of the court in the progress of the trial,' does not include the general finding of the Circuit Court nor the conclusions of the Circuit Court embodied in such general finding."

Statement of the case in the opinion.

ERROR to the Circuit Court for the Eastern District of Virginia; in which court Littleton Omohundro, a citizen of Ohio, sued Richard Cooper, a citizen of Virginia, executor of Silas Omohundro (which said Silas was in his lifetime a citizen of the same State), to recover certain advances which the plaintiff, the said Littleton, who was the son of the said Silas, the defendant's testator, had made (as the evidence tended to show, though this fact was *not in any way shown by the pleadings*), during the rebellion, and while funds could not be transmitted from Virginia to Ohio for the said Silas, his father.

The said Silas, the decedent, though living in Virginia, had been building a house in Ohio, for his wife (or reputed wife) and children, who resided there, and where he was in the habit of visiting them till the rebellion broke out. He died in 1864.

The court gave judgment for the plaintiff, and the defendant brought the case here on error.

Messrs. J. M. Carlisle and J. M. Lyons, for the plaintiff in error; Mr. J. M. Crump, contra.

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

Advances were made by the plaintiff to Silas Omohundro in the sum of $4390, as alleged in the bill of particulars filed in the case. None of that amount, as the plaintiff alleges, was ever paid by the decedent, and the defendant, as his executor, having neglected and refused to pay the same, the plaintiff brought an action of assumpsit against the defendant, as such executor, to recover the amount. Service being made the defendant ultimately appeared and pleaded the general issue. Both parties being present they waived a jury, and agreed that the issues of fact should be tried and determined by the court without the intervention of a jury.

Subsequently the defendant filed a special plea, that the plaintiff ought not to have and maintain his action aforesaid

Statement of the case in the opinion.

against him because, he says, that at the time of making the supposed contract and promise in the declaration mentioned, war existed between the United States and the Confederate States, and that the plaintiff and the testator of the defendant were alien enemies, concluding with a verification and a prayer for judgment. Responsive to that special plea the plaintiff filed a replication denying the allegations thereof, and prayed that the same might be inquired of by the country.

Three depositions were introduced by the plaintiff to sustain the issue on his part, and he also introduced certain receipts, four of which were signed by the reputed wife of the decedent, and two by the contractor employed to build a dwelling-house for his reputed wife and children. Taken together, these proofs tend strongly to prove that the decedent was indebted to the plaintiff in the sum of $4390, as found by the Circuit Court.

Countervailing evidence was introduced by the defendant consisting of five depositions, a deed from the decedent to his reputed wife for her life, remainder to her six children, and the will of the testator with the probate thereof, the Virginia ordinance of secession, and an ordinance of the State requiring the governor to call volunteers into the service of the State to repel invasion and to protect the citizens of the State in the emergency, and ten other ordinances passed by that State during the rebellion. All of the testimony introduced on the one side and the other being set forth at large in what is denominated in the transcript a bill of exceptions, filling thirty-seven pages of the transcript.

None of the evidence introduced by the plaintiff was objected to at the time, nor is any part of it made the subject of an exception, nor was any request made by the defendant at the close of the plaintiff's case for a ruling adverse to the right of the plaintiff to recover. On the contrary, the defendant immediately proceeded to introduce evidence responsive to that introduced by the plaintiff, and evidence to show that the decedent never promised the plaintiff as alleged in the declaration, and at the close of his evidence

Statement of the case in the opinion.

requested the Circuit Court to decide substantially as follows:

1st. That the alleged contract, inasmuch as war existed at the time between the United States and the Confederate States, was illegal and void.

2d. That the alleged contract, if not actually void, was an executory agreement, and as such was terminated by the war.

3d. That the alleged contract, if otherwise valid, was too indefinite to be executed.

4th. That no interest is recoverable during the war or any portion of the war upon a contract between alien enemies.

5th. That upon the whole case, judgment should be for the defendant.

But the court refused so to decide, and ruled against the defendant upon each of the propositions, and the defendant excepted to the said ruling.

Under those circumstances the record states that "the court does find the facts in the case for the plaintiff, and gives judgment that the plaintiff recover of the defendant the sum of $4391, with interest from the 24th day of June, 1864, at the rate of six per cent. per annum, and costs of suit."

Judgment having been rendered, the defendant moved the court to arrest the same and grant him a new trial, alleging for cause that the judgment was contrary to the evidence and the law, and in support of the motion assigned for error the same causes as those stated in the requests submitted before judgment, but the court overruled the motion and the defendant excepted to the ruling.

Such is the state of the record which is brought here by the defendant in the subordinate court. Since the cause was removed here the losing party assigns a single cause of error, which is that the Circuit Court erred in refusing to rule in favor of the defendant upon the questions of law as requested, and in ruling to the contrary thereof.

Much discussion of the motion for new trial is unnecessary, as the motion is one addressed to the discretion of the

court, in respect to which the ruling of the Circuit Court cannot be reviewed here upon a writ of error, nor in any other mode. Nor can it make any difference in this case that the motion for new trial was blended with one to arrest the judgment, as such a motion ought regularly to be made before the judgment is entered. Motions in arrest at common law were made after verdict and before judgment, and it is quite clear that the refusal to grant such a motion after judgment, in case where the finding of the Circuit Court is general, cannot be regarded as a ruling made in the progress of the trial.

Nothing remains to be considered except the requests for rulings presented by the defendant before judgment.

Beyond all doubt the only effect of the exception to the refusal of the court to grant the fifth request, if the exception is admitted to be well taken, will be to require the court here to review the finding of the Circuit Court in a case where the finding is general, and where it is unaccompanied by any authorized statement of the facts, which it is plain this court cannot do, for the reasons given in the opinion of the court in the case of *Insurance Company* v. *Folsom*, decided at the present term.* Our decision in that case was, that in a case where issues of fact are submitted to the Circuit Court and the finding is general, nothing is open to review by the losing party under a writ of error except the rulings of the Circuit Court in the progress of the trial, and that the phrase "rulings of the court in the progress of the trial" does not include the general finding of the Circuit Court nor the conclusions of the Circuit Court embodied in such general finding, which certainly disposes of the exceptions to the refusals of the Circuit Court to decide and rule as requested in the first four prayers presented by the defendant, as it is clear that those exceptions seek to review certain conclusions of the Circuit Court which are necessarily embodied in the general finding of the Circuit Court.

* 18 Wallace, 237.

Statement of the case in the opinion.

Opposed to that it may be suggested that the judgment shows that interest is allowed, but the answer to that is that neither the finding nor the judgment shows anything in regard to the principal except the amount awarded to the plaintiff. Nothing can be inferred from the declaration to support the defence of illegality, as it contains only the money counts, nor from the bill of particulars filed in the case, as it gives only the dates of the payments and makes no reference to the date of the contract. Support to the defence is entirely wanting without resorting to the evidence as reported in the bill of exceptions, which includes all that was introduced on both sides and is unaccompanied by any special finding of the facts. Issues of fact cannot be found by this court, as the act of Congress requires that such issues shall be found by the Circuit Court. Consequently there can be no review of the finding of the Circuit Court where the finding is general, nor of the conclusions of the Circuit Court embodied in the general finding.

JUDGMENT AFFIRMED.

CREWS *v.* BREWER.

The doctrine of the preceding case reaffirmed. Declared further, and in explanation, that a mere report of the evidence is not such a special finding or authorized statement of the case as will allow this court to pass upon the judgment given.

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

Mr. Albert Pike, for the plaintiff in error; Mr. Gustavus Koerner, contra.

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

Complaint was made by the plaintiff that the defendant,

Statement of the case in the opinion.

at the time and place mentioned in the declaration, broke and entered the plaintiff's close therein described and ejected him from the premises, and that the defendant still unlawfully withholds the possession of the same from the plaintiff; and the plaintiff avers that he claims title to the land in fee, and that the same is worth $5000. Service was made and the defendant appeared and pleaded that he was not guilty of unlawfully withholding the premises claimed by the plaintiff in the manner and form as alleged in the declaration. Issue was joined by the plaintiff, but the parties subsequently appeared and waived a jury and submitted the issue to the court. Evidence was introduced on both sides, and the record states that "the court being sufficiently advised finds the issue for the defendant, that he is not guilty of unlawfully withholding from the plaintiff the possession of the premises," as alleged in the declaration. A motion for new trial was filed by the plaintiff, which was overruled by the court, and the court entered judgment for the defendant and that he recover the costs of suit. Leave was granted to the plaintiff to file a bill of exceptions within sixty days, and within that period he filed the paper exhibited in the transcript, which is denominated the bill of exceptions. Evidence, consisting of a certain patent and certain original deeds, and of certain depositions and a certain record and other documents, was introduced by the plaintiff. Countervailing evidence was then introduced by the defendant, consisting of oral testimony and a copy of a deed, all of which, together with that introduced by the plaintiff, is set forth at large in the instrument called the bill of exceptions. All of the evidence was introduced without objection, and of course was properly admitted. Instructions were asked by the plaintiff at the close of the trial, which the court refused to adopt, and stated what the conclusions of court were as matter of law, in view of the whole evidence reported in the bill of exceptions. To each and all of which propositions of law the plaintiff then and there excepted and his exceptions were duly allowed. Dissatisfied with the judgment the plaintiff sued out a writ of error and removed the cause into

this court. Error is assigned in this court controverting each and every one of the propositions of law decided by the Circuit Court.

Suffice it to say, that the finding of the Circuit is general, and that there is no authorized statement of facts in the record. Under such circumstances our decision is that no review of the questions of law can be had in this court, except such as arise from the rulings of the court made in the progress of the trial, as it would impose upon this court the duty of hearing the whole case, law and fact, as on an appeal in chancery or in an admiralty suit, which would operate as a repeal of the provision in the act of Congress, that issues of fact in such cases may be tried and determined by the Circuit Court; and would also violate that clause of the twenty-second section of the Judiciary Act which prohibits this court from reversing any judgment "for any error of fact."* Questions of fact will not be reviewed by this court in common-law actions, nor can the questions of law presented in such cases be re-examined here unless the matters of fact out of which they arise are, in some authorized form, given in the record; to which it may be added, as applicable to cases tried by the court, that a mere report of the evidence is not sufficient, as it belongs to the Circuit Court to find the facts, and in order to do that the Circuit Court must weigh the evidence and draw the inferences of fact from the whole evidence given in the case.†

JUDGMENT AFFIRMED.

* 1 Stat. at Large, 85; Insurance Co. *v.* Folsom, 18 Wallace, 237; Dirst *v.* Morris, 14 Id. 490; Basset *v.* United States, 9 Id. 40; Miller *v.* Insurance Co., 12 Id. 297.

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

Statement of the case.

THE LUCILLE.

1. An appeal in admiralty from the District to the Circuit Court in effect vacates the decree of the District Court, and a new trial in all respects, and a new decree, are to be had in the Circuit Court. The latter must execute its own decree, and the District Court has nothing more to do with the case.
2. An order of the Circuit Court merely affirming the decree of the District Court, and nothing more, is not such a decree as the Circuit Court should render, and is not a final decree from which an appeal lies to this court.

ON motion to dismiss, for want of jurisdiction, an appeal in admiralty from the Circuit Court for the District of Maryland.

The act of March 3d, 1803,* amendatory of the Judiciary Act, enacts that "from all *final* decrees" rendered in any Circuit Court in any cases of admiralty, "where *the matter in dispute*, exclusive of costs, shall exceed the sum or value of $2000," an appeal shall be allowed to this court.

This statute being in force, Nancy Repass libelled the schooner Lucille, in the District Court for Maryland, for damages; alleging a collision by the Lucille, whereby she had been "damaged to the extent of $2000, *for which* she claims reparation in this suit."

The libel concluded with a prayer, that "the court will pronounce for the libellant's aforesaid demand, and for such other and further relief and redress as to right and justice appertain, and as the court is competent to give in the premises."

The court decreed in favor of the libellant for $2100. The libellant, objecting to a decree for a sum larger than that claimed, remitted, of record, $100, parcel of the said sum; and the other side appealed to the Circuit Court, where an order was entered affirming the decree below. The order thus made, and from which the present appeal was taken, was in the following words:

* 2 Stat. at Large, 244.

"It is, this 27th day of May, A.D. 1872, adjudged and ordered that the decree of the District Court be, and the same is hereby, affirmed, with costs."

It was this appeal that the libellant moved to dismiss.

Messrs. W. S. Bryan and T. A. Seth, in support of the motion:

The libellant never claimed more than $2000, and when more was decreed objected and remitted the surplus. "The matter in dispute," in the *Circuit* Court, was, therefore, the original decree, *less* the amount remitted; that is to say, it was for $2000, and for no more. Not exceeding $2000 no appeal to this court will lie. The matter in dispute means the amount claimed on the one side and whose payment or surrender is resisted on the other.

Mr. R. S. Matthews, contra:

The decree in the District Court was for $2100, and by the order of the Circuit Court *that* decree and no other is affirmed. Exceeding thus $2000, an appeal will lie.

Mr. Justice MILLER delivered the opinion of the court.

Whatever may be the merit of the objection on which the motion is founded, namely, that the above decree is not for an amount exceeding $2000, we are of opinion that there is not a final decree from which an appeal can be taken to this court, and that this appeal must for that reason be dismissed.

An appeal in admiralty has the effect to supersede and vacate the decree from which it is taken. A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or, if asked for, is contemplated,—a trial in which the judgment of the court below is regarded as though it had never been rendered. A new decree is to be made in the Circuit Court. This decree is to be enforced by the order of that court, and the record remains there. The case is not sent back to the District Court for executing the decree, or for any other proceeding whatever, and that court has nothing further to do with it. The decree should,

therefore, be complete within itself. In the case before us, the decree fixes no sum which the successful party is to recover. If any process is to be issued to enforce it, the clerk must from the record of the District Court ascertain the amount, or he can issue no such process. But this is the duty of the court, and not the clerk. It may be said that it is, in such case as this, a mere matter of computation, and in some cases it may be. But the one before us shows that it is not always so, for the only question argued by counsel on this motion is, whether the judgment affirmed is for $2000 or $2100—for the amount after the remittitur or before. No final decree of a court which enforces its own judgments ought to be left in such condition that the record of another court is the only evidence of the amount recovered by the successful party. An order affirming a decree in another court is neither in express terms nor by necessary implication a judgment or decree for the amount of the judgment or decree in that court. The costs of the lower court, and the interest on its judgment to the date of the decree or judgment on appeal, are to be added to it, and, though they *may* be computed by the clerk, they should have the judicial consideration of the court. According to these views, there is no final decree such as the law intends in the Circuit Court in this case, and the appeal is

DISMISSED.

Mr. Justice CLIFFORD dissented.

THE FALCON.

1. A steamer running at the rate of from eight to ten knots an hour, on a bright moonlight night, in an open bay, with nothing to mislead her, condemned for the loss of a schooner sailing with a six-knot breeze, whose only fault was alleged to be a false manœuvre in the moment of impending collision. The court declares it to have been the "duty of the steamer to see the schooner as soon as she could be seen, to watch her progress and direction, to take into account all the circumstances of the situation, and so to govern herself as to guard against peril to either vessel."

Statement of the case in the opinion.

2. Where the libel alleged that the loss by the collision was substantially a total loss, and the answer substantially admitted this—the vessel having sunk in Chesapeake Bay in five fathoms water, and it being clear from the proofs that she could not have been repaired without a large expenditure of time and money—*held*, that the fact that she was finally raised, repaired, and put in good condition, was no defence to a claim for a total loss;—especially as it did not appear at whose instance or at what cost this was done; nor by what right those in possession of her held her; and it not being either alleged or proved that she had been tendered back to her original owners. The case distinguished from *The Baltimore* (8 Wallace, 378).
3. But this decree for a total loss declared to bar any claim to the schooner by her former owners, and that their title should be remitted to the owners of the steamer.

APPEAL from the Circuit Court for the District of Maryland, reversing a decree of the District Court for the said district, in which, on a libel filed by the owners of a small schooner, the Mary Banks, of one hundred and eighty-six tons, against the steamer Falcon, for a *total loss* by collision, the District Court had condemned the steamer for the total loss asserted.

Mr. W. C. Schley, for the appellant; Messrs. J. H. B. Latrobe and S. T. Wallis, contra.

Mr. Justice SWAYNE stated the facts or evidence, and delivered the opinion of the court.

On the 21st of June, 1867, about half-past one o'clock, A.M., the schooner Mary Banks was proceeding up the Chesapeake Bay to Baltimore. The steamer Falcon, on her way to Charleston, came in view. The night was clear and bright, with moonlight and starlight. The waters of the bay were calm. The schooner was under way with a six-knot breeze. The steamer was making from eight to ten knots an hour. The captain of the steamer says: "My steamer is one hundred and sixty-five feet long, or thereabouts. I had about three miles navigable water on my starboard bow. On my larboard bow I had all of five or six miles of navigable water. There was no obstacle to the navigation of this sea-room except the schooner." The

vessels approached each other and came in collision. The steamer struck the schooner. The answer admits "that the said schooner was cut half in twain, and not altogether in twain, as charged;" a difference of small moment, however, inasmuch as it is admitted that she sank in consequence of the collision. The sinking was immediate. The crew were rescued by the steamer and landed at Fortress Monroe. The answer alleges that the collision was caused by the fault of the schooner in porting her helm and coming suddenly under the bow of the steamer when it was too late for the latter to avoid her. The District Court adjudged the steamer to have been solely in fault, and decreed accordingly. The respondents appealed to the Circuit Court. There the decree of the District Court was reversed and the libel dismissed. The libellants appealed to this court, and the decree of the Circuit Court is thus brought before us for review.

This is a simple case. No searching analysis of the testimony is necessary to enable us to find the proper conclusions. It was the duty of the steamer to keep out of the way of the schooner. She had at command all the means to do so. There was ample sea-room, calm weather and water, abundant light, and no other vessel in proximity on her larboard or starboard side. None other is mentioned as in sight. It was the duty of the steamer to see the schooner as soon as she could be seen, to watch her progress and direction, to take into account all the circumstances of the situation, and so to govern herself as to guard against peril to either vessel.

The steamer was grossly in fault in approaching so near the schooner and at so high a rate of speed. This was the source of the disaster that followed. The only fault imputed to the schooner is that almost at the moment of the collision she ported her helm. This fact is not satisfactorily established by the testimony. The proof is that the captain said so after reaching the steamer. He denies it. The mate says, "I kept my course steadily north by west." He

was cross-examined by the respondents' counsel, but no question was asked as to this point. There is no other evidence upon the subject. What was deemed due to porting the helm may have been the effect of the wind after the helmsman fled from his post. If the fact were as claimed it would not mitigate the fault of the steamer. Nor can the desertion of the helmsman at such a time have that effect. The peril was immediately impending. The safety of the vessel and the lives of the crew were at stake. A moment later the collision occurred. The helmsman in his flight was thrown down by the shock and broke his leg. The vessel sank, and the crew would have gone down with her but for the aid of the steamer. If in an emergency so sudden and so alarming an order were given which should not have been given, or an act were done which should not have been done, the law regards it an error and not a fault, and holds the offending vessel to be the cause, and liable as if it had not occurred.

We think the decree of the District Court was in all things correct, and should have been affirmed.

After the case was appealed to the Circuit Court, and before the hearing there, the respondents took testimony showing that the schooner had been raised, repaired, and put in good condition. At whose instance and at what cost this was done, and by what right those in possession claimed to hold her, are not shown; nor is it alleged or proved that she was ever tendered back to the appellants. The appellees insist that the facts disclosed entitle them to have the decree of the Circuit Court affirmed, and rely upon the case of *The Baltimore** as an authority to that effect. This is a mistaken view of the subject. In the case of *The Baltimore* the libel alleged a total loss. The answer expressly denied it. There the sinking was in the river Potomac. The water was shoal. The masts projected eighteen feet above its surface, and the position of the hull was clearly discernible. The

* 8 Wallace, 378.

vessel could have been easily raised and repaired. Here the libel alleges substantially a total loss, and the answer substantially admits it. No point to the contrary was raised or suggested. The schooner was sunk in the Chesapeake Bay, where the water was five fathoms deep. It is clear, from the proofs, that she could not have been raised and repaired without a large expenditure of time and money. The case of *The Baltimore* has, therefore, no application to the case before us.

This subject has been under consideration upon two occasions in the English admiralty court. In *The Empress Eugenie*,* the owner had raised and repaired the vessel. The cost of the repairs exceeded the original value of the vessel, and this might have been ascertained before the repairs were commenced. It was held that the measure of damages was the value of the ship before the collision, with interest from the date when the cargo would, in the ordinary course, have been delivered, together with the cost of raising and the cost of placing the ship in the dock for inspection, less the value of the wreck as raised. It was said "that it was a mistake to have repaired her at all, and that it would have been better to have abandoned her from the first."

In the case of *The Columbus*,† that vessel had sunk the fishing-smack Tryall. The owner of the Columbus raised the smack and carried her into Rye Harbor. Notice of this was given to the owner of the smack, with an intimation that the owner of the Columbus was ready to deliver her up and would not be responsible for any further damage or expense that might be incurred by her remaining unrepaired in the harbor of Rye. It does not appear whether she was repaired or not. Dr. Lushington said: "The rule which I consider it incumbent upon this court to follow is this, that if a vessel is not merely run into and partially damaged, but is actually sunk at sea, it is not incumbent upon the owner of that vessel to go to any expense whatever for the purpose

* 1 Lushington, 139.

† 3 W. Robinson, 161.

of raising her." He said further, that the owner of the smack "was not bound to repair her, and might have left her lying in the port," and that the proper course would have been to apply to the court for an order that the smack be sold and the proceeds brought in to abide the result of the suit. The Columbus was held liable for the full value of the smack as if there had been a total loss; but it was also held that the owner of the Columbus might still apply for an order to sell the smack, and that "the proceeds of such sale will be his own property." Whether, if the smack had been repaired and then tendered back, her owner would have been bound to receive her, is a point not touched upon, and which it is not necessary here to consider.*

Upon the authority of *The Columbus*, it is clear that the steamer is liable for the full value of the schooner at the time of her loss. We think that case lays down the proper rule.

There may be interests and complications touching the schooner in relation to which we are not advised and which are not represented in this litigation. We cannot, therefore, order her to be sold and the proceeds to be paid to the owners of the steamer. But, where there is an abandonment by the assured to the assurer, the title of the property passes to the latter. So, where in an action of trespass or trover there is a recovery of the full value of the property to which the action relates, the title of the plaintiff is transferred *ipso facto* to the defendant. In analogy to the principle of these cases, we adjudge that the decree to be pronounced against the steamer shall bar any further claim to the schooner on the part of the appellants, and that their title shall be thereby remitted to the appellees.

DECREE REVERSED, and the case remanded to the Circuit Court with directions to enter a decree

IN CONFORMITY TO THIS OPINION.

* 1 Parsons's Shipping and Admiralty, 543.

MORGAN'S EXECUTOR *v.* GAY.

1. Where a citizen of one State as indorsee of inland bills, drawn or accepted by a citizen of another—the plaintiff claiming through the indorsement of the payee, or of the payee and subsequent indorsers—sues the drawer or acceptor, in the Circuit Court, the eleventh section of the Judiciary Act requires that the citizenship of such payee, or of such payee and subsequent indorsers, be alleged to be different from that of the defendant. It is not enough to allege that the plaintiff is a citizen of one State and the defendant of another.
2. It is not competent for a Circuit Court to determine, without the intervention of a jury, an issue of fact in the absence of the counsel of the party and without any written agreement to waive a trial by jury.

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

The eleventh section of the Judiciary Act, which gives jurisdiction to the Circuit Courts of suits "between a citizen of the State where the suit is brought and a citizen of another State," enacts, nevertheless, that no Circuit Court shall "have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made; except in cases of *foreign* bills of exchange."

This statute being in force, Gay, as indorsee of three several *inland* bills of exchange, drawn or accepted by one Morgan, in his life, sued his executor upon them. Two of the bills were indorsed by the payees, and the third by its payee and by other indorsers.

The plaintiff in his petition described himself as a citizen of Kentucky, and described the defendant as a citizen of Louisiana, but said nothing about the citizenship of the payees of the bills, nor, in the case of that one indorsed by subsequent indorsers, of the citizenship of these.

The defendant pleaded the statute of limitations, general issue, &c.

The cause was called for trial, the plaintiff being repre-

sented by counsel; but the counsel for the defendant *not being present.* The cause was submitted for hearing to the court *without a jury*, and without any written stipulation such as that which, when made in writing and filed with the clerk of the court, the act of March 3d, 1865, allows to have the effect of waiving a jury. The court overruled the plea, determined that the case was made out, and rendered a judgment for the plaintiff for the sum of the three bills, with interest and costs.*

The defendant now brought the case here for review.

Messrs. J. A. and D. G. Campbell, for the plaintiff in error; no opposing counsel.

Mr. Justice STRONG delivered the opinion of the court.

The plaintiff is an assignee of the bills within the meaning of the eleventh section of the Judiciary Act of 1789, and by the express provisions of the section is not entitled to maintain his action in the Circuit Court, unless a suit might have been prosecuted in such court to recover the contents of the bills if no assignment had been made. But the petition does not show that the indorsers through whom the plaintiff claims were not citizens of Louisiana at the time the suit was brought. It is true, the citizenship of the defendant is averred to have been in Louisiana, and that of the plaintiff in Kentucky, but there is no averment of the citizenship of the payees of the bills, or of the citizenship of the subsequent indorsers. For aught that appears in the record, they may also be citizens of Louisiana; and, therefore, incapable of suing in the Circuit Court for that district to recover the contents of the bills. As that court has only a limited jurisdiction, it must appear affirmatively that it may take cogni-

* The act referred to enacts:

"Issues of fact in civil cases, in any Circuit Court . . . may be tried and determined by the court without the intervention of a jury, whenever the parties or attorneys of record file a stipulation in writing with the clerk of the court waiving a jury."

zance of the controversy between the parties.* In *Turner* v. *The Bank of North America*,† it was distinctly ruled that when an action upon a promissory note is brought in a Federal court by an indorser against the maker, not only the parties to the suit, but also the citizenship of the payee, and the indorser, must be averred in the record to be such as to give the court jurisdiction. The same rule was asserted in *Montalet* v. *Murray*,‡ in *Mollan* v. *Torrance*,§ and in *Gibson et al.* v. *Chew*.‖ The judgment must, therefore, be reversed, and the cause sent back that amendment may be made in the pleadings showing the citizenship of the indorser of the bills, if it be such as to give the court jurisdiction of the case.

We may notice another error which will doubtless be avoided should there be a second trial. Issues of fact appear to have been made up which were determined by the court in the absence of the defendant's counsel, and without any written agreement to waive a jury trial. This was irregular. In the absence of such an agreement, and of the defendant's counsel, it was not competent for the court to try the issue without the intervention of a jury.¶

JUDGMENT REVERSED, and the cause remanded for further proceedings,

IN ACCORDANCE WITH THIS OPINION.

TOWN OF QUEENSBURY *v.* CULVER.

1. There being nothing in the constitution of the State of New York which makes unconstitutional an act of the legislature authorizing the people of a town to decide whether they will donate its bonds to a railroad company, and collect taxes for the amount, such an act (the same being enabling merely and not mandatory) is binding.

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* Turner *v.* Enrille, 4 Dallas, 7.
† Ib. 8.
‡ 4 Cranch, 46.
§ 9 Wheaton, 537.
‖ 16 Peters, 315.
¶ Kearney *v.* Case, 12 Wallace, 275.

2. Where a town, issuing bonds to which coupons or interest warrants are attached, acknowledges, in the body of the bond, that the town is indebted to the bearer or his assigns in such a sum of money, payable at a future day named, "with interest thereon at the rate of 7 per cent., on presentation and delivery of the coupons for the same thereto attached," it may be sued on the coupons alone, though they may have been issued by commissioners specially made agents of the town by the legislature, and by it charged with the matter of issuing the securities, and not made by the ordinary town authorities.
3. This liability of the town is not taken away by the fact that the legislature has directed a special mode in which the money to pay the principal and interest of the bonds is to be raised; the directions being given to the town and county agents, and not to the holders of the bonds or coupons.
4. An act empowered commissioners to dispose of certain town bonds (whose issue for the benefit of a railroad company named, the act authorized), "to such persons or corporation and upon such terms as the commissioners should deem most advantageous for the town, but not for less than par;" and to "donate the *money* which should be so raised to the railroad company." The act, however, required that they should not "pay over any money *or bonds*" except upon certain conditions specified. The commissioners did not sell the bonds, but handed them over to the railroad company in discharge of the authorized donation. On suit against the town by a *bonâ fide* holder of the bonds, *held*, that there was no violation of the act by the commissioners in what they had done.

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

In May, 1857, the State of New York passed "An act to authorize the town of Queensbury, in the county of Warren, to issue bonds to aid in the construction of a railroad from the village of Glenn's Falls to intersect the Saratoga and Whitehall Railroad." The act enacted:

"SECTION 1. On the application, in writing, of twelve or more freeholders, residents of the town of Queensbury, it shall be the duty of the county judge of said county to appoint five freeholders, residents of said town, to be commissioners of such town to carry into effect the purposes of this act. A majority of the said five shall constitute a quorum for the doing of any act contemplated in this act.

"SECTION 2. It shall be lawful for the said commissioners to borrow, on the faith of the credit of the town, $100,000, &c., . . . at a rate of interest not exceeding 7 per cent., and to execute

Statement of the case.

bonds therefor. The bonds may be in such form as the commissioners shall deem expedient.

"SECTION 3. The said commissioners may dispose of such bonds to such persons or corporation and upon such terms as they shall deem most advantageous for the town, but not for less than par; and the money which shall be so raised *shall be donated* to such railroad corporation or association as has now or shall hereafter file articles of association to build and operate a railroad from the village of Glen's Falls to the Saratoga and Whitehall railroad, its buildings and necessary appurtenances, and for no other purpose whatsoever. For the completion of said road and the expenditure of the sum so donated by said town, said corporation shall give full and adequate security to said commissioners, and for the more effectual enforcement of this act, the commissioners shall not pay over any *money or bonds* to the said railroad corporation until they have been furnished with satisfactory assurances that the sum of $100,000 shall have been subscribed and paid in, and actually expended in the construction and building of the said road. And this act shall not be construed so as to make the said town a party to this corporation, and the said town shall not be taxed hereafter for any appropriation required for said road beside the amount donated in the second and third sections of this act, but such additional amount shall be raised by said corporation.

"SECTION 4. The commissioners shall report annually to the board of supervisors of the county of Warren, the amount required to pay the principal and the interest on the bonds authorized to be issued under and by virtue of this act; and it is hereby made the duty of the board of supervisors, and they are hereby authorized and required to cause to be assessed, levied, and collected of the real and personal property of said town of Queensbury, such sum of money as shall have been reported to the said board of supervisors by the said commissioners to be necessary; and the same when collected, shall be paid to such commissioners, and by them be applied to the payment of the bonds, with the interest.

"SECTION 5. No money shall be borrowed, or bonds issued, until the question whether or not it is expedient to borrow such money and issue such bonds, for the purpose named in this act, shall have been submitted to the *taxable electors* of the town of Queensbury, and affirmatively determined by them.

"SECTION 8. The said company so to be formed may charge the sum of not exceeding six cents per mile for passengers riding over said road."

Commissioners (including among them H. R. Wing, D. Peck, and W. A. Wait) were appointed under the act, and an election was held at which the majority of those voting were in favor of the project. The commissioners prepared and executed bonds to the amount authorized, with interest warrants attached.

The bonds acknowledged "that the town of Queensbury was indebted to the bearer in the sum mentioned for value received in money borrowed, payable on the 6th day of February, 1868, with interest thereon, at the rate of 7 per cent., *on presentation and delivery of the coupons for the same thereto attached.*"

The warrants were in this form:

TOWN OF QUEENSBURY.

$70. **Interest Warrant.** $70.

GLENN'S FALLS NATIONAL BANK:

Pay to Bearer SEVENTY DOLLARS, *interest on Bond No.* 92, *due February* 1, 1870.

D. B. KETCHUM, Town Clerk.

H. R. WING, D. PECK, W. A. WAIT, } Commissioners.

No money was raised by the commissioners upon the bonds or interest warrants, but both were delivered by the commissioners to the railroad corporation.

One Culver was a contractor with the corporation for the construction of its road. He received certain bonds and interest warrants from the railroad corporation on its contract, and the warrants not being paid he sued the town of Queensbury in assumpsit upon them. Plea, non-assumpsit. The warrants sued on were detached from the bonds.

The counsel for the defendant requested the court to give various instructions, as:

1st. That the act was in violation of the constitutions of New York and of the United States.

2d. That if valid, assumpsit would not lie against the town on the interest warrants sued on; they not purporting to be made or issued by or in behalf of the town; and the town not being liable in assumpsit on them.

3d. That the only remedy to enforce the payment by the town was to compel an assessment, collection, and payment, such as was contemplated by the fourth section of the act.

4th. That in delivering the bonds and warrants to the railroad company as they had done, the commissioners had not disposed of them or raised money on them at not less than par as the statute required them to do; and that they had thus violated the statute.

The court refused all of these requests for instructions, or to nonsuit the plaintiff, and verdict and judgment having gone accordingly for him, the town of Queensbury brought the case here.

Mr. Francis Tiernan, for the plaintiff in error:

1. *The act by which the donation was authorized was void.* The farthest that the courts of New York have gone is to hold that the legislature has power to authorize municipal corporations to become owners of stock in a railroad company, and to incur debt and impose taxes to pay for the same;* but it has never been decided that the legislature has power to order money to be taken by taxation from the people of a town and "*donated*," that is to say, *given away as a present* to a railroad company; and still less that the legislature, in which alone by the constitution of New York the *legislative power* of the State is vested, can appoint a sub-legislative body to do it for them.

In 1868, *before* the making of the instruments in question,

* Bank of Rome *v.* The Village of Rome, 18 New York, 38.

an act of the legislature of New York, precisely like the act under consideration, was held to be void by the Supreme Court of that State.* This adjudication has never been reversed or questioned.

It will hardly be pretended that this depriving the parties of their property was "by the law of the land" or "by due process of law." To hold that it was would be to render those well-known provisions of the Constitution, which say that no one shall be otherwise deprived of his property, nugatory as against the arbitrary will of the legislature; and be contrary to the settled meaning of those terms.†

Conceding that this taking of property was for *public use*, it was for a public use without compensation made. The very purpose of the act was to enforce a gift. It requires a *donation*.

But the money was not for *public use* within the legal signification of the terms. It was not to be paid into the treasury of the State, or to any State officer. It was not to be applied to the construction of any work owned by the State or any political division thereof, or in which either has any legal interest. The money is to be taken from the owners of property in a particular town, and *given away* to a *private* corporation.

For that the road to be constructed by the corporation is private property is obvious. Indeed the corporation has a vested right, by virtue of the act in question, if it be valid, to expel any person from the road who will not pay six cents per mile for riding in its cars thereon. The fact that the business of this corporation is to be that of a *common carrier* of persons and property for hire, and that as such the corporation is liable at common law to certain duties and responsibilities, and doubtless may be subjected by statute to others, does not make the road cease to be *private* property,

* In the matter of Sweet *v.* Hulbert, 51 Barbour, 312.

† Wynehamer *v.* The People, 13 New York, 392–396; Norman *v.* Heist, 5 Watts & Sergeant, 173, per Gibson, C. J.

and its business *private*, and to be carried on for the private gain of its stockholders.*

The occupation of an innkeeper is in the nature of a public employment. Inns are necessary for the accommodation of the public. The innkeeper is bound to receive all travellers who apply peaceably to be received as guests, so long as he has room; and he is an insurer of the property of the guest. But the legislature has not power to order money to be levied upon the inhabitants of a locality and *given away* to a company, even to aid it in the erection and maintenance of an inn.

So it may be for the public good that a factory be built and worked. Such enterprises as making railroads, opening good inns, building factories, &c.,—although done by individuals or corporations—may enhance the value of property and may tend to general prosperity. But this does not authorize the legislature, under the guise of an exercise of the taxing power, to compel citizens who are not regarded as public spirited to "*donate*" a portion of their property to individuals or corporations who propose to construct such works. There is a wide difference between exacting money from the citizen for *the use* of the State or a political division of it, and commanding him by legislative enactment to present to another individual or to a private corporation money to aid in constructing a work to be owned and worked by them for their private gain. This may be for the *public good*, but it *is not* taking the money for public *use*.

2. Conceding the statute to be valid, the plaintiff was not entitled to recover in assumpsit. The interest warrants do not purport to be and were not made by or in the name of the town. There was no evidence of any *promise* by the town to pay the amount sought to be recovered; and none from which a promise by the town could be implied.

3. The town is not liable in its corporate capacity to an action at law for the non-payment of the instruments made

* Presbyterian Society *v.* Auburn, &c., Railroad Co., 3 Hill, 567, 569, 570; Williams *v.* New York Central Railroad, 16 New York, 97, 104, &c.

and issued by the commissioners. The statute which authorized the money to be borrowed on the credit of the town and the instruments in question to be issued, prescribes how they shall be paid; and the holder must pursue the remedy prescribed.*

4. The bonds and coupons were disposed of by the commissioners in violation of the act of the legislature, and, therefore, the plaintiff cannot recover. By the third section, the commissioners were required to dispose of the bonds for money at *not less than par*, and pay over the money to the company to aid in constructing the road. The commissioners raised no money on the bonds, but delivered them to the railroad company, and the latter gave them to the plaintiff and others who were contractors to build the road. The plaintiff occupied no better position than the railroad corporation.

Mr. C. Hughes, with whom was Mr. J. P. Stockton, contra.

Mr. Justice STRONG delivered the opinion of the court.

In view of the numerous decisions made by the highest courts of most of the States, including New York, as also of those made by this court, it ought to be considered as settled that a State legislature may authorize a municipal corporation to aid in the construction of a railroad, in the absence of any express constitutional prohibition of such legislative action. There is no such prohibition to be found in the constitution of New York, and the courts of that State have many times held that the legislature has power to authorize cities and towns to subscribe for stock of a railroad corporation, to incur indebtedness for the subscription, and to impose taxes for the payment of the debt incurred. It is true no case in the highest court of that State has determined the precise question now presented, namely, whether a municipal corporation may be empowered to donate its

* Edwards *v.* Davis, 16 Johnson, 285; Almy *v.* Harris, 5 Id. 175; Brady *v.* The Supervisors of New York, 2 Sandford, Superior Court, 460; S. C., 10 New York, 260; Martin *v.* Board of Supervisors, 29 Id. 645.

bonds to a railroad company and collect taxes for the payment of the bonds. But subscriptions for stock, equally with donations, are outside of the ordinary purposes of such corporations, and the design of both is the same. It is to aid in the construction or maintenance of a public highway. It is for the promotion of a public use. The inducement to a subscription may be greater than the inducement to a donation. In the one case there may be a hope of reimbursement by the stock obtained; in the other there can be no such expectation. In both, however, the warrant for the exercise of the power is the same. It may be that a mandatory statute requiring a municipal corporation to subscribe for stock in a railroad company, or to contribute to the construction of the railroad of such a company is not a legitimate exercise of legislative power, and that it is not even an act of legislation. This was decided by the Court of Appeals of New York in the case of *The People ex rel.* v. *Bacheler.** But the present is no such case. The legislative act by which the town of Queensbury was authorized to issue bonds in aid of the railroad from the village of Glenn's Falls to intersect with the Saratoga and Whitehall Railroad was not mandatory. It was merely enabling. It authorized the issue and donation of the bonds, if approved by a popular vote. It was a mere grant of power upon conditions, coupled with a prescription of the mode in which the power granted might be exercised. And that it was a constitutional exertion of legislative power must be considered as settled affirmatively by the decisions of this court in *Railroad Company* v. *The County of Otoe*,† and *Olcott* v. *The Supervisors of Fond du Lac County*.‡ It cannot, therefore, be maintained, as contended by the plaintiff in error, that the statute under which the coupons in suit were issued was transgressive of the power vested in the legislature. If the Court of Appeals of New York had decided otherwise we should feel constrained to follow its decision, but no such determination has been made.

* 8 Albany Law Journal, 120. † 16 Wallace, 667. ‡ Ib. 678.

It is next insisted that, even if the statute under which the bonds were issued be valid, an action of assumpsit cannot be brought to recover the sums due on the coupons. The reasons given in support of this proposition are that the coupons do not purport to be, and that they were not, made in the name of the town; and that the town is not liable to an action at law for the failure to pay the instruments made and issued by the commissioners designated by the statute. Neither of these reasons is well founded. The bonds to which the coupons were attached do purport to bind the town. They acknowledge that the town of Queensbury is indebted to the bearer or his assigns in the sum mentioned, for value received in money borrowed, payable on the 6th day of February, 1878, "with interest thereon at the rate of seven per cent., on presentation and delivery of the coupons for the same, thereto attached." They are signed by the commissioners who were by the statute made agents of the town for issuing them, and they are countersigned by the clerk of the town of Queensbury. The coupons attached are all headed "Town of Queensbury Interest Warrant." They are in the form of orders drawn upon a bank, but signed by the commissioners as commissioners and attested by the town clerk. Very plainly, therefore, both the bonds and the interest warrants are evidence of indebtedness by the town. They appear to have been issued in strict compliance with all the requisitions of the statute. It is vain to say the statute imposed no duty upon the town or its officers. No one can doubt that it is competent for the legislature to determine by what agents a municipal corporation shall exert its powers. The statute in question did designate the agents, and their acts, within the authority conferred, are binding upon their principal, upon the town of which they had been constituted the agents.

Equally untenable is the position that an action at law is not maintainable, because the holders of the bonds and coupons are entitled only to that remedy for a default of payment which is provided by the statute. There are cases, it is true, which hold that where a statute creates a right

and enjoins a duty, nothing may be done agreeably to the provisions of the common law to enforce the duty or assert the right further than is necessary to give effect to the statute. But we do not perceive that this principle has any bearing upon the present case. The fourth section of the act requires the commissioners designated as the agents of the town to report, annually, to the board of supervisors of the county, the amount required to pay the principal and interest on the bonds authorized to be issued, and makes it the duty of the supervisors to assess, levy, and collect of the real and personal property of the town of Queensbury, such sum or sums of money as shall have been reported to them by the commissioners. The money thus collected the supervisors are required to pay to the commissioners, to be applied by them to the payment of the bonds and interest. These are all directions given to the town and county officers and agents—not to the holders of the bonds and coupons. They prescribe duties to be performed after the amount of the debt due by the town has been ascertained, either by agreement or by judgment. That amount may be contested. It has been in this case. It could only be determined by an action at law. Only after such a determination could the commissioners report how much was required to be levied by taxation. The action, then, does not take the place of any remedy provided by the legislature. At most, it is a step to give effect to the statutory provision.

The only other error assigned which requires notice is, that the court refused to direct a verdict for the defendants because the bonds were not disposed of by the commissioners at not less than par, because no money was received for them by the commissioners, and because they were delivered directly to the railroad company. But a delivery to the railroad company was plainly authorized by the act of the legislature. True, the commissioners were not at liberty to dispose of them for less than their par value, and they did not. Had they done so, and had the plaintiff not been a holder—without notice and for a valuable consideration—there might have been a defence to the action. The third section, how-

ever, empowered the commissioners to "dispose of the bonds to such persons or corporation as they should deem most advantageous for the town, but not for less than par." And it required them not to pay over "any money or bonds" to the railroad corporation until certain satisfactory assurances should be furnished them. Thus it appears that delivery of the bonds to the railroad company was contemplated and authorized.

There is, therefore, no error in the record, and the judgment is

AFFIRMED.

ROBERTSON *v.* CARSON.

A. and B., executors in South Carolina, and authorized by their testator to sell all his real and personal estate, and to pay the proceeds to the testator's sons, sold the lands to C. on mortgage. C. wishing to pay the mortgage, A. received the amount of it from him in notes of the so-called "Confederate States," surrendered the instrument and entered satisfaction upon it. C. sold the property (whether with warranty or without did not appear) to D. E. & Co., a mercantile firm, composed of the said D. and E. and three other persons, including F.; the deed, however, being made to D. and E. individually, upon such uses as they should appoint, and until they did appoint to the use of the whole five partners, according to their interests in the firm. F. afterwards retired from the firm, transferring, in consideration of a sum of money to be paid, his interest in the firm to his remaining partners; and D. and E., in order to secure the payment to F. of the sum of money, appointing the land to the use of him, F.

The executors sold the personal estate also to C., who had bought the real; this sale of the personal being on credit, and X. becoming C.'s surety to the executors for payment of the price.

In August, 1866—the notes of the "Confederate States" being now wholly worthless—the sons of the testator (or rather their mother, to whom they had transferred all their interests in their father's estate) filed a bill (charging fraud and conspiracy) against the executors (A. and B.), against D. (one of the trustees to whom C. had conveyed in trust for the firm), and against X. (the surety of C. in the matter of the personal property)—*nobody else being brought in*—to charge the executors with all moneys received by them, to reinstate and establish the mortgage given by C., and to hold X. liable as surety in the matter of the price of the personal property.

Statement of the case.

Held, that the bill could not be sustained, that C. (the purchaser from the executors), and E. (the co-trustee with D.), were indispensable parties, and that if it was intended to conclude F. (in case he did not get his money from his partners) from proceeding on the mortgage given to him to secure its payment and raising anew the question of the validity of the sale of the real estate to C., and of that by him to D. and E., he was to be made a party also.

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

William Carson, of South Carolina, died in August, 1856, somewhat indebted, but possessed of considerable real and personal estate, including a plantation called Dean Hall, and leaving a widow, Caroline, and two minor sons, William and James. By his will he appointed two persons, named Robertson and Blacklock, his executors, and directed all his estate to be sold by them on such terms as they should deem judicious; and the proceeds, after payment of his debts, to be divided into three parts, all "to be *held* in trust" by his executors; the interest of one-third to be paid to his widow, and the interest of the other two to be devoted to the support of his sons till they came of age, and the principal to be then paid to them.

The executors, soon after his death and near the close of the year 1856, sold Dean Hall to one Elias Nonus Ball, most of the purchase-money being in the form of a purchase-money mortgage reserved to them as executors. Ball, in 1863, the rebellion being now in full action, agreed to sell it to a firm trading under the name of Hyatt, McBurney & Co., and which was composed of five persons, to wit, Hyatt and McBurney, aforesaid, and three other persons named, respectively, Gillespie, Hazelton, and McGann. Hyatt, McBurney & Co. paid the purchase-money in "Confederate States" notes, the usual currency during the rebellion of South Carolina. With this Ball paid off his bonds to the executors, and Robertson, one of them, surrendered his bonds and entered satisfaction on the mortgage. Ball then conveyed the plantation (by what kind of deed as respected warranty did not appear), to McBurney and Gil-

lespie, two partners, as already said, of Hyatt, McBurney & Co., "to such uses as they or the survivors of them should appoint, and until such appointment to the use of the said Hyatt, Hazelton, McGann, McBurney, and Gillespie, partners, trading as Hyatt, McBurney & Co., according to their respective interests in the partnership."

Hyatt, some time after, by deed, bearing date 8th May, 1863, released his interest in the plantation, and on the last-named day, Hyatt retiring from the partnership, McBurney and Gillespie appointed the plantation to his use to secure a bond of the remaining partners to him for $40,000, given for the purchase of his interest in the partnership. *Hyatt was and now is a citizen of New York.* Gillespie so also, apparently. Hazelton was domiciled at Liverpool, England; and McGann then, as now, was a citizen of South Carolina. Ball, the purchaser, was a citizen of New Jersey.

The executors, at the time they sold the plantation to Ball, sold to him also certain personal property. This was sold on credit, and one *W. J.* Ball became jointly bound with the said E. N. Ball, and as his surety for the payment of the price of it.

McBurney and Gillespie remained in possession of Dean Hall until August, 1866, when the two sons of Carson having reached their majority, and having transferred all their interest in their father's estate to their mother, his widow, she, describing herself as a citizen of New York, filed a bill in the court below against the executors (Robertson and Blacklock), against E. N. Ball, W. J. Ball, McBurney, and the two sons Carson; these two being made parties apparently for mere form. But from a fear perhaps of ousting the jurisdiction of the Circuit Court, if it made them parties, the bill did not attempt to make either Hyatt, who, as already said, like the complainant, was a citizen of the State of New York, Gillespie, Hazelton, or McGann (the four persons who, with McBurney, constituted the firm of Hyatt & McBurney, and for whose use along with that of McBurney, the plantation had been conveyed when conveyed to Hyatt & McBurney), parties to the bill. And of those whom it sought to make

parties, only Robertson and Blacklock (the executors), and McBurney and *W. J.* Ball were served. *The purchaser, Elias Nonus Ball, was not served.* [The same was true as to the sons Carson, though these last were, as already said, added for form only, and the omission to serve them was obviously unimportant.]

The purpose of the bill was:

As respected the executors, to make them account in good money, for the proceeds of the sales which they had made, if the sales should stand:

As respected the defendant McBurney, to set aside his purchase and re-establish the mortgage given by E. N. Ball to the executors, upon the ground that he, McBurney, paid no valuable consideration for his purchase; that the pretended payment of his bond by Ball, the mortgagor and purchaser from the executors, and the release and satisfaction of the mortgage was procured by him without valuable consideration, and was a breach of their trust by the executors. That McBurney aided and procured the executors to commit the breach of trust, and with full knowledge of the same, became possessed of Dean Hall without any valuable consideration passing from him to Ball, or from Ball to the executors, and that he should, in equity, be declared to hold the premises for the benefit of the complainant:

And as respected *W. J.* Ball, to make him respond as surety for the debt of E. N. Ball, incurred in the purchase of the personal property.

The executors, McBurney, and W. J. Ball, answered, setting up:

1st. *Matter of form.* That Hyatt, Hazelton, Gillespie, McGann, and Elias Nonus Ball were indispensable parties to the bill; the answer of W. J. Ball alleging in addition, and in regard to the sale of the personal property bought by *E. N.* Ball, that *he,* the respondent, was but a surety, and that the said E. N. Ball was the principal debtor, and the person alone acquainted with the facts of the case.

2d. *Merits.* That the payments were made in money that was universally current in the South, money which had

value, and which was received on deposit in all the banks of South Carolina at the time; that in fact the payments were made in checks on the Bank of South Carolina. It alleged further, that with this same money received the executors had paid off the debts of their testator.

The court below (Chase, C. J., presiding) with some hesitation overruled the objection as to parties,* observing that "it would be a positive wrong for the Circuit Court to turn from its doors a suitor in another State, seeking a remedy against citizens in this State, and thus deny to her, upon a doubtful question in reference to parties, a right secured to her by the Constitution;" and that the court would "strain a point in favor of the constitutional right of citizens of the several States to sue the citizens of other States in the courts of the United States."

On the merits it decreed that the surrender of the bonds of E. N. Ball by Robertson, the executor, and the satisfaction of the mortgage of Dean Hall, were done in breach of his duty as trustee, and were null and void; that the obligations were not discharged; that the mortgage of Dean Hall was a valid and subsisting mortgage, and that the complainant was entitled to the bonds and to enforce the mortgage as a security for the same. And after finding a certain sum due as principal of the mortgage, it decided that if the debt and interest were not paid by a day named, the plantation should be sold by the marshal under foreclosure.

On the 15th of June, 1872, that is to say, *after* the date of filing the bill in this case, and indeed after the decree made, Congress, by "*An act to further the administration of justice*," enacted as follows:†

"SECTION 13. That when, in any suit in equity . . . to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, . . . it shall be lawful for the court to make an order directing such absent defendant to appear, plead,

* 2 American Law Times Reports, 116. † 17 Stat. at Large, 198.

answer, or demur, to the complainant's bill at a certain day therein to be designated; which order shall be served on such absent defendant, if practicable, wherever found; or, where such personal service is not practicable, such order shall be published in such manner as the court shall direct, and in case such absent defendant shall not appear, plead, answer, or demur, within the time so limited, . . . it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district," &c.

Mr. Edward McCready and Mr. Edward McCready, Jr., for the appellants, charging multifariousness and great disorder on the bill, argued that there was plain error in the action of the court below:

1. *In overruling the objection as to parties.* They contended that the objection under the aspect of one of form was really one of substance, and of great substance; the property and rights and character of Elias Nonus Ball being certainly involved, and none the less certainly involved or the less completely because they were not directly involved; that if the complainant succeeded in this suit *he*, E. N. Ball, who was the principal debtor in the bond for the personal property, would have to pay what his surety had paid for him; while as to the real estate, since fraud and collusion were charged, to which he was averred to be a party, he would have to pay the amount whether his deed to McBurney and Gillespie contained a warranty or not.

Then, the conveyance to McBurney and Gillespie, was to them both in trust; to Gillespie as much as to the other. McBurney was brought in by the bill and Gillespie was left out. Why was this done? Being co-trustees, one was as important as the other. If McBurney had died, the legal estate would have survived to Gillespie. In truth, to be in a form perfectly regular, not only the trustees but the *cestuis que trust*, Hazelton and McGann, should have been made parties. On the payment of Hyatt's claim against the four partners, the interest of all four in the estate would come into action.

Argument for the appellees.

But Hyatt especially ought to be made a party. He had released his interest in the land immediately after the purchase, and the trustees had appointed a use of Dean Hall to secure the bond of the other partners, given to secure the price of the purchase of his interest in the firm.

The copartnership of which Hyatt was a member expired on the 31st of May, 1863, and he then sold his interest in the firm to the other partners and retired from business. His interest in the plantation was only by the mortgage upon it, which he held under the appointment from the trustees, to secure the bond of his late copartners.

As the record now stood, no decree upon it in favor of the complainant could end the litigation. Hyatt was free to bring his bill to foreclose his mortgage of Dean Hall, and Hazelton, Gillespie, and McGann free to bring their action in ejectment against any person who might purchase at the sale prayed for.

The case was not one where the doctrine of one partner representing the firm applies. Here was a conveyance to *trustees;* not to the firm, but to two individuals.

2. *In regard to the merits.* The counsel argued that McBurney was a purchaser for value; that the case showed no fraud, and that the whole transaction was in the then ordinary course of business in the South, and that the bills of the Confederate States were not then valueless—far from it; and that the payments were protected by the cases in this court of *Thorington* v. *Smith*,* *Delmas* v. *Insurance Company*,† and *Planters' Bank* v. *Union Bank*.‡

Messrs. James Lowndes and W. W. Boyce, with whom was Mr. Caleb Cushing, for the appellees:

1. *As to parties.* The Federal courts, sitting in equity, are exceptionally liberal in dispensing with parties, and for two obvious reasons. The first is the limitation upon their jurisdiction by the citizenship of parties; the other is the limitation upon their jurisdiction by their inability (until the

* 8 Wallace, 1. † 14 Id. 661. ‡ 16 Id. 483.

statute of 1872) of bringing in parties by publication. The narrowing effect upon their jurisdiction of these limitations has led them to enlarge the rule as to parties.*

In pursuance of this liberal policy, the courts have acted upon this principle, viz., that where a party, not before the court, is not an inhabitant of or found within the district where the suit is brought, the court will proceed without such party, unless he is an *indispensable* party, or *one whose rights are necessarily affected by the decree.*

There are three classes of parties: 1. Formal parties. 2. Necessary or convenient parties. 3. Indispensable parties. The Federal courts dispense with parties of the first two classes.

The parties dispensed with in *Payne* v. *Hook*† and in *Traders' Bank* v. *Campbell*,‡ were directly affected in their interests by the decrees; and they were in a stronger sense "necessary parties" than those whose absence is objected to in this case.

To apply these principles to the case, Ball passed all his interest in Dean Hall to McBurney and Gillespie by his deed. Ball's presence would be convenient to the defendants, because they might make their claim over against him. But he is only a convenient party, and his convenience is to the defendants. A stronger case than this is that of a mortgagor making a second mortgage; but by the statutes in South Carolina he need not be made a party.§ The case of *Caldwell* v. *Carrington*,‖ was a case similar to this.

Gillespie, in his character of co-trustee with McBurney, is not an indispensable party. The other trustee, McBurney, is before the court, and fully represents the trust estate. If Gillespie came in, he would have nothing to do but to sign McBurney's answer. An absent co-trustee is not an indispensable party.¶

* Mallow *v.* Hinde, 12 Wheaton, 198; Eberly *v.* Moore, 24 Howard, 158.
† 7 Wallace, 431.
‡ 14 Id. 94.
§ General Statutes, 389.
‖ 9 Peters, 86.
¶ West *v.* Randall, 2 Mason, 191.

Hyatt, McGann, Hazelton, and Gillespie, in their character of copartners of Hyatt, McBurney & Co., are not indispensable parties. They are *cestuis que trust*, under the conveyance to McBurney and Gillespie, and their trustee, McBurney, who is before the court, fully represents them. By the forty-ninth rule in equity, the trustee under a devise of realty is the proper party to defend a suit affecting it. This case is an analogous one. It is decided that a copartner is not an indispensable party; a partner before the court being taken to represent sufficiently the others.* At law, service on one copartner is sufficient in South Carolina.† Suits like this are within the reason of that rule. The property is realty; a fact which makes the case stronger than *Payne* v. *Hook*, or than *Traders' Bank* v. *Campbell*.

McBurney and Gillespie exercised their power of appointment by mortgaging Dean Hall to Hyatt. Is, then, Hyatt, as mortgagee, an indispensable party? The mortgage was simply a copartnership transaction. It amounted, in fact, to nothing more than setting aside in severalty Hyatt's share in the assets of Hyatt, McBurney & Co. The equitable lien which Hyatt had on the copartnership assets, for his share on an account with his copartners, was as sufficient a security to him as the mortgage. The mortgage was idle, for Hyatt's lien existed antecedently to it and independently of it. There was no new consideration given for the mortgage by Hyatt, and he is therefore not, by virtue of the mortgage, a purchaser for value. It would be great hardship to hold him to be an indispensable party, by reason of a supposed deed which did not materially change his rights.

There is another principle observed by the Federal courts of equity, viz., that where the joinder of a party will oust the court of its jurisdiction, it will go very far in dispensing with parties.‡

It is on this principle that the Chief Justice rested his decree overruling the objection to want of parties in this case.

* West *v.* Randall, 2 Mason, 191. † 7 Statutes, 281.

‡ West *v.* Randall, 2 Mason, 196; Payne *v.* Hook, 7 Wallace, 431.

Recapitulation of the case in the opinion.

Hyatt and Gillespie being both citizens of New York, where the complainant, Mrs. Carson, also has her domicile, to order them to be made parties is to send the complainant out of the Federal courts. To send her out of those courts is, in consequence of the decisions of the State courts of South Carolina on this class of questions, to take away from her all redress.

Since the decree was rendered in this case, an act of Congress* has provided that absent defendants may be brought into the United States courts by publication. If this court holds that this act so enlarges the jurisdiction of the Federal courts as to allow the absent parties in this case to be brought in, then the rule laid down in *Pugh* v. *McCormick*† will apply, viz., that this court will not send back a case when, by reason of a new statute, the decree appealed from has ceased to be error.

To sustain the decree is not to adjudicate the rights of any one in his absence. Its effect would only be to place the appellee in possession of lands as against those now actually in possession. The absent claimants are in noways concluded.

2. *The question of merits* was argued fully; the counsel contending, among other things, that the executors (after the sale converted into trustees) were bound to *hold* the proceeds of sale; that the Confederate States had never attempted to make their notes a legal tender; and that, as frequently decided, of late, in South Carolina, the so-called payment was no payment at all.

Mr. Justice SWAYNE delivered the opinion of the court.

We have not found it necessary to come to any conclusion as to the merits of the case. Aside from that subject, there is an insuperable difficulty arising from the want of parties. A brief statement will be sufficient to show the foundation upon which this objection rests.

William Carson by his will, after certain other bequests, directed his executors, Robertson and Blacklock, to sell all

* 17 Stat. at Large, 198, § 13. † 14 Wallace, 361.

Recapitulation of the case in the opinion.

his real and personal property, and after paying his just debts, to hold the residue of the proceeds upon the trusts prescribed, for his widow, Caroline Carson, and his two children, William and James Carson. The executors were authorized to invest and reinvest as they should deem best. They sold a plantation known as Dean Hall, to Elias N. Ball, and took his bonds for the purchase-money, secured by a mortgage upon the premises. They sold also a large amount of personal property to the same Elias N. Ball, and took his bonds for the proceeds, with W. J. Ball as his surety. Elias N. Ball sold the Dean Hall property to Hyatt, McBurney & Co. The firm consisted of Hyatt, McBurney, Gillespie, Hazelton, and McGann. The property was conveyed to McBurney and Gillespie, to be held by them for themselves and for such uses as they should appoint for the benefit of the other members of the firm. They paid Ball in Confederate money, and he paid his debt to the estate of Carson in the same medium. Robertson, one of the executors, thereupon gave up his bonds and released the mortgage. The legatees, William and James Carson, after reaching the age of majority, assigned all their rights under the will to the complainant, who is the widow of the testator. The bill charges that the transaction between Hyatt, McBurney & Co., E. N. Ball, and Robertson, the executor, was fraudulent and void. It seeks to charge the Dean Hall property with the amount of the debt secured by the mortgage, and to call Elias N. Ball and his surety to account upon their obligations for the proceeds of the personal property. The parties defendant made by the bill are the executors, Robertson and Blacklock, and McBurney, Elias N. and W. J. Ball, and William and James Carson. Process was returned not found, as to William and James Carson and Elias N. Ball. The two former having assigned all their rights and interest to everything in controversy, it was not necessary to make them parties. Nothing more need be said in regard to them.* But as the pleadings stand, the

* Garrett *v.* Puckett, 15 Indiana, 485; Whitney *v.* McKinney, 7 Johnson's Chancery, 147.

presence of Elias N. Ball was necessary in both aspects of the case.

First. As to the personal property:

The bill does not aver that he is insolvent, and gives no reason why he should not or cannot be brought before the court. The answer of W. J. Ball takes the objection of his absence and alleges that he represents the debt to be paid. The surety is entitled to have him present that he may assist in making this defence, that he may assist in taking the account of what is due if the defence fail, that the decree in that event may be primarily against him for payment, and that the amount may be conclusively fixed for which he will be liable over to the surety, if the latter should be compelled to pay the debt.*

Secondly. As to the real estate:

The bill charges fraud and conspiracy, and that he was a party to them. It denies that the mortgage was paid, alleges that the bonds are still in force, avers that the release was a nullity, and seeks to enforce the mortgage.

If these allegations are maintained, the whole amount of the debt will be rehabilitated against him. He is entitled to an opportunity to repel these imputations and to protect himself if he can do so. His vendees are entitled to his aid. His defence is their defence. It does not appear whether his deed to McBurney and Gillespie contains the usual covenants of title. If so, he would be liable over to his grantees in the event of the mortgage being enforced. This would be an additional reason for his being a party when the case is disposed of.

The general rule is that a mortgagor who has parted with his interest in the mortgaged premises need not be a party in a suit for foreclosure, unless he has warranted the title to his assignee. Whether there were such warranty by Ball,

* Story's Equity Pleadings, § 169; Madox *v.* Jackson, 3 Atkyns, 406; Angerstein *v.* Clark, 2 Dickens, 738; Cockburn *v.* Thompson, 16 Vesey, 326; Bland *v.* Winter, 1 Simons & Stuart, 246.

or not, we hold him to be an indispensable party by reason of the circumstances of the case.*

Gillespie was one of the grantees in the deed of E. N. Ball. The legal title was vested by that instrument in him and McBurney, and there is no averment that they do not yet hold it. This renders Gillespie an indispensable party.†

It appears that Hyatt has released his interest to his co-partners, but it also appears that they have given him a mortgage upon the premises to secure the payment of $40,000. If he shall not be made a party, and the complainant shall be successful, his rights will not be affected by the decree. In such case he can file a new and independent bill and renew the litigation as to all the questions touching the prior mortgage which are involved in this controversy.‡

The complainant has the option to make him a party or to proceed without him and take the hazard of the consequences.

The statute of South Carolina referred to by the counsel for the appellee, does not affect the case.

The act of Congress of June 1, 1872, was passed several years after this bill was filed. The thirteenth section has, therefore, no application to the question of parties in this litigation.

It is competent for a party to make a change of domicile for the purpose of giving jurisdiction to the Federal courts where it could not otherwise exist. With that privilege and the help of this section, there can hardly in any case be an

* Calvert on Parties, 179; Milroy *v.* Stockwell, 1 Carter, 35; Haines *v.* Beach, 3 Johnson's Chancery, 459; Worthington *v.* Lee, 2 Bland, 682; Ducker *v.* Belt, 3 Maryland Chancery, 13; Hallock *v.* Smith, 4 Johnson's Chancery, 649; Bigelow *v.* Bush, 6 Paige, 343; Drury *v.* Clark, 16 Howard's Practice Reports, 424.

† Watson *v.* Spence, 20 Wendell, 260; Story's Equity Pleading, 192, 197; Barber on Parties, 463, 491; Shaw *v.* Hoadley, 8 Blackford, 165; Betts *v.* Starr, 5 Connecticut, 551.

‡ Haines *v.* Beach, 3 Johnson's Chancery, 459; Ensworth *v.* Lambert, 4 Id. 605; Judson *v.* Emanuel, 1 Alabama N. S. 598; Brainard *v.* Cooper, 10 New York, 356; Story's Equity Pleadings, § 192.

irremediable difficulty as to jurisdiction, however diversified the residence of those necessary to be made defendants.

This record is in a singularly defective and confused condition. The allegations in the bill lack clearness and precision. This has perhaps arisen from the want of full and accurate information until the coming in of the answers. There are important averments on both sides unsupported by evidence. Important papers are referred to, but copies are not given, and there is no proof of their contents. There are many matters of detail of no moment to the rights of the parties which should be expunged. If there were no defect of parties, we should have great difficulty in disposing of the case upon the pleadings and proofs before us. If the case shall be brought here again, these objections, it is to be hoped, will in the meantime be obviated.

DECREE REVERSED, and the cause remanded, with directions to proceed

IN CONFORMITY TO THIS OPINION.

REES *v.* CITY OF WATERTOWN.

Although a *mandamus*, and *alias mandamus*, and *pluries mandamus*, commanding a city to levy and collect a tax upon the taxable property of its citizens in it, to pay judgments which the relator in the mandamus has obtained against it, have all, in consequence of the devices of the city authorities, such as resignation of their offices, &c., proved unavailing to compel the levy and collection of the tax, and though "the prospect of future success" by the same writ "is perhaps not flattering," the Federal courts sitting in equity do not possess power to appoint the marshal to levy and collect the tax, nor to subject the taxable property situate within the corporate limits of the city in any way to an assessment in order to pay the judgment.

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

Rees, a citizen of Illinois, being owner of certain bonds issued under authority of an act of the legislature of the State

of Wisconsin, by the city of Watertown, in that State, to the Watertown and Madison Railroad Company, and by the company sold for its benefit, brought suit in the Circuit Court of the United States for the District of Wisconsin, against the city, and, in 1867, recovered two judgments for about $10,000.

In the summer of 1868 he issued executions upon the two judgments thus obtained, which were returned wholly unsatisfied.

In November of the same year he procured from the United States Circuit Court a peremptory writ of mandamus, directing the city of Watertown to levy and collect a tax upon the taxable property of the city, to pay the said judgments; but before the writ could be served, a majority of the members of the city council resigned their offices. This fact was returned by the marshal, and proceedings upon the mandamus thereupon ceased.

In May, 1869, another board of aldermen having been elected, Rees procured another writ of mandamus to be issued, which writ was served on all of the aldermen except one Holger, who was sick at the time of the service upon the others. No steps were taken to comply with the requisition of the writ. An order to show cause why the aldermen should not be punished for contempt, in not complying with its requirements, was obtained, and before its return day six of the aldermen resigned their offices, leaving in office but one more than a quorum, of whom the said Holger, upon whom the writ had not been served, was one. Various proceedings were had and various excuses made, the whole resulting in an order that the aldermen should at once levy and collect the tax; but before the order could be served on Holger, he resigned his office, and again the board was left without a quorum. Nothing was accomplished by their effort in aid of the plaintiff, but fines were imposed upon the recusant aldermen, which were ordered to be applied in discharge of the costs of the proceedings.

In October, 1870, the plaintiff obtained a third writ of mandamus, which resulted as the former ones had done, and

by the same means, on the part of the officers of the city. A special election was ordered to be held to fill the vacancies of the aldermen so resigning, but no votes were cast, except three in one ward, and the person for whom they were cast refused to qualify. The general truth of these facts was not denied. No part of the debt was ever paid.

In this state of things, the district of Wisconsin having been divided into an eastern and a western district, and the city of Watertown being in the latter, Rees brought suit in the latter district on his judgments obtained in the general district before the division, and got a new judgment upon them for $11,066.

He now filed a bill in the said western district, setting forth the above facts, the general truth of which was not denied; that the debt due to him had never been paid, and that, with an accumulation of fourteen years' interest, the same remained unpaid, and that all his efforts to obtain satisfaction of his judgments had failed. All this was equally undenied.

The bill set forth also certain acts of the legislature of Wisconsin, which, it was alleged, were intended to aid the defendant in evading the payment of its debts, and which, it seemed sufficiently plain, had had that effect, whatever might have been the intent of the legislature passing them.

The bill alleging that the corporate authorities were trustees for the benefit of the creditors of the city, and that the property of the citizens was a trust fund for the payment of its debts, and that it was the duty of the court to lay hold of such property and cause it to be justly applied, now prayed that the court would subject the taxable property of the city to the payment of the judgments. It asked specifically that a decree might be made, subjecting the taxable property of the citizens to the payment of the complainant's judgments, and that the marshal of the district might be empowered to seize and sell so much of it as might be necessary, and to pay over to him the proceeds of such sale.

The answer (or the argument made in the brief upon it) set up, among other things, "that the city of Watertown

contained a population of but 7553 inhabitants; that the value of its property was assessed at but little over a million of dollars; that the debt of the city is $750,000; that it was impossible for the city to pay this debt; that it was expected and provided that the railroad company would pay the bonds in question; that the city had compromised and settled a portion of its debt; that it had levied the taxes necessary to effect such compromise; and that it was ready to compromise all outstanding bonds and judgments at as high a rate as can be collected of the people of Watertown; that there was no law to compel the retention of the office by aldermen to levy taxes; that the plaintiff took his chance of its being voluntarily done, and that not being voluntarily done there was no violation of law."

By the charter of the city of Watertown* it was thus enacted:

"Nor shall any real or personal property of any inhabitant of said city, or any individual or corporation, be levied upon or sold by virtue of any execution issued to satisfy or collect any debt, obligation, or contract of said city."

The case was tried in June, 1872, before two judges, holding the Circuit Court, upon these questions:

"1. Whether, when the principal and interest on the bonds were unpaid, as well as the judgment, and there being no property on which to levy an execution, the plaintiff was confined to a remedy at law by mandamus or otherwise, to enforce the payment of his judgment recovered in this court.

"2. Whether it was competent for the court, as a court of equity, on the failure of the officers of the city of Watertown to levy the tax as required by law, referred to in the bill, through their neglect, refusal, absence, or resignation, to appoint the marshal of the court to levy and collect the tax to pay the judgment.

"3. Whether it was competent for the court, as a court of equity, to subject the taxable property situate within the corporate limits of the city of Watertown, in any way, to an assess-

* Private laws of Wisconsin, acts of 1856, chapter 237.

ment, in order to pay the judgment of this court referred to in the bill of complaint."

The judges were divided in opinion upon them and the bill was dismissed.

The case was now here on certificate of division and appeal, the error assigned being that the court dismissed the bill, when it ought to have given the relief prayed for.

Messrs. H. W. and D. W. Tenney (with whom was Mr. S. U. Pinney), for the creditor appellant:

The theory of the bill is that the complainant having established a clear legal right at law, and having demonstrated that he has no remedy there, it is the duty of a court of equity to devise and enforce an effectual remedy. This must be done through its own officers, because there are no others in existence capable of doing it.

The opposite theory is that the court can only command existing city officers to execute existing State tax laws, and if there are no such officers, the end of judicial power is reached.

We assert the right of the Federal court to take possession of a city, and sell it in its own way, without regard to State laws or State officers. And on the other side, the position is that the Federal court is powerless in this case to execute its judgments, except through instrumentalities provided by another sovereign; and that, these being withdrawn, the city may safely and effectually repudiate its debt.

That we have established a clear legal right will be admitted. Equally admitted will it be that, in good faith, through several years, we have tried with diligence, but in vain, every resource of the law, and that now and for a long time past there are no officers in existence capable of executing the command of the court to levy a tax, and that the city has no property subject to execution. What is our remedy at law, if we have one? Any further attempt at law would not only be fruitless to us, but would bring the court of law which sought to give it into ridicule.

Then comes the important question whether, all legal

remedies failing, the court of chancery can give us a remedy? This involves the original and ultimate powers of the court. Story says:*

"Perhaps the most general, if not the most precise description of a court of equity, in the English and American sense, is, that it has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate, and *complete remedy cannot be had* in the courts of common law."

Now, a proceeding at law, which, after having been tried and retried, once, twice, and again, is found to be wholly worthless, cannot be called "an adequate and complete remedy."

Looking through the specific enumeration of the cases in which equity acts, we find nothing substantially limiting the broad statement made by Story, or taking our case out of it. The very ground of the jurisdiction of equity is that there is a legal right and no legal remedy, and by necessity the jurisdiction must be coextensive with the reason. Finding that the general words and the reason of the law cover our case, and finding no limitation thereon, we may stop and ask our opponents to show where any limitation has been made, and why it should be made, to prevent the court from giving us redress in this case, as it does in others upon the same reason. Here is legal right and no legal remedy. If that ever gives jurisdiction, why not in this case? If the court *generally* takes jurisdiction on that ground, what is there to make this an exception?

Will it be said that in other cases there is a practicable remedy which the court can devise and enforce, but not in this? The persons and the property chargeable with this debt are within the territory habitually traversed by the marshal, and so within the reach of the court. The number of persons interested in resisting the execution of the decree of the court is not so great but that the court can summon

* 1 Equity Jurisprudence, § 33.

to its aid a hundred fold to execute it. The thing to be done is not so complex or extensive but that the court can handle it properly. Wherein, then, is the difficulty?

Are the proper parties before the court to entitle us to the relief we ask? The defendant is the same that contracted the debt. It is the same that was charged with the duty of paying it, and which alone had the power to take the property of the citizens for that purpose. It is the embodiment of the citizens to act for them in this matter, made and unmade by them at their pleasure, so far as filling the offices and controlling their action is concerned. It had authority to borrow the money for the citizens, to spend it for the citizens, and to defend against the payment of it at the expense of the citizens. In short, it had ample and exclusive authority to represent the citizens at every stage. The citizens are a numerous and fluctuating body, whom it would be impracticable to bring into court, and merely as representatives of a class, the officers upon whom the law requires process to be served, and whose duty it is made to take action in regard to it, have shown by their diligence that they are sufficient for that purpose.

It may be said that we hold in substance only a contract that the city officers will levy a tax for our benefit, and that the court has no power except to compel a specific performance of this agreement. Such was not the contract. The gist of the contract was to repay the money borrowed, and to this the contract to raise a tax was subsidiary. We are not seeking a specific performance through the means appointed, knowing it cannot be had, but, as in a creditor's bill, are seeking to reach assets in equity which cannot be reached at law. The case is the same as if any ordinary debtor, at the time of contracting his debt, had agreed that he would raise the money to pay it in a particular way, and then had disabled himself from raising the money in that way, having ample funds otherwise.

It may be said that the relief we ask involves an exercise of the taxing power, and that this is not a judicial power. We do not ask the court to exercise the power of taxation,

and we admit that in the proper sense of the word the court does not possess such a power. In some analogous cases, courts have spoken of "ordering the marshal to levy a *tax*," &c., and one of the questions certified here is, whether the court has power to appoint the marshal to levy and collect the *tax* which the city officers ought to have levied and collected. This makes it necessary to discriminate accurately the taxing power from that which we invoke.

In this ordinary sense of the word, the taxing power is a legislative power, and can only be exercised under and by virtue of that power, and by the particular officers and in the particular manner provided for by the legislature. But the power which we invoke and the rights which we assert are simpler than this. We say that the court has *jurisdiction* of the persons and the property in question, and of the case; and that it can, in any way which its wisdom may approve, subject the taxable property of the city to the payment of our debt, without the intervention of State taxing officers, and without regard to tax laws. The court has the subject-matter within its reach, and the persons representing it before its bar. It has property in sight, out of which it has adjudicated that this debt should be paid. It can see no restriction upon its power to lay hold of it and apply it to that purpose. Why should it fail to execute justice in the matter? It constantly hears controversies as to the title to lands, or the existence of liens or charges upon them, or equities respecting them, and finds no difficulty in handling the matter by its own officers, by sale, or passing of title, or otherwise, so as to accomplish what it has determined that justice requires. If an equitable charge existed against a tract of land owned in severalty by a thousand different persons, the court would not defeat the charge nor refuse jurisdiction because of the difficulty of settling the equities between so many defendants. That seems to us the only difficulty here, and not a very great one. And considering that the parties interested have by their own wrongful acts prevented the payment of this debt by the levy of a tax, which would have settled the equities between them perfectly, it

seems to us that we should not be delayed, much less defeated, by this difficulty.

Stating more specifically what remedy we think the court should give us, we may say that it might be something like this: The court might make a decree subjecting the taxable property of the city of Watertown to the payment of this debt, and ordering the marshal to make a list thereof from the best sources he could obtain, and as nearly as convenient like the last assessment roll, the same to be reported to the court. The court might then hear and settle objections to this list, apportion our claim upon the items thereof, as valued, and order the marshal to collect from each person or piece of property the amount apportioned thereto, or in default, to sell the property, or levy on the property of the persons in default, in the main following the analogy of the tax laws, but not too literally. In all the proceedings these things should be kept in mind: First, that the principal object is to give the complainant a simple and effectual remedy. Second, that the proceedings should be wholly in the control of the Federal court, and should not depend on the actions of any State or city officers. Third, that the State tax laws should be disregarded as a source of authority, and regarded as an analogy only so far as convenient. Fourth, that anything done for the purpose of settling equities between the defendants in interest is only a matter of grace, and should not be allowed to work any substantial injury to the complainant.

We suppose that the court might order the money to be made out of any of the taxable property in the city, leaving the citizens to settle the equities between themselves at their leisure; and perhaps that would be the best way.

There is a dearth of precedents on the point now raised. However, in *Welch* v. *St. Genevieve*,* the court, in a mandamus case, ordered the marshal to levy and collect a tax to pay the debt. There was no State statute authorizing it. In *Supervisors* v. *Rogers*,† the court issued a mandamus to

* 1 Dillon, 522.

† 7 Wallace, 175.

the marshal "commanding him to levy and collect the taxes named in said peremptory writ," &c. But there was a State statute authorizing the court to "direct that the act required to be done may be done by the plaintiff or some other person appointed by the court," and the proceeding was probably founded upon that.

Mr. D. Hall (*with whom was Messrs. M. H. Carpenter and H. L. Palmer*), *contra.*

Mr. Justice HUNT delivered the opinion of the court.

This case is free from the objections usually made to a recovery upon municipal bonds. It is beyond doubt that the bonds were issued by the authority of an act of the legislature of the State of Wisconsin, and in the manner prescribed by the statute. It is not denied that the railroad, in aid of the construction of which they were issued, has been built, and was put in operation.

Upon a class of the defences interposed in the answer and in the argument* it is not necessary to spend much time. The theories upon which they proceed are vicious. They are based upon the idea that a refusal to pay an honest debt is justifiable because it would distress the debtor to pay it. A voluntary refusal to pay an honest debt is a high offence in a commercial community and is just cause of war between nations. So far as the defence rests upon these principles we find no difficulty in overruling it.

There is, however, a grave question of the power of the court to grant the relief asked for.

We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it be-

* Stated *supra*, pp. 109–110.

yond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important. The question is not entirely new in this court.

In the case of *Supervisors* v. *Rogers*,* an order was made by this court appointing the marshal a commissioner, with power to levy a tax upon the taxable property of the county, to pay the principal and interest of certain bonds issued by the county, the payment of which had been refused. That case was like the present, except that it occurred in the State of Iowa, and the proceeding was taken by the express authority of a statute of that State. The court say: "The next question is as to the appointment of the marshal as a commissioner to levy the tax in satisfaction of the judgment. This depends upon a provision of the code of the State of Iowa. This proceeding is found in a chapter regulating proceedings in the writ of mandamus, and the power is given to the court to appoint a person to discharge the duty enjoined by the peremptory writ which the defendant had refused to perform, and for which refusal he was liable to an attachment, and is express and unqualified. The duty of levying the tax upon the taxable property of the county to pay the principal and interest of these bonds was specially enjoined upon the board of supervisors by the act of the legislature that authorized their issue, and the appointment of the marshal as a commissioner in pursuance of the above section is to provide for the performance of this duty where the board has disobeyed or evaded the law of the State and the peremptory mandate of the court."

The State of Wisconsin, of which the city of Watertown is a municipal corporation, has passed no such act. The case of *Supervisors* v. *Rogers* is, therefore, of no authority in the case before us. The appropriate remedy of the plaintiff was and is a writ of mandamus.† This may be repeated as often as the occasion requires. It is a judicial writ, a part of a recognized course of legal proceedings. In the present

* 7 Wallace, 175.

† Riggs *v.* Johnson County, 6 Wallace, 193.

case it has been thus far unavailing, and the prospect of its future success is, perhaps, not flattering. However this may be, we are aware of no authority in this court to appoint its own officer to execute the duty thus neglected by the city in a case like the present.

In *Welch* v. *St. Genevieve*,* at a Circuit Court for the district of Missouri, a tax was ordered to be levied by the marshal under similar circumstances. We are not able to recognize the authority of the case. No counsel appeared for the city (Mr. Reynolds as *amicus curiæ* only); no authorities are cited which sustain the position taken by the court; the power of the court to make the order is disposed of in a single paragraph, and the execution of the order suspended for three months to give the corporation an opportunity to select officers and itself to levy and collect the tax, with the reservation of a longer suspension if it should appear advisable. The judge, in delivering the opinion of the court, states that the case is without precedent, and cites in support of its decision no other cases than that of *Riggs* v. *Johnson County*,† and *Lansing* v. *Treasurer*.‡ The first case cited does not touch the present point. The question in that case was whether a mandamus having been issued by a United States court in the regular course of proceedings, its operation could be stayed by an injunction from the State court, and it was held that it could not be. It is probable that the case of *Supervisors* v. *Rogers*§ was the one intended to be cited. This case has already been considered.

The case of *Lansing* v. *Treasurer* (also cited), arose within the State of Iowa. It fell within the case of *Supervisors* v. *Rogers*, and was rightly decided because authorized by the express statute of the State of Iowa. It offered no precedent for the decision of a case arising in a State where such a statute does not exist.

These are the only authorities upon the power of this

* 10 American Law Register, New Series, 512.
† 6 Wallace, 166.
‡ 9 American Law Register, N. S. 415.
§ 7 Wallace, 175.

court to direct the levy of a tax under the circumstances existing in this case to which our attention has been called.

The plaintiff insists that the court may accomplish the same result under a different name, that it has jurisdiction of the persons and of the property, and may subject the property of the citizens to the payment of the plaintiff's debt without the intervention of State taxing officers, and without regard to tax laws. His theory is that the court should make a decree subjecting the individual property of the citizens of Watertown to the payment of the plaintiff's judgment; direct the marshal to make a list thereof from the assessment rolls or from such other sources of information as he may obtain; report the same to the court, where any objections should be heard; that the amount of the debt should be apportioned upon the several pieces of property owned by individual citizens; that the marshal should be directed to collect such apportioned amount from such persons, or in default thereof to sell the property.

As a part of this theory, the plaintiff argues that the court has authority to direct the amount of the judgment to be wholly made from the property belonging to any inhabitant of the city, leaving the citizens to settle the equities between themselves.

This theory has many difficulties to encounter. In seeking to obtain for the plaintiff his just rights we must be careful not to invade the rights of others. If an inhabitant of the city of Watertown should own a block of buildings of the value of $20,000, upon no principle of law could the whole of the plaintiff's debt be collected from that property. Upon the assumption that individual property is liable for the payment of the corporate debts of the municipality, it is only so liable for its proportionate amount. The inhabitants are not joint and several debtors with the corporation, nor does their property stand in that relation to the corporation or to the creditor. This is not the theory of law, even in regard to taxation. The block of buildings we have supposed is liable to taxation only upon its value in proportion to the value of the entire property, to be ascertained by

assessment, and when the proportion is ascertained and paid, it is no longer or further liable. It is discharged. The residue of the tax is to be obtained from other sources. There may be repeated taxes and assessments to make up delinquencies, but the principle and the general rule of law are as we have stated.

In relation to the corporation before us, this objection to the liability of individual property for the payment of a corporate debt is presented in a specific form. It is of a statutory character.

The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor. Thus a statute prohibiting the exercise of its taxing power by the city to raise money for the payment of these bonds would be void.* But it is otherwise of statutes which are in existence at the time the debt is contracted. Of these the creditor must take notice, and if all the remedies are preserved to him which were in existence when his debt was contracted he has no cause of complaint.†

By section nine of the defendant's charter it is enacted as follows: "Nor shall any real or personal property of any inhabitant of said city, or any individual or corporation, be levied upon or sold by virtue of any execution issued to satisfy or collect any debt, obligation, or contract of said city."

If the power of taxation is conceded not to be applicable, and the power of the court is invoked to collect the money as upon an execution to satisfy a contract or obligation of the city, this section is directly applicable and forbids the proceeding. The process or order asked for is in the nature of an execution; the property proposed to be sold is that of an inhabitant of the city; the purpose to which it is to be applied is the satisfaction of a debt of the city. The proposed remedy is in direct violation of a statute in existence

* Van Hoffman *v.* City of Quincy, 4 Wallace, 535.

† Cooley, Constitutional Limitations, 285, 287.

when the debt was incurred, and made known to the creditor with the same solemnity as the statute which gave power to contract the debt. All laws in existence when the contract is made are necessarily referred to in it and form a part of the measure of the obligation of the one party, and of the right acquired by the other.*

But independently of this statute, upon the general principles of law and of equity jurisprudence, we are of opinion that we cannot grant the relief asked for. The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and limited as is that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations. Judge Story says,† "There are cases of fraud, of accident, and of trust which neither courts of law nor of equity presume to relieve or to mitigate," of which he cites many instances. Lord Talbot says,‡ "There are cases, indeed, in which a court of equity gives remedy where the law gives none, but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows."

Generally its jurisdiction depends upon legal obligations, and its decrees can only enforce remedies to the extent and in the mode by law established. With the subjects of

* Cooley, Constitutional Limitations, 285.

† 1 Equity Jurisprudence, § 61.

‡ Heard v. Stanford, Cases Tempore Talbot, 174.

fraud, trust, or accident, when properly before it, it can deal more completely than can a court of law. These subjects, however, may arise in courts of law, and there be well disposed of.*

A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels. Thus, assume that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens. This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defence to the debt itself, or if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are in some cases beyond legislative interference. The proceeding supposed would violate that fundamental principle contained in chapter twenty-ninth of Magna Charta, and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law—that is, he must be served with notice of the proceeding, and have a day in court to make his defence.†

"Due process of law (it is said) undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."‡ In the New England States it is held that a judgment obtained against a town may be levied upon and made out of the property of any inhabitant of the town. The suit in those States is brought in form against the inhabitants of the town, naming it; the individual inhabi-

* 1 Story's Equity Jurisprudence, § 60.

† Westervelt v. Gregg, 12 New York, 209. ‡ Ib.

tants, it is said, may and do appear and defend the suit, and hence it is held that the individual inhabitants have their day in court, are each bound by the judgment, and that it may be collected from the property of any one of them.* This is local law peculiar to New England. It is not the law of this country generally, or of England.† It has never been held to be the law in New York, in New Jersey, in Pennsylvania, nor, as stated by Mr. Cooley, in any of the Western States.‡ So far as it rests upon the rule that these municipalities have no common fund, and that no other mode exists by which demands against them can be enforced, he says that it cannot be considered as applicable to those States where provision is made for compulsory taxation to satisfy judgments against a town or city.§

The general principle of law to which we have adverted is not disturbed by these references. It is applicable to the case before us. Whether, in fact, the individual has a defence to the debt, or by way of exemption, or is without defence, is not important. To assume that he has none, and, therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest.

Again, in the case of *Emeric* v. *Gilman*, before cited, it is said: "The inhabitants of a county are constantly changing; those who contributed to the debt may be non-residents upon the recovery of the judgment or the levy of the execution. Those who opposed the creation of the liability may be subjected to its payment, while those, by whose fault the burden has been imposed, may be entirely relieved of responsibility. . . . To enforce this right against the inhabitants of a county would lead to such a multiplicity of suits as to render the right valueless." We do not perceive, if the doctrine contended for is correct, why the money might not be entirely made from property owned by the creditor him-

* See the cases collected in Cooley's Constitutional Limitations, 240–245.

† Russel *v.* Men of Devon, 2 Term, 667.

‡ See Emeric *v.* Gilman, 10 California, 408, where all the cases are collected.

§ Cooley's Constitutional Limitations, 246.

self, if he should happen to own property within the limits of the corporation, of sufficient value for that purpose.

The difficulty and the embarrassment arising from an apportionment or contribution among those bound to make the payment we do not regard as a serious objection. Contribution and apportionment are recognized heads of equity jurisdiction, and if it be assumed that process could issue directly against the citizens to collect the debt of the city, a court of equity could make the apportionment more conveniently than could a court of law.*

We apprehend, also, that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit a question, that there is no chancery jurisdiction where there is an adequate remedy at law. The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that, by means of the aid afforded by the legislature and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. To illustrate: the writ of *habere facias possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in Central New York combinations of settlers and tenants disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could gain possession of his land. There was a perfect remedy at law, but through fraud, violence, or crime its execution was pre-

* 1 Story's Equity Jurisprudence, § 470 and onwards.

vented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedies was temporarily suspended by means of illegal violence, but the remedies remained as before. It was the case of a miniature revolution. The courts of law lost no power, the court of chancery gained none. The present case stands upon the same principle. The legal remedy is adequate and complete, and time and the law must perfect its execution.

Entertaining the opinion that the plaintiff has been unreasonably obstructed in the pursuit of his legal remedies, we should be quite willing to give him the aid requested if the law permitted it. We cannot, however, find authority for so doing, and we acquiesce in the conclusion of the court below that the bill must be dismissed.

JUDGMENT AFFIRMED.

Mr. Justice CLIFFORD, with whom concurred Mr. Justice SWAYNE, dissenting:

I dissent from the opinion of the court in this case upon the ground that equity will never suffer a trust to be defeated by the refusal of the trustee to administer the fund, or on account of the misconduct of the trustee, and also because the effect of the decree in the court below, if affirmed by this court, will be to give judicial sanction to a fraudulent repudiation of an honest debt. For which reasons, as it seems to me, the decree of the subordinate court should be reversed.

THE PENNSYLVANIA.

1. A collision occurred in a very dense fog between a sailing bark and a large steamer, about two hundred miles from Sandy Hook, and therefore in the track of inward and outward bound vessels. The bark was under way moving slowly, and at about the rate of a mile an hour, and was *ringing a bell* as a fog signal. The steamer was going at the rate of seven knots an hour.

Held, That the damages were to be equally divided between the two vessels, as, being both in fault, the steamer in moving in such a place at so rapid a rate in so dense a fog, the bark for her violation of the act of Congress for preventing collisions at sea (identical in this respect with the British Merchants' Shipping Act), which requires, in its "Rules concerning Fog Signals," that "sailing vessels under way shall use a *foghorn*," and "when not under way shall use a *bell*."

2. Although, if it clearly appears that a fault committed by a vessel has had nothing to do with a disaster which has occurred, the liability for damages is against the vessel alone which has produced the disaster, still where a vessel has committed a positive breach of statute she must show not only that probably her fault did not contribute to the disaster, but that certainly it did not; that it could not have done so. In this case, therefore, Congress having made the use of a foghorn obligatory on sailing vessels under way in a fog, it was declared to be out of place to go into an inquiry whether, in fact, a bell gave notice to the steamer that the bark was where she was as soon as a foghorn would have done.

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

An act of Congress for preventing collisions at sea*—the act being essentially the same as one† enacted by the British Parliament—lays down these

Rules governing Fog Signals.

Whenever there is a fog, whether by day or night, the fog signals described below shall be carried and used:

Steamships under way shall use a steam whistle.

Sailing ships under way shall use a foghorn.

Steamships and sailing ships when not under way shall use a bell.

This statute being in force, the Mary Troop, a British bark, was bound from Androssan, in Scotland, to New York, with a cargo of iron, and at ten o'clock on a morning of June, 1869, found herself still on the high seas, about two hundred miles from Sandy Hook. A dense fog was prevailing at the time, so thick that a large vessel could hardly be seen at the distance of fifty feet. The wind was variable, and rather strong from south to southwest. The bark was under

* Act of April 29, 1864, 13 Stat. at Large, 61; Article 10.

† The Merchants' Shipping Act of 1862.

way, heading from southeast to south-southeast, and moving at least a mile an hour; her helm lashed three-quarters to port, but on her starboard tack, carrying two close-reefed topsails, foresail, foretopmast and mizzenstay sails; no sail aback. She had a bell, hung to the forestay by a reef-earing to the forestay, and this bell was rung by a lanyard tied to the tongue of the bell, from fifteen to twenty times a minute. She also had a good foghorn. This horn had been used the day before, but was not used on the morning of which we are speaking.

The whistle of a steamer was heard through the fog off the port side. The second mate, who had just at that moment reached the deck, called to the captain and mate, "Do you hear that foghorn?" The mate replied, "It is a whistle," and he and the captain at once ran aft. As they got on the quarter deck, the bows of a large steamer appeared through the fog heading rapidly for the bark, and but a short distance off. The steamer appeared to be then swinging on a starboard helm, but almost instantly changed her course on a port helm and struck the bark stem on, on the port side of the bark by the forerigging. The blow cut the bark in two and she sank instantly. The captain, the second mate, and four of the crew were drowned. The only persons saved were the mate, the cook, and two men who were in the watch below.

The steamer proved to be the British steam propeller Pennsylvania, a vessel of 300 horse-power, 2388 tons, and 341 feet long. Her speed at the time when she thus appeared to the bark and coming down upon her, was seven knots an hour.

There was nothing in the evidence beyond the evidence of her speed—if that was proof of want of precaution—to show any want of efficiency, vigilance, or precaution in the navigation and management of the steamer up to the first intimation of the bark's proximity. She had two lookouts at their stations, "keeping their eyes and ears open for anything that might come in the way." They heard the bell of the bark, and reported, "Ship ahead, a little on the star-

board bow." Order was given to the engineer, "Full speed astern," and the order was executed as soon as practicable. The helm was ported; then a call to "starboard" was heard from some quarter, and she starboarded; then again ported, but in less than half a minute after the report of "ship ahead" was made, and before the steamer had run her own length, she went head on into the bark with the deplorable result already stated.

When the steamer had got in the port of New York, the owners of the bark libelled her in the District Court there.

There was comparatively little dispute about facts. It was admitted that the steamer's rate was seven knots an hour. Her master was examined, and said:

"The steamer was going seven knots. Her highest rate of speed under the most favorable circumstances, is thirteen and a half knots. The wind, the day of the collision, was south-southwest, strong. The wind had been this way all the morning, and I think all the night. There was a good heavy swell—more than there should have been for the wind there was.

"*Question.* With the wind and sea as it was, could you have run your vessel safely at a less rate of speed?

"*Answer.* I *don't consider* we could have steered the vessel, going slower; that is, could not have steered her straight."

Two other masters were examined, and confirmed this view; but they had never, either of them, sailed the Pennsylvania, and each of them had sailed other vessels at a less rate.

On the other hand, one Lovett, a shipmaster for sixteen years, who had happened in 1865—she being then heavily laden—to be a passenger on the Pennsylvania, testified that on one whole day then, her speed, he thought, did not average over four knots an hour, and that he noticed no difficulty in her steerageway.

So, too, while the *technical* violation of law in ringing a bell instead of blowing a foghorn was not denied, evidence was introduced by the owners of the bark to show that a good bell could be heard further than a foghorn; evidence, however, which was contradicted by witnesses in behalf of

the steamer, who swore that if the foghorn was a good one it could be heard further off than could a bell.

The District Court condemned the steamer for the whole loss. On appeal by her to the Circuit Court, that court affirmed the decree, yielding assent, however, with great hesitation, to the view of the District Court, that notwithstanding the conceded violation on the part of the bark, of a plain rule of navigation, the consequences of the disaster were to be visited *entirely* upon the steamer. From the decree of the Circuit Court thus affirming the decree of the District Court, the present appeal was taken.

Before the case came here, and on the steamer's return to England, the owners of the cargo of the bark libelled her in the British admiralty. The case was heard there on evidence much less full than that upon which it was heard in New York, especially less full on the part of the steamer. The admiralty, admitting the violation of law by the bark in not sounding a foghorn, condemned, nevertheless, the steamer for the whole loss; considering that it was attributable to the improper rate of speed of the steamer in a fog so thick as here existed, and this decree was affirmed by the judicial committee of the Privy Council.*

Messrs. William Allen Butler and John Chetwood, for the appellants:

1. The presence of the bark was discovered by the steamer's lookouts at the earliest possible moment, and the steamer was, therefore, without fault in respect to that point. And the steamer was equally without fault in respect to every act done after the presence of the bark in her neighborhood was first indicated.

2. The bark was clearly in fault in not complying with the rule which required the use of a foghorn while she was under way. The rule is imperative:

"Sailing ships, when under way, *shall* use a foghorn."

3. The steamer was not to blame on account of her rate

* The Pennsylvania, 23 Law Times, 55.

of speed at the time of the collision. Lovett's evidence as to the speed five years before the collision, when she was very heavily loaded, is irrelative to the present case.

The law prescribes no rate of speed, and in the absence of controlling evidence that seven knots is an unsafe rate of speed for a steamer under the circumstances shown in this case, the court cannot say that it is evidence of negligence when all the testimony shows that in every other respect the utmost care and vigilance were exercised to navigate the steamer safely. The weight of evidence shows that it was the lowest rate of speed at which *this* steamer could go in the then state of the wind, consistently with safety. A steamer has a right to go as fast as she can, provided that it is not so fast as to prevent her from avoiding vessels under way or at anchor which are complying with the law. Had the bark been properly blowing a horn, or even regularly and loudly ringing a bell, it could have been heard, with the wind blowing as it was from the boat toward the steamer, at such a distance that the steamer might, and the court is bound to assume in this case would, have avoided the bark. Any other rule would impose upon ocean steamers the alternative of reducing their rate of speed, so as to render them much less serviceable by prolonging their voyage, or of taking the risk of being punished for every collision with a sailing vessel, however carelessly or illegally navigated. It would virtually announce to sailing vessels that in every case of collision with a steamer, the court would punish the steamer, even though innocent, and indemnify the sailing vessel, even though guilty.

4. The court below erred in attempting to speculate upon the question whether the established negligence and violation of law, on the part of the bark, was or was not the cause of the disaster. The fact of such violation without excuse being proved, and the extent to which it operated as a proximate cause of the collision not being ascertained, it was error to impose the burden of the disaster upon a vessel which was complying with the law in all respects.

The decree below should be wholly reversed.

Argument for the bark.

Mr. R. D. Benedict, contra:

The decree below is right.

The Pennsylvania was in fault in the contradictory orders which were given as to her helm. It was first ported, then starboarded, and then again ported. This shows that there was confusion on the part of the steamer. Such confusion is a fault. There was abundance of time for the steamer to have avoided the bark after her presence was known, by either starboarding or porting, if the steamer had been properly managed.

The fact that the bark was ringing a bell instead of blowing a foghorn, if a fault at all under the circumstances, was only a technical, not a substantial fault, and did not in any way contribute to the collision.

The bark was lying-to under close-reefed sails, with her helm lashed three-quarters to port. She was making leeway, heading from southeast to south-southeast, but going east by south, and making a speed of one mile per hour on that course, practically drifting helpless; as the opinion of the British Privy Council says, "forging ahead very softly."* Although the foghorn was the signal which the law requires for a vessel under way, yet the bell gave the louder signal, and could be heard farther. The fact that this master and mate, having a good foghorn on board, hung this bell on the stay to use as a fog signal, is conclusive. Their property and their lives were at stake, and it would require very strong evidence to induce any court to believe that they deliberately chose that one of the two signals, which carried with it the *smaller measure of protection.*

If it is to be held that this bark was "under way," still she was barely under way. And the case then is one in which the vessel being barely under way, used the signal for a vessel not under way, which was in fact a louder signal than the law required, and gave the notice required by the rule, viz., that the vessel was helpless, as was the fact. If that was a fault it was as already said not a substantial fault.

* The Pennsylvania, 23 Law Times, 57.

To visit it upon these owners with the loss of their vessel, would be a hard measure. If it was clearly made to appear that the steamer had been misled by it, the case would be a very different one. But the steamer was not misled in the slightest. It is not even suggested by opposing counsel that she was. And it is clear that she could not have been, because she don't pretend to have heard the bell at all; but acted confessedly on the call, "Ship ahead." If a horn had been blown, therefore, instead of a bell being rung, the movements of the steamer would have been the same. The collision then was absolutely unaffected by the substitution of the bell for the horn.

It is urged that the courts below should not have considered the question whether or not the ringing of the bell contributed to the collision. Doubtless it would simplify the trial of collision cases, if the courts were only called upon to inquire whether each vessel had complied with all the requirements of the law, and not to inquire whether any failure to comply with them had anything to do with the collision. But that would be an unheard of mode of disposing of these cases. The question always is: "Did the vessel commit a fault *which contributed to the collision?*" As Judge Phillimore puts it in this very case, "not which vessel was to blame, but which was to blame *for this collision*," is to be considered. And a fault which did not contribute to it, has never been held a reason for refusing to a libellant his full damages.

In *The Farragut*,* the absence of a special lookout was charged as a fault, and this court said:

"It is perfectly evident that the absence of a special lookout had nothing to do with the happening of the accident, and therefore it can have nothing to do with fixing the liability of the parties."

In addition to concurring decrees in the District and Circuit Court, which when they exist this court will not lightly disturb, we have on our side the high authority of the judi-

* 10 Wallace, 334, 339.

cial committee of the British Privy Council, affirming the decree of the British admiralty. This court will not readily disturb the concurring decrees of so many tribunals.

Mr. Justice STRONG delivered the opinion of the court.

It may be that when the bark was discovered by those on board the steamer it was too late to avoid a collision. The two vessels were then not more than three or four hundred feet apart, and the steamer had the bark almost across her bow. Yet it is possible that if her helm had been put to starboard instead of to port when the lookout announced, "Bell on the starboard bow," and had been kept starboarded, the collision might either have been avoided or have been much less disastrous. By porting her helm she was turned toward the point where the bell indicated the bark was, and this apparently increased the danger of a collision.

But if this is not to be attributed to her as a fault, there is no excuse to be found in the evidence for the high rate of speed at which she was sailing during so dense a fog as prevailed when the vessels came together. The concurrent testimony of witnesses is that objects could not be seen at any considerable distance, probably not farther than the length of the steamer, and yet she was sailing at the rate of at least seven knots an hour, thus precipitating herself into a position where avoidance of a collision with the bark was difficult, if not impossible, and would have been, even if the bark had been stationary. And she ought to have apprehended danger of meeting or overtaking vessels in her path. She was only two hundred miles from Sandy Hook, in the track of outward and inward bound vessels, and where their presence might reasonably have been expected. It was, therefore, her duty to exercise the utmost caution. Our rules of navigation, as well as the British rules, require every steamship, when in a fog, "to go at a moderate speed." What is such speed may not be precisely definable. It must depend upon the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others. But the purpose of the re-

quirement being to guard against danger of collisions, very plainly the speed should be reduced as the risk of meeting vessels is increased. In the case of *The Europa*,* it was said by the Privy Council: "This may be safely laid down as a rule on all occasions, fog or clear, light or dark, that no steamer has a right to navigate at such a rate that it is impossible for her to prevent damage, taking all precaution at the moment she sees danger to be possible, and if she cannot do that without going less than five knots an hour, then she is bound to go at less than five knots an hour." And we do not think the evidence shows any necessity for such a rate of speed as the steamer maintained. It is true her master, while admitting she was going seven knots, states that he don't consider she could have been steered going slower—could not have been steered straight. And two other witnesses testify that, in their opinion, she could not have been navigated with safety and kept under command at a less rate of speed than seven miles an hour. These, however, are but expressions of opinions based upon no facts. They are of little worth. And even if it were true that such a rate was necessary for safe steerage, it would not justify driving the steamer through so dense a fog along a route so much frequented, and when the probability of encountering other vessels was so great. It would rather have been her duty to lay to. But there is the evidence of one who had been a shipmaster, and who once crossed the Atlantic as a passenger in this steamer. He states that on the passage she did not, to the best of his knowledge, average over four knots during twenty-four hours, and that he noticed no difficulty in her steerageway at that low rate of speed. As he was in the habit of going to sea he would probably have noticed difficulty if there had been any. This is a fact of more weight than any mere opinions unsupported by observation or trial. We think, therefore, it must be concluded that the steamer was going at an undue rate of speed, and that it was her fault that she came into a position from

* Jenkins's Rule of the Road at Sea, 52.

which she could not, or certainly did not, escape without colliding with the bark.

It is next to be considered whether any fault of the bark contributed to the collision. That she was in fault is beyond controversy. She was in plain violation of the rules of navigation, which required her to blow a foghorn. Both our own and the British shipping acts enact that sailing ships, when under way, shall use a foghorn, and, when not under way, shall use a bell. The British merchants' shipping acts expressly declare that owners and masters of ships shall use no other fog signals than such as are required by the regulations, and that if in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by the act, or in pursuance thereof, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary. Our own statute does not contain this provision expressed, but its meaning is the same. The bark in this case was a British ship, as was the steamer. She was under way, moving slowly, indeed little, if any, more than a mile an hour, with her helm lashed three-quarters to port, but on her starboard tack, carrying two close-reefed topsails, foresail, foretopmast and mizzen staysails, and with no sails aback, so far as it appears. She was constantly changing her position. It was her duty, therefore, to blow a foghorn, and not to ring a bell. By ringing a bell, as she did, she gave a false signal, and, so far as she could, assured all approaching vessels that she was not under way. There is some evidence that a bell can be heard as far as can a foghorn, and some that it can be heard farther. On the other hand there is evidence that a foghorn can be heard farthest. However this may be the bark had no right to substitute any equivalent for the signal required by the navigation rules. In the case of *The Emperor*,* it was said, "It is not

* Holt's Rule of the Road, 38.

advisable to allow these important regulations to be satisfied by equivalents, or by anything less than a close and literal adherence to what they prescribe." In addition to this it may be remarked that a bell can never be an equivalent for a foghorn. It gives different information. Both may notify an approaching vessel that the signalling ship is in the neighborhood, but the one gives notice that the ship is moving, and the other that the ship is stationary.

Concluding then, as we must, that the bark was in fault, it still remains to inquire whether the fault contributed to the collision, whether in any degree it was the cause of the vessels coming into a dangerous position. It must be conceded that if it clearly appears the fault could have had nothing to do with the disaster, it may be dismissed from consideration. The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute. In the case of *The Fenham*,* the Lords of the Privy Council said, "It is of the greatest possible importance, having regard to the admiralty regulations, and to the necessity of enforcing obedience to them, to lay down this rule: that if it is proved that any vessel has not shown lights, the burden lies on her to show that her non-compliance with the regulations was not the cause of the collision." In some cases it is possible to show this with entire certainty. In others it cannot be. The evidence in the present case leaves it uncertain whether if a foghorn had been blown on the bark, it would not have been heard sooner than the bell was heard, and thus earlier warning

* 23 Law Times, 329.

have been given to the steamer—seasonable warning to have enabled her to keep out of the way. It was not without reason that the statute required a foghorn for ships under way, and a bell for those not under way. The legislature must have known it was important ships should have the earliest possible notice of the proximity of other moving vessels. They might be approaching each other. If so, they would come together sooner than they could if one of them was not under way. It may be assumed, therefore, that the legislature acted under the conviction that a foghorn could be heard at a greater distance than a bell, and required the use of one rather than that of the other for that reason. To go into the inquiry whether the legislature was not in error—whether in fact a bell did not give notice to the steamer that the bark was where she was as soon as a foghorn would have done—is out of place. It would be substituting our judgment for the judgment of the law-making power. It would be admitting the validity of an equivalent for that which the statute has made a positive requirement. Then how can it be shown on the part of the bark that the failure to use a foghorn certainly contributed in no degree to the collision? How can it be proved that if a foghorn had been blown those on board the steamer would not have heard it in season to have enabled them to check their speed or change their course, and thus avoid any collision? Though there were two lookouts on the steamer, each in his proper place, the bark's bell was not heard until the vessels were close upon each other. Who can say the proximity of the vessels would not have been discovered sooner if the bark had obeyed the navy regulations? If it be said this is speculation, it may be admitted, but it is speculation rendered necessary by a certain fault of the bark. It is equally speculative to conclude that the collision would have taken place if a foghorn had been used instead of a bell, and infer therefrom that the fault of the bark had no relation to the disaster. The truth is the case is one in which, while the presumption is that the failure to blow a foghorn was a contributory cause of the collision,

and while the burden of showing that it was in no degree occasioned by that failure rests upon the bark, it is impossible to rebut the presumption. It is a well-known fact that in some states of the atmosphere a foghorn can be heard at much greater distances than in others. How far it could have been heard when this collision occurred can never be known. Nor can it be known what precautions the steamer would have adopted if the true and proper signal had been given her. Hence, it appears to us the bark has not proved that her failure to obey the shipping regulations was not a concurrent cause of the injury she received; and, consequently, as both vessels were in fault, the damages, according to the admiralty rule, should be divided.

We have not overlooked the fact that in a libel by the owners of the cargo of the bark against the steamer for damages resulting from the same collision, it was held by the judicial committee of the Privy Council in England, that the disaster was chargeable to the steamer alone. But with great respect for the tribunal that thus decided, we do not feel at liberty to surrender our judgment, especially in view of the fact that the case is now more fully presented and the evidence is more complete than it was in the British court.

DECREE REVERSED, and the cause remanded with instructions to enter a decree

IN ACCORDANCE WITH THIS OPINION.

CARPENTER v. RANNELS.

A. having, prior to July, 1801, an inchoate title to lands in the then French territory of what is now Missouri, agreed in July of that year to sell it, on certain conditions of improvement, required by the government, to B. On B.'s making the required improvements, the land was to "belong to him in full proprietorship," and A. bound himself, his heirs, and assigns, "to solicit title from the government, and to make a regular transfer to the said B. without any further cost on his part, except the expenses of the necessary deed." The said French territory, having

General statement of the case.

passed to the United States in 1803, and commissioners having been appointed in 1805 by act of Congress "to ascertain and adjust titles and claims" to lands within the newly acquired territory, B. appeared before the board in April, 1811, with his conditional transfer from A., and the board, as a record in their minute-book showed, "grant to A. *or his legal representatives*" the land thus claimed, and order the same to be surveyed "so as to include *his* improvements." In the June following the commissioners issued their *certificate*, in which they say, "We . . . have decided that the legal representatives of A., original claimant, are entitled to a patent," &c., for the land, "and order the same to be surveyed so as to include *his* improvements," &c. The land thus granted having been injured by earthquakes, and Congress, in February, 1815, having authorized persons whose land had been thus injured to make new locations of the same quantity of land on any of the public lands then open for sale in the same Territory, it appeared by different records that A., asserting that his land had been thus injured, claimed new land, and also that A. "*or his legal representatives*" claimed it. A patent was finally issued, reciting that in pursuance of the act of Congress of February, 1815, there had been located for A. "*or his legal representatives*" a tract described: the *habendum* of the patent being to the said A. "*or his legal representatives and to his or their heirs and assigns forever.*"

Held, that the title enured to *B.* and his legal representatives, and that no other representative of A., whether hereditary or by contract, had any right, legal or equitable, to the premises.

ERROR to the Supreme Court of the State of Missouri.

Carpenter brought ejectment against Rannels in one of the Circuit Courts of Missouri to recover possession of two hundred arpents or acres of land in the county of St. Louis, located under a New Madrid certificate of relocation, No. 511, which was issued under an act of Congress of February 17th, 1815,* and acts supplementary thereto, in lieu of lands in New Madrid County, which had been injured by earthquakes, and upon which certificate a patent issued, dated March 30th, 1833, to "John Butler *or his legal representatives.*"

The plaintiff claimed, under the confirmation and patent, directly through the heirs of this John Butler.

The defendant claimed also through the confirmation and patent to Butler, but asserted that the same had in law

* 3 Stat. at Large, 211.

Statement of the case in the opinion.

passed the equitable title to one James Bankston, hereinafter mentioned, and whom he asserted to be the "legal representative" of the said Butler, and he gave evidence tending to show derivative title under Bankston.

The cause was submitted to the court without the intervention of a jury. The court found and gave judgment for the defendant, and that judgment being affirmed in the Supreme Court of the State,* the plaintiff brought the case here for review.

Mr. B. A. Hill, for the plaintiff in error; Messrs. Glover and Shepley, contra.

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

John Butler had an inchoate title derived from the Spanish government, acting through its authorized agents. Upon this subject there is no controversy between the parties. It is the common source of the derivative titles upon which they severally rely.

On the 23d of July, 1801, Butler entered into an agreement with James Bankston to the following effect:

Butler leased the land to Bankston for three years from the date of the contract. Bankston agreed, "during the three years, to erect on said tract all the improvements and establishments—to break up the ground, and to make the Royal road and other improvements required by law; to be enabled at the end of three years from the petition for said land to obtain the title of proprietorship from the government of the province." Butler acknowledged the payment of forty piasters by Bankston. On condition that Bankston, at the end of the three years, should have made the improvements stipulated for, the land was to "belong to him in full proprietorship," and Butler bound himself, his heirs and assigns, "to solicit the title from the government, and to make a regular transfer of said land to the said James

* 45 Missouri, 584.

Statement of the case in the opinion.

Bankston, without any further cost on his part, except the expenses of the necessary deed," and "Bankston . . . promised to fulfil and execute all the said clauses and conditions, under penalty of the forfeiture of the advantages which might result in his favor."

This instrument shows that so far as Butler was concerned the entire consideration of the transaction had been paid. What remained for Bankston to do was wholly for his own benefit, and not for Butler's. If he fulfilled, a perfect title was to be acquired from the government; not for Butler, but for himself. It was implied that the title was to emanate in Butler's name. He stipulated to apply for it and to convey it to Bankston without expense to the latter except for the necessary conveyances.

The State of Missouri is a part of a larger territory which belonged to France, then to Spain, and again to France. France ceded it to the United States in 1803. The United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The law of nations would have given this guaranty if the treaty had been silent upon the subject, and the result would have been the same if the territory had been acquired by conquest and not by cession. The new government took the place of that which passed away, and was clothed with the same duties and obligations as to all rights of property subsisting when the dominion of the latter was withdrawn.*

Congress, by the act of March 2d, 1805,† provided for the examination and adjustment of claims of title like the one here in question, and created a board of commissioners for that purpose. Other acts were passed relating to the subject, but it is not necessary particularly to advert to them. This title came before the commissioners in the year 1811, and the result of their action is the hinge of the controversy between these parties. The question to be determined is

* Soulard *v.* United States, 4 Peters, 512; Strother *v.* Lucas, 12 Id. 436.
† 2 Stat. at Large, 324.

whether it was confirmed to Butler or to Bankston. This renders it necessary to examine that part of the record which relates to the subject. It consists of a transcript of the proceedings of the commissioners and of the evidence before them. We shall itemize as we proceed.

(1.) "John Butler claims two hundred arpents of land in the district of New Madrid, under the second section of the act of Congress made and provided."

(2.) An order, dated April 16th, 1801, from Peyroux to Story, to survey two hundred arpents of land for Butler. This was before the date of the contract between Butler and Bankston.

(3.) A plat of the survey made by Story and a certificate by him that he made it at the request of Butler, who claimed the land by virtue of a grant from Peyroux while commandant of the district of New Madrid, and in virtue of the second section of the act of March 2d, 1805. This certificate is dated February 2d, 1806.

(4.) The contract between Butler and Bankston already adverted to.

(5.) "*Friday, April 12th*, 1811.—Board met: Present, John B. C. Lucas, Clement B. Penrose, and Frederick Bates, commissioners.

"James Bankston, assignee of John Butler, claiming two hundred arpents of land, situate in Cypress Swamp, district of New Madrid, produced to the board an order of survey dated 16th April, 1801, a certified copy of a conditional transfer from Butler to claimant, dated 23d July, 1801, and a plat of survey dated 2d February, 1806.

"The board grant to John Butler, *or his legal representatives*, two hundred arpents of land, and order that the same be surveyed as nearly in a square as may be, and so as to include his improvements.

"Board adjourned till Monday next, nine o'clock A.M." Signed by the commissioners. "See Board Minute-Book, No. 5, pages 145, 148, and 149."

(6.) "*Thursday, June 20th*, 1811.—Board met: Present, Clement B. Penrose, Frederick Bates, commissioners. John

B. C. Lucas, commissioner, appeared at the board and took his seat.

"Cert. No. 1103, *John Butler's legal representatives*, Book 5, page 148.

"Survey at expense of the United States. Board adjourned till to-morrow, eight o'clock A.M." Signed by the commissioners. "See Board Minute-Book, No. 5, page 187, 188, and 193."

(7.) "*Louisiana Commissioners' Certificate No.* 1103, *June 20th*, 1811.

"We, the undersigned, commissioners for ascertaining and adjusting the titles and claims to lands in the Territory of Louisiana, have decided *that the legal representatives of John Butler*, original claimant, are entitled to a patent under the provisions of the second section of an act of Congress of the United States, entitled 'An act for ascertaining and adjusting the titles and claims to land within the Territory of Orleans, and the District of Louisiana, passed the 2d day of March, one thousand eight hundred and five,' for two hundred arpents of land, situate in the district of New Madrid, Cypress Swamp, and order that the same be surveyed as nearly in a square as may be, and so as to include *his* improvements, by virtue of a permission from the proper Spanish officer, and also of actual inhabitation and cultivation prior to, and on, the 20th day of December, one thousand eight hundred and three." Signed by the commissioners. "See certificate on file."

So far as the name of Butler appears in these documents, as the claimant, it is to be borne in mind that he was bound by his contract with Bankston to procure the emanation of the final title for the benefit of the latter. It is shown that Bankston produced to the commissioners a copy of his contract with Butler; that the board granted to Butler, *or his legal representatives*, the land claimed; that it was ordered to be surveyed in the name of "John Butler's legal representatives;" that there were improvements made by permission of the proper Spanish officer, and "actual inhabitation and

cultivation on and prior to the 20th of December, 1803;" and finally, that the board "decided that the *legal representatives* of John Butler, original claimant, are entitled to a patent under the second section of the act of March 2d, 1805." There is no evidence that Butler or any one else questioned the claim of Bankston before the commissioners.

The act of Congress of February 17th, 1815,* declared that any person owning lands in the county of New Madrid, in Missouri Territory, which land had been injured by earthquakes, might "locate the like quantity of land on any of the public lands of said Territory the sale of which is authorized by law." In the event of such location being made, the title of the owner to the lands injured was to revert to the United States. In the proceedings under this act the following testimony is found in the record:

(1.) A, a line in a tabulated statement, showing that Butler claimed that the land in question was injured, and had relinquished the title to the United States.

(2.) A, in line in a like statement that Butler was the claimant, and that a certificate of injury had been delivered to James Evans.

(3.) A, a line in a like statement that Butler, or his legal representatives, claimed, and that a patent certificate was prepared accordingly by the recorder of land titles under the act of 1815 and the supplementary acts, and that it was delivered to William Smith, of St. Louis.

The only other testimony in the record necessary to be adverted to is:

(1.) A power of attorney from Butler to James Evans, dated February 9th, 1819, authorizing him, as the attorney of Butler, to sell "a certificate of location for two hundred arpents obtained from the recorder of land titles for the Territory of Missouri, or to locate the same as he should think proper."

(2.) A deed from Evans, as such attorney, dated January 1st, 1819, whereby he assigned the certificate to Henry

* 3 Stat. at Large, 211.

Waddle. It is described as "a New Madrid certificate, issued by Frederick Bates, recorder of land titles for the Territory of Missouri, No. 511, dated December 31st, 1818, whereby it is certified, among other things, that John Butler, or his legal representatives, is entitled to locate two hundred arpents of land."

(3.) A patent from the United States to John Butler, or his legal representatives, dated March 30th, 1863. It recites that, in pursuance of the act of February 17th, 1815, there had been located "for John Butler, or his legal representatives, a certain tract of land, described," &c. A full description is then given. The *habendum* is, "to the said John Butler, or his legal representatives, and to his or their heirs and assigns forever."

This is the land in controversy in this case.

In the opinion of the court in *Hogan* v. *Page*,* it is said that at an early period there was difficulty as to the form of patent certificates and of patents, arising out of applications to have them issued in the name of the assignee or present claimant, thus imposing upon the office the burden of deciding as to the validity of the derivative title. The same difficulty, it is said, existed in respect to the boards of commissioners appointed to adjust French and Spanish claims. The result, after consulting the Attorney-General, was that the Commissioner of the Land Office recommended that in such cases the patent certificate or the patent should be issued to the original *grantee, or his legal representatives*, and that this suggestion was adopted by the several boards of commissioners. It is added: "This formula, '*or his legal representatives*,' embraces the representatives of the original grantee of the land by contract, such as assignees or grantees, as well as by operation of law, and leaves the question open to inquiry in a court of justice as to whom the certificate, patent, or confirmation should enure."

This is decisive of the case before us. There it was argued

* 2 Wallace, 607.

that "the confirmation to the representatives of Auguste Condé" enured to his heirs. In the case before us, Butler was living at the time of the confirmation. He and Bankston were before the commissioners. Bankston produced his contract. It does not appear that Butler made any objection to his claim, and the commissioners adjudged in his favor. The omission of Butler's name in the patent certificate, under the circumstances, closed the door finally against any claim thereafter on his part touching the property by virtue of his original title. The commissioners must have found that Bankston had done all that he was bound to do by his contract. An act done by a public officer which presupposes another act is presumptive proof of the latter.*

The certificate issued by the recorder of land titles under the act of 1815, the location of that certificate and the patent, enured to Bankston and his legal representatives.† No other representative of Butler, whether hereditary or by contract, has any right, legal or equitable, to the premises. The testimony in the record is conclusive upon the subject.

JUDGMENT AFFIRMED.

SAWYER v. PRICKETT AND WIFE.

A farmer and his wife on the line of a proposed country railroad, subscribed to stock in the road and mortgaged their farm, upon representations made to them by agents of the road and others, in a time of excitement got up at public meetings, that the road would prove a most lucrative investment of money, a very profitable thing to the neighborhood, and would enable farmers to sell the products of their farm at a large advance over existing prices. The making of the road was begun, and after a good deal of money had been laid out in grading, &c., the further making of it was absolutely stopped for want of funds, and it remained unmade.

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* Bank of the United States *v.* Dandridge, 12 Wheaton, 70; Lessee of Ward *v.* Barrows, 2 Ohio State, 242.

† Bissell *v.* Penrose, 8 Howard, 338; Hogan *v.* Page, 2 Wallace, 605; Papin *v.* Massey, 27 Missouri, 445; Boone *v.* Moore, 14 Id. 420; Carpenter *v.* Rannells, 45 Id. 591; Page *v.* Hill, 11 Id. 149.

Statement of the case.

The mortgage thus got was assigned to a director of the road who was a large creditor of the road (then much embarrassed for money), when the mortgage was given.

Held, on a bill by him to foreclose, that he was to be taken as an innocent holder for value; and that on the distinction recognized by the law between a representation of existing facts, and a representation of facts yet to come into existence—the distinction between "promissory statements" based upon general knowledge, information, and judgment, and those representations which, from knowledge peculiarly his own, a party may certainly know will prove to be true or false—he was entitled to a decree.

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

Ephraim Sawyer filed a bill in the court below against Henry Prickett and wife, to foreclose a mortgage given by them, on the 1st of September, 1857, to the Fox River Valley Railroad Company, to secure the payment of a note for $2000 at ten years from its date, and by the company assigned to him, the complainant. The answer set up as a defence, that at the date mentioned Prickett gave the note described to secure the payment of a subscription to the stock of the railroad company mentioned, and that this subscription was obtained by fraud and deceit; and so that the note and the mortgage were void.

The fraud and deceit alleged consisted in the following matters which the answer stated, to wit, that two persons, one Conover and a certain W. G. Parsons, of Milwaukee, in Wisconsin, as agents of the company, and John Sibley and W. A. McConnell, residents of Richmond, in Illinois, caused it to be understood that a railroad had been incorporated to extend from Richmond to Milwaukee aforesaid, and "that the said parties above named, for the purpose of inducing the property-owners in Richmond and its vicinity to take an interest in the road, and to subscribe for the stock of the company, resorted to fraudulent and deceitful artifices and representations; that they caused a subscription-book for the taking of subscriptions to the stock to be prepared and opened at Richmond; that they caused McConnell, a man of large means, and one in whom the

citizens of Richmond and its vicinity had confidence as a man of integrity and good judgment, and of prudent and sagacious management of business, to head such subscription list, as a subscriber to the stock, to the amount of $1500; that for the same fraudulent purpose they caused one John Woodell, a citizen of Richmond, and a man at that time of considerable means and of good business reputation, to appear in the subscription list as a subscriber to the stock to the amount of $1000, and, also for the same purpose, caused it to be represented and believed among the residents of Richmond and its vicinity that the said John Sibley (already mentioned), a person at that time of means and large influence in that community, and of integrity, had subscribed largely to the stock; and further, that the railroad, when constructed, would greatly enhance the real estate and other property in Richmond and its vicinity by furnishing a market in Milwaukee for the farm products raised in the vicinity of Richmond, and that the said market, especially for the sale of wheat, would be much more advantageous to the farming community of Richmond than the market which they now had at Chicago.

That the said parties publicly represented, and caused it to be believed by the residents and property-owners of Richmond and its vicinity, that the company would pay large dividends upon its stock; that farmers and parties owning real estate could become the owners of so much of the stock as they should subscribe for, by giving their notes for the amount so subscribed to the company on long time and drawing interest at 8 per cent. per annum, and securing the notes by mortgage upon their farms or other real estate; that the company would promptly pay all the interest upon said notes so given, as the same should mature, out of the dividends that would from time to time be declared upon the stock of the company, and that the balance of the dividends, after the payment of the interest, would be amply sufficient to pay the principal of the notes when the same should become due.

That, in this manner and by these means, the said parties

Statement of the case.

aroused and caused a great interest and unusual excitement among the citizens, residents, and property-holders of Richmond and its vicinity regarding the railroad, and that large numbers of them, relying upon the flattering representations made, as aforesaid, were prevailed upon to subscribe to the stock of the company; that the defendant was among those who, by the means, in the manner, and upon the representations made, as aforesaid, became and was interested in said railroad project; and that after he had thus become informed thereof, and of the general features of the railroad project, as hereinbefore set forth, and had become greatly excited on account thereof, a short time prior to the said 1st of September, A. D. 1857, the said Conover and Sibley represented to him that the company was duly incorporated and fully organized, and that it would construct and equip the road and have the same in full and complete operation within *one year* from the date last aforesaid; that the railroad, when constructed, would greatly enhance the value of the defendant's real estate, by furnishing better market facilities, as hereinbefore stated; that the defendant would not be required to pay any money for the stock so subscribed for by him, but that the company would take in lieu of such money his note, payable in ten years from date, with interest thereon at 8 per cent. per annum, secured by a mortgage of the land owned by him; that the railroad would earn large dividends, and that the company would pay the interest upon the note as it should mature, and that, with the excess of dividends, the company would be amply able to pay the principal of the note when it should become due.

The answer averred also that the defendant reposed confidence in these flattering statements, and relying upon the promise given, subscribed for $2000 of the capital stock of the said company, and gave the note and mortgage in suit to secure the payment of the same.

It further averred that the Fox River Valley Railroad Company was never incorporated; that no part of it had ever been built; that it had been given up and abandoned; that McConnell, Woodell, and Sibley were not subscribers

for stock as was represented, or that their subscriptions were upon a secret agreement that they should stand upon the books for larger sums than were actually subscribed by them; that McConnell, appearing as a subscriber for $1500, should only be bound for $500; and that Woodell appearing as a subscriber for $1000 should only be bound for $500; and that Sibley never subscribed for any amount of stock, and never gave his note and mortgage as was represented.

It further averred that these misrepresentations were made with an intent to defraud; that the complainant was not a *bonâ fide* holder of the note and mortgage, but was himself one of the projectors and managers of the fraudulent contrivance, and well knew all of the facts alleged before he became the owner of the instruments.

Replication being made, testimony was taken. Sawyer, Prickett, McConnell, Sibley, and Woodell were all examined as witnesses.

From the testimony the facts of the case appeared to be thus:

The town of Richmond was a small place, close to the north line of Illinois, and between Milwaukee on the north of it (about fifty miles off), and Chicago, on its south, at a greater distance. It had a railroad connection, through the railroad of the Fox River Railroad Company of *Illinois*, with Chicago, but none with Milwaukee.

In this state of things the Fox River Railroad Company of *Wisconsin* was incorporated in Wisconsin, to connect by a prolongation of the Illinois road Richmond and Milwaukee; Milwaukee being the place where the organization of the latter company was had and the place from which its affairs were managed.

The charter being obtained and the company organized as early at least as 1854, efforts were put in action to build the road. Prior to 1856, the subscriptions to the capital stock coming in slowly, ready funds were short. In 1855 or 1856, Sawyer, then a director with other directors, lent the road money. The work was still going on. And in the autumn of 1857—there being still stock unsubscribed for—a com-

mittee, on which was Conover, then a director and lately before president of the company, and Parsons, at one time its secretary but now its "stock agent," were appointed to go to different villages along the line of the projected road to procure subscriptions for the stock yet untaken. Among other places to which they went was Richmond. Here they got up meetings, got speakers to come and address the citizens, and publicly and privately represented the great benefit that it would be to the farming community to have the road; that the Milwaukee market would give five cents a bushel for wheat more than the Chicago; that stock in the road would *probably* pay thirty per cent. dividend, and be a fine investment for the farmers to make; that if they would take stock they could take it by giving a mortgage running ten years at eight per cent. interest, payable annually; that the company was willing to pay the interest; that the person giving the mortgage would not be called upon for the interest; and that if they would let the dividends of the road remain in the company's hand, in ten years, or before, the dividends would pay for the stock and perhaps more, and then that the farmer would have his stock clear.

The matter was thus summed up by McConnell, one witness in the case:

"They made some very fine speeches, and told what they would do for us if we would sign for stock; and told us a great many things, and those statements induced the people to subscribe."

At one of these town meetings in Richmond, a committee composed of McConnell, Sibley, and some other persons, was appointed to solicit subscriptions.

McConnell, who was regarded as one of the most judicious men of Richmond, headed the list with a subscription for $1500 of the stock; but he did not actually give a mortgage on his property, though he was bound to do so when called on by the company to do it.

McConnell, Sibley, and other citizens of Richmond, then went about at different times for a few days, while Conover and Parsons remained at Richmond to get subscriptions.

Among the farmers in the neighborhood of Richmond was Prickett; he had already met Conover in the town. Prickett's own account of the matter was thus:

"I own the real estate described in the bill of complaint, and have owned it for twenty-one years; it is now occupied by me as the residence of myself and family, and has been so occupied by me as a residence and homestead for twenty years, and during that time I have worked the farm.

"The first that I saw of Conover was in the village of Richmond. He and a number of citizens were together; they thought the property would be enhanced by having a railroad; they came to me and wanted me to subscribe. The first time that they came to me, I told them I would not have anything to do with it. Afterwards I did sign the subscription list, and *they* represented to me that I should never have anything to pay; that *they* would pay the interest, and that the dividends upon the road would pay the principal; that at the time the mortgage ran out, I should be ahead. A short time after that they came to my house, Mr. Parsons with the squire, to acknowledge the mortgage, and my wife held out about signing it half an hour, I should think. They talked to her and told her it would be an everlasting benefit to her to sign it, and that the railroad would probably make thirty per cent., and it would give her and her family $600 a year always. Mr. Sibley and this Conover were the two principal agents in getting subscriptions, and when they came to get the mortgage this Mr. Parsons came with the squire, in order to induce us farmers to subscribe to the subscription list. Conover said the rolling stock would be on *in eighteen months.* They got Mr. McConnell, a leading citizen, to sign. They used every means they could to induce persons to become subscribers to the stock. They represented that the road would be a good thing; that it would bring us a better price for our produce, enhance the value of our property, and that we should never have anything to pay for it—the dividends would pay the interest, and they would pay the principal; they held meetings and got up a great excitement. *The influence was principally exerted by some of our own citizens*—Mr. McConnell, Mr. Sibley, and some others in whom we had the utmost confidence. We thought that if they took stock we could take it too. Mr. Sibley, a citizen in whom we

placed the utmost confidence, said he had mortgaged his house and lot, and that it would be a good thing; induced me in every way to sign, and others; it is not necessary to mention their names. Dr. Stone, Dr. Bennett, and some others. I did not attend any of the meetings held for the purpose of obtaining subscriptions."

The following question was asked of the complainant on his examination as a witness:

"Would you have become a subscriber to the capital stock of this company except from the fact that Mr. McConnell became a subscriber thereto, and the other parties you have named?"

To this he answered:

"If they had not represented as they did, and if McConnell and other leading citizens of the town had not subscribed, I certainly should not; but the representation was an inducement to make farmers subscribe, 'See here, you put in $2000 and you get $600 for life. Is not that enough?'"

Cross-Examination.

"*Question.* You say in your direct examination 'the influence was principally exerted by some of our own citizens, Mr. McConnell, Mr. Sibley, and some others in whom we had the utmost confidence.' Do you mean by that that you were influenced by Mr. McConnell and Mr. Sibley to subscribe for this stock?

"*Answer.* By Mr. Sibley, more particularly. *He pictured it out so nice to me that he had a great influence on me to take stock.*

"*Question.* Did you see Mr. Sibley on the day on which you subscribed for this stock?

"*Answer.* No. It was some time before that; almost every day he was exerting himself in the matter."

Parsons, it appeared, was a witness to the mortgage; the wife executing it by a cross or mark.

McConnell testified that in the autumn of 1857 he subscribed for $1500 worth of stock, agreeing to give a mortgage at ten years, on the plan already mentioned; but that in the spring of 1858 the intended subscription by mortgage was converted into a cash subscription of $1200, "a square

trade," he receiving only twelve shares of stock; that he was never an agent for the company, nor received a cent from it.

Sibley testified that at the solicitation of the town meeting —of the citizens, and not at all of the company—he had gone out, as a private citizen, for about a day and a half, having then leisure, and solicited subscriptions; that at other times when going backwards and forwards, to and from the village, which was seldom, if he met a man who he thought was interested, he would ask him to take stock; that he dropped the whole matter within three weeks; that he had never asked Prickett to subscribe or even knew that he had subscribed; that he had never himself subscribed for any stock in the Fox River Railroad Company, incorporated by *Wisconsin;* and had never represented to Prickett or to any one that he had; that he told to different people (as the fact was) that he had taken $500 worth of stock in the Fox River Railroad Company incorporated by *Illinois;* and that "it was fair for them to subscribe for stock in the Wisconsin road, as this was a continuation of the Illinois road."

Sawyer testified that he was director of the road in 1855 and 1856, but not after the last year; that after that time he "had been kind of out one side, and proposed to keep away;" that in the summer of 1854 he had solicited subscriptions, and had for one day been with the agents of the company, and saw how they got them; that "there was an understanding that the company would pay the interest so long as *it* kept the mortgages, but if transferred it would be no defence after they passed into a third person's hands;" that he was a subscriber to the stock, $500 cash, $5000 mortgage, which last he cashed at eighty per cent. In addition to this, that in 1855 or 1856—while he, Sawyer, was a director—the company getting into straits for money, he, "with some of the other directors," had lent to it their individual notes, which they had themselves to take up; that they had taken them up, he, Sawyer, to the amount of $10,000; that he and the other lenders then sent their

attorney up to see what securities he could get, to do the best he could, and that he got for all parties in common, certain mortgages, which, like that of Prickett's, had been given for stock; and that that of Prickett's had fallen to his, Sawyer's, lot in the division, the claims on the company being released.

Woodell, who it was alleged in the bill had subscribed for $1000 worth of stock, with an understanding that he should really be bound to take but $500 worth, was not examined. He had left Richmond, and was said to live in Iowa. One witness said that Woodell had *told* him this, but there the matter rested.

The railroad company had undoubtedly been incorporated both in Illinois and Wisconsin. About $150,000, raised partly from cash subscriptions, but much more largely by farm mortgages, passed off to contractors at par, or sold to others at eighty per cent. and like great rates of discount, had been expended on the road. It had been graded, but by 1859 the company formed to make it found itself so entirely without money that it could do nothing more then, and in that year the further construction was stopped, though the project was not entirely abandoned as desperate.

At the time when Prickett gave the mortgage, Parsons, the stock agent, gave to him two papers, thus:

"Whereas, Henry Prickett, obligor, has executed a note and mortgage in favor of the Fox River Valley Railroad Company, a body corporate, created by the laws of the State of Wisconsin, bearing date on the first day of September, A.D. 1857, payable in ten years from the first day of September, A.D. 1857, for the sum of $2000, with interest annually at the rate of 8 per centum per annum, from and after the said first day of September, A.D. 1857. And whereas said note and mortgage have been received in payment of twenty shares of the capital stock in said company. Now, therefore, in consideration of the relinquishment and assignment, by the said obligor to the said company, of so much of the dividends on said stock which he may become entitled to as shall be sufficient to pay the interest on said note, the said company agree not to demand said interest from him,

and in case said note and mortgage shall be negotiated by said company, then said company agree to save him harmless from said interest. And the said obligor hereby assigns to the said company so much of any dividend to which he may become entitled on said shares as shall be sufficient to pay off said interest, and agree to pay said principal sum when the same shall become due.

"And it is further understood that this agreement of the said company to relinquish said interest, or to secure the said obligor harmless therefrom, *shall not be a defence on his part against the payment of such interest, if said note and mortgage shall be in the hands of a third party as security or otherwise.* Nevertheless said company will at all times punctually pay and discharge the same.

"In witness whereof the board of directors of said company have caused these presents to be signed by their duly constituted secretary, and the said obligor has also set his hand and seal, on this first day of September, A. D. 1857.

"C. H. MILLER,
Secretary.

[SEAL.] "HENRY PRICKETT."

"STOCK CERTIFICATE.

"*To the Secretary of the Fox River Valley Railroad Company of Wisconsin.*

"SIR: This is to certify that Mr. Henry Prickett, of McHenry County, Illinois, is entitled to a certificate of twenty shares of the capital stock of the Fox River Valley Railroad Company, he having executed a mortgage for the same to this company, provided the property described in said mortgage is free from other incumbrances.

"W. G. PARSONS,
Stock Agent.

"September 1st, 1857."

The court below dismissed the bill for foreclosure, and the complainant brought the case here.

Mr. M. H. Carpenter, for the appellant, contended that none of the material allegations of the answer were proved, and that most of them were disproved.

That as to what was said at public meetings, or even the

flattering prospects held out at any time, however improper they might have been, prudentially considered, to have been made, they constituted no bar to the foreclosure prayed for; that many of them were not made in the hearing of Prickett; that many were not made by agents of the company; that those which were made to him and by agents of the company were representations of the parties' opinions, or belief, or expectations—or mere predictions—as to the increase of everybody's property about Richmond, in case the road should be made; matters, therefore, not in the nature of representations of *existing facts*, but matters of speculation and matters about which Prickett could form his own judgment independently of the parties expressing their anticipations.

That, however the case might stand as between Prickett and the road, it was plain that Sawyer was an assignee *bonâ fide* and for value of the mortgage, and that by a formal instrument, executed in writing at the same time when the mortgage was given, Prickett had bound himself to pay it to any such holder.

Mr. T. G. Frost, contra:

1. We concede that in an ordinary case—a case where a man having no knowledge of facts more than another with whom he deals—standing in no position of superiority or confidence to him—expresses simply his anticipations—merely *prophecies*—in such case the failure of the anticipations, the error of the prophecies, cannot be set up by the other party to relieve himself of the consequences of a contract by him fairly and deliberately entered into.

But that is not this case. Here directors of a road, greatly embarrassed—for before 1857 Sawyer, with other directors, had been compelled to advance their private credit to the road—these directors send out persons as their agents to farms and country villages to get subscriptions. A "stock agent" attends the party. All of the persons sent know perfectly well that the road had been organized long before, and that it had no money, but was insolvent. With this

knowledge they go among poor farmers; they conceal its real condition; they intentionally produce upon the minds of the parties of whom they solicit subscriptions and mortgages to build the road, the false impression that the company was able soon to build and would soon build the road, and that soon it would be in full operation. This fact they must have known was false.

Then it must be constantly kept in remembrance that the men making these representations were sharp, intelligent men of business, coming from Milwaukee, the seat of knowledge, thoroughly informed about everything, dealing with a poor and confiding farmer and his wife, representing to him and her that which they knew that neither of them could, in the nature of things, have any information about.

The relation in which such men as Conover, and Parsons, and the other persons coming from Milwaukee stood in relation to such people as Prickett and his wife, was a confidential relation, as every relation is when a person ignorant of facts, not highly intelligent, and in a walk of life where everything like suspicion is disarmed, is approached by an imposing, practiced man of business, from a city, thoroughly conversant with the matter on which he is bent. In the hands of such men as came after them from Milwaukee, Prickett and his wife were in the view of equity not much better than children. She, it seems, could not write. She signed the mortgage by a mark.

Sibley denies that he made the representations which Prickett swears that he did make. The matter is unimportant. Parsons is a witness to the mortgage. *He* may have made them. If so, the company is more immediately connected with them, for he was its "stock agent." That the representations were made is not doubted; that they operated to decoy and to deceive is certain. The company was the *causa causans*, the cause *causative*, of them all. *It* sent its agents to Richmond. Those agents got up the meetings, and those agents originated, directed, and carried on, directly or through instruments, all that was done.

In short, the entire scheme of obtaining these subscrip-

tions and mortgages was an immoral proceeding, and one which equity must look at with disgust. The concealment of the real facts in the case, and the real condition of the company, and of the real purpose for which the mortgages were obtained, and the representations made (*necessarily implying* the sound fiscal condition of the company and its ability to soon complete the road, and exciting by fraudulent means unfounded hopes in the minds of the subscribers of large pecuniary benefits to accrue from their subscriptions), present a case of fraud practiced upon unwitting victims, entirely ignorant of the real truth of the matter and of the real purpose and design of these directors; one which, had the subscribers known it, would have prevented these subscriptions from being taken and the mortgages from being executed.

2. *The complainant is not an innocent holder.* He had been a long time intimately connected with the road as a director, a creditor, and an agent. He had himself solicited subscriptions; he knew how these farm mortgages were got and what was the expectation of the farmers giving them; he knew it not only by what was notorious in the whole region, but by his own direct communication, observation, and knowledge. After 1856, indeed, he kept a "*kind* of out" of the directorship—"one side"—and "*proposed* to keep away." No doubt he did. He was now a large creditor and vitally interested. He made others his instruments. He was careful not to be a director in form; while obviously one in reality. Finally, when the other directors have got the mortgages, a division is made, contractors get some, and the money-lenders the rest. What is it to the purpose that Sawyer did not solicit *this* mortgage? and that *it* was got *after* he had stopped his solicitations. He took what other directors got, and they doubtless took what he got. That which is to the purpose is, that in 1855 and 1856 the road was greatly embarrassed; that Sawyer and other directors lent it money; that soon afterwards these mortgages were taken, and that *now* they are found in the hands of Sawyer and these directors, Sawyer seeking to foreclose the one which

came to him. The whole case is one—we repeat it—on which a chancellor will look with reprobation.

3. *There was an entire failure of consideration for which the note and mortgage in question were executed.*

The actual consideration for which the note and mortgage were given was in the circumstances and upon the representations that accompanied their execution—a railroad from Richmond to Milwaukee, to be very soon fully completed and equipped, and in running order, giving increased value to the lands of the subscribers, and bringing in a large annual revenue upon their stock, and reimbursing them to the full extent of their subscriptions. Instead of this they received absolutely nothing for their subscriptions. No road was ever built, nor was any road really expected to be built by the parties procuring the subscriptions. As soon as the mortgages were got in, little or no further work was done upon the road. The entire enterprise was abandoned from that time forward. The company was all the time hopelessly insolvent.

Mr. Justice HUNT delivered the opinion of the court.

The law gives a different effect to a representation of existing facts, from that given to a representation of facts to come into existence. To make a false representation the subject of an indictment, or of an action, two things are generally necessary, viz., that it should be a statement likely to impose upon one exercising common prudence and caution, and that it should be the statement of an existing fact. A promissory statement is not, ordinarily, the subject either of an indictment or of an action.* The law also gives a different effect to those promissory statements based upon general knowledge, information, and judgment, and those representations which, from knowledge peculiarly his own, a party may certainly know, will prove to be true or false. It becomes necessary to classify, to some extent, the representations alleged to have been made in the present case.

* People *v.* Williams, 4 Hill, 9; Roscoe on Criminal Evidence, 362; Ranney *v.* The People, 22 New York, 413.

1st. The facts alleged to have been represented as actually existing, but which it is said did not exist, are the following, viz., that the Fox River Railroad Company was an organized incorporation; that McConnell appeared as a subscriber for stock to the amount of $1500, when, by secret agreement with the company, he was a subscriber for $500 only; that one Woodell stood in the same position, giving the amounts; that one Sibley had become a subscriber for stock, and given his note and mortgage for the same, the amount not being specified; and that Conover represented himself as one of the officers of the company.

2d. The promissory representations, as might be expected, cover a larger space. Thus it is said to have been represented, that the farms and lands of the contributors would be greatly enhanced in value; that the wheat market of Milwaukee was a better market than that of Chicago, and that they would be able to command five cents more per bushel for their wheat after the road should be built; also that the road should be constructed and equipped within one year; also that the company would pay large dividends upon its capital stock; that where farmers and others became subscribers for stock, and gave their mortgages for the same on long time, drawing eight per cent. interest, that the company, from its dividends, would pay the interest on such notes, and that the balance of the dividends, after paying the interest, would be sufficient to pay the principal of the said notes when the same should become payable; and the defendant testifies that it was represented to his wife that it would be an everlasting benefit to her to sign the mortgage; that the railroad would probably make thirty per cent., and that it would give her and her family six hundred dollars a year always.

It is scarcely credible that Prickett should have believed that the persons making representations like these, intended to bind themselves to their fulfilment. That Prickett may have believed the prophecies, is possible; that he may have understood the makers to believe them is possible, as it is possible the makers did believe them. But that Prickett

believed the makers to have undertaken for the accomplishment of the results promised, is not to be believed. It is contradicted by all the facts in the case. A man of common intelligence, or of ordinary prudence and caution could not have so believed.

He did not ask that they should enter into such engagements. He did not stipulate that his obligation to pay his note and mortgage should depend upon the realization of the rich promises made to him. On the contrary he made his subscription, gave his note and mortgage to secure its payment, and relied upon the success of the enterprise to indemnify and to enrich him. If there were dividends to pay the interest, he would not be required to pay it. If there were dividends applicable to the payment of the principal, the principal would also be discharged. If there were no dividends, or dividends to pay a portion only of his obligation, he must have known and understood that he had pledged his farm to the payment of the residue. If his present theory is correct, instead of giving security to them, Prickett should have required a bond and mortgage from the company, as the actual responsibility for results would rest on the company alone. We are satisfied that such representations, if made, were not relied upon by Prickett; that they did not form the inducement and consideration of his subscription.

This view is sustained by the additional writing made at the time the note and mortgage were executed. That paper recites the execution of the note and mortgage and their receipt in payment of the stock subscription; it stipulates that so much of the dividends of the stock as shall be sufficient to pay the interest on the note and mortgage is relinquished to the company, the company agreeing not to demand the interest, but to save Prickett harmless from the same. This would be well enough except for the two agreements immediately following in the same paper, viz., that Prickett undertakes in any event to pay the principal when it matures, and that the provision in relation to interest shall not be a defence on the part of Prickett to the pay-

ment of the interest, if the note or mortgage shall be in the hands of a third party, either as security or otherwise. So long as he bound himself, at all hazards, to pay the principal, and to pay the interest if the company should transfer the note, it is impossible to credit the theory that he relied upon the alleged promises and expectations as statements which the makers bound themselves to make good to him.

It is alleged that the representation was made that the road should be constructed and equipped, and in full operation, within one year from the date of the giving of the note and mortgage. Such a promise by parties having the means of knowledge of its falsity, from their position as managers and directors of a railroad, might in law stand upon a different basis. We do not examine this point, as there is no evidence of such statement by any one professing to have knowledge, or that there was knowledge of its falsity, if made. Prickett testifies that Conover stated that the rolling stock would be on in eighteen months. His allegation in his answer and his evidence do not agree. It is not proved that Conover was authorized to make the statement, or that he did not believe it to be true.

It is difficult to see how an action or a defence can be based upon promissory representations of the character we have considered, and we are of the opinion that they were the expressions of hopes, expectations, and beliefs, and that neither party understood, or had the right to understand, that they were to be received as statements of facts which any one was bound to make good, or upon which the validity of the subscription should depend.

The alleged representation of existing facts requires consideration.

1st. It is stated that it was represented that the railroad in question was duly incorporated and fully organized. The statement, if made, is sustained by the evidence. It appears that the company had a regular charter; that it was organized by the election of directors, the choice of a president and secretary; and that it had expended considerable

amounts of money in grading its road and in purchasing materials for its construction.

2d. It is said that the defendants were influenced by, and were deceived and defrauded by, a pretended subscription for $1500 of the capital stock of the road, made by McConnell, a man of wealth, of prudence, and caution, in whose judgment and discretion great confidence was placed, while in truth, by some secret agreement with the company he was a subscriber for $500 of stock only. The attempted proof of this allegation is a failure. It is proved on the other hand by the officers of the company, and by McConnell himself, that McConnell made a subscription for $1500; that it was a valid, *bonâ fide* subscription; that there was no condition, limitation, or qualification of it by any agreement, secret, or otherwise, and that he settled and arranged it as a subscription for $1500.

3d. It is alleged that one John Woodell subscribed $1000 upon a similar understanding or agreement. There is no proof to sustain the allegation. Prickett says that he has so heard, but that he has no knowledge on the subject.

4th. It is said that the persons obtaining the subscription caused it to be represented that John Sibley, a man of wealth, of integrity, and of influence, had subscribed largely to the capital stock of the company. Prickett testifies that Sibley told him he had mortgaged his house and lot for stock, and that it would be a good thing, and that he and others induced him to sign. In answer to a question by his own counsel, "Would you have become a subscriber to the capital stock of this company, except from the fact that McConnell became a subscriber and the other parties you have named?" he says: "If they had not represented as they did, and if McConnell and other leading citizens of the town had not subscribed, I certainly should not; but the representation was an inducement to make the farmers subscribe." "See here, you put in $2000, and you get $600 for life. Is not that enough?" In effect, he says that he should not have subscribed except that McConnell and the others did so, but it is apparent that the controlling influence was

the idea that if he subscribed for $2000 of the stock he should get a return of $600 for life.

To make this alleged representation a defence to the mortgage we must believe, first, that it was actually made. Prickett says that it was made. Sibley testifies positively that he never made it, that he had subscribed for $500 of stock in a road of Illinois having the same name, with which this was intended to connect, that he told Prickett of that subscription, but that he had never subscribed to stock in this road, and had never so stated to Prickett or to any one. If any statement was made it was more likely to have been made as to the road where he did own stock than to this one.

It must be believed, secondly, that Sibley was the agent of the company by whose acts or declarations they would be bound. Sibley denies any agency or authority, in fact or assumed, and there is no reasonable evidence to the contrary. He states that as a citizen, and one desirous to have the road built, he solicited subscriptions, and that he acted in this capacity only.

And lastly, it must be believed that Prickett relied upon the statement, that it was an inducement to him to become a subscriber. This has been sufficiently illustrated by what has already been said. These are all the allegations of misrepresentations in regard to existing facts. The evidence to sustain them is too weak to justify the decree.

The counsel for the defendants insists further that there has been a failure of consideration, and that a defence on that ground arises. We do not so understand it. The defendant received what he bargained for, to wit, a certificate that he was entitled to twenty shares of the capital stock of the company. He can, so far as the case shows, obtain his formal shares upon presentation of his certificate. The fact that the road is unprofitable, or that it has never been completed, does not entitle one who has paid in his subscription to the capital stock to recover it back, nor does it furnish a justification for a refusal to pay when the subscription has not, in fact, been paid. Moneys so paid or subscribed belong to the creditors of the corporation.

Nor does a defence arise from the separate paper in relation to the non-payment of interest, which has been before referred to. The paper expressly provides that it shall furnish no defence to the payment of interest if the note and mortgage shall be transferred to another party. It is the personal, separate undertaking of the company to save him (Prickett) harmless from the ultimate payment of interest, leaving Prickett to pay the interest if the security shall be transferred, and to resort to the company for reimbursement. The paper does not require that there should be an absolute transfer of the interest and title to the mortgage to cut off the defence. A transfer conditionally, or as security, is sufficient.

We see no reason, however, to doubt that the plaintiff is a *bonâ fide* holder. He paid a portion of the amount of the mortgage in money, and cancelled a valid debt against the company for the residue. He had no notice of any defence to the note, and received the note before its maturity. Under the rulings of this court it is not necessary to constitute a *bonâ fide* holding that the value should have been paid at the time of receiving the security. A past consideration is sufficient.*

We have recently decided that the rule of *bonâ fide* holding applies to a case where the proceeding is to foreclose a mortgage accompanying a note, with the same force as when the suit is brought upon the note itself.†

The plaintiff had not been a director for some time previously to the taking of this mortgage, and had no part in getting up this or the other mortgages. The proof shows a large expenditure in grading and preparing, and in the purchase of materials, after the giving of this mortgage. For what reason the enterprise failed does not appear. There is no evidence of fraud or bad faith.

The defendant's position is an unfortunate one, but we do

* Swift *v.* Tyson, 16 Peters, 1; Goodman *v.* Simonds, 20 Howard, 343.

† Carpenter *v.* Longan, 16 Wallace, 271.

not discover any principle upon which he can justly avoid the payment of his mortgage.

DECREE REVERSED, and the cause

REMANDED FOR FURTHER PROCEEDINGS.

CROPLEY *v.* COOPER.

A testator having five pieces of property, to wit, insurance stock, a vacant city lot, a farm, corporation stock, and a city house, and little or no other, and having four children, to wit, three sons, two (A. and B.) married and having children, and one (C.) unmarried, and one daughter (D.) aged thirty, then married and having a child (E.) aged three years, made his last will.

He left the interest on the insurance stock and the vacant lot to his married son A.; "and at his death" "the aforementioned stock and the said vacant lot he equally divided between his (A.'s) children, their heirs and assigns, forever."

He left the interest on the corporation stock to his son B. "for and during his life," and at his death the said stock to be equally divided between his (B.'s) children.

He left the usufruct of the farm to his unmarried son C., "for and during his life;" "and should he marry and have legal issue," the said farm to be equally divided amongst his children, when they shall have arrived at the age of twenty-one years. The will continued: "*Should my said son die without lawful issue, it is my will that the said farm be equally divided between my other children*, share and share alike, to them, their heirs and assigns, forever."

To his daughter he left the rent of his city house for and during her life, and directed that at her death the same should be sold and "the avails thereof become the property of her children or child, when she or they have arrived at the age of twenty-one years, the interest in the meantime to be applied to their maintenance."

After the testator's death, D., the daughter, had another child, who died in infancy. The first child, E., lived till he was twenty-eight years old, and then died, his mother still living, aged fifty-six, and the house not yet having been sold.

On a bill filed by D., after the death of both her children and of her husband, to settle the title to the city house, as between herself and her brothers, the other children of the testator: *Held*, both on the apparent intent of this particular will, as seen on reading the dispositions in the different clauses to all the children, to give a full estate where the child

Statement of the case.

of the testator had a child or children, and on the technical rules about vested and contingent remainders applicable to the clause relating to that share given to the daughter, that the grandson, E., took a vested remainder in the city house at the death of his grandfather, the testator, but subject to open and let in after-born children, and to take effect in enjoyment at his mother's death, that (the statute of Maryland making him sole representative of his infant sister) the right of this infant sister passed on her death to him, and (the same statute making a widowed mother the representative to her only child) that on his, E.'s, death, all his right passed to his mother, and accordingly that *she*, the daughter of the testator, was invested with all his right to the city house, and that she could have the property now sold, and that if it should be sold at her death the avails would go to her representative, and that she might either dispose of them in advance, by will, or leave them to be disposed of by the statute.

APPEAL from the Supreme Court of the District of Columbia.

William Cooper, of Maryland, died in 1845, leaving a widow (Sarah), three sons, William, Joseph, and John, and one daughter, Elizabeth. Two of the sons, William and Joseph, were married and had children; John was unmarried. Elizabeth, then thirty years old, was married to Richard Cropley and had one son, William Cooper Cropley.

The testator's property consisted of a farm in Maryland, on which he resided; a house on Pennsylvania Avenue, in the city of Washington; a vacant lot there, on Capitol Hill; stock in the Potomac Insurance Company, and stock in the corporation of Alexandria.

His will ran as follows:

"I will and bequeath to my dear wife, Sarah Cooper, all my stocks which I own in corporate institutions during her life; also the rents arising from my house in the city of Washington. I also devise and bequeath to my said wife the usufruct of the farm on which I now reside, for and during her life, with the option of selling the same by her, . . . in which case my will is that the proceeds shall be invested in stocks of some sound and corporate institutions, the interest from the same to be enjoyed by my said wife for and during her life, and at her death the said farm, or its avails if previously sold, as above permitted, to be appropriated as hereinafter directed.

Statement of the case.

"I will and devise to my son William, after his mother's death, the interest on $1250 stock now held by me in the Potomac Insurance Company, Georgetown. I also will and bequeath to my said son, William Cooper, a vacant lot on Capitol Hill, Washington; and at his death it is my will that the said vacant lot and aforementioned stock be equally divided between his children, their heirs and assigns forever.

"To my son John I give and bequeath, at his mother's death, the usufruct of the aforementioned farm, or the interest of its avails, if previously sold, for and during his life; and should he marry and have legal issue, it is my will that the said farm, or, if previously sold, the avails thereof, together with any interest that may be due thereon at his decease, shall be equally divided amongst his children when they shall have arrived at the age of twenty-one years, the interest in the meantime to be applied to their maintenance. *Should my said son John die without lawful issue, it is my will that the said farm, or its avails in case of its being sold, be equally divided between my other children*, share and share alike to them, their heirs and assigns forever.

"To my son Joseph, at his mother's death, I give and bequeath, for and during his life, the interest on $1500 in the Alexandria Corporation stock, held by me, and at his death the said stock to be equally divided between his children.

"To my daughter, Elizabeth Cropley, at her mother's death, I give and bequeath the rent of my house on Pennsylvania Avenue, in the city of Washington, situated on square ——, *for and during her life; and at her death it is my will that the said —— be sold, and the avails thereof become the property of her children or child, when he, she, or they have arrived at the age of twenty-one years, the interest in the meantime to be applied to their maintenance.*"

Shortly after the death of the testator, Mrs. Cropley had another child, a daughter, who died in infancy.

William Cooper Cropley, the child living at the death of the testator, died in December, 1870, at the age of twenty-eight, without issue, leaving his mother his sole heir-at-law and personal representative.

The widow of the testator died in February, 1854. Richard Cropley, the husband of Elizabeth, died in 1851.

Statement of the case.

After William Cooper Cropley's death, his mother, then fifty-six years of age, asserted ownership in the house on Pennsylvania Avenue, mentioned in the will, and by the last but two of the above-quoted clauses of the will devised to her for life, and at her death over to her child or children. Her view was that her deceased son, William Cooper Cropley, took a vested interest in the bequest in question at the death of his grandfather, the testator, but subject to open and let in after-born children, and to take effect in enjoyment at the death of his mother; that his sister, at her birth, took a like vested interest to the extent of a moiety; that at the sister's death her right passed to him as distributee (the statute of distributions of Maryland thus providing); that at his death all his right passed to her, his mother, the complainant, as a like distributee under the same statute.

The other children of the testator, William, John, and Joseph, claimed the property, as heirs-at-law, on the ground that the devise over to the child or children had lapsed.

This claim of the heirs-at-law casting a cloud on the title, Mrs. Cropley filed a bill in the court below against said William, John, and Joseph, to obtain a construction of the will.

The bill represented that the complainant wished to sell the property, but could not, owing to the cloud on the title made by the claim of the sons, and it prayed that a decree might be passed divesting the defendants of any title in or to the property, and vesting the same in the complainant, giving the true construction and interpretation of said last will and testament.

That the court would grant such other and further relief as to the court may seem meet and the interests of the com plainant might require.

The court below decreed that the devise over to the child or children of Mrs. Cropley was contingent upon the child or children surviving the mother, and also attaining twenty one, and hence that the devise over did not vest at the death of the testator, nor even upon William Cooper Cropley at-

Recapitulation of the case in the opinion.

taining twenty-one, he having died in the lifetime of the mother. It accordingly dismissed the bill.

From this decree Mrs. Cropley took this appeal.

The case was elaborately argued on principle and authority, by *Messrs. W. D. Davidge and F. W. Jones, for the appellant, and by Messrs. J. H. Bradley and R. T. Merrick, contra.*

Mr. Justice SWAYNE delivered the opinion of the court.

This case turns upon the following clause of the will of William Cooper, deceased:

"To my daughter, Elizabeth Cropley, at her mother's death, I give and bequeath the rent of my house on Pennsylvania Avenue, in the city of Washington, situated on square ——, for and during her life; and at her decease it is my will that the said —— be sold, and the avails therefrom become the property of her children or child, when he, she, or they have arrived at the age of twenty-one years, the interest in the meantime to be applied to their maintenance."

The testator died in 1845. He left at his decease a widow, Sarah Cooper, and four children, William, John, Joseph, and Elizabeth, the complainant. William and Joseph were married and had children. John was unmarried. Elizabeth was intermarried with Richard Cropley, and had living one child, William Cooper Cropley, then about three years old. Shortly after the testator's death, Elizabeth gave birth to a daughter, who died in early infancy. Richard Cropley, the husband of Elizabeth, died in 1851. Her mother died in 1854. Her son, William Cooper Cropley, died in 1870, at the age of twenty-eight years, not having married. After his death, Elizabeth Cropley, the complainant, then fifty-six years of age, claimed to own the house on Pennsylvania Avenue devised to her for life. Her brothers, William, John, and Joseph, set up claims as heirs-at-law of their father, alleging that the bequest to the children of Elizabeth had failed by reason of the death of both of them before the death of their mother, and of the younger one before reach-

ing the age of twenty-one years. The complainant thereupon filed this bill to obtain a construction of the will, and to ascertain her rights.

The question presented for our determination is, whether the bequest to her children lapsed, as is insisted by the appellees; or, in other words, whether it was vested or contingent.

It is an axiom in the law of wills that the intention of the testator shall prevail. Upon looking at this will as regards the four children of the testator, we find that the provision made for each is clear and explicit. He gave to William, after his mother's death, the income from $1250 of the stock of the Potomac Insurance Company, and a vacant lot on Capitol Hill. At his death, it is directed "that the said vacant lot and the aforementioned stock be equally divided between his children, their heirs and assigns forever." To John, at his mother's death, was given the use of a farm; or, if sold by his mother, the interest accruing from the proceeds, for life. If he should marry and have lawful issue, at his death, the farm or its avails was to be equally divided among his children when they should arrive at the age of twenty-one, "the interest in the meantime to be applied to their maintenance." This clause concludes as follows: "Should my son John die without issue, it is my will that the said farm or its avails, in case of its being sold, be equally divided among my other children, share and share alike, to them, their heirs and assigns forever." To Joseph, at his mother's death, was given the interest of $1500 of Alexandria Corporation stock, and at his death it was "to be equally divided between his children." Then follows the provision for Elizabeth and her children.

The property given to the sons who had children, is given to them for life, and at their death to their children in equal shares. There is no provision beyond this. The gift is absolute. The children of John, if he should have any, were not to receive their shares until they should arrive at the age of twenty-one. But the interest, in the meantime, was

to be applied to their support. It was only in the event of his dying without issue that the further provision was to take effect. The entire failure of issue at his death and not the failure of such issue to reach the age named was the condition of the gift over to his brothers and sister.

So as respects the complainant, who, like her brothers William and Joseph, had issue living at the death of the testator. The gift is to her and her child or children, and there is no devise or bequest over in any contingency that might occur. The mother and children were the objects of the testator's solicitude and bounty. He looked no further into the future. William, Joseph, and Elizabeth, and their children were thus placed upon a footing of equality. If John should have lawful issue living at his death, such issue would be in the same category with the children of William, Joseph, and Elizabeth. It seems clear to us that the testator intended that what was given to each of his children should vest interest in them and in their children as early as possible, the period of enjoyment to be deferred in each case as was specially provided, and that the result should be the same in John's case if issue should thereafter be born to him and survive him. Beyond his grandchildren, including the children of John, if any should be living at his death, the testator left it to the local law of descent and distribution to meet any emergency that might arise.

It was only in the single event of John dying without issue, that it was declared by the testator that the property thus given to one of his children should go over to the others.

If we pursue the subject before us by the light of the rules of law which apply, we shall reach the same conclusion. An analysis of the clause in question eliminates these particulars:

Laying out of view the estate of her mother, a life estate is given to Elizabeth Cropley.

At her death, whenever that might occur, and whatever then the age of her offspring, the property was to be sold

and converted into money. Her death and the sale might have occurred immediately after the death of the testator.

Upon the sale being made, her offspring, if minors, would have become entitled to the interest of the fund until the age of twenty-one years was reached. The right to receive the whole or an aliquot part of the fund would then have accrued.

The time of selling had no relation to the age of the legatees.

It depended wholly on the death of the tenant of the life estate.

The effect of her dying during their infancy would have been that they would have taken the interest instead of the principal of the fund up to the age of twenty-one, and then the principal instead of the interest.

The real estate having been directed by the will to be converted into money, it is to be regarded for all the purposes of this case as if it were money at the time of the death of the testator. That it was not to be sold until after the termination of two successive life estates does not affect the application of the principle. Equity regards substance and not form, and considers that as done which is required to be done. The sale being directed absolutely, the time is immaterial.*

Where a bequest is given by a direction to pay when the legatee attains to a certain age, and the interest of the fund is given to him in the meantime, this shows that a present gift was intended, and the legacy vests in interest at the death of the testator.†

A bequest in the form of a direction to pay at a future period vests in interest immediately if the payment be post-

* Craig *v.* Leslie, 3 Wheaton, 563; Peter *v.* Beverly, 10 Peters, 563; Taylor et al. *v.* Benham, 5 Howard, 269; Fairly *v.* Kline, Pennington, 554; Reading *v.* Blackwell, Baldwin, 166; Hocker *v.* Gentry, 3 Metcalfe, 473.

† Re Hart's Trusts, 3 De Gex & Jones, 202; Hanson *v.* Graham, 6 Vesey, 239; Hammond *v.* Maule, 1 Collyer, 281; Burrill *v.* Sheil, 2 Barbour, 471; Bayard *v.* Atkins, 10 Pennsylvania State, 20; Provenchere's Appeal, 67. Id. 466; Hanson *v.* Brawner, 2 Maryland, 102; Nixon *v.* Robbins, 24 Alabama, 669.

poned for the convenience of the estate or to let in some other interest. The payment of debts is an instance of the former, and a prior temporary provision for some other person, as for Elizabeth Cropley in this case, is an instance of the latter. In all such cases it is presumed that the testator postponed the time of enjoyment by the ultimate legatee for the purpose of the prior devise or bequest.*

A devise of lands to be sold after the termination of a life estate given by the will, the proceeds to be distributed thereafter to certain persons, is a bequest to those persons and vests at the death of the testator.†

It is a consideration of weight that if William Cooper Cropley, who died at the age of twenty-eight, had married and left children, according to the proposition of the appellees, they could have taken no benefit from the provision made for their father. Such could not have been the intention of the testator. In real property cases, where the question arises whether a remainder is vested or contingent, this consequence is held to be conclusive—that it was the former.‡ In *Goodtitle* v. *Whitby*,§ Lord Mansfield said: "Here, upon the reason of the thing, the infant is the object of the testator's bounty, and the testator does not mean to deprive him of it in any event. Now, suppose this object of the testator's bounty marries and dies before his age of twenty-one leaving children, could the testator intend, in such event, to disinherit him? Certainly he could not." In *Doe* v. *Perryn*,‖ Buller, J., said: "But if this were held not to

* Hallifax *v.* Wilson, 16 Vesey, 171; Leeming *v.* Sherratt, 2 Hare, 14; Packham *v.* Gregory, 4 Id 396; Winslow *v.* Goodwin, 7 Metcalf, 363; White *v.* Curtis, 12 Gray, 54; Tucker *v.* Ball, 1 Barbour, 94; Barker *v.* Woods, 1 Sandford's Chancery, 129; Thomas *v.* Anderson, 6 C. E. Green, 22; McGill's Appeal, 61 Pennsylvania State, 47; Tayloe *v.* Mosher, 29 Maryland, 443; Brent *v.* Washington, 18 Grattan, 526; Fuller *v.* Fuller, 5 Jones's Equity, 223; Roberts *v.* Brinker, 4 Dana, 573; Rawlings *v.* Landes, 2 Bush, 159.

† Fairly *v.* Kline, Pennington, 554; Reading *v.* Blackwell, 1 Baldwin, 136; Rinehart et ux. *v.* Harrison's Executors, Ib 177; Loftis *v.* Glass, 15 Arkansas, 680.

‡ Carver *v.* Jackson, 4 Peters, 1. § 1 Burrow, 234. ‖ 3 Term, 495.

vest till the death of the parents, this inconvenience would follow: that it would not go to grandchildren, for if a child were born, who died in the lifetime of his parents, leaving issue, such grandchild could not take, which could not be supposed to be the intention of the devisor." This reasoning applies to the present case.

*Boraston's Case** was referred to by counsel on both sides. The point there ruled was as follows: If real estate be devised to A. when he shall attain a given age, and until A. attains that age the property is devised to B., A. takes an immediate vested estate, not defeasible on his death under that age; the gift being read as a devise to B. for a term of years, with remainder to A. The same doctrine has since been affirmed in numerous other cases, and is now a canon of the English law.† *Boraston's Case* related to real property. If this were such a case it would be in point and conclusive. It has been applied by American courts to bequests of personalty.‡ The subject of vested and contingent remainders was examined by this court in *Poor* v. *Considine*.§

Chancellor Kent says:‖ "It is the uncertainty of *the right* of enjoyment and not the uncertainty *of its actual enjoyment* which renders a remainder contingent. The present capacity of taking effect in possession, if the possession become vacant, distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues."

"When a remainder is limited to a person in esse and ascertained to take effect by words of express limitation on the determination of the preceding particular estate, this remainder is *most clearly and unquestionably vested.*"¶

Bequests involving the question before us may be resolved into two classes:

(1.) Those where the time or event referred to in the

* 3 Reports, 21.

† Hawkins on Wills, 237.

‡ Roberts *v.* Brinker, 4 Dana, 573; Watkins *v.* Quarles, 23 Arkansas, 179; Collier's Will, 40 Missouri, 287.

§ 6 Wallace, 476.

‖ 4 Commentaries, 203.

¶ 1 Preston on Estates, 70.

future is of the substance and a condition of the gift, and, hence, marks the time of vesting in interest.

(2.) Those where the vesting in interest has already occurred, and such event or time only designates the period of the commencement of the enjoyment.

We think this case belongs to the second category.

We hold that William Cooper Cropley took a vested interest in the bequest in question at the death of the testator, but subject to open and let in after-born children, and to take effect in enjoyment at the death of his mother; that his sister, at her birth, took a like vested interest to the extent of a moiety; that at her death her right passed to him as distributee, according to the Statute of Distribution of Maryland; that at his death all his right passed to his mother, the complainant, as a like distributee under the same statute. If the property shall be sold at her death all the avails will go to her legal representative. She may dispose of them in advance by will, or leave them to be distributed according to the statute.

At the age of twenty-one William Cooper Cropley might have elected to take the property instead of its proceeds. In that event no sale could have taken place. The complainant is now the only party in interest. Under the circumstances, we think the complainant may exercise the right of election as her son, if living, could have done, and that, under the general prayer for relief in the bill, she may accomplish that object in this case, if she shall desire to do so.*

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

IN CONFORMITY TO THIS OPINION.

* Craig *v.* Leslie, 3 Wheaton, 563; Fletcher *v.* Ashburner, 1 Leading Cases in Equity, 794, 805, notes.

THE RIO GRANDE.

1. Five libellants, on separate libels *in rem*, got a decree in the Circuit Court of one circuit against a vessel for sums each one under $2000, and so without right of appeal here, *and costs*. Before they could get satisfaction from the vessel, she was taken out to sea.

   The vessel happening to be subsequently in *another* district the same five libellants now sent and libelled her there; not filing five separate libels, as in the former district, but all five persons joining in one libel, claiming for each the old sums, with interest from a day named, and claiming in one sum, and without any specification of what portion of it was for which libellant, the sum of $1767.62, costs of the courts of the first district, "and also all costs in this behalf expended." The Circuit Court decreed in favor of the libellants the amount claimed by each, with 8 per cent. interest from a day named, to the date of the Circuit Court's decree; and "the further sum of $1767.62 costs in the District and Circuit Courts" of the former district, and all costs in the District and Circuit Courts where the libels had last been filed. With the interest thus allowed the claims of two of the five libellants exceeded the sum of $2000, but even with it added the claims of the remaining three did not do so.

   The owners of the vessel having taken an appeal to this court, a motion "to dismiss the appeal," for want of jurisdiction, because "the matter in dispute did not exceed the sum or value of $2000," was denied; the ground for the denial assigned being that "the motion is to dismiss the appeal," and that the decree in favor of two of the libellants was greater than $2000 when the interest allowed by the Circuit Court to the date of its decree was included with the principal.

2. Great faith given to a certificate of a clerk below (in the face of things apparent on the transcript itself, and in face of the assertion by counsel of one side and the admission by counsel of the other), that a record sent here by him is a full, complete, true, and perfect transcript of the record and proceedings in a court below.

3. On an allegation of deficiency in the record, the deficiency, if any, may be supplied by *certiorari*. A motion to dismiss the appeal upon such allegation denied.

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

The Judiciary Act as amended by an act of 1803 gives appeals to this court from the Circuit Courts in admiralty causes, "where the matter in dispute exceeds the sum or value of $2000, *exclusive of costs.*"

Statement of the case.

These provisions of law being in force, the steamer Rio Grande, owned, as was alleged, by persons in Mexico, being in the port of Mobile, in the *Southern District of Alabama*, certain material-men, on the 26th of November, 1867, filed separate libels against her in the District Court for the said district. The libels, with their numbers and the names of the libellants on the docket, were thus:

No. 221.	William Otis, for	$1,508 00
No. 222.	Joseph Hastings, ...	83 75
No. 223.	R. D. Post & Co., ...	125 00
No. 224.	Lyons & Keyland, ...	1,411 83
No. 225.	G. B. & C. B. Gwin & Co., ...	713 00

Upon process issued on these libels the vessel was seized by the marshal and held by him during the pendency of the proceedings in the said court.

Several other libels had apparently been filed against the same steamer. The record at least contained this entry, which, as it is referred to in what is said by the learned justice who delivered the opinion of this court, and apparently as affecting the case, is here set out:

Order granting Motion to consolidate Causes.

"Tuesday Morning, December 10th, 1867.

"Court met pursuant to adjournment. Present: the honorable Richard Busteed, judge presiding.

JOSEPH HASTINGS ET AL. *v.* STEAMBOAT RIO GRANDE.

"In this cause G. N. Stewart, Esquire, attorney for the claimants, moves the *consideration* of admiralty cases Nos. 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, and 138, with the above-mentioned case; which motion was granted by the court upon a written agreement being filed that *such* consolidation should not prejudice the officers of the court in respect to costs."

One Williams and others appeared as claimants and owners of the vessel.

On the 11th of May, 1868, the court dismissed all the libels, on the ground that the credit had been a personal one to the owners, and that there had been no credit to the

ship. Hereupon the claimants, on the 12th, and before it was possible to perfect an appeal, got—through some clerical accident apparently—an order of restoration of the vessel to themselves, and carried her right out to sea. The libellants, nevertheless, on the 14th, 15th, and 16th of May took their appeal with supersedeas to the Circuit Court, the Circuit Court, of course, for the District of *Alabama;* and on the appeal that court, holding that the credit had been to the vessel, reversed, January 11th, 1869, the decree of the District Court, and awarded to each of the libellants above-named the amount claimed by him, with interest at 8 per cent. from the 1st of August, 1867. The order of decree, after setting out the numbers of the cases and the names of the libellants, proceeded thus:

"The above-stated cases having been appealed to this court from the District Court of the United States for the Southern District of Alabama, came on to be heard this day, upon the libels, answers, and proofs; and, it appearing to the court that each of said claims are liens upon said steamer Rio Grande, and it further appearing to the court from the evidence—

"That the claim of William Otis is sustained, $1508, with interest on the same from the 1st day of August, 1867;

"And the claim of Lyons & Keyland is sustained, for the sum of $1411.83, with interest on the same from the 1st day of August, 1867;

"And the claim of Joseph Hastings, for the sum of $83.75, with interest from the 1st day of August, 1867;

"And the claim of R. D. Post, for the sum of $121.75, with interest from the 1st day of August, 1867;

"And the claim of G. B. & C. B. Gwin & Co., for the sum of $713.14, with interest from the 1st day of August, 1867;

"It is therefore ordered and decreed that the said steamer Rio Grande be condemned for the payment of said respective sums, ascertained and admitted to be due to the respective libellants, and that she be sold to pay the same, *and the costs of this court and of the District Court.*"

Subsequently to all this the material-men, from whose process in the judicial District of Alabama the vessel had been withdrawn, hearing that she was now in the port of New

Orleans, in the *District of Louisiana*, sent over there and, on the 8th of June, 1871, there libelled her.

In this new libel they all joined in *one* libel. This libel set forth that the steamer was indebted to them severally in the sums already named, with interest, at the rate of 8 per cent. per annum, from the 1st of August, 1867, until paid, that they had libelled her in the District of Alabama, and had got a decree of the Circuit Court, such as has been already stated, and decreeing that the vessel should be sold to pay their claims, "*and the costs of both District and Circuit Courts aforesaid;*" that after the decree of the District Court the claimants had removed the vessel from the jurisdiction of the Circuit Court for the District of Alabama, and brought her into the jurisdiction of the Circuit Court for the District of Louisiana, where the same material-men now libelled her. The libel reasserted the old liens for materials, asserted further a lien for $1767.62 for said *costs*, and prayed that the steamer "be sold to satisfy the claims of the libellants in the sum of $1767.62, costs of the courts of *Alabama*, with also all costs in this behalf expended." After referring to the proceedings in the District and Circuit Court, it added:

"All which will more fully appear by the *transcript of the record of said case, which is filed herewith and made part of this libel.*"

The District Court for Louisiana (Mr. Justice Durell), like the District Court in Alabama, dismissed the libel. The Circuit Court of Louisiana on appeal, like the Circuit Court for Alabama, reversed the decree of the District Court, and the claimants of the vessel took this appeal.

The transcript of the record, as it came to this court, was composed of what was called in the index the "original record" (103 pages), and an "additional record" by way of continuation, and running from page 103 to page 183.

At the conclusion of the former, on page 103, and just above a certificate of the clerk of the Circuit Court of Louisiana, appeared—

Statement of the case.

Instructions from F. Michinard, Esq., to make transcript.

[Filed September 11th, 1873.]

WILLIAM OTIS ET AL. *v.* S. S. RIO GRANDE.—No. 6819.

In making out the transcript of appeal in the above case, the clerk will please omit the following documents.

In the case proper:

All appeal-bonds filed in Judge Durell's court.

Notices to take testimony and continuances.

In the transcript filed with the libel:

Omit all libels except those of William Otis (1), Lyons & Keyland (2), R. D. Post & Co. (3), and G. B. & C. B. Gwin & Co. (4).

State that the original libel of Joseph Hastings is for $183.75, for 26¼ days' labor, @ $7.

Omit bills attached to libels.

Omit all admiralty warrants and returns, monitions, &c., except in the case of William Otis.

Omit motion for subpœna duces tecum.

Omit orders allowing master further time, and leave to counsel to file briefs.

Omit appeal-bonds.

Very respectfully,

F. MICHINARD,

For Rio Grande.

These instructions had been apparently more or less fully complied with. Moreover, the "original record" did not contain any transcript of a record of the proceedings in the Circuit and District Courts of Alabama, the record, namely, which the libel in the District Court of *Louisiana* referred to as appended to *it*, but it did contain, and following the libel, what it called "*Extracts* from the transcript annexed to libel and filed in the United States District Court, June 8th, 1871."

Nevertheless, the clerk of the Circuit Court for Louisiana put, under date of 26th September, 1873, and at the close of the "original record," the usual certificate that the 103 pages named contained and formed a "full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of *William Otis et al.* v. *The Steamer Rio Grande*, No. 6819 of the docket, so far as the same now remain of record."

Then followed in the transcript sent here the "addition to the record." This opened with an agreement signed by the counsel of both sides, and dated November 27th, 1873, thus:

"It is agreed that the appellants may make perfect and complete the transcript in this case, by having the following documents, forming part of the record of the Circuit Court, copied by the clerk and filed in the Supreme Court, before the trial of the motion to dismiss, to wit."

[Here followed a list of documents, some, but not all of those which the clerk had omitted.]

Then came what were entitled—

"Extracts from the transcript filed with libel in the United States District Court, District of Louisiana, June 8th, 1871, and in the Circuit Court of the United States, November 2d, 1872."

This part of the transcript, that is to say, the "addition to the record," the clerk of the Circuit Court for Louisiana did not certify as before to be a "full, complete, true, and perfect copy" of anything; but on the contrary, under date of December 6th, 1873, certified to contain "true and perfect copies *extracts from* the transcript of the record and proceedings had in the suits in Southern District of Alabama, and *filed in the case of William Otis et al.* v. *The Steamship Rio Grande*, No. 6819 of the docket, so far as the same now remain of record, or on file in said court."

A motion was now made to dismiss the appeal, because,

1st. The transcript did not contain a true copy of the record and of all the proceedings in the case.

2d. This court had no jurisdiction in the case, as the amount in dispute was less than $2000.

Mr. Semmes, in support of the motion to dismiss:

1st. The eighth rule of court requires that the clerk of the lower court shall make and transmit a true copy of the record and of all proceedings in the cause; this has not been done in the present case, but on the contrary, portions of the record, important to show the character of the seizure

and condemnation of the Rio Grande in the several suits of the libellants, have by order of the claimants' proctor been excluded from the transcript.

2d. The decree of the Circuit Court for the District of Alabama was a separate decree for different sums of money, due to the different libellants as material-men against the vessel. None of these amounts, with the interest allowed, amounted at the time of the decree rendered to the sum of $2000, and unless the decree be for more than $2000 in favor of *each libellant* an appeal cannot lie, even though the aggregate amount exceeds that sum.

And where joint libels *in rem* are filed for wages of seamen and for supplies, which make a lien on a vessel, the claims for wages and supplies do not become joint, but the decree rendered in favor of each libellant for the sum due him is a several decree, and cannot be appealed from by either libellant or claimant, unless the amount in dispute on each claim exceeds $2000, which amount in dispute as regards the claimant is shown by the decree rendered in favor of the libellant. This is settled in *Rich* v. *Lambert*,* and in *Oliver* v. *Alexander*.†

The separate character of the claims of the libellants was not changed or altered by their attempt to enforce the decree of the District Court of Alabama in the Admiralty Court of Louisiana by a joint libel. The sole purpose of the proceedings in Louisiana was to enforce the decree made in Alabama, and the proceedings in Louisiana are merely in the nature of an execution against the vessel. If the vessel or its claimants could not appeal from the decree of the Circuit Court in Alabama, no appeal from proceedings to execute that decree will lie from the decree of the Circuit Court in Louisiana, although the vessel may have been removed from one jurisdiction to another, or have changed owners. The removal or change of ownership cannot affect the jurisdiction of the court.

But if the amount claimed in the libel in Louisiana is to

* 12 Howard, 347.

† 6 Peters, 143.

govern the appellate jurisdiction, then the claim of William Otis alone, under that ruling, will be subject to appeal, all the others being for sums below the jurisdiction of the Supreme Court.

Mr. D. C. Labatt, contra, for the appellants:

1. The clerk of the Circuit Court has omitted many important documents which he was not instructed to omit, but the agreement of the counsel about perfecting and completing the transcript, estops from asking a dismissal on that ground. It has been abandoned by the agreement.

2. This appeal is from the Circuit Court for Louisiana, not from the Circuit Court for Alabama; and the decree appealed from was made March 3d, 1871. Now, as Otis claimed $1508, and as Lyons & Keyland claimed $1411.83, and as the decree appealed from, made, as just said, March 3d, 1871, allows them those sums, with interest at 8 p. c. from the 1st day of August, 1867, that is to say, for five years, seven months, and three days, computation will show that, as respects each of those two libellants at least, the matter in controversy does exceed $2000.* On such a case, no motion "to dismiss the appeal," that is, to dismiss it *in toto*, can be granted. The most that could be asked for would be some action in regard to the minor claimants.

But none can be asked for in regard to them. There was but one libel filed in the District Court for Louisiana, and that was a joint libel. That joint proceeding was quite unlike the separate proceedings in the District Court for Alabama.

In Alabama the libellants were seeking to enforce their several claims against the Rio Grande for supplies; in Louisiana they sought to enforce the execution of a decree which awarded to them not only the amounts originally claimed by them, but also a sum of $1767.62 for costs. And in their libel in Louisiana the libellants asked that the steamer be "sold to satisfy the claims of your libellants,

* The Patapsco, 12 Wallace, 451.

with the sum of $1767.62, *costs of the courts of Alabama*, with *also* all costs in this behalf expended." And the decree did award to the libellants the amount thus claimed by them.

The costs thus awarded are not embraced within the exception of the law ("except costs") in computing the amount in dispute. The only costs that are not to be included in the computation are the costs in the proceedings actually carried on in the courts in *Louisiana*, to secure an adjudication of the rights of the libellants.*

Now, touching the amount of these former costs the libellants were joint suitors, not joint and several; they claimed that sum conjointly, and it was thus awarded to them by the decree appealed from. What portion of this sum of $1767 is coming to Otis, or what to Hastings, or what to any of the libellants, the decree does not determine. The sum constitutes a *common fund* to be distributed among the libellants, and, *quoad* that amount, brings the case strictly within the rule laid down in *Shields* v. *Thomas*,† a case in which the cases of *Rich* v. *Lambert* and *Oliver* v. *Alexander*, cited by the opposing counsel, are reviewed, and in which the distinction which we contend for is recognized.

Now, if such be the case, the appellant cannot be protected against execution for this whole sum of $1767, unless the appeal is maintained against all the libellants. Suppose the appeal to be dismissed as to Hastings, Hastings can issue his execution for the amount awarded to him and the $1767. Opposing counsel will agree to this. And this shows that the libellants are joint libellants to enforce the execution of "a decree" in their favor; and *not joint and several* libellants for the sums claimed. Indeed, having filed their libel in the form in which they have consented to do, they could not be heard to say that they were joint and several libellants for a part of their claim and joint libellants only for another part.

In so far as the appellant is concerned, it is a matter of indifference how the whole amount claimed is distributed.

* Lee *v.* Watson, 1 Wallace, 337.

† 17 Howard, 3.

That is a matter to be settled between the material-men (the appellees) themselves. At present, in the libel in Louisiana, the decree on which alone it is that there is an appeal, they claim jointly. And, so claiming, it is unimportant that the claims of particular claimants are less than $2000, the claim of all exceeding that sum.

Mr. Justice CLIFFORD delivered the opinion of the court.

Separate libels were filed by the appellees, in the District Court of the United States for the Southern District of Alabama, against the steamboat Rio Grande, to enforce the payment of certain claims made by those parties against the steamboat for materials furnished for repairs and for necessary supplies, which it is alleged constituted a maritime lien upon the steamboat. Process was issued and served and the parties appeared and were heard, and the decree states that the court ordered, adjudged, and decreed that the claims contained in the libels in this cause do not constitute such a maritime lien as to give the court jurisdiction, and the court entered a decree that the libel in each case be dismissed with costs. Immediate application was made to the court by the claimants for an order that the possession of the steamboat should be delivered to them by the marshal, and the record shows that on the twelfth of May, 1868, the motion was granted. Notice of appeal was immediately given by the libellants, and two days after the order was passed delivering the steamboat to the trustees named in the application for the order, the appeal bonds were filed. During the pendency of the several libels in the District Court and before the final decree, to wit, on the tenth of December, 1867, the causes were consolidated by the court upon a written agreement being filed that the consolidation should not prejudice the officers of the court in respect to costs.

On the eighth of June, 1871, the same material-men filed a libel in the District Court of the United States for the District of Louisiana, against the same steamboat, to enforce the maritime lien for the same claims, in which they alleged that during the pendency of the said admiralty proceedings

in the District Court for the Southern District of Alabama, the court there ordered the marshal to deliver the possession of the same, as in the order previously described, and that the order was executed as made, notwithstanding the libellants appealed and gave appeal bonds operating as a supersedeas within the period allowed by law for perfecting such appeals. Process was issued and served and the appellants appeared as claimants and filed an answer. Testimony was taken, and the parties having been heard, the court entered a decree dismissing the libel, and the libellants appealed to the Circuit Court, where the parties were again heard, and the Circuit Court reversed the decree of the District Court and entered a decree that the libellants do have and recover from the steamboat the following sums, to wit: William Otis, $1508; Lyons & Keyland, $1411.83; Joseph Hastings, $83.75; R. D. Port & Co., 121.25; G. B. & C. B. Gwin & Co., $713.14, with eight per cent. interest on said different amounts, from the first of August, 1867, until paid, and costs of suit as therein specified. By the record it appears that the decree was entered on the first day of March, 1873, and of course five years and seven months' interest must be added to each of the several sums awarded in the decree. Whereupon the respondents appealed to this court.

Two grounds for dismissing the appeal are set forth in the motion under consideration:

1st. That the transcript does not contain a true copy of the record and of all the proceedings in the case, under the hand and seal of the Circuit Court.

2d. That this court has no jurisdiction in the case, as the amount in dispute is less than $2000.

1. Probably the stipulation filed in the case allowing the appellants to complete and perfect the transcript in the case may be regarded as an answer to the first ground of the motion, but if not it is quite clear that the certificate of the clerk of the court must be regarded as *primâ facie* evidence that the matter of fact alleged in the motion is not well founded. Deficiencies, if any, may be supplied by *certiorari*.

Syllabus.

2. Nor can the motion be sustained for the other reason set forth, as it is certain that the decree against the appellants here in favor of two of the respective appellees exceeds the sum of $2000. True, the sums recovered by the other three appellees respectively were not sufficient to give this court jurisdiction, but the motion is to dismiss the appeal, which must be denied, as the decree in favor of the two libellants first named in the decree is, as it respects each of those, greater than $2000, when the interest allowed by the Circuit Court to the date of the decree is included with the principal.* Interest to that date being specifically allowed by the decree must be included with the principal in order to determine what "the sum or value in dispute was" at the time the appeal was taken and allowed.

MOTION DENIED.

ELDRED *v.* SEXTON.

The fundamental principle established by the act of Congress of April 24th, 1820, and since governing the matter of sales of the public lands, that private entries are not permitted until after the lands have been exposed to public auction at the price for which they are afterwards sold, *held* to be applicable to a case—that of the grant by Congress, June 3d, 1856, of alternate sections designated by odd numbers, to the State of Wisconsin for the aid of the Chicago and Northwestern Railway.

There, after the line of the railroad was located and the price of sections within six miles designated by even numbers, doubled, that is to say fixed at $2.50 per acre, and after these were offered at public sale at *that* price and remained unsold, so that thenceforth they became open to private entry at $2.50, but not at less, the line of the road was changed by joint resolution of Congress, leaving *outside* of the six mile limits certain of these even sections; the joint resolution providing that the even sections of public lands "reserved to the United States by the act of June 3d, 1856 (the original grant), along the originally located route of railroad, and along *which no railroad has been constructed, shall hereafter be sold at* $1.25 *per acre.*"

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* The Patapsco, 12 Wallace, 451.

Held, notwithstanding this provision that the "fundamental principle" above spoken of, was of so pervading a character, that although these sections, while within the six miles limit, had been offered at public sale at $2.50 and refused, they were not open to private entry now that by the change of location they were without that limit, until they had been offered for public sale at $1.25 per acre, and had been left unsold.

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

An act of Congress, approved April 24th, 1820,* laid down the following general law about the public lands:

"The price at which the public lands shall be offered for sale shall be $1.25 an acre, and at every public sale the highest bidder who shall make payment as aforesaid shall be the purchaser; but no land shall be sold either at public or private sale for a less price than $1.25 an acre; and all the public lands which shall have been offered at public sale before the first day of July next, and which shall then remain unsold, as well as the lands that shall thereafter be offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at $1.25 an acre, to be paid at the time of making such entry as aforesaid," &c.

This statute being in force as the general regulation about public lands, Congress, by an act of June 3d, 1856,† in order to aid the construction of a line of railroad from Fond du Lac, at the south end of Lake Winnebago, in the State of Wisconsin, northerly, to the north line of the said State, granted to the said State of Wisconsin every alternate section of land designated by odd numbers, for six sections in width, on each side of the road. In pursuance of a well-settled policy of the government on the subject, the price of the even-numbered sections remaining to the United States was doubled, and the act declared,

"Nor shall any of said lands become subject to private entry until the same shall have first been offered at public sale at the increased price."

* 3 Stat. at Large, 566.

† 11 Id. 20.

Statement of the case.

This land grant, by the legislature of Wisconsin, became vested in the Chicago and Northwestern Railway Company, which had, before the 3d of May, 1859, located the line of its road, so that certain lands, the subject of the controversy in this case, were within the prescribed limits. Up to that day they had never been brought into market, but upon that day, by proclamation of the President, they were offered for sale at $2.50 per acre. Not being sold, they remained subject to private entry at that sum. A change in the route of the road being desirable, Congress was asked to authorize it, and this was done by the joint resolution of April 25th, 1862.*

The first section of the resolution authorized a change of the location of the line of the railroad.

The third and fourth sections of the resolution were thus:

"SECTION 3. The Secretary of the Interior is hereby authorized to cause all even sections or parts of even sections of public land that may be brought within six miles of the new line of railroad, to be sold at the same price and in the same manner as those have been upon the originally located route. And all purchasers, or their heirs or assigns, within the six-mile limits of the said originally located route who shall be more than six miles from the new line, and who have paid the sum of $2.50 an acre, shall have the right either to exchange their locations upon the line as first established to the new line, upon the same terms, in like quantities, and in the same manner as on the line first established; or, at their option, to enter, without further payment, anywhere within the Menasha land district, in the State of Wisconsin, an additional quantity of public lands subject to private entry, at $1.25 an acre, equal to the quantity entered by them at $2.50 an acre, so that the lands originally entered by them shall *thus* be reduced to the rate of $1.25 an acre.

"SECTION 4. The even sections of public lands, reserved to the United States by the aforesaid act of June 3d, 1856, along the originally located route of railroad north of the said town of Appleton, and along which no railroad has been constructed, *shall hereafter be sold at* $1.25 *an acre.*"

* 12 Stat. at Large, 618.

Argument for the plaintiff in error.

A change in the route of the road was made, which left the lands now in question outside of the new limits. After this, but before any public offer of the lands for sale at the reduced price, one Eldred applied to the register and receiver of the local land office, and in 1865 and 1866 was allowed to enter them at the price of $1.25 per acre. The entries, however, were subsequently cancelled by the Commissioner of the General Land Office, on the ground that when they were made the lands were not subject to private entry at such minimum price, and this decision, on appeal, was affirmed by the Secretary of the Interior. On the cancellation of the entries the lands were offered at public sale at the minimum price of $1.25 an acre, and not being sold were subsequently purchased at private entry at that price by one Sexton, to whom patents were issued in 1870.

Hereupon, Eldred filed a bill in one of the State courts of Wisconsin to have Sexton declared a trustee for him, and to have a surrender of the patents, and conveyance of all Sexton's rights to him.

The court decreed against the complainant; and that decree being affirmed in the Supreme Court of the State, the case was brought here by him for review.

The sole question was whether the action, as above stated, of the Commissioner of the General Land Office and of the Secretary of the Interior was correct. If correct, it was conceded that the defendant's title, obtained subsequently, could not be impeached. If incorrect, the defendant was to be treated as a trustee holding the legal title for the plaintiff.

The solution of the question depended, of course, upon the effect to be given to the land-grant legislation, already quoted, for the benefit of Wisconsin.

Mr. J. P. C. Cottrill, for the plaintiff in error:

When and how the public lands shall become subject to private entry at the minimum price does not depend upon any mere practice of the land department of the government, or upon the "say so" of the public servants who administer

that department, but depends upon the enactments of Congress; and when these enactments have been complied with so that the public lands once become subject to private entry, they remain so unless their condition is again changed by force of law. There is no discretionary power reposed in the officers of the land department by which they can say that certain lands shall be in the market subject to private entry to-day, and that to-morrow they shall not be.

Now, confessedly, at the close of the offer of them at public sale, on the 3d of May, 1859, these lands became and remained subject to private entry at the price of $2.50. And they were thus subject to private entry, of course, at *that* price when Congress passed its explanatory resolution. Now, what does that resolution say? Simply that "they *shall* be sold at $1.25 per acre." Congress of course knew that the even sections within the six-miles limit were in the market, subject to entry at $2.50 an acre. And, having this knowledge before them, it is but respectful to that body to infer that if it had been their intention to withdraw these lands from market and not to subject them to private entry until they had again been offered at public sale at the minimum of $1.25 per acre, they could have expressed such intention in clear terms.

In the second section of the Land-Grant Act of June 3d, 1856, they did not leave it a matter of doubt or construction as to whether the even sections within the six-mile limits of the grant should become subject to private entry, by being first offered at public sale at the ordinary minimum price of $1.25 per acre, as provided by the general law, but expressly enacted that they should first be offered at public sale at the increased price.

The only change, therefore, produced upon these lands by the joint resolution was, we submit, to reduce their price from $2.50 to $1.25 per acre. In other respects they stood in the same condition and situation to which they had been brought by the force of other laws and the acts of the officers and agents of the government under those laws.

Suppose that prior to the passage of the resolution, and

while the line remained unchanged, and while the even sections within six miles of that line were in the market subject to private entry at $2.50 per acre, a person had entered a quarter section of land, and paid therefor $2.50 per acre. Now if, after the passage of the resolution and the relocation of the line, this quarter section was not within the six miles of the new line, the person would, under the third section of the resolution, be entitled to enter another quarter section at $1.25 per acre. Now, suppose that he actually entered the additional quarter section, what would be the practical result of the transaction in reference to the first entry? Certainly that the first quarter section, by virtue of the operation of the explanatory resolution, was in effect entered at private entry at $1.25 per acre.

The theory of the government in this land-grant legislation has been, and is, that the public lands within six miles of a railroad would be at least doubled in value by the location and construction of a road so near them, and that such increased value was a compensation to the government for giving the alternate sections to aid in the construction of the road. Hence the price of $2.50 per acre within the six-mile limits has always been deemed the equivalent of $1.25 without those limits. We say, therefore, that the offer of these lands at public sale at the minimum price of $2.50 an acre, while they were within the six-mile limits, was equivalent to an offer of the same at the price of $1.25 when outside of those limits. At the public offer of $2.50 per acre of lands within the six-mile limits the lands had been refused, and there was no sense in offering them, when put by the change outside the limits, at $1.25 per acre. Practically, as we say, they had been offered at that and refused. Congress so viewed the matter, and intended, we submit, that they should not be *re*offered.

Nowhere, in all our legislation in reference to the public domain, can a law be found which requires lands that have once become subject to private entry, and the price of which may afterward be changed, to be again offered at public sale, after the change in price, before they shall be subject

to private entry, or, in other words, that a mere change in price withdraws lands from market; and if any such requirement exists, it is based wholly upon the practice of the Land Office; a vicious practice as respects these lands, since it is arrayed against a positive enactment of Congress as expressed in the explanatory resolution.

Mr. S. U. Pinney, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is a fundamental principle underlying the land system of this country that private entries are never permitted until after the lands have been exposed to public auction, at the price for which they are afterwards subject to entry.

They are first surveyed, then a day is appointed for their sale by the President, which is to be kept open for two weeks. At this sale they are offered at a minimum price, and cannot be sold for less, but may be sold for as much more as any one will give, and what remains unsold at the close of such sale is subject to entry at that price.

There is an obvious reason for requiring a public sale before leaving the lands open to private entry. It is to secure to all persons a fair and equal opportunity of purchasing them, and to obtain for the government the benefit of competition in case the lands should be worth more than the price fixed by Congress. This system commenced at an early period of our history, and was perfected in 1820. For a period of twenty years, beginning with the commencement of this century, the public lands were sold on credit at not less than two dollars an acre; but the mode of selling on credit working badly, it was in 1820 abandoned, and the price reduced to $1.25 per acre.*

Since that time the great body of the public domain has been brought into market, after proper notice, at this reduced price, and, unless Congress by special act ordered otherwise, private entries have never been allowed unless

* 2 Stat. at Large, 73: 3 Id. 606.

the land applied for had been previously offered at public sale to the highest bidder at the same price. This has been the established practice of the Land Office, sanctioned by the law officers of the government, and recognized by this court as a leading feature in our system of land sales.*

The inquiry arises whether Congress intended to change this system in the new policy adopted by it, to aid States by grants of lands to build railroads. This policy is of comparatively recent date, but there is nothing that we are aware, in any of the various acts on the subject, which tend to show that it was the purpose of Congress, in its land-grant legislation, to alter the *manner* in which the public lands had been brought into market and made subject to private entry. It is true the minimum price of the lands within certain prescribed limits was doubled, on the supposition that the construction of the contemplated roads would enhance the value of the lands to such an extent that the government would be enabled to realize as much for them as if the grants had not been made, but in all other respects the general system for the disposition of public lands was preserved. It is difficult, therefore, to see how the plaintiff can succeed, unless the legislation on which he rests his title was designed to be exceptional, which we think was not the case. The grant was an ordinary one to build a road in Wisconsin, for which a change of route was desirable, after the line had been located. This change was authorized by Congress, but before the line was relocated the lands in question, being within the six-mile limit, had been, at a public land sale, offered for sale at $2.50 per acre, and not being sold, were subject to entry at that price, but not at any less sum. The location of the new route left them outside of the required distance, and legislation was necessary to take them out of the condition of lands affected by the construction of a railroad, and to restore them to the general body of the unsold lands, so that they could be sold in the same manner and at the same price that the public

* Johnson *v.* Towsley, 13 Wallace, 88; Chotard *v.* Pope, 12 Wheaton, 588; 2 Opinions of the Attorney-Generals, 200; 3 Id. 274; 4 Id. 167.

domain is usually subject to sale. This object was accomplished by the joint resolution of April 25th, 1862, which declares that "these lands should hereafter be sold at $1.25 per acre." It is contended that this declaration fixed the price absolutely, and subjected them to private entry at that price, without any further proceeding. This proposition is based on the idea that Congress intended to adopt a different rule for the disposition of these lands from that which had always obtained for the disposition of other public lands; but there is nothing in the circumstances of this legislation which tends to prove an intentional abandonment of a long-existing policy. Why make an exception in the case of these lands? There was no exigency requiring it, nor any reason to suppose that Congress had any purpose to place them on a different footing from other government lands for sale at $1.25 an acre. Such a purpose would conflict with the general land system, and disturb its harmony, and cannot be imputed to Congress in the absence of an express declaration to that effect. This system required that all lands should be brought into market, after proper notice, so as to afford competition before being subject to private entry. It is true the lands in question were once offered at public sale at $2.50 an acre, but the reason of the rule required that they should be again offered to the highest bidder, because their condition as to price had been changed, and there had been no opportunity for competition at the reduced price. Congress meant nothing more than to fix $1.25 as their minimum price, and to place them in the same category with other public lands not affected by land-grant legislation. When they were withdrawn from the operation of this legislation, and their exceptional status terminated, the general provisions of the land system attached to them, and they could not, therefore, be sold at private entry, until all persons had the opportunity of bidding for them at public auction.

It follows that the plaintiff's entries were invalid and rightly cancelled, because they were made before the lands had been proclaimed for sale at the minimum price of $1.25

an acre, and that the defendant's entries were in accordance with law, as they were located after the lands had been properly brought into market.

JUDGMENT AFFIRMED.

UNITED STATES v. GAUSSEN.

1. Under the act of March 3d, 1797, enacting that in suits against delinquent revenue officers, "a transcript *from* the books and proceedings of the treasury shall be evidence," it is not necessary that every account with any individual and all of every account, should be transcribed. An extract may be given in evidence if not garbled or mutilated—that is to say, an extract wherein credits are not suppressed, and which does not confine itself to results, or balances without details, but which is complete in itself—perfect for what it purports to represent—and which gives both sides of the account as it stands upon the books of the treasury.
2. The court, however, states that "it is not authorized to regulate the manner in which the departments shall keep their books, or to prescribe the minuteness of detail," and that the statements and details of daily business made by a collector are necessarily condensed when carried to a ledger account, and the results of many items stated in a briefer form than that in which they stood on the original entries. And it confines itself to saying that certain particular transcripts, all much alike, offered in the case, and one of which is given by the Reporter at large as an illustration of the whole, were sufficiently minute.
3. The said act of March 3d, 1797, proceeds upon the theory that the officers of the Government shall make up the account of every revenue officer, that it shall adjust the same on its books, and that the account thus stated and adjusted shall stand as and for the sum for which such officer shall be liable to it. The statement is *prima facie* evidence only.

   A transcript of the accounts rendered by a collector himself (when not partial or fragmentary), is evidence against the surety on his official bond.

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

An act of March 3d, 1797,* enacts:

"SECTION 1. That when any revenue officer . . . shall neglect or refuse to pay into the treasury the sum or balance reported to be due to the United States upon the adjustment of his ac-

* 1 Stat. at Large, 512.

counts, it shall be the duty of the comptroller to institute suit for the recovery of the same, adding to the sum stated to be due, on such account, the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment obtained.

"SECTION 2. That in every case of delinquency, where a suit has been or shall be instituted, a transcript *from* the books and proceedings of the treasury, certified by the register and authenticated under the seal of the department, shall be admitted as evidence, and the court trying the cause shall be thereupon authorized to grant judgment and award execution accordingly.

"SECTION 4. That in suits between the United States and individuals, no claim for a credit shall be admitted upon trial but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed."

This act being in force, the United States sued Gaussen, executor of Elgee, in the court below, on a bond given in 1845, by Thomas Barrett, as collector of the customs at the port of New Orleans, in which bond Elgee was a surety. The declaration filed by the government referred to a transcript, which was annexed to and made part of it, from the books of the treasury, containing eight certain quarterly reports, numbered 5688, &c., of the first auditor, upon the quarterly accounts of Barrett, as admitted and certified by the comptroller and commissioner of customs, and "statements of differences" thereon; and *also* copies of quarterly accounts current rendered by Barrett, the collector, himself. Each class of things covered the whole term that Barrett was in office.

The report of the first auditor and the statement of differences thereon were, as respected the report numbered 5688, in this form; the reports bearing the other numbers being in form very similar:

[No. 5688.]

"TREASURY DEPARTMENT,
FIRST AUDITOR'S OFFICE, June 20th, 1845.

"I have examined and adjusted the accounts of Thomas Barrett, collector of the customs for the district of New Orleans,

Statement of the case.

State of Louisiana, under his bond, dated July 6th, 1844, commencing on the 25th day of July, and ending on the 30th day of September, 1844, and find that he is chargeable with the following sums, viz.:

To duties on merchandise to September 30th, 1844,	$168,645 76	
duties on railroad iron imported in 1836, *but the duties not credited by the collector at that time*,	2,502 24	
		$171,148 00
To duties on tonnage, to September 30th, 1844,		171 75
light money collected, " "		174 37
marine hospital money collected, to September 30th, 1844,	549 55	
Deduct commissions thereon, at one per cent.,	5 50	
		544 05
interest received on goods in store, to September 30th, 1844,	85 30	
interest received on bonds for duties on railroad iron,	662 44	
		747 74
amount received for fines, penalties, forfeitures, on account of Thomas Gibbes Morgan, late collector, collected and retained by him and placed to the credit of the United States, in account now stated, and for which said Morgan will receive credit,		16 21
		$172,802 12

"I also find that he is entitled to the following credit, viz.:

By payments to inspectors, &c., to September 30th, 1844,		$18,844 81
contingent expenses paid, " " "		783 46
disbursements for the revenue cutter Woodbury, to September 30th, 1844,		3,956 97
" " " " Vigilant, " "		48 00
" " " boats, " "		840 00
" in relation to appraisements, " "		1,177 62
balance of public store account, " "		716 25
debentures paid on merchandise exported, " "		15,994 45
fines, &c., costs of suits, " "		542 19
duties on merchandise refunded to correct errors, " "		672 15
duties on tonnage refunded to correct errors, " "		101 33
amount paid for extra clerk hire in the office of the naval officer,		368 00
amount paid George Royster, collector of Têche, per order of the comptroller of the treasury, dated July 23d, 1844, and with which said Royster has been debited, per report No. 5387,		200 00
amount paid Willis H. Arnold, collector of Pearl River, per order of the comptroller of the treasury, dated 7th August, 1844, and with which said Arnold has been debited, per report No. 5324,		75 24
By three months' salary—		
To the naval officer, to September 30th, 1844,	$62 50	
" surveyor of New Orleans, to September 30th, 1844,	62 50	
" surveyor of Bayou St. John, " "	62 50	
" surveyor of Port Pontchartrain, " "	62 50	
" surveyor of Madisonville, " "	62 50	
By three months and 17 days' salary to the surveyor of Lafayette, from 14th June to 30th September, 1844, at $250 per annum,	74 17	
		386 67
amount of warrant No. 3152, in favor of the treasurer, dated September 30th, 1844,		83,164 68
commissions on $127,816.22 at one per cent.,		1,278 16
And that the balance due to the United States on the 1st day of October, 1844, amounted to,		43,652 16
		$172,802 12

Statement of the case.

"As appears from the statement and accounts herewith transmitted for the decision of the comptroller of the treasury thereon.

(Signed) "WILLIAM COLLINS,
"First Auditor.

"To JAMES W. MCCULLOH, ESQ.,
First Comptroller of the Treasury."

Auditor's balance is,	$43,652 16
Add this sum, amount of difference, to the debit of the collector, as per corrected statement,	10 40
Balance due to the United States,	$43,662 56

"COMPTROLLER'S OFFICE.

"Admitted and certified to the above as corrected 7th day of August, 1845.

(Signed) "J. W. MCCULLOH,
Comptroller.

"R. H. GILLETT, ESQ.,
Register of the Treasury."

Thomas Barrett, under his bond, dated July 6th, 1844, in account with the United States.

DR.

To duties on merchandise, to September 30th, 1844,	$168,645 76	
duties on railroad iron imported in 1836, but the duties not credited by the collector at that time,	2,502 24	$171,148 00
duties on tonnage, to September 30th, 1844,		171 75
light money collected, " "		174 37
marine hospital money collected,	549 55	
Deduct commission thereon, at one per cent.,	5 50	544 05
interest received on goods in store, to September 30th, 1844,	85 30	
interest received on bonds for duties on railroad iron,	662 44	747 74
amount received for fines, penalties, and forfeitures on account of Thomas Gibbes Morgan, late collector, collected and retained by him and placed to the credit of the United States, in account now stated, and for which said Morgan will receive credit,		16 21
		$172,802 12

CR.

By payments to inspectors, &c., to September 30th, 1844,	$18,844 81
contingent expenses paid, " "	783 46
disbursements for the revenue cutter Woodbury, to September 30th, 1844,	3,956 97
" " " " Vigilant, " "	48 00
" " " boats, " "	840 00
" in relation to appraisements, " "	1,177 62
balance of public store account, " "	716 25
debentures paid on merchandise exported, " "	15,994 43
fines, &c., costs of suits, " "	542 19
duties on merchandise refunded to correct errors, " "	672 15
	$43,575 88

Statement of the case.

Amount brought forward,		$43,575 88
To duties on tonnage refunded to correct errors, to September 30th, 1844,		101 33
amount paid for extra clerk hire in office of the naval officer,		368 00
amount paid George Royster, collector of Têche, per order of the comptroller of the treasury, dated July 25th, 1844, and with which said Royster has been debited, per report No. 5387,		200 00
amount paid Willis H. Arnold, collector of Pearl River, per order of the comptroller of the treasury, dated 7th August, 1844, and with which said Arnold has been debited, per report No. 5324,		75 24
By three months' salary—		
To the naval officer, to September 30th, 1844,	$62 50	
" surveyor of New Orleans, to September 30th, 1844,	62 50	
" surveyor of Bayou St. John, " "	62 50	
" surveyor of Port Ponchartrain, " "	62 50	
" surveyor of Madisonville, " "	62 50	
By three months and 17 days' salary to the surveyor of Lafayette, from 14th June to 30th September, 1844, at $250 per annum,	†63 87	
	*64 17	
		†376 37
		*386 67
amount of warrant No. 3152, in favor of the treasurer, dated September 30th, 1844,		83,164 68
commission on †$127,805.82 [*$127,816.22], at one per cent.,		†1,278 06
		*1,278 16
balance due the United States,		†43,662 56
		*43,652 16
		$172,802 12

"TREASURY DEPARTMENT,
FIRST AUDITOR'S OFFICE, June 19th, 1845.

"Examined and stated by—
(Signed) "J. COLGATE."

"COMPTROLLER'S OFFICE, July 21st, 1845.
(Signed) "J. BARTRAM WORTH."

W. A. W.

[*Statement of Differences.*]

The balance due to the United States, per his account ending September 30th, 1844,			$39,507 50
Add amount overcharged for payments to inspectors, &c., viz.:			
Overpaid N. C. Snethen for making other articles than spirits, cordials, wines, &c. [†will be all'd on next qr. ac.] (red),	$653 70		
Overpaid S. Boyer, weigher, his fees for weigher, amt'g to $440.61, charged $951.62,	511 01	$1,164 71	
Add amount erroneously charged to contingent expenses:			
Amount paid J. Royalls, bell-keeper of new marine hospital,	$75 00		
" " New Orleans Republican, advertising proposals for ditto,	12 50		
" " J. H. Dakins, architect, bill of drawings for ditto,	75 00		
" " Graham & Williams's bill, printing specifications of builder's work,	40 00		
" " New Orleans Republican, advertising postponement of proposals,	11 00	‡213 50	
		$1,378 21	$39,507 50

* Erased. † Interlined in red. ‡ See *infra*, p. 207, note ‡.

Statement of the case.

Amount brought forward, ...		$1,378 21	$39,507 50
These bills are chargeable in account for building new marine hospital [†which is now being stated in the Auditor's Office], (red).			
Add amount paid, two bills, New Orleans Republican, advertising unclaimed goods; must be paid out of proceeds of sales, ...	No. 7, 700 00 " 11, 580 00	‡1,280 00	
Add amount paid D. W. Noble's bill, subscription to daily New Orleans Herald, ...	5 00		
Add amount paid J. Beardue's bill, subscription to N. O. Cornell, Bulletin, ...	12 00	‡17 00	
[†Payable out of official emol'ts], (red).			
Add amount paid Whiting & Shimmerhorn's bill, carriage hire, chargeable to lighthouse account, ...		‡7 50	
Add amount charged for payment to G. W. Lewis, as inspector at Natchitoches; a bill receipted by Lewis himself, accompanied with the usual affidavit, is required, ...		‡822 00	
Add amount paid R. Coudon's bill, keeping a horse for the captain of night watch, disallowed, ...		‡15 00	
Add amount of Bailie Peyton's (dist. att'y) bill of fees, No. 5, $459 00 And his bill of fees, No. 17; judge's certificate of probable cause wanted, ...	255 00	‡714 00	
Add amount overpaid D. Clark, surveyor of Lafayette, from 29th [*appointed 14th] June, 1844, date of oath, to 30th September, 1844, is three months and [*seventeen] two days, at $250 per annum, .		‡‡170 13 *159 83	
Add amount overcharged for disbursements for revenue cutter Woodbury, viz.:			
amount paid Joseph Dyer's bill, for meat and vegetables, &c., disallowed, ...	26 28		
amount paid Hitchcocks & Brothers' bill, for beef, bread, groceries, &c., disallowed, ...	104 71		
amount paid P. Gernon's bill, for arresting deserters, disallowed, ...	50 00		
amount paid J. D. Usher, third lieutenant, for month of September, and also cnt'd in pay-roll for September, and charged in account for fourth quarter, 1844, . . .	65 63		
amount charged per order of Captain Foster, in favor of Noel Barrett; not receipted, ...	20 00	266 62	
Add amount charged for payment to deputy collector of Natchitoches; payable [*out of official emoluments]. Revenue, as per order of secretary, 10th September, 1844, and will be allowed in next acc't,		630 00	
Add amount overcharged to public store account, viz.:			
amount overpaid W. H. Wilder, storekeeper, from 25th July to 30th September, 1844. (Authority wanted for increase of pay), ...	$74 23		
amount of extra pay to J. E. Quere, late storekeeper, disallowed, ...	113 66		
amount of extra pay to E. Wiltz, deputy storekeeper, disallowed, ...	93 00		
amount overpaid E. Wiltz, deputy storekeeper, for third quarter, 1844, ...	92 00		
Add subscription to Louisiana Courier, disallowed, . . .	12 00	384 89	
		$5,685 35	$39,507 50

* Erased. † Interlined in red. ‡ See *infra*, p. 207, note ‡.

Statement of the case.

Amount brought forward, ...	$5,685 35	$39,507 50
Add amount charged for treasury note and interest; will be brought to his credit in the next statement of his account, ...	565 71	
Add commissions overcharged in this account now stated, . . .	†31 28	
	*31 19	
		†6,282 34
		*6,271 94
		*45,779 32
		†45,789 92
Deduct amount credited for moneys received on account of G. Dorsey, late collector (must be settled between them), ...	$51 08	
Deduct amount erroneously credited, in account now stated, for deposits to secure duties, ...	2,076 28	
		2,127 36
		†$43,662 56
		*43,652 16

The quarterly account rendered by Barrett, during the quarter to which the above copied report and statement of differences applied, was in this form, the other quarterly accounts being essentially like it:

The United States in account current with Thomas Barrett, collector of the customs for the district of New Orleans, from the 25th of July to the 30th of September, 1844, *in the third quarter of the year* 1844.

DR.

1.	To payments of debentures, ...	$15,994 43
2.	" to inspector, weigher, measurer, marker, and gauger, . . .	20,009 52
3.	" to revenue boats and boatmen, ...	840 00
4.	" *on account of contingent expenses*, ...	4,394 65
5.	" *payments* to clerks in the naval office, ...	368 00
6.	" naval officer and surveyors, for salary, ...	546 50
7.	" *payment* on account United States revenue cutter Woodbury,	4,223 59
8.	" on account of appraiser's office, ...	1,177 62
9.	To amount refunded to correct errors in duties on merchandise, . . .	773 48
10.	To payment to deputy collector, Natchitoches, ...	630 00
11.	" to collector at Têche, ...	200 00
12.	" to collector at Shieldsborough, ...	75 24
13.	" on account United States schooner Vigilant, ...	48 00
14.	" on account of public stores, ...	1,101 14
	To balance, ...	121,382 63
		$171,764 80

CR.

	By amount of duties on goods imported this quarter:	
	In vessels of the United States, ...	$152,252 90
	" foreign equalized, ...	14,156 10
	" other foreign, ...	462 23
	On inland importations, ...	1,774 53
		$168,645 76
A.	Less this amount unsettled entries, belonging to this quarter, the deposits on which appear below, ...	6,896 72
		$161,749 04

* Erased. † Interlined in red.

Statement of the case.

Amount brought forward,		$161,749 64
By amount of deposits above mentioned, made to secure duties on entries belonging to this quarter,		8,973 00
By amount of duties on tonnage,	$185 55	
B. By amount of light money,	160 57	
		346 12
By amount of marine hospital dues,	$549 55	
C. Less commission, one per cent.,	5 50	
		544 05
D. By amount of interest received,		85 30
E. By amount received on account of G. Dorsey, late collector,		51 08
F. By amount on account fines, forfeitures, and penalties, this sum unpaid and due to T. G. Morgan, late collector,		16 21
		$171,764 80

Treasurer of the United States.

DR.

To remittances, as follows:	
Treasury notes and interest cancelled and returned to Secretary of Treasury,	$565 61
In certificates of deposits in Bank of Louisiana,	80,000 00
To commissions on remittances and payments to officer of the customs, &c., $129,624 85,	1,309 34
To balance,	39,507 58
	$121,382 63

CR.

By balance brought down from above account,	$121,382 63
	$121,382 63
By balance brought down,	$39,507 58

THOMAS BARRETT,
Collector.

COLLECTOR'S OFFICE,
NEW ORLEANS, 30th September, 1844.

Indorsed: "The United States in account current with Thomas Barrett, from 25th July to 30th September, 1844. E."

In one of the reports of the auditor there was an entry thus:

"I also find that he is entitled TO CREDIT, as follows, by amount of the following sums:

Balance of his account of official emoluments from 1st July, 1844, to 12th October, 1845, as per report No. 6771, ... $16,529 75"

There was no report No. 6771 in evidence.

The whole of these records (that is to say, reports of the first auditor, the statement of differences, and the quarterly accounts current of Barrett himself), were attached together and certified by one certificate of the register and

by one impression of the seal of the treasury, to be true copies of the said reports of the first auditor, of the said statement of differences, and of the said quarterly accounts current of Barrett.

On the trial the government offered as evidence the copies of the reports of the First Auditor, numbered respectively 5688, &c., and also of the statements of differences thereon, "all of said papers," said the bill of exceptions, "being fastened together as a whole and embraced in one certificate; all of which more fully and at large appears by the said transcript of said report and adjustment of account filed in this cause with the plaintiff's petition therein."

The defendant, "while making no objection to the form or substance of the certificate by which the authenticity of such transcript was attested," objected to the same on the grounds—

"That the act of the 3d of March, 1797, which makes transcripts from the books and proceedings of the treasury evidence, only applies to public defaulters in terms, and, being in derogation of common right and penal in its character, cannot be extended by construction so as to make such transcripts evidence against the sureties of such defaulters or the legal representatives of deceased sureties.

"That the said reports, which, together with the quarterly returns, constituted an entire document (said reports and returns being fastened together and authenticated by one and the same certificate), were fragmentary, incomplete, and partial.

"That the reports and statements of differences charged Barrett with gross sums and balances without any detail or exhibition of the items of which they were composed, as, for instance, in report No. 5688, a gross sum of $2502.24 is charged against him for 'duties on railroad iron imported in 1836, and not credited by the collector at the time.'*

"That it disallowed gross sums, and subtracted gross sums on and from the credit side of Barrett's account without any detail or specification of the items disallowed. That, *ex. gr.*, by comparing quarterly return for the third quarter of 1844 with

* See *supra*, p. 200, seventh and eighth lines from top, in Italics.—REP.

report No. 5688 and the statement of differences, it will appear that Barrett claimed credit for $4394.65 for contingent expenses * He was allowed only $783.46† in the report, $3611.19 being disallowed, but the detail of the items disallowed, as appeared by the statement of differences, amounts to only $3239.13,‡ and there is no detail or specification of the balance of the $3611.19 disallowed, nor is there any information or explanation in the transcript of what composes that balance, or why it was disallowed.

"And further, that the said reports and statements of differences did not contain or exhibit the accounts as they were presented to and acted upon by the accounting officers of the department, nor their action nor their proceedings relative thereto."

The court held the objections good, and rejected the evidence.

The government afterwards offered in evidence certified copies of the several quarterly statements of accounts rendered by Barrett himself to the United States, "which said certified copies aforesaid were and are on file in the suit, having been filed with the petition and contained in the said document, marked and already made part of this bill of exceptions."

This evidence was objected to on the ground that the said statement was not legal proof of the existence of a debt by Barrett, did not tend to prove the same, and was not competent evidence thereof, and that the same were fragmentary and incomplete. This evidence was excluded, and the plaintiff excepted to the ruling.

Verdict and judgment having gone for the defendant, the government brought the case here.

Messrs. J. M. Carlisle and J. D. McPherson, in support of the ruling below:

1. *The reports of the auditor and accompanying statements of*

* See p. 204, twenty-second line from bottom, in Italics.

† See *supra*, p. 200, about twenty-second line from top, in Italics.

‡ These figures, $3239.13, are the total of the items marked with a ‡ before them on p. 202 (at bottom) and 203.

differences were not admissible in evidence separately from the quarterly returns.

Not everything which a treasury officer chooses to write upon the books of the treasury thereby becomes evidence under the act of March 3d, 1797. Those matters of which the treasury officers have official knowledge, and which upon such knowledge they have recorded in the books of the treasury, thereby become evidence. But when those officers ascertain facts by evidence, that evidence becomes part of their proceedings, and their conclusions, apart from the evidence upon which they are founded, are not evidence.*

In the present case the auditor's reports contained debits of large sums received as duties upon imports by the collector at New Orleans—a matter of which the auditor had no official knowledge—and although annexed to the transcript containing those reports there were copies of the returns containing the evidence on which those debits were entered against the collector, the attorney for the plaintiff sought to introduce the auditor's reports without the said returns. When, for instance, the auditor, in settlement No. 5688, certified that he had examined the accounts of Thomas Barrett, collector, &c., and found he was chargeable with $168,645.76 duties on merchandise to September 30, and with $2502.24 "duties on railroad iron imported in 1836, but such duties not credited by the collector at that time," the accounts so examined, as well as the result of the examination, were part of the proceedings. The report of the auditor purports to find its facts in the accounts rendered by Barrett, and had it been admitted in evidence the defendant would have been put to proof that the duties accrued in 1836 had not been received by him within the period covered by the bond. Whereas, had the accounts themselves been put in evidence as part of the proceedings, it would have been found that no such amount was acknowledged therein, and that the "finding" of the first auditor was without any evidence to support it.

* United States *v.* Jones, 8 Peters, 375, 381.

With each report of the auditor is a "statement of differences," purporting to show in what particulars the amount stated by the auditor differs from that rendered by the collector. It begins by setting down "the balance due the United States per his account ending" at such date, and this balance is increased by the addition of such sums as the collector has taken credit for, but which the auditor has refused to allow. It is only by comparing this statement with the original account rendered that the matters of difference between the parties can be understood. And any paper which was passed upon by the auditor and is necessary to a correct understanding of the action of the auditor, is a part of the proceedings.

For example: In the report already cited, No. 5688, the collector is credited with contingent expenses $783.46,* and in the statement of differences it is stated that $3239.13† have been disallowed, thus accounting for $4022.59 as if it were the whole amount charged by the collector; but on looking at his account (on page 204), it is seen that he has charged for contingent expenses $4394.65, and the auditor has thus failed to consider and pass upon ($4394.65 less $4122.59) $372.06, either by allowance or disallowance.

This example, taken from the bill of exceptions, was brought to the notice of the court when the transcript was excluded.

2. *The quarterly returns were not admissible in evidence without the auditor's reports.*

The defendant is entitled to the benefit of all credits allowed by the accounting officers. But as credits claimed, if not admitted by the accounting officers, must be proven, then it follows that to admit the quarterly returns without the auditor's reports would be to deny the defendant the benefit of all credits given him at the treasury, and put him to proof of all the credits anew. This would have been

* *Supra*, p. 200, about twenty-second line from top, in Italics.

† These figures, $3239.13, as already said, are the total of the items marked with a ‡ on pp. 202 and 203.

a great hardship and one which no court would impose, especially if, as stated in the bill of exceptions, the reports thus omitted contained credits which do not appear in the quarterly returns, but do appear first in the settlements made after the collector's death, and which with other settlements the United States declined to offer with the quarterly returns.

3. *But if the plaintiff had offered in evidence the complete transcript of which they offered parts, it would not have been admissible.*

It is on its face fragmentary and imperfect, and it moreover contains items not within the scope of the liability of surety on whose bond the suit was brought. We assume that under the act of 1797, which alone makes such a transcript evidence, the transcript must contain, 1st, all the proceedings; 2d, a decision either of allowance or disallowance of all claims to credit, which have been submitted to the accounting officers; 3d, debits manifestly and clearly not within the scope of the account settled and adjusted.

Now in this case,

1. *The transcript was incomplete.*

In one of the settlements is a gross amount brought into the account as

"Balance of his account of official emoluments from 1st July, 1844, to 12th October, 1845, as per report No. 6771, $16,529.73."*

Such a transcript was rejected in *United States* v. *Paterson*.† A "balance" implies debits and credits, but the report No. 6771, in which they are contained, is not produced; and the transcript thus on its face is fragmentary and imperfect, and shows that there has been a settlement with the collector which is not contained in the transcript. It is unimportant that the unproduced settlement resulted in a credit. There are debits in it, as appears by the result being a "balance," and the mischief is the same whether debits be unjustly charged, or credits be unjustly withheld.

* See *supra*, p. 205, seventh line from bottom. † 1 Gilpin, 44.

2. In the instance cited on p. 209, from report No. 5688, the collector had claimed credit for large disbursements on account of contingent expenses. Portions of these were allowed in gross, and other portions rejected, and still other portions are not specially either allowed or rejected.

The act of 1797 declares that no credit, not allowed by the accounting officer, shall be allowed on the trial, unless it has been presented to the accounting officer, "and *disallowed*," or has not been presented by reason of accident or absence from the United States. It results from this provision that the officer is entitled to the decision of the accounting officers on every item, and this court so ruled in *United States* v. *Jones*.*

In these cases where the accounting officers have failed to account for more than a small part of the difference between the amount charged by the collector and that admitted by the auditor, it is manifest that, in order to obtain credit for the part rejected, the defendant must prove the whole, for as he cannot identify the part admitted, if he prove any amount less than the whole, the part already admitted will be deducted from it, and he will lose the balance.

3. There are debits in the transcript not within the scope of the liability sought to be enforced. One is seen in the report No. 5688, where there is a charge of duties on railroad iron imported in 1836, and as we understand the entry, paid in 1836, but "not credited by the collector at that time."

A transcript containing such an item is not admissible in evidence against a surety on a bond dated in 1844.

Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice HUNT delivered the opinion of the court.

The act of March 3d, 1797, proceeds upon the theory that the officers of the United States shall make up the account

* 8 Peters, 375, 382.

of every revenue officer, that it shall adjust the same on its books, and that the account thus stated and adjusted shall stand as and for the sum for which such officer shall be liable to the government. This no doubt is subject to correction by such competent evidence as may be produced. In other words, the statement is *primâ facie* evidence only, not absolute and conclusive.

In furtherance of this idea it is the duty of the comptroller at once to institute suit for the recovery of the balance thus found and stated. A second result, and one indispensable to the existence of the theory, is, that the books shall be evidence of the truth of the amounts thus stated and declared to be due to the United States. The act, therefore, provides that a transcript from these books and proceedings shall be admitted in evidence, and that, thereupon, the court is authorized to proceed to judgment and execution.

In the present case "copies of the report of the first auditor," numbered respectively 5688, &c., and eight in number, were offered in evidence. The bill of exceptions states that no objection was made to the manner in which they were certified.

The suggestion that the act is applicable to a defaulting principal, and not a surety, is not pressed and need not be considered.

The objection that the reports were fragmentary and incomplete is not sustained by the facts. As presented in the record each report is complete and perfect in itself. Each report contains all upon the subject during the time that it purports to represent. In the aggregate they cover the whole period of Barrett's service. The statute says that a transcript *from* the books shall be admitted as evidence. A transcript or a transcribing is substantially a copy. A copy from the books, and not of the books, shall be admissible in evidence. An extract from the books, a portion of the books, when authenticated to be a copy, may be given in evidence. While a garbled statement is not evidence, or a mutilated statement, wherein the debits shall be presented and the credits suppressed, or perhaps a statement of results

only, it still seems to be clear that it is not necessary that every account with an individual, and all of every account, shall be transcribed as a condition of the admissibility of any one account. The statement presented should be complete in itself, perfect for what it purports to represent, and give both sides of the account as the same stands upon the books.*

Nor is the objection that the reports charge Barrett with gross sums and with balances without giving details, sustained by the facts.

The reports are made up with much particularity, and give the items on each side of the account. It is not a case of a certificate of balances merely. We are not authorized, however, to regulate the manner in which the departments shall keep their books, or to prescribe the minuteness of the detail. The items in these reports are manifestly made up from statements and details of the daily business furnished by the collector. They are necessarily condensed when carried to a ledger account, and the results of many items or of some considerable period of time, may be stated in a briefer form than they stood upon the original entries. The means of particular information are open to either party. We see no objection on this ground to the evidence now presented, and are of the opinion that there was error in its exclusion.

There was error also in excluding the evidence of the accounts rendered by Barrett, the principal. They seem to be complete, not partial or fragmentary as alleged, and being statements made by him to the government in the performance of his official duty, they are evidence against the party making them not only, but his sureties as well, and against third persons in privity with him. The authorities place the rule upon the ground—1st, that the entries made are against the interest of the party making them; and 2dly, that a surety is bound by the acts and declarations of his

* Gratiot *v.* United States, 15 Peters, 356, 370; Hoyt *v.* United States, 10 Howard, 109, 132; United States *v.* Eckford, 1 Id. 250.

principal, being within the scope of the business, as a part of the *res gestæ*.*

JUDGMENT REVERSED, AND A NEW TRIAL ORDERED.

INSURANCE COMPANY *v.* DUNN.

1. Where, after a suit has been properly removed from a State court into the Circuit Court of the United States, under the act of March 2d, 1867, which allows such removal, in certain cases specified by it, "at any time before the final hearing or trial of the suit," the State court still goes on to adjudicate the case, against the resistance of the party who got the removal, such action on its part is a usurpation, and the fact that such a party has contested the suit in such State court, does not, after a judgment against him, on his bringing the proceedings here for reversal and direction to proceed no further, constitute a waiver on his part, of the question of the jurisdiction of the State court to have tried the case.
2. The language above quoted—"at any time before the final hearing or trial of the suit"—of the act of March 2d, 1867, is not of the same import as the language of the act of July 27th, 1866, on the same general subject—"at any time before the trial or final hearing." On the contrary, the word "final" in the first-mentioned act, must be taken to apply to the word "trial" as well as to the word "hearing." Accordingly, although a removal was made after a trial on merits, a verdict, a motion for a new trial made and refused, and a judgment on the verdict, yet it having been so made in a State where by statute the party could still demand, as of right, a second trial, *held*, that such first trial was not a "final trial" within the meaning of the act of Congress; the party seeking to remove the case having demanded and having got leave to have a second trial under the said statute of the State.

ERROR to the First Judicial District Court of Hamilton County, Ohio; the case being thus:

The Judiciary Act of 1789,† thus enacts:

"If a suit be commenced in any State court by a citizen of the State in which the suit is brought against a citizen of another

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* See 1 Phillips on Evidence, 4th Am. ed., p. 307, and note, also pp. 525, 526; Plaxton *v.* Dare, 10 Barnewall & Creswell, 17; Middleton *v.* Melton, 10 Id. 317.

† 1 Stat. at Large, 79.

State, . . . and the defendant shall *at the time of entering his appearance* in such State court file a petition for the removal of the cause for trial into the next Circuit Court, to be held in the district where the suit is pending, &c., . . . it shall then be the duty of the State court . . . to proceed no further in the cause."

Then came an act of July 27th, 1866.* It was thus:

"If in any suit . . . in any State court by a citizen of the State in which the suit is brought against a citizen of another State, . . . a citizen of the State in which the suit is brought is or shall be a defendant, and if the suit, so far as relates . . . to the defendant who is the citizen of a State other than that in which the suit is brought, is or has been instituted or prosecuted for the purpose of restraining or enjoining *him*, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then, and in every such case, . . . the defendant who is a citizen of a State other than that in which the suit is brought, may, *at any time before the trial or final hearing of the cause*, file a petition for the removal of the cause as against him into the next Circuit Court of the United States to be held in the district where the suit is pending, . . . and it shall be thereupon the duty of the State court to . . . proceed no further in the cause as against the defendant so applying for its removal."

Finally came an act of March 2d, 1867.† Its title is,

"An act to *amend* an act entitled 'An act for the removal of causes in certain cases from State courts,'" approved July 27th, 1866.

It runs thus:

"*Be it enacted*, That the act entitled '*An act for the removal of causes in certain cases from State courts*,' approved July 27th, 1866, be and the same is hereby amended as follows: That where a suit may hereafter be brought in any State court, in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit, stating

* 14 Stat. at Large, 306. † Ib. 558.

that he has reason to and does believe that from prejudice or local influence he will not be able to obtain justice in such State court, may, *at any time before the final hearing or trial of the suit*, file a petition in such State court for the removal of the suit into the next Circuit Court of the United States, to be held in the district where the suit is pending, . . . and it shall be, thereupon, the duty of the State court to . . . proceed no further in the suit."

Each of these three acts enacts that after the case is removed, in the way which they respectively provide, into the Circuit Court of the United States, it shall *there* proceed in the same manner as if it had been brought in that court by original process.

These statutes being in force, Mrs. Dunn, widow and administratrix of John Dunn, sued the Home Life Insurance Company of Brooklyn, in one of the courts of common pleas of Ohio, on a policy of insurance for $2000 on her husband's life, and obtained a verdict against the company. The company moved to set aside the verdict and for a new trial. But upon consideration the court overruled the motion; and it was "therefore considered by the court that the plaintiff recover her damages herein assessed, and the costs to be taxed."

This, of course, in any court proceeding in the course of the common law, would have been the end of all "trials," or of other relief to the insurance company, except such as it might have provided for itself through writ of error.

But the law of Ohio respecting second trials is somewhat peculiar. The matter does not, as at common law, and in most of the States, rest in the discretion of the court trying the case, but rests in the option of the suitor himself. One of the statutes of the State,* known as the Second Trial Act, thus enacts:

"SECTION 1. A second trial may be *demanded and had* in any civil action which has been . . . instituted in any court of com-

* "An act to relieve District Courts, and to give greater efficiency to the judicial system of the State," passed April 12th, 1858, Swan & Critchfield's Statutes, 1155.

mon pleas in this State, in which said court has original jurisdiction, and in which either party has the right by law to demand a trial by jury . . . and *after a judgment or final order has been rendered*, upon the terms and in the manner hereinafter provided.

"SECTION 2. Any person desirous of such second trial . . . shall at the term of the court at which judgment was rendered, enter . . . into an undertaking within the time hereinafter limited, with security . . . payable to the adverse party in such sum as may be fixed by the court, and conditioned to the effect that the party obtaining such second trial shall abide and perform the order and judgment of the court, and pay all moneys, costs, and damages which may be required or awarded against him consequent upon such second trial."

Under this statute of the State, the insurance company after trial and judgment demanded and had leave to have "a second trial." The company gave a bond in $4000, conditioned that it should abide and perform the judgment of the court, and pay all moneys which might be required of or awarded against it consequent upon a second trial by the Court of Common Pleas of Hamilton County.

At the next term of the court the company—assuming that, notwithstanding the trial already had, they had (in virtue of their demand for a second trial and their leave to have it) not yet had a "*final* hearing or trial"—filed a petition in the Court of Common Pleas, where the case had been tried, to remove it into the Circuit Court, under the last of the above-quoted acts of Congress, the act, namely, of 1867, quoted on pages 215–16. And the Court of Common Pleas ordered the removal, and that no further proceedings should be had before *it*. A transcript of the record was accordingly filed in the Circuit Court, and the cause docketed there. Mrs. Dunn, by her counsel, now appeared in that court and moved to dismiss the case, as not having been one for removal under any of the acts of Congress.

The ground of her motion apparently was that the petition for removal had been too late; that it should have been *before* the trial in the Common Pleas; that under the act of 1789 a defendant desiring to remove was bound to

petition for a removal, if he wanted one, "at the time of entering his appearance;" that under that of 1866, "at any time *before the trial* or final hearing of the cause," and that though in the act of 1867 there was a slight transposition of words, so as to read "at any time before the *final* hearing or *trial* of the suit," the meaning in both acts was the same, the words "final hearing" referring to proceedings in equity, and the word "trial" to a proceeding at common law; and even if this were not so, that the case was the same, for that the company had had a final trial; that Congress could not be supposed to have had reference to the very peculiar local law of Ohio, about trials, of which perhaps not ten of its members had ever heard, but was to be taken to have referred to the general system of the common law, which came to us all by inheritance, and still so widely prevailed over the nation; that thus viewed the company had had a final trial; for it had had a trial on merits before a jury, it had moved for and it had been refused a new trial, and a judgment had been entered against it, which was now in existence, a lien upon its property; that the words "final trial" were used in contradistinction to the words "interlocutory trial," and this trial not having been interlocutory was final. Further than this, that if the application for removal, after a second trial was taken, was in time to be within the terms of the act of March 2d, 1867, then that the act violated the seventh amendment to the Constitution, which reads thus:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

It was said that one branch of this suit was a suit at common law, and that the amount in controversy exceeded twenty dollars; and that all of the facts in the case were tried by a jury, and their verdict was affirmed before the case was removed into the Circuit Court for these same facts

to be re-examined there, for a cause and under a proceeding not known to the common law, nor within any of its rules.

It was said further, that the law of March 2d, 1867, was unconstitutional for another reason, to wit, that it destroyed the second trial bond that had been given in the State court to secure the claim being litigated, without the process of law, and without consideration or any equivalent bond being substituted; that the condition of the bond to pay a judgment to be obtained at a second trial in the Court of Common Pleas of Hamilton County, Ohio, was not answered by a judgment obtained in the Circuit Court, and that the sureties on the bond would not be liable to answer to such a judgment.

But the Circuit Court was not of this view; and so, overruling the motion to dismiss, it retained the cause upon its docket.

Mrs. Dunn then filed an amended declaration in the Circuit Court, and that was now pending there.

She now went back into the State courts, and by petition for error filed in the *District Court* of Hamilton County (a court superior to the Common Pleas, and having in general jurisdiction to review its orders*), prayed for a reversal of the order which the Common Pleas had made to remove the case into the Circuit Court, and that it should be no further proceeded in before *it*. The insurance company opposed the application.

The District Court, however, did reverse the order; being of opinion that the petition for removal, in being filed after the trial, had not been filed in accordance with any act of Congress, and that the removal was not authorized by law.

The insurance company then took the question of the right of removal from the District Court to the Supreme Court of the State. That court, like the District Court, held—the bench being unanimous—that the removal, in being made *after* the trial, was unauthorized by law and void. It said:

* Code, §§ 512, 513; Swan & Critchfield's Statutes, 1099.

"This act of March 2, 1867, is an amendment of the act of July 27, 1866, in which the language used is, that the petition may be filed 'at any time before *the trial* or *final hearing* of the cause.'

"We have no doubt the terms 'trial' and 'final hearing' ought to have the same meaning in both acts, and that their transposition in the amendatory act was merely accidental.

"The terms, it seems to us, were intended to embrace actions at law and suits in equity—the word 'trial' having reference to an action at law, and the words 'final hearing' to a suit in equity; and that by 'the final hearing or trial of the suit,' is meant a hearing or trial upon the merits, such as results in a final judgment in an action at law, and a final decree in a suit in equity.

"The act of Congress was, doubtless, intended to have the same operation in all the States, irrespective of the difference that may exist in the modes provided in the several States for examining, in the appellate court, questions decided in the court below.

"In this State, after final decree, equity cases are appealable to the District Court, on the appellant giving notice and entering into an undertaking as required by the statute. In cases in which either party has the right to a trial by jury, there can be no appeal, but either party, after final judgment, by giving notice of his demand, and entering into an undertaking as required by the statute, is entitled to a second trial. If no undertaking is given, the demand for a second trial and the notice of appeal go for nothing; and the judgment or decree is conclusive upon the rights of the parties. Such, also, is the effect of the judgment or decree from the time of its rendition to the giving of the undertaking. And notwithstanding the appeal or the right to a second trial may be perfected, the lien of the judgment or decree is continued until the determination of the cause on appeal or second trial.

"It is competent for the legislature to take away the right of appeal and of a second trial. If this were done there would be no ground for the removal of the cause under the act of Congress.

"The true construction of the act does not, we think, thus make its operation depend upon whether the legislation of the State allows or does not allow the exercise of appellate juris-

diction after a common-law trial, or the final hearing of a suit in equity in the court of original jurisdiction.

"To bring this case within the act of Congress would be to allow the non-resident party to experiment with the jurisdiction of the State courts. If the trial should result in his favor, it would bind his adversary, but if it should result adversely to him, he could escape the effect of the litigation by removing the cause to another jurisdiction. To lead us to such a conclusion, 'the intention ought to be expressed with irresistible clearness.'

"The conclusion at which we have arrived in this case is in accordance with the decision of the Supreme Court of Wisconsin in *Akerly* v. *Vilas*.* The judgment of the court in that case was pronounced by Paine, J., in an able opinion, to which we refer for a more elaborate discussion of the questions."

A second trial, contested by the company upon both law and merits, was then had, in the Common Pleas, resulting as before in a verdict and judgment for the plaintiff, which judgment the District Court, after hearing upon petition in error, affirmed.

Upon petition averring these facts, a writ of error was granted by one of the justices of this court, to the said District Court, directing the records and proceedings in the cause to be certified to this court, which was accordingly done, and the plaintiff in error, the insurance company, sought, herein, to reverse the order of the said District Court, asserting that the decision called in question the construction of the statute of 1867, of the United States, and was against the right and privilege set up by the defendant, the now plaintiff in error, thereunder.

The errors complained of were:

1st. The reversal by the District Court of the order of removal.

2d. The subsequent judgment in the Court of Common Pleas after the jurisdiction of that court had been ousted by the removal.

3d. The affirmance of the said judgment by the District Court.

* 24 Wisconsin, 165.

Recapitulation of the case in the opinion.

Mr. H. A. Morill, with whom were Messrs. George Hoadly and E. M. Johnson, for the plaintiff in error; Mr. W. H. Standish, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The case involves a question of jurisdiction arising between State courts and a Federal court, which, though not without interest, involves no difficulty in its solution.

The administratrix sued the insurance company upon a life policy, in the Court of Common Pleas of Hamilton County. She recovered a verdict, and thereafter a judgment was rendered upon it. The company applied for a new trial, and gave bond pursuant to the laws of Ohio, in that behalf.* This had the effect of vacating the verdict and judgment as if a new trial had been granted according to the course of the common law, except that the lien of the judgment remained for the security of the plaintiff, in addition to the bond given by the defendant. In this condition of things, the company petitioned the Court of Common Pleas for the removal of the cause to the Circuit Court of the United States for that district, pursuant to the act of Congress of March 2d, 1867.† The requirements of the statute having been complied with, the court ordered that no further proceedings be had there in the cause, and it was removed to the Circuit Court.

The administratrix appeared in that court and moved that the case be dismissed for want of jurisdiction. The motion was overruled. The administratrix thereupon asked leave to file an amended petition in that court. Leave was granted. The petition was filed, and is still pending there. She thereupon instituted proceedings in error in the District Court for the county to reverse the order made by the Court of Common Pleas, and a judgment of reversal was rendered. The company applied to the Supreme Court of the State for leave to file a petition in error. Leave was refused. This in effect affirmed the judgment of the District Court. A

* Swan & Critchfield's Revised Statutes, 1155. † 14 Stat. at Large, 558.

second trial was thereupon had in the Common Pleas, and the administratrix recovered a second judgment. The company removed the case to the District Court of the county by a petition in error. That court affirmed the judgment. The company thereupon sued out this writ of error, and the entire record in the State courts is thus brought before us for review.

It is insisted that the company, by appearing and contesting the claim in the second trial, waived the question of jurisdiction, and was bound by the judgment. To this there are several answers.

The company resisted the reversal of the order of removal made by the Common Pleas, and did all in its power to that end. Having failed, and being forced into a trial, it lost none of its rights by defending against the action.

The cause was out of the Common Pleas, and in the Circuit Court. The former had jurisdiction to remit and the latter to receive it. Being in the latter, that court had jurisdiction to retain it. If there were error on the part of the Circuit Court in overruling the motion to dismiss, because the case had been improperly brought there, the remedy should have been sought in the Federal courts. The State courts were incompetent to give it. The authority of the latter was at an end until the case should be restored, if that were ever done, by the action of the former. Nothing is lost to the State courts by the application of this rule, for if they refuse improperly to permit a case to be removed, their refusal is liable to be reviewed and reversed by the Federal tribunals, and the power of paramount and final judgment rests with them.* The same rule of exclusion applies in favor of a State or Federal court which first gets possession of a case over which both have jurisdiction.†

The conditions prescribed having been complied with, the act of Congress expressly required the State court where it was originally pending, "*to proceed no further in the suit.*"

* Gordon *v.* Longest, 16 Peters, 97.

† Hagan *v.* Lucas, 10 Id. 400; Taylor *v.* Carryl, 20 Howard, 583.

The further proceedings of the Common Pleas was a clear case of usurped jurisdiction. The illegality was gross. The action of the District and Supreme Court of the State gave them no validity. The maxim, that consent cannot give jurisdiction, applied with full force. *Gordon* v. *Longest** is exactly in point and conclusive.

This brings us to the cardinal inquiry in the case. It is maintained by the counsel for the administratrix, that the order of removal by the Common Pleas was erroneously made, the first verdict and judgment being "*final*" within the meaning of the act of Congress and the laws of Ohio. If the point be well taken the judgment must be affirmed. Otherwise it must be reversed.

It is not denied that the requirements of the act of Congress were fully complied with. No question is raised upon that subject. The proposition involves the construction and effect of the act, and of the laws of Ohio under which the transfer was made. The act declares that the petition may be filed "at any time before the final hearing or trial of the suit." It is contended that the qualifying adjective *final* applies to the term "*hearing*" and not to "*trial*," and that any *trial*, whether final or not, is conclusive against the petitioner. This is too narrow a view. It is contrary to the grammatical construction and the obvious import of the words. The repetition of *final* before *trial* would have been tautology. To produce such a result as that contended for, the indefinite article should have been placed before the word "*trial*," so that the language would have been,—before the final hearing *or a trial*. This would doubtless have been done if such had been the intent of the act. The statute is remedial, and must be construed liberally. There is no reason for interpolating this limitation. The adjective must be taken distributively and applied as well to the second as to the first term, and to both alike. The test is whether the

* 16 Peters, 97; see also Stevens & Dwight *v.* Phœnix Insurance Co., 41 New York, 149; Kanouse *v.* Martin, 14 Howard, 23; Same *v.* Same, 15 Id. 198; Hadley et al. *v.* Dunlap et al., 10 Ohio State, 1.

hearing or the trial is the final one in the cause. It would be a strange anomaly if in equity and admiralty cases a final hearing only, could take away the right of removal, while any trial, however interlocutory in its character, should have the same effect in an action at law. This would be in conflict alike with the letter, the spirit, and the meaning of the act, and would largely defeat the purpose of its enactment. It was intended to permit the removal at any time before a hearing *or trial*, final in the cause as it stood, when the application for the transfer was made.

The proposition that the first judgment of the Common Pleas was final within the meaning of the laws of Ohio cannot be maintained. To say that there can be *two* final judgments upon the same pleadings, in the same cause, in the same court, and for exactly the same things, as the results of two successive trials, involves a solecism. If the first judgment was not final the first trial could not have been so. When the demand for a new trial was made, and the requisite bond was given and approved, the case stood upon the docket in all respects as if a new trial had been granted for some error or defect in the former trial, irrespective of the laws in question, and as if no previous trial had taken place. It is true that the lien of the judgment was preserved, but that was an incident remaining after the principal thing had been put an end to. It was like the bond, for the security of the plaintiff, and for no other purpose. The former affects the question of the finality of the first trial no more than the latter. The law of Ohio declares that the bond shall be "conditioned to the effect, that the party obtaining such second trial shall abide and perform the order and judgment of the court, and pay all money, costs, and damages which may be awarded against him, consequent upon such second trial." The proceeding is thus designated and regarded as a "second trial." The judgment following—unless reversed or set aside—is the one to be satisfied, and it must necessarily be the final, and the only final one. The same remarks as to finality apply to the trial which preceded it.

In the act of Congress of 1866,* the language used in this connection is, "at any time before the trial or final hearing." If the difference in the act of 1867 be material, it is fair to presume that the change was deliberately made to obviate doubts that might possibly have arisen under the former act and to make the latter more comprehensive.

The fact that, under our construction, a case which has made progress, however far, if it has not passed the *final trial*, is liable to be removed, has little weight as an adverse argument. Under the Judiciary Act of 1789, cases that have reached their termination in the highest courts of the States, may be brought here by a writ of error for review, and the practice in conformity to that section has been constant from the organization of this court down to the present time. If the act be unwise, the remedy lies with the legislature and not the judicial department of the government.

Of the constitutionality of this act we entertain no doubt. The question is not an open one in this court. A few remarks will be sufficient to dispose of the subject. The third article of the Constitution declares that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time establish, and that it shall extend, among other things, to "controversies" "between citizens of different States." As regards the inferior courts authorized to be established, Congress may give them such jurisdiction, both original and appellate, within the limits of the Constitution, as it may see fit to confer. How their appellate jurisdiction shall be exercised, is not declared. The whole subject is remitted to the unfettered discretion of Congress. It may be applied to any other inferior Federal court, and to any State court where a case is presented which, by reason of the character of the parties or a question involved, falls within the scope of such judicial cognizance. Courts of the States and those of the nation are alike within its sphere, and its exercise may be authorized before or after judgment in the tribunals over which it is extended.

* 14 Stat. at Large, 307.

Syllabus.

This act is confined to controversies between citizens of different States, and the power given to the Circuit Court is appellate. The jurisdiction involves the same principle, and rests upon the same foundation with that conferred by the twenty-fifth section of the Judiciary Act of 1789. The constitutionality of that provision has been uniformly sustained by the unanimous judgment of this court, whenever the subject has been presented for adjudication. The twelfth section of the act of 1789, and the third section of the act of the 2d of March, 1833, relating to revenue officers, present the same question. We are not aware that a doubt of the validity of either has ever been expressed by any Federal court. The acquiescence is now universal. The subject was elaborately examined in *Martin* v. *Hunter*.*

The seventh amendment to the Constitution, touching the re-examination in the courts of the United States of facts which have been tried by a jury, has no application to this case, because the first judgment had been vacated, the first verdict set aside, and a new trial granted, as before stated, when the cause was removed to the Circuit Court.

The judgment of affirmance by the District Court and the judgment affirmed are REVERSED, and the District Court and the Court of Common Pleas will be directed to

PROCEED NO FURTHER IN THE SUIT.

THE DOLLAR SAVINGS BANK *v.* UNITED STATES.

1. The ninth section of the Internal Revenue Act of 1866 subjects to the tax of five per cent. laid on the undistributed sum or sums made and added during the year to their surplus or contingent funds, by banks and savings institutions generally, such sum or sums, when made and added to such funds even by savings banks without stockholders or capital stock, and which do the business of receiving deposits to be lent or invested for the sole benefit of their depositors.

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* 1 Wheaton, 333; see also The Mayor *v.* Cooper, 6 Wallace, 247.

Statement of the case.

2. A construction of a proviso to an act which makes the proviso plainly repugnant to the body of the act, is inadmissible.
3. The construction given to the Internal Revenue Act by commissioners of internal revenue, even though published in an Internal Revenue Record, is not a construction of so much dignity that a re-enactment of the statute subsequent to the construction having been made and published, is to be regarded as a legislative adoption of that construction; especially not when the construction made a proviso to an act repugnant to the body of the act.
4. By the Internal Revenue law the United States are not prohibited from adopting the action of *debt* or any other common-law remedy for collecting what is due to them. This is true on general principles.
5. Under the Internal Revenue Act of July 13th, 1866, "taxes may be sued for and recovered in the name of the United States in any proper form of action."
6. The requirement by statute on all banks to pay a tax of a certain sum, per cent., on all undistributed earnings made or added during the year to their contingent funds, is a charge of a certain sum upon the banks, and without assessment makes the banks a debtor for the sum prescribed.

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

The United States brought an action of *debt* against The Dollar Savings Bank, in the court below, to recover certain internal revenue taxes, which the declaration alleged were due from it to the government. These taxes were asserted to have been authorized by an amendment contained in the ninth section of the Internal Revenue Act of July 13th, 1866,* by which part of a prior Internal Revenue Act, the act, namely, of June 30th, 1864, was repealed, and in place thereof it was enacted:

"That there shall be levied and collected *a tax of five per centum on all dividends in scrip or money thereafter declared due*, wherever and whenever the same shall be payable, to stockholders, policy-holders, or depositors, or parties whatsoever, . . . *as part of the earnings, income, or gains* of any bank, trust company, savings institution, and of any . . . insurance company . . . in the United States or Territories, . . . and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds; and said banks, trust companies, savings

* 14 Stat. at Large, 138.

institutions, and insurance companies shall pay the said tax, and are hereby authorized to deduct and withhold from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid, the said tax of five per centum. *And a list or return shall be made and rendered to the assessor*, . . . on or before the tenth day of the month following that in which any dividends or sums of money become due or payable as aforesaid; and said list or return shall contain a true and faithful account of the amount of taxes as aforesaid; and there shall be annexed thereto a declaration of the president, cashier, or treasurer of the bank, trust company, savings institution, or insurance company, under oath or affirmation, *in form and manner as may be prescribed by the commissioner of internal revenue*, that the same contains a true and faithful account of the taxes as aforesaid. And for any default in the making or rendering of such list or return, with such declaration annexed, the bank, trust company, savings institution, or insurance company making such default shall forfeit as a penalty the sum of $1000; and in case of any default in making or rendering said list or return, or of any default in the payment of the tax as required, or any part thereof, *the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal.*

"*Provided*, That the tax upon the dividends of life insurance companies shall not be deemed due until such dividends are payable; *nor shall* the portion of premiums returned by mutual life insurance companies to their policy-holders, nor *the annual or semi-annual interest allowed or paid to the depositors in savings banks or savings institutions*, be considered as dividends."

The view of the government was that this act required a tax of five per cent. to be levied and collected, amongst other things, on sums added during the year by the Dollar Savings Bank, the defendant in the case, to its surplus or contingent fund, without regard to the character of the bank, or the nature and purpose of that fund.

The section above quoted, as the reader has observed, contains a requirement that each bank shall make a certain return, "in form and manner as may be prescribed by the commissioner of internal revenue, that the same contains a

true and faithful account of the taxes aforesaid." It appeared in this case that after the passage of the act in question, Mr. Rollins, the then commissioner of internal revenue, made, in February, 1867, a construction of it, so far as it affected banks of the character of the one now sued, and held that they were not required to pay a tax upon amounts which were added to their retained funds instead of being divided among their depositors, and that of course no return relating to any such subjects was required from such a bank.*

This action of Commissioner Rollins was repeated by his successor, Commissioner Delano, in 1870;† and it was reaffirmed and repeated by Commissioner Pleasanton, in 1871.‡

The Dollar Savings Bank, it seemed, had accordingly made no return during either of the years mentioned in the declaration, not being required to do so by the commissioner of internal revenue.

In the year 1872, the successor of Commissioner Pleasanton adopted a different construction of the act, and this action of debt was brought to recover the taxes which the declaration alleged should have been paid between June, 1866, and December, 1870, inclusive; and these taxes, thus alleged to be due, formed the subject-matter of this suit. The jury found a special verdict:

"We find that the Dollar Savings Bank is a banking institution created by the laws of the State of Pennsylvania, without stockholders or capital stock, and doing the business of receiving deposits to be loaned or invested for the sole benefit of its depositors; that the charter authorizes the *retention* of a contingent fund, accumulated from the earnings, to the extent of ten per centum of its deposits *for the security of its depositors;* that it has earned and added to the said contingent fund, or *undistributed sum*, from 13th July, 1866, to 31st December, 1870, $107,000 (the tax of five per cent. on its earnings having been paid prior to 13th July, 1866); that the earnings were carried to and added to the said contingent or *undistributed fund semi-*

* 5 Internal Revenue Record, 60. † 11 Id. 73. ‡ 13 Id. 73.

annually, on the first days of July and January in each year. And we find, if the court should be of opinion, on this state of facts, that the plaintiff is entitled to recover, a verdict for the United States for the sum of $5356, to which is to be added, if the court should be of opinion that plaintiff is entitled to interest on the semi-annual taxes, from the time they were due and payable, the further sum of $1100; but, if the court should be of opinion, on the said facts so found, that the plaintiff is not entitled to recover under the law, then we find for the defendant."

The court rendered a judgment in favor of the United States for the principal sum of $5356, with costs of suit, and this writ of error was taken.*

The errors assigned were:

1st. Holding that the act of Congress authorized the levy and collection of the tax.

2d. Holding that an action of debt was maintainable for the recovery of the tax.

No question was made in the court below as to whether *debt* was the proper form of action, nor any question except as to the liability of the savings bank to pay the tax.

Mr. B. R. Curtis, for the plaintiff in error:

1. *The act of Congress does not authorize the levy and collection of the tax in question upon the defendant.*

The decisions of the commissioners, Rollins and Pleasanton, were correct. They seem to have been founded upon this view of the law, that Congress intended to tax the net earnings of certain banking and other institutions named, whether those net earnings should be distributed to the stockholders in the form of dividends, or retained and added to the capital; and that in those cases in which Congress did not intend to tax the distributed earnings, they did not intend to tax the undistributed earnings; and as it is ex-

* The court gave no interest, because it was admitted that the savings bank was not reprehensibly in default, and that its refusal to pay the tax was induced by the inconsistent action and the conflicting opinions of the Internal Revenue Department.

pressly declared in the law, that sums paid to depositors in savings banks are not to be deemed dividends within the meaning of that word in the law, neither should the sums which the bank has lawfully omitted to pay to its depositors, and has held undistributed, not as an addition to the capital stock (such banks having no capital stock), but only for the security of its depositors in the future, be deemed taxable as such surplus.

It is important to note in this connection, that, while this power of the commissioners to prescribe what returns should be made by savings banks was in full force, and while the construction placed by the commissioners on the law was known by public promulgation, Congress passed the act of July 14th, 1870,* and in the fifteenth section used substantially the same language concerning the subject now in question as was contained in the act of 1866. The case, therefore, stands thus: Congress required the commissioner to prescribe what returns savings banks should make. This necessarily required him to put a construction on the law. He did so, and held that they were not required to return the sums held undistributed solely for the security of these depositors. After this practical construction had been made and acted on for nearly four years, Congress re-enacted the tax (though it was reduced in amount) in the same words which had received this practical construction.

It is a settled rule, that the re-enactment of a statute which had received a *judicial* construction in effect adopts that construction. And why not apply the same principle to a contemporaneous practical construction put upon the act by an officer expressly required to construe it?†

2. *An action of debt was not maintainable for the recovery of the taxes in question.*

This was an action at the common law. The United States has no common law;‡ but the thirty-fourth section of the Judiciary Act provides that the laws of the several

* 16 Stat. at Large, 256.

† Edwards's Lessee *v.* Darby, 12 Wheaton, 206.

‡ Wheaton *v.* Peters, 8 Peters, 658.

States shall be the rules of decision in the trial of actions at the common law.

Now, by the law of Pennsylvania, as also of many other States, as it existed in 1789, an action of debt will not lie to recover a tax authorized to be levied and collected by a statute, which statute affords a remedy for its assessment and collection.* The principle in all the decisions is, that where a statute creates a right, and provides a particular remedy by which that right may be vindicated, no other remedy than that afforded by the statute can be used.

Especially will no such action lie under the statute in question; because it expressly provides, that

"In case of any default in making or rendering said list or return, or of any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the *general provisions of law in other cases of neglect and refusal.*"

Those other provisions here referred to are found in the act of July 13th, 1866.† They require the assessor to make lists; they point out what the lists are to contain; they authorize him at any time *within fifteen months* from the time of the passage of the act, or from the time of the delivery of the list to the collector, to make special additional lists; and these general or special lists are to be delivered by him to the collector, to stand as his warrant for the levy of the tax upon the property of the delinquent taxpayer, pursuant to the directions of the statute.

Further: Even if an action of debt could be sustained, according to the common law of Pennsylvania, or any common law, to recover taxes *duly assessed, duly notified and demanded*, it does not appear by the special verdict, nor is there any reason from the known facts even to conjecture, that

* Mayer *v.* Kirby, 14 Sergeant & Rawle, 165; Turnpike Company *v.* Brown, 2 Pennsylvania, 463; Turnpike Company *v.* Martin, 12 Pennsylvania State, 37.

† 14 Stat. at Large, 103, 104; see the section quoted 18 Wallace, 643, Dandelet *v.* Smith.

any one of these taxes ever was duly assessed. For aught that appears, the commissioners of internal revenue prior to December 1st, 1870, gave such instructions to the assessors that none of these taxes were assessed; and when, at the end of that time, a new commissioner promulgated new views as to the construction of the law, this action of debt was brought. Now, if there had been any attempt regularly to assess these taxes, by reason of an assumed mistake in the construction of the law under which assessments had been omitted, the assessor could not have gone back to the term of fifteen months before he delivered his last list to the collector. Yet, without any attempt to make such a corrected assessment, so far as appears, or, indeed, ever to assess regularly the taxes demanded in this suit, the court below has rendered a judgment for their full amount.

Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice STRONG delivered the opinion of the court.

The facts found by the special verdict are that the plaintiff in error is a banking institution created by the laws of the State of Pennsylvania, without stockholders or capital stock, and doing the business of receiving deposits to be loaned or invested for the sole benefit of its depositors; that the charter authorizes the retention of a contingent fund accumulated from the earnings to the extent of ten per centum of its deposits for the security of its depositors; that the bank has earned and added to the said contingent fund, or undistributed sum, from July 13th, 1866, to December 31st, 1870, one hundred and seven thousand dollars; and that such earnings were carried to and added to said contingent or undistributed fund semi-annually, on the first days of January and July in each year.

Upon this state of facts, the first question presented is whether the act of Congress of July 13th, 1866, which was an amendment to the Internal Revenue law,* authorizes the

* 14 Stat. at Large, 138.

levy and collection of a tax upon the accumulated earnings carried to the contingent fund. It is very plain that the first intent of the act was to impose a tax upon all the earnings, income, or gains, of the institutions mentioned therein. The language of its one hundred and twentieth section is, "There shall be levied and collected a tax of five per centum on all dividends in scrip or money thereafter declared due, whenever and wherever the same shall be payable to stockholders, policy-holders, or depositors, or parties whatsoever, including non-residents, whether citizens or aliens, as part of the earnings, income, or gains of any bank, trust company, savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called in the United States or Territories, whether specially incorporated or existing under general laws; *and on all undistributed sum or sums made and added during the year to their surplus or contingent funds.*" This tax the banks, trust companies, savings institutions, and insurance companies are required to pay, and they are authorized to deduct it from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid. It is, however, only so much of the tax as is levied upon dividends or sums of money due and payable to stockholders, policy-holders, or depositors, &c., which they are authorized to deduct. Thus it appears the tax is laid upon two subjects,—the one dividends or sums due and payable, and the other the undistributed surplus of gains or earnings carried to a surplus or contingent fund. These subjects, though together making up the entire net earnings, are distinct from each other; and they are thus treated throughout the section as well as throughout other sections of the act. If the portion of the act which we have quoted were all, it would not admit of a doubt that both these subjects—the dividends, or annual or semi-annual payments, and the sums added to the contingent fund—are made taxable.

It is argued, however, that savings institutions were relieved by the proviso to the section. That, of course, is to

be construed in connection with the section of which it is a part, and it is substantially an exception. It takes out of the operation of the body of the enactment that which otherwise would be within it. It restrains the generality of the previous provisions. Its language is: "*Provided* that the tax upon dividends of life insurance companies shall not be deemed due until such dividends are payable; nor shall the portion of premiums returned by mutual life insurance companies, nor the annual or semi-annual interest allowed or paid to the depositors in savings banks or savings institutions be considered as dividends." But so far as it relates to savings banks, the only subject of the proviso is the annual or semi-annual interest allowed or paid to the depositors. It makes no reference to the undistributed surplus which may be carried to a surplus fund. That it leaves as it was in the body of the section, subject to the tax therein imposed. And to us it appears quite plain that such was the intention of Congress. Had it been the purpose to exempt savings banks from liability to pay the tax on both the interest paid to its depositors and on all undistributed sums carried to the surplus fund, the plain mode of expressing such a purpose was to say in the proviso that such banks should be excepted from the operation of the section. If such was the purpose, why except them expressly from the operation of a part of the section only? Why take out one subject of taxation specifically, and leave the other unmentioned? And still more. If, as the plaintiff in error contends, it was intended that savings banks should pay no tax on either of the two subjects mentioned in the body of the section, why were such banks mentioned in the section at all? The broad construction of the proviso contended for makes it plainly repugnant to the body of the act, and it is, therefore, inadmissible.

Our attention has been called to the fact that in 1867, and again in 1870, the commissioners of internal revenue construed the proviso as exempting savings institutions from the tax upon all sums added to their surplus or contingent funds, and that the act of Congress of July 14th, 1870, which

reduced internal taxation, employed substantially the same language respecting savings banks as that contained in the act of 1866. In view of this, the plaintiffs in error argue that Congress required the commissioner to prescribe what returns savings banks should make; that this made it his duty to put a construction on the law; that he did so, and held that such institutions were not required to return undistributed earnings carried to a surplus fund, and that after this practical construction had been made and acted upon more than three years, Congress re-enacted the tax, reduced in amount, in the same words. Hence, it is inferred, the construction given by the commissioner was adopted. It is, doubtless, a rule that when a judicial construction has been given to a statute, the re-enactment of the statute is generally held to be in effect a legislative adoption of that construction. This, however, can only be when the statute is capable of the construction given to it, and when that construction has become a settled rule of conduct. The rule, we think, is inapplicable to this case. In the first place, the decisions of the internal revenue commissioner can hardly be denominated judicial constructions. That officer was not required by the law to prescribe what returns savings banks were required to make. That was prescribed by the act of Congress itself, and he had no power to dispense with the requisition. There is, therefore, no presumption that his decisions were brought to the knowledge of Congress when the act of 1870 was passed. And again, the construction he gave is an impossible one, for, as we have seen, it makes the proviso plainly repugnant to the body of the section.

We are constrained, then, to hold that the act of Congress does impose upon the plaintiffs in error the tax to recover which the present suit was brought.

The second error assigned is that the Circuit Court erred in holding that an action of debt is maintainable in that court for the recovery of the taxes.

We do not perceive that the question presented by this assignment was raised or even mentioned in the court below,

and it is not clear that it may first be raised here. But if it may, the answer must be that the taxes may be recovered in an action of debt brought in the Circuit Court.

The argument in support of the assignment of error is that the United States has no common law; that the thirty-fourth section of the Judiciary Act enacts that the laws of the several States shall be the rules of decision in the trial of actions at common law, of which debt is one; that the act of Congress which imposes the tax on savings banks provides a special remedy for its assessment and collection, and that it is a principle of the common law of Pennsylvania, that when a statute creates a right and provides a particular remedy by which that right may be enforced, no other remedy than that afforded by the statute can be used.

It must be conceded that in the section of the act,* which required savings banks to pay the tax, they are also required to render to the assessor or assistant assessor a list of the amount of taxes with a declaration under oath attached thereto, on or before the 10th day of the month following that in which any dividends or sums of money may be due and payable, and for any default in rendering such a list they are liable to a penalty. The act also declares that "in case of any default in making or rendering said list or return, or any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal." What those general provisions are may be seen in other sections of the act which prescribe assessments, delivery thereof to the collectors, and distraint if necessary.

It must also be conceded to be a rule of the common law in England, as it is in Pennsylvania and many of the other States, that where a statute creates a right and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common-law remedies.

But it is important to notice upon what the rule is

* Act of 1866, § 120.

founded. The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. It applies and it is enforced when any one to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other. But by the Internal Revenue law, the United States are not prohibited from adopting any remedies for the recovery of a debt due to them which are known to the laws of Pennsylvania. The prohibitions, if any, either express or implied, contained in the enactment of 1866, are for others, not for the government. They may be obligatory upon tax collectors. They may prevent any suit at law by such officers or agents. But they are not rules for the conduct of the State. It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests.* He may even take the benefit of any particular act, though not named.† The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state as it does into the principles of the British constitution.‡

It must, then, be concluded that the government is not prohibited by anything contained in the act of 1866 from em-

* Magdalen College Case, 11 Reports, 74; King *v.* Allen, 15 East, 333.

† 7 Reports, 32; Potter's Dwarris on Statutes, 151, 152.

‡ Commonwealth *v.* Baldwin, 1 Watts, 54; People *v.* Rossiter, 4 Cowen, 143; United States *v.* Davis, 3 McLean, 483; Same *v.* Williams, 5 Id. 133; Commonwealth *v.* Johnson, 6 Pennsylvania State, 136; United States *v.* Greene, 4 Mason, 427; Same *v.* Hoar, 2 Id. 311; Same *v.* Hewes, Crabbe, 307.

ploying any common-law remedy for the collection of its dues. The reason of the rule which denies to others the use of any other than the statutory remedy is wanting, therefore, in applicability to the government, and the rule itself must not be extended beyond its reason. And we do not find that either in England or in Pennsylvania it has been held to be applicable. On the contrary, in England informations of debt, and exchequer informations for discovery and account, to recover duties on importations, have been of frequent occurrence, though the acts of Parliament have provided a different remedy for enforcing the payment. Numerous such cases are reported in Bunbury's Reports.* And in *United States* v. *Lyman*,† Judge Story held that debt might be maintained in the Circuit Court for Massachusetts to recover duties upon imported goods; a doctrine reasserted by this court in *Meredith* v. *United States*.‡

But all this is superfluous, for the act of Congress authorizes suits at law to recover unpaid taxes.§ It enacts as follows: "And taxes may be sued for and recovered, in the name of the United States, in any proper form of action, before any Circuit or District Court of the United States for the district in which the liability for such tax may have been or may be incurred, or where the party from whom such tax is due may reside at the time of the commencement of said action."

Nor is there anything in the objection that the taxes for which judgment has been recovered in this case had not been assessed. No other assessment than that made by the statute was necessary to determine the extent of the bank's liability. An assessment is only determining the value of the thing taxed, and the amount of the tax required of each individual. It may be made by designated officers or by the law itself. In the present case the statute required every savings bank to pay a tax of five per cent. on all undistributed earnings made, or added during the year to their

* See pp. 155, 299, 300, 339; see also Comyn's Digest, title "Debt," A. 9; 1 Rolle, 383.

† 1 Mason, 482. ‡ 13 Peters, 486. § 14 Stat. at Large, 111.

contingent funds. There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank,* and without more it made the bank a debtor.

We think, therefore, the second assignment of error cannot be sustained.

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY, with whom concurred Mr. Justice FIELD, dissenting:

I dissent from the judgment of the court, on the ground that an action will not lie for a tax of the kind in question in this case, unless it be first entered on the assessment-roll. The assessment-roll should be regarded as conclusive as to the persons or things liable to taxation. If it is not, if the matter is left open so that any person or corporation may be prosecuted for taxes at any time, it leaves the citizen exposed to many hazards, and to the mercy of prying informers, when the evidence by which he could have shown his immunity or exemption has perished. If an action of debt without an assessment can be brought, what is the limit of time within which it must be brought? To what statute of limitations is the government subject? It seems to me that the decision introduces a new principle in the system of taxation, dangerous to the rights of the citizen and the peace and security of society.

NUGENT *v.* THE SUPERVISORS.

1. To constitute a "subscription" by a county to stock in a railroad company, it is not necessary that there be an act of chirographical subscribing. A resolution of the county declaring a subscription made, an acceptance of such subscription by the railroad company, and notice to the county of such acceptance; the delivery to the railroad company by the proper county officers of the county bonds, and acceptance by the county of the corresponding stock, voting as a stockholder and levying a tax to pay the interest on the bonds, estop the county (assuming that it had a legal right to subscribe) from denying its subscription.

* Attorney-General *v.* ——, 2 Anstruther, 558.

Statement of the case.

2. Although a subscriber for stock in a company is released from his subscription by a subsequent alteration of the organization or purposes of the company, this is only when such alteration is a fundamental one, and when, in addition, it is not provided for or contemplated by either the charter itself or the general laws of the State.

ERROR to the Circuit Court for the Northern District of Illinois; in which court, in December, 1872, Nugent sued the supervisors of Putnam County, Illinois, on coupons for the interest of certain bonds issued by the said county.

The case, as appearing on demurrer to a replication by the plaintiff to several pleas of the defendant, and by admitted statutes, was thus:

A general statute of the State of Illinois, entitled "An act to enable railroad companies . . . to consolidate their stock," passed February 28th, 1854, thus enacts:

"SECTION 1. All railroad companies now organized, or hereafter to be organized, which now have, or hereafter may have their termini fixed by law, whenever their said road or roads intersect by continuous lines, may, and the same are hereby authorized and empowered to consolidate their property and stock with each other, and *to consolidate with companies out of this State, whenever their lines connect with the lines of such companies out of this State.*

"SECTION 2. The said companies, when so consolidated, shall be authorized to agree upon the name or names of such consolidated company; and by such name or names the said consolidated company shall be a body corporate and politic, . . . and shall have all the powers, franchises, and immunities which the said respective companies shall have by virtue of their respective charters, before such consolidation passed, within the State of Illinois."

A similar general statute exists in Indiana.*

This public statute being in force, the State of Illinois, on the 15th of April, 1869, by special act, incorporated the Kankakee and Illinois River Railroad Company. The company was authorized to make and maintain a railroad from the

* Act of February 23d, 1853; see Clearwater *v.* Meredith, 1 Wallace, 26.

eastern line of the State to a place called Bureau Junction; and had liberty to increase its stock to such an amount as might be necessary to complete its road. The eleventh section of its charter ran thus:

"SECTION 11. It shall be lawful for said company, and they shall have power to unite or consolidate its railroad with any other railroad or railroads now constructed, or being constructed, or which may hereafter be constructed within this State, *or any other State*, which may cross or intersect the same, *or be built along the line thereof*, upon such terms as may be mutually agreed upon between said company, or any other company. And for said purpose, full power is hereby given said company to make and execute such contracts with any other company or companies as will secure the object of such connections or consolidations."

At the same time the county of Putnam was empowered, by a general law of the State, to subscribe for the stock of the company, and to issue its bonds in payment of its subscription. In attempted exercise of the power thus conferred, the board of supervisors of the county, on the 4th day of June, 1869, ordered an election to be held, to determine whether the county should subscribe for stock of the railroad company, to the amount of $75,000, to be paid for with the bonds of the county, provided the railroad should be so located and constructed through, or within one-half mile of, the town of Hennepin. The election was held, and it resulted in favor of the subscription. On the 4th day of January, 1870, another election was ordered, to determine whether the county would subscribe for $25,000 more of the stock, to be paid in the same manner, and with a similar provision respecting the location of the road. This subscription was also sanctioned by the popular vote. On the 24th day of September, 1869, the railroad company accepted the $75,000 subscription, and on the 27th of October next following, gave notice of the acceptance to the board of supervisors of the county. This notice was put upon record, and on the same day the board of supervisors adopted a resolution that the subscription was thereby made for the

building of the railroad, and directed the clerk of the county court to execute and deliver the bonds on behalf of the county. The resolution also declared that the bonds should be issued on the written order of a committee appointed to protect the interests of the county; that they should not be issued until the railroad company should have made a *bonâ fide* contract with responsible parties for all necessary iron for their road, nor until the company should have made a *bonâ fide* contract with responsible parties for laying the iron and operating the road through the county, as specified in a previous order of the board. On the 15th day of March, 1870, the second subscription for $25,000 was made in a similar manner, and with like directions.

The bonds, with the proper number of coupons attached, were executed in proper form by the proper county officers. The bonds were made payable to the Kankakee and Illinois River Railroad Company "*or bearer;*" the coupons to the bearer simply.

On the 12th of January, 1870, and before the instruments were delivered to the said railroad company, a company had been organized under the laws of Indiana, for the purpose of building a railroad from Plymouth, Indiana, to the east line of the State of Illinois, at some point to be selected in the direction of Momence and Kankakee, with a view to connection with some railroad leading westward. Its corporate name was the Plymouth, Kankakee, and Pacific Railroad Company. With this corporation, on the 21st day of October, 1870, the Kankakee and Illinois River Railroad Company became consolidated, taking the name of the former. This consolidation was made at the instance of the board of supervisors of Putnam County. It was not asserted that it had not been legally effected. The consolidation being completed, and the conditions precedent to the delivery of the bonds having been complied with to the satisfaction of the officers of the county, the bonds and coupons were delivered to the railroad company, and certificates for a corresponding amount of stock in the consolidated company delivered to and received by the county. The county voted as a stock-

holder of the railroad company, and proceeded to levy a tax to pay the interest on the bonds.

Certain of the coupons passed into the hands of the plaintiff, Nugent, *bonâ fide;* he having paid value for them, in the market, without notice of any defence.

On these coupons it was that the present suit was brought.

The court below, disregarding an argument made in the case, that the county had made no actual *subscription*, and that what it had otherwise done wanted such completeness of action as would amount to a "subscription" in law to anything—sustained nevertheless the demurrer on other grounds. It said:

"I feel compelled to say that I cannot find any line of distinction between this case and *Marsh* v. *Fulton County*,* but it seems to me that that case must control the decision of the court in this.

"The vote of the 10th of July, 1869, and the 8th of February, 1870, were both upon the proposition to subscribe to the capital stock of the Kankakee and Illinois River Railroad Company, a corporation possessing the power to construct and maintain a line of road between certain termini in this State, with a capital stock limited, in any event, to the cost of constructing of this road. The bonds in question were issued after this Kankakee and Illinois River Railroad Company had merged itself, by articles of consolidation, into another corporation, now known as the Plymouth, Kankakee and Pacific Railroad Company, a road having control of a different enterprise from that of the original corporation, possessing a different capital stock, and governed by a different board of directors, elected upon a different basis, with different termini to the road.

"In the case of *Clearwater* v. *Meredith*, in the 1st of Wallace,† the Supreme Court of the United States has passed upon the effect of consolidating railroad corporations. The principle which I have alluded to is there clearly announced, namely, that a different corporation results from the consolidation. The consolidated company is not either of the original corporations, although it may take the name of one of them. Here the original corporation for the stock of which the county of Putnam

* 10 Wallace, 676.

† Page 25.

subscribed, was solely under control of the State of Illinois; its franchises had been created by that State, and were under its control. The consolidated company is in two States; its affairs are subject to the control of the legislatures of two States.

"Now, the principle of these authorities, it seems to me, is that the corporate existence of the Kankakee and Illinois River Railroad Company ceased on the 21st of October, 1871, and from that time forward whatever franchises it had were merged in the Plymouth, Kankakee and Pacific Railroad Company, the consolidated corporation, and after this event had taken place, after what we may call the legal demise of the Kankakee and Illinois River Railroad Company, the board of supervisors of Putnam County authorized the issue to the consolidated corporation of the bonds in question.

"I cannot see any feature in this case which differs from *Marsh* v. *Fulton County*, unless that this is a stronger case than that. There the corporation existed in and was controlled by this State alone, and its termini remained the same, while this consolidated corporation is a very different enterprise from the original to which the subscription was authorized.

"It was insisted in the argument, and also in the pleadings, that these bonds being made payable in terms to the Kankakee and Illinois River Railroad Company, is a fact which the court should notice, and which should control the decision of the court. It certainly is an important fact, and has received consideration, but I cannot see that it changes the legal bearings of the question. This was a defunct corporation, and the bonds might just as well have been made payable to bearer, and the person to whom they are made payable cuts no figure in the case.

"In the case of *Clearwater* v. *Meredith*, the general law of the State of Indiana existed at the time the stock in question was issued. The law of that State and of Illinois are substantially the same, the two States keeping pace with each other in their legislation on this question; but the Supreme Court did not hold that the organic right of either or both corporations to consolidate changed the rights of the stockholders."

To a judgment against him the plaintiff took this writ of error.

Mr. T. M. Shaw, for the plaintiff in error; Mr. T. L. Dickey, contra.

Opinion of the court.

Mr. Justice STRONG delivered the opinion of the court.

We think the Circuit Court erred in sustaining the demurrer to the plaintiff's replication. The bonds to which the coupons in suit were attached, purport to have been made and issued by the order of the board of supervisors of Putnam County, in payment of the county's subscription to the capital stock of the Kankakee and Illinois River Railroad Company. They are made payable to that company or bearer, and the plaintiff is a *bonâ fide* holder of the coupons, having paid value for them without notice of any defence. If, then, the bonds are valid obligations, if they were rightfully issued, the right of the plaintiff to a judgment against the county is plain.

That by what it did in the matter the county became in effect a subscriber to the capital stock of the railroad company, and liable for the sums designated, admits of no serious question. The fact that no subscription was formally made upon the books of the company is quite immaterial. In *The Justices of Clarke County* v. *The Paris, Winchester, and Kentucky River Turnpike Company*,* it was ruled that an order of the County Court, by which it was said that it subscribed for a specified number of shares of road stock, was binding, the court having authority to make a subscription. In this case there was more. There was not only the resolution, declaring the subscription made, but there was an acceptance by the railroad company, and notice of the acceptance. The minds of the parties came together. Both understood that a contract was made, and had nothing subsequently occurred to change their relations the county could have enforced the delivery of the stock, and the company could have compelled the delivery to itself of the bonds, on performance of the conditions stipulated. So the parties regarded their relations to each other. The bonds were delivered. The committee appointed by the board of supervisors to protect the interests of the county, under whose direction the bonds were ordered to be issued, were satisfied

* 11 B. Monroe, 143.

that all the prescribed conditions precedent to their delivery had been complied with, and they so decided. The county accepted the position of a stockholder, received certificates for the stock subscribed, voted as a stockholder, and proceeded to levy a tax to pay the interest falling due on the bonds. Were this all of the case, the validity of the bonds, and of their accompanying coupons in the hands of a *bonâ fide* holder for value, would be beyond doubt.

The Circuit Court, however, was of opinion, and so decided, that the bonds are invalid, because before their delivery the Kankakee and Illinois River Railroad Company had become consolidated with the Plymouth, Kankakee, and Pacific Railroad Company, another corporation. This consolidation was authorized by the general laws of the two States, and by a section in the special charter of the latter company. No claim is made that it was not legally effected. The result necessarily was, that the consolidated company succeeded to all the rights, property, and privileges which belonged to each of the two companies out of which it was formed, before their consolidation. It was not until after this had taken place that the county bonds were handed over and sold, and it was certificates of the stock of the consolidated company which the county received.

What, then, was the legal effect of the consolidation? Did it release the county from its prior assumption to take stock in the Kankakee and Illinois River Railroad Company and give its bonds in payment? Or, did it render unauthorized the subsequent delivery of the bonds, and make them invalid even in the hands of a *bonâ fide* purchaser? These are the only questions presented by the record that need discussion.

It must be conceded, as a general rule, that a subscriber to the stock of a railroad company is released from obligation to pay his subscription by a fundamental alteration of the charter. The reason of the rule is evident. A subscription is always presumed to have been made in view of the main design of the corporation, and of the arrangements made for its accomplishment. A radical change in the organization or purposes of the company may, therefore, take

away the motive which induced the subscription, as well as affect injuriously the consideration of the contract. For this reason it is held that such a change exonerates a subscriber from liability for his subscription; or, if the contract has been executed, justifies a stockholder in resorting to a court of equity to restrain the company from applying the funds of the original organization to any project not contemplated by it. But while this is true as a general rule it has no applicability to a case like the present. The consolidation of the Kankakee and Illinois River Railroad Company with another company was no departure from its original design. The general statute of the State, approved February 28th, 1854, authorized all railroad companies then organized, or thereafter to be organized, to consolidate their property and stock with each other, and with companies out of the State, whenever their lines connect with the lines of such companies out of the State. The act further declared that the consolidated company should have all the powers, franchises, and immunities which the consolidating companies respectively had before their consolidation. Nor is this all. The special charter of the Kankakee and Illinois River Railroad Company contained, in its eleventh section, an express grant to the company of authority to unite or consolidate its railroad with any other railroad or railroads then constructed or that might thereafter be constructed within the State, or any other State, which might cross or intersect the same, or be built along the line thereof, upon such terms as might be mutually agreed upon between said company and any other company. It was therefore contemplated by the legislature, as it must have been by all the subscribers to the stock of the company, that precisely what has occurred might occur. Subscribers must be presumed to have known the law of the State and to have contracted in view of it. When the voters of the county of Putnam sanctioned a county subscription by their vote, and when the board of supervisors, in pursuance of that sanction, resolved to make the subscription, they were informed by the law of the State that a consolidation with another company might be made, that the stock

they proposed to subscribe might be converted into stock of the consolidated company, and that the liability they assumed might become owing to that company. With this knowledge and in view of such contingencies they made the contract. The consolidation, therefore, wrought no change in the organization or design of the company to which they subscribed other than they contemplated at the time as possible and legitimate. It cannot be said that any motive for their subscription has been taken away, or that the consideration for it has failed. Hence the reason of the general rule we have conceded does not exist in this case, and, consequently, the rule is inapplicable.

In a multitude of cases decided in England and in this country it has been determined that a subscriber for the stock of a company is not released from his engagement to take it and pay for it by any alteration of the organization or purposes of the company which, at the time the subscription was made, were authorized either by the general law or by the special charter, and a clear distinction is recognized between the effect of such alterations and the effect of those made under legislation subsequent to the contract of subscription. In *The Cork and Youghal Railway Company* v. *Paterson*,* which was an action to recover a call of one pound per share on one hundred shares subscribed, it appeared that the defendant was one of the subscribers to the agreement for the Cork, Middleton, and Youghal Railroad Company. That agreement authorized the provisional directors to extend the purposes of the organization, to change the termini of the road, and to amalgamate with other companies. The subscriber's agreement for the Cork and Waterford Railroad Company contained similar provisions. After the defendant's subscription was made the two companies executed a deed of amalgamation, without any other assent of the defendant than his signature to the subscriber's agreement for the first-named company. Upon this state of facts all the judges held that he remained liable on his sub-

* 37 English Law and Equity, 398.

scription. Its effect was said, by Chief Justice Jervis, to be an authority to the company to tack his subscription to anything else they might see fit, and thus make him a subscriber to that, and therefore, added the judge, by signing the Cork and Youghal he afforded an authority to the directors to apply his signature to the Cork and Waterford, and so make him a subscriber to that. To the same effect are the cases of *Nixon* v. *Brownlow* and *Nixon* v. *Green*.* The American authorities are equally explicit. They uniformly assert that the subscriber for stock is released from his subscription by a subsequent alteration of the organization or purposes of the company, only when such alteration is both fundamental *and not provided for or contemplated by either the charter itself or the general laws of the State.* In *Sparrow* v. *The Evansville and Crawfordsville Railroad Company*,† where it appeared that after a public act had taken effect authorizing the consolidation of the charters of two railroad companies, the defendant had subscribed for shares in one of them, and a consolidation was afterwards made, he was held liable to the consolidated company for his subscription, and this, though the consolidation took place without his knowledge or consent. The same doctrine was asserted in *Bish* v. *Johnson*.‡ The Supreme Court of Connecticut recognized the rule in *Bishop* v. *Brainerd*,§ and a subscriber to one company was held to be a debtor to the consolidated company in a case where there was no general authority to consolidate, but the charter of the company was subject to amendment by the legislature, and where the legislature, after the subscription confirmed the consolidation.

Many other citations are at hand, but these are sufficient.

* 3 Hurlstone & Norman, 686. † 7 Porter (Indiana), 369.

‡ 21 Indiana, 299; see also Hanna *v.* Cincinnati, 20 Id. 30.

§ 28 Connecticut, 289; see also Schenectady and Saratoga Plankroad Co. *v.* Thatcher, 1 Kernan, 102; Buffalo and New York City Railroad Co. *v.* Dudley, 4 Id. 336; Meadow Dam *v.* Gray, 30 Maine, 547; Agricultural Branch Railroad Co. *v.* Winchester, 13 Allen, 32; Noyes *v.* Spaulding, 27 Vermont, 420; Pacific Railroad Co. *v.* Renshaw, 18 Missouri, 210; Fry *v.* Lexington, 2 Metcalfe, 314; Illinois River Railroad Co. *v.* Beers, 27 Illinois. 189; Terre Haute and Alton Railroad Co. *v.* Earp, 21 Id. 292.

No well-considered cases are in conflict with them. *Marsh* v. *Fulton County* is altogether a different case. In that it appeared that the people of the county voted in November, 1853, in favor of a subscription for stock in the Mississippi and Wabash Railroad Company, and in April, 1854, the board of supervisors of the county ordered their clerk to make the subscription. It was not, however, then made. Subsequently, in 1857, the legislature made fundamental changes in the organization of the company, dividing it substantially into three companies, with a distinct governing body for each, and with three classes of stockholders. It was after this that the county subscription was made; and made not for the stock of the Mississippi and Wabash Railroad Company, but for the stock of one of the divisions. Necessarily, therefore, we held that there was no authority to make the subscription which was made, that it had not been approved by a popular vote, and hence that the bonds issued in payment for it were invalid. The county had entered into no contract until after the radical changes had been made in the organization of the company. It never assented to such a change, and when the proposed subscription was approved by the popular vote, there was no reason to expect the change afterwards made. There was at that time nothing in the general law of the State, and nothing in the charter, which authorized the company to change its organization, or which looked to its division into several distinct corporations. It needs nothing more to show how unlike that case was to the present.

In the case in hand the county had, under lawful authority, undertaken to subscribe for stock before the consolidation was made, and the undertaking had been accepted. A liability had been incurred, and the business agents of the county, to whom exclusively the law intrusted the management of its affairs, consented to and promoted the consolidation. And the subscription was made in full view of the law that allowed an amalgamation with another company. The contract was made with reference to that law. Nothing has taken place which the county was not bound to antici-

pate as likely to happen, and to which the people in voting for the subscription, and the board of supervisors in directing it, must not be considered as having consented. What was ruled in *Marsh* v. *Fulton County*, therefore, does not touch this case. Nor was there anything decided in *Clearwater* v. *Meredith* which sustains in any degree the defence set up on behalf of the defendants.

We have, then, in brief, this case: The people of Putnam County, in pursuance of law, voted a county subscription for stock in a railroad company, to be paid for with county bonds. The financial agents of the county agreed to make the subscription, and the company accepted it. The bonds were made payable to the company, or bearer, but before they were delivered, the company became consolidated with another, in pursuance of authority conferred by the law in force when the subscription was voted, and at the instance of the board of supervisors of the county. All the conditions precedent to the delivery of the bonds were complied with to the satisfaction of the county agents, certificates for the stock were received, and the bonds were delivered and sold. The plaintiff is a *bonâ fide* holder of some of the coupons for value paid. It would, we think, be a reproach to the administration of justice if he cannot enforce the payment of those coupons, and we see no principle of law or equity that stands in the way of his action. He found the bonds and the coupons upon the market, payable to the Kankakee and Illinois River Railroad Company, or bearer. Proposing to buy, he had only to inquire whether the county was, by law, authorized to issue them, and whether their issue had been approved by a popular vote. He was not bound to inquire farther, and had he inquired he would have found full authority for the issue, and if he had also known of the consolidation it would not have affected him.

JUDGMENT REVERSED, and the cause remitted with instructions to

OVERRULE THE DEFENDANT'S DEMURRER.

Dissenting, Mr. Justice DAVIS and Mr. Justice MILLER.

KITCHEN *v.* RAYBURN.

A., the president of a railroad company, wanting B., a farmer, to sell to him a piece of land containing about 1100 acres, and worth $10 an acre, agreed to give to B. five bonds, for $1000 each, of the company, with coupons for overdue interest, the whole principal and interest being nominally for $6000, assuring B. that the bonds and coupons were very good, that he could make the money any time out of them, and could enter 1100 acres of other land, belonging to the railroad company, full out as good as his own. B., believing what A. told him, gave up his land to A.

The representations made by A. were false. The bonds were without any market value, though when sold, sold at that time for about five cents on the dollar. The company had no lands anywhere which could be entered with the bonds, and A., the president of the railroad company, knew all this when he got B.'s land from him on the representations mentioned, and B. did not know anything about it and trusted to what A. told him.

At the same time that A. gave B. the five bonds, he gave him one hundred and nineteen other and similar bonds for $1000 each, which had $50,405 interest due upon them; and B. executed a declaration of trust under seal and in form by which he acknowledged that he had received the sum of $119,000 in bonds, and also $50,405 coupons due, in the aggregate $169,405, which sum he promised to expend in the purchase of lands from the trustees of the railroad company at a price named, taking deeds in his own name, and to sell the lands so purchased as soon as possible, at such prices as A. should direct, and after deducting expenses to pay to the wife of A. seven-eighths of all that the lands sold for.

B. not being able to purchase any lands with these bonds, sold the whole of them at about eight cents on the dollar, and retained the money.

On bill filed by A. and his wife to make B. account for the proceeds of the bonds for which he had executed the declaration of trust, B. set up that before executing it, it had been agreed between A. and himself, that if he could not get 1100 acres of lands with the $6000 bonds, that he might sell the others and retain any balance due himself out of the proceeds; and that he had made the best sale practicable. The evidence as to whether there was such an agreement was conflicting.

Held, that it was impossible to separate the receipt for the one hundred and nineteen bonds from the arrangement by which B. gave up his own land to A., and that this being so, A. had made such fraudulent misrepresentations to B. about the value and character of the bonds that for this reason, if for no other, he could not ask the aid of equity to compel an execution of the alleged trust.

APPEAL from the Circuit Court for the District of Missouri, in which court Solomon Kitchen filed a bill against

Statement of the case.

W. C. Rayburn, charging a breach of trust in appropriating to his own use the proceeds of certain bonds put into his hands, as the bill alleged, to sell for another purpose. The case was thus:

Kitchen, president of the Cairo and Fulton Railroad Company, owning in his own right a valuable tract of land in Missouri, containing 2200 acres, and called the St. Luke lands, agreed to sell one-half of it to Rayburn, a farmer, for a price fixed on. Rayburn accordingly paid him the amount, and so became the equitable owner of the half; Kitchen giving to him a bond to make a complete title. The consideration was paid in Confederate notes, then having some market value. Both parties had been in the rebel service; Kitchen as a colonel. Having an opportunity to use the whole of the tract in paying a debt of his own, Colonel Kitchen now proposed to Rayburn to buy back the half; and in March, 1866, he passed to him bonds of the said Cairo and Fulton Railroad Company for $5000, with unpaid interest coupons, which made the amount more than $6000. At about the same time he passed to him $119,000 of other bonds, with unpaid interest coupons attached, to the amount of $50,405. Rayburn's account of this matter was thus:

"Some time in March, 1866, Kitchen told me if I would go home with him, he would place a sufficient amount of the bonds of the Cairo and Fulton Railroad Company in my hands to secure me in the price of the undivided half of the St. Luke lands, which I owned at that time, and which Kitchen wanted. I told him then that I would be at his house in a short time. During this conversation I stated to him that I knew nothing of the value of the bonds; that his words were good to me. I went to his house. He then told me he had a lot of bonds that he wanted me to enter land with; that he wanted me to enter the land in my own name, and sell it, and that he did not want his name known in the transaction, and wanted to know what I would be willing to do this for. He told me that I would have no trouble, only to examine the land and get the numbers. I I told him I thought I could do it for one-eighth of the whole amount. He then gave me five bonds to enter land in lieu of

the St. Luke lands that I had let him have. He told me that I could take those five bonds and enter the whole 1100 acres, paying all expenses, anywhere about Clarkton, Dunklin County, Missouri; and that he had a lot of bonds, over one hundred in number, that he would let me have and take my receipt for; that he wished me to enter land in my own name, in accordance with our agreement. I told him that I knew there were valuable lands around Clarkton, and he told me that those lands were railroad lands, and subject to be entered with those bonds at this time. I told him that I did not know anything about the bonds, nor the railroad land, nor the railroad company, and that I did not know whether the five bonds he had laid out for me would enter me the 1100 acres of land and pay all expenses or not. He told me they would, and if they did not, he said, 'Pay yourself out of the bonds I am going to give you, and take your receipt for.' I had confidence in what he told me to be facts that I had no means of knowing myself. I agreed to the proposition and took the five bonds. He then wrote a receipt in his wife's name for one hundred and nineteen bonds, with which I was to enter Cairo and Fulton Railroad lands in my own name, sell the lands and turn them into money, reserving one-eighth of the proceeds, after all expenses were paid, and turn him over the balance. This is the receipt:

"WILCOX, ARKANSAS, March 16th, A.D. 1866.

"Received, from Martha Kitchen, the sum of $119,000, in bonds of the Cairo and Fulton Railroad Company of Missouri, and I also received $50,405 of coupons or interest warrants due and owing by said company, amounting, in the aggregate, to the sum of $169,405, which said sum I promise to expend in the purchase of land from J. Moore, J. Wilson, and A. G. Waterman, trustees of the said Cairo and Fulton Railroad Company of Missouri, at or near the average price of $5 per acre, taking the deeds in my own name; and I further promise to sell all the lands purchased as aforesaid, as soon as possible, at such prices as the said Kitchen may direct; and if I should fail to sell all said lands as soon as said Kitchen may desire them, I promise to sell the same at public auction whenever so directed by the said Kitchen; and after deducting the expenses of stamps and the necessary travelling expenses, to pay unto the said Martha Kitchen, or her legal representatives, seven-eighths of all the money that I may sell the said lands for.

"Given under my hand and seal the date above written.

[SEAL.] "W. C. RAYBURN."

"Kitchen then placed in my hands maps and plats showing

the railroad lands. I then signed the receipt spoken of, made in his wife's name. He then gave me the one hundred and twenty-four bonds. I saw that they were of $1000 each, the coupons thereto attached. I then went home with the maps, plats, and bonds, and went to work hunting up the numbers of the lands in Missouri. I spent a good deal of time, trouble, and some money, and employed another man to assist me. Some time afterwards I made inquiry of every person that I thought knew anything about these railroad lands, and I never have been able to find out how I could lay the bonds on lands. I then tried to sell the bonds and convert them into money. I found no one that would purchase up to July, 1866. I then told Kitchen that I didn't believe I could do anything with the bonds. He told me it would be only a short time then till the railroad company would be organized; and for me to continue to get up numbers of land, and be ready. He then called on me for the bond which he had given me for the undivided half of the St. Luke lands, which was my interest therein. I gave him the bond, and saw him put this bond in the fire. He then and there again assured me that the five bonds would satisfy me, and if they did not, I could use a sufficient number of the other bonds in my possession to pay myself for the undivided half of the St. Luke lands, valued at $10,000 by Kitchen himself."

[The witness here narrated various efforts which he had made in vain to locate the bonds and to sell them.]

"I then, with the effort I had made, become very much discouraged, and come to the conclusion that I could not realize anything out of the bonds. I think it was some time in December, 1866, H. H. Bedford made me an offer of $10,000 for the one hundred and twenty-four bonds. I sold them to him for that sum and he paid me the money. Before I sold these bonds to Bedford I saw a proposition made by Kitchen, stating that he was willing to take $8423 for one hundred and sixty-eight bonds. I think this was some time in August, 1866. Under these and other considerations I thought it best to sell for the $10,000. With a part of the proceeds I got for those bonds I purchased the lands from one Timberman, mentioned in the plaintiff's bill."

One Starr gave this testimony:

"I was present at a conversation when Mr. Kitchen stated to Mr. Rayburn that he would give him bonds sufficient to secure him in the sum of $10,000, upon the condition that he, Rayburn, would give up his claim or obligation on him for the St. Luke lands; and stated that with the bonds he, Rayburn, could get more land equally as good and in a better body or locality; that he would be *amply* able to secure himself for the loss, or for his surrendering his claim on the St. Luke lands, by a transfer of railroad bonds, with which he would be able to enter more and better lands. I think that the land relinquished by Rayburn was worth at least $10 per acre, then and now. After Rayburn had got some railroad bonds, he placed in my hands a lot of them to see if I could enter lands with them. I did all that I could to obtain lands for them and to ascertain what they were worth. I could not get lands for them or sell them for anything. I know that Rayburn made considerable inquiry and went to great trouble about getting lands for the bonds, and I know that he was offering to sell them. I do not know of any offer being made to him for the bonds until I learned that he had sold them to Bedford, for the sum of $10,000. I then thought and still think it was the best that Rayburn could have done. I know that he went to great trouble in getting up the numbers of lands, and in trying to get lands for the bonds which he held, and was not able to do it."

Some considerable time after this sale the railroad company was organized; the prospects of its success improved; and Bedford, to whom Rayburn sold the bonds for $10,000, sold them for $26,300.

Kitchen's account of the matter was that the land, though it had been worth $10 an acre before the Rebellion, was not worth that sum when Rayburn agreed to retransfer it to him; not worth more than $5; and that the *five* bonds of the Cairo and Fulton Railroad Company, with the coupons with arrears of interest, were the payment for it on the retransfer, the amount above $5000 being added, in case the trustees of the railroad company should charge Rayburn more than $5 an acre for *their* lands; that the remaining one hundred and nineteen bonds were put in Rayburn's hands

for the exact purpose stated in Rayburn's receipt, and for no other purpose.

At the time when these transfers took place, and when this receipt was given, the Cairo and Fulton Railroad was insolvent. There was no fixed market for its bonds; but when sold they would bring about five cents on the dollar. Kitchen, in settling with the company a claim which he had against them, took the bonds which he transferred to Rayburn at about that price. Neither the company, nor Moore, Wilson, or Waterman, the trustees of the company, had any lands open to purchase through the surrender of bonds.

Rayburn not being able to use his bonds in the way in which Kitchen had told him that they could be used, Kitchen sent a young man named Carter with a letter in the shape of an order to deliver up to Carter the one hundred and nineteen bonds mentioned in the receipt. But Rayburn had in the meantime sold the bonds. He soon afterwards wrote this letter to Kitchen:

"PRAIRIE CITY, STODDARD COUNTY, MISSOURI,
"February 8th, 1867.

"COLONEL KITCHEN.

"DEAR SIR: I received your note a few days ago, and should have *wrote* to you before, but was on my way to Cape Girardeau. Colonel, *I may have done rong*, but if I have I thought it was the best that could be done, and I hope you will be satisfied. I have sold the bonds. D. B. Miller advised me to sell. He sold, and everybody else that had bonds, I think. The hole number of bonds that went from Bloomfield was something over $800,000. I agreed to take whatever they got, and I only got $10,000, or am to get by the first of April next. *I ought to have went to see you before I sold*, but hope you will be satisfied. I will write again soon. Let me hare from you.

"W. C. RAYBURN."

In 1870 Kitchen and wife filed a bill against Rayburn and others, claiming the proceeds of these bonds, now alleged to have passed into certain real estate. The bill set out that the bonds had been given to Rayburn in trust, as the receipt showed; that in breach of his trust he had sold them and

vested the proceeds in lands. The answer gave the history of the transaction as given in Rayburn's statement above.

The court below dismissed the bill, and the complainants brought the case here.

Messrs. J. M. Carlisle and J. D. McPherson for them relied on the declaration of trust signed by Rayburn, and which they contended the court ought not to suffer to be weakened by parol testimony, and especially not by his own parol testimony. It was certain that he had received other bonds, and it was not to be doubted that *those* were the bonds that were the equivalent for the moiety of the St. Luke property originally bought for Confederate money, at what value did not appear, and on a retransfer of which the $6000 debt due by the railroad company was, probably, a sufficient compensation.

Then Rayburn's own letter came in confirmation. He admits that he may have done wrong, and that he ought to have gone to see Kitchen before selling as he did.

The fact that the bonds were worth but five cents on the dollar would be important if Kitchen were seeking to charge Rayburn with some higher sum than the admitted proceeds; but as he is only seeking to charge Rayburn with such admitted proceeds, their small market value in comparison with their "face value" has nothing to do with the matter. Rayburn got about eight cents, and he is asked to account for no more.

Messrs. Montgomery Blair, T. T. Gantt, and F. A. Dick, contra.

Mr. Justice STRONG delivered the opinion of the court.

It is impossible to separate the receipt which Rayburn gave for the one hundred and nineteen bonds from the arrangement by which he gave up his title to the moiety of the St. Luke lands, and the engagement of Kitchen to secure to him $10,000, the understood value of the lands. They are all parts of one transaction. The assent of Rayburn to a rescission of the contract by which he had become the equitable owner of that moiety, the acceptance of some of the bonds

as security for payment of the consideration for the surrender, and the undertaking to invest the remaining bonds in the purchase of land from the trustees of the railroad company, were all induced by the representations of Kitchen, and they were obtained at the same time. The evidence satisfactorily establishes that, having sold an undivided half of the St. Luke lands to Rayburn, and subsequently finding it for his interest to recover the ownership of them, he proposed a repurchase. There appears to have been no difference of opinion respecting the value of the lands and the price to be paid for the proposed surrender of Rayburn's title. Starr, a witness present when the arrangement was spoken of, testifies that Kitchen stated to Rayburn he would give him railroad bonds sufficient to secure him in the sum of $10,000 if he would give up his claim or obligation on him for the lands, and further stated that with the bonds he, Rayburn, could get more land equally good and in a better body or locality. The St. Luke body of lands contained twenty-two hundred acres, of which a moiety had previously been sold by Kitchen to Rayburn, and this witness thought they were worth at least $10 an acre then, that is, when the arrangement was made for the repurchase. To the same effect is the testimony of Rayburn himself. It is that the undivided half of the St. Luke lands were valued by Kitchen at $10,000, and there is no evidence in the case inconsistent with this. Ten thousand dollars, then, was the sum which Kitchen came under obligation to pay to Rayburn for the lands which the latter surrendered by giving up the receipt he had taken for the purchase-money, and by returning the property bond.

Thus far there is little conflict in the evidence. But from this point onward there is more disagreement. The account of the transaction given by Kitchen is that he agreed to give Rayburn, in satisfaction of the debt, railroad bonds of the Cairo and Fulton Railroad Company, enough to pay for a thousand acres of land of the company, then held by trustees, and that he did give him five such bonds for $1000, each amounting with the interest coupons thereon to more than

$6000, telling him the trustees might charge him for the land a little more than $5000, but that he would make it up. The remaining bonds, he states, were taken by Rayburn to be invested in lands for Mrs. Kitchen. He does not admit that he authorized the application of any of those remaining bonds to the payment of his debt to Rayburn.

The testimony of Rayburn is that Kitchen not only gave him the five bonds towards the liquidation of the debt, but that he also said if they were not sufficient, he (Rayburn) might use a sufficient number of the others in his possession (meaning those for which the receipt was given) to pay himself for the undivided half of the St. Luke lands, valued at $10,000 by Kitchen himself. If this is true there is an end of the plaintiff's case, for it clearly appears that the bonds could not be used in the entry or purchase of the railroad company's lands, and that the whole of them, one hundred and twenty-four in number, were sold for $10,000, a sum not greater than the agreed value of the St. Luke lands. The plaintiff's bill affirms that sale, and it seeks to follow the proceeds subsequently invested, in part, in the land bought from Timberman.

It is not necessary, however, to determine whether the testimony of Rayburn in this particular is a true account of the transaction. There is another aspect of the case which is controlling. The arrangement between Kitchen and Rayburn, in which the latter surrendered his claim to the St. Luke lands, accepted bonds in payment of the debt due him, and assumed a trust of other bonds, even if it was such as the plaintiffs allege, was fraudulently obtained by Kitchen. He had been president of the railroad company. He knew its condition. He knew that the bonds were almost valueless. He had declared that under certain circumstances they would not be worth more than five cents on the dollar. Having himself a claim upon the company, he had refused to receive the company's bonds in liquidation of the claim at more than $50 each, including unpaid coupons, and he had settled with the company, receiving one hundred and sixty-eight bonds at that rate. Yet, in order to effect his

bargain with Rayburn, who was an illiterate man, he represented to him that the bonds were very good; that he (Rayburn) could make the money at any time out of them; that he could enter eleven hundred acres anywhere about Clarkton, Dunklin County, with five of them, paying all expenses; that the lands about Clarkton, known to Rayburn, were railroad lands, and subject to be entered with those bonds at that time. All these representations were false, and were known by Kitchen to be false. Moreover, he was assured that Rayburn had no knowledge upon the subject, and that confidence was reposed upon his statements. It was thus the contracts were obtained. Rayburn gave up his bond for the conveyance of the St. Luke lands, accepted the bonds, and assumed the trust. And it was not until after he had discovered that neither the trustees of the railroad company nor the company itself had any lands about Clarkton, or elsewhere, that could be entered with the bonds, either at five dollars per acre or at any price, that the bonds were almost valueless, and that Kitchen had offered to sell one hundred and sixty-eight similar bonds for $8423, that he sold those transferred and deposited with him for $10,000.

The complainants, then, do not come into court with clean hands. They are seeking the benefit of a contract obtained by their fraud, or by the fraud of Kitchen. Hence they can have no standing in a court of equity. Such a court will not lend its power to assist or protect a fraud. It will not even enforce an unconscionable bargain. In *Bein* v. *Heath** it was said to be a principle in chancery "that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity." For this reason, if for no other, the plaintiffs cannot succeed. They are seeking in a court of equity to derive an advantage from their own wrong.

DECREE AFFIRMED.

* 6 Howard, 247.

CALDWELL'S CASE.

1. In a contract made for the transportation of military supplies and stores in the Western country, and in the presence of actual war, between the military department of the government and a private party, the terms "posts, depots, and stations" are to be taken in their military sense and not in the sense of railway posts, depots, and stations.
2. When such a contract speaks of military posts or depots ON the west bank of a river, posts, one of which is 92 miles west of the river, and another 132 miles, and a third 191 miles, cannot be considered as within the designation.

APPEALS from the Court of Claims.

Caldwell sued the United States to recover damages for the breach of a transportation contract, dated March 12th, 1866; the government then being at war with Western Indians. The articles on which the points in dispute arose were thus:

"ARTICLE I. The said Caldwell shall receive at any time, *in any of the months from April to September*, inclusive, during the year 1866, from the officers or agents of the quartermaster's department at Forts Leavenworth and Riley, in Kansas; at Fort Kearney, Nebraska Territory; Fort Sedgwick, Colorado Territory; Fort Laramie, Dakota Territory; and at any points or places at which *posts* or *depots* shall be established during the continuance of this contract, ON the west bank of the Missouri River, north of Fort Leavenworth and south of latitude 42 degrees north, all such military stores and supplies as may be offered to him for transportation . . . by the officer of the quartermaster's department, at any or all of the above points or places, and transport the same with dispatch, and deliver them . . . to the officer of the quartermaster's department on duty at any of the *posts* or *depots* which *are now or may be hereafter established* in the Territory of Colorado north of 40 degrees north, and at Denver City, and in the Territories of Nebraska, Dakota, Idaho, and Utah, south of latitude 44 degrees north, including Fort Reno, and east of longitude 114 degrees west of Greenwich.

"ARTICLE II. The said Caldwell agrees . . . to transport un-

der this agreement, from the *posts*, *depots*, or *stations* named in Article I, or from and to any other *posts*, *depots*, or *stations that may be established within the district named in said article*, any number of pounds of military stores and supplies, from and between 100,000 lbs. and 10,000,000 lbs. in the aggregate.

"ARTICLE XI. The said Caldwell shall transport all the military stores and supplies for which the quartermaster's department may require *wagon* transportation by contract, on the route specified by this agreement, *during the year* 1866, provided the weight of such military stores and supplies shall not exceed, in the aggregate, 10,000,000 lbs.; yet nothing herein shall be so construed as to forbid or prevent the United States from using its own means of transportation for such service, whenever it may be deemed advisable to do so."

The case, as found by the Court of Claims, was thus:

At the date of the contract the only military posts ON the west bank of the Missouri River, within the said district, were Fort Leavenworth, in Kansas, and Omaha, in Nebraska Territory.

On or before the 30th day of March, 1866, the president of the Union Pacific Railroad advised the Quartermaster-General that the company had sixty miles of their line completed west of Omaha, and that the company expected to complete the first hundred miles by the 10th of June.

In the summer and autumn of 1866 the railroad company had extended their line westward to Columbus, Lone Tree, and Kearney's Station, and it offered to the United States a more expeditious and cheaper mode of transportation than wagon transportation.

In the summer of 1866 the United States had collected at Omaha military stores and supplies, intended for the supply of posts west of the Missouri River, and within the district covered by the contract with Caldwell, and in the year 1866 they sent by the said railroad quantities of the said stores and supplies from Omaha to Columbus, Lone Tree, and Kearney's Station, the successive termini of the railroad as it was extended westward.

In the month of June, 1866, the United States contracted

with one Kountze for the transportation of the said stores and supplies from Columbus, Lone Tree, and Kearney's Station to Fort McPherson, Fort Laramie, and Fort Kearney, and Kountze, under the said contract, and in the year 1866, performed the transportation; that is to say, from April to September, 1866, he transported 2,945,484 lbs., and in October transported 693,964 lbs.

Previous to the delivery of the said military stores and supplies to the railroad company, and before the making of the said contracts with Kountze, Caldwell was prepared, and gave notice to the United States of his readiness to transport them, under and according to his contract.

Previous to the delivery of the stores and supplies to Kountze, but after the making of the said contracts with him, Caldwell was prepared and claimed of the United States the right, under his contract, to transport them from the termini of said railroad to such places, within his contract, as the United States might designate.

No notice was given by the United States to Caldwell, under his contract, to transport the military stores and supplies transported by said Kountze. But on the 11th of June, 1866, he received notice from the United States that transportation, under his contract, would not be needed.

The cost of the transportation of the said stores and supplies delivered to Kountze in any of the months from April to September, inclusive, would have been to Caldwell $1.45 per 100 lbs. per hundred miles.

The Court of Claims, holding that the expression "posts and depots ON the west bank of the Missouri River," &c., was not confined to posts and depots "on the water-line of the river," but was used "merely to denote the most easterly line of the district covered by the contract," and that the terms "posts, depots, or stations" did not, of necessity, mean *military* posts, depots, or stations, awarded to Caldwell $35,689.01, as damages for the failure to deliver 2,945,484 lbs. of supplies, which were transported from Omaha to Columbus, to Lone Tree, and to Kearney Station by rail, and thence to Fort McPherson, Fort Laramie, and Fort

Reno by wagon, between the months of April and September, 1866. But holding that the clause in Article XI, by which it was agreed that Caldwell should transport all the military stores and supplies for which the quartermaster's department might require wagon transportation, &c., "during the year 1866," was only a provision for additional transportation that might be required in other months than those from April to September, previously specified, and under another contract than this to be made, the court limited the recovery to transportation during the months from April to September, 1866, inclusive, and refused to allow damages for the failure to deliver for transportation the supplies which were carried in October, 1866. The United States appealed from the first branch of the judgment, and Caldwell from the latter part.

Messrs. Durant and Horner, for the claimant, Caldwell; Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice HUNT delivered the opinion of the court.

In the view we have taken of the case, it is unnecessary to consider a question largely discussed in the court below, and in the briefs of counsel here, to wit, whether the contract, although not in terms containing a stipulation binding the United States to deliver to the claimant all the stores and supplies it desired to transport between the points mentioned, was to be construed as having that effect. Our decision of the case rests upon other grounds, which are reached upon the assumption that the claimant is right in his construction of the contract, in that respect, but do not at all depend upon it.

By the second article of the contract of Caldwell, the claimant, he undertakes to transport "from the posts, depots, or stations named in Article I," or from "any other posts, depots, or stations that may be established" on the west bank of the Missouri River, any number of pounds of supplies not exceeding 10,000,000 lbs. in the aggregate. The posts named in Article I are, Forts Leavenworth and Riley,

in Kansas; Fort Kearney, Nebraska; Fort Sedgwick, Colorado; Fort Laramie, Dakota. The district named in said article within which other posts may be established is, the west bank of the Missouri River, north of Leavenworth and south of 42 degrees north latitude.

The posts from which the supplies were sent, which, it is said, should have been delivered to the claimant, were not those named in Article I, or either of them. They were Omaha at the outset, or starting-point, and Columbus, Lone Tree, and Kearney Station (not Fort Kearney), as the intermediate points from which wagon transportation was taken. These three points were railroad stations on the Union Pacific Railroad, and they were points to which the road was, from time to time, sufficiently completed for the purposes of railroad travel or transportation.

The judgment of the Court of Claims is based upon the theory that the expression in the contract, "posts, depots, or stations," includes railway depots or stations; that when a depot or station was established upon the Pacific road, as its construction advanced westwardly, such point became a post or station within the meaning of the contract. We are of the opinion that this was not the intention of the parties, but that military posts or stations alone were intended by them.

The contract was intended to aid the government in the transfer of its stores and supplies from one military post, station, or depot to another. While the same words in a contract, the subject-matter of which respected goods to be transported for individuals, and in time of peace, might be construed as claimed, such is not their fair and natural meaning in the contract we are considering. The term "post," in this instrument, means a military establishment where a body of troops is permanently fixed; "station" means a place or department where a military duty is to be discharged, or the synonym of "depot," a place where military stores or supplies are kept, or troops assembled. To apply them otherwise would, we think, be giving a forced construction to language used in the presence of actual war,

in reference to military stores, and in reference to their transportation from one military position to another, as the necessities of the army should require.

Columbus, Lone Tree, and Kearney are not "on the west bank of the Missouri River," and the contract limits the other posts, stations, or depots that may be established to that locality. The record shows that from Omaha to Columbus is ninety-two miles, to Lone Tree is one hundred and thirty-two miles, and to Kearney Station is one hundred and ninety-one miles, and there is no evidence that the Missouri River is, at any other point, nearer to the places named than is thus indicated. It would be quite a latitudinarian construction that would hold that these places are "on the Missouri River." The specifications of the points of departure are minutely described in Article I, and cannot be enlarged by the looser language used in Article III, where another subject is provided for, and the points of departure are mentioned in an incidental manner only.

The supplies now under consideration, it will be observed, were shipped from Omaha as the first or original point of departure. Omaha is situated on the west bank of the Missouri River, and was a station, or depot, where military stores and supplies were collected, and where troops were assembled at the time the claimant's contract was made. It is, nevertheless, not a point from which the supplies that were to be forwarded, were by the contract to be delivered to the claimant. Those points were the places named, to wit: Forts Leavenworth, Riley, Kearney, Sedgwick, and Laramie; the station, or depot, of Omaha not being named. Nor can it come under the words "at such points or places at which posts or depots shall be established during the continuance of this contract, on the west bank of the Missouri River," as it was a post, or depot, established long before the making of the contract, and was in full operation as a post or station when the contract was made.

The reason for this careful omission of Omaha, both from the expressed points of departure and those afterwards to be formed, is found in the fact that it was the eastern terminus

of the Union Pacific Railroad. The building of this road was then going on. It was well known to the United States authorities that it would be rapidly extended westwardly, and that it would be a speedy and cheap means of transporting its supplies. The contract with the claimant required the supplies to be transported at the rate of ten miles a day with mule trains and fourteen miles a day with ox trains, and at the expense of $1.45 per 100 lbs. for every hundred miles. The train upon the railroad would carry the supplies the same distance in an hour, and the expense would be diminished nearly as much as the speed would be increased. All this was well known to both parties. Hence when the road was completed to Columbus it was used by the government for that distance, and when successively completed to Lone Tree and Kearney, it was used to those places. That the United States under such circumstances intended to deprive itself of the power to use this new and more useful mode of transportation can scarcely be credited. It has not done so in terms, and, we think, that there is no fair reason to suppose that it has done so by implication.

The whole matter results in this: The government is responsible in damages if it has sent its supplies through other parties than the claimant from the posts of Leavenworth, Riley, Kearney, Sedgwick, or Laramie, or from other stations or posts thereafter established on the west bank of the Missouri River. The points from which it is proved to have sent supplies by other means than through the claimant are not among those named, nor are they military posts, nor are they on the west bank of the Missouri River. Omaha is not among the posts named, nor is it one established after the making of the contract. Hence there has been no breach of the contract, and there is no liability in damages.

The judgment awarding damages in the sum of $35,689.01 is REVERSED, and the case is remitted to the Court of Claims, with directions to

DISMISS THE PETITION.

HALL *v.* JORDAN.

1. Where the consideration in a deed is expressed to be so many dollars, the stamp required is the same whether in point of fact the sum named be paid in gold or in notes of the United States, made by law a legal tender.
2. A party alleging that the stamp on a deed was too small (he being by the law of the State where the deed was made obliged to put on the stamps), who brought such a question here, delaying the judgment below for two years and a half, punished under the Twenty-third Rule, by a judgment of ten per cent. damages in addition to interest and costs.

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

Jordan, on the 1st of November, 1866, sold a tract of land to Hall & Conley, the consideration as expressed in the deed being $13,000; the deed not stating, however, whether this $13,000 was gold and silver coin, or notes of the United States; a kind of notes, always up to this time, from the time of their issue, less valuable than such coin; but which in February, 1862, and afterwards had been made by act of Congress a legal tender in the payment of debts, and which in point of fact at the time of the sale were the universal currency, to the exclusion of gold and silver as currency, of all parts of the United States except parts on the Pacific Coast.

In point of fact the consideration of this deed was one of gold coin, or based on the value of coin; that is to say, $6500 were paid in gold coin when the deed was made, and an agreement given to pay "on the 25th of December, 1867, an amount of legal currency of the United States sufficient to purchase $6890 of the present gold coin of the United States;" this $6890 being the balance ($6500) of the $13,000 consideration-money, with interest added to the day of payment.

An act of Congress in force at the date of the deed,* en-

* Act of June 30th, 1864, 15 Stat. at Large, 295.

Argument for the plaintiff in error.

acted that on deeds of land there should 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 should be received in evidence. The act makes a provision, however, for the correction of unintentional error by application to the collector, and purchase of the proper stamp. This deed was stamped with a stamp for $13, the stamp confessedly proper for one when the consideration was $13,000 in notes of the United States.

On a question in the court below whether the deed was properly stamped, or whether the stamp ought not to be such as the amount of notes which the $13,000 of gold coin, the actual consideration of the deed, would have bought—if the amount represented by *them* had been set forth in the deed—required, that court held the stamp sufficient, and on the 29th of June, 1871, the present writ of error was taken to its judgment. The case came on to be heard here December 16th, 1873.

Messrs. R. Johnson and J. H. Imbree, for the plaintiff in error:

It is a matter of universal knowledge that there has always been a difference between the value of what are called "legal tender notes" and of coin. At times, as in the summer of 1864, one day in which it required $285 of notes to buy $100 of gold,* this difference has been immense; and it has been frequently great. Now, the question is, may parties at a time when gold and silver have in fact no currency—when the notes of the government are the sole currency of the country, or certainly of all that part of it where the parties to this transaction lived—may parties put in their deeds the value, in *gold*, of the property sold, and then pay stamps on that value? the real thing which passes between them being, all the while, not gold, but paper; not $13,000 in coin, but a greater amount in notes; more or less greater according as the discount on paper in the market may be higher or lower. We submit that they cannot, because a contrary

* See Legal Tender Cases, 12 Wallace, 512, note.

rule will tend directly to frauds upon the revenue. In cases of large deeds or of large mortgages the temptation will be prevailing.

Mr. F. P. Stanton, contra:

No man could tell on the 1st of November, 1866, how much currency would be required to purchase gold on the 25th of December, 1867, or even that legal tenders would not be equivalent to gold at that time.

But there has never been any law requiring the stamps on deeds or other instruments to be regulated by the currency values, when the transactions were for gold coin. The stamp affixed to the deed was then exactly what the law required. Supposing the plaintiffs in error honestly doubted this, they had it in their power to correct the supposed error by applying to the collector; and as it is evident no fraud was intended, the correction would have cost them fifty cents. It is apparent then, that the writ of error in this case, which has delayed the proceedings in the court below for two years and a half, was sued out "merely for delay," and comes strictly within the letter and spirit of the Twenty-third Rule of this court, which declares that "in all cases where a writ of error . . . shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per cent. per annum on the amount of the judgment."

In addition, by the practice in Tennessee, a vendee must furnish deeds and stamps. In this proceeding, therefore, the plaintiffs in error are endeavoring to take advantage of their own wrong, as it was their duty to affix the proper stamp to the deed. For this reason, as well as for those already stated, the defendant in error asks for damages at the rate of ten per cent., in addition to interest, in accordance with the rule aforesaid.

Mr. Justice CLIFFORD announced the judgment of this court, affirming the judgment of the court below with costs, interest,

AND TEN PER CENT. DAMAGES.

COIT *v.* ROBINSON.

When, after opposition by a creditor to the discharge of a petitioner in bankruptcy, the District Court discharges him, and the opposing creditor files in the Circuit Court a "petition of appeal,"—a petition setting forth the application for the benefit of the Bankrupt Act, the opposition, and the discharge, and praying the Circuit Court for a reversal of the orders of discharge of the District Court—such "petition of appeal" must be regarded as being a petition for review under the first clause of the second section of the Bankrupt Act, which gives the Circuit Courts a general superintendence and jurisdiction of all cases and questions arising under the act; and on an affirmance by the Circuit Court of the decree of discharge by the District Court, no appeal lies to this court, though the debt of the opposing creditor discharged be more than $2000.

ON motion to dismiss an appeal from the Circuit Court for the Southern District of New York, affirming a decree of the District Court in bankruptcy, forever discharging, in the usual way, two persons, partners in trade, from payment of all debts and claims against them, &c., including a debt of one Coit, to a greater amount than $2000.

The case was thus:

Robinson & Chamberlain, partners in trade, applied to the District Court for the Southern District of New York for a discharge under the Bankrupt Act of March 2d, 1867.* Coit opposed their discharge, notwithstanding which the court held them entitled to be discharged, and by its decree discharged them accordingly. Thereupon Coit petitioned the Circuit Court for a reversal of the decree of the District Court, and on the same day filed a bond with surety for costs, and pursuant to the notice given, filed in the Circuit Court a paper entitled "*petition of appeal*," in which he referred to the petition in bankruptcy of Robinson & Chamberlain, and stated that he was a creditor; that he had proved a part of his claim and filed his proof; that the bankrupts were examined at his instance, that he made op-

* 14 Stat. at Large, 518.

position to their discharge, and that he filed the grounds of his opposition with the District Court; that he was heard in support of his opposition before that court, and that the court overruled his opposition and granted a discharge with costs against him, the opposing creditor. The petition concluded thus:

"Your petitioner, feeling aggrieved thereby, prays the Circuit Court for a reversal of the said several *orders* of the said District Court as being contrary to law and to the evidence."

All the proceedings, including the evidence, had in the District Court were filed with this petition.

The petition of appeal was heard in the Circuit Court, and a decree made, which, after reciting, that "*at a stated term of the said court*," "the petition of W. A. Coit, one of the creditors, &c., praying for a review and reversal of the *decree* of the District Court, &c., granting a discharge to the bankrupts, and the appeal thereon had been brought to a hearing before the said Circuit Court," concluded:

"Now, on all the papers and proceedings herein, and after hearing, Mr. Charles Tracy, of counsel for said creditor and appellant Coit, on behalf of said petition, and Mr. G. A. Seixas of counsel for said bankrupts and respondents, in opposition thereto. It is ordered, adjudged, and decreed that the said decree of said District Court be and the same is hereby affirmed."

Coit thereupon filed in the Circuit Court a petition, addressed to this court, giving a statement of the proceedings already referred to, both in the District Court and in the Circuit Court, and concluding as follows:

"Your petitioner, therefore, prays that all and singular the records and proceedings of said Circuit Court upon the said case and the appeal thereon may be removed to the Supreme Court, and that the said decree of the Circuit Court may be reversed, and that your petitioner may have such other and further relief as may be deemed fit and proper."

Before filing this petition he filed in the same office where he had filed it a bond in $1000, conditioned to prosecute the

appeal with effect, and approved by the circuit judge "as to form and sufficiency of sureties."

The appeal being entered in this court the bankrupts moved to dismiss it, on the ground that no appeal would lie in such a case from the Circuit Court. And whether one would or would not, was the question before this court.

The question depended largely upon certain enactments of Congress, including specially clauses of the Judiciary Act of 1789, and of the Bankrupt Act of March 2d, 1867, under which the discharge took place. The sections referred to or relied on in the opinion of the court run thus:

*Judiciary Act.**

"SECTION 11. The Circuit Courts shall have appellate jurisdiction from the District Courts under the regulations and restrictions hereinafter provided.

"SECTION 22. Final decrees and judgments in civil actions in a District Court where the matter in dispute exceeds the sum or value of $50, exclusive of costs, may be re-examined and reversed or affirmed in a Circuit Court upon a writ of error.

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

[By act of March, 1803,† an appeal is given to the Supreme Court from all final judgments or decrees rendered in any Circuit Court in any cases of *equity*, of *admiralty*, and *maritime jurisdiction*, of *prize* or *no prize*, under the same conditions as to the sum or value of the matter in dispute as before existed in regard to writs of error.]

Bankrupt Act.

This act, after constituting the several District Courts of the United States, "courts of bankruptcy," and after giving to them "original jurisdiction in their respective districts in all matters and proceedings in bankruptcy," enacts by its

* 1 Stat. at Large, 79. † Ib.

second section (the same, for the convenience of the reader of the court's opinion, being here broken into clauses), as follows:

"SECTION 2. The several courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all *cases and questions* arising under this act; and except when special provision is otherwise made may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity.

"The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof, in term time or in vacation.

"Said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the same district of all suits at law or equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of said bankrupt, transferable to or vested in such assignee, &c.

"SECTION 8. 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 from said District 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 whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the District Court to the Circuit Court for the same district, &c., &c.

"SECTION 9. 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 in such case shall exceed $2000."

The twenty-ninth section authorizes a discharge by the District Court of the petitioning debtor when there has been no fraud on the act. The act goes on:

"SECTION 31. Any creditor opposing the discharge of any bankrupt, may file a specification in writing of the grounds of his opposition, and the court may, in its discretion, order any

question of fact so presented to be tried at a stated session of the District Court."

Mr. G. A. Seixas, for the bankrupts, and in support of the motion to dismiss, contended that the only mode of review at the circuit was by petition, under the first clause of the second section of the act,* which Coit, the opposing creditor, had in fact followed, and that in such case no appeal lies to this court; and that this was settled by *Morgan* v. *Thornhill*,† *Hall* v. *Allen*,‡ *Smith* v. *Mason*,§ *Mead* v. *Thompson*.‖

Mr. Charles Tracey, contra, argued that none of the cases cited governed this; that they were all upon interlocutory orders; and so no precedent in a case like this, where the debtor was discharged and the debt of the opposing creditor annihilated; a case where he certainly ought to have the privilege of being heard in a superior court.

Mr. Justice CLIFFORD delivered the opinion of the court.

District Courts have original jurisdiction, in their respective districts, of all matters and proceedings in bankruptcy, and are authorized to hear and adjudicate the same according to the provisions of the Bankrupt Act.¶ Circuit Courts have a general superintendence and jurisdiction of all cases and questions arising under that act, within and for the districts where the proceedings under the act are pending; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as in a court of equity; the provision also being that the Circuit Court, or any justice thereof, may exercise the powers and jurisdiction granted by that clause, "*in term time or vacation.*"**

* Ruddick *v.* Billings, 3 Bankrupt Register, 14; 1 Woolworth, 330; In re O'Brien, Bankrupt Register, Sup. 38; In re Hall, 1 Dillon, 586; 1 Abbott, N. S. 503.

† 11 Wallace, 65.

‡ 12 Id. 452.

§ 14 Id. 419.

‖ 15 Id. 638.

¶ 14 Stat. at Large, 517.

** Ib. 518.

Restatement of the case in the opinion.

On the 29th of February, 1868, the respondents filed their petition in the District Court for the Southern District of New York, representing that they owed debts within the judicial district exceeding $300, and that they were unable to pay all their debts in full; that they were willing to surrender all their estate and effects for the benefit of their creditors, and stating that they desired to obtain the benefit of the Bankrupt Act; and prayed that, after due proceedings had, they might, by a decree of the court, be adjudged to be bankrupts, and that, upon complying with all the requirements of that act, they may severally be decreed to have a certificate of discharge from all their debts provable under the said act. By the record it also appears that the petitioners, on the 12th of June in the same year, were adjudged to be bankrupts within the true intent and meaning of the Bankrupt Act.

Complete jurisdiction of the case was by those means acquired by the District Court, and it further appears that such proceedings were had that the respondents, on the 17th of July following, were, by the decree of the District Court, discharged from all debts and claims provable under that act against them on the day their petition to be adjudged bankrupts was filed.

Opposition to their discharge was made by the present appellant, and the District Court, on the 24th of the same month, heard the parties and passed an order that the bankrupts recover of him, as such opposing creditor, the costs incurred by them in resisting such opposition, amounting to the sum of $129.50. Three days later the appellant, as such opposing creditor, gave notice that he intended to petition the Circuit Court for the same district for a reversal of the aforesaid decree of the district judge, and on the same day he filed a bond for costs, executed by himself and a surety, and pursuant to the notice given, on the 6th of August following he filed in the Circuit Court a certain paper called the "*petition of appeal*," in which he refers to the petition in bankruptcy of the respondents and states that he is a creditor of their estate; that he proved a part of his claim in

that proceeding, and that he filed proof of the same with the register; that the bankrupts were examined at his instance, and that he made opposition to their discharge, and that he filed the grounds of his opposition in that behalf with the District Court; that he was heard in support of his opposition before the district judge, and that the district judge overruled his opposition and granted the respective certificates of discharge to the alleged bankrupts, and awarded such costs to them as they incurred in resisting his opposition, and concludes as follows: "Your petitioner, feeling aggrieved thereby, prays the Circuit Court for a reversal of the said several orders of the said District Court as being contrary to law and to the evidence," as more fully set forth in the petition, to which he made oath before the register and caused notice thereof to be served on the solicitor of the bankrupts.

Duly certified copies of the proceedings in bankruptcy, as well those that took place before the register as those before the district judge, whether in term time or vacation, were, on the 17th of September in the following year, filed in the office of the clerk of the Circuit Court for the same district, together with a copy of the minutes of the testimony taken before the register, filling more than three hundred and sixty closely printed pages of the transcript, without including the numerous exhibits which are annexed to the certificate of the clerk. Hearing was had in the Circuit Court on the petition for review, and the Circuit Court, on the 28th of March last, adjudged and decreed that the decree of the District Court be in all things affirmed, and that the bankrupts recover such costs of the petitioner as they incurred in resisting his opposition, amounting to the sum of $94.25.

Beyond all question the case in the Circuit Court was a petition for review under the first clause of the second section of the Bankrupt Act, which gives to the Circuit Courts within and for the districts where the proceedings in bankruptcy are pending, a general superintendence and jurisdiction of all cases and questions arising under the Bankrupt

Act, except where special provision is otherwise made. Such courts, in the exercise of their supervisory jurisdiction, may hear and determine any such case or question upon bill, petition, or other proper process of any party aggrieved, as in a court of equity. Cases and questions of the kind may be heard and determined by the proper Circuit Court, or by any justice thereof, in term time or vacation, which of itself is quite sufficient to show that the power and jurisdiction conferred by that clause of the second section are not the same as that conferred upon the Circuit Courts by the eleventh section of the Judiciary Act.*

Special provision is not otherwise made in the Bankrupt Act for the review or revision by the Circuit Court of either of the questions involved in the orders or decrees of the District Court which are the subject of complaint in the case, and for that reason it follows that the power and jurisdiction of the Circuit Court to hear and determine the complaint of the appellant and to review or revise the orders or decrees of the District Court in the case were decided under the first clause of the second section of the Bankrupt Act.

Said Circuit Courts also have jurisdiction, concurrent with the District Courts, of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming any adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to or vested in such assignee.

Concurrent jurisdiction with the District Courts of all suits at law or in equity are the words of that clause, showing conclusively that the jurisdiction intended to be conferred is the regular jurisdiction between party and party, as described in the eleventh section of the Judiciary Act and the third article of the Constitution. Consequently it follows that final judgments in such civil actions, or final decrees in such suits in equity, rendered in cases where the matter in dispute exceeds, exclusive of costs, the sum or

* 1 Stat. at Large, 78.

value of $2000, may be re-examined in this court under the twenty-second section of the Judiciary Act, when properly removed here by writ of error or appeal, as required by existing laws.*

Like jurisdiction in all such suits at law or in equity is also vested in the District Courts concurrent with the Circuit Courts, but inasmuch as such controversies are made the subject of special provision, neither the judgment nor the decree of the District Court in such a suit can be reviewed or revised by the Circuit Court under the first clause of the second section of the Bankrupt Act, nor in any other manner than that provided in the twenty-second section of the Judiciary Act and the subsequent act regulating appeals.†

Opportunity for further litigation, either in the District or Circuit Court, being closed, the appellant, on the 11th of April last, filed in the Circuit Court a petition, addressed to the justices of this court, giving a full summary statement of the aforesaid proceedings, both in the District Court and in the Circuit Court, and concluding as follows: Your petitioner therefore prays that all and singular the records and proceedings of said Circuit Court upon the said case and the appeal thereon may be removed to the Supreme Court, and that the said decree of the Circuit Court may be reversed, and that your petitioner may have such other and further relief as may be deemed fit and proper.

Before lodging that petition in the clerk's office of the Circuit Court the appellant filed in the same office a bond in the sum of one thousand dollars, conditioned to prosecute the appeal with effect, dated one day earlier, and approved by the circuit judge "as to form and sufficiency of sureties."

Since the case was entered in this court the respondents have appeared and filed a motion to dismiss the appeal for the want of jurisdiction, which is the principal question for the consideration of the court at the present time.

Cases arising under the third clause of the second section

* Morgan *v.* Thornhill, 11 Wallace, 80.

† 1 Stat. at Large, 84; 2 Id. 244.

of the Bankrupt Act, where the amount is sufficient, are plainly within the ninth section of the Bankrupt Act, and as such, when the case has proceeded to final judgment or decree, may be removed here for re-examination by writ of error or appeal, as the case may be, but the review and revision contemplated by the first clause of the same section is evidently the same in substance and effect as that given to the Circuit Courts in the prior Bankrupt Act, as sufficiently appears from the words, "general superintendence," preceding and qualifying the word "jurisdiction;" and more clearly from the fact that the revisory jurisdiction extends to mere questions, as contradistinguished from judgments or decrees, as well as to cases; and from the further fact that the jurisdiction in that behalf may be exercised in chambers as well as in court, and in vacation as well as in term time.*

Suits in equity and cases at law, under the jurisdiction created by that act, may be removed to the Circuit Court for re-examination, as provided by the eighth section of the act, but it is quite clear that the removal in such cases must be effected under the regulations prescribed in the twenty-second section of the Judiciary Act and the subsequent act allowing appeals in cases of equity and of admiralty and maritime jurisdiction.†

Mere questions are not re-examinable under the regulations prescribed in those acts, nor would any judgment or decree be regarded as a regular final judgment or decree for such a purpose, unless it was rendered in term time when the court was in session.

By that section "all cases in equity" and "cases at law," when the debt or damages claimed amount to more than $500, may be removed into the Circuit Court for re-examination, and the further provision is that any supposed creditor whose claim is wholly or in part rejected, or any assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the District Court to the Circuit Court for the same district, if claimed and due notice thereof is

* Morgan *v.* Thornhill, 11 Wallace, 80. † 2 Stat. at Large, 244.

given, as therein required, within ten days after the entry of the decree or decision in the District Court. Nor can any writ of error be allowed under that section unless the party claiming it shall comply with the statutes regulating the granting of such writs, and the better opinion is that the writ of error must be sued out within the same time as that allowed for claiming an appeal in an equity suit.*

Appellate jurisdiction may unquestionably be exercised by the Circuit Courts in four classes of cases under the Bankrupt Act: (1.) By appeal from the final decree of the District Courts, in suits in equity commenced and prosecuted in the latter courts by virtue of the jurisdiction created by the third clause of the second section of the act. (2.) By writs of error sued out to the District Courts in civil actions finally decided by such courts in the exercise of jurisdiction created by the same clause of that section. Where the amount in dispute in such cases exceeds, exclusive of costs, the sum or value of $2000, the final judgment or decree in the case, as rendered in the Circuit Court, may be removed into this court for re-examination, as provided in cases originally brought in the Circuit Court. (3.) By appeal from the decision of the District Court rejecting wholly or in part the claim of a creditor, as provided in the eighth section of the act. (4.) By appeal from the decision of the District Court allowing such a claim when the same is opposed by the assignee.

Doubts are entertained whether the cases mentioned in the last two propositions are re-examinable in this court, but the question is not presented for decision in this case.

Whether the bankrupt is entitled to a discharge pursuant to the twenty-ninth section of the Bankrupt Act is always a question to be decided by the District Court under the conditions prescribed in that section. Creditors opposing the discharge may file a specification in writing of the grounds of their opposition, but the only effect of such a specification, as declared in the thirty-first section of the act, is to

* Insurance Co. *v.* Comstock et al., 16 Wallace, 258.

authorize the court, "*in its discretion*," to postpone the question of fact to be tried at a stated session of the court, as the thirty-second section provides that if it shall appear to the court that the bankrupt has, in all things, conformed to his duty under the act, the court shall grant the prescribed discharge.*

Regulations of a different character are prescribed in a case where the question is whether the alleged insolvent shall be adjudged a bankrupt without his consent, as in that event the provision is that the court shall, if the debtor, on the return day of the notice, required to be given on the petition, so demand in writing, order a trial by jury as therein provided, but the Bankrupt Act contains no provision for a jury trial on the question of discharge, and in the judgment of the court the only power vested in the Circuit Court to review and revise the decision of the District Court, made in granting or refusing such a discharge, is that conferred by the first clause of the second section of that act.

Except when special provision is otherwise made the Circuit Courts under that clause have a general superintendence and jurisdiction of all cases and questions arising under the Bankrupt Act. Special provision is not otherwise made for the re-examination by the Circuit Court of the decision of the District Court in granting or refusing a discharge in bankruptcy, and, of course, it can only be done under the power conferred by that clause.

Nothing remains for consideration in this case except to inquire whether an appeal lies to this court from a decree of the Circuit Court rendered in the exercise of the supervisory jurisdiction conferred upon that court by the first clause of the second section of the Bankrupt Act, which is the very question that was presented to this court in the case of *Morgan* v. *Thornhill*,† where this court unanimously decided the question in the negative. Since that opinion was delivered this court has decided the same question in

* 14 Stat. at Large, 533.

† 11 Wallace, 65.

the same way in four other cases, all of which are published in the regular series of the reports of the Supreme Court.* None of these statements can be successfully contradicted, and it follows that this court has no jurisdiction of the appeal in this case.

MOTION GRANTED, and the case

DISMISSED FOR WANT OF JURISDICTION.

Mr. Justice BRADLEY, with whom concurred Mr. Justice MILLER, dissenting:

I dissent from the judgment of the court in this case. The Judiciary Act gives a writ of error to this court from all final judgments and decrees in civil actions and suits in equity in the Circuit Courts, where the matter in dispute exceeds the sum or value of two thousand dollars. The act of March 3d, 1803, converts this writ of error into an appeal in cases of equity, and admiralty and maritime jurisdiction and prize cases. The cases in which appeals in bankruptcy have heretofore been disallowed, were cases of interlocutory orders or decrees; and, therefore, not within the terms of the law. The decree appealed from in this case has all the elements of a final decree, and belongs to a system of proceeding which has always been regarded in England as of equitable cognizance. The fact that it depends upon statutory regulation does not divest it of that character. A bankruptcy proceeding, by which the estate of a debtor is administered, is essentially an equitable one. In a case of such importance as that which involves a man's liability or non-liability for his debts after he has given up all his property, he ought not to be deprived of the right of appeal if the law, fairly considered, gives it to him. I think it does give it to him in this case.

* Hall *v.* Allen, 12 Wallace, 452; Smith *v.* Mason, 14 Id. 430; Mead *v.* Thompson, 15 Id. 638; Marshall *v.* Knox, 16 Id. 555.

Statement of the case.—Preliminary remarks.

MITCHELL *v.* TILGHMAN.

What R. A. Tilghman, of Philadelphia, claimed as his invention under the letters-patent granted to him of January 9th, 1854, was the process of manufacturing fat-acids and glycerin from fatty or oily substances by the action of water at a high temperature and pressure.

Two conditions, viz., that the heating vessel must be kept entirely full of the mixture of fat and water, and that no steam or air must be allowed to accumulate in the vessel employed to impart the heat, were material and indispensable conditions of Tilghman's patented method.

The claim of the patentee must be limited to the specific method or means of applying highly heated water under pressure pointed out in the specification; and although the claim is on its face broader than this, yet it is to be construed by reference to the specification.

In this point of view it is unimportant whether the claim contained any direct reference to the specification or not. Such reference, where not expressed, will be implied.

The precise apparatus described in Tilghman's specification does not appear to have gone into practical use in this country or in Europe, and the apparatus worked by Tilghman's licensees differs in many material respects from the apparatus described in his patent, and taken as a whole, therefore, it was considered by this court that Tilghman did not succeed in introducing his invention into practical use by the means and mode of operation described in his specification.

Accordingly, where a defendant had used highly heated water in a close vessel, but used a much more moderate degree of heat than specified by Tilghman, and used an entirely different apparatus from Tilghman's, and one which permitted the existence of steam as well as water—construing Tilghman's claim of invention as limited by the specific means and mode of operation described in his specification—such defendant was held not to have infringed.

APPEALS from the Circuit Court for the Southern District of New York, in which court R. A. Tilghman filed two bills in equity against R. G. Mitchell, under a patent granted to him the said Tilghman, for a process for making fat-acid and glycerin from natural fat; one bill having been filed during the first term of the patent, and the other under the extended term of the same patent.

In both cases final decrees were given in favor of Tilghman; and the defendant, Mitchell, took these appeals.

The bill set forth the grant of letters-patent to Tilghman,

October 3d, 1854, for fourteen years from January 9th, 1854, the reduction of the patented improvement to use, and the infringement by Mitchell.

The invention claimed by Tilghman may be stated, in general terms, to be based upon the discovery that if water be heated to a high degree, and at the same time retained in a close vessel so that it cannot pass into the state of steam, but must remain in the liquid state, it will, while in such highly heated liquid state, possess a peculiar property of separating natural fat into its chemical constituents, glycerin and fat-acids. He undertook to claim the employment of water *in the liquid state, heated and under the pressure* necessary to retain it in the liquid state as *the decomposing agent.* He asserted that prior to his discovery and invention, no one had ever known, used, or described the employment of *highly heated water retained in the liquid state* by *pressure* as such decomposing agent, and that under the law if he set forth this newly discovered decomposing power of *liquid water heated and under pressure*, and exhibited in his specification one mode of practically applying it, he was entitled to the exclusive use of this decomposing agent in treating fats for the purpose of separating them into fat-acids and glycerin.

To understand the questions at issue in this case, and passed upon by the court, there is first to be considered the phenomenon of heating water, &c., its behavior and properties when heated.

Water when heated in an open vessel at the surface of the earth passes into a state of vapor, at a temperature of 212° of Fahrenheit's thermometer; the waters expanding over eighteen hundred times in passing into steam. It is impossible to retain water in a liquid state, in an open vessel, after it has reached that temperature. If the vessel in which the water is heated, however, be covered, and the cover be fastened down, the water can be heated to any temperature whatever, and will still remain in the liquid state. The tendency of the water to pass into vapor increases with the

degree of heat applied to it, and there must, therefore, be a proportionate pressure or restraint by the inclosing vessel on the heated water to overcome this expansive tendency, or tendency to pass into a state of a vapor.

Vessels in which water could be heated to any desired temperature, and the water still retained in the liquid state, were known in the arts, and called "digesters."

To understand matters further a brief statement of the art of treating fat is necessary.

Fats obtained from various sources differed much in hardness and fusibility, and each variety was formerly supposed to be an entirely different article. About 1816, Braconnot, a French chemist, discovered that all natural fats were merely *mechanical* mixtures, in various proportions of fats entirely solid and hard, now called stearin, with a more fluid fat or oil, called olein. He found that simple pressure very slowly applied, squeezed out the more fluid part, and that the remainder made harder candles. But the process of separation by pressure was difficult and imperfect.

Chevreul, in 1825, discovered that all fats were *chemical* compounds of a substance called glycerin, with fatty bodies having slight acid characters called fatty acids; that fatty acids were of different degrees of fusibility, and that when the glycerin was separated from fats, the fatty acids could be more rapidly and perfectly pressed so as to get out the hardest fatty acids for candles; and he patented a chemical process of separating these fatty acids from glycerin.

His process consisted of two distinct stages:

1. The manufacture of natural fat into *soap*, by boiling lime or other alkali with the fat, in which case fourteen pounds of lime were used to one hundred pounds of fat.

2. The decomposition of the soap so produced into fat-acid by the use of two pounds of sulphuric acid to each pound of lime.

Soap had always previously been made by boiling the fat and solution of alkali together, and Chevreul suggested that this production of *soap* could be expedited by boiling the

fat and the solution of alkali together *under pressure*. He did not, however, suggest that *water alone*, heated and under pressure, would of itself decompose neutral fat into fat-acid and glycerin, but expressly mentioned alkali and sulphuric acid as the decomposing agents.

Another mode of separating free fat-acids was devised, which was called *decomposition by sulphuric acid distillation.*

This process was invented and used for producing *fat-acid only*, and not glycerin; the glycerin being *destroyed* by the process. It was asserted by Tilghman that this process differed from his:

1. In that the result produced was different, viz., fat-acid only, while his, Tilghman's, produced simultaneously both fat-acid and glycerin;

2. In that it required sulphuric acid to decompose the fat into fat-acid;

3. In that it did not depend for its efficiency on the use of *highly heated water* in the liquid state, retained in such state by pressure;

4. In that it was a process of distillation.

We must view here also the *attempted decomposition by steam.*

It was from time to time attempted, prior to Tilghman's alleged invention, to decompose neutral fat into fat-acid by *distillation* in a current of steam, but it was asserted by Tilghman that it was an unsuccessful and abandoned experiment, and had never come into use; and that even if it had been successful it differed in every way from his process. Among other ways,

In not producing glycerin as a result;

In not depending upon, or even allowing of, the presence of highly heated *water* under pressure;

In that it was a process depending on vaporization and subsequent condensation of the fat-acids;

In that the apparatus absolutely *necessary* for the distillation process was such as to render the execution of the hot-water process of him, Tilghman, in the same utterly *impossible.*

Tilghman asserted that he had made the discovery—not

that *heat alone* would decompose fats into fat-acid and glycerin, nor that the presence of water was necessary when chemicals are used to decompose fats into fat-acid and glycerin—but merely that *water* in a *liquid state*, heated to a high degree of temperature while inclosed in a strong vessel, so as to prevent its passing into steam, would of itself and without the aid of chemicals separate natural fat into its constituent elements, fat-acids and glycerin. Having made, as he alleged, this discovery of a new chemical decomposing property of *water highly heated and retained in the liquid state* by pressure, Tilghman, in his patent, announced it, and, as will be seen directly, also described two modes of carrying out his process based thereon.

In the alkaline saponification processes, which were in use prior to Tilghman's invention, various forms of closed boilers, provided with safety valves, were known. It was also known that fat and water would tend to remain unmixed in a boiler, and therefore agitators or circulators, for preserving a mixture or intimate contact between the fat and lime and water during the process of alkaline saponification, under pressure, were also in use.*

The specification, in the patent, ran thus:

"Be it known that I, Richard Albert Tilghman, of Philadelphia, have invented a new and improved *mode of treating fatty and oily bodies*, and I hereby declare that the following is a full and exact description thereof.

"My invention consists of a process for producing free fat-acids and solution of glycerin from those fatty and oily bodies of animal and vegetable origin which contain glycerin as their base. For this purpose, I *subject these fatty or oily bodies to the*

* Testimony in the case showed a great variety of these things, the common barrel churn being one of the simplest and best known. De Milley's vertical boiler, with an agitator going up and down, used A. D. 1834, was another form. Alliott's vertical boiler, with centrifugal pump to draw water from bottom and to spread it on the top, used A. D. 1851, was another. Radley & Meyers's revolving mechanical agitator, used A. D. 1851, in a closed boiler having a safety-valve, was yet another. The automatic circulation by the ascending power of a column of heated water, it was testified, was used in an apparatus of Floyd, A. D. 1795.

action of water at a high temperature and pressure, so as to cause the elements of those bodies to combine with water, and thereby obtain at the same time free fat-acids and solution of glycerin. I mix the fatty body to be operated upon with from a third to a half of its bulk of water.

"And the mixture *may* be placed *in any convenient vessel in which it can be heated to the melting-point of lead*, until the operation is complete. The vessel must be closed and *of great strength*, so that the requisite amount of pressure may be applied to prevent the conversion of the water into steam.

"*The process* may be performed more rapidly and also *continuously* by causing the mixture of fatty matter and water to pass through a tube or continuous channel, *heated to the temperature already mentioned;* the requisite pressure for preventing the conversion of water into steam being applied during the process, and this, *I believe*, is the *best* mode of carrying my invention into effect.

"In the drawing hereunto annexed are shown figures of AN apparatus for performing this process *speedily and continuously*, but which apparatus *I do not intend to claim as any part of my invention*.

"Figure 1 of the said drawing is a vertical section of this apparatus, and Figure 2 shows the various parts of the apparatus in horizontal section: similar parts in these figures being marked with similar letters of reference.

"I place the fat or oil in a fluid state in the vessel, A, with from one-third to one-half its bulk of warm water; the disk or piston, B, perforated with numerous small holes, being kept in rapid motion, up and down, in the vessel, A, causes the fat, or oil and water, to form an emulsion, or intimate mechanical mixture. A force-pump, C, like those in common use for hydraulic presses, then drives the mixture through a long coil of very strong iron tube, D, D, D, D, which, being placed in the furnace, E, E, E, E, is heated by a fire, F, to about the temperature of melting lead. From the exit end, G, of the heating tubes, D, D, D, D, the mixture, which has then become converted into free fat-acids and solution of glycerin, passes on through another coiled iron tube, H, H, H, immersed in water, by which it is cooled down from its high temperature to below 212° Fahrenheit, after which it makes its escape through the exit-valve, I, into the receiving vessel.

Statement of the case.—Tilghman's patent.

"The iron tubes I have employed and found to be *convenient* for this purpose, are about one inch external diameter, and about half an inch internal diameter, being such as are in common use for Perkins's hot-water apparatus. The ends of the tubes are joined together by welding to make the requisite length, but where welding is not practicable, I employ the kind of joints used for Perkins's hot-water apparatus, which are now

FIG. 1.

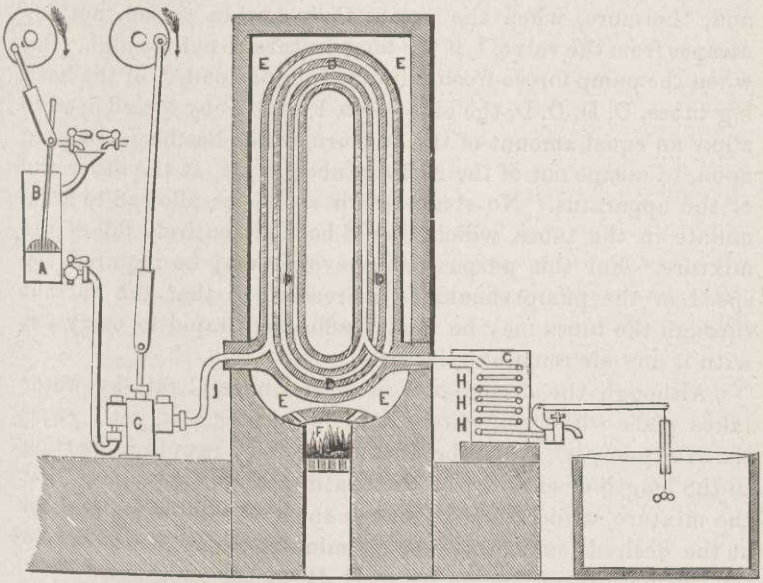
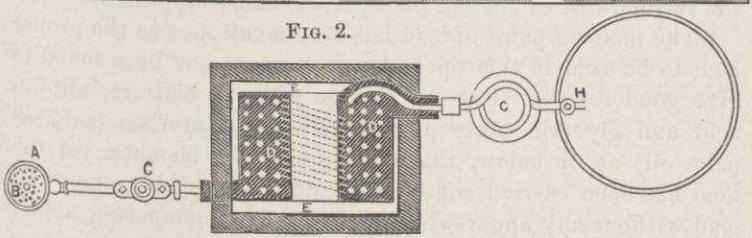


FIG. 2.



well known. The heating-tube, D, D, D, D, is coiled several times backwards and forwards, so as to arrange a considerable length of tube in a moderate space. The different coils of the tube are kept about a quarter of an inch apart from each other, and the interval between them is filled up solid with cast iron, which

also covers the outer coils or rows of tubes to the thickness of half or three-quarters of an inch, as shown in Figure 2. This casing of metal insures a considerable uniformity of temperature in the different parts of the coil, adding also to its strength, and protecting it from injury by the fire.

"The exit-valve, I, is so loaded that when the heating tubes, D, D, D, D, are at the desired working temperature, and the pump, C, is not in action, it will not be opened by the internal pressure produced by the application of heat to the mixture; and, therefore, when the pump, C, is not in action, nothing escapes from the valve, I, if the temperature be not too high. But when the pump forces fresh mixture into one end, J, of the heating tubes, D, D, D, D, the exit-valve, I, is thereby forced open to allow an equal amount of the mixture, which has been operated upon, to escape out of the cooling tubes, H, H, at the other end of the apparatus. No steam or air should be allowed to accumulate in the tubes, which should be kept entirely full of the mixture. For this purpose, whenever it may be required, the speed of the pump should be increased, so that the current through the tubes may be made sufficiently rapid to carry out with it any air remaining in them.

"Although the decomposition of the neutral fats by water takes place with *great quickness at the proper heat*, yet I *prefer* that the pump, C, should be worked at such a rate in proportion to the length or capacity of the heating tubes, D, D, D, D, that the mixture, while flowing through them, should be maintained at the desired temperature for *ten* minutes before it passes into the refrigerator or cooling parts, H, H, of the apparatus.

"The melting-point of lead has been mentioned as the proper heat to be used in this operation, because it has been found to give good results. But the change of fatty matters into fat-acid and glycerin takes place with some materials (such as palm oil) at, or below, the melting-point of bismuth, yet the heat has been carried considerably above the melting-point of lead without any apparent injury, and the decomposing action of the water becomes more powerful as the heat is increased. *By starting the apparatus at a low heat, and gradually increasing it, the temperature giving products most suitable to the intended application of the fatty body employed, can easily be determined.*

"To indicate the temperature of the tubes D, D, D, D, I have found the successive melting of metals and other substances of

different and known degrees of fusibility to be convenient in practice; several holes, half an inch in diameter, and two or three inches deep, are bored into the solid parts of the castings surrounding the tubes, each hole being charged with a different substance. The series I have used consist of tin, melting about 440° F.; bismuth at about 510° F.; lead at about 612° F.; and nitrate of potash at about 660° F. A straight piece of iron wire, passing through the side of the furnace to the bottom of each of the holes, enables the workmen to feel which of the substances are melted, and to regulate the fire accordingly. It is important, for the quickness and perfection of the decomposition, that the oil and water, during their entire passage through the heating tubes, should remain in the same state of intimate mixture in which they enter them. I therefore prefer to place the series of heating tubes in a vertical position, so that any partial separation which may take place, while the liquids pass up one tube, may be counteracted as they pass down the next. I believe that it will be found useful to fix at intervals, in the heating tubes, diaphragms pierced with numerous small holes, so that liquids, being forced through these obstructions with great velocity, may be thoroughly mixed together.

"I deem it prudent to test the strength of the apparatus by a pressure of ten thousand pounds to the square inch, before taking it into use; but I believe that the working pressure necessary in using the heat I have mentioned will not be found to exceed two thousand pounds to the square inch.

"When it is desired to diminish the contact of the liquids with iron, the tubes or channels of the apparatus may be lined with copper. The hot mixture of fat-acids and solution of glycerin which escapes from the exit-valve of the apparatus separates by subsidence. The fat-acids may then be washed with water, and the solution of glycerin concentrated and purified by the usual means.

"The fat-acids thus produced may, like those obtained by other methods, be used in the manufacture of candles and soaps, and applied to various purposes, according to their quality; and, when desired, they may also be first bleached by chemical agents, or purified by distillation, in a current of steam or in a vacuum, as is now well understood. I prefer that the fatty bodies should be previously deprived, as far as practicable, of such impurities as would cause the discoloration of the fat-acids

produced; but when the fat-acids are to be finally purified by distillation this preliminary purification is of less importance.

"When the sulphuric acid, nitrous fumes, or other corrosive agent shall have been used for purifying, hardening, or otherwise preparing the fatty body to be operated upon, I take care that all traces of it shall be washed out, or neutralized, before passing it through the apparatus.

"Some fatty bodies (particularly when impure) generate, during the process, a portion of acetic or other soluble acid, which might tend to injure the iron tubes; in such cases, I add a corresponding quantity of alkaline or basic matter to the water and oil before they are pumped into the tubes.

"Having now described the nature of my said invention, and the manner of performing the same, I hereby declare that

"*I claim as of my invention, the manufacturing of fat-acids and glycerin from fatty bodies by the action of water at a high temperature and pressure.*

"R. A. TILGHMAN."

The answers to the bill of Tilghman, which set forth his patent, denied that Tilghman had applied his improvement to practical use;

Alleged that the manufacturing of fat-acids and glycerin from fatty bodies by the action of water at a high temperature and pressure, cannot be accomplished so as to be practically useful, if it can at all, by the method and apparatus described in said letters-patent;

Alleged that all attempts to carry on the manufacture of fatty acids by means of the apparatus and method described in said letters-patent had failed;

Denied that the defendant had been using the improvement of Tilghman, or "any method in construction or *operation* substantially the same, *otherwise than was thereinafter alleged*," but admitted that he "used *water at a high temperature*, and steam, and *such pressure* as arises from the expansive force of *hot water* or steam in a *close* vessel, under and in pursuance of a patent of Wright & Fouché, January 25th, 1859;"

Alleged that "the action of *water highly heated in a close*

vessel upon very many substances to decompose *them*, and upon fats and oils," was, prior to Tilghman's invention, well known to chemists, &c., and was described in printed publications;

Alleged that before the invention of Tilghman "the use of a close vessel of such strength as to resist the pressure of the water when heated, or *any needed pressure* when using water to decompose *other* substances, was known to and practiced by men of science and manufacturers in the United States and elsewhere;"

Alleged that the said quality of highly heated water thus used is an elementary principle, and *not patentable;*

Alleged that the mode and means described in the specification as the best means of carrying the invention into effect was dangerous, owing to the degree of heat required.

It also referred to numerous prior patents, and contained extracts from publications to show that Tilghman's invention had been anticipated. Among the extracts were:

1st. Extracts showing use of digesters, for heating water to high temperature and still retaining it in a *liquid* state;

2d. Extracts showing use of digesters for *rendering* raw fat or removing the membranous and cellular matter, and thus purifying it;

3d. Extracts from text-books and writers, stating generally that neutral fats can be decomposed into fat-acids and glycerin, and that in the act of decomposition the elements of the water are taken up by the fat-acids and glycerin;

4th. Extracts to show that alkaline saponification decomposes neutral fat into soap and glycerin, which soap can afterwards be decomposed into fat-acid; and also to show that the *alkaline saponification* can be better effected in a close vessel under pressure;

5th. Extracts stating that fats can be *distilled* in the presence of steam into *fat-acids*, which are passed over as vapors and condensed in the still.

The patent of *Wright & Fouché*, dated January 25th, 1859, under which the defendant, Mitchell, in his answer as above condensed, asserted that he was working, was thus:

Statement of the case.—Wright & Fouché's patent.

"TO ALL TO WHOM IT MAY CONCERN:

"Be it known that we, Robert Alfred Wright, civil engineer, and Louis Jules Fouché, steam-boiler maker, of Paris, in the empire of France, have invented 'a new apparatus, destined to produce chemical decompositions by means of superheated steam and water;' and we do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the annexed sheet of drawings, making a part of the same.

"The apparatus, which is the object of the present patent to secure, is susceptible of several industrial applications; but as it is chiefly intended for the *decomposition of fatty substances into fatty acids and glycerin*, we will describe it as applied to that purpose.

"This invention is represented in the annexed drawing, which shows the elevation of the apparatus complete.*

"The dimensions of the apparatus may vary with the various purposes to which it may be applied.

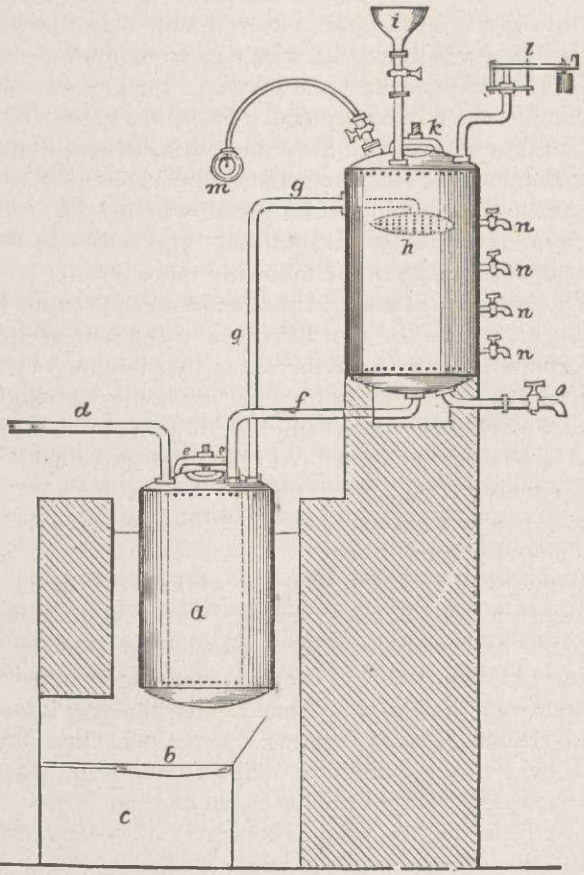
"*a* is a metal (iron or copper) boiler, of any form whatever, placed in a furnace, in order to be heated by a naked fire; this boiler has sides *sufficiently strong to resist a pressure of from ten to twenty atmospheres*;† it is of a variable capacity, according to the requirements of the manufacture, and it may have its interior lined with lead, or by any other metal which will not be attacked by the fatty bodies which are to be introduced and produced therein; *b*, hearth; *c*, ashpit; *d*, dipping-pipe, furnished with a cock to empty the apparatus by pressure; *e*, *e*, manhole, serving for cleaning the cylindrical vessel *a*, and for the introduction of substances, if required; *f*, metal tube (of iron or copper) connecting the bottom of the boiler *a* with the bottom of the cylinder *h*; *g*, metal tube of ascension, conducting the superheated water from the boiler *a* to the upper part of cylinder *h*. This tube is terminated in the interior of the cylinder *h* by a rose-jet, or, more simply, holes are made in the extremity, so as to distribute the water uniformly in the cylinder *h*, and to insure a molecular or finely subdivided contact between the superheated water and the substance submitted to

* In the patent itself, there were besides, some descriptions and drawings of parts of the apparatus modified. With neither of these, however, is it necessary to embarrass the reader.—REP.

† From 340° to 420° Fahr.

the operation; *h*, iron or copper upper cylinder, which should, like boiler *a*, be able to resist a pressure of from ten to twenty atmospheres. The cylinder *h* receives the substances to be treated; *i*, funnel, furnished with a tube and with a cock, serving for the introduction of the substances to be treated into the cylinder *h*; that is, when this substance is of such a nature as

FIG. 3.



to be introduced through a small aperture; *k*, manhole, serving for cleaning the cylinder *h*, and for the introduction of substances to be treated which cannot pass through the funnel *i*; *l*, safety-valve; *m*, manometer or pressure-gauge, indicating the pressure

in the whole of the apparatus; *n*, *n*, cocks serving to indicate the height and level of the substance and of the water in cylinder *h*; *o*, cock serving to empty the cylinder when the operation is completed.

"ACTION OF THE APPARATUS.

"Supposing everything arranged as shown in the drawing, then, in order to decompose fatty substances into fatty acids and into glycerin, the boiler *a* is completely filled with water. The cylinder *h* is filled with water up to one-third of its height, and it is then filled up to the level of the upper cock with the fatty bodies to be decomposed. The introduction of the fatty bodies takes place, as we have said, either through the funnel *i* or by the manhole *k*. The boiler *a* is then gradually heated till the pressure-gauge indicates a pressure of from *ten to twenty atmospheres*, according to the nature of the substances submitted to the operation, when the following takes place:

"The *superheated water* in the boiler *a* acquires an ascending motion on account of the difference in the temperature of the two capacities *a* and *h*; a current is thus created, whence it results that the *heated water* in boiler *a* ascends through the tube *g* into the cylinder *h*, and being forcibly driven out through the holes in the rose-jet, passes through the fatty bodies and descends again through the tube *f* to the bottom of the boiler *a*, where it is again warmed, in order to recommence its ascending motion, and so on.

"When this operation has been thus continued during a length of time which may vary from five to eight hours, according to the nature of the fatty bodies operated on, and also according to the variation of pressure (varying from ten to twenty atmospheres) the fatty bodies are decomposed into glycerin, which remains dissolved in the water, and into fatty acids, which float in the cylinder *h*. The contents are now emptied out and separated from each other at the same time.

"In conclusion, we would remark that we are aware that: Firstly, the decomposition of fatty bodies by *water under the influence of heat and of pressure* is a well-known scientific fact. Water is substituted for the organic basis. It forms a perfect and fixed combination with the fatty acids, while the glycerin is dissolved in the excess of water. Secondly, that as this chemical action takes place under the influence of a weak

affinity, it is necessary, in addition to the abovenamed physical and chemical conditions, to insure a *perfect molecular agitation* of the whole mass; and that we wish it to be understood that what we wish to claim and establish as of our invention consists of an apparatus wherein the water and the fatty matters are heated separately in two different boilers. The first boiler is heated by the source of heat, while the second boiler is heated by the first boiler.

"In these boilers the agitation necessary for the *chemical action and combination is produced* by the pressure of the *heated water in the first boiler*. *This water* circulates continuously from this first boiler to the second boiler, and from the *second boiler to the first*, in a continuous and self-acting or automatic manner, without interruption. The characteristics of our apparatus are, that it produces *agitation* by *circulation alone*, a continuous and automatic circulation, produced by the pressure of water.

"Lastly, our apparatus effects its chemical action in a continuous manner, without the aid of any manual or other assistance."

"CLAIMS. Having described the nature of our invention and the manner in which the same is to be performed, we do not claim the application of *superheated water* for decomposing fatty bodies, nor the form of the apparatus above described, which may vary somewhat according to conditions and circumstances; but what we *claim* as our invention is, producing a continuous automatic circulation of *highly heated water*, in a very finely divided state, through the bodies under treatment, by means of an apparatus constructed and employed substantially as herein shown and described."

Tilghman insisted that the use of highly heated water under pressure to decompose neutral fats into fat-acids and glycerin was an infringement of his patent, no matter what particular form of apparatus might be used, or what particular temperature adopted, and no matter what particular device might be adopted to maintain the intimate mechanical mixture of the fat and water during the decomposing operation; these last being obvious matters of detail, susceptible of infinite variety.

He contended that Mitchell's infringement consisted in

Statement of the case.—Mitchell's view of the case.

using highly *heated water* with neutral fat in a close vessel, and restraining or confining it there under pressure so as to preserve the water while heated in *a liquid state*, and by means of this highly *heated liquid water* to produce fat-acid and a solution of glycerin.

Mitchell, on the contrary, asserted that *heat* alone will decompose fats into their elements; that the decomposition is effected by temperatures varying from about 510° F., the melting-point of bismuth, to 610° F., the melting-point of lead; *that these were the very temperatures named by Tilghman as required* in his process; but that in the very act of separation they will be destroyed unless some base be present to unite with these elements; that this destruction so produced was the *burning up*, in fact, of the fat by heat; that this effect was known to Tilghman; and that his invention consisted merely in using heat to decompose the fat by sheer heat, and to supply, at the instant of decomposition, water to prevent the burning up or destruction of the elements produced; that the single idea of Tilghman's patent was the use of great heat to decompose and a contrivance for immediately presenting particles of the aqueous agent to fix and reunite into the new forms the decomposed elements; that he did this by making an emulsion or mechanical mixture of fat and water; that he called for a vessel of great strength, and proposed to work under a pressure of 2000 pounds to the square inch; and that he loaded the safety-valve to prevent the conversion of water into steam.

Mitchell therefore contended that from the very purpose of his patent, Tilghman was to be confined to the very ranges of heat above described; that it was an essential condition of the patent that there should be heat not below 510° Fahr.;* that the manipulation should be rapid, not exceeding ten minutes; that the vessel should be entirely filled with the mixture of fatty matter and water, and that no steam whatever should be permitted in it.

He contended, in addition, as the Reporter understood it,

* The melting-point of bismuth.

that this construction of the patent was the right one on the face of the instrument and on principles of patent law, independently of the alleged special design of the patentee in framing his specification.

The evidence as to the range of heat by which fats are destructively decomposed, seemed, as the Reporter read it, to show, perhaps, that it was one of conditions.

Renwick (see *infra*, 357) and Rand, experts of Mitchell, fixed the working range of Tilghman's patent at from 440° F. to 660° F.; and Rand and Wayne, also his experts, testified that the chemical action is the same with water heated and under pressure from 300° F. to 600° F.

From what has been said the reader will have perceived that the first question in the case was—

The construction of the patent. Tilghman had "claimed" as his "invention" "the manufacturing of fat-acids and glycerin from fatty bodies by the action of water at a high temperature and pressure," and he claimed as his invention nothing besides. And in the opening of his specification he declared that "for the purpose of executing his invention, he subjected these bodies to the action of water at a high temperature and pressure," and declared nothing more.

But he had said in his specification, that he "mixed the fatty body to be operated on with from a third to a half of its bulk of water," and that "the mixture may be placed in *any* convenient vessel in which it can be heated to the *melting-point of lead*, until the operation is complete;" adding that "the vessel must be closed and of great strength, so that the requisite amount of pressure may be applied to prevent the conversion of the water into steam." Saying nothing, however, about keeping the vessel entirely full of the mixture.

And he had described more specially "*an*" apparatus by which "the process may be performed more *rapidly*, and also *continuously*, by causing the mixture of fatty matter and water to pass through a tube *heated to the temperature already mentioned*," &c., which he said he *believed* to be the *best* mode

of carrying his invention into effect, but which apparatus he stated that he "did not intend to claim as any part of his invention."

He had stated also that "the melting-point of lead had been mentioned as the proper heat to be used in this operation, because it had been found to give good results; but that the change desired took place with some materials at or *below* the melting-point of bismuth;" and "that no steam or air should be allowed to accumulate in the tubes, which should be kept entirely full of the mixture;" and that although decomposition took place "with great quickness at the proper heat," he "*preferred* that the mixture, while flowing through them, should be maintained at the desired temperature for *ten minutes.*"

And he had said, when speaking of the matter of heat:

"By starting the apparatus at a low heat and gradually increasing it, the temperature giving products most suitable to the intended application of the fatty body employed, can be determined."

Was, then, the invention claimed (a process) so inseparably connected with certain means, that is to say, with certain and *specific* degrees of high temperature, or fulness of vessels or tubes, or rapidity of manipulation, as that, unless it was effected through those same specific degrees of high temperature, or fulness of vessels or tubes, or shortness of time, it could not be effected under the patent at all?

If this question was to be answered affirmatively there was no necessity to make a single inquiry further:—there was an end of the complainant's case; though, it might be admitted, that the defendant was doing exactly that which in the claim to his patent Tilghman claimed as *his* invention, to wit, the "manufacturing of fat-acids and glycerin from fatty bodies by the action of water at a high temperature and pressure." For however practical Tilghman's exact methods and exact means might be—that is to say, however much and well reduced into use—the defendant confessedly was not using exactly the same methods, or ex-

actly the same means, in the particulars just mentioned, but was using methods and means different, confessedly, in some details of both. Plainly, he did not infringe.

But if this first question was not to be answered affirmatively—if the patent was to be construed broadly rather than closely—if Tilghman's invention was the manufacturing of fat-acids and glycerin from fatty bodies by the action of water at a [any] high temperature, by "any convenient" vessel, and irrespective of manipulation in a limited time, and of tubes or vessels kept constantly and entirely full of the mixture, then, of course, arose,

2d. *A question whether he was an original inventor.* And if he was, then would arise,

3d. *A question whether he had given anywhere such "a full, clear, and exact" description of his invention, and of the manner of making and using the same, as would enable any one skilled in the art most nearly allied to make and use the invention;* a matter required by the Patent Acts* as a condition to the validity of any patent granted.

And if he had given such a description, then would arise, as one not so immediately to be answered as before,

4th. *A question whether the defendant infringed the patent of Tilghman.*

It will be seen† that this court in giving its judgment took the first view of the case, that is to say, construed the patent closely; so that the other questions possible to have arisen in the case did not perhaps arise, nor indeed any question but the great one of the construction of the patent.

Nevertheless, a great body of evidence was given on the assumption that the other view—that which gave to the patent the broad construction claimed for it by the patentee—was the true one, or might be taken by the court. The case was argued largely on that assumption, and the questions which would necessarily arise in that view are discussed very fully in the opinion given in the case.‡

Some of the evidence is, therefore, perhaps proper to be

* 5 Stat. at Large, 117. † *Infra*, pp. 379–390. ‡ *Infra*, pp. 390–418.

mentioned; in mentioning which the Reporter begs leave to say that the evidence was in some parts conflicting; that in his limited space he can present it much less perfectly than he could desire, and as with larger space he would not fail to endeavor to do.* He has also to say, that in some of its parts the case presented recondite matters of chemical science; matters which he confesses that he understands but little, and is perhaps unable to understand much more. If in any points, therefore, he has fallen into error, he asks for excuse from any one whom he may either mislead or fail to lead at all.

It is requisite to state that Richard Albert Tilghman, the patentee, was a citizen of Philadelphia, and brought up a practical chemist; that having, as he conceived, made the discovery that he could *by the action of water at a high temperature and pressure*, produce free fat-acids and solution of glycerin from fatty and oily bodies which contained glycerin as their base, he went in 1853 to England, and there, March 25th, 1854, obtained a patent from the British government for his invention. In the same year he got patents for the same invention from the governments of the United States, of France, and of Belgium; that granted by the United States being given at *supra*, p. 291. He was in Europe and America alternately, from 1853 to 1859; and returned to the United States in August or September of the year last named.

I.

ORIGINALITY OF INVENTION.

THE COMPLAINANT'S SIDE OF THE QUESTION.

The fact that Tilghman was the person who first distinctly observed and publicly announced that water, in a liquid state, at a high temperature and under pressure, would, of itself, and without the aid of chemical substances, separate natural fat into its constituents of fat-acids and glycerin, did

* The records contained 1048 closely printed 8vo. pages.

not, as the Reporter read the proofs, seem to be open to well-founded question.

Tilghman relied on the following evidences:

I. SCIENTIFIC TREATISES.

Among these the following were specially quoted:

1. *Richardson & Watts's Chemistry Applied to the Arts*, London, 1863,* where it is thus said:

"The only perfectly unobjectionable mode of obtaining glycerin, inasmuch as it alone insures the entire absence of mineral impurities, is the decomposition of the fats by the vapor of water at a high temperature. This mode of decomposition was first adopted as a means of obtaining fatty acids and glycerin by Mr. Tilghman, in 1854."

2. *Musprat's Chemistry*, London, 1856–8, article "Glycerin,"† where it is thus said:

"A much more economical method is that introduced by Mr. Tilghman in 1854. By this process the fatty bodies are broken up into acid and basic substances, through the agency of heat, pressure, and steam."

3. *Watts's Dictionary of Chemistry*, London, 1864,‡ article "Glycerin," where it is thus said:

"By heating fats with water or with steam. This is the only unobjectionable method of obtaining glycerin, inasmuch as it alone insures the entire absence of mineral impurities. It was first carried out by Mr. Tilghman in the following manner."

Tilghman's mode of working with the coil apparatus is then described.

II. MEN OF SCIENCE.

1. *The Paris jury of savants*, at the Exposition of 1855, when speaking of Chevreul, the eminent French chemist, say:

"We can affirm, without fear of contradiction, *that, with the exception of the undertaking of the saponification of the fatty bodies by water, which remained unknown to him*, he has indicated in a

* Vol. 1, part 3, p. 751. † Vol. 2, p. 252. ‡ Vol. 2, p. 886.

clear and precise manner all the scientific bases upon which depend the different methods of practical manufacture of the fat-acids employed for making candles."

And speaking of Tilghman, under the head of "*Aqueous* saponification in a close vessel," the same jury say:

"*It was Mr. Richard Albert Tilghman, chemist, of Philadelphia, who was the first who had the idea of applying this reaction on a large scale.* In his patent taken in London, the 25th of March, 1854, he thus sets forth *his discovery*, and his manner of operating:

"'My invention consists in a new method of obtaining free fat-acids and solution of glycerin from animal and vegetable fatty and oily bodies which have glycerin as their base.

"'My invention consists in exposing the aforesaid fats and oils to the action of water at a high temperature and pressure, the effect of which is to cause the combination of the water with the elements of the neutral fats, so as to produce at the same time free fat-acids and solution of glycerin.'"

2. *Professor J. C. Booth*, analytical chemist, of Philadelphia, called and recalled, was thus in substance interrogated, and thus in substance answered:

"Q. With whom did you study chemistry, and where? How long have you been engaged in the profession of analytical chemist? What posts, if any, in public institutions have you held, and what works or papers have you written on chemistry?

"A. I studied chemistry with Wöhler, in Cassel, Germany, and with Professor Magnus, in Berlin, during 1833, 1834, and 1835. From 1835 to the present time I have been engaged as professional analytical chemist. I was Professor of Chemistry applied to the Arts in the Franklin Institute, Philadelphia, for ten years; and Professor of Chemistry and Physics in the Central High School, Philadelphia; I have been for the last eighteen years in the United States Mint, and I still continue, independent of the mint, my profession of analytical chemist. I am the author of the greater part of the Encyclopedia of Chemistry; of a report upon the progress of chemical manufactures made to the Smithsonian Institute, at the request of the perpetual secretary of that institute, Professor Henry; I also edited the translation of Regnault's Chemistry, translating much of it myself, and annotating it.

"Q. From your knowledge of chemistry, who would you say

was the discoverer of the chemical power of water in a liquid state, at a high temperature and pressure, on fats, to produce fat-acids and glycerin?

"A. Mr. R. A. Tilghman.

"Q. Do you know of any other person who has claimed the merit of this discovery?

"A. I know of no other.

"Q. Is this discovery regarded as a new and important fact in chemistry?

"A. It is so regarded."

* * * * * * * *

3. The answer of the defendant having set up that it was shown by a paper published in the year 1823 (*Journal of Science*, London, vol. xvi, p. 172), entitled, "Change of Fat in Perkins's Engine by Water, Heat, and Pressure," that Tilghman had been anticipated in his discovery, and, as will be hereafter seen, some reliance having been placed on that paper, the examination of the witness thus proceeded:

"Q. Give a list of chemical treatises that you have examined on the subject of this discovery and its date, and particularly with a view of showing whether it was known between 1823 and 1854, and whether it has been known since 1854.

"A. I annex a list of standard chemical treatises, of the highest authority, of dates between 1823 and 1854, which I have examined. They all contain descriptions of the properties of fat and fat-acids, and the known methods of producing fat-acids and glycerin. None of them mention the fact that fat-acid and glycerin can be produced by the action of water on fats at a high temperature and pressure.

"I annex another list of standard chemical treatises of dates subsequent to April 3d, 1854, all of which contain mention of that chemical fact.

"I therefore infer and conclude that that chemical fact was first made known subsequent to 1852, and prior to April 3d, 1854.

List of treatises published between 1823 *and* 1854, *which do not mention the chemical fact.*

Dumas's Chemistry, vol. 5. Paris, 1835.

Berzelius's Chemistry, vol. 2. Brussels, 1838.

Ure's Dictionary of Chemistry. London, 1831.
Brande's Chemistry. London, 1841.
Graham's Chemistry. London and Philadelphia, 1843.
Booth's Encyclopedia of Chemistry. Philadelphia, 1850.
Regnault's Chemistry. Paris and Philadelphia, 1852.
Gerhardt's Chemistry. Paris, 1854.
Gmelin's Chemistry, vol. 7. London, 1852.
Pelouze & Fremy. Chemistry. Paris, 1850.

List of chemical treatises published after April 3d, 1854, which do mention that chemical fact.

Comtes Rendues. Paris, April 3d, 1854.
Liebig & Kopp's Year-book. Giessen, 1855.
Miller's Chemistry. London, 1862.
Watts's Dictionary of Chemistry. London, 1864.
Gmelin's Chemistry, vol. 16. London, 1864.
Musprat's Dictionary of Chemistry, vol. 2. London, about 1856-8.
Chemical Gazette. London, 1856.

"Q. State what technical works on the subject of the manufacture of fat-acid, published between 1823 and 1854, you have examined, and whether any of them contains any description or notice of the process of manufacturing fat-acid and glycerin from fats by the action of water at a high temperature and pressure.

"A. I have examined the following technical works, all of which contain descriptions of the various processes for the manufacture of fat-acids. None of them mentions or refers to the process for the manufacture of fat-acid and glycerin by the action of water on fats at a high temperature and pressure.

Chevreul & Gay-Lussac's Patent. Paris, 1825.
Hibert's Encyclopedia. London, 1838.
Dumas's Chemistry, vol. 6. Paris, 1863.
Parnell's Applied Chemistry, vol. 2. London, 1844.
Knapp's Technology. London and Philadelphia, 1848.
Roret's Encyclopedia. Fat-Acids. Paris, 1849.
Morfit's Chemistry of Soap and Candles, 1st edition. Philadelphia.
Payen's Chemistry. Paris, 1851.
Official Report of London Exhibition. London, 1851.
Tomlinson's Cyclopedia of Arts. London, 1852.
Appleton's Dictionary. New York, 1852.
Ure's Dictionary of Arts. Boston, 1853.

"Q. State what technical works on the subject, published since 1854, you have examined, and whether they mention the

process of manufacturing fat-acids and glycerin by the action of water on fat at a high temperature and pressure, and to whom they refer as the inventor of that process.

"A. I have examined the following technical works. They all mention the water process, and refer to Tilghman as its inventor:

Bulletin de la Société d'Encouragement. Paris, 1855.

Morfit's Chemistry of Soap and Candles, 2d edition. London and Philadelphia, 1856.

Official Report of London Exhibition. London, 1863.

Richardson & Watts's Technology, vol. 1, part 3. London, 1863.

Repertory of Patent Inventions, 3d series, vol. 24, page 408. London, 1854.

Mechanics' Magazine, vol. 61, page 111. London, 1854.

Newton's Journal of the Arts and Sciences, vol. 45. London, 1854.

Franklin Institute Journal, 3d series, vol. 29, page 36. Philadelphia, 1855.

"Q. Please state in general terms the result of your examination of the standard chemical and technical publications.

"A. No one of the technical treatises or chemical works, published prior to 1854, contains any mention either of the chemical fact of the decomposition of fat by water at a high temperature and pressure, or of the manufacturing process founded upon it. After 1854 both the chemical fact and the manufacturing process are mentioned in numerous technical and chemical publications."

The testimony of—

4. *Professor R. E. Rogers*, Professor of Chemistry for ten years in the University of Virginia; Professor of the same science for eighteen years in the University of Pennsylvania; editor of the last American edition of Turner's Chemistry,

5. *Professor Wolcott Gibbs*, who had studied with Professor Hare, of Philadelphia; with Dr. Torrey, of New York; with Professors Ramelsberg and Rose in Berlin, Prussia, and with Liebig in Giessen; for ten years Professor of Chemistry and Physics in the Free Academy in New York, and now Rumford Professor in Harvard University,

6. *Professor F. A. Genth*, student for two years with Professor Gmelin; for two with Liebig and others; for three

years assistant to Bunsen; for two years Professor in the University of Marburg,

7. *Professor Robert Bridges*, Professor of Chemistry in the Philadelphia College of Pharmacy; editor of Graham's Chemistry, and of several editions of Fowne's Chemistry,—all sustained the assertion of Professor Booth as to the originality of Tilghman with the invention.

Professor Gibbs thus testified:

"Q. State when and by whom your attention was first called to the question of the *novelty* of the plaintiff's patented invention, as affected by defendant's exhibits. State whether you then made a full investigation of the subject, and a report, and state the substance of any such report.

"A. My attention thereto was first called by Mr. Mitchell, the defendant, in the early part of the year 1863. I then made a full investigation of the subject at his request, and gave him a written opinion, the substance of which was *that the plaintiff's invention was new.*"

8. *The testimony of the Patent Office.* In 1858, Mr. Werk, a manufacturer of candles in Cincinnati, and afterwards sued by Tilghman as an infringer of his patent, applied to the Patent Office for an improved treatment of fatty acids through the aqueous process. He was thus replied to by the Honorable Joseph Holt, then Commissioner of Patents:

"UNITED STATES PATENT OFFICE,
"June 26th, 1858.

"SIR: Your application for a patent for an improved treatment of fatty acids has been examined. You are referred to Regnault's Chemistry, vol. ii, p. 1594; to Payen's Chemie Industrielle, p. 771, and to the patents of R. A. Tilghman, January, 1855, and October, 1854. Mr. T. is the acknowledged discoverer of this process. The application is refused for want of novelty.

"Respectfully yours, &c.,

"J. HOLT,
Commissioner.

"M. WERK, ESQ."

9. *The London International Exhibition of* 1862. At this exhibition one of the juries, reporting on the subject of oils, fats, wax, and their products, and referring to the efforts

made "as early as 1855," by M. De Milly, to modify the process of saponification by means of lime, said:

"Instead of effecting this decomposition at a temperature of 212°, and employing 14 per cent. of lime, he raised the temperature by working under pressure and employing only 4 per cent. of lime.

"At the present time M. De Milly has, indeed, reduced the proportion of lime to 2½ per cent. This process has been imitated in Austria. Undoubtedly it constitutes a real improvement upon the ordinary method of saponification by lime; *but in spite of this considerable improvement, which is in fact but a combination of Mr. Tilghman's mode of saponification by water at a high temperature,** combined with the lime process, we cannot believe that these two methods of saponification, under any modification at present attempted, can, in an *economical* point of view, successfully compete with the sulphuric saponification."

10. *Medal of Honor.* The report of the same exhibition† contains this:

"MEDALS.

"UNITED STATES: TILGHMAN, *for fatty acids obtained by aqueous saponification.*"

III. MANUFACTURERS OF CANDLES.

1. *Mr. G. F. Wilson*, managing agent of Price & Co.'s Patent Candle Company, at Battersea, London—the largest candle factory in the world—who, it appeared, was besides a man of education and had made the general and particular matters now under consideration the subject of learned research, and was in the habit of writing and lecturing upon them, affirmed that Tilghman was the discoverer of the invention claimed by him. In a public lecture, delivered by him in January, 1856, before the Society of Arts, in London, he said:

"In January, 1854, Mr. Tilghman, an American chemist, who has studied all that has been published here and in France on the subject of acidification and distillation of fatty bodies, ob-

* Specimens of which are exhibited in the American Department.

† Page 7.

tained a patent for exposing fats and oils to the action of water at a high temperature, and under great pressure, in order to cause the combination of the water with the elements of the neutral fats, so as to produce at the same time free fat-acids and solution of glycerin. He proposed to effect this by pumping a mixture of fat and water, by means of a force-pump, through a coil of pipe heated to about 612° Fahr., kept under a pressure of about 2000 pounds to the square inch; and he states that the vessel must be closed so that the requisite amount of pressure may be applied to prevent the conversion of water into steam. This is, all must admit, *a beautiful, original* chemical idea, *well carried out.*"

The defendant, Mr. R. G. Mitchell, who was a witness, testified that the process by water, heat, and pressure alone had not been known to him *before* the date of Tilghman's patent, nor indeed known to him until four years afterwards. He said:

"I have known for more than forty years that fats were acidified by moisture. I never knew that fat-acids and glycerin could be obtained from fats by heat, water, and pressure until I heard of it in connection with the patent of Wright & Fouché, in 1859."

ORIGINALITY OF INVENTION.

THE DEFENDANT'S SIDE OF THE QUESTION.

I. SCIENTIFIC TREATISES.

No scientific treatise was produced which denied, with mention of Tilghman's name, or by specific reference to what he asserted to be his, that he had discovered what in the claim to his patent he claimed as his invention. An extract from a paper in the *Journal of Sciences*, vol. xvi, p. 172, published in London in 1823, entitled, "Change of Fat in Perkins's Engine by Water, Heat, and Pressure," and made by the defendant an Exhibit (E) in the case, and somewhat relied on by him, mentioned that

"Mr. Perkins used in his steam-cylinder a mixture of about equal parts of Russia tallow and olive oil to lubricate the piston and diminish friction; that the mixture was consequently

exposed to the action of steam at considerable pressure and temperature; and, being carried on by steam, it was found in the water, giving rise to peculiar appearances."

A particular account, too long to be here inserted, was annexed.

II. MEN OF SCIENCE.

1. *Professor P. H. Vanderweyde*, a native of Holland, educated in chemistry at the Royal University of Delft, M.D., Professor of Chemistry in the New York Medical College, and in the Cooper Institute, and fifteen years in America, was at different times asked and answered thus:

"Q. From your knowledge of chemistry, would you say that complainant was the discoverer of the power of water under heat *and pressure* to dissolve fats into acids and glycerin?

"A. The more my information about the matter has increased the more I am convinced that the power of *water* to decompose fats into the fatty acids and glycerin was known a long time before the date of Mr. Tilghman's patent.

"Q. Do you know, or did you ever hear of any standard chemical treatise or book, which states that complainant made any chemical discovery as to the decomposition of fats into fat-acids and glycerin?

"A. I do not know, nor did I ever hear of such a statement; and, in those standard works, when Mr. Tilghman's process is mentioned at all, it is stated simply that he took out a patent for a certain apparatus."

Cross-examined.

"Q. State who was the first person, within your knowledge, who made the explicit statement that fat-acids and solution of glycerin could be obtained for manufacturing purposes by the action of liquid water on neutral fatty bodies at temperatures above 350° Fahrenheit; and state when and where such statement was made.

"A. I am not aware that any other man made that precise statement, with all the special conditions mentioned in the question, before Mr. Tilghman.

* * * * * * * *

"Q. Who was the first person who got so far as to use 'water

alone' in the practical manufacture of stearic and margaric acid, and oleic acid, and glycerin, from neutral fat?

"A. I know not who the first person was who practically manufactured stearic and the other fatty acids besides glycerin, from the fats by means of water alone; but I know that Mr. Tilghman took a patent for that purpose. I doubt, however, if it was ever put in practical operation. Surely not to make glycerin."

2. The defendant having put in evidence an extract from the *Journal of Science*, London, 1823, vol. xvi, p. 172, entitled "Change of Fat in Perkins's Engine, by Water, Heat, and Pressure," which paper was marked "Exhibit E" (quoted *supra*, p. 314)—

Florence Verdin, *partner of the defendant*, under the firm name of Mitchell & Co., and who testified that he had an interest against the patent, and if in the present suit a sum of money was decreed to be paid to the complainant, he would be, he supposed, responsible for one-half, had testified, in 1868, in another case (all the testimony in which was received by consent), as follows:

"Q. Would not any manufacturer of ordinary skill and information in his art, as current prior to 1854, have known from Exhibit E that fat-acids and glycerin were produced by the action of water at a high temperature and pressure, and does not the presence of acrolein involve the production of glycerin?

"A. *I* should have known it, and I cannot doubt others would, as a person had only to subject the fat to the action of water at a temperature and pressure named to have acidified fats; acrolein cannot be formed without glycerin being formed first.

"Q. Do you know of any standard chemical treatise or book which states that the complainant has made any chemical discovery in reference to the decomposition of fats into fat-acids and glycerin?

"A. I do not know of any such works which give Tilghman the credit of being a chemical discoverer.

"Q. Did you ever hear of any standard chemical treatise or book which ascribes to the complainant any such discovery?

"A. I have never heard of any.

"Q. Are technical works of any value to the manufacturers

of fat-acids and candles, so far as you have examined them; and if so, what?

"A. They have never been to me; my knowledge was always superior to theirs; they are generally more likely to mislead the manufacturers than to benefit them.

"Q. Is the information communicated in Tilghman's patent of 1854 of any more value to a manufacturer of fat-acids and candles than that which is found in defendant's Exhibit E?

"A. I think there is no difference between the two, and I have always thought, and think so yet, that the patent of Mr. Tilghman had been copied from Exhibit E."

Cross-examined.

"Q. When did you first see it stated in a book or document that highly heated water under pressure would, without the aid of chemicals, decompose neutral fat into fat-acid and a solution of glycerin?

"A. I don't know when.

"Q. Can you swear you ever saw that statement prior to the date of Mr. Tilghman's patent, January, 1854?

"A. I cannot."

3. See also testimony of Drs. Rand and Wayne, *infra*, pp. 355–357.

II.

CAPACITY FOR PRACTICAL USE.

THE COMPLAINANT'S SIDE OF THE QUESTION.

How far Tilghman's discovery or invention had been or could be carried on so as to be practically, that is to say, commercially, of value by the rapid manipulation described by him, or with the *very* high degrees of heat which he mentioned, or with the vessels filled with the mixture alone,—assuming that either rapidity, or specific degrees of high heat, or entire absence of steam from the vessel in which his mixture was to be put, were an essential part of his invention as patented,—seemed, as the Reporter read the evidence, to be a matter less clear than that he was the true and first discoverer of what in the claim to his patent he claimed as his invention.

As on the first point, the evidence relied on by him was that of books of science, and more particularly of men of science and manufacturers of candles.

I. SCIENTIFIC TREATISES.

1. *Richardson & Watts's Chemistry* (quoted *supra*, p. 307): "The only perfectly unobjectionable mode of obtaining glycerin."

2. *Musprat's Chemistry;* article, "Glycerin" (quoted *ut supra*): "A much more economical method is that introduced by Mr. Tilghman."

3. *Watts's Dictionary;* article, "Glycerin" (quoted *ut supra*): "This is the only unobjectionable mode."

II. MEN OF SCIENCE.

1. *Professor J. C. Booth*, already described, thus testified:

"I tried the second apparatus indicated in the patent, with an apparatus quite similar to the drawing accompanying the specification to Mr. Tilghman's patent, except that the coil was circular, rising in a continuous spiral coil from below upwards, so that the exit-pipe came from the upper part instead of the lower, as indicated in said drawing.

"As we obtained at the rate of four hundred to four hundred and fifty pounds in twenty-four hours, in so small an apparatus, and as the product consisted of fat-acid and glycerin, I regard the process as a most perfect manufacturing process; that is, making fat-acid and glycerin in an economical manner, and adapted to commercial uses.

"By comparing the solid fat-acids obtained by the coil apparatus, and subsequent clarification and pressure, with the solid fat-acids obtained in Grant's candle factory, in Philadelphia, by the sulphuric saponification, I believe that the product of the coil apparatus is fit for making candles. By comparing the glycerin which I obtained by the coil apparatus with several kinds of glycerin of commerce, I believe that the coil apparatus will make a glycerin, suitable for commercial purposes, equal to that produced by any other process, after resorting to the usual method of purification."

2. *Professor Rogers*, already described:

"I was present at the trial of the process of the complainant,

in the coil apparatus, in company with Professors Booth and Bridges, and Mr. R. A. Tilghman. It is my opinion, and not only my opinion, but my thorough conviction, that it is a process altogether adapted to carrying out the method of Mr. Tilghman.

"The odor of the products evinced nothing offensive which would indicate the presence of acrolein as a hurtful substance, the small amount of oxide of iron being an accidental and not necessarily present substance, and was readily removable."

3. *Professor Bridges*, already described, stated that he had been present at the trial of the apparatus referred to; that the trial was made at "about the temperature of the melting of lead." He exhibited specimens of the lard stearin used, and some of the results of the operation, describing particularly how they were obtained. He concluded by saying:

"From the amount of the material used during the operation, and from the character of the results, I consider the apparatus of Tilghman as one capable of carrying on, in a practical manner, his process."

III. MANUFACTURERS OF CANDLES.

1. In June, 1854, Tilghman exhibited his patent and his coil apparatus to Mr. G. F. Wilson, above named as the managing director of Price & Co.'s large candle company in England, and made experiments with it before him. On the 13th of December, 1855, after having thus seen it, that company agreed to pay Tilghman £1000 sterling a year for the use of that patent, and some minor ones of less importance that expired prior to 1859, they, Price & Co., being free to terminate the arrangement at any time by giving Tilghman two years' notice. They had not terminated it in May, 1864, when the testimony to prove facts just stated was taken, but had, since 1859, paid in each year, and in 1864 were still paying to Tilghman the £1000 sterling for the use of his patent of 9th January, 1854, alone.

2. So a certain Monier, of Paris, one of the managing agents of the *Société Générale de Stearinerie*, at Villette, near Paris, having seen Tilghman's apparatus at Tilghman's laboratory in London, in June, 1854, and samples of fat-acid and

glycerin said to have been produced by it, made a preliminary agreement with Tilghman that "after experiments had been made to enable Monier to judge of the efficacy and reality of the invention," a contract by which they were "to buy the absolute, general, and exclusive license for the new processes of Mr. R. A. Tilghman, giving him a royalty in money," should be made before a notary. The coil apparatus was brought to Paris and worked at Monier's factory; many experiments being made with it. It was worked both by hand and by steam-power. A contract in form was then made between Tilghman and Monier, and 15,000 francs were paid to Tilghman. Tilghman and his brother then attempted to make a large apparatus at Monier's factory at Paris. This occupied nearly six months; a good deal of what was done having been superintended by Tilghman's brother, and not by him; he having been ill a short part of the time, and for much the greatest absent in America. The experiments, owing to causes about which Tilghman and Monier disagreed, were unsuccessful, and the contract was annulled by consent of both parties. Tilghman having returned to France, a new contract was made with him, and 12,000 or 15,000 francs paid to him; and more experiments made in Paris. They, too, were unsuccessful; Tilghman and Monier disagreeing as before about the cause. Tilghman being now in Philadelphia, Monier, representing that the agreement between them was verbal, and not producing the written contract, sued him in one of the inferior courts of Paris, claiming damages in 25,000 francs. Judgment by default for want of an appearance was got by Monier, and damages given in 2000 francs. Tilghman, in America, hearing of this, ordered an appeal to be taken, and one was taken. The appeal, however, was not prosecuted. A compromise was made between the parties by which 1000 francs were paid to Tilghman, the lawsuit discontinued, all previous engagements made "null and of no effect," and Tilghman left free to "re-enter into the free use and enjoyment of his patents."

3. *The testimony of Charles Taylor Jones*, of Cincinnati, since

1849 a member of the firm of Gross & Dietrich, manufacturers of candles.

"Q. State the process first employed by you for decomposing fats into fat-acids and solution of glycerin.

"A. The first process used by me was that of saponification with about fourteen per cent. of lime, in open vessels, and decomposing the lime-soap thus obtained with sulphuric acid; the quantity of sulphuric acid requisite being about two and a half pounds to each pound of lime.

"Q. What was the next process, and what advantages had it over the first? And why did you abandon it?

"A. The next process was saponification under pressure of about 130 lbs. to the square inch, with six to seven per cent. of lime, and a corresponding diminution of sulphuric acid. It had the advantage over the first process of diminishing the cost of the operation just as much as the lime and sulphuric acid was diminished. This process was abandoned for another, which enabled me to dispense entirely with the use of lime and sulphuric acid.

"Q. State what process you now use and what are its advantages; and also, whether you practice the said process by a license from the complainant, and have paid and are to continue to pay him for its use.

"A. I use the process patented to Tilghman, the advantages of which, over all other processes known to me, are, that it enables me to produce fat-acids without the use of lime or sulphuric acid. I practice this process by a license from the complainant, and have paid and am to continue to pay him for its use.

"Q. State how much fat has been decomposed at your factory by the action of water only at a high temperature and corresponding steam pressure of 300 lbs. to the square inch.

"A. About 90,000 lbs.

"Q. How much fat is treated at each charge of the apparatus? And how much fat could you decompose per week, if working night and day, at 300 lbs. pressure, at the same rate you have obtained in working by daylight only?

"A. From 6000 lbs. to 7000 lbs. of fat is treated at each charge of the apparatus, and I could decompose about 150,000 lbs. per week by continuous work.

"Q. State how long it takes, in your apparatus, after the charge has been heated up, to decompose it into fat-acid and glycerin by the action of water alone at 300 lbs. steam pressure.

"A. About five hours.

"Q. Would you have any difficulty in continuing to work by water only if you desired to do so?

"A. I think not.

"Q. Have you any specimens of stearic acid and of candles made from fat decomposed at your factory by water only? If so, produce them, and mark them.

"A. I have such specimens. Here they are, marked as directed.

"Q. How much fat have you worked, in all, under the complainant's patent when using one-half per cent. of lime in addition to the action of the heated water? And how long has your factory been working Tilghman's process?

"A. I have treated 738,000 lbs. of fat in which a half per cent. of lime was used; and I have been using Tilghman's process since the first of November last.

"Q. Examine the first-described process in the complainant's patent, and state whether or not you would infer therefrom that the strong vessel mentioned was to be entirely filled up with oil and water, so as to leave no steam-room whatever in the vessel.

"A. I have examined this part of the patent, and I can see nothing in it requiring the vessel named to be completely filled with oil and water.

"Q. State whether there are reasons, obvious to any one accustomed to steam-boilers, why said vessels should or should not be entirely full, and state such reasons.

"A. There are reasons which I should think would be entirely obvious to one accustomed to steam-boilers why said vessels should not be perfectly filled with oil and water; the prominent one of which, to my mind, would be the danger of applying even a moderate heat to the vessel, under such circumstances, inasmuch as the expansion of the contents under only a moderate heat might rend the vessel asunder.

"Q. Examine the second-described process in the complainant's patent, and state whether or not you can see reasons for the direction there given, to keep the tubes entirely full of liquid, and not to allow steam to accumulate in them; if yea, state such reasons in detail.

"A. I see no reasons given therefor, in that second part of the patent. Obvious reasons for that direction occur to my mind as a manufacturer, which are the avoidance of irregular working of the machinery indicated, and consequently increased strain and wear of the machinery.

"Q. Do you know the rules for calculating the strength of cylindrical iron boilers? If yea, calculate thereby the strength of perfectly welded iron tubes of the dimensions directed to be used in the second-described apparatus in plaintiff's patent.

"A. I know the rules which I believe to be generally adopted for calculating the strength of boilers. By that rule I compute the strength of the tubes alluded to in the second part of the plaintiff's patent, at 60,000 lbs.; that is, it would take 60,000 lbs. to burst them."

Cross-examined.

"Q. In the first process used by you, was not water used, and were fats ever decomposed into fat-acids and a solution of glycerin without the intervention of water, which was always necessarily present when glycerin was obtained, and generally used in connection with steam?

"A. Water was used in the first process described, but in quantity only slightly in excess of that requisite for preparing the milk of lime. I do not know of the decomposition of neutral fats into fat-acids and a solution of glycerin ever having been attained without the intervention of water. Within the limits of my experience or knowledge, steam has always been an agent in the process.

"Q. When was the second process, described by you, first used by yourself?

"A. In the fall of 1859.

"Q. You state you use the process patented to Mr. Tilghman. Describe in detail that process, as used in your factory.

"A. I place the melted fat to be treated in a large vessel with water, equal to one-half the bulk or weight of the fat, or in excess of that proportion, and subject the charge to a pressure of steam, 300 lbs. to the square inch, for a period of about five hours, keeping the water and fat in intimate contact by pumping the water from the bottom to the top, and discharging it on the surface of the fat to make its way to the bottom. I prefer, however, to use half of one per cent. of lime, inasmuch

as that quantity of alkali enables me to perfect the decomposition in four hours' working, at a pressure of 250 lbs. per square inch, with material economy of fuel, and of wear and tear of machinery. Since ascertaining the advantages of this mode I have adhered to it.

"Q. Describe particularly when your apparatus was first put in operation, under whose superintendence, where made, the size, construction, shape, materials that compose it, its capacity and cost, the quantity of fat and water put into the apparatus at one time, how full at each charge, and the disposition made of the products after it was decomposed.

"A. My apparatus was first put in operation in September, 1863, under the superintendence of R. A. Tilghman. The vessel in which the fat is treated was made in Philadelphia. This vessel comprises a tube of about thirty-eight feet in length and thirty-eight inches in internal diameter, made of iron plates of half-inch thickness, and a copper tube of nearly the same length, and about thirty-five inches diameter, placed inside the iron tube so as to leave an annular space of about one and a half inches between the copper and iron vessel. The estimated capacity of the vessel is about 10,000 lbs. of oil and water, and the quantity usually put into the vessel at one time is 6000 lbs. of fat, and about 4000 lbs. of water, which is held by the copper vessel mentioned above, and serves to fill it within about three feet of the head or top. When the decomposition is perfected, the water holding the glycerin in solution is discharged into its proper receptacle, and the fat-acids into their place.

"Q. Explain why two tubes are used instead of one, and why they are of different metals.

"A. Because the cheapness of iron, and its greater strength as compared with copper, suggested its use to resist the great requisite pressure, and the inner vessel was introduced to save the iron from contact with the fat-acids, which would rapidly corrode the iron, and soon render such iron vessel unfit for use.

"Q. In the description of the operation now used by you, you mention oil and water as the contents of the boiler. When no lime is used, are the products satisfactory?

"A. The products are satisfactory when no lime is used. I have treated fourteen or fifteen charges of 6000 lbs. to 7000 lbs. of fat, each with water alone. The reasons for adding lime in subsequent treatments was the desire to diminish the pressure,

and this course has been persevered in, not only because that object was attained, but because an economy was effected in fuel, labor, and time.

"Q. Do you now state that in order to make the process with the greatest economy in practice, the aid of the pump to circulate the water and oil freely, and the presence of lime in the proportion described by you, are necessary?

"A. I do not know that a less quantity of lime would not suffice, but I do regard the use of the pump and of some lime essential to the use of my apparatus with the greatest economy.

"Q. By whose direction do you use the pump and the percentage of lime now employed by you?

"A. The pump was an original part of the apparatus named, and its use directed by the complainant. I use the lime solely for my own convenience and advantage, at my own instance, without direction.

"Q. Who was present when you first employed lime in the process; and who first suggested its use?

"A. Some of my employés were the only ones present when lime was first used. The suggestion of its use, I think, was made by my foreman at the factory.

"Q. Is not lime used in the process produced by the apparatus of Mr. Tilghman, in every instance, so far as your knowledge extends, when said apparatus is used?

"A. I believe it is.

"Q. Why?

"A. I believe it is used for the same reasons that I use it, namely, to economize time and cost.

"Q. State whether any one in your manufactory ever mixed a fatty body with from a third to a half of its bulk of water, and placed the mixture in any convenient vessel in which it could be heated to the melting-point of lead; that is, to 600° Fahrenheit, until the operation was completed, the product being free fat-acid and a solution of glycerin?

"A. No.

"Q. Have you always used the pump in your apparatus?

"A. I have invariably used the pump.

"Q. State how long it takes to heat up the charge in your apparatus.

"A. I have not noted the time. The water is heated up to a temperature indicated by a pressure of 250 lbs. to the square

inch, before its introduction to the vessel in which the fat is decomposed; and the pump is set to work immediately after the water has been introduced. This water is heated in the boilers which supply the steam pressure, and is blown up from them into the vessel containing the fat.

"Q. In your examination in chief, you state that you have examined the first-described process in the complainant's patent and could see nothing in it requiring the vessel named to be completely filled with oil and water; please quote from the said specification any part which states that the convenient vessel therein mentioned should not be completely filled with fat and water, or any passage implying the same.

"A. There is no part of the said specification which requires explicitly or implicitly that the said vessel should not be completely filled.

"Q. Do you now say that, by a plain interpretation of said specification, as a manufacturer, you would not infer that said vessel was to be completely filled with oil and water?

"A. I do now say that, as a manufacturer, I would not infer that a plain interpretation thereof would require the vessel to be completely filled with fat and water.

"Q. Have you ever used, for the manufacture of fat-acids and glycerin, such an apparatus as is described in the second part of the complainant's patent?

"A. I have not.

"Q. Please quote from the complainant's patent the words explicitly or implicitly requiring or authorizing the use of a pump and one-half per cent. of lime as used in complainant's apparatus, now employed in your factory.

"A. I find no such words.

"Q. Is there anything to that effect in the patent as reduced to practice in your factory?

"A. I believe not, sir.

"Q. State how the steam pressure of your apparatus is produced, and how it is applied.

"A. It is produced by cylindrical boilers, which are twenty-four inches in diameter and about thirty-four feet long, of which there are two. The steam generated in them is introduced into the upper part of the digester, and into an angular space between the iron and copper vessels composing the digester, the iron vessel being closed steam-tight, and the upper part of the

copper vessel sufficiently open to admit the steam directly into contact with the charge."

Re-examined.

"Q. You have stated the use of the pump in the apparatus erected by the plaintiff at your factory, to be the circulation of the water through the oil under treatment; now state, from an examination of the second-described apparatus in Tilghman's patent, whether or not provision has been made for producing this thorough mixture of the fat and water before it went into the apparatus, as well as for renewing the state of mixture, should it be necessary, within the apparatus itself.

"A. It seems to me that provision has been made for effecting and renewing that intimate mixture; not having used the apparatus described in the second part of the plaintiff's patent, I cannot speak from experience.

"Q. Has the pump employed in your apparatus ever failed to act? Of what material is it composed?

"A. It has not. It is composed of bronze."

IV. OTHER PROOFS.

1. *Tilghman offered to show to the defendant his coil apparatus practically at work, and the offer was declined.*

Just before the testimony had been closed, Mitchell asked for the inspection of Tilghman's apparatus. The examiner's minutes proceed:

"March 24, 1864. Tilghman replied:

"'That the coil apparatus is very weighty and bulky, and was dismantled at the request of Professors Booth and Bridges, the day after the experiments therewith were tried by them, in order to enable them to examine its interior construction and dimensions; that to get the coil apparatus again in working order, and try new experiments, would require considerable time and delay the hearing; that the defendant neglected to make his request until the moment of adjournment on the day originally fixed for closing the testimony; that the complainant has, however, caused the same experiments to be repeated in a more portable apparatus, which he produces and now formally offers to experiment with it, and try any pertinent experiment in the presence of defendant, on Friday, March 25th, at any suitable

place and hour which defendant will now indicate; it being understood also that such experiments tried for defendant are not to be permitted to delay the hearing.'"

To this offer the defendant made no reply.

Tilghman subsequently thus addressed his counsel:

"April 5th, 1864.

"SIR: The only objection which the complainant had to the repeating of his experiments on the coil apparatus was the risk of delaying the hearing to the next term.

"As the court has ordered that the case shall still be heard this term, though at a later day, the complainant now offers to repeat the experiment tried by Professors Booth, Rogers, and Bridges, in the presence of the defendant; and requests the defendant to signify his acquiescence or refusal of this proposition within five days. If accepted, the complainant will at once have his apparatus put in order, and then appoint the earliest day which may be convenient to both parties for the defendant to visit complainant's laboratory in Philadelphia, and see the process in action.

"Very truly yours,

"R. A. TILGHMAN.

"G. C. GODDARD, ESQ.,

"Solicitor for defendant, 17 William Street, New York."

And thus subsequently (inclosing a copy of the letter) again:

"PHILADELPHIA, April 13th, 1864.

"SIR: On the 5th instant I mailed to you the notice of which the following is a copy, requesting the favor of an answer within five days.

"For fear that you did not receive it, I now send this copy of my former note, requesting the favor of an answer accepting or declining my proposition within the five days after your receipt of this present notice, inasmuch as I have other engagements to which I wish to attend. I would also thank you to acknowledge the receipt of my former notice, if it was received by you.

"Very respectfully yours,

"R. A. TILGHMAN.

"G. C. GODDARD, ESQ.,

"Solicitor for defendant, 17 William Street, New York."

Mr. Goddard, the counsel, thus replied:

"NEW YORK, April 15th, 1864.

"DEAR SIR: Yours of the 13th is received, as was yours of the 4th or 5th, to which I think I made answer.

"After the use of your coil apparatus by us was declined by you, we made arrangements which we hope will supersede the necessity of making experiments on yours. Should we change our minds, and desire to experiment on yours, we will advise you; *but at present we do not.*

"GEORGE C. GODDARD.

"MR. R. A. TILGHMAN."

The minutes of testimony taken before the examiner next contained the following:

"May 6th, 1864.

"Counsel for the defendant offers to repeat the experiments in the coil apparatus, and on the Scharling apparatus, in the presence of complainant, and make alterations therein to make it conform to complainant's patent, if any are necessary; it being understood that such experiments are to be made at a time which will give opportunity to give evidence in this cause in respect thereto. Also to repeat the experiments on the Scharling apparatus, in complainant's presence.

"Mr. Harding, in behalf of Mr. Tilghman, replies by giving in evidence the offers contained in Mr. Tilghman's letter of April 13th, 1864, to G. C. Goddard, Esq., the defendant's counsel, together with the reply, April 15th, 1864, of the said counsel; and further refers to his offer to repeat the complainant's experiments on the digester, contained in the record of the date of March 24th, 1864. And adds that, as the complainant has a complete apparatus, constructed in accordance with his patent, the successful operation of which he has proved by disinterested experts, and has repeated the offer to exhibit to the defendants, he cannot see any reason why he should occupy time in altering the apparatus now at the defendant's works, especially since the time for closing testimony and the day of hearing will not leave time to reopen this matter."

CAPACITY FOR PRACTICAL USE.

THE DEFENDANT'S SIDE OF THE QUESTION.

I. SCIENTIFIC TREATISES.

Nothing as to the incapacity for practical use of the invention patented to Tilghman was derived from this source.

II. MEN OF SCIENCE.

1. *Professor Vanderweyde* (already described, *supra*, p. 315), on examination in chief, stated that he had made experiments—Professor Doremus being present—for testing the effects of water on fat at a high temperature and pressure. They were careful to follow the directions given in the specifications of Tilghman's patent, except that they did not use the apparatus specified in it. The experiments were not for the purpose of testing the apparatus described. The witness said:

"The first experiment was: Fat and water were placed in an iron vessel, hermetically closed. This vessel was provided with a few holes to place in the different substances mentioned in the patent, by the melting of which the temperature was to be determined. The experiment was made by raising the temperature to the melting-point of lead; keeping at that temperature for ten minutes, removing the vessel from the fire, cooling it in water and opening it. The result was that the fat was changed into a black substance, which possessed the well-known and very characteristic strong smell of acrolaic acid. [Sample exhibited.] Dr. Doremus kept detailed notes. Chemically speaking, I would declare the sample a mixture of acrolaic, stearic, margaric, and oleic acids with water. Heat was obtained from charcoal.

"The second experiment was in all respects similar to the first, except that the temperature was only carried up to the melting-point of tin. The result was that the fat was not so black-looking as in the first instance; but the smell of the acrolaic acid was not less offensive. [Sample of this result exhibited.] This sample is the same as the former. There is a difference in color, produced by the difference in temperature, almost 200°.

"Doubts were entertained by both Dr. Doremus and myself if the experiments were fair, as, perhaps, some parts of the iron vessel might be exposed to a temperature somewhere above the melting-point of lead and tin; therefore it was suggested by us to procure a bath of melted lead and place the vessel in it, in order to have an equal temperature throughout. This was done. The same experiments were repeated, as in the first instance, with the vessel immersed in the melted lead, taking care that the lead was not heated above its melting-point; keeping a hose ready to bring in a water-jet into the fire when supposed necessary. In the first experiment in the bath the vessel was full; in the second it was filled about two-thirds, as doubts were expressed if the patent requires the vessel to be full or not. Of the results I have the samples here. [Samples exhibited.] In both instances the smell of the acrolaic acid was as strong as the results of the first experiments.

"Q. What caused or produced the acrolein in these experiments?

"A. As the temperature of melted lead corresponds with the boiling-point of fat, and as the boiling of fat is in fact a chemical decomposition of the base of the fat, the glycerin, into acrolein or acrolaic acid, it was anticipated that exposing fat to so high a temperature would have the effect of destroying the glycerin, and to contaminate the fatty acids with so much acrolein as to make them comparatively worthless. The result fully answered our expectations. Acrolein is produced in no other way than by the decomposition or destruction of glycerin. In the first two experiments there was a little agitation, as the vessel was standing in the charcoal, and from time to time moved up or down to regulate the heat; in the last two experiments there was considerable agitation, as the vessel was rolled about in the melted lead in order to secure a uniform temperature.

"Q. Is the method described in said specification for producing fat-acids and glycerin, in your opinion, practical; and if not, why?

"A. That specification bases the treatment of fats on two principles: one, a special, very ingenious apparatus, about the practicability of which I, however, am much in doubt. The other, the action of water and heat combined on fat in a close vessel. The objection, however, is, that the temperatures pre-

scribed in the specification are altogether too high, and that no provision is made to keep the particles of fat and water in a continually varying contact by means of circulation of some kind.

"Q. Why is this contact and circulation necessary?

"A. It has been ascertained, first by Chevreul and later by other chemists, that fats are composed of one base, glycerin, and three or more acids, stearic, margaric, and oleic, and that the action of water will be sufficient to separate those substances; the water having a strong affinity for glycerin, has the power to abstract this base from the fats; and Berthollot stated more than ten years ago that water will rapidly, at 360°, or slowly at ordinary temperature, resolve all fatty bodies into the acids and glycerin. Circulation is only necessary to hasten the process."

Cross-examined.

"Q. What temperature, in your judgment, would be about as low as it would be proper to use as a practical one for decomposing of fats in the arts for the manufacture of candles?

"A. When water alone is used under pressure, the most profitable temperature ranges from 350° to 390°. When we are below this, the time is too long. When we go beyond this, to above 400°, 430°, the melting-point of tin, 500°, the melting-point of bismuth, and 615°, the melting-point of lead, as Mr. Tilghman prescribes in his patent, we decompose the glycerin, entirely destroy it, and contaminate the fatty acids with acrolein.

"Q. Prior to the experiment with what you call Mr. Tilghman's mode, state precisely what experiments you had tried to enable you to express an opinion as to the temperature at which fat will begin to decompose into acrolein.

"A. I have never tried any experiments expressly for the purpose to verify this temperature, but I have had plenty occasion, during my labors in different laboratories, to observe this change incidentally, and so has, I believe, every cook; but I was ahead of the cook in making an estimate of the temperature, and always adopting at about 620°, the boiling-point of fat, or the melting-point of lead, and this view is fully confirmed by the experiments stated.

"Q. Who took part in the experiments you have described, to verify what you call Mr. Tilghman's process? Who was present, and where were they tried?

"A. Dr. Doremus, myself, Mr. Verdin, senior (Mr. Mitchell's partner), and two or three men assisting to regulate the fires, &c. The experiments were tried at Mr. Mitchell's factory.

"Q. Was no glycerin left undecomposed in your experiments with what you call the Tilghman process?

"A. In some of the four experiments there was.

"Q. Why was it left undecomposed in some and not in others?

"A. I don't know.

"Q. Why did you not mention in your examination in chief that you sometimes obtained glycerin?

"A. Because I made all my statements by memory. They were quite long, and it is very natural to forget some particular when the attention is not called to it by a direct question, as is done now.

"Q. Did you ever see or try Mr. Tilghman's apparatus as described in his patent?

"A. I like to see any one who saw it in successful operation. I never saw it; and it is the impression generally entertained by those who understand those matters, that it never has been, nor never will be, except by some important modifications, or rather change.

"Q. Name every person skilled in the art of treating fats practically whom you know entertain and have expressed to you this opinion.

"A. Among the practical men I know is, of course, at the head of the list Mr. Mitchell, Mr. Verdin, and Mr. Verdin, Jr., and all the intelligent employés in their factory. With other practical men I had not occasion to converse on the subject; but no scientific man will doubt that they are right.

"Q. Why do you yourself pronounce Mr. Tilghman's apparatus impracticable?

"A. In the first place, because it does not provide for a circulation sufficient to bring the particles of oil and water in a continually varying contact. In Mr. Tilghman's apparatus the fat is only pushed forward with the water by means of a piston, through a long tube coiled up, escaping at one end in proportion as it is pressed in at the other extremity. The first extremity is closed by a safety-valve charged to stand a pressure of not less than 130 to 150 atmospheres. Now, it is doubtful that if this safety-valve is once opened by the pressure of the force-pump, if not by the expansion of the steam necessarily formed

when some exit presents itself, a great deal more of the contents will escape than is forced in at the other end. This is a view which I cannot help entertaining till seeing it to be erroneous by the practical operation of said apparatus, always supposing the apparatus to be constructed exactly as the patent describes it.

"Q. If fat or water are kept in a perfect state of mechanical mixture while exposed to heat, is any other circulation needed to decompose the fat?

"A. You cannot possibly keep fat and water in a mechanical mixture when at rest or simply pushed forward, as is the case in Mr. Tilghman's apparatus. To keep them in a mechanical mixture you have continually either to bring the water from below over the fat above, as is done by the circulation process, or may be done with some pump, or the mixture may be stirred with some kind of wheel, otherwise fat and water will follow the laws of their respective specific gravities; the water below, the fat above.

"Q. Question repeated.

"A. Mechanical mixture alone will, of course, promote the action; but when this is combined with a continual motion and intermingling of the two substances, the action will be greatly improved, and in so far circulation may be considered necessary."

2. *Professor Ogden Doremus*, resident in New York, who began the study of chemistry with Dr. Draper, in the city just named; who had been Professor of Chemistry in the Brooklyn Medical College, in the New York Medical College, in the College of Pharmacy, New York, and was now (1864) professor of the same science in the Bellevue Medical College and the Free Academy in the same city.

"I assisted, in February, 1864, with Professor Vanderweyde, in performing experiments after the method described in the specification to Tilghman's patent of 1854."

[The witness then described at length the apparatus and the experiments.]

"The fatty acids produced were not in a pure state. Acrolein was produced at each operation. It was produced by the

high temperature to which the tallow was heated in the presence of water. The temperature, however, was not higher than that indicated in Mr. Tilghman's specification as proper."

Cross-examined.

"Q. What do you know about the condition of that apparatus at the time you tried that experiment, and of its previous use?

"A. I know not what use it had been put to prior to the experiment, but believed it to be in a fitting condition for an honest investigation of the subject.

"Q. Who put the fat into it?

"A. The tallow and water were weighed out by Mr. Verdin, in the presence of Professor Vanderweyde and myself; they were poured into the apparatus by a workman from the story above, Dr. Vanderweyde accompanying him, the other remaining below.

"Q. Were any means tried in your presence to satisfy you whether any remains of fat-acids might be adhering to the interior of the vessel in the last operation in it?

"A. The vessel was simply washed out; I felt satisfied that the vessel was clean; my impression is, it was hot water, but I am not certain.

"Q. Did you test any of the results of that experiment as to the proportion of the fat-acids obtained to the whole mass?

"A. I did not; I made a rough approximation of an analysis, and should judge there was at least five per cent. of acid."

3. *The Paris jury of savants*, already mentioned,* at the Exposition of 1855, after stating that Tilghman was the first who had the idea of undertaking, on a large scale, the saponification of fatty bodies by water, and after describing the coil apparatus recommended by him, say:

"Visiting the manufactory of Messrs. Monier & Co., at Villette, near Paris, we had an opportunity of seeing the trial of the continuous process in its application to palm oil.

"We are sorry to say that the fatty matter on coming out of the apparatus was not at all deodorized, and, more besides than that, that it gave out a strong odor of acrolein. From the point

* *Supra*, p. 307.

of view of the quality of the products, this arrangement of apparatus, then, by no means realized the end which the author has proposed. Moreover, in our opinion, the chances of deterioration of a system of apparatus of any kind which works constantly at a temperature capable of exerting a pressure of ninety to one hundred atmospheres are such that it is hardly possible that industry will utilize it, even if the products which it furnishes were irreproachable."

4. *The jury of the London International Exhibition*, already mentioned* as having given Tilghman the credit of saponification by water, and declared that De Milly had only much improved it, added that they doubted whether the two methods, "under any modifications up to that time attempted, successfully compete with the sulphuric saponification."

III. MANUFACTURERS OF CANDLES.

1. *Nathaniel Ropes*, resident in Cincinnati, Ohio; a manufacturer of star candles, sometimes called adamantine candles, and of lard oil, a witness of the defendant.

"Q. Describe the old process used in your factory by which you obtained the fatty acids and glycerin, and describe the process now used there.

"A. We formerly worked in an open tub with about thirteen per cent. of lime and about twice that quantity of sulphuric acid; we now operate in close tanks, copper tanks, and use about a half per cent. of lime and about twice that quantity of sulphuric acid, and have operated under a pressure of about 150 lbs. or 160 lbs. to the square inch. But I feel satisfied in my own mind that lime could be dispensed with altogether under a higher pressure, probably 180 lbs. to 200 lbs., and the same result accomplished in about the same time—say six or seven hours; whereas under a pressure of only 150 lbs. it would take from twelve to twenty hours to accomplish a like result, depending upon the quantity of water and the quality of stock used. We have taken twenty hours; but, with a better quality of stock and nearly double the quantity of water, we have accomplished the result in about twelve hours; under a higher

* *Supra*, p. 313.

pressure the time would be very much shortened. In the twelve-hour operation, with 2000 lbs. of prime stearin, and the same quantity of water introduced, 1000 lbs. each time, a beautiful result was produced. The separation was perfect, and the stock well crystallized. We have continued on since using a half per cent. of lime, as we prefer doing this to adding a greater pressure than 150 lbs. or 160 lbs. to our works, as we incur less risk from explosion. We have not repeated the operation since then without any lime, not because we don't think them practicable, for I fully believe that under pressure—say of 200 lbs. to the square inch, which would give something like 400° Fahrenheit, I should suppose—as good a result could be obtained in as short a time as with a half a pound of lime under a pressure of only 150 lbs. to the square inch. This last is, as I say, a matter of opinion, without having tested it.

"Q. Describe your works; also describe the mode of their operation when you first began; under whose superintendence; what changes you made in its operations by experimenting therewith, and how long you experimented therewith before finally adopting your present mode of operation.

"A. We generate steam in an iron boiler, about thirty feet in length and forty inches diameter. Another boiler is connected with our copper tanks by means of iron steam-pipes, with stop-cocks attached, for letting off or on the steam from the first-named boiler; steam is made to operate on the crank inside, that revolves by means of a pulley. The steam agitates the stock inside of these boilers. When sufficiently cooked it is forced off through pipes to an open tub on the second floor. The tank was first brought on in January, 1860; it was introduced under the superintendence of Mr. B. C. Tilghman, brother of the patentee; he operated or experimented for several months; he had never had an opportunity of operating with lard stearin; he was willing, if I would find the stock, to operate without any compensation, and we did so operate for several months; after that, as long as I continued to operate, I was to pay him, and am still to pay him twenty cents a hundred. Mr. Tilghman desired the place and the opportunity where he could exhibit this operation to other manufacturers, and he proposed, if I was not satisfied with the operation and the working of the apparatus, to take it away without expense to me; but I was so well satisfied with it that I purchased

of him the tank and its connections probably five or six months after its first introduction—in August, 1860. I have made no particular changes since that time, with the exception of introducing this other tank, and from that time forward we have continued to operate in this and no other way.

"Q. State when you first introduced lime, and the quantity.

"A. We introduced it from the start; a half per cent.

"Q. Describe the construction and the operation of the mixer or stirrer, and whether or not the mixer is essential, in mixing together the ingredients in your decomposing tanks, to the decomposition of the fats.

"A. The shaft is constructed with wings, or more properly arms, through its whole length, so that when it revolves it keeps the whole of the stock in agitation. To show the importance of this, the arms upon my shaft on the new tank are not sufficiently extended, and the stock would collect at one end of it, and we would have to take off the main head and clear it out. I am now extending the shaft in my new boiler to its full extent, so that the stock may be well agitated throughout the full extent of the boiler. We have had no trouble with the small boiler, which was constructed under Mr. Tilghman's directions. This fault that I speak of was only with my new tank. Under this mode of operation, which I have adopted, the mixer or stirrer is essential to the decomposition of the fat. At the same time other apparatus might possibly be constructed in which the mixer or stirrer might be dispensed with.

"Q. In the boiler furnished by Mr. Tilghman, or in your own tanks, state whether or not you have ever produced free fatty acids or glycerin without the use of the stirrer or agitator just described.

"A. No, sir, we never have. We have never tested it without the use of the stirrer. We never have attempted it.

"Q. State whether or not, after your process is completed, the glycerin-water contains free fatty acids; if yea, how are the free fat-acids separated from the glycerin-water?

"A. I don't think there is any free fat-acids connected with the glycerin-water. They are separated by the process.

"Q. State whether or not water is used in the old process as well as in the new.

"A. It could not be used to the same advantage as under the new. If I understand Mr. Tilghman's process, it is to produce

a free fat-acid with one operation, under pressure, either with or without lime; but if so much lime is used as to produce a lime-soap, it goes without his process, right or wrong. Of course water is used in the old process, but in diminished quantities. We dilute our sulphuric acid with water, and a sufficiency is used, of course, to boil up the lime-soap.

"Q. In the practical operation of your process, as introduced by Mr. Tilghman, state whether or not you use any other agents than those employed formerly in the old process.

"A. No, sir; none other. No other agents, and these (with the exception of water, which we use largely) in very small quantities.

"Q. State where, if at any place within your personal knowledge, soap or candles are manufactured from free fat-acids produced by the use of water alone, at a high temperature and pressure, without the use of any alkali.

"A. I can't say that I know of any place. I don't know about other establishments, of my own personal knowledge.

"Q. State where, if at any place, the manufacture of free fat-acids by water alone, at a high temperature and pressure, has been tried under the direction of R. H. Tilghman, or B. C. Tilghman, and desisted or discontinued in whole or in part, and afterward some alkali used in the process.

"A. I don't know of any place where it has been tried and been discontinued; that is, voluntarily discontinued.

"Q. State whether or not, in your own factory, in the two operations you have mentioned, of twelve and twenty hours respectively, such was the case.

"A. No, sir; we did not. We never, in our factory, adopted the use of water alone, except with a view of testing the practicability of it. We preferred, in our factory, to use a half per cent. of lime, with a pressure of 150 lbs. to the square inch, rather than to subject our works to the higher pressure which would be necessary to produce the result without lime. It is only with reference to safety that we have not discontinued the use of lime altogether, and subjected our works, boiler and tanks, to a higher pressure.

"Q. State whether or not any one in your factory has ever mixed a fatty body with from a third to a half of its bulk of water, and placed the mixture in any convenient vessel in which it can be heated to the melting-point of lead, until the operation

was completed, the products being free fat-acids and a solution of glycerin.

"A. No, sir."

Cross-examined.

"Q. State as nearly as you can, how many pounds of stock you have worked into good stearic acid with the Tilghman process, and without the use of any lime.

"A. About 8000 lbs. altogether. About 6000 lbs. successfully; a very good result from 8000 lbs.

"Q. Are you or not satisfied that the Tilghman process, without the aid of any lime, is a practical process?

"A. I think it is, sir.

"Q. Could you have continued to work that process without any lime regularly and daily?

"A. I think so, sir; yes, I think so.

"Q. Was not this 6000 lbs. of stearic acid made into merchantable candles? What was their character?

"A. They were made into candles; they were first-rate candles—no better; they were unexceptionable. All were made into candles, with the exception of about 150 lbs., which quantity of the stearic acid was retained for Mr. Tilghman, and a portion of it to be retained at home as a sample of what could be accomplished without the use of lime.

"Q. Can you produce a specimen of that stearic acid?

"A. I have a specimen here. [Marked by the commissioner.]

"Q. How many pounds of stock have you worked with the apparatus and process of Tilghman since you first commenced?

"A. I took it off from my books last night, as you requested. From February 1st, 1860, to April 1st, 1863, 1,127,000 lbs. under that process.

"Q. How many pounds of lime and how many of sulphuric acid did you save by the Tilghman process on each 100 lbs. of stock worked by you, as compared with the old process used prior to the introduction of Mr. Tilghman's process?

"A. Well, we saved about twelve and a half pounds of lime and twenty-five pounds of sulphuric acid on the hundred pounds of stock.

"Q. In your opinion, is it or not owing to the decomposing power of highly heated water under pressure that this saving is due?

"A. Yes, sir; I think so.

"Q. Have you paid Mr. Tilghman twenty cents on every 100 lbs. of fat you have worked since April, 1860? Do you continue to pay him that amount?

"A. I have paid him since August 1st, 1860, twenty cents on every 100 lbs. I think it was from August 1st, 1860, that I contracted to pay him. I have not paid him all, but I am ready to pay him the balance when called on. The arrangement still continues."

2. *Nathaniel Ropes, Jr.*, a witness of the defendant, was also examined, and confirmed, so far as he was examined on the same topics, the testimony of N. Ropes, his father. He stated among other things that in using Tilghman's process the firm generally employed one-half per cent. of lime; that a saving of lime and acid was effected by this process, as compared with the old process used prior to the introduction of Tilghman's process, of ten and a half to twelve and a half pounds of lime to a hundred pounds of fat; twice that quantity of vitriol; and that this saving was due to the chemical action of highly heated water under pressure on the fat; and that this chemical agent of highly heated water, under pressure, was not, so far as the witness knew, used prior to the introduction of Tilghman's process.

3. *Florence Verdin*, a partner of the defendant, already described, manufacturer of stearic acid and candles:

"I have tried several experiments in which I followed the specification of Tilghman's patent. There was very little glycerin and it was very poor. The acrolein had injured it so much that it would not have been salable. The fatty acids also were very poor; affected by the acrolein. Candles made from these fatty acids might be freed from the smell of the acrolein with additional expense. The value of the fatty acids as they come out of the vessel would be impaired in value at least one cent per pound.

"The process described in the specification would not in my opinion be of any value to a manufacturer of candles or of stearic acid. The use of the apparatus, as there described, would not be safe to the operatives in charge of it. There would be danger of explosion from the heat and pressure specified. I think I

should make my will before I would operate with them. With the heat and pressure mentioned in the specification, the valves therein mentioned will not keep tight. The process described in that specification is not anywhere adopted that I know of."

Cross-examined.

"Q. What heat are said valves exposed to in the apparatus described in complainant's patent?

"A. The melting-point of lead.

"Q. Examine the drawing now shown you of the complainant's patent, and state what valves in said apparatus are exposed to any heat above 212°.

"A. There are none. I was mistaken. I had seen the drawing before, but was under the impression that the valves were nearer to the boiler."

Re-examined.

"Q. From your present knowledge of the position of the valves in the complainant's drawing and the mode of operation, is or is not the complainant's apparatus a practical mode of accomplishing his object?

"A. I think not."

4. *C. H. Grant*, resident in Philadelphia, of the firm of C. H. Grant & Co., manufacturers of adamantine candles, a witness of the defendant, testified, in substance, among other things, thus:

"We now use the distillation process, with the use of sulphuric acid. From the fall of 1859 to nearly the beginning of 1862, we used the Tilghman process, under a license from him, but not continuously. Our interests are in his favor. We did not employ the coil apparatus, but a cylindrical digester with spherical ends, procured from Mr. Tilghman. We used it in connection with high pressure; 160 lbs. to the square inch. We used the process a portion of the time without lime. The fat during its treatment was agitated by paddles on a shaft running through the digesters, from end to end. We voluntarily abandoned the use of the Tilghman process, because we found it was costing us too much. The process was unprofitable; that is to say, the profits were not equal to what they would have been by the sulphuric acid process. Mr. Tilghman was at our manufactory frequently, and suggested all the modes of treatment. We ex-

pected, as well as I can recollect, to produce decomposition by water alone in about six hours; but I think we were about twice that time. Except, possibly, by double hot pressure, which we never tried, we could not by the use of water with heat and pressure alone produce such a decomposition as would make merchantable candles. It is my opinion that a person of ordinary skill in the branch of manufacture to which this patent relates, with the patent as his guide, and without experiment, could not decompose fat by water, heat, and pressure so as to produce a valuable result."

Cross-examined.

"There was a difference of opinion between myself and my partner as to the policy of abandoning Tilghman's process. I always advocated the process, and was unwilling to abandon it so long as there was the least hope of success. Since we abandoned the process, it has not been generally abandoned by other manufacturers. I know of no manufacturers in the United States who are now working by the old lime-saponification process, though there may be some. I cannot name any manufacturer in the United States, besides ourselves, who has abandoned the use of Tilghman's process after having once adopted it. I do at this moment believe that fat can be decomposed by the action of water, at a high temperature and pressure, into fat-acids and solution of glycerin. I believe that the intimate mixture of the fat with the water is an important circumstance in producing this decomposition. I believe that, the higher the temperature and pressure employed, the more quickly the decomposition will be produced. I believe that the pressure should be made to correspond with the temperature employed, so as to prevent the water escaping as steam. Except agitation, which is of use only to produce mixture of the fat and water, I do not believe that any conditions besides intimate mixture of fat and water, a high temperature, and a pressure sufficient to prevent the water from escaping as steam, are necessary to produce the decomposition of fat into fat-acid and glycerin. Which of these three conditions we were unable to produce in the apparatus we used, I don't know. If we had used twice as much water, or continued the operation twice as long, or taken a second charge of water, I believe that we would have made better decomposition."

5. *Mr. E. S. Wayne*, manufacturer of candles in Cincinnati, a witness of the defendant, testified that Tilghman's process with the coil apparatus was practical but not economical.

6. Soon after the issue of his patent, Tilghman began to modify the apparatus described in his specification. Of this it did not appear that he made any secret. One of his letters to Messrs. Thomas Emry & Son, manufacturers of candles in Cincinnati, produced by the defendant, was thus:

"LONDON, June 25th, 1856.

"GENTLEMEN: I have received from Mr. Davenport your favor of 30th May last. Our experiments in the factories here and in Paris have shown that, on the large scale, the decomposition of fats by water is more conveniently effected by modifying the apparatus originally proposed, so that the fat and water are exposed to a comparatively lower heat and pressure for a longer time, instead of a very high pressure for a few minutes; and a considerable quantity of material is *treated at one charge, in an ordinary steam boiler*, lined with lead or copper, and provided *with an agitator*, in place of using the continuously working pumps and coil of pipes. At a pressure of 225 lbs. per inch, tallow, or palm-oil, or lard stearin is completely decomposed in five hours. In the course of a few months we shall probably have going on at Price & Co.'s works an apparatus on the above plan capable of treating *several tons* per day. Until my process is in actual use in England I have decided not to begin its introduction into the United States, and therefore cannot at present reply to your request as to terms of sale. As soon as *it is well established here* I intend returning home, and will immediately communicate with you. . . .

"I remain, very respectfully yours,

"R. A. TILGHMAN."

7. *Mr. G. F. Wilson*, already mentioned as the managing agent of Price & Co.'s candle works in London (which company, as has been mentioned, paid to Tilghman £1000 sterling a year), and whose statement in a public lecture delivered by him in January, 1856, that Tilghman's discovery, as carried out by his coil process, would draw from all the admission that it was a beautiful, original chemical idea,

well carried out; in that same lecture, and in immediate sequence to this statement, added:

"It has yet to be proved how far it can compete successfully with distillation."

Adding further:

"We have made an arrangement with Mr. Tilghman which will give us the means of testing its commercial merits."

Mr. Wilson, in a public lecture delivered previously (of September, 1855), after referring to the fact that until of late times no practical modes of obtaining glycerin other than in an impure state had existed, said:

"A new process for decomposing neutral fats *by water under great pressure coming under our notice*, led us to look again more closely into our old distilling processes, and the doing this showed, what we had often been on the brink of discovering, that glycerin might be distilled.

"In *our* new process the only chemical agents employed for decomposing the neutral fat, and separating its glycerin, *are steam and heat;* and the only agents used in purifying the glycerin thus obtained are heat and steam; thus all trouble from earthy salts or lead is escaped. Distillation, however, purifies the impure glycerin of the old sources."

8. *Mr. Tilghman*, who was examined as a witness, and who stated the fact of the agreement to pay him £1000 sterling a year, stated further that though he had been in some of the factories of Price & Co., he had not been in all, nor had he been in *all* the parts of all the factories which he did visit; and being requested to speak "of his personal knowledge" of what processes, &c., Price & Co. used, stated that he had no personal knowledge whatever as to what process they employed for decomposing fats, what form of apparatus was used by them, or what degree of heat.

9. *Monsieur Monier*, whose *stearinerie* had now apparently failed or otherwise come to an end, thus testified:

"We made numerous experiments immediately after signing the contract. Mr. R. A. Tilghman was present and worked with

his brother during ten or fifteen days. Mr. R. A. Tilghman, on leaving the factory, left his brother to represent him with my firm, and to continue and direct alone the experiments described in the patents. The results of these first experiments, as well as of those which followed, were entirely useless and productive of no good. They took place in our factory at Villette, near Paris, by means of a little apparatus brought from London by Mr. Tilghman. [Described by the witness, and obviously the coil apparatus.] It was placed in a furnace of fireproof brick and received all the heat of the furnace, the flame of which completely enveloped it, and which brought it to an excessive heat, of which it was impossible to ascertain the degree of intensity, as there was no instrument which would indicate the degree of heat. A suction and force-pump was firmly established and fixed at some distance from the apparatus. This pump was worked by hand, and being connected with one end of the coil in the cast-iron block, threw into the said coil a mixture of water and fatty matter contained in a vessel from which it drew it, and forced it to traverse all the turns of the coil, and forced it out of the other end of the said coil incased in the block of iron, which was, as I have already said, heated to an excessive degree. Although the mixture of water and fatty matter was, during its passage in the coil, subjected to a temperature which I estimate to have been above five hundred degrees (500°) and a pressure of more than twenty atmospheres, the decomposition of the fatty matter was never complete, and never produced fat-acids and glycerin, but only an altered fatty matter, which, when washed, produced acrolein to such a point as to fatigue the workmen who assisted at the experiments. The experiments, in conformity to the indications of Mr. Tilghman, possessor of the patent for making fat-acids and glycerin, lasted about six months. The first fifteen experiments were made by the Messrs. Tilghman, aided by two workmen, in my presence, and they alone directed the work; and after the departure of Mr. R. A. Tilghman, the patentee, they were all directed by his brother. None of the numerous experiments succeeded. After the failures with the little apparatus brought from London by Mr. Tilghman, his brother caused to be constructed successively three apparatus. The first was composed of a hollow iron tube, and was made by Perkins, in London, and put in a bath of melted lead, in order to always have at least three hundred de-

grees of heat. The second, which was also composed of a hollow iron pipe, was constructed in Paris, and put in a bath of melted zinc, in order to always have at least five hundred degrees of heat. The third, and last, was constructed with the Perkins pipe, divided into three equal parts, of which each part was placed in a block of cast-iron, by Davidson, iron founder at La Villette, and under the superintendence of Mr. Tilghman's brother. This last apparatus was placed in a furnace of fire-proof brick, constructed upon the plan of Mr. Tilghman's brother and under his direction, and at a temperature the elevation of which I never determined, but which certainly much surpassed that of melted zinc. It is easy to see that Messrs. Tilghman paid no attention to the process patented, but made at our factory and at our expense, not serious experiments, but trials to find the means of overcoming the difficulties which arrested them. This is shown by the fact that all which Mr. Tilghman demanded was instantly given him, and that he often used two kilogrammes of fatty matter in one day, and always without any results. I have no plans or drawings of the apparatus which Mr. Tilghman had made. The experiments made at our factory by Messrs. Tilghman cost the firm of Monier & Co. more than forty thousand francs, counting the money given to the brother, which was, I think, between 12,000 and 15,000 francs. The contract made between Mr. Tilghman and our firm was annulled by common consent, because the process never produced fat-acids and glycerin. I affirm that it is impossible to decompose fatty matter and obtain fat-acids and glycerin by the method indicated in Mr. Tilghman's patent.

"Some time after the first experiments were discontinued and the first contract annulled with Mr. Tilghman, Mr. De Fontaine Moreau, in whom we had great confidence, announced to us the return to Europe of Mr. Tilghman with a new process, based upon the principles of the method already patented, and urged us earnestly and decided the firm, much to my regret, I assure you, to join the firm of Charles Leroy & Durand, candle manufacturers at Paris, to whom he had already spoken, for the trial of the new process, the success of which he said was certain, as Mr. Tilghman had already obtained admirable results in the United States. A new contract was made between Mr. Tilghman and my firm, representing also Messrs. Charles Leroy & Durand, upon the same basis as the first, Mr. De Fontaine Mo-

reau again representing Mr. Tilghman, the patentee. New experiments were made at La Villette by Mr. Tilghman's brother during two or three months, and, like the first, produced neither fat-acids nor glycerin.

"In my opinion, a mixture of fatty bodies and water, exposed in a close vessel at a high temperature, and under a strong pressure, cannot decompose the fatty bodies to the point of producing fat-acids and glycerin."

10. *Mitchell offered to show to the complainant operations with an apparatus* alleged by Mitchell to have been made in accordance with the specification in the complainant's patent. Which offer, for certain reasons stated, the complainant declined. [The history of this matter appears *supra*, pp. 327–329.]

REDUCTION TO PRACTICAL USE.

REBUTTAL BY THE COMPLAINANT.

1. To rebut the testimony of Monier given in 1867, Tilghman proved that suspecting that a certain De Milly, a large manufacturer of candles in France, was using his patent, he had requested his agent, Mr. Fontaine Moreau, to inquire how this was; that Mr. Fontaine Moreau had inquired of Monier, and that Monier had thus answered him:

"SOCIÉTÉ GÉNÉRALE DE STEARINERIE,
"LA VILLETTE (near Paris), July 17th, 1857.

"MY DEAR FRIEND: I received your letter of yesterday. Not only does De Milly work by the Tilghman process, but also he has sold to many candle manufacturers, amongst others to MM. Petit & Lemoult, the right to work his patent in France, in their factory at Grenelle. Mr. De Milly has also sold in Belgium and in Austria, so that while the Messrs. Tilghman are in London and suspect nothing, Mr. De Milly reaps a harvest in selling that which he has stolen from them. But what can any one here say of all this so long as the Messrs. Tilghman are content to suffer themselves to be robbed? You know De Milly. He does not lose his time. So he is more and more eager to offer his processes. He has offered them to us many times. If the Messrs. Tilghman wish to draw any profit from their patent, they ought to prosecute him for infringement as soon as possi-

ble. Let them think of it seriously. I am too much interested in the question to admit of my giving them advice which might perhaps be misinterpreted. I must be content with wishing that Mr. Tilghman should have the courage to defend his intellectual property, that is to say, his honor.

"Your very devoted,

"MONIER."

2. In regard to Tilghman's inability, when requested by the defendant's counsel, cross-examining him as a witness, to state on his "personal knowledge" what processes, forms of apparatus, and what degrees of heat were used at Price & Co.'s factory, it appeared by the testimony of the defendant, Mitchell, that he, Mitchell, before July, 1865, which was before this suit arose, had asked Tilghman *why* he had not personally inspected their mode of working, and why he did not know how they worked.

"He stated in reply that Mr. Wilson, who was the managing director of that company, was trying to invent a process of his own, and would not allow him to inspect it."

3. One of the defences set up in the answer, it will be remembered, was, that the apparatus described by Tilghman as the one which he believed was the best to carry his invention into effect was dangerous, from the degree of heat required. On that point this testimony was given:

Joseph Nason, mechanical engineer and constructor of steam apparatus for warming buildings, for heating evaporators, &c.

"I have had two years' experience as an assistant to Mr. Perkins, during which I have applied the apparatus to many purposes requiring very high pressures and temperatures, among which I will mention the generators of steam for Perkins's steam-gun, heating-ovens for baking bread, and for heating various processes requiring temperatures as high as 600° Fahrenheit and upwards. I cannot state precisely the maximum of temperature at which such an apparatus could be used without injurious or dangerous results, but I can say positively not less than 650° or 700°. I have known the apparatus, working at the temperature of 600° and upwards, to be in daily use for many years

without injurious or dangerous results, without inconvenience, and without any considerable depreciation. With ordinary care I should consider an apparatus, constructed in accordance with the descriptions and drawing of the coil apparatus in the patent of Tilghman, a perfectly safe practical apparatus for heating the materials to a lead-melting heat. I do not see that any practical difficulty would be incurred in its operation. So long as the temperature be limited to the melting-point of lead, an apparatus as strongly constructed as those with which I have been familiar, would be almost absolutely secure against explosion. I should consider such an apparatus used at lead-melting heat much safer than an ordinary form of steam-boiler at a pressure, say of 180 lbs."

REDUCTION TO PRACTICAL USE.

EVIDENCE CLAIMED BY BOTH PARTIES

In addition to the evidence which has been grouped, as on the preceding pages,* as tending apparently to sustain either the complainant's case or the defendant's, there was some evidence which perhaps it was not quite easy to say, until the construction of the patent was settled, which side it sustained. It was claimed by each side. Such was,

1. *A statement by Mr. Wilson*, already more than once mentioned. In the public lecture referred to on page 313, as given in January, 1856, he said:

"*I went with my chemist-assistant, Mr. Payne, to see Mr. Tilghman's little apparatus at work, and in the course of some experiments which it led us to try, or rather to try over again*, it struck me that steam passed into the fat at a high temperature should effect by a gentle process what Mr. Tilghman aimed at effecting by a violent process,—the resolving of the neutral fat into glycerin and fat-acids. We proved that this was so, and that the glycerin distilled over in company with the fat-acids, but no longer combined with them.

"In July, 1854, we took out a patent for this process, by which many hundred tons of palm oil and other fats have now been worked, and which has given to the arts and medicine a body never before known, either in France or here, even in the chem-

* From p. 306 to p. 350.

Statement of the case.—Practicalness—Evidence claimed by both sides.

ist's laboratory,—glycerin which had passed over in the form of vapor without a trace of decomposition."

2. In July, 1857, Tilghman introduced into Price's candle factory in London, an *ordinary long boiler with a revolving stirrer*, working at a temperature of about 400° Fahr. (225 pounds pressure), and having a capacity of treating two and a half tons of fat daily. This appeared by a letter of his own, given in evidence, like the one just above by the defendant.

"LONDON, July 20th, 1857.

"To M. DE FONTAINE MOREAU.

"DEAR SIR: In compliance with your request, I proceed to describe the present state of the apparatus for decomposing fats, as it is now being worked at Messrs. Price & Co.'s.

"As I have before mentioned to you, it consists of a boiler thirty-two inches diameter, and thirty feet long, made of iron nine-sixteenths thick, and lined with copper.

"It is heated by an interior copper serpentine, '*a retour d'eau*,' which is supplied with steam from a smaller tubular boiler (thirty-two inches diameter by ten feet long, with eighteen flues, three inches diameter). It also has a tube pierced with holes to inject free steam. The apparatus is worked at a pressure of from 200 lbs. to 225 lbs. per square inch (fourteen to fifteen atmospheres); it is charged with two and a half tons palm oil and three-quarter tons water, and the oil is perfectly decomposed in four and a half hours after the above pressure is attained. *The decomposition would be effected in shorter time if a larger proportion of water was employed, and if agitation and mixture of the materials was produced by the injection of free steam from the pierced tube*, but as one object is to get the glycerin in a strong state (the demand for glycerin being just now greater than they can supply), they prefer for the present to work it as described.

"Price & Co. are now thinking of putting up another apparatus, which will probably be constructed to work at a pressure considerably higher than abovementioned, so as to shorten the time of decomposition, and also will *be made to work continuously, so as to avoid loss of time* in filling and emptying.

"Very truly yours,

"R. A. TILGHMAN."

Statement of the case.—Practicalness—Evidence claimed by both sides.

This apparatus continued at work at Price's factory down as late as 1865, as appeared by a letter of Tilghman admitted in evidence.

"PRICE'S PATENT CANDLE COMPANY,
"LONDON, July 13th, 1865.

"R. A. TILGHMAN, ESQ.,
"Philadelphia.

"DEAR SIR: I thank you for your letter of 19th of June, which I have laid before the directors to-day, and they will be much obliged if you will, as you kindly offer, procure for us tracings of the working drawings of the apparatus now in use for your process in America, and most approved of by you.

"You are right in supposing that the apparatus we have now at Battersea is just what you saw or heard about when you were here. There is a stirrer in each vessel, but plainly insufficient for the proper contact of the water with the fatty body. I should think, we may very probably use our present digesters for the outer iron vessels of your apparatus, putting them, of course, upon their ends. They are very much the shape of the vessels you describe. You do not mention what quantity of water you put to the fat. I should think it might be well to put it in at two doses, drawing off the first where it has taken up the bulk of the glycerin, and then finishing off with fresh water, to take the last part of it away, using this water again as the first water for a fresh charge of fat; but very likely you already do this. The whole of your letter now being replied to, as well as of the previous one, was of much interest to us. If any further matters occur to you as worth mentioning in connection with the working of the process on your side, we shall be much obliged by your stating them when you write again.

"I am, dear sir, yours, faithfully,
"J. P. WILSON."

On the 15th of May, 1860, Tilghman took out another patent. The specification and claims in that patent were thus:

"Be it known that I, Richard Albert Tilghman, of Philadelphia, Pennsylvania, have invented a certain *new and improved method* of decomposing fatty and oily substances, and I do hereby declare that the following is a full and exact description thereof:

Statement of the case.—Practicalness—Evidence claimed by both sides.

"My invention *relates* to the process of obtaining free fat-acids and solution of glycerin from fatty substances by the action of water at high temperatures and pressures, and it is applicable either when water alone is used, or when, in addition to the water, a portion of alkali is used to aid the chemical action.

"I have observed, in working this process, that though the action of the water in extracting the glycerin from the fat is rapid at first when the water is fresh and the fat contains all its glycerin, yet as the decomposition advances, and the fat gradually loses, and the water takes up the glycerin, that the decomposition becomes slower and slower, so that to extract the last portion of glycerin from the fat with a moderate quantity of water requires a considerable time when the lower range of pressures are used.

"Now if we use a large proportion of water to a given quantity of fat, the decomposition may be made sufficiently complete in a moderate time; but this has the inconvenience of occupying a considerable portion of the vessel or apparatus used, and thereby diminishes the quantity of fat that can be treated therein.

"Now, my invention consists in *applying* the water to the fat in *several successive portions.* I remove the first portion as soon as it becomes partly saturated with glycerin, and I add successive portions of fresh water to the partly decomposed fat, which fresh water is more active in taking up the last remaining glycerin of the fat, and *thereby I render the decomposition more rapid and complete, and can treat a larger quantity of fat in a given apparatus.*

"My invention can be applied to any of the different forms of boilers or tanks used for the decomposition of fats by water at a high temperature or pressure, either with or without lime, which are now well known, and need no detailed description. Instead of putting nearly an equal or more than an equal bulk of water to the fat, I put in say only one-third of the bulk of the fat, and after this has been stirred up with the fat, and exposed to a high temperature and pressure during some time (say from two to three hours, if working at from 120 lbs. to 150 lbs. per square inch), I allow the water to settle, and blow it out of the tank. A similar quantity of water, which has been previously heated up to the working temperature of the apparatus

Statement of the case.—Practicalness—Evidence claimed by both sides.

in a separate close iron vessel, is then forced into the tank by steam pressure, and is stirred up with the fat, and after two or three hours' mixture is settled and blown out as before; and this is repeated until samples show that all the glycerin has been extracted and that the fat is well decomposed.

"I will now describe another method of applying my invention to practice, whereby the operation is made continuous; that is, the raw or neutral fat, either by itself or previously mixed with a small quantity of alkali, is introduced in a continuous stream, or nearly so, at one end of the apparatus, and the decomposed fat or fatty acids issue continuously, or nearly so, from the other end of the apparatus, while at the same time the water enters where the fat-acids issue, and following the opposite route to that taken by the fat issues as a solution of glycerin from that part of the apparatus where the raw fat enters. By this method the fat which has lost nearly all its glycerin is brought in contact with fresh water containing no glycerin, and the water partly charged with glycerin comes in contact with raw fat containing all its natural glycerin.

"In the arrangement of this form of apparatus there are two features which form distinct parts of my invention. As fat and water dissolve each other, to a very slight extent, their action upon each other is much accelerated by large surface of contact. This large surface of contact has generally been produced by a mechanical agitation and mixture of the two liquids; but as this mixture is almost incompatible with a perfectly continuous form of apparatus, I have devised plans whereby these advantages of large contact and renewal of the water may be obtained by other means, either in continuous or intermittent forms of apparatus.

"1. I arrange the fat and water in numerous shallow layers, so as to obtain large surface of contact.

"2. I cause the fat and water, arranged in shallow layers, to flow in opposite directions, so as to bring fresh water in contact with partly decomposed fat.

"The following is a description of the *apparatus*, it being understood that if any alkali is used (which is generally in but small proportions, say one-half to one per cent. of the fat), it should previously be combined with the fat."

[Here follows a description of the apparatus, and the schedule proceeds:]

"What I claim as my invention, and desire to secure by letters-patent, is—

"*In* the process of decomposing fats into fat-acids and glycerin by means of water at a high temperature or pressure, either with or without the presence of an alkali,

"1st. *Applying* the water in several successive portions, and removing those portions when partly saturated with glycerin.

"2d. *Arranging* the fat and water in shallow layers, so as to give an increased surface of permanent contact between them.

"3d. *Causing* the fat and water arranged in shallow layers to *flow in opposite directions*, so as to bring fresh water in contact with the partly decomposed fat.

"R. A. TILGHMAN."

In 1867 ten factories in the United States were working the water process under license from Tilghman, but none of them probably with heat so high as 440° Fahr., or without the aid of certain amounts of alkali, as described by C. T. Jones, *supra*, p. 325.

III.

AS TO THE MATTER OF INFRINGEMENT.

THE COMPLAINANT'S SIDE OF THE QUESTION.

On this matter, Professors Booth, Rogers, Genth, Bridges, and Gibbs, all testified that the defendant's process was identical with Tilghman's.

"It is the same," said Professor Booth.

"I consider it to be identical," said Professor Rogers; an expression iterated by Professors Bridges, Genth, and Wolcott Gibbs.

THE DEFENDANT'S SIDE OF THE QUESTION.

Professor B. H. Rand, lecturer on chemistry at the Franklin Institute, from 1853 to 1862; Professor of Chemistry in Philadelphia College of Medicine, 1853 to 1858; in the Medical Department of Pennsylvania College, 1859 to 1861; in the Central High School, 1859 to 1864; and since 1864 in the Jefferson Medical College:

"There is, in my opinion, a great difference in the mechanical surroundings and conditions forming part of the processes of

the complainant and defendant respectively. The process of the complainant requires a very high temperature. It also requires vessels of very great strength, 'the working pressure' being stated as not likely to exceed '2000 lbs. to the square inch.' The conditions of complainant's process could not possibly be realized in the defendant's apparatus. The complainant's patent speaks of subjecting the mixture, in the continuous apparatus, at the desired temperature, for ten minutes; the defendant's requires as many hours. Again, the requirements of the patent, that 'the vessel must be closed and of great strength, so that the requisite amount of pressure may be applied to prevent the conversion of the water into steam,' and 'no steam or air should be allowed to accumulate in the tube, which should be kept entirely full of the mixture,' do not exist in defendant's processes, because the vessels employed by him are not full, or nearly so, and steam, the source of the heat used, is constantly present during the continuance of the processes. In my opinion, therefore, the mode of working in the two processes is essentially different.

"Again, it is my understanding of the patent of the complainant, that it describes and claims a process in which the decomposition of fats is effected by the sole action of water in the liquid form, highly heated in close vessels.

"*With this understanding* of it, it is my belief that defendant's processes are substantially different in a chemical sense."

It is obvious that on this matter of infringement Professor Rand assumes the close construction of Tilghman's patent to be the true one. Doubtless experts of the other side assumed the broad one to be. So that here, as in a large degree in the question of practicalness, the construction of the patent was the fundamental question.

In this view of Professor Rand concurred—

Mr. E. S. Renwick, residing at Milburn, New Jersey, and occupied principally as expert in the trial of patent causes, and in soliciting patents, and

Mr. E. S. Wayne, of Cincinnati, chemist and druggist, engaged practically and theoretically for the last thirty years in chemistry, formerly Professor of Chemistry in the Ohio Medical College, Cincinnati, and of pharmacy and chemis-

try in the Cincinnati College of Pharmacy. Mr. Wayne, after stating that he was fully satisfied that the patent of Tilghman described a different process from that of Mitchell, because, among other reasons, "*it describes a different apparatus*," added on a different topic:

"I am of the opinion that the liquid water in Tilghman's process is of itself of no value beyond furnishing the elements of water for the decomposition, and that heat alone is the agent causing the decomposition of the fats by water; and the pressure he claims and uses is the only way to obtain the heat necessary for this decomposition. The water is only necessary so far as it furnishes the elements of water in chemical equivalent to the fat to form respectively fat-acids and glycerin. Steam in its chemical relations in this decomposition is equivalent and identical with water. All that steam requires is the same temperature. This is given to it by superheating* it to the point necessary for the decomposition. Fat-acids and glycerin is the result. Could water be heated without pressure to the temperature necessary for the decomposition of fatty bodies, the same result would follow as with the use of pressure, namely, fat-acids and glycerin.

"Hence, I can perceive that there is no new discovery of the decomposition of fatty matters by the agency of water alone, and conceive the facts in relation to it have been known, mentioned, and experimented with prior to the complainant's patent. Water and steam for the decomposition of fats require a high temperature, and the higher the temperature the more rapid the decomposition; but the introduction of another agent in the decomposition, such as an alkali, or water containing a small percentage of sulphuric or sulphurous acid, or neutral lime-soap, the decomposition of fats into fat-acid and glycerin will take place at a much lower temperature than can be effected by steam or water alone."

In regard to the range of heat allowed by Tilghman's patent Renwick said:

* By "superheating" steam is meant applying heat directly to steam which has been already generated by the action of heat on water. This latter sort of steam is called "saturated steam;" the former, "superheated steam."—REP.

"*The temperature relied upon is one exceeding the melting-point of tin* (440° F.), and not exceeding the melting-point of nitrate of potash (660° F.), the temperature of the melting-point of lead (612° F.) being the temperature for general practice."

Mr. Justice Nelson, in giving the opinion of the court below, held:

"1. That Tilghman's invention consisted of a *process* for producing free fat-acids and solution of glycerin from fats and oils.

"2. That 'for this purpose he subjects the fatty or oily bodies to the action of *water* at a high temperature and pressure, so as to cause the elements of these bodies to combine with water, and thereby obtain at the same time free fat-acids and glycerin.'

"3. That Tilghman proposes to do this in any convenient vessel of the requisite strength, and that although under the law he describes two vessels or apparatus for doing it, there is *no claim* for any special vessel or machine.

"4. That Tilghman's patent does not require that the vessel should be absolutely *full of water* and fat.*

"5. That Tilghman's patent does *not require the use of a heat* so

* "We cannot agree," said the court, when speaking of this point, "that a fair construction of the specification tends to the conclusion either that the vessel was to be entirely filled or that no steam was to be permitted in it. No doubt it is true, as urged for the defendant, if thus filled and the vessel closed, and the contents heated to the point of melting lead, or under a pressure that would prevent the existence of steam, the process would be utterly impracticable; and doubtless the patentee knew this would be the result as well as any of the experts. It would require but the commonest knowledge and experience in the business of life to reach such a conclusion. This moderate degree of knowledge, at least, should be kept in view in construing the general terms of the description.

"Besides, the patentee does not direct that the vessel should be entirely filled. This is an inference of the learned counsel, from the direction that the vessel must be closed and be of great strength, so that the requisite amount of pressure be applied to prevent the conversion of the water into steam.

"All that was intended, as is apparent from the context, by the patentee was that the pressure should be so great as to prevent the body of the water in the vessel from passing into steam, as the heated water was the element that separated the fatty acids and glycerin. That there would necessarily be some steam must have been obvious to the patentee as well as to any one of common observation."

high as melting lead, but merely prescribes it as a maximum, and announces that no fixed degree of heat can be given, as the different fatty or oily substances that may be used will require different degrees, and that by starting the vessel at a low heat and gradually increasing it, the best temperature may be ascertained for the particular substance used.

"6. That upon a proper interpretation of the patent, the process could be and had been proved to have been carried into successful operation by both the means pointed out by the patentee.

"7. That 'prior to the date of Tilghman's invention there were but two modes known or in practical use for decomposing fatty substances, and obtaining from them fatty acids and glycerin. One called the lime saponification, and the other known as the distillation process,' and that they were different from patentee's, more expensive and tedious, and have generally gone out of use in this country and England since appellee's invention.

"8. That Tilghman was the first person that discovered the chemical fact that fatty or oily substances could be decomposed, and that the fatty acids and glycerin separated by the action of water at a high temperature and under pressure.

"9. That it is immaterial to inquire whether defendant's vessel or machinery is similar to that described in Tilghman's patent; they constitute no part of his invention.

"10. That the defendant has manufactured fat-acids and glycerin from fatty bodies by the action of water at a high temperature and pressure, according to the process explained by appellee in his specification, and hence had infringed his patent."

Mr. Justice Nelson accordingly decreed for the complainant.

The case afterwards came up before Judge Blatchford on exceptions to the master's report or otherwise. That learned justice on different occasions said:

"It is manifest, that the defendant decomposes fatty bodies into fat-acids and glycerin by the action of water at a high temperature and pressure, and thus uses the plaintiff's process."

As to Mr. Justice Nelson's views, "that the plaintiff's specification did not require, either that the vessel containing the mixture of water and fatty matter should be en-

tirely filled therewith, or that no steam was to be permitted in it," he said:

"On full consideration, I concur in his views, and have no doubt that his interpretation of the specification in regard to them was correct."

To the defence of want of practicalness he said:

"The defendant has entirely failed to show that the plaintiff's process, carried out as described in his patent, is not practicable or practical. It was put in practical operation in London in 1857, a patent having been taken out for it in England by the plaintiff, January 9th, 1854. It was put in operation in Cincinnati, Ohio, in 1860, and has been in use, under license from the plaintiff, in the United States, ever since, there being ten factories in the United States working under such license."

On the other points he agreed with Mr. Justice Nelson, and in conclusion said:

"The great merit and value of the plaintiff's invention, not only in the manufacture of candles, but as a process for obtaining pure glycerin for use in the arts, are shown by evidence. The case is a clear one, on all points."

Decrees were finally entered for Tilghman for $335,661, as the amount of the profits, with interest, which the defendant had made by infringement.

The merits of Tilghman's patent had also been before Justices McLean and Leavitt, in Ohio, in *Tilghman* v. *Werk*, October, 1860. There was a concurrence of opinion between those judges about the case, and Mr. Justice McLean was to deliver the opinion of the court in it. His death having supervened, it was delivered in February, 1862, by Leavitt, J. That learned justice said, that he had "no hesitation in concluding that the attempt to invalidate the plaintiff's patent for want of originality had wholly failed," and that it was shown by "actual and successful experiments," made alike by experts and by the practical manufacturers, Ropes and Grant, who made no mention of any difficulty from a want of exactness in the specification as to the de-

gree of heat required, that free fat-acids and solution of glycerin could be produced by Tilghman's process. Referring to the language of the specification in reference to the temperature of the heated water, he said:

"The specification seems to be sufficiently explicit. There is a precise degree of heat, the melting-point of lead, 612° Fahr., recommended and prescribed as sure to produce a good result in changing common fatty bodies to acid and glycerin; and a lower temperature, the melting-point of bismuth. 510°, when palm oil or similar substances are to be operated upon. And it clearly does not render the specification liable to objection for want of certainty and clearness, that the patentee states that the degree of heat may be carried above these figures without injury. Nor is the sufficiency of the description impeached by the fact that the desired result has been produced at a lower temperature of water. There is a fixed rule given which may be safely followed, while it is made known that the manufacturer may safely depart to some extent, from this rule, if from experiment and a just exercise of discretion it should be expedient to do so.

"DECREE ACCORDINGLY."

The matter came up also subsequently to all these decisions before Mr. Justice Emmons, in the Ohio Circuit Court, in the cases of *Tilghman* v. *Werk*, *Kirby et al.*, and of *Tilghman* v. *Shillito*. That learned justice there said, that "were he to consider this matter uninfluenced by precedent, he feared that he should be compelled to give the patent a more limited construction than it had received," and to hold "that the claim included only those higher degrees of heat at which lead and other substances mentioned in the patent will melt."

He added, however, that without a violation of judicial propriety, he could not disregard the judgments of his own court and of the co-ordinate one in New York, adding:

"Especially is this so where the judge delivering the opinion has taken so leading a part in all the discussions, on the subject in the court of last resort."

It was from the decrees in New York that the case was now here.

Messrs. W. M. Evarts and C. M. Keller (*with whom was Mr. S. D. Law*), *for the appellant:*

I. *What is the construction of the patent?*

These facts of science, it is submitted by us, were known prior to the year 1854, the date of Tilghman's patent.

1. That water is composed of two gases, oxygen and hydrogen; the former of which acidifies what it unites with, and the latter of which hydrates what *it* unites with.

2. That fats are composed of fat-acids, to wit: 1st. Of stearin combined with oxide of glyceryl as a base (the compound being called stearate). 2d. Of margarin combined with the same oxide and a base (the compound being called margarate); and 3d. Of olein combined with the same oxide and a base (the compound being called oleate).

3. That if you take away the oxide of glyceryl from the stearin, margarin, and olein, you must, if you still want the fat-acids, supply some other oxide with which they may unite and so become again acidified. And so too if you want glycerin, you must supply something to hydrate the element of glyceryl (which hydration of glyceryl makes glycerin).

4. That high temperatures would decompose the fats; the temperatures varying with different fats, from about 510° F., the melting-point of bismuth, to 610° F., the melting-point of lead, *the very temperatures named and required by Tilghman;* and that this process of decomposition is of no value only because the heat, while decomposing the fats generally, destroys all valuable products.

5. That by putting the fat into water and mixing both with lime—which is an oxide—or with other oxides, such as soda, potash, &c., the fat-acids could be obtained; and that by boiling the solution under pressure (though at lower temperatures than from 510° F. to 610° F.), the proportion of lime could be reduced; this tending to show that a por-

tion of the fatty acids were oxidized by the oxygen of the water.

6. That water can be heated up to and beyond 610° F., in vessels entirely full, so that steam shall not be produced; the vessels being provided with a piston weighted, so as to yield to the expansion of the liquid by the heat applied, and that though in a vessel not entirely full even an intimate admixture of fat and water could not long subsist (the fat and water having different specific gravities, and the fat tending therefore to float), yet, that when the vessel is entirely filled with such intimate admixture, the fat and water will not separate.

And we submit that the evidence in this case proves that fats had been decomposed by steam;* the successful production of glycerin being sometimes affirmed and sometimes denied.

Now, in view of these facts known in 1854, it is a fair presumption that Mitchell's theory, so fully sustained by Professor Wayne, as to Tilghman's purpose when he got his patent, is the true one;† and that Tilghman in his specification did mean to confine himself:

1st. To the range of heat stated and such as would also decompose fats; adding water to acidify by its oxygen the fats, and to hydrate, by its hydrogen, the glyceryl.

2d. To the use of a close vessel entirely full of the mixture of fat and water so that no steam could be formed; a matter which he knew could be effected by digesters with a safety-valve.

3d. To the use of liquid water to the exclusion of steam, so as to distinguish his process from previously known processes through steam.

4th. To the thorough admixture of the fat before putting it into the vessel, and during the manipulation.

If this is so his patent cannot receive a construction broad enough to cover Mitchell. That it is so seems most probable.

The high pressure named in the patent is only a conse-

* See *supra*, p. 357.

† *Supra*, pp. 302, 357.

quence of the high temperature required, viz., from 510° Fahr. to 610° Fahr. The range of heat and not the pressure is the condition required. The pressure, named in the patent, was unavoidable in subjecting fats in the presence of liquid water to the high temperatures named. Heat to the requisite very high degree was what Tilghman's purpose required, with water as an attendant aid. This, it is obvious, is a process different in its nature from that which Tilghman now sets up, and which Mitchell practices.

But assuming that water, heat, and pressure used as the chemical decomposing agent were what Tilghman had in his mind, it is plain that he had no idea that the required result could be produced by them at less degrees than from 510° to 610°, depending upon the quality of the fat to be treated. Why else did he prescribe apparatus of the strength which he does; apparatus to be tested at a pressure of 10,000 lbs. to the square inch; with a safety-valve loaded to a pressure of 2000 lbs. Apparatus demanding such high pressure, he must have known, even if scientifically safe, is never—and for good reasons, seeing that they have no men of science to watch their engines—liked by manufacturers; the class whom alone could make his labors practically valuable. Yet he not only never tried any lower degrees of heat, but nowhere so much as intimated that the process is practicable with any lower. His letter to the Cincinnati firm of Emry & Son, of the 25th of June, 1856,* shows that he had no idea when he applied for his patent that he could work with lower heats, and that as soon as he did discover that he could so work, he began to do so.

II. But if the patent were susceptible of a construction broad enough to include all ranges of high temperature, the complainant's case is not helped.

1. *There is no novelty in Tilghman's alleged discovery.* The change of fat into fatty acids, through the means that he speaks of, was announced to the scientific world as early as 1823, in a paper published in the *Scientific Journal* of that

* *Supra*, p. 344.

year, and referred to in the evidence.* The testimony of Professor Vanderweyde and of Florence Verdin and of Professor Wayne, show this.†

2. *The process is incapable of being practically used by any description given in the specification.*

Certainly the process has never been reduced to practice in the United States by the mode of operation or the means described in it. There is not one of the licensees of Tilghman who uses his water, heat, and pressure alone. Even his witness and licensee, Charles Taylor Jones, proves this. All use alkalies. To say nothing of the fact that all work at low heat. His licensees, the Ropeses, father and son, show the same thing.

The process was never reduced to practice in England in the business of manufacturing fatty acids and solution of glycerin. Wilson & Co. may have paid Tilghman for something; but there is no evidence that they ever used water, heat, and pressure to produce fat-acids and glycerin. Tilghman himself could not tell what process they used.

The patentee, after selling his French patent to Monier, tried during months and with the outlay of great sums to make the process work at the *stearinerie* of Villette, but failed after repeated trials in everything, and the French jury declare the process a failure.

The tests made by the chemical experts, on the part of the patentee, were not made in accordance with the mode of operation described in the patent; Professor Booth and the other experts having experimented not with the coil apparatus, but with a distiller's worm. Moreover, they are all theorists; their experiments were in very nice apparatus and on a small scale, and neither their experiments nor their evidence are of value on a practical subject to be applied on a large scale.

The patent to Tilghman of May 15th, 1860, virtually condemns the patent in issue, as not practically useful.

III. *As to infringement.* On this point the learned counsel

* *Supra*, p. 314.

† *Supra*, pp. 315, 316.

contended, that even on a very broad view of the patent—one much broader than that which they had already contended for, and believed to be the true legal view—(a view obviously held by Emmons, J.) there was no infringement; that Mitchell's apparatus was peculiar and unlike Tilghman's apparatus; that it was composed of two vessels, and that the bubbles of superheated water were carried up by the steam from one vessel into the other, and that the superheated water there falling on the fat descended through it, decomposing it on its passage, thus producing a circulation; that this circulation of Mitchell's apparatus was opposed to and annihilated the theory and scheme upon which Tilghman's patent was framed, which required, as an essential condition, that there should be no circulation. If, indeed, it were that Tilghman discovered that *water alone* would acidify the other elements and hydrate the glycerin, he did not claim it in his patent, and if he did, it was a fact in nature incapable of being patented.

As to the Circuit Court decrees they had no authority here. In the case before McLean and Leavit, JJ., the testimony was less full than here.

Mr. George Harding, contra:

I. *What is the construction of the patent?* The first position of the other side is, that heat alone from 510° F. to 610° F. itself decomposes fat destructively; that this is alone the operative agency in Tilghman's process; that the water operates as a base; and that Tilghman specifies as his temperature degrees of heat from 510° F. to 610° F.; and that he is limited to them.

One sufficient answer to this is as follows: Specifications are addressed to those skilled in the art. Now, Renwick, an expert called by Mitchell himself, and giving testimony on this exact point, says that "the temperature relied on is one exceeding the melting-point of tin (440° F.), and not exceeding the melting-point of nitrate of potash (660° F.)."*

* See *supra*, pp. 303 and 357–8.

Rand, another expert of Mitchell, fixes the temperature of Tilghman's patent at the same points.* Here then Mitchell proves as part of his case that practical men would be instructed by the patent to use any temperature above 440° and below 660°. This range extends from 70° below the lowest limit fixed by Mitchell to 50° above the highest.

Rand and Wayne both testify that the chemical action of water heated and under pressure is the same below 440° as above that point, and the same from 300° to 600°.

Further. Tilghman's patent says, that the change of fatty matters into fat-acid and glycerin, takes place with some things, such as palm oil, at or below the melting-point of bismuth, 510°. By starting the apparatus *at a low heat*, and gradually increasing it, the temperature giving products most suitable, &c., can be easily determined. A limit to 510° as a minimum is grossly inconsistent with this passage.

The next position of the other side is that granting what we thus assert, still Tilghman had no idea that his process was practicable except at or above the ranges 510°.

Now, the language of the claim in Tilghman's patent differs from the language of claims to patents generally. Had it followed that language it would have run thus:

"Having now described the nature of my said invention, and the manner of performing the same, I hereby declare that I claim, as of my invention, the manufacturing of fat-acids and glycerin from fatty bodies by the action of water at a high temperature and pressure, *substantially in the manner described.*"

But in Tilghman's claim the words in italic are left off. Tilghman obviously had a determination to cut away from and to keep himself clear of everything which could be regarded as working through specific machinery, or in specific times, or through any specific temperature other than that which would come within the designation "high." And the question is, has he, in the face of this purpose thus declared in one part of the schedule to his patent, so tied himself up in another part of the same schedule as that, going

* See *supra*, 303.

in free from them all, he comes out, bound indissolubly, and as with hooks of steel, to the very things which it is plain that it was his purpose to avoid? After announcing a wish to secure one result, has he reached a directly opposite result? reached it, too, with such malignant effect as that a great discovery, which has done honor to the United States in the eyes of Europe, and which men of science—and to a great degree men of trade as well—have delighted in calling his, is brought at once disastrously to naught?

If Tilghman has not bound himself to degrees of heat between 510° F. and 610° F.; if completion of his process, in at most ten minutes, is not indispensable; if he has not required that the vessel containing the mixture of water and fatty matter should be entirely filled therewith, or that no steam was to be permitted in it; and if in other respects he has not required things impracticable, then there is no difficulty in his case. Now—

1. *As to the heat.* Tilghman having in the opening part of his specification announced that for the purpose of carrying into practice his invention, he subjects the fat bodies on which he wishes to operate simply "to the action of water *at a high temperature*" and pressure, announces two modes of working. In the first he says:

"I mix the fatty body to be operated upon with from a third to a half of its bulk of water, and the mixture may be placed in any convenient vessel in which it can be heated *to the melting-point of lead*, until the operation is complete. The vessel must be closed and of great strength, so that the requisite amount of pressure may be applied to prevent the conversion of the water into steam."

He also describes a special apparatus. He says:

"The process may be performed *more rapidly* and also continuously by causing the mixture of fatty matter and water to pass through a tube or continuous channel, *heated to the temperature already mentioned;* the requisite pressure for preventing the conversion of water into steam being applied during the process; and this, I believe, is the *best* mode of carrying my invention into effect."

This, he "believes," is "the *best* mode;" the "temperature already mentioned," that is, the melting-point of lead being included, as much as and no more than the use of the tubes.

On this subject of heat he continues:

"Although the decomposition of the neutral fats by water takes place with *great quickness at the proper heat*, yet I *prefer* that the pumps should be worked at such a rate in proportion to the length or capacity of the heating tubes, that the mixture, while flowing through them, should be maintained at the desired temperature for *ten* minutes before it passes into the refrigerator or cooling parts of the apparatus."

He says further:

"The melting-point of lead has been mentioned as the proper heat to be used in this operation, because it has been found to give good results. But the change of fatty matters into fat-acids and glycerin takes place with some materials (such as palm oil) at or below the melting-point of bismuth, yet the heat has been carried considerably above the melting-point of lead without any apparent injury, and the decomposing action of the water becomes more powerful as the heat is increased. *By starting the apparatus at a low heat, and gradually increasing it, the temperature giving products most suitable to the intended application of the fatty body employed can easily be determined.*"

He goes on again:

"To indicate the temperature of the tubes, *I* have found the successive melting of metals and other substances of different and known degrees of fusibility to be convenient in practice. . . . The series *I* have used consist of tin, melting at about 440° F.; bismuth, at about 510° F.; lead, at about 612° F.; and nitrate of potash, at about 660° F."

And now, before all this description, how had he begun? Thus:

"My invention consists of a process for producing free fat-acids and solution of glycerin from those fatty and oily bodies of animal and vegetable origin which contain glycerin as their base. For this purpose, I subject these fatty or oily bodies to the action of water *at a high temperature* and pressure."

And how, after all this, does he end? Thus:

"Having now described the nature of my said invention, and the manner of performing the same, I hereby declare that I claim as of my invention, the manufacturing of fat-acids and glycerin from fatty bodies by the action of water *at a high temperature* and pressure."

In the face of such a beginning, and such an ending, how can it be said that the patentee had no conception of anybody's doing anything by his process but when working with or between the exact two degrees of 510° F. and 610° F.?

The point that Mitchell makes, as to both the vessels, is that *he* uses a lower temperature than that stated by Tilghman to be his preference. But does not the general include the particular? And after the general announcement that water at a high temperature and pressure will decompose fats, how can any one argue that it still remained unknown that it would do so at *any particular* high temperature and pressure? It would follow, if the argument of the other side were good, that the day after Tilghman got his patent, another person could have obtained a valid patent for using the same process at all temperatures not specifically mentioned by Tilghman. Tilghman's discovery was that water at a high temperature and pressure had a certain chemical power; that it was for a purpose mentioned a new chemical agent. If his discovery had been that nitric acid would produce fat-acids, and he had said, I prefer to use strong nitric acid of 20° B., but weaker acid will act less powerfully, and I claim the use of nitric acid generally, could a man have used nitric acid of 1° B. and have said that it was a different invention? The chemical action of water upon fat is the same at 300° as at 612° F. This is proved in the case.*

2. *As to rapidity of manipulation; ten minutes.* That plainly is but a consequence of the rate at which you work the pump. If you pump fast you will get the product with "great quickness," if you have used "the proper heat." "Yet, *I* prefer," says Tilghman, "that the pump be worked

* See *supra*, p. 303.

at such a rate . . . that the mixture should be maintained at the desired temperature for ten minutes." But may not any one else who has used "the proper heat" drive the pump faster, and get *his* product the moment it is made, or drive it more slowly and not get it till after more than ten minutes, say not till fifteen?

3. *As to the fulness of the heating vessel.* In the court below the assumption was made by the other side that the specification required the heating vessel to be full, and the argument then was that as it would of necessity burst the patent was void.* The argument of the same side here, now assumes that it must be full, and that it will not burst for certain very good reasons stated. The answer is the same to both these internecine arguments; to wit, that neither in the first nor in the second modes set forth by Tilghman, was the vessel required by the specification to be full; though in the second one the *tubes*—which in the particular coil apparatus, described by Tilghman, *happen* to be also the vessel in which the mixture is heated—are so required to be, in order that steam may be kept out from them. The witness, C. T. Jones, a practical manufacturer, explains what, both here and in the court below, has confused the counsel.† That witness states that there are reasons obvious to any one accustomed to boilers, why, in the first process of Tilghman, the heating vessel should *not* be filled (the reason being obviously that it would burst), and that obvious reasons occur to him why, in the second, the tubes *should be* kept full; which is to keep steam out of them and prevent irregular working of the machinery. If *steam* were permitted to accumulate and displace the highly heated liquid water away from the fat in the tube, the decomposition would not take place regularly.

So in regard to other matters. Alkalies had long been used in this operation. Tilghman did not deem it necessary to say that if the operator thought well to throw in a dash of lime he might do so. It has been frequently decided

* *Supra*, p. 358, note.

† *Supra*, pp. 322, 323.

that known things need not be described when they are used in carrying out a newly patented invention. English and American cases alike lay down this rule.*

So again it was obvious that lower heat and longer time would give the result of higher heat and less time.

II. The originality of Tilghman's invention we leave on the evidence. Professor Vanderweyde and Mr. Verdin are the only persons called to disprove the originality; but they give no testimony at all in the case. They testify only to certain singular facts about themselves. Neither had ever seen a book of science in which it was stated that Tilghman had discovered anything about the decomposition of fats at all.†

4. Concede that the experiments of Dr. Vanderweyde and Dr. Doremus were not successful. What kind of experiments were they? Experiments made with Verdin, at the factory of the defendant, in a vessel probably soiled with dirt, and where the chief experimenter, Verdin, had a vast pecuniary interest not to make the experiment succeed, but to make it fail. And they managed everything so well that, to a considerable degree, it did fail. Yet they confess that they always got some fat-acids and some glycerin.‡

5. We offered repeatedly to show in operation to Mitchell the very apparatus from which our experts got our fat-acids and glycerin, and he declined to see it. What if he did offer to show to us an apparatus so made by him as not to succeed, and offer to alter it, as we should tell him. If we showed to him an apparatus made according to the specification, that had done and would do the work, that was enough. We were not bound to be delayed by his alterations of an apparatus perhaps radically defective.

III. *Practicalness.* 1. Four experts—men of the highest reputation in chemical science throughout the country—say that they have made experiments in accordance with the specification, and that the process is perfectly practicable.§ The manufacturers, as Jones, and Ropes, and Grant, all say

* Household & Co. *v.* Nelson, Webster's Patent Cases, 687; Emerson *v.* Hogg, 2 Blatchford.

† *Supra*, pp. 315, 316. ‡ *Supra*, p. 333. § *Supra*, pp. 318, 319.

substantially the same thing.* It is said that they use low heat and a dash of alkali. It is said that while they all say they are using the "Tilghman process" they are not using it; for that they use different degrees of heat, a dash of alkali, and quite different apparatus from the coil. But this argument acts in two ways. What does it prove, but that these manufacturers, these practical men, these men who have to pay for using this process, all regard the lower degrees of high heat and the use of a dash of alkali, and an apparatus unlike the coil, as within Tilghman's patent. Like the four great experts, they distinguish accident from essence, incident from substance, an illustration from the principle receiving it. We have here, then, a construction of the patent from a very high source. Besides, they all declare that with higher heat, and water and pressure merely, they can produce the results very well; and some of them, that they have done so.

2. But the payment of £1000 for year after year by Price & Co.'s great British candle company stands in the place of all other argument. It is *réponse sans replique.* No manufacturers on the earth were so competent to say whether what the scope of the invention was and whether it had practical value, none so much interested to say that it had none, yet Mr. G. F. Wilson, their managing agent, the most competent of witnesses, publicly declared that "*all* must admit it a beautiful, *original* chemical idea, *well carried out.*"† Tilghman, of course, was never inducted into the arcana of their factories. Such places in Great Britain are closed to the public; and Mr. Mitchell has himself told us why Tilghman saw no more than he did.

3. Monier's testimony is reduced to naught in the face of his compromise with Tilghman, by which he paid him one thousand francs, and still more of his letter to Fontaine Moreau, in which it is asserted that De Milly was using and greatly profiting by Tilghman's process. Indeed, in his testimony, Monier says that the "Messrs." Tilghman "paid no

* *Supra*, pp. 324, 340, 343.

† *Supra*, p. 314.

attention to the process patented," and "made—not serious experiments,—but trials to find the means that arrested them."* Arrested them in what? In their endeavors to carry out some ridiculous ideas of improvement in their process which were Monier's own; and for his vexation about which, to the Tilghmans, he finally had to pay and did pay them one thousand francs.

4. With the annihilation of Monier's account of things, the report of the French jury falls lifeless to the ground.

5. It is argued that Tilghman's letter of June 25th, 1856, to the Cincinnati house of Emry & Son, showed that he did not originally know that he could work at low heats, and that as soon as he learned the fact he changed his mode of working. It shows no such thing. The case is this: Tilghman, being a scientific and careful man, knowing exactly what steam machinery was safe and how to regulate it, preferred to work rapidly, cheaply, and to use a pressure of 2000 lbs. to the square inch; a pressure which Nason, a practical steam-engineer, testifies is perfectly safe in tubular apparatus.† But in cities, where explosions of common boilers sometimes occur in manufactories with awful loss of life, a horror prevails of the very idea of high pressure. It is a prejudice. Finding it too strong to be resisted, Tilghman conformed to it, and in 1856 introduced low pressures, and let his licensees take more time, and pay more money.

6. The purpose of Tilghman's patent of 1860, relied on to defeat the patent of 1854, was quite different from that patent, as appears by examination of it.

The patent of 1860 was for an improvement in that of 1854; and had no other design than to enable the operator to secure the glycerin produced in the operation, with the least quantity of water, or in other words in a higher state of concentration.

Glycerin is soluble in water, and, of course, the less water that can be used the better. When the water and fat are put in a single vessel there is only a single surface of contact. By the use of a series of trays, such as the patent of

* *Supra*, pp. 347, 348.

† *Supra*, p. 349.

1860 provided for, and the establishment of opposite currents of fat and water, the contact of the water and fat is greatly extended, and hence less water suffices. This improvement is applicable alike to high and to low pressures. Inasmuch, however, as in the interval between 1854, the date of his first patent, and 1860, the date of the second one, Tilghman's process had gone into general use at lower temperatures, and with the use occasionally of small percentages of alkali, he describes his improvement of 1860 so as to make it applicable to his prior invention as subsequently used.

IV. *As for infringement.* The chief witness of the other side is Professor Rand. He says:

"There is a great difference in the *mechanical surroundings* and conditions forming part of the processes of the complainant and defendant respectively."

He assumes that the "mechanical surroundings" of Tilghman's special apparatus are of the essence of Tilghman's patent, though Tilghman expressly disclaimed, as part of his invention, that special apparatus. Five experts, who look beyond "mechanical surroundings" into scientific and deep-laid truths, contradict him. The question is one of construction of the patent, and if it is not construed in the very narrow way in which the witness construes it, the infringement will hardly be denied.

Tilghman was the inventor of a process; that is to say, a result produced by chemical action; a thing for which it is lawful to take out a patent as much as for a new machine. Now, the law on that subject was thus declared in *Household Company* v. *Neilson*,* in a way acknowledged in this court as right:†

"*You may obtain a patent for a mode of carrying a principle into effect;* and if you suggest and discover not only the principle, *but suggest and invent how it may be applied to a practical result by*

* Webster's Patent Cases, 683.

† Corning *v.* Borden, 15 Howard, 267; O'Reilly *v.* Morse, Ib 62, where Morse's case was distinguished from Household Company *v.* Neilson.

mechanical contrivance and apparatus, and show that you are aware that no particular sort or modification of form of apparatus is essential in order to obtain benefit from the principle, then you may take your patent for the mode of carrying it into effect, and are not under the necessity of describing and confining yourself to one form of apparatus."

What is said here of apparatus will apply, of course, and with greater force, to temperature.

Now, Tilghman having made the discovery that water when heated and retained in a liquid state by pressure in a close vessel to prevent its escaping as steam, possessed certain chemical powers with reference to fat, did not stop there.

He went on to find out how this principle might be made practically useful. The first thing was to discover by experiment how much water was necessary, and he announces in his patent that from one-third to one-half of the bulk of the fat will produce the result.

The next thing was to discover the degree of heat, and length of time, and he naturally sought to do it in the shortest time, and he found by experiment, and announces in his patent, that the higher the temperature the more powerful is the action, and that at the temperature of about 612° Fahr., the action will take place in ten minutes.

In Whitney's patent for a process for making chilled peripheries or treads of iron carwheels, the language of Whitney in describing his process was that "the temperature of the furnace or chamber and its contents are gradually raised to a point a *little below* that at which *fusion commences;*" when, he added, "that by this process all parts of each wheel are raised to an equal temperature." This was the *only instruction* as to temperature given in that patent. On a suit by Whitney against Mowry, the defendant relied on two points in opposition to that claim in the specification:*

1. "That Whitney's patent was void, because it designated and provided for such a degree of reheating and none other ('*a little below that at which fusion commences*'), as would de-

* Mowry *v.* Whitney, 14 Wallace, 630, 636.

stroy the chilled periphery or tread, an essential feature to a carwheel."

2. "That Mowry's process did not infringe on Whitney's patent, because it was incredible (that in the Mowry process), any such degree of reheating is or could result as was contemplated in Whitney's patent."

But this court rejected this narrow view, and said:*

"It would be most unreasonable to read the directions of the specification without reference to the object which they profess to have in view. . . . We do not think it a fair construction of the patentee's language to hold that it requires the heat to be raised in all cases to a degree only a little below the point of fusion. He does not attempt to give any more definite direction than that all parts of the wheel must be raised to the same temperature, suggesting in a parenthesis ('say, a little below that at which fusion commences'). He fixes a maximum."

This was the view taken in accordance with settled law by McLean and Leavitt, JJ., when the case was before them.†

This case has been before no less than five judges, and on three different occasions all have given judgment in favor of Tilghman. Two of these judges, McLean and Nelson, were reverend judges of this court; and both eminent in their knowledge of the law of patents. The labors and the judgments of the dead are as sterling as those of the living. The speculative questionings of Emmons, J., are worth nothing in view of the fact that he decided the case in full face of and against them. The case here is on the identical evidence on which it was before Nelson and Blatchford, JJ., who on that evidence adjudged the patent good and the defendant an infringer, and the construction of the specification of the patent in which Nelson, Blatchford, McLean, and Leavitt, JJ., were clear and unanimous, and on which Emmons, J., followed them is a matter which is independent of evidence altogether. The opinions and judgments of so many and so learned judges deserve a very high respect.

* Mowry *v.* Whitney, 14 Wallace, 645, 646. † *Supra*, p. 360.

Opinion of the court.—Recapitulation of the pleadings.

Mr. Justice CLIFFORD delivered the opinion of the court.

Exclusive jurisdiction, in all actions at law and suits in equity arising under any act of Congress granting or confirming to inventors the right to their inventions or discoveries, is conferred upon the Circuit Court, subject to the condition that the final judgment or decree in such a controversy may be removed here for re-examination.

On the third of October, 1854, letters-patent were granted to the complainant for a new and useful improvement in processes for purifying fatty and oily substances of animal and vegetable origin and which contain glycerin (glyceryl) as their base. His invention, as the patentee states, consists of a new and improved mode of treating such substances in order to produce fat-acids and solution of glycerin, which, as he says, was not known or used before his application, and the recital of the patent is that it shall take effect from the ninth day of January preceding the date of the instrument. By virtue of the said letters-patent, as the complainant alleges in his bill of complaint, he acquired the exclusive right to make and use the described improvement, and to vend the same to others to be used; and he also alleges that the respondent, prior to the time when the bill of complaint was filed, without his license and in violation of his rights, engaged in making and using his patented process, and that he, the respondent, intends to continue to make and use the same, as set forth in the bill of complaint. Service was made and the respondent appeared and filed an answer setting up several defences, as follows:

1. That the complainant, on the ninth of January, 1854, was not the original and first inventor of the improvement described in the said letters-patent.

2. That the result described in the specification and claims of the patent cannot be accomplished, so as to be practically useful, by the method and apparatus described in the specification.

3. That the respondent never practiced or used the patented process of the complainant as charged in the bill of complaint, or in any other manner. He admits that he is

engaged in manufacturing candles, and that in manufacturing such articles he uses water and steam at high temperature, and that he also uses such pressure as arises from the expansive force of hot water or steam in a close vessel, but he denies that he uses any such method, process, or apparatus as those described in the letters-patent of the complainant.

4. That the patented processes described in the specification were well known to chemists and men of science and to manufacturers long before the alleged invention of the complainant, and were also used and practiced by them and were described in printed publications before the complainant filed his application for a patent.

5. That the use of a close vessel of sufficient strength to resist the pressure of water when heated, or any pressure needed when using water to decompose other substances, was known to, and practiced by, men of science and manufacturers in this country and elsewhere long before the alleged invention; that highly heated water when used as described is an elementary principle open and free to all, and that such a principle is not one that is subject to a patent; that a prior knowledge of the alleged invention was possessed by many other persons, and that the same was described in many printed publications, as fully set forth in the answer.

Issues of the kind cannot be intelligently determined without a clear understanding of the nature and scope of the invention secured by the letters-patent, as it is the patented invention which it is alleged the respondent has infringed, and in order to such an understanding it becomes necessary, as a preliminary step in the investigation, to construe and define the claims of the patent, as the most efficient means of ascertaining the precise nature and extent of the inquiry involved in the respective issues presented in the pleadings.

What the patentee claims as his invention is the process of manufacturing fat-acids and glycerin from fatty or oily substances by the action of water at a high temperature and

pressure, which, beyond doubt, is the true object of the invention described in the specification, as plainly appears from the description of the means employed by the patentee to decompose the described substances and to produce the described result. His invention, as the patentee states, consists of a process to produce fat-acids and glycerin from the described fatty and oily substances by subjecting the substances to the action of water at a temperature and pressure, so high as to decompose those substances and cause the elements of the same to combine with water, and by such means to produce fat-acids and solution of glycerin, which is the described result. Specific description is also given as to the relative quantity of water to be used, and of the character of the vessel to be employed, as means to create the high temperature and pressure and to decompose the original substances, and cause the elements of the same to combine with the water to produce the result described in the patent. Such substances, the specification states, must be mixed with a quantity of water, equal in bulk to one-third or one-half of the fatty or oily substance to be subjected to the patented process, and that the mixture of the substance and the water must be placed in some convenient vessel in which it can be heated to the melting-point of lead and be kept at that temperature until the operation is complete. Undoubtedly the mixture may be placed in any convenient vessel of sufficient strength to resist the internal pressure when the solution is heated to the point described in the specification, but it is equally clear that any vessel not strong enough to resist such a pressure would not be a convenient one for such a purpose, nor is any one of less strength within the contemplation of the patentee, as he states with emphasis that the vessel must be closed and of great strength, so that the requisite amount of pressure may be applied to prevent the conversion of the water into steam, and he might have added, to prevent the vessel from bursting. High temperature, in the view of the patentee, is indispensable, and inasmuch as the vessel must be closed it follows that the vessel must be one of great strength, as the high tempera-

ture will necessarily produce very great internal pressure. Hence the requirement is that the vessel must be one of great strength, and the patentee suggests, as the best mode of carrying his invention into effect, that the mixture, prepared as described, be passed through a tube or continuous channel, heated to the before-mentioned temperature, that is, to the melting-point of lead.

Figures of the several parts of the described apparatus for performing the operation are given in the drawings, and the inventor proceeds to state, that in applying his process and carrying it into effect he places the fat or oil to be subjected to the process in the receiving vessel shown in the drawings, with from one-third to one-half its bulk of warm water, and to effect the described result he employs a piston with a perforated disk, arranged to work up and down, in the receiving vessel, which being kept in rapid motion will cause the fat or oil and the water to form an emulsion or intimate mechanical mixture, which is the mixture to be subjected to the high temperature and pressure. But the heat is to be applied in another vessel, as shown in the drawings, and for the purpose of removing the mixture to such other vessel the inventor employs a force-pump, like those in use for hydraulic presses, by means of which he drives the mixture into and through a long coil of very strong iron tube, which being placed in a furnace is continued there until the mixture is heated to the temperature of melting lead. Attached to the opposite end of the coil is a refrigerator or cooling apparatus, but the inventor states that he prefers that the high temperature of the mixture should be maintained for ten minutes before the product passes through that part of the coil immersed in water, by which it is cooled down from its high temperature to 210° Fahr., after which it escapes through the exit valve to the vessel prepared to receive the product of the patented process. High heat applied in the manner and by the means described is unquestionably the agent employed by the patentee to decompose the fatty and oily substances to be subjected to the patented process, and it is equally certain that he contemplates that the tempera-

ture shall be so high that the fatty and oily substances, as mixed with the water, in the manner before explained, will be decomposed and converted into fat-acids and solution of glycerin in a brief space of time, not exceeding ten minutes, as he gives no intimation that it will ever be necessary to continue the mixture in the heated coil beyond that length of time.

Rapid manipulation and high heat are therefore the leading characteristics of the described process, as the great pressure mentioned is only the consequence of the high heat, but as the high heat is indispensable to produce the described result, and as the vessel containing the mixture to be heated must be closed, it is quite obvious that the vessel must be one of very great strength, else it would prove to be a very inconvenient one, as it would be likely to burst. Support to that conclusion is found in the description which the inventor gives of the character of the tubes which he employs as the vessel for heating the mixture. He employs coils of tube for the purpose, arranged in such a manner that a considerable length of the same will occupy but a moderate space, the coils being kept about a quarter of an inch apart from each other. Tubes of the kind are made of iron, and the inventor states that they are one inch in the external diameter with a half-inch bore, incased with solid cast iron, which also covers the outer coils or rows of tubes to the thickness of half or three-quarters of an inch, to insure uniformity of temperature in the different parts of the coil and to give strength to the apparatus and to protect it from injury by fire. Much additional confirmation to the conclusion that the process of the patentee contemplates high heat and rapid manipulation is also found in the other parts of the specification. Evidently the inventor is of the opinion that the operator must be exposed to imminent danger unless the vessel is one of very great strength, as he states that he deems it prudent to test the strength of the apparatus by a pressure of ten thousand pounds to the square inch before taking it into use. Such a test he deems prudent before using the vessel, but he expresses the opinion that the work-

ing pressure necessary in using the degree of heat required will not be found to exceed two thousand pounds to the square inch, which admission of itself is sufficient to maintain the conclusion that high heat is the agent which the inventor in his process employs to decompose the substances subjected to the patented process. Certain substances, such as palm oil, the inventor represents, may be decomposed and converted into fat-acid and glycerin under his process when the temperature is at or below the melting-point of bismuth, but he states that the heat in decomposing such a substance may be raised considerably above the melting-point of lead without any apparent injury, and he adds that the decomposing action of the water becomes more powerful as the heat is increased.

Considered as a whole these several considerations show to a demonstration, in the judgment of the court, that the invention described in the specification and embodied and claimed in the patent is the use of great heat in the manner described to decompose the described substances when properly prepared, by being pulverized or broken into small particles and mixed with water, and cause the elements of the decomposed substances to unite with the particles of the heated water by which the mixture is converted into fat-acids and solution of glycerin. Manifestly great heat, applied in the method described, is the principal agent, but water is an essential ingredient, as without it the product of decomposition would be destroyed in the operation.

Evidence that the inventor contemplates that the change in the substance shall be accomplished in a brief space of time abounds in the specification. Ten minutes is the maximum time suggested that the high temperature should be maintained while the mixture is flowing through the heated tubes before it passes into the refrigerator, but the patentee also states that it is important for the quickness and perfection of the decomposition that the oil and water should continue, during the passage of the emulsion through the heating tubes, in the same state of intimate mixture as they were when the mixture was driven into the heated coil, and to that

end the inventor states that he prefers to place the series of heating tubes in a vertical position, so that if any partial separation takes place while the liquid passes up one tube, the change may be corrected as the liquid passes down the next.

Suitable means are pointed out to indicate to the operator the state of the heat in the tubes, and for that purpose the inventor suggests the making of certain indicators or gauges showing the melting-point of certain metals and other substances, of different and known degrees of fusibility, and he gives the series which he has used, which consist of tin, melting at 440° Fahr.; bismuth, 510° Fahr.; lead, 610° or 612° Fahr.; nitrate of potash, 660° Fahr.; and he describes the mode in which such gauges may be constructed. Palm oil will be decomposed by heat at 510° Fahr., and the inventor mentions that as the lowest gauge for the treatment of any known fatty or oily substance to be subjected to the patented process under consideration.

Ordinary fats, such as beef tallow, or the tallow of sheep, require the heat to be raised to 612° Fahr., which is the melting-point of lead. Mention is made in the series set forth in the specification of the melting-point of tin, which is 440° Fahr., but the mention of that chemical fact was doubtless made as a guide to the operator in carrying up the heat to the point necessary to decompose the respective substances, such as palm oil or the ordinary tallows, all of which require the heat to be raised to a point higher than the melting-point of tin.

No different conclusion can be reached, as there is nothing in the record which gives any countenance to the theory that the melting-point of tin, 440° Fahr., was given as a gauge of heat which, under the process of the patentee, would decompose any known fatty or oily substance in such a manner as would enable the operator to manufacture the product described in the patent.

Substances are mentioned in the specification which, under the described process, would require the heat to be raised to the melting-point of bismuth and to the melting-point of

lead, but the specification does not make mention of any substance of the kind which can be decomposed as required at the melting-point of tin, nor does it mention any one which for the same purpose would require the heat to be raised to the melting-point of the nitrate of potash. Probably the former was mentioned for the guidance of the operator, as before explained, and it may be that the latter was given for a corresponding purpose as the maximum limit for the operator in raising the heat to decompose such fatty and oily substances as the ordinary beef tallow or the tallow of sheep, which require the heat to be raised to the melting-point of lead in order to produce a good result under the patented process.

Two other requirements of the specification support the theory that high heat is the principal agent of the patented process, and that the vessel to be used for heating the mixture must be kept closed during the process of decomposition, and be one of sufficient strength to sustain, without bursting, an internal pressure of at least two thousand pounds to the square inch. One is that the exit valve is required to be so loaded that when the heating tubes are at the desired working temperature the valve will not be opened by the internal pressure produced by the application of the heat to the mixture, so that when the pump is not in motion none of the mixture will escape at the other end of the apparatus; and the other requirement is that "no steam or air shall be allowed to accumulate in the tubes, and that the tubes shall be kept entirely full of the mixture."

Argument to show that the vessel used for heating the mixture must be kept closed is unnecessary, as the terms of the specification expressly require it, and the patentee to that end directs that if practicable the ends of the tubes should be welded, and if not, that they be connected by certain described joints to accomplish the same purpose, evidently regarding a compliance with the requirement that "the vessel must be closed" as an indispensable condition.

Half or one-third of the mixture to be subjected to the patented process is water, and the condition set forth in the

specification is imperative that the vessel used for heating the mixture must be closed, that the requisite amount of pressure may be applied to prevent the water from being converted into steam; and it is also an express condition that no steam or air should be allowed to accumulate in the tubes, for reasons which will be obvious to any who will carefully examine the described method of producing the described result.

Means of a mechanical character are prescribed in the specification for intermingling the fat and the water into what is called an emulsion, which is the mixture to be subjected to the patented process, but the difference between such an intermingling of one substance with another, which may be accomplished by a stirrer or by the churning process, and the actual union produced by chemical affinity between two or more substances, is as wide as one thing well can be from another. Such an intermingling of fat with water does not work any chemical change in either substance, as it creates at best but a temporary affinity. Consequently the water, if the mixture is left for a sufficient length of time undisturbed by the stirrer or piston, will separate from the particles of fat and settle at the bottom. Widely different results flow from chemical affinity, as such an affinity will produce a new and distinct substance, uniting, it may be, the constituents or properties in whole or in part of substances as different as fat and water.

Fats consist of several constituents closely united in indefinite proportions, of which olein, margarin, and stearin are the only ones usually recognized and defined by chemists; the former constituting the oily and the two latter the solid principle of the united substance.*

These constituents or elements are held together by chemical affinity, the consistency of the united substance depending upon the respective proportions of the constituent parts. High heat will overcome the affinity by which the constituents are united and decompose the substance. Different

* 1 Regnault's Chemistry, § 1592.

kinds of fat, however, require different degrees of heat to effect the decomposition of the united substance, varying in intensity from 510° Fahr., the melting-point of bismuth, to 610° or 612° Fahr., the melting-point of lead, which are the very temperatures mentioned as required in the specification of the complainant's patent. But it should be remarked in this connection that the decomposition of such a substance by heat alone will not produce fat-acids or solution of glycerin.*

Free fat-acids and solution of glycerin are what the patentee promises as the result of a proper application of the patented process. Those acids, it is conceded, are oleate, margarate, and stearate, which, it is claimed, the process will produce, together with the solution of glycerin, but it is clear that heat alone will not produce either of those fat-acids or the solution of glycerin, as the three acids and the glycerin are chemically combined in the original substance with the oxide of glyceryl as an acidifying base. Temperatures such as described will decompose the fat, but unless some chemical agent, such as water, lime, soda or potash, is present to take the place of the oxide of glyceryl to acidify the olein, the margarin, and the stearin, or to oxidize the said several constituents and to convert the same into oxide of olein, margarin, and stearin, neither of the fat-acids required, to wit, oleate, margarate, or stearate, can be obtained from the decomposition of fats by heat, as the oxide of glyceryl, which was their base in the original substance, is separated by the act of decomposition; nor is it possible, unless water or its equivalent be present when decomposition takes place, to obtain solution of glycerin, for reasons equally conclusive though somewhat dissimilar in the chemical sense, as the presence of water or its equivalent is required in the latter case to hydrate the glyceryl and convert the same into the solution of glycerin. Without the presence of water or its equivalent constituents neither the fat-acids mentioned nor solution of glycerin will be obtained

* Turner's Chemistry, by Johnston, 8th edition, p. 456.

by heat, but with it the three fat-acids mentioned and solution of glycerin will be produced if the operator complies with all the other conditions described in the specification.*

Viewed in the light of these suggestions, as the question should be, it is quite clear that the two conditions last named, to wit, that the heating vessel must be kept entirely full of the mixture and that no steam or air must be allowed to accumulate in the vessel employed to impart the heat, are material and indispensable conditions of the patented method of producing fat-acids and solution of glycerin from the described substances, as without a compliance with those requirements there might not, and probably would not, be present when decomposition takes place any equivalent of a base to take the place of the oxide of glyceryl and to unite with the olein, margarin, and stearin to convert the same into the three fat-acids known as oleate, margarate, and stearate. These three constituents in the fat, to wit, olein, margarin, and stearin, are combined with the oxide of glyceryl as a base, and when decomposition is effected under the influence of heat, some chemical agent, such as water or its equivalent must be present, which can take the place of the oxide of glyceryl to change the three constituents of fat just named into the oxides of olein, of margarin, and of stearin.†

Some chemical agent must also be present to take the place of the constituent which was combined with the glyceryl to produce the solution of glycerin, as represented in the specification; and it does not appear to be controverted that in all methods heretofore practiced water or its equivalent has always been present for such purpose, and it is manifest that the requirement that water or its equivalent shall be present to accomplish that purpose, in the specification, is an indispensable condition, as the new substance would otherwise be destroyed by the operation, which requirement cannot be fulfilled unless the vessel is kept

* Silliman's Chemistry, 25th edition, p. 441.

† 3 Miller's Chemistry, 370, § 1141; 2 Ure's Chemical Dictionary, 5th edition, 379.

entirely full of the mixture, as otherwise steam and air will accumulate and fill the vacuum.

Water must be present in the mixture to furnish the requisite constituent to unite with the olein, margarin, and stearin, and to oxidize the same, else it will be impossible to obtain the described fat-acids; and the presence of water in the mixture when the decomposition takes place is also equally indispensable to furnish the requisite constituent to take the place of the oxide evolved by the operation from the glyceryl and to unite with the other constituents of the same to produce solution of glycerin, which the specification alleges is one of the results to be obtained from the decomposition in the method therein described. Unless water or its equivalent be present to furnish such constituent to take the place of the oxide evolved from the glyceryl, the same heat that separates the glyceryl from the other constituents of the fat in the mixture will convert the same into acrolein, which is an offensive substance destitute of any useful quality, or, in other words, the glyceryl will be converted into a substance which is neither new nor useful, and of course the process to obtain it would not be the proper subject of a patent.*

Nothing provided in the patent or suggested by the patentee will secure the presence of water when decomposition takes place, unless the vessel be closed and be kept entirely full of the mixture, as otherwise the water will be converted into steam, and steam and air will accumulate in the heating vessel. No means are described or suggested to add water to the mixture after the mixture is forced into the heating vessel, and it is plain that nothing of the kind can be successfully accomplished without some material change in the apparatus.

Beyond all doubt the conditions mentioned appertain to the described method patented by the complainant for producing fat-acids and solution of glycerin from fatty and oily substances of animal and vegetable origin, which contain

* 2 Watts's Chemical Dictionary, 894; Attfield's Chemistry, 394; Silliman's Chemistry, 25th edition, p. 44, § 763.

glyceryl as their base, but it is equally clear that the patentee does not claim the described apparatus as any part of his invention, and that he is not the original and first inventor or discoverer of the scientific truth that such fats as beef tallow and palm oil may be decomposed by heat or by heat and water combined, nor of the scientific truth that fat-acids of commercial value may be obtained from such substances as tallow and palm oil by means of heat or by heat and water.

Power to issue letters-patent is conferred upon the commissioner of patents, and inasmuch as such grants are executed by public authority and in pursuance of an act of Congress, the rule is that the patent, when introduced in evidence by the complaining party in a suit for infringement, affords a *primâ facie* presumption that the patentee is the original and first inventor of what is therein described and claimed as his invention. Application for a patent is required to be made to the commissioner appointed under authority of law, and inasmuch as that officer is empowered to decide upon the merits of the application, his decision in granting the patent is presumed to be correct.*

Sufficient has already been remarked to show what the alleged invention is as construed and defined by the court. Having ascertained that matter, the next inquiry is, whether the complainant is the original and first inventor of the improvement?

1. Persons seeking redress for the unlawful use of patented inventions must allege and prove that they are the original and first inventors of the same, and that the party defendant is guilty of the alleged infringement. In the first place, the burden to establish both of those allegations is upon the party instituting the suit, but the rule, as before explained, is that where the complainant or plaintiff introduces the patent in evidence, if it is in due form, it affords a *primâ facie* presumption of its correctness, which, in the absence

* Agawam Co. *v.* Jordan, 7 Wallace, 597.

of opposing proof, will entitle the complaining party to relief. Availing himself of that rule the complainant introduced his patent in evidence, which is sufficient to show that he is the original and first inventor of his improvement, as construed and defined by the court, unless sufficient evidence to overcome that presumption and to establish the contrary allegation of the answer is exhibited in the record.*

Whether tested by the language of the claim or by that of the patent, or by the language embodied in the two introductory sentences of the specification, it is equally clear that the patentee, at the time the patent was granted, did not pretend that he was the original and first inventor or discoverer of the scientific truth that high heat or water heated to a high temperature would decompose such fatty and oily substances as those mentioned in the specification of his patent, and the evidence in the record shows that such a pretence, if it had been made, could not have been supported for a moment.

Opposed to that proposition it is suggested that the patentee claims "the manufacturing of fat-acids and glycerin from fatty substances by the action of water at a high temperature and pressure," which must be admitted subject to the universal qualification that the legal construction of every such claim is that the patentee means to limit the same to his described method or process; or, if it be a machine, to his described means of obtaining or of accomplishing the described result. Usually the claim contains the words as described or substantially as described, or words of like import, which are everywhere understood as referring back to the descriptive parts of the specification. Words of such import, if not expressed in the claim, must be implied, else the patent in many cases would be invalid as covering a mere function, principle, or result, which is obviously forbidden by the patent law, as it would close the door to all subsequent improvements.†

* Seymour *v.* Osborn, 11 Wallace, 538.

† Ib. 547; Curtis on Patents, § 242.

Doubtless, an invention may be good though the subject of it consists in the discovery of some principle of science or property of matter, never before known or used, by which some new and useful result is obtained, and such an invention or discovery may be the subject of a valid patent without including in the claim any new arrangement of machinery to accomplish the object, provided the inventor describes, as required in the patent law, the method, process, or means of applying the invention to practical use and of obtaining the described new and useful result.*

Limited, as explained by reference back to the descriptive parts of the specification, the claim may well be regarded as in due form, but it is quite clear that it would be invalid if it is not so limited, as it has always been held that a patent embraces nothing more than the improvement described and claimed as new, and that any one who afterwards discovers a method of accomplishing the same object, substantially and essentially differing from the one described, has a right to use it and to vend it to others to be used.†

Apply that rule and it is clear that the invention must be limited to the described method of producing free fat-acids and solution of glycerin from the fatty and oily substances therein mentioned, as the patent states that the patentee alleges that he has invented a new and useful improvement in processes for purifying such fatty and oily substances, and the opening sentence of the specification describes the invention as a new and improved mode of treating fatty and oily substances, and the patentee, in describing his invention, states that it consists of a process for producing free fat-acids and solution of glycerin from such fatty and oily substances as are therein particularly described, and there is not a word either in the specification or claim of the patent to warrant the conclusion that the patentee or the commissioner of patents, at the time the patent was granted, regarded the patentee as the original and first inventor or discoverer of

* Household Co. *v.* Neilson, 1 Webster's Patent Cases, 683; Curtis on Patents, 4th edition, 279; Foote *v.* Silsby, 2 Blatchford, 260.

† O'Reilly *v.* Morse, 15 Howard, 119; Curtis on Patents, 4th edition, § 163.

the scientific truth that such fatty and oily substances may be decomposed by high heat or water heated to a high temperature.

Unquestionably the method or process embodied in the patent includes high heat and rapid manipulation, but the patentee is not the original and first inventor of the scientific truth that heat or water at high temperature will decompose such fatty and oily substances as those mentioned in the specification. Different gauges of heat to be employed in applying his process are certainly given in the specification, as before explained, but it is a great mistake to suppose that the gauge for decomposing such fats as beef tallow or the tallow of sheep admits of any variation except what is authorized by the word "about," or that the gauge given for decomposing palm oil may be varied from the melting-point of bismuth, except so far as the authority to diminish the temperature may be inferred from the words "at or below," which words, when properly construed, mean substantially the same thing as the word about, when the latter is used to qualify the temperature designated as the melting-point of lead.

Attempt is made in argument to show that the respective gauges given in the specification to specify the required degree of heat are subject to a much wider variation, and that the patentee did not intend to require that the mixture should be exposed to any higher temperature than that which should prove to be requisite to accomplish the described result. Suppose that could be admitted, still it is not probable that the admission would much vary the case if the apparatus employed should not be changed, and all the conditions for applying the process should remain in full force, as rapid manipulation is an express condition in applying the process of decomposition, which, it is believed, cannot be accomplished in the time allowed unless the high temperature is maintained.

Support to the theory that the gauges given admit of a wider variation than is here supposed is attempted to be drawn from the sentence in the specification which im-

mediately follows the statement that the decomposition of the water becomes more powerful as the heat is increased. Fatty matters such as palm oil, says the patentee, may be changed into fat-acids and glycerin at or below the melting-point of bismuth, but he states in the same connection that the heat in such a case has been carried considerably above the melting-point of lead without any apparent injury; and he adds that the decomposing action of water becomes more powerful as the heat is increased. Then follows the sentence which is invoked as supporting the theory that the gauges of heat given in the specification, to wit, the melting-point of bismuth and the melting-point of lead, are subject to indefinite variation.

By starting the apparatus at a low heat, says the patentee, and gradually increasing it, the temperature giving products most suitable to the intended application of the fatty substance employed, can easily be determined. Evidently the sentence should be examined in the light of the context, and when so examined it is quite clear that the patentee never intended to employ the language in any such sense as that which the complainant ascribes to it, as he was speaking of palm oil, which is decomposed at the melting-point of bismuth, and had just remarked that the heat, in applying the process to that substance, had been carried considerably above the melting-point of lead without any apparent injury.

Water, said the patentee, becomes more powerful to decompose such substances as the heat is increased, and then adds, as a precaution to the operator, not to carry it too high above the gauges given. You can easily determine what is best in any given case by starting the apparatus at a low heat and gradually increasing it to the gauge given or above, as may appear to be best from the particular substance subjected to the process and the quality of the product obtained by the operation. Not an intimation is given in the sentence that any less heat will accomplish the purpose than that indicated by the gauges mentioned in the specification. On the contrary, the language employed, if it

warrants any substantial variation from the prescribed gauges, justifies the inference that the heat may be increased above the temperatures mentioned rather than diminished.

High temperature and pressure are among the leading characteristics of the invention, as appears from the claim and every part of the specification. Doubtful expressions may be subject to construction, but where the language employed is clear and unambiguous it must speak its own construction in the specification of a patent as well as in any other grant issued by public authority. Intention in every case, it may be admitted, is the primary rule of construction, but language invoked to support a particular theory must be such as is fit, when it is compared with the whole instrument, to express the imputed intention, else the theory in question cannot be supported, as courts of justice cannot legislate nor can they add to a grant or contract any stipulation or condition which it does not contain. Consequently, the theory of the complainant that the sentence under consideration warrants the conclusion that the claim of the patent includes low as well as high heat must be overruled.*

Additional observations respecting the apparatus employed by the patentee are unnecessary, as he expressly states that he does not intend to claim it as any part of his invention. Enough has already been remarked also to show what is the nature and scope of the invention and to point out what the question is which is involved in the first issue presented in the pleadings. Construed and defined as explained, the first issue respecting the patent must be found for the complainant, as the proofs in the record bearing upon the question of novelty are not sufficient to overcome the *primâ facie* presumption that the patentee is the original and first inventor of what is described in the patent as his invention.†

2. Grant all that, still it is insisted by the respondent that

* Green *v.* Wood, 7 Queen's Bench, 178; Potter's Dwarris, 199–200.

† Railroad Co. *v.* Stimpson, 14 Peters, 458; Curtis on Patents, 4th edition, § 472.

the result described in the specification and claim of the patent cannot be accomplished so as to be practically useful by the method and apparatus described in the specification.

Whoever discovers that a certain useful result will be produced in any art, machine, manufacture, or composition of matter by the use of certain means is entitled to a patent for his invention, provided he specifies the means he uses in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from the described means, produce precisely the result he describes. Such description must be correct, as it is settled law that the patent is void if the described result cannot be obtained by the described means.*

Nor does it make any difference whether the effect is produced by mechanical principles or by chemical agency or by the application of discoveries in natural science, as in either case the requirement of the act of Congress is imperative that the patentee must describe the method, process, or means he employs in full, clear, and exact terms, and the end which the invention accomplishes.

Inventions, in order that they may be the proper subjects of letters-patent, must be new and useful. Utility in most cases is a question of fact, as it usually depends upon the evidence resulting from actual experiment. There are two modes, says Mr. Curtis, in which the utility of an invention may be impeached, the second of which is where it appears that it is not capable of being used to effect the object proposed, which is the question presented in the second defence set up by the respondent.†

Cases arise also, even where the means described will accomplish the described result, when it cannot be held that the invention is useful if it appears that the operater, in using the described means, is constantly exposed to imminent danger, either from the explosive tendency of the sub-

* O'Reilly *v.* Morse, 15 Howard, 119; Curtis on Patents, 189.

† Curtis on Patents, 4th edition, § 449.

stance to be used or from the liability of the vessel to burst which is required to be employed as means of accomplishing the patented result. Where the patentee finds it necessary to employ any such dangerous means to accomplish the described end it cannot be held that his invention is useful, within the meaning of the patent law, even though it appears that the operator, when no such disaster happens, may be able to work out the described result by the described means, as it is quite clear that Congress, in making provision to secure to inventors the exclusive right to their discoveries, never intended to promote any such as were in their nature constantly dangerous to the operator in employing the described means to accomplish the described result.*

Apply these rules and it follows that neither an invention which will not enable the operator to accomplish the described result nor one which constantly exposes the operator to the loss of his life or to great bodily harm can be regarded as useful within the meaning of the patent law.

Patents were granted to the supposed inventor by the proper public authorities in England, France, and Belgium, as well as by the proper public authorities in the United States, but the respondent insists that the described result cannot be obtained by the means and in the mode of operation described in the specification, and that the invention has never been reduced to practice by the use of those means or in that mode of operation, either in the United States or in any one of the foreign countries where the same has been patented.

Both branches of the proposition are controverted by the complainant and many depositions and other proofs upon the subject were introduced at the hearing. Witnesses were examined by the complainant to prove the affirmative of the issue, but none of them appear to sustain his views in that behalf unless the scope of the invention is extended beyond the means and mode of operation described in the specification as construed and defined by the court. Proofs

* Curtis on Patents, 4th edition, §§ 106 and 449.

of the kind, if they exist, could easily have been procured, as both the complainant and his brother, who acted as his agent in efforts to introduce the invention in the United States, were examined as witnesses in the case.

Licenses were given by the complainant in some instances, and he called Charles T. Jones, one of his licensees, to prove the affirmative of the issue under consideration. It appears by his deposition* that he became a member of a certain firm in 1849, and that the firm were engaged in the manufacture of candles; that they first used the process of saponification with about fourteen per cent. of lime in an open vessel; that they decomposed the lime soap thus obtained by sulphuric acid, using for that purpose two and a half pounds of sulphuric acid to each pound of lime; that they continued to use that process until the fall of 1859, when they introduced the process of saponification under pressure of about one hundred and thirty pounds to the square inch, with only six or seven per cent. of lime and with a corresponding diminution of sulphuric acid. Subsequently they abandoned the second process used by them and introduced another, which the witness calls the process of the complainant.

On cross-examination he was asked whether water was not used in their first process and whether he ever knew any process by which fats were decomposed into fat-acids and a solution of glycerin without the intervention of water; to which he answered, water was used in the first process described, but in quantities only slightly in excess of that requisite for preparing the milk of lime; and he added that he did not know that the decomposition of neutral fats into fat-acids and a solution of glycerin had ever been accomplished without the intervention of water.

Counsel for the respondent also requested the witness to describe the process used by his firm which he calls the complainant's process. His answer is, in substance and effect, as follows: He places the melted fat to be treated in a large vessel with a quantity of water equal at least to

* See *supra*, p. 321.—REP.

one-half the bulk or weight of the fat, and subjects the melted fat and water to a steam pressure of three hundred pounds to the square inch for a period of about five hours, keeping the water and fat in intimate contact by pumping the water from the bottom to the top of the vessel and discharging it on the upper surface of the fat, in order that the water may make its way to the bottom of the same; to which he added that he preferred to use half of one per cent. of lime, for the reason, as he states, that that quantity of alkali enables him to perfect the decomposition in four hours at a pressure of two hundred and fifty pounds to the square inch with material economy of fuel and of wear and tear of machinery; and he states that since ascertaining the advantages of the lime he has adhered to that mode of operation.

Responsive to another question he states that the apparatus was first put in operation, under the superintendence of the complainant, in September, 1863; that the vessel used was manufactured in Philadelphia; that it comprises a tube thirty-eight feet in length and thirty-eight inches in the internal diameter; that it is made of iron plates of the thickness of a half inch, and a copper tube of nearly the same length, thirty-five inches in diameter, which is placed inside of the iron tube so as to leave an annular space of about one and a half inches between the copper and the iron vessel, whose estimated capacity is about ten thousand pounds of oil and water, but the quantity of fat usually put into the vessel at one time is about six thousand pounds, with about four thousand pounds of water, all of which is placed in the copper vessel, which serves to fill the vessel within three feet of the head or top; and he states that when the decomposition is perfected the water holding the glycerin in solution and the fat-acids are discharged into their respective receptacles.

Two vessels are used instead of one, as directed in the specification, because iron is cheaper than copper, and to secure greater strength to resist the requisite pressure and to save the iron from contact with the fat-acids, which dis-

colors the product and rapidly corrodes the iron to such an extent that it will soon render the vessel unfit for use.

Satisfactory products, as the witness states, may be obtained by the process without lime, though he adheres to the statement that he prefers to use it in order to diminish the pressure which would otherwise be required, and for the economy which it effects in fuel, labor, and time, but he states without any qualification that no one in their manufactory ever mixed any fatty or oily substance with water, in the proportions given in the complainant's specification, and placed the mixture in any vessel in which it could be heated to the melting-point of lead until the operation was completed and thereby obtain free fat-acids and solution of glycerin.

Even without any discussion it is obvious that the means and mode of operation practiced by the witness are widely different from the method or process described in the specification of the complainant's patent. Instead of working in a vessel entirely full of the fat and water and under a pressure sufficient to prevent the presence of steam, the operation under the process of the witness is performed in a vessel only partly filled, which is open at the upper end and inclosed in another vessel, and the heat is applied by the introduction of steam from boilers outside. Other differences also exist, as for example, instead of being worked at a temperature of 510° or 612° Fahr., and in a vessel capable of sustaining an internal pressure of two thousand pounds to the square inch, the process of the witness is worked at a temperature represented by a pressure of only three hundred pounds to the square inch, which is a latitude of deviation not warranted by any language to be found in the complainant's specification.

Two other differences may also be mentioned, which are equally persuasive, to show that the method or process practiced by the witness is substantially different from that embodied in the patent of the complainant. Instead of the fat and the water being maintained during the entire operation in a state of intimate mechanical mixture, as required

in the specification, a pump is provided, not to force the mixture into the heating vessel, but to be kept constantly at work to draw the water from the bottom of the vessel and to discharge it on top of the charge of fat, in order that it may percolate down through the fat and supply the deficiency occasioned by the fact that the water is constantly being converted into steam.

Ten minutes is the maximum time allowed for the operation in the complainant's specification, but the method or process employed by the witness, instead of effecting the decomposition in ten minutes, requires at least four or five hours, even when he uses a small proportion of lime to assist the chemical action of the heated water.

Besides the differences between the two methods already pointed out, there are others which may be suggested, equally striking and of a character equally persuasive, to show that the two methods are substantially different, as for example, the apparatus employed by the witness consists of two vertical cylinders, one within another, instead of a coil of tubing, with an annular space between the two, as before explained, of an inch and a half.

Fat and water in nearly equal proportions are charged into the inner cylinder, leaving a vacant space at the top of the same of about three feet. Like the coil of tube the outer cylinder is steam-tight, but the inner one is open at the top. Steam for the operation is generated in two separate boilers, which is introduced through the top of the outer cylinder to the space between the two and through the upper end of the inner one, which is open, to facilitate the circulation of the steam, in order that the fat and water in the inner cylinder may be heated to the temperature represented by a pressure of two hundred and fifty to three hundred pounds to the square inch; and the witness testified that he regarded the use of the pump and the use of some lime as essential to the use of the apparatus with the greatest economy.

Licensees of the complainant were also examined by the

respondent, to wit: Nathaniel Ropes and Nathaniel Ropes, Jr.* These witnesses have had great experience in manufacturing candles, and they testify that they know of no place in this country where candles or soap are manufactured from free fat-acids produced by water alone at high temperature and pressure without the use of alkali. They both describe the old saponifying process as consisting in the treatment of fat by water heated in an open vessel, lime being mixed with the water, by which the glycerin was separated from the other constituents of the fat, leaving what some manufactures call lime soap, or fat-acids and lime, which latter ingredient was afterwards removed by sulphuric acid, the residuum being free fat-acids.

Changes were made in their mode of operation early in the year 1860, which alterations were introduced to them by the brother of the complainant, who experimented in their manufactory several months before he put the apparatus adopted in operation. By that plan they use water in equal proportions with the fat, with a half per cent. of lime and double that quantity of sulphuric acid, the whole being heated to a temperature representing a pressure of about one hundred and fifty pounds to the square inch in a closed vessel for twelve hours. Formerly they conducted the operation in open tubs, using thirteen per cent. of lime with double that quantity of sulphuric acid, but since the new method was introduced by the agent of the complainant they have substituted closed copper tanks in the place of the open tubs, using, however, the same agents to effect the decomposition of the fatty substances, though in different proportions.

Copper tanks are used as receptacles for the fat and the water, but the steam to communicate the heat is generated in a large iron boiler thirty feet in length and forty inches in diameter, with which the copper tank is connected by means of steam pipes furnished with stop-cocks as regulators in the use of the steam. There is also a shaft in the

* *Supra*, pp. 336-341.—REP.

tank having radial arms, which shaft is kept in rotation to cause and preserve an intimate mechanical mixture of the fat and the water during the whole operation.

Instead of having the tank constantly filled with the fat and water the fact is that it is never filled, nor is the mixture kept under a pressure sufficient to prevent the accumulation of steam and air, as directed in the specification of the patent described in the bill of complaint. Empty space is left in the tank above the fat and water at the outset sufficient to allow boiling, which space of course would be filled with steam and air. Heat is communicated to the mixture by introducing steam from the large iron boiler into the copper tank, creating a temperature causing a pressure of one hundred and fifty pounds to the square inch.

Several months were employed in making the experiments before the method now in use was finally put in practice by the complainant's agent. He tried it without lime at a pressure of two hundred pounds, allowing twenty-four hours for the operation, but the result was not satisfactory. Dismissing that method he next tried the experiment with fat and water in the proportion of two to one, allowing twenty hours; still the result was unsatisfactory. Next he tried the compound of fat and water in equal proportions, using only half of the water during the first part of the operation, then discharging that and putting into the charge the other half of the water, and he found that the operation produced a good result in twelve hours. Some of the experiments were without lime, but the witnesses state that inasmuch as they found that by the addition of lime they could accomplish the work at a pressure of one hundred and fifty pounds to the square inch and in less time, they have ever since continued the use of lime in their business.

Much discussion of the process introduced on that occasion is unnecessary, as it appears that instead of working at a heat equal to the melting-point of lead, in a vessel capable of sustaining an internal pressure of two thousand pounds, these licensees of the complainant use a certain per cent. of lime at a pressure not much above one hundred and fifty

pounds; and it appears that they decompose the fat in a vessel not filled with the mixture, nor provided with a mechanical stirrer, and leave a vacant space in the vessel sufficient for circulation, in which steam is not only generated but is introduced from a separate boiler. Differences such as these require no comment except to say that the method is entirely different from that described in the patent in question, and to add that it corresponds much more nearly to the method described in a patent dated May 15th, 1860, subsequently obtained by the complainant, and which was introduced in evidence by the respondent.

Reasons exist besides those disclosed in the testimony of those witnesses to support the conclusion that the complainant never supposed that his patent conferred the exclusive right to use temperatures and pressure to decompose fats with water alone much below the gauges given in his specification, and that he had come to doubt, several years before those experiments were made, whether the patented method or process could be accomplished so as to be practically useful by the means and in the mode of operation pointed out in the patent.

His letter, dated London, June 25th, 1856, addressed to a certain firm in Cincinnati,* affords strong support to that conclusion, in which he states that our experiments in the factories here and in Paris have shown that on the large scale the decomposition of fats by water is more conveniently effected by modifying the apparatus originally proposed so that the fat and water are exposed to a comparatively lower heat and pressure for a longer time, instead of a very high pressure for a few minutes. By which means he suggests in the same letter that a considerable quantity of material may be treated at one charge in an ordinary steam-boiler lined with lead or copper, and may be provided with an agitator in the place of using the continuously working pump and coil of pipe, and the suggestion is that

* *Supra*, p. 344.—REP.

at a pressure of two hundred and twenty-five pounds to the square inch tallow, palm oil, or lard stearin may be completely decomposed in five hours.

Nearly two years before the date of that letter, to wit, on the twenty-fifth of March, 1854, the complainant took out a patent in England for the same invention as that described in the patent in issue in this case, and the proofs show that he made various efforts to introduce it into practice in that country. He remained there, it seems, from 1854 to 1859, and it appears that in June, 1854, he exhibited his process in the old form to George F. Wilson, the managing director of the Price Patent Candle Company, and the company entered into a contract with the complainant respecting the same, by which he assigned the said letters-patent and the privileges thereby granted to the said company, and that the said company, in consideration of the assignment, covenanted to pay him an annuity of one thousand pounds sterling from the month of October of the following year during the continuance of the patent, subject to various conditions, and among others to be terminated by giving notice to the complainant as therein provided; the company were also to have the use of several other patents therein described, which have since expired.

Proofs were also exhibited showing that the said company have ever since paid the stipulated annuity, but there is no satisfactory evidence in the case to show that they have ever applied the process to produce fat-acids and solution of glycerin by the means and in the mode of operation described in the specification, as construed and defined by this court. Some use, it may be presumed, has been made of the patent by the assignees, but what that use is does not very satisfactorily appear. It does appear, however, from a paper read before the British Association, in September, 1855, by the general director of the company, to whom the complainant testifies that he exhibited his process the year previous, that he stated that in our new process the only chemical agents employed for decomposing the neutral fat and for separating its glycerin are steam and heat, and that

the only agents used in purifying the glycerin thus obtained are heat and steam.*

Strong confirmation of that is also derived from a paper read by the same person at a session of the Society of Arts, held in that country, January 25th, 1856, also put in evidence by the complainant,† in which the author says, in speaking of the patented process, "It has yet to be proved how far it can compete successfully with distillation," adding that they had made an arrangement with the inventor which, as he expresses himself, will give them the means of testing its commercial merits, and then he proceeds to state that on witnessing a trial of the process in the small tube apparatus, it struck him that steam passed into the fat at a high temperature should effect by a gentle process what the patentee aimed at effecting by a violent process, to wit, the resolving of the neutral fat into glycerin and fat-acids; finally stating that they had proved that the fact was so and that the glycerin distilled over with the fat-acids though it was no longer combined with those products, evidently showing that the process employed by them was at that time widely different from that claimed by the complainant.

Application for a patent was also made by the complainant to the proper authorities of France during the same year, and it appears that the application was successful, as he immediately commenced negotiations through his patent agent with the firm of Monier & Co., doing business near Paris in that empire, for the sale of the patent, which negotiations resulted in a contract of sale. Pursuant to that contract he transferred the patent to that firm subject to the condition that the process would effect the results promised by the grantor.

Numerous experiments were subsequently made under the superintendence of the patentee or his brother, for a period of six months, all of which produced results which the evidence shows were entirely useless. They were made in the first place, as the senior partner of the firm states,‡

* *Supra*, p. 345.—REP.

† *Supra*, pp. 344, 345, 350.—REP.

‡ *Supra*, pp. 345-348.—REP.

by means of a small apparatus brought from London by the patentee, which consisted of a hollow iron tube of serpentine form, incased in a cast-iron block from which the two ends of the tube projected—one for receiving the fatty substance used in the experiments for decomposing the same, and the other for discharging the product.

High heat was required for the purpose, and with that view the apparatus was so placed in a furnace constructed of fire-proof bricks that it received all the heat, the flames of which completely enveloped it, and which brought it to an excessive heat, but the witness cannot give the degree of heat, as the apparatus did not contain any gauge to indicate its intensity.

Fatty matter and water were put in a vessel prepared for the purpose, which was provided with a bronze suction and force pump worked by hand, and connected with one end of the iron coil projecting from the cast-iron block, by which the mixture of fatty matter and water was drawn from the receptacle and was forced into and through the iron coil of tube, as the same was incased in the iron block, and out at the opposite end of the same, where it was discharged into another receptacle prepared for the purpose. By means of the furnace the iron tube and the block in which the coil was incased were "heated to an excessive degree," estimated by the witness to exceed 500° Fahr. with an estimated pressure of more than twenty atmospheres. Both the patentee and his brother worked at the experiments ten or fifteen days, but the decomposition of the fatty matter, as the witness states, was never complete, and that they never produced fat-acids and glycerin, the product being only an altered fatty matter, which, when washed, showed acrolein to such an extent as to fatigue the workmen who assisted at the experiments. Fifteen of the experiments were made by the patentee aided by two workmen, in the presence of the witness, and he states, without qualification, that none of the experiments succeeded.

Three new apparatuses were subsequently constructed by the brother of the patentee, acting as his agent. Two were

constructed in Paris and one in London. Experiments were subsequently made by the brother of the patentee, and in some instances without any regard to the patented process, the aim being to find out if possible the means of overcoming the difficulties manifested in the prior attempts to produce the promised results.

None of his efforts, however, succeeded, though the experiments were continued until the expenditure exceeded forty thousand francs, and it appearing that fat-acids and glycerin could not be produced by the process, the contract was annulled, and the witness affirms that it is impossible to decompose fatty matter and obtain fat-acids and glycerin by the method indicated in the complainant's patent. He admits, however, that his firm were subsequently induced, on the return of the patentee to that country, to join with another firm engaged in manufacturing candles, to make a new contract with the same party upon the same basis as the first contract, it being represented that the patentee would introduce a new process, based upon the principles of the patented method, which promised certain success and admirable results. Such a contract was accordingly made, and new experiments were prosecuted for a period of two or three months, but, like the first efforts in that direction, the experiments failed to produce either fat-acids or glycerin. How much these last experiments cost, the witness does not state, but he does state that the experiments were productive of no good, as they produced neither fat-acids nor glycerin.

Remarks respecting the Belgium patent are unnecessary, as no proof was offered to show that the process was ever introduced into practice in that country.

Having failed to accomplish such results in those countries as would show that his process would be practically useful if applied by the means and in the mode of operation described in the specification, and probably having become convinced that the decomposition of fats by water could be more conveniently effected by modifying the described apparatus so that the fat and water would be exposed to a lower

heat and pressure for a longer time, as expressed in his letter of the twenty-fifth of June, 1856, the patentee left England in August or September, 1859, and returned to the United States.

Conclusive proof that the patentee did not accomplish results in France, which would show that the patented process, applied by the means and in the mode of operation set forth in the specification, is exhibited in the record of the other case between the same parties, which was heard at the same time. Reference is made to the report of the jury upon organic chemistry made the third of December, 1855, to the international exhibition held in Paris, which is made an exhibit in that case.

Chemists, say the jury, liken neutral fats to compound ether, which was the hypothesis put forth by Chevreul in his investigations of such matters. Ether, it was known, may be decomposed by being heated to a high temperature in close vessels with water, and from that persons were led quite naturally to attempt to effect in the same way the decomposition of neutral fats, and they state that experience has confirmed the assumed theory, which, as the jury say, is the origin of all the new processes of saponification to which they refer, and they add that it was the patentee in this case who first had the idea of applying such reaction on a large scale, which they verify by an extract from the specification of the patent;* but, as they report, they visited the manufactory of Monier & Co., where they had the opportunity of seeing the trial of the process in its application to palm oil, and they conclude their report upon the subject as follows:†

"We are sorry to say that the fatty matter on coming out of the apparatus was not at all deodorized, and, more besides than that, that it gave out a strong odor of acrolein. From the point of view of the quality of the products, this arrangement of apparatus, then, by no means realized the end which the author has proposed. Moreover, in our opinion, the

* *Supra*, pp. 307–8.—REP.

† *Supra*, pp. 335–6.—REP.

chances of deterioration of a system of apparatus of any kind which works constantly at a temperature capable of exerting a pressure of ninety to one hundred atmospheres are such that it is hardly possible that industry will utilize it, even if the products which it furnishes were irreproachable."

Made public, as the report was, more than two years before the patentee returned to the United States, it may be presumed that it came to his knowledge before his return.

On the fifteenth of May, 1860, the new patent referred to was granted to him in this country,* which affords the most conclusive proof that the alleged invention is one of a very different character from that described in the specification of the patent in issue in this case, and yet he states under oath that he verily believes that he is the original and first inventor of the improvement, and that to the best of his knowledge and belief it had not been known or used before his application for the patent, which is utterly repugnant to the pretence that anything which is embodied in that patent was included in the one granted to him more than five years before the latter application was filed.

Experience seems to have greatly modified the views of the patentee, as he now characterizes the improvement as a new and improved method of decomposing fatty and oily substances, and alleges that it is applicable either when water alone is used, or when, in addition to water, a portion of alkali is used to aid the chemical action; and he also alleges, that to extract the whole of the glycerin from the fat with a moderate quantity of water, when the lower range of pressure is used, requires considerable time; and he actually states that his invention consists in applying the water to the fat in several successive portions.

High temperature and pressure are represented as the agents of decomposition, but in the view of the complainant as expressed in that specification the high temperature required may be only that which is represented by a pressure of one hundred and twenty to one hundred and fifty pounds to the

* See *supra*, pp. 353–355.—REP.

square inch. Gauges to indicate the required temperature are dropped, and all idea of rapid manipulation seems to be discarded as the terms "a considerable time" or "from two to three hours" are substituted in the place of "ten minutes."

Vessels of very great strength are no longer required, as the patentee states that his invention may be applied to any of the different forms of boilers or tanks used for the decomposition of fats by water at a high temperature or pressure, meaning, doubtless, that the terms high temperature and pressure shall be understood in the same sense in which he employs them in a subsequent part of the same paragraph. Water may be supplied when wanted, and, of course, it is of no moment even if some of it is converted into steam; nor does the specification contain any requirement that the heating apparatus shall be kept entirely full of the mixture, or that neither steam nor air shall accumulate therein during the time required for decomposition, or, in other words, the old specification is divested of every one of its extreme conditions, and the inventor, under his new patent, is left free to claim every means and every mode of operation which the ingenuity of man ever did or ever can invent or discover. Further remarks respecting it, however, may be omitted, as it is not the subject of litigation in this case.

Chemical and mechanical experts were examined as witnesses on both sides in about equal numbers. Those called by the complainant express the opinion that the patented process may be applied by the means and in the mode of operation described in the specification so as to accomplish useful results, and of a character to give commercial value to the new product. On the other hand, those examined by the respondent express opinions widely different, and most or all of them are of the opinion not only that the means and mode of operation described in the patent cannot be so applied that the invention will be practically useful, but several of them state that the attempt to apply it without the exercise of extraordinary precautions must be attended with danger to the operator.

Most of the expert witnesses made experiments in applying the process, and in the course of their examination were required to state the results of the same as supporting their opinions, but experiments made, as most of these were, with small apparatuses admitting only a small charge of the fatty substance or mixture to be treated are not entitled to much weight in determining such an issue, however satisfactory the analysis may have been to the chemist who conducted it, as the issue necessarily involves very difficult questions of mechanics as well as of chemistry.

Taken as a whole the evidence convinces the court that the patentee never did succeed in introducing his invention into practical use by the means and in the mode of operation described in the specification to such an extent as would warrant the court in finding that issue in his favor.

Doubts of a very serious character are also entertained by the court whether the patented process, unless divested of its extreme and unparalleled conditions, can ever be reduced to practice by the means and in the mode of operation described in the specification, so as to be practically useful or safe to the operator, but the proofs are very conflicting upon the point, and inasmuch as it is impossible to foresee what future experiments may do in the way of overcoming the existing doubts and difficulties, the court is not inclined to rest their decision entirely upon that ground.

3. Passing from that, the next question is whether the proofs show that the respondent practiced and used the patented process of the complainant, when properly construed and defined, as charged in the bill of complaint.

Such an inquiry cannot be intelligently considered without first ascertaining what the respondent's process is, as it is obvious that the two processes must be compared in order to determine whether they are substantially the same in principle and mode of operation, or substantially different, which is the criterion by which to determine every such issue as the one under consideration.

Factories have been erected by the respondent for manu-

facturing candles, and he is largely engaged in that business, but he denies that he uses the alleged improvement of the complainant, or any method of decomposing neutral fats embracing the means and mode of operation described in the specification of the complainant's patent. He admits that in his process of manufacture he uses water at high temperature, and steam, and that he also uses such pressure as arises from the expansive force of hot water or steam in a close vessel; that he is engaged in manufacturing candles under and in pursuance of letters-patent granted by the United States of the twenty-fifth of January, 1859, to Wright and Fouché, as subsequently amended, but he denies that he employs either the method, process, or apparatus described in the complainant's specification.

Appropriate means are at hand to enable the court to make the comparison, as the patent under which the respondent works was given in evidence at the hearing.* On the face of the patent it purports to be a new and useful improvement in process for decomposing fats, and it appears that the inventors obtained a patent for the improvement in France two years before the complainant left England to return to the United States, and more than three years before the complainant obtained his new patent in this country, in which he left out all of the extreme and unexampled conditions of the old patent, and in which he stated under oath that he verily believed he was the original and first inventor of the improvement, and that it had never been known or used before his then application was filed.

Wright and Fouché describe their invention in their specification as a new apparatus destined to produce chemical decomposition by means of superheated steam and water, and that it is chiefly intended for the decomposition of fatty substances into fat-acids and glycerin, and they particularly describe the means to be employed and the mode of operation when the patented method is applied to that purpose. Drawings are annexed to the specification, which

* See it, *supra*, pp. 298-304.—REP.

contain figures of the apparatus to be employed in applying the patented process in the decomposition of fatty substances to obtain fat-acids and glycerin.

Two vessels constructed of iron or copper are required for the purpose—one is called the boiler in the specification, which it is said may be of any form, and the other is called the cylinder, and is placed on a base and elevated higher than the boiler. Both are required to be sufficiently strong to resist a pressure of from ten to twenty atmospheres, and of a capacity varying according to the requirements of the manufacture, and they are connected by a tube extending from the bottom of the boiler to the bottom of the cylinder, and also by another tube, called in the specification the tube for ascension to conduct the superheated water from the boiler to the upper part of the cylinder, which terminates in the interior of the cylinder by a rose-jet, or holes may be made in the end of it, so as to distribute the water uniformly in the cylinder and to insure the intimate contact between the superheated water and the fatty substance subjected to the process. Fatty substances to be subjected to the process are placed in the cylinder, which, with other things, is furnished with a pressure gauge to indicate the pressure in the apparatus used with devices to indicate the height and level of the substance and of the water in the cylinder.

Everything being arranged as described for applying the process, the boiler is completely filled with water and the cylinder is filled with water to one-third of its height, and then it is filled to the level of the upper cock, shown in the drawings, with the fatty substances to be decomposed, the latter substance or substances being above the water in the cylinder, which is still not filled, there being a vacant space in the cylinder above the fatty substance. Heat is then applied to the boiler, which is placed in a furnace where it may be exposed to fire. By the direction the heat is to be gradually applied until the pressure gauge indicates a pressure of ten to twenty atmospheres, according to the nature of the fatty substance to be decomposed.

Minute description is then given of what it is claimed

takes place in the apparatus. Superheated water it is said acquires an ascending motion, whence it results that the heated water in the boiler ascends through the described tube into the cylinder, and being forcibly drawn out through the holes in the described rose-jet, passes through the fatty substance to the vacant space above, where the temperature being reduced, it descends through the other described tube to the bottom of the boiler, where it is again heated and then recommences its ascending motion as in the first instance, and so on during the operation.

Suggestion is made that the operation may be continued from five to eight hours, according to the nature of the fatty substance composing the charge and the degree of heat and pressure applied, and it is claimed that the result will be that the fatty substance will be decomposed and that the product will be fat-acids and glycerin.

In their specification they admit that it is a well-known scientific fact that fatty substances may be decomposed by water under the influence of heat and pressure, which could not well be denied in view of the fact that water or its equivalent was used in all the prior processes of saponification, and of the great mass of other evidence to support that proposition which is embodied in this record. Consequently those inventors do not claim to be the discoverers of that scientific truth. All they claim is that their invention consists of an apparatus wherein water and the fatty substances are heated separately in two different boilers, the first boiler being heated in the furnace, called in the specification the source of heat, while the second boiler, called the cylinder, is heated from the first boiler.

Unlike as the two processes are in so many material characteristics, it seems almost a work of supererogation to enter much into details, as the dissimilarity is apparent in the whole description of the respective inventions, except that both contemplate the employment of heat and water in effecting the decomposition of fatty substances; and even in that respect, they are widely different, as the patentees under whose patent the respondent works employ only

moderate heat as compared with the other process, never exceeding in practice what is represented by a pressure of one hundred and eighty pounds to the square inch; and they also employ steam as well as water in a vessel which is never filled with the fatty substance or with water or with both combined.

None of the other characteristic conditions of the complainant's invention are found in the specification of the patent under which the respondent works, full proof of which is shown in the enumeration of those conditions, which are as follows:

1. That the fatty substances to be treated must be first mixed with water equal in bulk to one-third or one-half of the fatty substance.

2. That for that purpose the fatty substance and the water in the proportions mentioned must be put into the described receiving vessel, where it must be subjected to the action of the piston with the perforated disk until it causes the fat and the water to form an emulsion or intimate mechanical mixture.

3. That the mixture so formed must then be driven by a force-pump through the connecting tube into the heating vessel, whether a coil of iron tubing or other convenient vessel, and be subjected to a high degree of heat and pressure for ten minutes to effect the decomposition of the fatty substance.

4. That the heating vessel must be closed and of great strength, so that the requisite amount of pressure may be applied to prevent the conversion of the water into steam.

5. That the heating vessel must be filled with the mixture and kept entirely full of it throughout the operation.

6. That the only means suggested to fulfil the condition is the forcing pump, as the provision is that if necessary the speed of the forcing pump should be increased.

7. That the heating vessel must be kept full of the mixture, so that no steam or air shall accumulate in the heating vessel, and to preserve the intimate mechanical mixture of the fatty substance and the water, as the description does

not suggest any means to supply any deficiency of water in any other way, whether occasioned by evaporation or by its being converted into steam.

8. That the temperature required for the operation, if the fatty substance be such as palm oil, is 510° Fahr., or if such as beef tallow or the tallow of sheep, it must be carried to 610° Fahr., or the melting-point of lead.

9. That the heating vessel should be tested before taken into use by a pressure of ten thousand pounds, and should be of sufficient strength to be safe at a working pressure of two thousand pounds to the square inch.

10. That the apparatus must be furnished with gauges to indicate the required heat to be applied in the operation, and with a refrigerator near the exit end of the apparatus to cool down the product from its high temperature below 212° Fahr. before it is discharged into the receiving vessel.

Compare these conditions with the specification of the patent under which the respondent works and it is clear that he does not use any such method, process, or operation as those described in the letters-patent of the complainant.

Witnesses have been examined by each party as experts, to assist the court in making the comparison, but they differ so widely in their statements as to afford the court but little aid in the solution of the question. Attention is also drawn to the fact that several circuit judges have decided otherwise, to which the proper reply seems to be that the proofs before the court are much fuller than on any former occasion, and that the conclusion stated is the best one the court can form after having given the whole record an attentive examination.

Expert witnesses on both sides have been examined also upon the issue of infringement, but they differ so widely in opinion that their testimony affords the court but little aid in deciding the question, which after all must depend chiefly upon the comparison of the descriptive portions of the two specifications.*

* Hill *v.* Thompson, 1 Webster's Patent Cases, 232; Turner *v.* Winter, Ib. 77.

Two things are not the same under the patent law when one is in practice substantially better than the other in a case where the second improvement is not gained by the use of the same means or known mechanical equivalents.*

Patent laws have for their leading purpose the encouragement of useful inventions. Practical utility is their object, and it would be strange if with such object in view the law should consider two things substantially the same which practically and in reference to their utility are substantially different.†

Slight differences in degree cannot be regarded as of weight in determining the question of substantial similarity or substantial difference, but in all cases the question whether the difference in degree is sufficient or insufficient to prove the alleged infringement is a question of fact to be determined by the jury in an action at law, or by the court in a suit in equity.‡

Differences, however, so great as are exhibited in this record relieve the case, in the judgment of the court, from all doubt, and warrant the conclusion that the process under which the respondent works is substantially different from that of the complainant.

On the twenty-third of November, 1867, the patent of the complainant was extended for seven years from the expiration of the fourteen years for which the original patent was granted. Subsequently, to wit, on the sixth of March, 1871, the complainant instituted a second suit against the respondent founded upon the extended patent, which is number 340 on the calendar. Both cases were heard at the same time. Suffice it to say in respect to the latter that the pleadings, issues, and proofs in the two cases are substantially the same, and that the latter must be disposed of in the same way as the preceding case.

Decrees were entered in these cases respectively in the

* Curtis on Patents, 4th edition, § 330. † Ib. § 331.

‡ Cahoon v. Ring, 1 Clifford, 621.

Circuit Court in favor of the complainant, each of which must be reversed.

DECREE IN EACH CASE REVERSED with costs, and the cases respectively remanded with direction to DISMISS the respective bills of complaint.

Justices SWAYNE, STRONG, and BRADLEY dissented.

Mr. Justice DAVIS took no part in the judgment.

TELEGRAPH COMPANY *v.* EYSER.

Under the eleventh section of the act of June 1st, 1872, "to further the administration of justice" (and which allows any person desiring to have a judgment, decree, or order, &c., reviewed on error or appeal, and to stay proceedings during the pendency of such writ of error or appeal, to "give the *security* required by law therefor within sixty days after the rendition of such judgment, decree, or order," &c.), it is not necessary to make it a supersedeas that the writ of error be served as was required by the twenty-third section of the Judiciary Act, or the supersedeas *bond* be filed, within ten days (Sundays excepted) after the rendering of the judgment complained of. The supersedeas bond may be executed within sixty days after the rendition of the judgment, and the writ may be served at any time before or simultaneous with the filing of the bond.

ON motion, by *Mr. J. Hubley Ashton*, for a supersedeas to the Supreme Court of Colorado Territory and the District Court in and for the county of Arapaho in that Territory. The case was thus:

The Judiciary Act of 1789, after enacting by its twenty-second section that final judgments in the Circuit Court may be examined and reversed, or affirmed in the Supreme Court, the citation being in such case signed by a judge of the Circuit Court or justice of the Supreme Court, and the adverse party having at least thirty days' notice, . . . continues:

"And every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security

that the plaintiff in error shall *prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good.*"

The next section, however, thus proceeds:

"SECTION 23. A writ of error, as aforesaid, shall be a *supersedeas and stay of execution* in cases *only* where the writ of error is served by a copy thereof being lodged in the clerk's office, where the record remains, within *ten* days (Sundays exclusive) after rendering the judgment complained of; until the expiration of which term of ten days executions shall not issue in any case where a writ of error may be a supersedeas."

By an act of 1803, amendatory of the Judiciary Act, "appeals" were made subject to the same rules, regulations, and restrictions as were prescribed in cases of writs of error.

Under these and other enactments,* and under rules of court and judicial decisions, it had been long settled that when the writ of error was not a supersedeas and did not stay execution, the security (in practice a bond) required was to be only to such an amount as should be sufficient to answer all such *costs*, as upon an affirmance of the judgment or decree might be adjudged or decreed to the respondent in error; but that when the writ of error would operate as a supersedeas, the supersedeas bond in the Circuit Court must be taken with good and sufficient security that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. And that such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest, on the appeal.

It had been long equally settled, when the writ of error was meant to operate as a supersedeas, that unless the complete security required was given within ten days, the writ could not be a supersedeas; the approving and filing of the supersedeas bond, or security, within ten days being as much

* Act of December 12th, 1794, 1 Stat. at Large, 404.

obligatory as the service of the writ and lodging the copy within that time; these latter things, though so much matter of form, being made indispensable under the words of the twenty-third section of the Judiciary Act. The supersedeas bond, however, obviously is, to the party having the judgment whereon execution is stayed, the practically important part of the matter.

In this state of things, Congress, by the eleventh section of an act of June 1st, 1872, entitled "*An act to further the administration of justice*," thus enacted:

"Any party or person, desiring to have any judgment, decree, or order of any District or Circuit Court reviewed on writ of error or appeal, and to stay proceedings thereon during the pendency of such writ of error or appeal, may give the *security* required by law therefor *within sixty days after the rendition of such judgment*, decree, or order, or afterward, with the permission of a justice or judge of the said appellate court."

But while this new enactment allowed the party desiring to have a judgment, &c., reviewed, to give the *security* required by law within *sixty* days, it said nothing about the old matter of lodging a copy of a writ of error "in the clerk's office where the record remained," nor indeed anything about making writs of error or appeals a supersedeas at all. It said simply that the party desiring to take a writ of error, &c., "may give the security required by law therefor within sixty days," &c. And the enactment thus contained obviously the germ of certain questions, as *ex. gr.:*

1st. Whether—without repealing any other provisions of the twenty-second and twenty-third sections of the old Judiciary Act, and the practice as settled by judicial decision upon it, and which required the security to be given within ten days—the new act meant only to enlarge the time for giving the *security*, leaving it still obligatory on the party desiring to take a writ of error, to serve as formerly his writ, by lodging a copy "in the clerk's office where the record remained, within ten days," &c., and to *file* within that time the supersedeas bond.

2d. Whether it meant to supersede the entire provision of the old law, with regard to the *time* within which the acts necessary to be done by the party to entitle him to a stay of proceedings were required to be performed, requiring, however, the same old *acts*, including a service of the writ in the form prescribed, to be done. Or finally, and

3d. Whether it meant to dispense entirely with everything, including perhaps the provision that no execution shall issue within ten days, but the most practically important matter, the giving of the security required by law, and meant to enlarge the time for doing this until sixty days after the rendition of the judgment.

Immediately on the passage of this act, Mr. Phillips, confessedly the highest authority not judicial, in a matter of practice, in a new edition of his "Statutory Jurisdiction and Practice of the Supreme Court of the United States,"* called attention to the "questions not without difficulty, suggested by a comparison of the two acts:" the act, namely, of 1872, and the old Judiciary Act. And—while presenting in his book the act at large in order that before the interpretation of it should be passed upon and settled by the judgments of the court, the practitioner who was compelled to construe it, might "decide for himself the questions suggested;" and acknowledging the difficulties and embarrassments necessarily attendant on the expression of his own opinion in advance as to the proper interpretation of its several sections—that acute and learned author inclined, in the absence of judicial decision on the new law, to think—

"That while the law has secured the *right* to stay proceedings by giving security in sixty days, the party is still bound to lodge his writ as required by the act of 1789, within ten days, and that in the absence of a supersedeas bond filed within that period the execution may issue. But that if within sixty days the bond is filed, then the judge may take such action for its stay or recall or give such order as the circumstances of the case may require to stay proceedings."

* Second edition, p. 107.

And this view, in his judgment, was "fortified by the provision that this security may be given *at any time after* the sixty days with the permission of a judge of the appellate court."

The idea which was at the foundation of the learned author's view obviously was, that as this court had frequently decided that the writ of error and the appeal were the means by which the Supreme Court was enabled to exercise the appellate power, matters connected with them could not be matters of form, but raised always a question of jurisdiction, as was shown by the numerous decisions dismissing writs or appeals for the least defect about either.

In this state of things Eyser had obtained a judgment in the District Court in and for the county of Arapaho, Colorado Territory, affirmed in the Supreme Court of the Territory, against the Union Telegraph Company, on the 6th of *September*, 1873.

On the 8th of October following—*that is to say, twenty-eight days afterwards*—the telegraph company took a writ of error, and on *that* day duly served a citation to the adverse party, properly signed by a judge, and filed in the office of the clerk of the court a sufficient supersedeas bond, conditioned and approved according to law.

The writ of error, it will thus be seen, was not sued out "within ten days after rendering the judgment complained of," and, of course, no copy of it was "lodged in the clerk's office where the record remained," nor any supersedeas bond *then* given.

In this state of things, the counsel of Eyser, the plaintiff in the case, assuming, as had been apparently the view of Mr. Phillips, that the act of 1872 only enlarged the time within which "the *security* required by law" might be given, and that what was done by the other side was no supersedeas, applied to the court below for an execution upon his judgment, notwithstanding the supersedeas bond, &c., given by the other side.

Hereupon the telegraph company applied to this court,

representing this last-mentioned fact, and representing further that they were afraid an execution would issue; and moved for a supersedeas to the said court commanding that further proceedings upon the judgment be stayed pending the writ of error.

Mr. Ashton, in support of his motion:

The question is new and of practical importance. We admit its difficulty, and that respect is due to the suggestion thrown out by an eminent writer at the bar to the contrary of the view on which our motion is founded. Professional opinion has been divided as to the meaning of the act, in which, without doubt, as finally passed, some things appear to be very curtly expressed.

But we submit that under the act of 1872, the writ of error having been sued out and served, and security having been given sufficient to cover the amount recovered, within sixty days after the rendition of the judgment, the plaintiff in error has a right to have a stay of proceedings on the judgment.

The act would seem to declare and provide that the party may "stay proceedings" on the judgment *by giving* "the security required by law therefor within sixty days after the rendition of the judgment." It says that any party who *desires* to have any judgment reviewed on writ of error, and, during the pendency of such writ of error, to stay proceedings on such judgment, *may obtain a stay of proceedings* thereon, *if* he gives, within sixty days thereafter, security to cover the amount recovered.

In other words, the act would appear to repeal, by implication, so much of the twenty-third section of the act of 1789 as made the lodging of a copy of the writ within ten days a prerequisite to entitle the party to a stay of proceedings on the judgment. It is not necessary to contend that the act affects that other provision of the twenty-third section of the statute of 1789, which prohibits the issuing of an execution, in any case, until the expiration of ten days after rendering the judgment. That is a prohibition addressed to the court. It disables it from issuing execution within the time limited

Recapitulation of the case in the opinion.

by the act. But the first provision of the twenty-third section, in regard to the operation of the writ as a supersedeas, was addressed to the *party*. It required him to lodge a copy of the writ within ten days, if he desired the writ to be a supersedeas.

The act of 1872, however, renders compliance with that condition no longer necessary, and gives the party a right to stay proceedings upon only one condition, namely, that he give a supersedeas bond within sixty days after the rendition of the judgment. If the requisite security is given within that period, and before execution issues, the writ has the effect of a supersedeas. If execution issues before security is given, proceedings under it are subject to be stayed, if the party afterwards and within the sixty days, files the proper bond.

Any other construction of the act of 1872 sacrifices the substance to the form. The substantial thing, under the old law, was the bond. The lodging of a copy of the writ in the clerk's office was the merest form. It cannot be denied that the act of 1872 has repealed the requirement that the *bond* shall be filed within ten days. And Congress must have intended, when it authorized a party to give security within sixty days, to do away with the most formal and unimportant part of the whole procedure, namely, the lodging of a copy of the writ within ten days.

The eleventh section, we submit, was intended to supersede the entire provision of the old law, with regard to the time within which the acts necessary to be done by the party to entitle him to a stay of proceedings, were required to be performed.

No opposing counsel.

Mr. Justice SWAYNE delivered the opinion of the court.

This is an application for a writ of supersedeas or an order, to the Supreme Court of Colorado Territory, and to the District Court of the first judicial district in and for the county of Arapaho, in that Territory, commanding that further pro-

ceedings upon the judgment in this case be stayed pending the writ of error whereby the judgment was brought into this court for review. The judgment was affirmed by the Supreme Court of the Territory on the 6th of September, 1873. On the 8th of October following the defendant sued out a writ of error returnable to this court. It was duly served and returned. On the day last mentioned a citation was served on the adverse party, and a supersedeas bond in the sum of $12,000, conditioned and approved according to law, was filed in the proper office. The plaintiffs in error represent in their petition that the defendant in error has applied to the Supreme Court of the Territory for an order that execution issue on the judgment, notwithstanding the writ of error and the supersedeas bond, and that they are apprehensive such an order will be made. Hence this application here.

The twenty-third section of the Judiciary Act of 1789 declares "that a writ of error, as aforesaid, shall be a supersedeas and stay of execution in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the judgment remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of."

The second section of the act of 1803 makes appeals "subject to the same rules, regulations, and restrictions as are prescribed in law in cases of writs of error."

The twenty-second section of the act of 1789 requires "that every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good."

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

* 29th Rule of this Court.

must be approved and filed within the ten days prescribed for the service of the writ of error.*

Such was originally the state of the law upon this subject. It frequently subjected parties to great inconvenience and sometimes to serious injury. If the writ were not served and the bond given within ten days from the rendition of the judgment or decree, the defendant, if it were for money, was liable to be compelled to pay, although he might ultimately be victor in the litigation. In such case he would lie out of the use of his money in the meantime, and finally be compelled to take the chance of getting it back, perhaps by further litigation. The facts and the law might be for him and yet the money be lost. If real estate were involved, he was liable to be turned out of possession and to lose all benefit from the property during the same period. It was frequently impossible to serve the writ and give the bond within the ten days, though both might readily have been done if more time were allowed.

The eleventh section of the act of June 1st, 1872, was intended to remedy these evils. That section is as follows:

"That any party or person, desiring to have any judgment, decree, or order of any District or Circuit Court reviewed on writ of error or appeal, and to stay proceedings thereon during the pendency of such writ of error or appeal, may give the security required by law therefor within sixty days after the rendition of such judgment, decree, or order, or afterward, with the permission of a justice or judge of the said appellate court."

These provisions are remedial, and, therefore, to be construed liberally. So far as there is any conflict with the pre-existing rules, the latter must yield. The intention of the lawmaker constitutes the law.† What is clearly implied in a statute is as effectual as what is expressed.‡ It is expressly declared that the supersedeas bond may be executed within sixty days after the rendition of the judgment, and

* Adams et al. *v.* Law, 16 Howard, 144; Hudgins *v.* Kemp, 18 Id. 533.

† United States *v.* Freeman, 3 Howard, 565.

‡ United States *v.* Babbit, 1 Black, 61.

later, with the permission of the designated judge. It is not said when the writ of error shall be served. Its issuance must, of course, precede the execution of the bond; and, as the judge who signs the citation is still required to take the bond, we think it is sufficiently implied that it may be served at any time before, or simultaneously with, the filing of the bond. Indeed, the giving of the bond alone is made the condition of the stay. The section is silent as to the writ. A construction which requires the service to be still within ten days from the rendering of the judgment, is, we think, too narrow. It is sustained by no sufficient reason, and would largely defeat the salutary purposes of the statute. The execution, approval, and filing of the bond are substantial. The filing of the writ is matter of form. Form, under the circumstances, must not be allowed to defeat substance, where the consequences would be of so serious a character. The application of the plaintiffs in error is founded upon this section. As we construe it, their case is within it. The order asked for will be directed to issue, unless this opinion shall render that procedure unnecessary.

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

Writs of error at common law, when bail was duly entered, operated as a supersedeas, but the twenty-third section of the Judiciary Act provides that a writ of error shall be a supersedeas and stay execution *in cases only* where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office . . . within ten days, Sundays exclusive, after rendering the judgment or passing the decree. Such writs, as provided in the preceding section of that act, may be brought within five years after the judgment is rendered or the decree is passed; and that section also provides that every justice or judge signing a citation on any writ of error, as aforesaid, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he

fail to make his plea good.* Under that provision this court decided that the security to be taken from the plaintiff in error by the justice or judge signing the citation must be sufficient to secure the whole amount of the judgment.† Where the writ of error is not a supersedeas and does not stay execution the security required and taken by the justice or judge signing the citation shall be only to such an amount as, in the opinion of the justice or judge taking the same, shall be sufficient to answer all such costs as, upon an affirmance of the judgment or decree, may be adjudged or decreed to the respondent.‡ But where the losing party desires to make the writ of error a supersedeas, and to stay execution, he must sue out the writ and serve the same by lodging a copy thereof for the adverse party in the clerk's office within ten days, Sundays exclusive, after the judgment is rendered or the decree is passed, and give the security required by the prior section in a sum sufficient to secure the whole amount of the judgment, except in certain special cases, as provided in the twenty-ninth rule of this court. Within that period it is the absolute right of the party to adopt the necessary measures to stay execution pending the writ of error or appeal, and in order that he may not be prejudiced in the enjoyment of that right, the same section of the Judiciary Act provides that until the expiration of ten days no execution shall issue in any case where a writ of error may be a supersedeas, and also makes provision, in case the judgment or decree is affirmed, that the court affirming it may adjudge just damages to the respondent in the writ of error for his delay, and single or double costs, at their discretion. Repeated decisions of this court have established the rule that neither a writ of error nor an appeal is a supersedeas under the Judiciary Act unless the required security be given within the ten days mentioned in the twenty-third

* 1 Stat. at Large, 85.

† Catlett *v.* Brodie, 9 Wheaton, 553; Stafford *v.* Union Bank, 16 Howard, 140.

‡ 1 Stat. at Large, 404.

section of the act.* Compliance with the conditions specified in the twenty-third section of the Judiciary Act must be shown in order that the writ of error or appeal may operate as a supersedeas and stay execution, and the rule is also well settled that if the writ of error be not sued out in time to operate as a supersedeas this court cannot award a stay of execution.† Unless the requirements of the act of Congress are complied with, within the ten days allowed for the purpose, no court can make a writ of error or appeal operate as a stay of execution under the Judiciary Act.‡

Grant all that, when the question is tested by the Judiciary Act, still it is insisted that the twenty-third section of the Judiciary Act is repealed by the eleventh section of the act entitled "An act to further the administration of justice,"§ so as to substitute sixty days in the place of ten days as provided in the former act.

By that act it is provided that the plaintiff in error or appellant in such a case "may give *the security* required by law therefor within sixty days after the rendition of such judgment, decree, or order, or afterwards, with the permission of a justice or judge of the said appellate court." Undoubtedly the security required by the twenty-second section of the Judiciary Act to be given to prosecute the appeal with effect may be given within sixty days from the date of the judgment or decree, but the act to further the administration of justice contains no provision whatever making writs of error or appeals a supersedeas, or giving them the effect to stay execution under any circumstances. They have that operation and effect by virtue of the twenty-third section of the Judiciary Act "in cases only where the writ of error is served by a copy thereof being lodged for the

* Stafford *v.* Union Bank, 16 Howard, 135; Same Case, 17 Id. 275; Green *v.* Van Buskerk, 3 Wallace, 448; Silsby *v.* Foote, 20 Howard, 290; Adams *v.* Law, 16 Id. 144; Hudgins *v.* Kemp, 18 Id. 531.

† Saltmarsh *v.* Tuthill, 12 Howard, 387; Wallen *v.* Williams, 7 Cranch, 278; Hogan *v.* Ross, 11 Howard, 294.

‡ The Roanoke, 3 Blatchford, 390.

§ 17 Stat. at Large, 198.

adverse party in the clerk's office" . . . "within ten days, Sundays exclusive," from the date of the judgment or decree. No provision of a different character upon that subject is enacted in the new act, nor does it contain a word repugnant to the language or the requirements of the former provision. Execution is required to be stayed by the former provision for the term of ten days, but the new law does not contain any regulation upon that subject.

None of these suggestions can be controverted, but the argument is that inasmuch as Congress has extended the time for giving the security to prosecute the appeal to sixty days, it follows that the writ of error may be served within that time and still have the effect of a supersedeas, although the only section of the act of Congress which gives it that effect provides that it shall have such an operation *in cases only* where the service is made by lodging a copy of it in the clerk's office for the adverse party within ten days.

Ten days from the date of the judgment or decree is allowed by the former law to serve the writ of error, but the new act allows to a party desiring to stay proceedings sixty days to give the required security; and it even goes further and permits it to be given afterwards, with the permission of a justice or judge of the appellate court.

Questions not without difficulty, says Mr. Phillips, are suggested by a comparison of these two acts, as the time within which the security is to be given is alone acted on by the new act. Based on that suggestion the author inquires, very pertinently as it seems to me, does this alteration carry along with it a change of all the other provisions of the old act as to the lodging of the writ of error in the clerk's office within ten days, and the provision that no execution shall issue within the ten days? The answer to the question, as given by the author, is directly opposed to the opinion just read, which appears to proceed upon the ground that inasmuch as a change has been made in one of the conditions essential to a valid supersedeas it follows that the same change must be considered as made in all the other conditions, even though the new act contains no other language

to express any such intention, which, as it seems to me, reverses the standard rule of construction as expressed in a valuable maxim often quoted and applied in such discussions—*Expressio unius est exclusio alterius.* If Congress had intended to make other alterations in the prior regulations upon the subject it is fairly to be presumed they would have said so, as it is always to be presumed that the legislature when it entertains an intention will express it in clear and explicit terms.* If the legislature intended more, said Lord Denman, in *Haworth* v. *Ormerod*,† we can only say, that according to our opinion they have not expressed it; to which it may be added that the better rule of construction is to hold that the legislature meant what they have actually expressed, unless some manifest incongruity would result from doing so, or unless the context clearly shows that such a construction would be erroneous.‡ Words may sometimes be transposed, but they cannot be inserted.§ Intention, it is true, should govern, but it must be such an intention as the legislature have used fit words to express.‖ Repeals by implication are not favored.¶ On the contrary, the leaning of the courts, says Mr. Justice Swayne,** is against the doctrine, if it be possible to reconcile the two acts of the legislature together. Our best judgment is, says Mr. Phillips, that while the law has secured the *right* to stay proceedings by giving security in sixty days, the party is still bound to lodge his writ, as required by the Judiciary Act, within ten days, and that in the absence of a supersedeas bond filed within that period the execution may issue; and in that view I concur, and consequently dissent from the direction and opinion of the court. Service of the writ of error by lodging a copy thereof in the clerk's office for the adverse party within ten days, *without more*, will not

* Potter's Dwarris, 219. † 6 Queen's Bench, 307.

‡ Rex *v.* Banbury, 1 Adolphus & Ellis, 142.

§ Lamond *v.* Eiffe, 3 Queen's Bench, 910.

‖ Potter's Dwarris, 182; Brewer *v.* Blougher, 14 Peters, 178.

¶ Wood *v.* United States, 16 Peters, 342.

** McCool *v.* Smith, 1 Black, 470.

effect a stay of execution, but if the security required is given within sixty days the supersedeas becomes effectual from the time the required security is given.

KLEIN v. RUSSELL.

1. Where on a trial for infringement of a reissue of letters-patent—the defence being a want of novelty—a defendant requests the court below to direct the jury to bring in a verdict for the defendant (no objection being then or having during the trial been taken by such defendant, that the reissue was for a different invention from that secured by the original patent), and the request for the direction just stated not having been on that ground, but on the ground of the evidence "relative to the alleged prior use of the process, and the novelty, and usefulness, character, and effect of the alleged invention being so decisive as to entitle the defendant to a verdict"—and the request has been refused—the defendant cannot assign as error the refusal to give the direction, because the reissue was not for the same invention as was the original patent.
2. A reissue is *primâ facie* to be presumed to be for the same invention as is the original patent.
3. A direction to find for one party or the other can only be given where there is no conflict of evidence.
4. Where, on a question of novelty in a patented process, a witness has stated that, after the patent, he was using a particular process which he had been using for twenty years before (a process which the defendant affirmed to be the same as the one patented), it is allowable to ask the witness whether the patentee had not forbid him to use what he was then using; the purpose of the question being to show that the patentee had forbid him, and that the witness then disclaimed using the patented process, and said that he had "a way of his own" which he was using.
5. It is allowable to ask a witness of the opposite side, who has referred to and said that he had seen and copied a paper in reference to the expenses of the suit, subscribed by various persons, what were the contents of the paper; the purpose of the question being to show by the answer that the defendants' witnesses were in a combination to defeat the plaintiff and to share the expense of the opposition. It was not necessary prior to the question to call on any one to produce the original paper.
6. When a patent is on trial and the question in issue involves the matter of novelty, utility, and *modus operandi*, it is proper enough to ask what the effect of the patented invention has been.
7. In construing a patent courts should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee, if it can

be done consistently with the language which he has employed; and this applies to a reissue as much as to an original patent.

8. Hence when there has been a reissue on an original patent, and the meaning of the specification and claim in the reissue is not perfectly clear, they may be read by the light of the specification and claim of the original patent, and if they can be sustained consistently with the language there used, be sustained by them.

9. A request which asks the court to charge that if a process patented was known to others more than two years *before the plaintiff applied for his patent*, the plaintiff's patent is void—is rightly refused.

10. Where a specification in describing the mode of treating articles with a patented process (a liquid) said that "it is desirable to heat the latter *to or near the boiling-point*," and there was testimony that if *applied* while in that state to the articles to be treated it would greatly injure them, as also that if it was suffered to cool before being applied it possessed virtue, a request which asked the court to charge that the proper construction of the patent is that if the liquid applied at such a temperature is injurious and pernicious, the patent is void for want of utility, is rightly modified by a change which makes the charge say to the jury that the proper construction is that the liquid should be applied at or near the boiling-point under the *common knowledge of persons skilled in the art* of treating the articles to be affected and to procure the desired results, and in reference to the fact whether* such knowledge would make them wait until it was partially cooled before its application; and that if the application of the liquid at such a temperature as is required by the specification, *under this qualification*, was injurious and pernicious, then that the patent was void for want of utility.

11. Where one claim of a patent was for treatment by a compound composed of a liquid and other ingredients mentioned, a request for an instruction that the addition to the liquid of the ingredients is not patentable if such addition does not change the properties of the liquid, or its effect or usefulness, when applied to the *purposes mentioned in the patent*, is rightly modified by charging as requested with the addition of the words "*or to other like purposes.*"

12. A claim for a compound is not void because the specification does not prescribe exact and unvarying proportions in the ingredients of a compound; some of the ingredients being, *ex. gr.*, coloring matter, which the specification says may "be omitted or modified as desired."

13. A court is not bound to comply with requests for charges on points not raised by the evidence; nor when it has charged generally on the subject in its general charge, to repeat itself by answering requests for the same instructions.

ERROR to the Circuit Court for the Northern District of New York; in which court one Russell, a glover, of Glov-

* See *infra*, p. 444, note.

ersville, New York, brought suit against Klein, glover in the same place, for an infringement of a patent. The plaintiff got a verdict; the defendant having in the course of the trial taken various exceptions, on which the case was now here.

The case was thus:

In August, 1869, Russell obtained a patent for a new and useful improved process of treating leather so as to render it suitable for the manufacture of gloves. The specification said:

"My invention consists in a novel treatment of what is known as 'bark-tanned lamb or sheep skin,' an article used by bookbinders, and which, while sufficiently soft and supple for the purposes of their trade, is too harsh and stiff for glove-making and a variety of other purposes. This objection is removed by my treatment of the article, and the leather rendered so soft and free, yet full in respect of body, as to adapt it, among other purposes or uses, to the making of what are termed 'dogskin gloves.'

"The process I adopt, and which constitutes my invention, is as follows: I take of 'fat liquor' obtained in scouring deerskin after tanning in oil, say ten gallons, and *warm the same by heating to or near the boiling-point.* I then add to such *heated* fat liquor eight ounces of sal soda, twelve ounces of common salt, one pint of soft-soap, and four ounces of Venetian red, and stir and mix these several ingredients with the fat liquor. This forms the treating mixture or compound; and when made in the foregoing quantity will suffice for five or six dozen skins, but of course such quantity may be more or less varied, as may also the proportions of the ingredients; and the Venetian red or other coloring matter is modified or omitted as desired.

"To effect the treatment hereinbefore referred to, of the bark-tanned lamb or sheep skins, I lay said skin on a table or other suitable surface, and *rub the above-described compound* on to both sides of it, using for the purpose a horse or other suitable brush or rubber, by which it can be worked into the skin, that is afterward hung out to dry, and subsequently 'staked,' when the character of the skin will be found entirely changed from harshness to softness, and in other respects, thereby adapting it to the manufacture of gloves of the description previously named,

and to a variety of other purposes for which said skin was not suitable prior to the treatment of it I have herein described."

The claim was thus:

"What is here claimed and desired to be secured by letters-patent is the process *substantially as herein described*, of treating bark-tanned lamb or sheep skin by means of a *compound* composed and applied *essentially as specified*."

On the 1st of February, 1870, Russell got a reissue of this patent under the thirteenth section of the Patent Act,* which permits a patentee, whenever any patent is "inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification as his own invention more than he had a right to claim as new, if the error has arisen by inadvertency, accident, or mistake," to apply for a new patent, and in such case authorizes a new patent to be issued for "*the same invention*," in accordance with the patentee's corrected description and specification.

In the reissue, the invention having been described exactly as in the original patent, the specification said:

"The *principal* feature of the invention consists in the employment of what is known amongst tanners and others as 'fat liquor,' which is ordinarily obtained by scouring deerskins after tanning in oil, but which, when it is not convenient to obtain in this manner, may be produced as a liquor having the same character obtained by the cutting of oil with a suitable alkali.

"In treating leather with the 'fat liquor' it is *desirable* to *heat* the latter *to or near the boiling-point*, and it is *preferred* to use the same in connection with other ingredients. Thus, for instance, there may be added to each ten gallons of such heated fat liquor eight ounces of sal soda, twelve ounces common salt, one pint of soft soap or an equivalent quantity of hard soap, and four ounces of Venetian red, such ingredients to be well stirred and mixed with the fat liquor.

"This forms a good treating mixture or compound, and, when made in the foregoing quantity, will suffice for five or six dozen

* 5 Stat. at Large, 122.

skins; but, of course, such quantity may be more or less varied, as may also the proportions of the ingredients, and the Venetian red, or other coloring matter *be modified or omitted as desired.*

"To effect the treatment hereinbefore referred to, of the bark-tanned lamb or sheep skin, the same should be *well dipped in* or saturated with the *fat liquor* OR *compound* of which fat liquor is the base. This may be done by laying the skin to be treated on a table or other suitable surface and rubbing the *fat liquor* OR *compound* on or into both sides of the skin, using for the purpose a horse or other suitable brush or rubber, by which it can be worked into the skin, that is afterward hung out to dry, and subsequently 'staked,' when the character of said skin will be found entirely changed from harshness to softness, and other respects, thereby adapting it to the manufacture of gloves of the description previously named, and to a variety of other purposes for which said skin was not suitable prior to the treatment of it I have herein described."

The claim was thus:

"What is here claimed and desired to be secured by letters-patent is:

"1. The employment of *fat liquor* in the treatment of leather *substantially as specified.*

"2. The process, substantially as herein described, of treating bark-tanned lamb or sheep skin by means of a *compound* composed and applied *essentially as specified.*"

Upon *this reissue* Russell sued Klein as an infringer. His allegation was that bark-tanned leather before his treatment of it was harsh, "squeaky," and unsuitable for gloves; but that by his process, which, as he alleged, included *heating* the fat liquor, the "squeak" was removed, and the leather rendered soft, pliable, and suitable for a fine glove; that the treatment costing little greatly enhanced the value of the leather, and furnished a cheaper material for gloves than any other of the same quality and value.

The plaintiff's charge of infringement was wholly confined to the use of his process, including heat; and there was no allegation that the defendant had violated the plaintiff's rights by using fat liquor without heating it.

The defence was want of novelty. The case was heard before the district judge, sitting on the circuit. Numerous witnesses in behalf of the defendant swore that the application of fat liquor to leather, for the purpose of making it soft and pliable, had been known and in more or less use for many years; though they did not swear clearly that the application of fat liquor in a *heated* state with the effects which, in *that* state, it produced had been thus known or in use; and there was no proof by them of any use of fat liquor since the plaintiff's process had been patented otherwise than by heating the ingredients. Nor did they all swear so fully that the application and value of it was known in regard to *bark-tanned* skins; a good deal of their testimony relating to *oil-tanned* skins; and some of it to tanning raw skins or skins imperfectly tanned. Some stated that fat liquor heated near the boiling-point and so applied would ruin the skins.

On the other hand, numerous witnesses of the plaintiff, glovers, at Gloversville, and elsewhere, more or less familiar with the glove business in the vicinity, and during the term of alleged prior knowledge spoken of by the witnesses of the defendant, testified that they had no knowledge of such leather as that which the plaintiff produced till about the date of his patent; that then the kind of leather produced by him with heated fat oils, &c., went into extensive use, and that there was a great demand for it in the market. Some of these witnesses stated that heating the fat liquor to the boiling-point and allowing it to cool so as to make it capable of being worked in, did not destroy its properties. And the testimony of the witnesses of the defendant on cross-examination, tended perhaps to show that their knowledge of the means of softening leather at all by fat oils was very imperfect, and that what product was produced from bark-tanned skins was much inferior to that produced by the plaintiff; and was still affected with "squeak," and could not be used for the better sorts of glove; and that while they had experimented with heated fat oil, they had

never brought any of their ideas to a practical use, and had abandoned them.

In the course of the trial, one *Uriel Case*, a witness of the defendant, having testified as to the manner in which skins were treated twenty years ago, which manner the defendant asserted was substantially like the patented process; and having testified further that he had treated skins in this manner for twenty years until after the issue of the plaintiff's patent, was asked by the plaintiff—

"Did the plaintiff come and forbid you going on?"

A question to which the defendant objected as immaterial, incompetent, and as calling for the declaration of the plaintiff. But the court allowed the question to be put; the defendant excepting. The witness stated that the plaintiff did not forbid him, but asked him, "Are you not interfering with my patent?" and that he, the witness, "might have told him that he had a way of his own of fixing bark-tanned skins," "that he did not remember having said anything about its being an old thing, or having been done so twenty years ago."

So too, one *Place*, a witness of the defendant, having disclosed on cross-examination the facts, that he was a glover at Gloversville, in partnership with his brother, and that the plaintiff in the present case had sued *him* and his said brother some time before for an infringement of this same patent; that he, the witness, was now present, as his brother also was, without any payment of witness fees, as a witness for the defendant; that his brother had given him a paper in reference to the expenses of this suit; that he, the witness, had copied it and given it back to his brother, and had not seen it since—was asked by the plaintiff to state the substance of that paper. This was objected to by the defendant: 1st. Upon the ground that the statement of the witness was not the best evidence. 2d. Because no foundation had been laid for the production of the secondary evidence of the contents of the papers in question; and 3d. Because the testimony would be immaterial and incompetent. But the

court held the question admissible, the defendant excepting. The witness answered:

"It was merely in substance to defend the manufacturing interests against Russell's patent. I didn't know who signed it."

The defendant having given evidence of the use of fat liquor upon oil-tanned skins for many years prior to plaintiff's patent, which use, he asserted, was the same, substantially, as the patented process—and the plaintiff having given evidence that the oil-tanned skins referred to in such testimony, were skins dressed "from the raw" in oil, and that the fat liquor used upon them was a part of, or in aid of, the oil-dressing process—and the plaintiff asserting that the use of the fat liquor in the process of oil tanning, was essentially different from the patented process, that in oil dressing, as it is termed, the fat liquor was used in connection with oil for the purpose of *tanning* the pelt, or, in other words, of *converting it into leather from the raw state*, while in the patented process the fat liquor was applied to a skin *already tanned*, and for the purpose of softening and adding new properties to it—called a witness, one Dr. Porter, who stated that he was a physician and chemist, and had examined the patent of Russell and the specifications, and had made tests and experiments in relation to the fat liquor and the process therein described. The plaintiff then asked him:

"Will you state whether the effect of fat liquor applied to oil-tanned and bark-tanned skins is the same."

The defendant objected to the question "as immaterial, the purpose for which the process is used being immaterial, if the process is the same;" but the court allowed the question to be put. The witness answered "that the general effect was the same, but that the combination by the fat liquor with the different skins produced compounds essentially different."

The record, which set out the substance of the evidence, proceeded:

"The evidence here closed, and the foregoing comprised the

substance of all the evidence given *relative to the alleged prior use of the process mentioned in the patent, and the novelty and usefulness, character and effect, of the alleged invention of plaintiff;* and thereupon the counsel for the defendant insisted before the said judge that the said several matters so produced and given in evidence as aforesaid were sufficient, and ought to be allowed as decisive evidence to entitle the defendant to a verdict, and requested the said judge to direct the said jury to find a verdict for the defendant."

The judge refused so to direct the jury, and proceeded to charge; charging among other things—

"That, taking the reissued patent as the basis of the plaintiff's claim, the true construction of the first claim is the employment of fat liquor generally in the state in which it comes from the mills, in the treatment of leather substantially as described; that this claim covered the employment of fat liquor in its pure and simple state.

"That the second claim covered the compound substantially as described in the specification, and that the heating of the liquor was an essential portion of the patented process under this claim.

"That specifications are not addressed to men entirely ignorant of the manufacture to which the specification relates, but to persons skilled in the art to which it appertains; that if, upon reading this specification, parties skilled in the art of dressing skins would know that this heating was for the purpose of making this compound with the fat liquor or for some other purpose, and that it would not do to apply the fat liquor at or near the boiling-point, because it would destroy the leather, such parties would not be misled by it, and therefore it would not be a fatal defect; but that, if persons skilled in the art, in attempting to put the plaintiff's invention in practice under this specification, would ordinarily apply the liquor to the skins used while it was at or near the boiling-point, and thus destroy them, then, of course, this specification was bad.

"That the jury were to consider the claim of the plaintiff as embracing two distinct and independent things; that the plaintiff had a right, if he was the first and original inventor of the use of fat liquor, in its simple and pure state, in this process, to secure that to himself pure and simple, and to hold, as an in-

fringer, any one who used it without adding the other ingredients that went to make up the compound specified; that he had a right to secure the use of the fat liquor and the other ingredients also, but that the difficulty was, so far as this case was concerned, that the party having embraced within his claim the use of fat liquor in its pure and simple state, the question of heat or of the use of the compound was not very important to the interests of the parties, because, if the party claimed in his patent what was not new, or a substantial or material part of which was not new, the patent was void.

"That, if the jury were satisfied that this process of employing fat liquor in the treatment of leather, as substantially described in the patent, was known, that the process had been perfected, and had been used prior to this time of the plaintiff's invention, and that the persons who used the process had an intelligent comprehension of its character and the effect produced, the patent would be void; and that, upon the question of the validity of the patent, they were to look to the proof in regard to the use of fat liquor, substantially in the manner described when fat liquor alone is used, unconnected with the other ingredients constituting the compound, which is covered by the second claim in the patent; that, if the jury should find that this process had been used prior to plaintiff's alleged invention by other persons, as stated and claimed here, that the persons who used the process were aware of the object and character of it, observed and comprehended the beneficial results produced by its use, then the patent would be void upon the ground of want of novelty, although some circumstances might have induced them to abandon temporarily the actual practice of the invention, or the use of the process.

"That if they came to the conclusion that the process claimed in the first specification, that is the fat liquor had been so used substantially as described in the specification before this invention, that was the end of the case.

"But if they should come to the conclusion, upon the other hand, that all these other experiments were failures and were abandoned, then they would come to the question of infringement.

"That the proof in regard to the quality and character of leather produced and the knowledge of it at Gloversville and vicinity, and the want of knowledge of it, was proper for the

consideration of the jury, in connection with the question of whether these experiments were failures; whether this process was perfected and used; or whether the experiments and trials never reached the point of invention and were consequently abandoned. But it was not a question whether the result of the use of the process was as perfect at the time as it is now. It was a question whether, substantially, the same process was used."

The PLAINTIFF'S counsel then requested the judge to charge the jury,

"That the application of heat to the liquor, and the use of liquor, as described, while in a heated state, are essential parts of the invention or discovery; but it is not, by necessary construction, required by the patent that the liquor should be applied to the skins at or near the boiling heat."

The judge declined to thus charge, on the ground that, under the first claim of the patent, neither the heating of the fat liquor nor the application or use of it, in a heated state, was an essential portion of the process.

The DEFENDANT'S counsel then requested the judge to charge,

"1st. That the invention, as described in the patent of February, 1870, is the treatment of bark-tanned sheep and lamb skins by the employment of fat liquor, and if such treatment was known to others, and more than two years before the plaintiff applied for his patent, his patent is void."

Refused.

"2d. That the proper construction of the patent is that the fat liquor should be applied at or near the boiling-point, and if the application of fat liquor at such a temperature to leather is injurious and pernicious the patent is void for want of utility."

Refused in the form put, but modified and given thus:

"The proper construction of the second claim of the patent, so far as it relates to the application of heat, is that the compound composed of fat liquor and the other ingredients required, should be applied at or near the boiling-point, *under the common*

knowledge of persons skilled in the art of treating this leather, to procure softness and pliability [?*], would make them wait until it was partially cooled before its application, and if the application of fat liquor at such a temperature to leather as is required by the specification under this qualification is injurious and pernicious the patent is void for want of utility, and the defendant entitled to a verdict."

"3d. That if the patent did not intend that the fat liquor be applied to leather when at or near the boiling-point, it is, in respect to the application of heat, void for ambiguity."

Refused for the reasons substantially appearing in the modification of the last preceding request.

"4th. That if cooling the fat liquor after boiling is an essential point of the plaintiff's process, then the patent is void for not indicating that such process of cooling is necessary or how it is to be accomplished."

Refused in the form put, but modified and given by adding thereto the words:

"Unless the common knowledge of persons skilled in the art of treating this leather to produce softness and pliability would make the operator wait until it was partially cooled before its application."

"5th. That the addition to the fat liquor of the other ingredients mentioned in the specifications is not patentable if such addition does not change the properties of the fat liquor, or its effect or usefulness, when applied to the purposes mentioned in the patent or specification."

Refused in the form put, but thus modified and given:

"The addition to the fat liquor of other ingredients mentioned in the specifications is not of itself patentable, if such addition does not change the properties of the fat liquor or its effect or usefulness, when applied to the purposes mentioned in the patent or specification, *or to other like purposes.*"

"6th. That the process of preparing leather by means of a

* Something was left out here in the transcript. In the syllabus I have assumed that it was the words, "and in reference to the fact whether such knowledge," &c.

compound, as claimed by the plaintiff, is not patentable, because the proportions of such compound are not fixed, but are in all respects indefinite and uncertain, and may be waived or omitted by the terms of the patent."

Refused.

"7th. That if fat liquor had been used substantially in the manner specified in the plaintiff's patent, for the purpose of rendering any kind of leather soft and supple, more than two years [before the plaintiff applied for a patent], the plaintiff cannot recover, even though it had not been so used in dressing bark-tanned lamb or sheep skins."

Refused. The defendant then modified his request, by substituting "used before the plaintiff's invention" for "before the plaintiff applied for a patent," and thereupon the court charged,

"That the application of an old invention or an old machine to produce a new result, because it is applied to a different material, is not an invention, and the question of novelty is to be determined in the same way. That under the first claim of the plaintiff's, if this particular process was used for the purpose of softening leather, it is not material that it was bark-tanned sheep or lamb skins, if it be used as a process for that purpose."

"8th. That if the object of plaintiff's process was to substitute a less valuable article for that commonly known as 'dog-skin,' and to impose upon the public by representing gloves made of softened sheep and lamb skins as dogskin gloves, the patent is void for fraud, and plaintiff cannot recover."

Refused, and the jury thus charged:

"If the process patented cannot be made useful for any honest purpose, and can be used only for perpetrating a fraud upon the public, and is therefore not useful, but pernicious, the plaintiff cannot recover."

"9th. That if anything claimed by the plaintiff in his patent, as used, was in fact old, the entire patent was void, and plaintiff could not recover."

Refused, except as had already been charged.

"10th. That the patent could not be sustained in the matter

of the mere degree of heat, if the principle of applying heat to any extent is an old process."

Refused, except as had already been charged.

The jury found for the plaintiff.

On a motion made for a new trial (the circuit judge, Woodruff, J., now sitting), that learned justice was of opinion that there was no sufficient reason for disturbing the verdict. He said:

"The conflict of evidence upon the questions of fact was great, and made it a very proper case for submission to the jury. The impression on my own mind, after a careful examination of the testimony, is that the verdict is right, and the plaintiff is in fact the inventor of a new and useful process secured to him by his patent, and that the defendant is a wilful and deliberate infringer of his rights."

Adverting to the construction of the patent, given by the learned district judge, he observed that it differed from a construction which he had himself put upon it on the trial on the circuit of another case by this same plaintiff, against another defendant, on the same patent (*Russell* v. *Place*), and where he instructed the jury that "the use of heat in the treatment of skins was an essential part of the patented process." The learned justice continued:

"But this instruction was not excepted to by the defendant, and he is not, as a matter of right, entitled to question the correctness of the charge to the jury on that point. In that particular, the question on a motion for a new trial is not simply whether the instruction was correct. If it appeared to me to be erroneous and yet it was clear that it worked no injustice to the defendant, it would be no reason for granting a new trial."

The exceptions to the evidence he considered were not well taken; independently of which the evidence led to nothing. And on the principal questions, the learned circuit judge considering, as already said, that the instructions of the court to the jury were, "at any rate, as favorable to the defendant as he had a right to require, and that the

special instructions sought were charged as fully as the law would allow," denied the motion for a new trial. The case was now here in this position.

Mr. Matthew Hale, with whom was Mr. J. M. Dudley, for the plaintiff in error:

I. *The court erred in not directing the jury to find a verdict for the defendant.* 1. The suit was upon the reissued letters. But those letters were void, because they were not granted for the *same invention* as that embodied in the original letters-patent.

2. The original patent had but one claim, substantially the same as the second claim in the reissued patent. This was for the treatment of "bark-tanned lamb and sheep skins" (not leather) with the same compound as in the reissue. The patentee stated in his original specification that it is "a full, clear, and exact description" of the invention. That "his invention consists in a novel treatment of what is known as 'bark-tanned lamb and sheep skins.'" That "the process" which he adopted and which "constituted his invention was as follows;"—here stating the ingredients of the compound and proportions, substantially as stated in the reissue, and describing only the mode of applying the compound to the skin, of crushing it into the skin, as described in the reissue, closing with the claim stated.

In the comparison it will be seen that the original claimed only the treatment of bark-tanned lamb and sheep skins with the specific compound, brushed or rubbed on, neither describing, suggesting, nor indicating the treatment of leather generally at all, nor such skins with fat liquor alone without said ingredients, nor the saturating by dipping. Upon the face of the two patents the old was for treatment with the *compound* alone, and the reissue is primarily for treatment with *simple fat liquor* alone, stating only that the patentee "*preferred* to use the same in connection with other ingredients;" and, after describing the compound, stating that "this forms a good treating mixture or compound," and closing with the second claim. It is simply for such treat-

ment with simple fat liquor as it comes from the mill (which is in no way indicated in the original), interpolated with the sole treatment and sole claim specified in the original, which is now suggested only as a "preferable" way, and secondary to that of fat liquor alone.

3. Another view exists having the same result.* The original letters were for the use of heated fat liquor, and the reissue for the use of fat liquor generally; there being no doubt that fat liquor generally, or in a cold state, had long been used to soften leather; various additions—ammonia, oil, eggs, &c.—being occasionally, though far from always, made to improve its operation. If this was so, the reissue was equally void. Now, what in the reissue did the patentee claim as his discovery; the use of fat liquor, or the use of heated fat liquor?

(*a*) The invention is alleged to consist in a novel treatment of bark-tanned sheepskins, by which treatment they are rendered soft and free, and suitable to be manufactured into dogskin gloves. This is the result or effect, merely, and gives no light as to the process.

(*b*) The "principal feature of the invention" consists in the employment of fat liquor, obtained from the scouring of deerskins, or manufactured by a process described. The employment of fat liquor, hot or cold, strong or weak, natural or manufactured, is the principal feature. So long as fat liquor in any condition is used, the principal feature is preserved.

(*c*) In treating the leather with the fat liquor, it is "*desirable*" to heat the liquor, and it is "*preferred*" to use the same in connection with other ingredients, to wit, the soda, the salt, and soap, as specified.

The words "desirable" and "preferred" are used to express the same idea, and each is used in contrast with essential or necessary; the meaning is this: "It is desirable to use the liquor heated, that is, the effect will be produced

* This view was taken by the Circuit Court for the Northern District of New York in Russell *v.* Dodge.

the more speedily, or with less trouble, or with less expense, but it is not necessary to heat the liquor, and to use the liquor in connection with the other ingredients is the preferable way, but it is not the only way. You may still accomplish the purpose, by using the liquor without the other ingredients and without its being heated."

"This forms," the statement adds, "a good treating mixture or compound." This, again, is an indication of a preference, but not of a necessity—a *good* treating mixture.

And again, "To effect the treatment . . . the skin should be . . . saturated with the fat liquor or compound of which fat liquor is the base." The fat liquor, without reference to its state or condition, or the compound, is here stated as the essential element, and the same expressions are again used in describing the manner in which the liquor shall be applied. It is not required that the liquor shall be heated. After thus describing his process, the patentee sums up his claim under the two heads already stated.

It is the settled rule in this country that the patent and the specification are to be construed together, and that the specification may control the general terms of the patent.* A reference to the claim gives the precise information required of the essentials of the patent, to wit:

1st. "The employment of fat liquor in the treatment of leather substantially as specified," making no distinction between its employment when cold or when heated; and 2d, the process of treating the skins by means of a compound composed essentially as specified.

Now this reissue is, in this respect, quite different from the original patent. In describing his process, the patentee *there* says:

"I take of fat liquor obtained in scouring deerskins, after tanning in oil, say ten gallons, and warm the same by heating it to or near the boiling-point. I then add to such heated fat liquor eight ounces of sal soda," &c.

And his claim is for "the process substantially as herein

* Curtis, § 221.

described, . . . by means of a compound composed and applied essentially as specified." In this description the heating of the fat liquor is not merely "desirable" or to be "preferred," it is an essential element of the process. But this specification the patentee amends by making his claim on the reissue reach the liquor itself, whether cold or hot, and making it reach the liquor whether employed as a compound or alone. He abandons his original claim, except so far as it is redescribed in the reissued patent.

The authorities show that the words "desirable" and "preferred" are not essential parts of the description of the article patented.* The patentee may have intended to take a patent for use of heated fat liquor, but he has failed to express it in his description and specification.

II. *The court erred further in not complying with our requests for instructions. Let us examine them:*

1*st request.* The court refused to charge that the invention claimed by the plaintiff below, in his reissued patent, was the treatment of bark-tanned sheep and lamb skins by the employment of fat liquor; and that if such treatment was known to others, and more than two years before the plaintiff applied for his patent, his patent was void, and the defendant entitled to a verdict.

The construction of the patent, as indicating only the use of *fat liquor* in dressing leather, whether hot or cold, alone or with other ingredients, as the alleged invention of the patentee, has already been shown to be the true one. Indeed, the patentee having, in surrendering his original patent and procuring the reissue, necessarily sworn that the original patent was *inoperative and invalid* by reason of a defective or insufficient specification, and the original patent having described a compound precisely like that recommended in the reissue, and indicated much more clearly than the reissue, that the application of heat was an essential

* Booth *v.* Kennard, 1 Hurlstone & Norman, 527; Stevens *v.* Keating, 2 Webster's Patent Cases, 172; Curtis, § 258.

element in this invention, he is now estopped from asserting that the same identical thing recommended in the specification and second claim of the reissue is valid and operative.* Unless the defendant in error was the *inventor* of the use of *fat liquor* for the purpose indicated, he took nothing by the reissue.

The second branch of the request, that knowledge of this treatment by others more than two years before *plaintiff applied for his patent* rendered the patent void, was also correct.†

The charge of the court had limited the effect of knowledge by others to two years before the *alleged invention*, which was erroneous.

2d, 3d, and 4th requests. The court below also erred in refusing these three requests to charge in relation to the construction of the patent, so far as it related to the application of heat, and in modifying the instructions requested as it did.

The patent recommended that the fat liquor be heated "to or near the boiling-point." The natural inference was that it was to be applied in that condition. If applied at such temperature, there was evidence that it would be *destructive* to the leather. But the judge refused to instruct the jury that the patent was void for want of utility, if they believed this evidence, except with a modification, which really left the construction of the specification in the patent to the jury.

We insist (under the third and fourth requests) that the specification in the patent either required the liquor to be applied at or near boiling-heat, or else utterly failed to specify at what heat it should be applied, and that for this reason the patent was void in respect to the application of heat.‡

5th request. The court erred in refusing to charge as here requested, with reference to the patentability of the addition to the fat liquor of the other ingredients mentioned in the specifications, and in modifying the request by adding thereto

* Moffitt *v.* Gaar, 1 Fisher, 613.

† Act of 1836, § 15; Act of 1839, § 7; 16 Stat. at Large, 208, § 61.

‡ Tyler *v.* Boston, 7 Wallace, 327.

the words "or other like purposes." The "purposes" of the process are clearly set forth in the patent. They were to remove the hardness and stiffness of bark-tanned skins. The evidence was that the other ingredients named in the patent did not change the properties of "fat liquor," which is simply *oil cut with alkali.*

The defendant was entitled to a charge that if the ingredients named when added did not change the properties of fat liquor, or its effect or usefulness, when applied to *the purposes mentioned in the patent or specification*, such addition was not patentable. The words "or other like purposes," added by the court, left the jury to *conjecture* that, for *some other* purpose than making leather soft and pliable, the addition of these ingredients might change the effect of the fat liquor and be patentable.

6*th request.* The court erred in refusing to charge that the process of preparing leather by means of a compound, as claimed by plaintiff, was not patentable, because the proportions were not fixed, but were indefinite and uncertain, and may be waived or omitted by the terms of the patent.

By referring to the specification in the patent, it will be seen that this request should have been complied with. "It is *preferred* to use the same in connection with other ingredients." Then after giving certain proportions, it goes on to say, "but of course such quantity may be more or less varied, as may also the proportions of the ingredients, and the Venetian red or other coloring matter, *be modified or omitted* as desired." In other words, everything was left to the taste and fancy of the user, who was at liberty, under this patent, to use any or all these ingredients in such proportions or manner as he pleased, or to omit them altogether. The description of the pretended "compound" was too vague and uncertain to sustain a patent.*

7*th request.* The court erred in refusing to charge the jury that if fat liquor had been used substantially in the manner

* Tyler *v.* Boston, 7 Wallace, 327; Wood *v.* Underhill, 5 Howard, 1; Parker *v.* Stiles, 5 McLean, 54.

specified in the plaintiff's patent, for the purpose of rendering *any kind* of leather soft and supple, more than two years before plaintiff applied for a patent, the plaintiff below could not recover, even though it had not been so used in dressing bark-tanned lamb or sheep skins.

This request was conceded by the learned judge to be correct in principle, so far as it referred to the use of the process for the purpose of softening any leather, but he refused to charge that such prior use for two years before the plaintiff below *applied for his patent* was sufficient.

The fact that the chemical combination of fat liquor with bark-tanned skins may be different from its combination with oil-dressed leather, as asserted by Dr. Porter, does not change the rule, since he states, and all agree, that the general effect is the same upon all skins or leather, namely, to make them soft and pliable.

9*th request.* The court erred in refusing to charge, when requested, that if anything claimed by the plaintiff in his patent as new was, in fact, old, the entire patent was void, and the plaintiff could not recover.

10*th request.* The court below erred in refusing to charge the jury that the patent could not be sustained in the matter of the mere *degree* of heat, if the principle of applying heat to any extent was an old process.

Witnesses had testified that they had used warm fat liquor for the purpose mentioned in the patent, but none testified to having heated it "to or near the boiling-point," as recommended in the specification of the patent. The request was, in effect, that the raising the heat of the fat liquor to the *boiling-point* did not of itself constitute an invention which was the subject of a patent, and the defendant below was entitled to this instruction.*

III. The reasons for our exceptions to evidence appear in the exceptions themselves.

* Brooks *v.* Bicknell, 3 McLean, 262; McCormick *v.* Manny, 6 Id. 557; Everson *v.* Ricard, Law's Digest, 181.

Argument in support of the reissue.

Mr. H. E. Smith, contra:

I. *The point that the reissue is not for the same invention is not well taken.*

1. It was not made in the court below, and is not, therefore, now available to the plaintiff in error. The general request to direct a verdict for defendant did not call the attention of the court to this point. The Supreme Court will not express an opinion upon a matter of defence not brought to the consideration of the court below.*

2. The original specification did embrace warm fat liquor as the principal thing in his invention; but it was defective in omitting to make the proper claim.

3. Variations from the description in the original specification do not necessarily imply that the reissue is for a new or different invention, for the right to surrender and obtain a new patent is given for the purpose of enabling the patentee to give a more perfect description, and cover what he has invented; and the second necessarily varies from the first.

And the defect entitling the patentee to a reissue may be in the specification or claim, or both.†

4. A reissued patent is presumed to be for the same invention as that included in the original patent. But such inference or presumption in respect to identity is open to be contradicted by proper evidence, which should be submitted to the jury.‡

The argument of the plaintiff in error on his exceptions to the judge's refusal to direct a verdict for the defendant raises the question of—

The construction of the patent. But if any error occurred in the construction of the patent in the court below, it was in favor of the plaintiff in error, and he did not except to it or ask a different construction. He cannot now be heard to

* Bell *v.* Bruen, 1 Howard, 169.

† O'Reilly *v.* Morse, 15 Howard, 112; Battin *v.* Taggert, 17 Id. 84; Carver *v.* Braintree Manufacturing Co., 2 Story, 439, 440.

‡ Stimpson *v.* Westchester Railroad, 4 Howard, 404; Allen *v.* Blunt, 2 Woodbury & Minot, 139.

complain. Still, as in the litigations under this patent, there has occurred a disagreement among the judges in the Circuit Court, in regard to the construction of the specification in an important particular, and as there are other suits pending which involve the same question, it is desirable to have an authoritative construction, and we consent to argue the question.

Our construction is that the patent covers two things: 1. A novel treatment of bark-tanned sheep or lamb skins, by heated fat liquor, substantially as described in the specification; and 2, the treatment of such skins with a heated compound, composed and applied substantially as specified.

The other construction is the one given by the court below and now adopted by the plaintiff in error, that the specification embraces two claims:

1. The use of fat liquor, pure and simple, as it comes from the mills, substantially as described in the specification; and—

2. The compound substantially as described, and that the heating of the liquor is an essential portion of the process under this claim.

The point of difference is, the *heating* of the fat liquor under the first claim, when it is used without the other ingredients; the patentee asserting that by a fair construction of the patent, it covers only heated fat liquor, while on the other side it is asserted that it covers the use of *cold* fat liquor as it comes from the mills.

The patent should receive the construction given to it by the patentee, for the following, among other reasons:

1. If it will bear either construction, it should receive the one most favorable to the patentee; that which will be most likely to protect the invention. The *intention* of the patentee is to be sought in giving construction to the language; and for this purpose particular phrases must not be singled out, but the whole specification and claim must be taken together.* 2. If it appear with reasonable certainty, either

* Whitney *v.* Emmett, Baldwin, 303, 315; Ames *v.* Howard, 1 Sumner, 482, 485; Page *v.* Ferry, 1 Fisher, 298, 302.

from the words used or by necessary implication, in what the invention consists, it will be adjudged sufficient, and the rights of the patentee will be protected, however imperfectly or inartificially he may have expressed himself.

In construing the claim it is proper to look at the original patent, and in the original specification it is clear that the patentee intended the use of fat liquor in a *warm* state only.*

Now a reissue must be for the *same invention.* It is not to be presumed that the patentee intended to embrace in the reissue what he had not invented or described in the original, and thus destroy his patent.

The power and duty of granting a new patent for the original invention, upon a surrender of the old, is intrusted to the Commissioner of Patents, and his decision is not re-examinable by the courts, unless it is apparent upon the face of the patent that he has exceeded his authority, or unless there is a clear repugnancy between the old and the new patent, or unless the new has been obtained by fraud or collusion between the commissioner and the patentee. The presumption upon all these points is in favor of the regularity and validity of the reissue.†

By the well-settled rules of construction already referred to in this discussion, the court will not give a construction that will create a repugnancy between the old and the new, and thus invalidate the patent, if the language of the specification and claim, taken together, and in connection with such extraneous facts as may aid in disclosing the intention of the patentee, will admit of another construction.

Independently of all this, the language and structure of the specification require the construction set up by the patentee.

The specification commences by stating in what the invention consists, in these words: "A novel treatment of what is known 'as bark-tanned lamb or sheep skins,' which in

* Johnson *v.* Root, 1 Fisher, 351, 355.

† Potter *v.* Holland, 4 Blatchford, 238, 242; Battin *v.* Taggert, 17 Howard, 74, 84; O'Reilly *v.* Morse, 15 Id. 62, 112; Hussey *v.* McCormick, 1 Fisher, 509, 515.

the bark-tanned state is too hard and stiff for glove-making, but when subjected to this treatment is rendered suitable for gloves." Stated generally, then, the invention consists of a *novel treatment* of a certain kind of skin, a *process* or *processes;* and the manner and character of this treatment or process is to be thereinafter described.

The specification then proceeds to describe *the novel treatment* or *process* constituting the invention, and begins by saying that the "*principal feature*" of the invention consists of the employment of fat liquor. It does not say that the *whole* invention, or the whole of *any* or *either claim* consists in the mere employment of fat liquor; but that this is a *principal* feature. The expression "*principal* feature" implies that there are other features. It is pertinent to observe also, in view of certain criticisms upon the specification to be noticed hereafter, that fat liquor as the *principal* feature, applies to the compound or *second* claim as well and as fully as to the *first* claim. As, therefore, the fat liquor is to be heated when used in the compound, no inference against its heating when used alone can be legitimately drawn from the statement that the employment of fat liquor constitutes the *principal* feature of the invention. If it intends *heated* fat liquor in one case, as is conceded, it must in the other also.

The specification then goes on to describe further the "novel treatment," and the *other* features of the invention, and says: "In treating leather," that is, the leather before-mentioned, "bark-tanned lamb or sheep skins," "with fat liquor, it is desirable to heat the latter to or near the boiling-point, and it is preferred to use the same," *i. e.*, fat liquor *heated*, "in connection with other ingredients." This plainly says, "in treating the leather with *fat liquor*," not with the compound, "it is desirable to heat the latter," *i. e.*, the *fat liquor alone*, "to or near the boiling-point." It will be observed that the heating of the liquor is mentioned before a word is said about other ingredients; and there can be no doubt that the patentee intended the heating of the fat liquor as a part of his process.

In prescribing the compound, the specification says: "There may be added to each ten gallons of such *heated fat liquor*," thus showing clearly that the patentee intended *heated* fat liquor, both when used alone and as the base of the compound.

Afterwards, in speaking of the treatment of the skin, the specification says: "The same should be well dipped in or saturated with the *fat liquor*, or *compound* of which the fat liquor is the base."

While this includes the treatment of the skins with the fat liquor alone, and also with the compound, of which *heated* fat liquor is the base, it does not repeat the word "heated;" hence the omission of the word "heated" when applied to the immersion of skins in the *fat liquor alone*, does not afford a presumption that the patentee did not intend *heated* fat liquor under the first claim. On the contrary, it affords a strong presumption of the reverse.

The construction asked by the patentee is confirmed by reference to the formal claim at the close of the specification. Read in connection with and construed in the light of the whole specification, it is twofold: 1. "The employment of fat liquor in the treatment of leather, *substantially* as specified," that is to say, *heated* and applied to the skin substantially as specified. 2. The process, "substantially as herein described, of treating bark-tanned lamb or sheep skins, by means of a compound composed and applied essentially as specified," that is to say, a *heated* compound composed and applied essentially and substantially as specified.

It is said that the words "*desirable*" and "*preferred*" in the specification are used to express the same idea, and each used in contrast with *essential* or *necessary*. This is a mistake.

The word "*desirable*" applies to the use of the fat liquor, whether alone or in the compound, and refers to the *degree* of heat and not to the *fact of heating*. The patentee does not mean to say that it is not *essential* or *necessary* to *heat* the fat liquor, but that it is not essential to heat it *up to or near the boiling-point*. The language is not the most apt that might have been employed to express the intention, but reasonably

plain nevertheless. The draughtsman evidently assumed the *fact* of heating, and sought to describe the temperature without limiting it to an exact degree. This view is strengthened by reference to the original specification, where the expression is "*warm the same by heating to or near the boiling-point.*" Here there is no question about the *fact* of heating being essential; and the formula, substantially, was transferred to the reissued specification and there applied to both claims. If, from the language employed, there is no question about the necessity of heating under the old patent, and none when applied to the compound under the new, why should the same language receive a different construction when applied to fat liquor alone?

The word "*preferred*" applies to the compound, and means simply that the inventor prefers it to the use of the heated fat liquor alone, and hence he describes and patents it.

This word may be said to be used in contrast with *essential* or *necessary*, in reference to producing the desired result; that is to say, such result may be produced by the heated fat liquor alone, and that is claimed and patented; but the inventor prefers the compound, and that is claimed and patented also.

II. *As to the requests for instructions.*

1. The first request does not correctly or fully describe the invention. The employment of fat liquor, merely, is not the whole of the invention. It is the employment of fat liquor in the *condition* and *manner* described in the specification. The request erroneously assumes that a knowledge by others of the thing patented, more than two years before *application for the patent*, renders it void. If a prayer for instruction be not correct *in its very terms*, it is not error to refuse it. The charge to the jury covered the ground of this request, and embraced all the defendant below had a right to ask upon the point involved.

2. The second request was properly refused, and the modification was correct. The court had already charged on this point, and the charge and the modification of the re-

quest under consideration, correctly present the law applicable, and were sufficiently favorable to the defendant below. Whether the specification is sufficient, within this rule of law, is a question of fact for the jury; and in the case at bar it was properly submitted to the jury.*

3. The refusal to comply with the third request was correct, for the reasons given in considering the second request, and also on grounds hereafter stated in considering the sixth request.

4. It would have been erroneous to charge as requested by the fourth request without the modification. The question here involved is substantially the same as that spoken of in considering the last two requests, and also hereinafter spoken of in considering the sixth request.

5. In reply to the fifth request, the charge was in accordance with the request except in the addition of the words, "or to other like purposes." If the request without this addition was proper as far as it went, the addition was proper, unless the *mere purpose* or *application* of a contrivance or process is patentable, which will not be asserted. If the addition was *right*, the request without it was *wrong*. The patent was *primâ facie* evidence of utility, and there was no conflicting evidence on this point. Hence, the request involved only an abstract question.

6. The sixth request presents one question only: "Is this claim void for uncertainty, because the specification does not prescribe exact and unvarying proportions in the ingredients of the compound?"

The formula given in the specification gives fixed and certain proportions in the compound, as a general rule. And the specification goes on to say that the proportions of the ingredients may be more or less varied, and the Venetian red or other coloring matter be modified or omitted, as desired. It evidently does not mean that all the ingredients may be omitted; for this part of the specification is treating

* Judson *v.* Moore, 1 Fisher, 544, 547; Davis *v.* Palmer, 2 Brockenbrough, 298, 308; Wood *v.* Underhill, 5 Howard, 1, 4; Battin *v.* Taggert, 17 Id. 74, 85.

of the *compound*, and if all the ingredients were omitted it would be no compound, but fat liquor, simply. The other ingredients may be varied, but the Venetian red or other ingredients may be omitted, if desired. A variety of colors are required in glove leather, and the use or omission of the coloring matter, as well as the kind to be used, would, it is obvious, depend upon the color of the leather desired in a particular case; hence, the impracticability of prescribing in the patent any exact and invariable rule for its use. If the patent fixed the exact and invariable proportions of the other ingredients, it would enable any one to produce the same results, and use the invention with impunity by a slight variation of the proportions, not affecting essentially the character of the compound. In this, as in other respects, the specification is addressed to persons "skilled in the art or science to which the invention appertains." Where the patentee gives a certain proportion as a general rule, which on the face of the specification seems generally applicable, the patent will be valid, though some small differences may be occasionally required.*

7. The seventh request referred to a prior use more than two years before *plaintiff's application for a patent*, and the court properly refused so to charge. The defendant then modified his request, and the court charged substantially as requested.

8. The eighth request is not insisted on in argument. It was purely abstract and speculative. The court was not bound to notice it at all, though it did notice it, and in a way which so far as the defendant is concerned, is unexceptionable.

9. The charge contains just what the ninth request requested. The judge was not bound to repeat himself.

10. The tenth request was to charge "that the patent could not be sustained in the matter of the mere degree of heat, if the principle of applying heat to any extent was an old process." So far as this point involves the question of novelty,

* Wood *v.* Underhill, 5 Howard, 1; Ryan *v.* Goodwin, 3 Sumner, 514.

the charge had fully covered the ground, and in accordance with the request. If it was intended by the request to elicit a ruling that a patent could not be sustained for a *mere degree* of heat, then it was, in that particular, abstract and speculative. The specification does not fix any exact degree of heat, and the plaintiff below did not ask to have his patent sustained on that ground.

III. *Exceptions to evidence.*

The question to *Uriel Case* was proper as introductory to the witness's statements at the interview, and as proof of the fact elicited by his further cross-examination, that when charged with an infringement of the patent, he made no pretence of prior knowledge, but claimed "a way of his own," &c., or, in other words, that he did not then infringe.

The question to *Place* was proper also, its object, obviously, having been to show a combination among the defendants' witnesses, including the witness under examination, to defeat the patent and share the expense, thus affecting their credibility.

The objection that it was not the best evidence is untenable. The question was upon a collateral matter arising incidentally in the progress of the trial, affecting merely the credit of the witness.

The witness did not know who signed the paper, and the evidence complained of being, therefore, harmless, error cannot be predicated of its admission.

On the state of the case the question to *Dr. Porter* was proper also, for while it is true that the mere purpose or effect of a process is not patentable, it is equally true that the effect or result produced is always proper to be considered when a patent is on trial. Indeed, it is often most important in determining the questions of novelty and utility. The result, if greatly more beneficial than that produced by old contrivances, reflects back and tends to characterize the importance of the change. Our question to Dr. Porter tended to solve the question raised by the defendant's evidence, whether or not the patented process was or

was not the application of an old principle or process to a new and analogous use. However, Dr. Porter's answer, if it was not harmless in itself, became harmless under the charge of the court in reply to the defendant's request.

Mr. Justice SWAYNE delivered the opinion of the court.

The action was for the infringement of a reissued patent. The plaintiff in error was the defendant in the court below. A verdict and judgment were rendered against him. In the progress of the trial he took numerous exceptions. We have considered them, and will proceed to dispose of the case.

There was no error in the refusal of the court to direct a verdict for the defendant. The evidence is fully set out in the record. It was well remarked by the circuit judge, in deciding the motion for a new trial, that "the conflict of evidence upon the questions of fact is very great, and made it a very proper case for submission to the jury." Where it is entirely clear that the plaintiff cannot recover, it is proper to give such a direction, but not otherwise.

It is insisted, in this connection, that the reissue is void, because it was not for the same invention as the original patent.

This point does not appear to have been taken in the court below, and, therefore, cannot be made here. No instruction was asked or given touching the subject. It is to be presumed, until the contrary is made to appear, that the commissioner did his duty correctly in granting the reissued patent.

The question put to Uriel Case, and his answer, were within the proper limits of a cross-examination.*

The question to Place was proper, and his answer was not objected to. His answer as to his connection with the paper to which he referred also passed without objection. But it is insisted that it was error to require him to state its con-

* Johnston *v.* Jones, 1 Black, 210.

tents, no notice to produce it having been given. To this there are two answers: It was an incidental and collateral matter drawn out to test the temper and credibility of the witness. It in no wise affected the merits of the controversy between the parties. The witness stated that he did not know who signed the paper. The contents could not, therefore, have operated to the injury of the defendant.

The question to Porter involved the novelty, utility, and *modus operandi* of the alleged invention of the plaintiff, and the answer was competent evidence.

Elaborate instructions covering the entire case were given to the jury. None of them were excepted to by the defendant.

Numerous instructions were asked by his counsel. An exception was taken in relation to each one of them, and is assigned for error.

We shall refer to them as they are numbered in the record.

I. That the patent is for "the treatment of bark-tanned sheep and lamb skins, by the employment of fat liquor, and if the jury believe such treatment was known to others more than two years before the plaintiff applied for his patent, his patent is void." This instruction was properly refused. It stated inaccurately the rule of law which it involved. A patent relates back, where the question of novelty is in issue, to the date of the invention, and not to the time of the application for its issue. The jury had already been sufficiently instructed upon the subject. The instruction assumes that the reissue was for the use of fat liquor, without reference to the point whether it were hot or cold. This renders it necessary to construe the patent with a view to the solution of that question.

The original specification declared that the invention consisted "in a novel treatment of bark-tanned lamb or sheep skins." The patentee said: "The process I adopt, and which constitutes my invention, is as follows: I take of 'fat liquor,' obtained in scouring deerskins after tanning in oil, say ten gallons, and warm the same to or near the boiling-point. I then add to such heated fat liquor eight ounces of

sal soda, twelve ounces of common salt, one pint of soft soap, and four ounces of Venetian red, and stir and mix these several ingredients with the fat liquor." The claim is as follows: "What is here claimed, and desired to be secured by letters-patent, is the process substantially as herein described of treating bark-tanned lamb or sheep skins by means of a compound, and applied essentially as specified."

With this specification and claim, it was apprehended that the patent did not cover the use of heated fat liquor *alone*—which the patentee claimed as a part of his invention—but that it would be held to cover the use of such heated liquor only in combination with the ingredients specified. If so, the omission of any one, or all, of the ingredients would have given immunity to an infringer. To remedy this defect the reissue was procured. In the specification in that case the patentee says: "My invention consists in a novel treatment of what is known as bark-tanned lamb or sheep skin."

"The principal feature of my invention consists in the employment of what is known amongst tanners as fat liquor, which is ordinarily obtained by scouring deerskins, after tanning in oil, but which, when it is not convenient to obtain in this manner, may be produced as a liquor having the same character—obtained by the cutting of oil with a suitable alkali. In treating leather with the 'fat liquor,' it is desirable to heat the liquor to or near the boiling-point, and it is preferred to use the same in connection with other ingredients. Thus, for instance, there may be added to each ten gallons of such heated fat liquor, eight ounces sal soda, twelve ounces common salt, one pint of soft soap, or an equivalent quantity of hard soap, four ounces of Venetian red; such ingredients to be well stirred and mixed with the fat liquor."

The claims are as follows:

"1. The employment of fat liquor in the treatment of leather, substantially as specified.

"2. The process, substantially as herein described, of treating bark-tanned lamb or sheep skins by means of a

compound composed and applied essentially as specified." The mode of application prescribed in both specifications is the same.

The first claim, it has been argued, is for the use of fat liquor generally, hot or cold. If it be for the former only, the patent may be valid; while, if for the latter, it may be too broad, and, therefore, void.

The counsel for the patentee insists that the claim is limited to fat liquor in a heated state. The subject is to be examined in the light of both specifications and of both sets of claims. The court should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee himself, if this can be done consistently with the language which he has employed.

The original specification and claim were clearly confined to heated fat liquor. The law* required that the reissue should be for the same invention as the original patent. It is to be presumed the commissioner did his duty. If the reissue be for fat liquor generally, it is for a thing then patented for the first time, and the patent involves a violation of the law.

The second specification says: "The principal feature of the invention is the employment of 'fat liquor.'" It then proceeds to direct how the liquor shall be prepared. In doing this it is said "it is desirable to heat the liquor to or near the boiling-point."

This is the foundation of the first claim, which is for "the employment of fat liquor in the treatment of leather, *substantially as specified.*" The heated condition of the liquor is before distinctly specified, and if it be applied in any other state its condition will not be as specified, either exactly or substantially. After the words "boiling-point," the specification proceeds: "And it is preferred to use the same in connection with other ingredients. Thus, for instance, there may be added to each ten gallons of such *heated* fat liquor," &c. The ingredients are then named. This is the ground

* Act of 1836, § 13, 5 Stat. at Large, 122.

of the second claim, to wit: "The process substantially as herein described of treating bark-tanned lamb or sheep skins by means of a compound composed and applied essentially as specified." Here *heated* fat liquor is clearly one of the constituents of the compound. A chemist proved on the trial that heat was an element essential, in a large degree, to the efficacy and utility of both the simple liquor and the compound, when so applied. We think the better opinion is, that the first claim was intended to cover, and does cover, only the use of heated liquor.

The first instruction might well have been refused for the reason, also, that it was too broad as to this point.

II. The next prayer and the action of the court are thus set forth in the bill of exceptions:

"2. The defendant's counsel also requested the said judge to charge that the proper construction of the patent is that the fat liquor should be applied at or near the boiling-point, and if the jury believe that the application of fat liquor at such a temperature to leather is injurious and pernicious, the patent is void for want of utility, and the defendant entitled to a verdict; but the said judge refused so to charge the jury, but modified the said request and instructed the jury that the proper construction of the second claim of the patent, so far as it relates to the application of heat, is that the compound, composed of fat liquor and the other ingredients required, should be applied at or near the boiling-point, under the common knowledge of persons skilled in the art of treating this leather, to procure softness and pliability, would make them wait until it was partially cooled before its application, and if the jury believe that the application of fat liquor at such a temperature to leather as is required by the specification under this qualification is injurious and pernicious, the patent is void for want of utility, and the defendant entitled to a verdict; and the counsel for defendant then and there duly excepted."

We think this ruling of the court was correct.

III and IV. These exceptions are sufficiently answered by what was said by the Circuit Court as to the second prayer.

V. This instruction was properly modified. The state of the evidence hardly justified the judge in giving any instruction upon the subject to which it related.

The remaining five exceptions may be grouped and disposed of together. Neither of them requires any special remark.

We are satisfied with the rulings of the learned judge who tried the case as to each and all of them.

We find nothing in the record of which the plaintiff in error has a right to complain.

JUDGMENT AFFIRMED.

Dissenting, Justices FIELD and HUNT.

THE MAYOR *v.* RAY.

A city corporation, the charter of which gave to it the usual powers formerly given to such corporations, but which did not give to it the power to borrow money, being, and, for some time having been, pecuniarily embarrassed, issued its checks, in form negotiable, and drawn by the mayor and recorder of the city on the city treasurer. The checks were presented to the city treasurer and by him indorsed with his name and the date of his indorsement; it being the practice of that officer, in the then embarrassments of the city, thus to indorse checks when the city was not in funds to pay them, in order that the checks might thereafter draw interest; as it was understood that they would do. The checks were then taken by the holder, and, according to a then prevalent custom to pay them for taxes, were paid to the treasurer of the board of education of the city in discharge of school taxes. This officer (again, according to a then prevalent custom) sold them to A. (selling them for eighty cents on the dollar), and with the money discharged the salaries due by the city to the teachers of its public schools.

On suit by A. against the city, the court below excluded evidence tending to show fraud and want of consideration, and authority to make them, in the issue of the notes; and held that under its charter the city could issue promissory notes, and that if signed by the proper officers and given for a good consideration, they would be legal and obligatory; that a usage to reissue such securities was good, and that though upon their face overdue they were payable on demand, and not to be deemed dishonored

so as to let in defences against a subsequent holder, until the lapse of a reasonable time for making demand; that the reissue, if made with the sanction of the city authorities, would be valid, and that such sanction might be presumed from circumstances. It gave judgment accordingly.

On the case coming here, the judgment was reversed; five judges only out of eight, of which the court was then composed, concurring in the judgment of reversal.

Four of these judges placed the judgment on the broad grounds:

1. That municipal corporations have not the power, without legislative authority expressly or clearly implied, to borrow money, or to issue notes, bills, or other securities of a commercial character, free from equitable defences in the hands of *bona fide* holders.
2. That such corporations are of a public character, instituted for purposes of local government, and constitute part of the domestic government of the state; that the power of taxation is given to them for the purpose of raising the means of carrying on their functions, and that the creation of such special power is exclusive of others.
3. That the officers of such a corporation cannot, like the officers of a private corporation, create, by their acts, an estoppel against the corporation, its taxpayers, or people, so as to render illegal issues of ordinary city drafts or vouchers (not authorized by law) valid in the hands of holders for value; that such holders are affected with notice of the illegality.
4. That certificates of debt, city warrants, orders, checks, drafts, and the like, used for giving to the public creditors evidence of the amount of their claims against the city treasury, are valid instruments for that purpose, and may be transferred from hand to hand; but that they are not commercial paper, in the sense of creating an absolute obligation to pay them, free from legal and equitable defences; and that the holder takes them subject to such defences.

These judges admitted, however, and as of course, that when power to borrow money and to issue bonds or other securities of a commercial character therefor is given to a municipal corporation, such securities will possess the usual qualities attaching to like securities issued by private corporations.

The remaining one of the five justices—not agreeing to all thus declared, and holding that the city, unless clearly forbidden by its charter, could issue negotiable notes to pay its debts, and that such notes would be subject to the law governing negotiable paper, and holding especially that the corporation, having received and still holding the money for the notes, could not repudiate its contract to pay—put his concurrence in the reversal on the narrower grounds:

1. That the judge erred in charging that though the checks had been presented for payment, and payment had been refused; and though the time of such presentation and refusal had been noted on them, the checks were not to be deemed dishonored so as to let in defences between the corporation and a subsequent holder.

Statement of the case.

2. That the plaintiff being thus not a holder *bona fide*, the court erred in excluding the offers to show fraud, corruption, or want of authority in the issue of the checks.
3. That it erred in charging that if it was the usage of the corporation to reissue its securities by sale in the market, after such securities had been fully paid and satisfied, such reissued securities were obligatory upon the corporation.

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

Ray sued the mayor and city council of Nashville to recover the amount of nineteen corporation drafts, or orders, ranging from a few dollars in amount to over $1000, and together amounting, with interest, to over $9000. In form, they were drawn by the mayor and recorder upon the city treasurer, payable to some person named, or bearer, and were impressed with the city seal. The following is one of the orders, and shows the form of them all.

No. 3521. **$1000.**

NASHVILLE, December 23, 1868.

Treasurer of the Corporation of Nashville.

Pay to A. J. Duncan, or bearer, one thousand dollars, on account of water-work.

A. E. ALDEN, Mayor. W. MILLS, Recorder.

[Indorsed:] THOS. G. MAGRANE, Treasurer, December 26, 1868.

This was the form in which all city dues were usually paid. The indorsement by the treasurer was made when the orders were presented to him. Evidence was given by the plaintiff tending to show that it had been the custom for many years, when the treasurer failed to pay such checks on presentation, for him to write his name on the back, with the date of presentation, and afterwards, in the payment of such checks, to allow interest from that date, and that it was usual to present such checks for indorsement to draw interest when it was known there were no funds for their payment; also, that it was the well-known custom of the

proper collecting officers of the corporation to receive such checks for taxes and other dues of the corporation; that at the time these checks were issued, and at the time they were bought by the plaintiff, the city was largely involved in debt, and that many such checks were outstanding unpaid, and were bought and sold in the market, and that nearly all the city taxes were paid therewith; that for some time before the plaintiff purchased the checks in question the taxes for the support of public schools were collected and paid over to the treasurer of the board of education in such checks; and for about five months before, it had been the practice of such treasurer to sell such checks and to use the proceeds in payment of teachers; also, that all the checks sued on (except one for $1000, payable to Julius Sax), were so received for taxes, and paid to the said treasurer of the board of education, and by him sold soon after receiving them to one McCrory as agent of the plaintiff to buy the same, at the rate of eighty cents on the dollar, *and the proceeds paid to teachers;* that the check payable to Sax was purchased from him by McCrory, as the plaintiff's agent, for $800, being one of sixteen checks of $1000 each, issued by order of the chairman of the finance committee of the city council without any order of the council, and hypothecated with Sax as security for a loan of $12,000, payable in four months (half of which was made in city checks), power being given in the loan note to sell the hypothecated checks, if the loan was not paid when due. Sax sold the check in question to the plaintiff within a week after receiving it. The plaintiff also offered the evidence of the city recorder to show that the checks sued on were made in the usual course of business of the corporation and for corporation purposes; also, evidence tending to show that the city collector, in collecting checks for taxes, was in the habit, in making change, of paying out checks previously collected, and that the mayor and council were informed of the practice pursued by the collector of reissuing checks which he had received in payment of taxes by paying a portion of them over to the board of education, and knew of the prac-

tice of issuing and hypothecating checks for loans and selling them for money.

The defendant introduced proof tending to show that McCrory, the agent of the plaintiff, when he purchased the eighteen checks, had notice that they had been received by the tax collector and reissued by him to the treasurer of the board of education (the evidence showing that the presentation and neglect to pay had in most instances been made nearly two months before, and in one instance nearly four months); also, that the city council had no knowledge of the manner of making checks on the mere order of the chairman of the finance committee, and their hypothecation and sale for money; and that some of them had no knowledge of the reissue of checks by the collector.

The charter and ordinances of the city were put in evidence, and were referred to on the argument before this court.

The former was couched in the usual form of such charters, conferring upon the corporation power to receive, hold, and dispose of property, to levy taxes, appropriate money, and provide for the payment of the debts and expenses of the city; to establish hospitals, schools, water-works, markets, and erect buildings necessary for the use of the city; to open, regulate, and light the streets; to establish a police, night watch, &c., and to pass all ordinances necessary to carry out the intent of the charter.

It contained, however, no express power to borrow money. But former laws (which were superseded by the charter) had authorized the issue of specific city bonds for that purpose; and such securities were outstanding in 1868, as appeared by an act of the legislature, passed March 16th of that year, by which it was provided that the taxes necessary to pay the coupons and interest on the bonds and funded debt of the city should be kept distinct and should be payable only in legal currency, and no checks or orders of the city were to be received therefor. It was also enacted by the same statute that the amount necessary to be raised by tax for the sinking fund for paying said bonds, and for the support of the public schools, should be paid in the same manner.

Statement of the case.

The public ordinances of the city were published in a book, and by these it was, among other things, provided that there should be a committee of improvements and expenditures, and that all propositions for improvements, or the expenditure of money, or the incurring of any liability, should be referred to this committee, who were to report to the city council, and that no liability should be incurred unless authorized by existing laws, or by order of the city council, and that no check should be issued by the recorder upon the treasurer, unless by authority of the city council, or in pursuance of existing laws of the corporation.

The defendant offered proof tending to show that there was no evidence of any authority having ever been given by the city council for the issue or reissue of checks in the manner in which the checks in question were issued and reissued; and that one of them (specified) had been issued in virtue of a corrupt contract with a member of the council. The proof was rejected under the defendant's exception.

The court charged in substance as follows: That the charter of Nashville authorized the corporation to issue promissory notes and other securities for lawful debts; that the instruments in question, if signed by the proper officers and given for a good consideration, were, in effect, promissory notes, legal and obligatory; that by long usage the corporation had sanctioned the authority of the officers to issue such instruments; that the purchasers thereof were authorized to presume that they were properly issued; that if it was the usage to reissue these securities by sale in the market, they would, when so sold, be obligatory on the corporation; and, though upon their face overdue, they would be in law payable on demand, and not to be deemed dishonored so as to let in defences against a subsequent holder of the paper, until after the lapse of a reasonable time for making demand; that the reissue and sale of the securities in question by the treasurer of the board of education, if done by the consent and sanction of the mayor, aldermen, and council, made them valid obligations against the city; and that

such consent and sanction might be presumed from the publicity of the transactions, the want of other resources to support the schools, and the other circumstances of the case, without any formal official action taken on the subject; and that the common usage of the finance committee, to pledge the city checks as security for its notes, if known to the corporation, was binding upon it, and that the checks so pledged would be valid in the hands of a purchaser before maturity, not having notice of a premature sale or other irregularity in their issue.

This charge was excepted to in all its parts, and upon these exceptions the case was argued before this court in reference to the following points:

1. Has a municipal corporation the power, without express legislative authority, to borrow money for any of the purposes of its incorporation?

2. Has it the power, without express legislative authority, to issue its paper clothed with all the attributes of negotiability?

3. Conceding the affirmative of these two queries, can the executive officers of a municipal corporation borrow money, or issue negotiable securities for the corporation, so as to bind it, without "ordinance;" that is to say, without express authority from the legislative department of the corporate government in its collective official capacity?*

The case was elaborately argued, both upon principle and authorities, on these points, by *Messrs. W. F. and H. Cooper, for the plaintiff in error, and by Messrs. G. F. Edmunds and R. McP. Smith, contra;* the latter counsel referring specially to *Adams* v. *The Memphis and Little Rock Railroad Company*, in the Supreme Court of Tennessee,† in which State the transactions now in question arose.

* There was no regular assignment of errors in the case, such as is required by the 21st Rule (11 Wallace, ix), and the court was at first indisposed to hear the case. However, by a careful inspection of the brief of the plaintiff in error, the three points here mentioned were considered as being, in substance, assigned, and on them alone the oral argument was made.

† 2 Coldwell, 645.

Opinion of Bradley, Miller, Davis, and Field, JJ.

Mr. Justice BRADLEY delivered the judgment of the court, and the opinion of himself and Justices MILLER, DAVIS, and FIELD; Mr. Justice HUNT concurring in the judgment.

A municipal corporation is a subordinate branch of the domestic government of a State. It is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution, it exists for the benefit of the people within its corporate limits. The legislature invests it with such powers as it deems adequate to the ends to be accomplished. The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government and to make such public improvements as it is authorized to make. As this is a power which immediately affects the entire constituency of the municipal body which exercises it, no evil consequences are likely to ensue from its being conferred; although it is not unusual to affix limits to its exercise for any single year. The power to borrow money is different. When this is exercised the citizens are immediately affected only by the benefit arising from the loan; its burden is not felt till afterwards. Such a power does not belong to a municipal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either express or implied. It does not belong, as a mere matter of course, to local governments to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation.

Our system of local and municipal government is copied, in its general features, from that of England. No evidence is adduced to show that the practice of borrowing money has been used by the cities and towns of that country without an act of Parliament authorizing it. We believe no such practice has ever obtained.

Much less can any precedent be found (except of modern date and in this country) for the issue, by local civil authorities, of promissory notes, bills of exchange, and other commercial paper. At a period within the memory of man the proposal of such a thing would have been met with astonishment. The making of such paper was originally confined to merchants. But its great convenience was the means of extending its use, first to all individuals and afterwards to private corporations having occasion to make promises to pay money. Being only themselves responsible for the paper they issue, no evil consequences can follow sufficient to counterbalance the conveniencies and benefits derived from its use. They know its immunity, in the hands of a *bonâ fide* holder, from all defences and equities. Knowing this, if they choose to issue it, no one is injured but themselves. But if city and town officials should have the power thus to bind their constituencies, it is easy to see what abuses might, and probably would, ensue. We know from experience what abuses have been practiced where the power has been conferred. Fraudulent issues, peculations, and embezzlements, and the accumulation of vast amounts of indebtedness, without any corresponding public benefit, have been rendered easy and secure from merited punishment. The purpose and object of a municipal corporation do not ordinarily require the exercise of any such power. They are not trading corporations and ought not to become such. They are invested with public trusts of a governmental and administrative character; they are the local governments of the people, established by them as their representatives in the management and administration of municipal affairs affecting the peace, good order, and general well-being of the community as a political society and district; and in-

vested with power by taxation to raise the revenues necessary for those purposes. The idea that they have the incidental power to issue an unlimited amount of obligations of such a character as to be irretrievably binding on the people, without a shadow of consideration in return, is the growth of a modern misconception of their true object and character. If in the exercise of their important trusts the power to borrow money and to issue bonds or other commercial securities is needed, the legislature can easily confer it under the proper limitations and restraints, and with proper provisions for future repayment. Without such authority it cannot be legally exercised. It is too dangerous a power to be exercised by all municipal bodies indiscriminately, managed as they are by persons whose individual responsibility is not at stake.

Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to public creditors, are of course necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of *bonâ fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by legislative enactment, either express or clearly implied.

There are cases, undoubtedly, in which it is proper and desirable that a limited power of this kind should be conferred, as where some extensive public work is to be performed, the expense of which is beyond the immediate resources of reasonable taxation, and capable of being fairly

and justly spread over an extended period of time. Such cases, however, belong to the exercise of legislative discretion, and are to be governed and regulated thereby. Where the power is clearly given, and securities have been issued in conformity therewith, they will stand on the same basis and be entitled to the same privileges as public securities and commercial paper generally.

But where the power has not been given, parties must take municipal orders, drafts, certificates, and other documents of the sort at their peril. Custom and usage may have so far assimilated them to regular commercial paper as to make them negotiable, that is, transferable by delivery or indorsement. This quality renders them more convenient for the purposes of the holder, and has, undoubtedly, led to the idea so frequently, but, as we think, erroneously, entertained, that they are invested with that other characteristic of commercial paper—freedom from all legal and equitable defences in the hands of a *bonâ fide* holder. But every holder of a city order or certificate knows, that to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bonâ fide* holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts cannot create an estoppel against the city itself, its taxpayers, or people. Persons receiving it from them know whether it is issued, and whether they receive it, for a proper purpose and a proper consideration. Of course they are affected by the absence of these essential ingredients; and all subsequent holders take *cum onere*, and are affected by the same defect.

We consider these principles to be so sound and fundamental as to make it a matter of some surprise that a different view should have been taken by some jurists of eminent ability. The cases on the subject are conflicting and irrecon-

cilable. It could not serve any useful purpose to make an elaborate review of them. We have endeavored clearly and explicitly, though briefly, to state the views which we entertain, and in accordance with which we think the questions in this case must be decided.

Much stress has been laid upon the decision of the Supreme Court of Tennessee, in the case of *Adams* v. *The Memphis and Little Rock Railroad Company*.* The mayor and common council of the city of Memphis, under a charter similar to that of Nashville, had mortgaged certain property belonging to the city, called the navy-yard property, which had been given to it by the United States for the use and benefit of the city, to secure the payment of $300,000 of the bonds of the Memphis and Little Rock Railroad Company. The road of this company extended from a point opposite the city to Little Rock, in Arkansas, and was deemed of great advantage to the city of Memphis. The rents and profits of this property were also appropriated by the mortgage to the payment of the interest on the bonds thus secured, and to the raising of a sinking fund to meet the principal when due; and authority was given to the trustees of the mortgage to enter and lease, or sell in case of default in the payment of interest or principal. The court held that the general power contained in the city charter to sell, lease, and dispose of the property of the corporation for the use and benefit of the city, authorized this transaction; and that the purpose for which the mortgage was given was a proper corporation purpose within the meaning of the charter. Other doctrines were propounded in the opinion of the court in reference to the implied powers of municipal corporations, which were not necessary to the decision of the case, and need not be adverted to here. The decision itself does not, in our apprehension, necessarily conflict with the views which we have stated above. We proceed, therefore, to the consideration of the particular facts of this case.

* 2 Coldwell, 645.

The eighteen checks purchased of the treasurer of the board of education will be first considered. In the absence of proof to the contrary, it may be presumed that they were properly issued at their inception. Evidence was offered by the defendants, it is true, tending to show that they had not been issued in accordance with the laws and ordinances of the city. But the view which we have taken of their reissue and sale by the treasurer of the board of education, renders it unnecessary to consider that aspect of the case. It is conceded that they had been received by the collector in payment of taxes due to the city. As evidences of indebtedness, where this was done, they were *functus officio.* They were paid and satisfied. They ceased to have any validity. They could not be reissued without the authority of the city council. Certainly the treasurer of the board of education had no authority thus to reissue them or sell them. Such an authority would render him controller and dispenser of the city credit. If he had authority to sell them for one price, he had authority to sell them for another; and there is no limit to which he would thus have power to involve the city in debt. Nor can the purchaser waive his claim to recover the amount of the checks, and demand a reimbursement of the money which he actually paid. Considered as a money transaction, and not as a purchase of the paper, it would amount to a loan and borrowing of money on the city account. And where can authority be found for the treasurer of the board of education to borrow money on account of the city? The city council may, no doubt, assume the responsibility of the transaction and make proper provision, as perhaps in equity ought to be done, for the repayment of the money so advanced. But the transaction had not the support of legal authority, and hence the money cannot be recovered in this action.

The remaining check of $1000, purchased from Sax, was pledged or hypothecated, with fifteen others of like amount, to Sax as collateral security for a loan of $12,000, payable in four months. This loan was secured by a note given at the same time, which recited the pledge or hypothecation of the

sixteen checks, and gave Sax power to sell them if the note was not paid at maturity. Sax, instead of waiting to see if the note would be paid, sold the checks thus pledged, or at least the one in question, within a week after the loan was effected. This, of course, was not only an unauthorized, it was a dishonest transaction, and could give no title to the purchaser as against the city. In the first place the finance committee, or its chairman, had no legal authority thus to pledge the evidences of city indebtedness and give to the pledgee the power of selling the same for any price he could get. In this way an untold amount of debt could be piled up against the city without any adequate consideration received therefor, and all the evil consequences before adverted to would be liable to follow the exercise of such a power. This very instance forcibly illustrates the mischievous results that would follow from inferring an incidental power in a municipal corporation to issue commercial securities. The check in question has the same form and appearance as all the other checks which the city officers are in the habit of issuing for ordinary city indebtedness. It must be subject to the same general rule of being valid or otherwise, according as it was properly or improperly, lawfully or unlawfully, issued. And the subsequent holder, whether purchaser or otherwise, takes it with all the original defects of title.

The judgment must be reversed, and a *venire de novo* awarded.

Mr. Justice HUNT: I concur in the judgment of this court reversing the judgment at the circuit, and remanding the case for further proceedings. I do not, however, concur in some of the grounds upon which the reversal is placed in the opinion delivered by Mr. Justice Bradley, and as my concurrence is necessary to the rendering of the judgment, there is a manifest propriety in an expression of the grounds of my concurrence.

I am of the opinion that the judge erred in charging and deciding that if the checks "are, upon their face, overdue

at the time of such sale (that is their reissue and sale), they will be in law payable on demand, and are not to be deemed dishonored so as to let in defences between the company and a subsequent holder of the paper until after the lapse of a reasonable time after their reissue for the making of such demand." All of the checks in question had been presented for payment. Payment was not made, but the time of presentation was noted in each instance, and interest was allowed upon the check from that date. The presentation and neglect to pay had been made in some instances nearly four months before such purchase, and the time of such presentation was noted upon the check by the city treasurer, and it bore interest from that date. A check requires no presentment for acceptance as distinguished from presentment for payment. If once presented and payment refused, it is dishonored.* To constitute a *bonâ fide* holder of a note or check it is necessary—1. That it should have been received before maturity; 2. That a valuable consideration should have been paid for it; and 3. That it should have been taken without knowledge of the defences sought to be made.

Whatever defences could properly be made to these checks in the hands of the original holder could be made while they were in the plaintiff's hands. He was not a *bonâ fide* holder.

Evidence to show fraud or corruption, or want of authority in their issue, should have been received at the circuit, and in excluding the offers made on that subject and in the charge in reference to the evidence given, I think there was error. Thus, the Sax check, it was alleged, had been issued without authority, hypothecated to secure a note of the city made without authority, and sold in violation of the terms of the hypothecation. It was open to this defence in the hands of the plaintiff.

In the case of another check it was offered to be proved that it was issued without authority and upon a corrupt contract, but the evidence was excluded.

* Chitty on Bills, 272, m.

The court in another place charged the jury that "if it is the usage to reissue the securities by sale in the market, they will, when so sold, be obligatory upon the corporation." I cannot think that it is lawful for a municipal corporation to issue its checks, pay them, reissue them, and repeat this operation as often as its convenience requires. This comes too near the character of a bank of issue and deposit.

In the particulars following, my views are different from those expressed in the opinion of Justice Bradley.

I hold it to be well established by the authorities that a municipal corporation may borrow money for the legitimate use of the corporation, and that it may issue its notes for the same unless expressly prohibited by its charter or by statute from so doing. The proposition that it cannot borrow money, unless by its charter expressly authorized to do so, is, in my opinion, unsustained by sound authority.*

That the securities thus issued by municipal corporations are subject to the rules of commercial law when held by a *bonâ fide* holder has been repeatedly held by this court. Every recent volume of its reports contains authorities to this effect. The authorities of the State of Tennessee sustain these general views.†

Checks of the city were issued for the payment of particular debts, and when paid should, no doubt, under ordinary circumstances, have been cancelled. A reissue of a paid check is an extraordinary proceeding. If done by an officer without the authority of the common council, it is a gross violation of duty. If with that authority, it is a loose practice, liable to abuse. Whether such reissue would be an act of positive illegality, *ultra vires* merely, or a bad practice simply, it is not necessary to decide. In neither case can the city repudiate the transaction. It is upon this point

* Whitewater Valley Canal Company *v.* Vallette, 21 Howard, 424, and see 1 Dillon on Municipal Corporations, §§ 82, 83, and notes, where the authorities are collected both from the State courts and from this court

† Adams *v.* The Memphis and Little Rock Railroad Company, 2 Coldwell, 645.

chiefly that I desire to express my dissent from the opinion just delivered. As to all the checks in question, the record shows that they were paid over by the collector of city taxes to the treasurer of the board of education, that they were by him sold to McCrory, at eighty cents on the dollar, and that the proceeds of such sales were applied to the uses of the city by an immediate payment of the wages due to the teachers in the public schools of the city. The city received this money upon the reissue of its checks. So far as McCrory is concerned, or the plaintiff who succeeds to his rights, the city now has the money in its treasury.

It is a general rule, applicable to all persons and corporations, and is a dictate of plain honesty, that whoever, knowing the facts of the case, retains and uses money received by an agent for his account, cannot repudiate the contract on which it is received.* Putting this transaction most strongly against the plaintiff, by assuming that this reissue was not *ultra vires* merely, but was positively prohibited by law, the city is still responsible to the holder of the checks for the money it has received and still retains. Conceding the illegal contract to be void, as forbidden by the legislature, it is to be remembered that the prohibition is upon the city only, and not upon the person dealing with it; the illegality is on the part of the city, and not of the person receiving the checks. The contract may well be void as to the city, and its officers punishable for the offence of making it, and yet it may stand in favor of innocent persons not within the prohibition. Such was the decision in *Tracy* v. *Talmage*,† in *Curtis* v. *Leavitt*,‡ and in *The Oneida Bank* v. *The Ontario Bank*.§ The latter case was briefly this: The general banking law of New York prohibited the issuance by a bank of a certificate of deposit payable on time. The cashier of the Ontario Bank received $5000 in cash from one Perry, and delivered to him a certificate of deposit post-dated about four weeks, for the purpose of raising funds for the bank.

* Bissell *v.* City of Jeffersonville, 24 Howard, 300; Sedgwick on Statutory and Constitutional Law, 90.

† 14 New York, 162. ‡ 15 Id. 9. § 21 Id. 490.

This draft Perry transferred to the Oneida Bank, who brought suit upon it. It was held, assuming this draft to be void, that the party making the contract could reject the security and recover the money or value which he advanced on receiving it. It was held further, that the right of action to recover this money passed to the Oneida Bank upon the transfer of the certificate to them. The plaintiff recovered the money advanced to the bank upon the illegal certificate. Both of these principles were held with equal distinctness in *Tracy* v. *Talmage*, *supra*.

They seem to me to be decisive of the right of the plaintiff to recover upon the checks, regarding them in their most unfavorable aspect, the amount of money advanced to and yet held by the city.

For the reasons thus presented, I concur in the reversal of the judgment.

JUDGMENT REVERSED, and a

VENIRE DE NOVO AWARDED.

Mr. Justice CLIFFORD, dissenting:

I dissent from the opinion and judgment in this case, chiefly upon two grounds: (1) Because I think the opinion restricts quite too much the powers of municipal corporations; and (2), because the doctrines of the opinion, as applied to negotiable securities of a commercial character, are repugnant to the well-settled rules of law established by the repeated decisions of this court.

Mr. Justice SWAYNE and Mr. Justice STRONG also dissented.

NOTE.

AT the same time with the preceding case, and by the same counsel, was argued the case of

THE MAYOR *v.* LINDSEY.

In error to the same Circuit Court, for the Middle District of Tennessee. In this case Lindsey sued the mayor of Nashville

on certain checks, similar in all respects, in form and inception, to the check issued to Julius Sax, and mentioned more particularly *supra*, p. 472. The checks now sued on had been pledged as collateral security for a loan of less amount than the checks pledged, and were sold soon after being pledged, and before the loan fell due; the transaction being effected by the chairman of the finance committee of the city council without other authority. Such at least was the tendency of the evidence, and the judge charged substantially as in the preceding case of Ray.

Mr. Justice BRADLEY announced the judgment of this court, REVERSING THE JUDGMENT BELOW, with directions to award a

VENIRE DE NOVO.

UNITED STATES *v.* ARWO.

Under the act of March 3d, 1825, § 22, by which an assault on a person upon the high seas with a dangerous weapon is made an offence against the United States, and the trial of the offence is to be "in the district where the offender is apprehended, OR into which he may first be brought," a person is triable in the Southern District of New York who, on a vessel owned by citizens of the United States, has committed on the high seas the offence specified; has been then put in irons for safe-keeping has, on the arrival of the vessel at anchorage at the lower quarantine in the Eastern District of New York, been delivered to officers of the State of New York, in order that he may be forthcoming, &c.; and has been by them carried into the Southern District and there delivered to the marshal of the United States for that district, to whom a warrant to apprehend and bring him to justice was first issued.

ON certificate of division in opinion from the Southern District of New York.

A statute of March 3d, 1825,* makes an assault committed on the high seas with a deadly weapon a crime against the United States, and the act is made cognizable in virtue of prior law,† "*in the district where the offender is apprehended* OR *into which he may first be brought.*"

* 4 Stat. at Large, 115, § 22.

† Act of April 30th, 1790, § 8; 1 Id. 113.

This statute being in force, Arwo was indicted in the *Southern* District of New York, for an assault of the kind just spoken of, committed on a vessel alleged to have belonged to citizens of the United States. He pleaded to the jurisdiction, alleging that, immediately upon the commission of the assault, he had been placed in irons on board ship, for custody and to be forthcoming to answer any charge therefor, and was so kept until the vessel reached the *lower quarantine* anchorage in New York harbor, within the *Eastern* District of that State; that the vessel lay at anchor at such station for five days, during which he, being still in such custody, was delivered to the harbor police, officers of the State of New York, in order that he might be forthcoming, &c.; and that they without process or warrant from any court carried him to the city of New York, where he was delivered over to the marshal of the United States for the *Southern* District of New York; and that a warrant for his arrest (being the first issued in this case) was afterwards duly issued to the said marshal; so that, upon the whole, he had been apprehended and brought first into the Eastern, and not into the Southern District, and, therefore, could be tried only in the former district, &c.

Upon demurrer, the following questions occurred, and the court certified a division upon them.

"1. Whether the prisoner, having been taken into custody by the master of an American vessel, while on her voyage, upon a charge of having, during the voyage, committed an offence against the United States on board such ship, upon the high seas and out of the limits of any State or district, and first brought, in such custody, into the Eastern District of New York, can be tried for such offence in the Southern District of New York.

"2. Whether the facts stated in the plea, show that the Southern District of New York is not the district in which the defendant was apprehended, within the meaning of the act of March 3d, 1825.

"3. Whether the plea discloses that, within the meaning of the act of March 3d, 1825, the apprehension of the defendant

occurred either upon the high seas, or in the Eastern District of New York, and not in the Southern District of New York.

"4. Whether the act of March 3d, 1825, confers jurisdiction in the alternative, and enables this court to assume jurisdiction to try an indictment by reason of the fact that the defendant has been arrested in this district, upon the charge in the indictment contained, by an officer of the United States, as stated in the plea, notwithstanding it appears that the defendant was first brought into the Eastern District of New York."

The Eastern District of New York consists of the counties of Richmond, Queens, Kings, and Suffolk;* and by an act of 1865, establishing it,† the jurisdiction of the court thereof over "the waters" of such counties, excepting the county of Richmond, and "all matters made or done on such waters," is concurrent with that of the court of the Southern District.

Mr. S. F. Phillips, Solicitor-General, for the United States.

I. The bringing of Arwo within the waters of the Eastern District is a "matter done" therein.

The first question certified does not define the place to which Arwo was brought as being within that part of the Eastern District over which the Southern has no jurisdiction. The division here is as to a "matter done" *in any part* of the Eastern District, and, therefore, is to be settled by the act of 1865. There is nothing stated in the question to affect a concurrence of jurisdiction in the Southern District and the Eastern District over this offence.

As regards the remaining three questions, the only fact as to the place contained in them additional to those in the first question, is as regards "lower quarantine." Now this court has no judicial knowledge as to where lower quarantine is, except so far as its situation is fixed by the plea and the corresponding admission in the demurrer;‡ that is to

* Richmond County is Staten Island. Queens, Kings, and Suffolk compose Long Island; Kings being the easternmost of the three; the county which is separated from Richmond chiefly by "the Narrows."

† Act of February 25th, 1865, 13 Stat. at Large, 438.

‡ 1 Taylor's Evidence, 25.

say, that it is within the Eastern District, but within which one of the four counties it is, there is nothing in the law or the record to show. If the present matter of first bringing Arwo was so done as to confer jurisdiction upon the courts of the Eastern District, then, by the act of 1865, it did so equally upon the Southern, unless it occurred within Richmond County. It was the business of the plea to draw this distinction. It has not drawn the required distinction. The plea is one of a class which must be "certain to every intent;" "that is, must have such technical accuracy as is not liable to the most subtle and scrupulous objection."*

Because of the *concurrence* of jurisdiction above specified, the first question is to be answered affirmatively; and the others are to be met by a general objection that under the statements of the plea they are merely abstract.

II. It may be, however, that the court will feel at liberty to express an opinion upon all the questions intended to be raised; and so we discuss their merits.

Some courts hold that in cases presenting *both* of the local features described in that part of the act given above (p. 486) in italics (viz., *two* districts, one of *apprehension*, and another, that into which the accused was *first brought*), the prosecutors have a choice, and may institute proceedings in either indifferently. Others, that, in such cases, there is but one place for trial, to wit, the district into which the accused is first brought; that the other district is mentioned as a place of trial only where there is in the case no district into which the accused has been brought, *i. e.*, *ex gr.*, in cases where, having come voluntarily into the United States, he is afterwards apprehended, &c. In these latter cases, the apprehension spoken of is plainly an apprehension under Federal authority. But there was no such apprehension here. Arwo was apprehended under ordinary ship police on board of a private vessel. There was no Federal color or element in his apprehension until that by the marshal of the Southern District.

But if this were otherwise, then, upon general principles,

* 1 Chitty on Pleading (edition of 1840), pp. 457, 234, and 663.

there is no reason for holding in such cases, that the act of 1790 does not give to the prosecution an unrestricted choice of districts.

As regards the defendant, the provision, in any sense, is merely *positive*.

On the other hand, it seems unreasonable to say that the statute meant to compel prosecutor and witnesses, and perhaps the ship besides, to lay up, at a quarantine anchorage as here, or as the case might make it, at a port of refuge or of repair, merely because they were so unfortunate as accidentally to be on a ship with a felon.

We, therefore, suggest, under this branch of the argument, that the first and fourth questions certified be answered in the *affirmative*, and the second and third, in the *negative*.

No opposing counsel.

Mr. Justice CLIFFORD delivered the opinion of the court.

Instead of answering separately the questions certified here, I am instructed to say, that the court, upon the facts alleged in the plea, is of the opinion, that the Circuit Court for the Southern District of New York had jurisdiction in this case, and that the court directs that this statement be certified to the Circuit Court as the only answer required to the several questions presented on the record.

TAPPAN, COLLECTOR, *v.* MERCHANTS' NATIONAL BANK.

1. Shares of stock in the National banks are personal property, and though they are a species of personal property which, in one sense, is intangible and incorporeal, the law which created them could separate them from the person of their owner for the purpose of taxation, and give them a *situs* of their own.
2. The forty-first section of the National Banking Act of June 3d, 1864— which in effect provided that all shares in such banks, held by any person or body corporate, may be included in the valuation of the personal property of such person or corporation in the assessment of taxes im-

posed under State authority, at the place where the bank is located, and not elsewhere—did this.

3. This provision of the National Banking Act became a law of the property, and every State within which a National bank was afterwards located acquired jurisdiction, for the purposes of taxation, of all the shareholders of the bank, both resident and non-resident, and of all its shares, and power to legislate accordingly.
4. Nothing in Article IX, in the constitution of Illinois, of 1848, and which was still existing in 1867, prevented the legislature of the State from providing for the taxation of the owners of shares of the capital stock of a National bank in that State, at the place, within the State, where the bank was located, without regard to their places of residence.
5. The act of the said legislature, passed June 13th, 1867, so providing, was valid under the said constitution.

APPEAL from the Circuit Court for the Northern District of Illinois, in which court the Merchants' National Bank of Chicago—a bank incorporated under the "Act to provide a National currency," &c., approved June 3d, 1864,* and having its banking-house and carrying on its operations of discount and deposit in the town of *South Chicago*, *Cook County*, Illinois—filed a bill against one Tappan, collector of county and municipal taxes, *in the said town of South Chicago*, *Cook County*, to enjoin his collection of such taxes upon *any* of the shares of stock in the said bank, assessed under a statute of Illinois, passed June 13th, 1867.

Some shares of the bank were held by persons resident in the said town of South Chicago, Cook County, where, as already said, the bank itself was situated, and where Tappan, the collector of taxes for that town, resided; but many were held by persons who, though residing in Illinois, did not reside in the town of South Chicago or in the county of Cook at all, but resided out of both; and many were held by persons who did not reside in the State of Illinois at all, but resided in other States altogether.

The grounds upon which the bill was filed were apparently that, under the constitution of Illinois, the taxes were not validly laid on the residents of the State who resided out of the town of South Chicago and out of the county of Cook;

* 13 Stat. at Large, 99.

that therefore, under that constitution, which required uniformity of taxation, in respect to persons and property within the jurisdiction of the body imposing the same, there were no taxes laid on the shares of any persons resident *in* the town of South Chicago or in the county of Cook; and of course therefore no taxes on any shareholders resident anywhere in Illinois; and as the act of Congress authorizing a taxation by the State of shares in the National banks, owned by persons who were not residents of such State, declared that there should be no tax imposed on *them* which was not imposed on residents of the State, there was no tax laid on any shareholders anywhere.

The whole matter, it is thus obvious, turned upon the validity of the tax laid under the State act of June 13th, 1867, upon the shares of residents of Illinois who resided out of Cook County and out of the town of South Chicago.

The case, as respected the constitution of Illinois, the State act of June 13th, 1867, laying the tax, and the provisions of the National Banking Act, or, to call it by its title, the "Act to provide a National Currency," &c., was thus:

The constitution of Illinois (adopted A.D. 1848) ordains—

"ARTICLE IX.

"SECTION 2. The General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property, such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct and not otherwise.

"SECTION 5. The corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be *uniform in respect to persons and property*, within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law."

This provision of fundamental law being in force in Illi-

Statement of the case.

nois, Congress passed, June 3d, 1864, the "Act to provide a National currency,"* already mentioned. This act, after providing for the formation of associations for the purpose of banking, declares:

"SECTION 12. The capital stock of any association formed under this act shall be divided into shares of $100 each, and be deemed *personal property and transferable on the books of the association.*"

"SECTION 40. The president and cashier of every association, shall cause to be kept at all times, a full and correct list of the *names and residences of all the shareholders in the association*, and the number of shares held by each; . . . and such list shall be subject to the inspection of *all the officers authorized to assess taxes under State authority.*

"SECTION 41. Nothing in this act shall be construed to prevent all the shares in any of the said associations held by any person or body corporate from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, *at the place where such bank is located and not elsewhere;* but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

Subsequently to the passage, by Congress, of this National Banking Act, the State of Illinois passed the act of June 13th, 1867, under which the tax now resisted was laid.

It enacted:

"No tax shall be assessed upon the capital of any bank or any banking association, organized under the authority of this State, or organized under the authority of the United States; and located within this State.

"But the *stockholders* in such banks or banking associations *shall be assessed and taxed* on the value of their shares of stock therein in the county, town, or district where such bank or banking association is located, and not elsewhere, *whether such stockholder reside in such town, county, or district, or not*, but not at any greater rate than is or may be assessed upon other moneyed capital in the hands of individuals in this State."

* 13 Stat. at Large, 102.

Statement of the case.

Before the passage of the act just above quoted, question had arisen as to the meaning in the forty-first section of the National Banking Act of the words "at the place where the bank is located." Some courts, like those of Maine, supposed that Congress meant that the shares should be assessed in and for the benefit of the taxing district.* Other courts, like those of Pennsylvania and Massachusetts,† were of a different opinion, holding that the expression meant the State and not the taxing district. Accordingly Congress, by an act of February 10th, 1868, enacted:‡

"That the words '*place where the bank is located and not elsewhere*,' in section 41 of the 'Act to provide a National currency,' approved June 3d, 1864, shall be construed to mean '*the State within which the bank is located.*' And the legislature of each State may determine and direct *the manner and place* of taxing all the shares of National banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. And provided always, that the shares of any National bank owned by non-residents of any State *shall be taxed in the city or town where said bank is located, and not elsewhere.*"

The bill filed by the bank, after setting out the facts of non-residence, &c., already stated, and the violation of the Constitution in levying the tax complained of, and a threat of the collector to sell the stock of the bank, if the taxes claimed were not paid, alleged, by way of giving a jurisdiction in equity, that the shareholders refused to pay the taxes and forbade the payment of them by the bank, and threatened a multiplicity of suits against the bank in case *it* paid them, or in case it deducted the amount thereof from any dividends upon the stock; that if the collector sold the stock irreparable damage would be done to the stockholders; that the bank was the trustee of its stockholders, and as such

* Opinions of the Justices of the Supreme Court, 53 Maine, 594.

† Markoe *v.* Hartranft, 6 American Law Register, N. S. 490; Austin *v.* The Aldermen, 14 Allen, 364.

‡ 15 Stat. at Large, 34.

entitled to protect their interests; and that a sale of their stock would prejudice the bank in the public mind, and work damage to it incapable of remedy at law.

The court below on demurrer to the bill for want of equity,—disregarding the technical objection (for which *Dows* v. *The City of Chicago** was cited as authority), that the bank had no power to interfere in the way in which it had done, in behalf of its stockholders,—and considering that the law of Illinois laying the tax was in violation of its constitution, decreed an injunction. From that decree this appeal was taken.

Mr. M. W. Fuller, in support of the decree:

1. It will be admitted by opposing counsel, that the authorities of Cook County had no jurisdiction for the purposes of taxation over the person of any one who lived not in Cook County, but who lived out of it, in a different county; and that any tax laid by such authorities on that person must be void. Now, the act of June 13th, 1867, enacts "that no tax shall be assessed upon the capital of any bank," but that the *stockholders* in such banks "shall be assessed and taxed on the value of their shares of stock therein." The act relieves the capital—the property—of the bank from all tax laid by the authorities of the place where that capital, property, or bank is, and lays it on the *stockholder* wherever he may be. It forbids a tax *in rem* and establishes a tax *in personam*. Now, so far as respects stockholders in Cook County, who are within the jurisdiction of the authorities of that county for the purposes of taxation, this is lawful. Is it so under the constitution of the State in regard to those who do not reside in Cook County, but reside out of it and in other counties of the State? We think that it is not.

Concede—as is probably true—that personal property having visible, tangible, and bodily form (as *ex. gr.*, cattle), is taxable in the place where it permanently is, the concession does not help the validity of this tax. In the first place it

* 11 Wallace, 108.

often happens that the capital of a bank is not at the place where the banking-house is situated, and where the operations of the bank are carried on. Many banks have their money largely deposited in distant places. Especially is this true of banks in the West dealing much in exchange. Their funds are necessarily on deposit in Eastern cities. But independently of this, shares of stock in a corporation represent an interest quite different, and separated from the capital stock of the corporation; that is to say, the real and personal property owned by the corporation. What is a share of stock in a bank? Nothing but a right to a dividend of profits as they are declared, and to a share of the effects of the bank if it should ever be wound up. Now, such a right can have no *situs* save at the domicile of the shareholder. Since the great case of *The State Tax on Foreign-held Bonds*, so recently decided by this court,* where it was held that a tax by a State on bonds given by her citizens, could not be levied on and retained from the interest of the bonds when they were owned by persons out of the State, and so held for the exact reason that *choses in action* followed the persons of their owner, it is unnecessary to refer to those numerous decisions in State courts which have adjudged that it is not within the power of a State legislature to cause a non-resident shareholder to pay taxes upon the value of his shares.†

We assume, therefore, that shares of stock owned by residents in other counties of Illinois than Cook County, are not in any sense situated in Cook County.

Now, to apply these principles. Congress has no power to authorize a violation of the constitution of a State in the assessment and collection of taxes for State and local purposes. The National Banking Act of June 3d, 1864, cannot have meant to do this.

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* 15 Wallace, 319.

† Union Bank *v.* State, 9 Yerger, 490; Conwell *v.* Connersville, 15 Indiana, 150; Savings Bank *v.* Nashua, 46 New Hampshire, 398; Dwight *v.* Mayor, 12 Allen, 322; Austin *v.* Aldermen, 14 Allen, 364; McKeen *v.* Northampton, 49 Pennsylvania State, 519.

Now, what did the constitution of Illinois, Article 9, declare? It declared that all taxes for corporate purposes shall be "uniform in respect to persons and property within the jurisdiction of the body imposing the same."

"To render taxation uniform," says a text-writer of the first class,* "two things are essential. The first is, that each taxing district confine itself to things within its limits." . . . "Within these districts the rule of absolute uniformity must be applicable."

But when a resident of La Salle County, Illinois, owning the whole stock perhaps of half a dozen banks in Cook County, and owning nothing besides, is not taxed in La Salle County at all, how is the rule of uniformity prescribed by the constitution of Illinois observed? Yet under the statute of June 13th, 1867, this is the sort of taxation which does occur. For that statute provides no mode of assessing the shares of residents in the State at the place where they reside. In *Trustees* v. *McConnell*,† the Supreme Court of Illinois said that under the provision of the constitution which we have referred to, the legislature "would have no power to exempt from taxation one species of personal property while it collected a tax from another within the same jurisdiction." But when you give to the county of Cook the proceeds of taxation of shares owned by a resident of La Salle, do you not exempt the latter in the county where he lives, and tax his co-residents in that county to make up the deficiency? Is this taxation uniform in respect to persons within the limits of such county? We submit that it is not.

There being then no valid law in force in this State, by which the shares of stock in National banks, belonging to residents of the State, can be taxed, the shares owned by non-residents cannot be taxed, because the proviso to section forty-one of the act "to provide a National currency," of June 3d, 1864, expressly declares that there shall be no tax

* Cooley, Constitutional Limitations, 496.

† 12 Illinois, 140.

imposed upon non-residents that is not imposed upon residents of the State.*

It ought, perhaps, to be observed, that when the act of June, 1867, was passed, controversy had arisen as to the meaning of the words (whose meaning certainly is not perspicuous) in the provisos to the forty-first section of the law of Congress, that the shares should be assessed "at the place where the bank is located." The framers of the State law doubtless supposed Congress to have required the shares to be assessed in and for the benefit of the taxing district of the bank's location; as courts of high respectability had supposed before them.

2. The technical objection that the bank cannot interfere in equity, in behalf of its shareholders, is without foundation. The bank occupies the position of a stakeholder. It is the custodian of the dividends of the shareholders. The shareholders insist that all the dividends be paid to them. The collector demands that a part be paid to him. The bank asserts and the demurrer admits that the shareholders have given notice to the bank that if it pay these taxes suits will be commenced at once against it. At the same time if it does not pay them the collector threatens to sell the shares, and so to get the taxes. It is obvious that the latter course, if taken, would lead to further and harassing litigation, working that kind of injury to the corporation which, because the law affords no such beneficial and complete remedy for it as the nature of the case requires, may be deemed irreparable. *Dows* v. *The City of Chicago* is not applicable to such a case.

Mr. J. K. Edsall, Attorney-General of Illinois, contra, argued the case fully on principle and authority; citing among other cases, one decided in February, 1873, *First National Bank of Mendota* v. *Smith, Collector*,† in which the law here in question was held by the Supreme Court of Illinois to be valid under the constitution of the State.

* Van Allen *v.* Assessors, 3 Wallace, 573.

† 5 Chicago Legal News, 253.

The CHIEF JUSTICE delivered the opinion of the court.

We are called upon in this case to determine whether the General Assembly of the State of Illinois could, in 1867, provide for the taxation of the owners of shares of the capital stock of a National bank in that State, at the place, within the State, where the bank was located, without regard to their places of residence. The statute of Illinois, under the authority of which the taxes complained of were assessed, was passed before the act of Congress, approved February 10th, 1868,* which gave a legislative construction to the words, "place where the bank is located, and not elsewhere," as used in section forty-one of the National Banking Act,† and permitted the State to determine and direct the manner and place of taxing resident shareholders, but provided that non-residents should be taxed only in the city or town where the bank was located.

The power of taxation by any State is limited to persons, property, or business within its jurisdiction.‡ Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicile. But, for the purposes of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. These are familiar principles, and have been often acted upon in this court and in the courts of Illinois. If the State has actual jurisdiction of the person of the owner, it operates directly upon him. If he is absent, and it has jurisdiction of his property, it operates upon him through his property.

Shares of stock in National banks are personal property. They are made so in express terms by the act of Congress under which such banks are organized.§ They are a species of personal property which is, in one sense, intangible and incorporeal, but the law which creates them may separate

* 15 Stat. at Large, 34. † 13 Id. 112.

‡ State Tax on Foreign-held Bonds (Railroad *v.* Pennsylvania), 15 Wallace, 319.

§ 13 Stat. at Large, 102, § 12.

them from the person of their owner for the purposes of taxation, and give them a *situs* of their own. This has been done. By section forty-one of the National Banking Act, it is in effect provided that all shares in such banks, held by any person or body corporate, may be included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed under State authority, at the place where the bank is located, and not elsewhere.* This is a law of the property. Every owner takes the property subject to this power of taxation under State authority, and every non-resident, by becoming an owner, voluntarily submits himself to the jurisdiction of the State in which the bank is established for all the purposes of taxation on account of his ownership. His money invested in the shares is withdrawn from taxation under the authority of the State in which he resides and submitted to the taxing power of the State where, in contemplation of the law, his investment is located. The State, therefore, within which a National bank is situated has jurisdiction, for the purposes of taxation, of all the shareholders of the bank, both resident and non-resident, and of all its shares, and may legislate accordingly.

The State of Illinois thus having had, in 1867, the right to tax all the shareholders of National banks in that State on account of their shares, it remains to consider at what place or places within the State such taxes could be assessed.

It is conceded that it was within the power of the State to tax the shares of non-resident shareholders at the place where the bank was located, but it is claimed that under the constitution of the State resident shareholders could only be taxed at the places of their residence. We have not been referred to any express provision of the constitution to that effect. There is nothing which in terms prohibits the General Assembly from separating personal property within the State from the person of the owner and locating it at appropriate places for the purposes of taxation, but it

* 13 Stat. at Large, 112.

is insisted that sections two and five of Article 9 of the Constitution of 1848, which was in force when the act of 1867 was passed, contain an implied prohibition.

Section two directs that "the General Assembly shall provide for levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise." Section five directs that "the corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the General Assembly shall require that all property within the limits of municipal corporations belonging to individuals shall be taxed for the payment of debts contracted under authority of law." The corresponding provisions of the Constitution of 1870 are in substance the same.

The object of these sections is to secure uniformity of taxation. That, it is said in *Bureau Co.* v. *C. B. and Q. R. R. Co.*,* is to be regarded as the cardinal principle, the dominant idea of this article of the constitution. But uniformity in this connection is only another name for equality, for the provision is for "levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property." The value of the property being ascertained, the same rate of taxation must be laid upon all.

Property is made the constitutional basis of taxation. This is not unreasonable. Governments are organized for the protection of persons and property, and the expenses of the protection may very properly be apportioned among the persons protected according to the value of their property protected.

The constitution does not undertake to fix the value of

* 44 Illinois, 238.

the property. Neither does it prescribe any rules by which it is to be fixed. That is left to the General Assembly, for the provision in that respect is, "such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise." The mode and manner in which the persons appointed to make the valuation shall proceed, are left to the discretion of the General Assembly. In fact, the whole machinery of taxation must be contrived and put into operation by the legislative department of the government.

As part of this machinery taxation districts must be created. All property within the district must be taxed by a uniform rate. If property is actually within a district it is but proper that the legislature should provide that it should be listed, valued, and assessed there. In fact, the last clause of section five, Article 9, seems to make that a duty, for it provides that the General Assembly shall require that all property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law.

This power of locating personal property for the purpose of taxation without regard to the residence of the owner has been often exercised in Illinois, and sustained by the courts.* Since the adoption of the constitution of 1870, which did not enlarge the powers of the General Assembly in this particular, very extended legislation has been had with a view to such location. Thus, live stock and other personal property used upon a farm, must be listed and assessed where the farm is situated; property in the hands of agents at the place where the business of the agent is transacted; watercraft where they are enrolled: or, if not enrolled, where they are kept; the property of bankers, brokers, merchants, manufacturers, and many other classes of persons specially enumerated, at the place where their business is carried on. This became necessary in order that the burdens of taxation might be equally distributed among those who should bear them.

* City of Dunleith *v.* Reynolds, 53 Illinois, 45.

We do not understand the counsel for the appellee to dispute this power, where the property is tangible and capable of having, so to speak, an actual *situs* of its own, but he claims that if it is intangible, it cannot be separated from the person of its owner. It must be borne in mind that all this property, intangible though it may be, is within the State. That which belongs to non-residents is there by operation of law. That which belongs to residents is there by reason of their residence. All the owners have submitted themselves to the jurisdiction of the State, and they must obey its will when kept within the limits of constitutional power.

The question is then presented whether the General Assembly, having complete jurisdiction over the person and the property, could separate a bank share from the person of the owner for the purposes of taxation. It has never been doubted that it was a proper exercise of legislative power and discretion to separate the interest of a partner in partnership property from his person for that purpose, and to cause him to be taxed on its account at the place where the business of the partnership was carried on. And this, too, without reference to the character of the business or the property. The partnership may have been formed for the purpose of carrying on mercantile, banking, brokerage, or stock business. The property may be tangible or intangible, goods on the shelf or debts due for goods sold. The interest of the partner in all the property is made taxable at the place where the business is located.

A share of bank stock may be in itself intangible, but it represents that which is tangible. It represents money or property invested in the capital stock of the bank. That capital is employed in business by the bank, and the business is very likely carried on at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides; but his property in this stock is protected at the place where the bank transacts his business. If he were a partner in a private bank doing business at the same place,

he might be taxed there on account of his interest in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporated bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there, and it seems reasonable that he should be compelled to contribute there to the expenses of maintaining that government. It certainly cannot be an abuse of legislative discretion to require him to do so. If it is not, the General Assembly can rightfully locate his shares there for the purpose of taxation.

But it is said to be a violation of the constitutional rule of uniformity to compel the owner of a bank share to submit to taxation for this part of his property at a place other than his residence, because other residents are taxed for their personal property where they reside. It is a sufficient answer to this proposition to say that all persons owning the same kind of property are taxed as he is taxed. Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it. The same rules cannot be applied to the listing and valuation of all kinds of property. Railroads, banks, partnerships, manufacturing associations, telegraph companies, and each one of the numerous other agencies of business which the inventions of the age are constantly bringing into existence, require different machinery for the purposes of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose different systems, adjusted with reference to the valuation of different kinds of property, are adopted. The courts permit this. Thus, in a case in Illinois, involving the system adopted for the taxation of bank shares, it was said by the Supreme Court,* "in view of this legislation it must be apparent that a system of taxation for bank shares was designed peculiar to itself and independent of the general revenue laws of the State;" and the authority of the law was sustained and enforced.

* McVeagh v. Chicago, 49 Illinois, 329.

Again, it is said the law in question destroys the uniformity of taxation, because it provides for the collection of the taxes assessed on account of this kind of property in an unusual way. The constitution does not require uniformity in the manner of collection. Uniformity in the assessment is all it demands. When assessed the tax may be collected in the manner the law shall provide; and this may be varied to suit the necessities of each case.

Since the decree was rendered in the Circuit Court the Supreme Court of Illinois has passed upon this same question and declared the law of 1867 to be constitutional. We might have contented ourselves by acknowledging the authority of this decision, but we are willing not only to acknowledge its authority, but to admit its correctness.

We have not felt called upon to consider whether the General Assembly could, under the provisions of the act of Congress, provide for the taxation of shareholders at any other place within the State than that in which the bank is located. It is sufficient for the purposes of this case that it might tax them there.

Other questions have been discussed in the argument, and among them one which relates to the power of the bank to interfere in behalf of its stockholders in the manner which has been done. We have not deemed it necessary to pass upon any of these questions, as those already decided are conclusive of the case.

DECREE REVERSED, and the cause remanded with instructions to proceed

IN CONFORMITY WITH THIS OPINION.

EX PARTE ROBINSON.

1. The act of Congress of March 2d, 1831, entitled "An act declaratory of the law concerning contempts of court," limits the power of the Circuit and District Courts of the United States to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the

courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and 3d, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts.

2. The seventeenth section of the Judiciary Act of 1789, in prescribing fine or imprisonment as the punishment which may be inflicted by the courts of the United States for contempts, operates as a limitation upon the manner in which their power in this respect may be exercised, and is a negation of all other modes of punishment.
3. The power to disbar an attorney can only be exercised where there has been such conduct on the part of the party complained of as shows him to be unfit to be a member of the profession; and before judgment disbarring him can be rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence.
4. Mandamus is the appropriate remedy to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter.

ON petition by J. S. Robinson, an attorney at law, for mandamus to the judge of the District Court for the Western District of Arkansas, the case being thus:

On the 16th of July, 1873, the grand jury of the Western District of Arkansas reported to the District Court of the United States for the district, then in session at Fort Smith, that in a case in which a certain Nash was a party, they had made every effort in their power to have a witness by the name of Silas Stephenson summoned to appear before them; that for this purpose a subpœna for him had been placed the day previous in the hands of a deputy marshal by the name of Sheldon, for service; that the deputy marshal, on the same day, went to the town of Van Buren, as he said, to make the service; that after he had left the said town, the witness was seen on the streets at Fort Smith, and the subpœna was on that morning returned unserved; that they had learned from evidence before them that the witness knew that a subpœna was issued for him, and had for that reason come to Fort Smith, "but," continued the report, "after seeing the attorney, J. S. Robinson, in the Nash case, very suddenly absented himself." The jury therefore prayed the court to issue an order that the witness, Stephenson, be brought before them.

Statement of the case.

Upon this report, without other complaint, the court ordered that Sheldon, the deputy marshal, Stephenson, the witness, and Robinson, the attorney, "show cause why they should not be punished as for a contempt."

Two days afterwards, on the 18th of July, the petitioner filed the response of the deputy marshal to the order. The judge then reminded the petitioner that there was also a rule against him, to which he replied: "Yes, sir; I know it, and I am here to respond. I don't know what there is for me to answer. It," referring to the report of the grand jury, "says I saw Silas Stephenson. I do not know what the grand jury has to do with my private business in my law office," and was proceeding to reflect upon the action of the grand jury, when the judge said: "You must answer in writing, Mr. Robinson;" to which the petitioner replied, "The rule itself does not require me to respond in writing." Upon this the judge said, turning to the clerk: "It should have done so; you will amend the order if it does not, Mr. Clerk." The petitioner declined to answer the rule until it was amended. The judge then said: "Well, I will make the order for you to respond in writing now. Mr. Clerk, you will enter an order requiring Mr. Robinson to answer the rule in writing." Upon which the petitioner said: "I shall answer nothing;" and thereupon immediately, without time for another word, the judge ordered the clerk to strike the petitioner's name from the roll of attorneys, and the marshal to remove him from the bar.

This account of the language used by the petitioner and the judge is taken from the latter's response to the alternative writ issued by this court as hereinafter mentioned. The judge states in the same response that the tone and manner of the petitioner were angry, disrespectful, and defiant; and that regarding the words "I shall answer nothing," and the tone in which they were uttered as in themselves grossly and intentionally disrespectful, and as an expression of an intention to disobey and treat with contempt an order of the court; and believing that the petitioner intended to intimidate him in the discharge of his duties,—he felt it due to

himself and his office to inflict summary and severe punishment upon the petitioner.

The order of the court disbarring the petitioner, made at the time, and entered in the minutes of the court kept by the clerk, was declared by the judge to be erroneous in form, and afterwards, on the 28th of July, a more formal order was entered *nunc pro tunc*. This latter order recited the report of the grand jury mentioned above, and the rule to show cause issued thereon why the parties should not be punished as for a contempt, amended from the original order by the insertion of the words, "forthwith in writing and under oath;" and that the petitioner having notice at the time that he was required to respond to the rule, "in a grossly contemptuous, contumacious, and defiant manner," in open court, refused to respond in writing; and then proceeded to decree that, for his contempt committed in open court, as well as for his contempt committed in refusing to respond to the rule, the license of the petitioner as an attorney and counsellor at law and solicitor in chancery be vacated; that the petitioner be disbarred from further practice in the court, and that his name be stricken from the roll of attorneys, counsellors, and solicitors of the court.

Before this amended order was entered, the petitioner, through counsel, filed a motion to vacate the judgment disbarring him, based upon different grounds, which were specified. After its entry a motion to set aside the order as amended was made, in which the petitioner adopted the grounds of the original motion and added others. The substance of the more important of these was, that no charges had been previously preferred in writing and filed against him; that he had had no notice of any charges; that the report of the grand jury contained no charge which he could be required to answer; that no rule had been served upon him to show cause why he should not be disbarred; that he had had no trial previous to being disbarred, and had been denied the right of being heard in his defence; and that the court had no jurisdiction under the circumstances to render the judgment disbarring him.

Statement of the case.

He also set up among the grounds upon which he would rely, that the sentence he uttered, "I shall answer nothing," was incomplete, and that he was prevented from finishing it by the action of the judge in interrupting him with the judgment disbarring him; that the sentence completed would have been, "I shall answer nothing until the order to answer the rule in writing shall be served upon me."

He also disclaimed any intention to commit a contempt of the court, or to act in defiance of its orders or authority at the time, and averred that he was not conscious of the conduct attributed to him towards the court. This statement was verified by his oath; but the motion was denied.

The petitioner then applied to this court for the present mandamus; a mandamus upon the judge to vacate the order disbarring him and to restore him to the roll of attorneys and counsellors. In his petition, which was verified, he referred to the proceedings of the court below, the record of which was on file in this court, on an appeal taken from the judgment of that court; and stated that in the interview with the witness Stephenson which the grand jury mentioned, there was no allusion made to the Nash case or to the grand jury, but that the consultation then had with the witness related to a totally different matter.

Upon filing the petition, the court ordered that a rule issue to the judge of the District Court,* requiring him to show cause on or before the 10th day of April, A.D. 1874, why a writ of mandamus should not issue to him directing him to revoke his order of July 28th, 1873, disbarring the petitioner, and to restore him to the roll of attorneys and counsellors practicing in the said court.

The rule was served personally upon the judge in March, and in April following he filed his answer. To the answer the counsel for the petitioner demurred and moved, on the papers, for a peremptory mandamus.

The seventeenth section of the Judiciary Act of 1789 pro-

* The District Court for the Western District of Arkansas is possessed of Circuit Court powers and jurisdiction, 9 Stat. at Large, 595.

vides that all the courts of the United States "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."*

The act of March 2d, 1831, entitled "An act declaratory of the law concerning contempts of court,"† provides, in its first section:

"That the power of the several courts of the United States to issue attachments, and inflict summary punishment for contempts of court, shall not be construed to extend to any cases, except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

Messrs. Durant and Hornor, for the petitioner. No opposing counsel.

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

The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2d, 1831.‡ The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the Circuit and

* 1 Stat. at Large, 83. † 4 Id. 487. ‡ Ib.

District Courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and, 3d, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes.

If we now test the report of the grand jury by this statute, we find nothing in it which justified any proceeding whatever as for a contempt on the part of the court below against Robinson. No act of his is mentioned which could constitute within the statute a contempt either of the court or of its judge. The allegation that the witness Stephenson, after seeing Robinson, had suddenly absented himself, amounted to nothing more than an insinuation that possibly he may have been advised to that course by Robinson. There was no averment of any fact which the court could notice or the attorney was bound to explain.

Whatever contempt was committed by the petitioner consisted in the tone and manner in which his language to the court was uttered. On this hearing we are bound to take the statements in that respect of the judge embodied in his order as true, for the question before us is not whether the court erred, but whether it had any jurisdiction to disbar the petitioner for the alleged contempt.

The law happily prescribes the punishment which the court can impose for contempts. The seventeenth section of the Judiciary Act of 1789 declares that the court shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment. The judgment of the court disbarring the petitioner, treated as a punishment for a contempt, was, therefore, unauthorized and void.

The power to disbar an attorney proceeds upon very different grounds. This power is possessed by all courts which have authority to admit attorneys to practice. But the power can only be exercised where there has been such conduct on the part of the parties complained of as shows them to be unfit to be members of the profession. Parties are admitted to the profession only upon satisfactory evidence that they possess fair private character and sufficient legal learning to conduct causes in court for suitors. The order of admission is the judgment of the court that they possess the requisite qualifications both in character and learning. They become by such admission officers of the court, and, as said in *Ex parte Garland*,* "they hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded." Before a judgment disbarring an attorney is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence. This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property. And such has been the general, if not the uniform, practice of the courts of this country and of England. There may be cases undoubtedly of such gross and outrageous conduct in open court on the part of the

* 4 Wallace, 378.

attorney, as to justify very summary proceedings for his suspension or removal from office; but even then he should be heard before he is condemned.* The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged.

That mandamus is the appropriate remedy in a case like this to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter, was decided in *Ex parte Bradley*, reported in the 7th of Wallace. It would serve no useful purpose to repeat the reasons by which this conclusion was reached, as they are fully and clearly stated in that case, and are entirely satisfactory.

A peremptory mandamus must issue, requiring the judge of the court below to vacate the order disbarring the petitioner, and to restore him to his office.

MANDAMUS AWARDED.

Mr. Justice MILLER dissented.

NOTE.

SAME CASE.

[On Appeal.]

An appeal does not lie to this court from an order of the District Court disbarring an attorney. The remedy of the party, if any, is by mandamus. See the case as reported, *supra*.

APPEAL from the District Court for the Western District of Arkansas.

Before the application for a mandamus was made to this court, as above reported, the petitioner, Robinson, had appealed

* Ex parte Heyfron, 7 Howard's Mississippi Reports, 127; People *v.* Turner, 1 California, 148; Fletcher *v.* Daingerfield, 20 Id. 430; Beene *v.* State, 22 Arkansas, 157; Ex parte Bradley, 7 Wallace, 364; Bradley *v.* Fisher, 13 Id. 354.

from the order of the District Court disbarring him. The record being filed, he moved that the case be advanced on the calendar for hearing.

Mr. Justice CLIFFORD, after stating the facts respecting the order disbarring the appellant, delivered the opinion of the court as follows:

The petitioner moves the court to advance the case. Cases involving great hardships are frequently brought here for revision, and in such cases it is competent for the court to advance the same on motion. Still the motion must be denied, as it is well-settled law that neither an appeal nor a writ of error will lie in such a case. Hence it was held in the case of *Ex parte Bradley*, that mandamus from this court to a subordinate court was a proper remedy to restore an attorney at law, disbarred by such subordinate court, for a contempt committed by him before another court, as in such a case the court issuing the order disbarring the attorney had no jurisdiction to pass the order.

Whether the present case can be distinguished from the case cited will not now be decided, but the court is of opinion that the remedy of the party, if any, in this court, is not by an appeal.*

MOTION DENIED.

RYAN ET AL. *v.* UNITED STATES.

1. Sureties on a bond for the transportation of tobacco from one district to another, in the condition of which, the number of boxes and pounds of tobacco are given, and the kind of tobacco described, are responsible for the delivery at the proper place of the *tobacco*, and not the boxes in which it was supposed to be, but never was.
2. The fraud of the principal in filling the boxes with other substances than tobacco before they left his warehouse, does not release the sureties from this obligation.
3. Nor does the carelessness of the inspecting officer, though it made the fraud of the principal in the bond *easier* of accomplishment, release the sureties on his transportation bond.

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* Ex parte Bradley, 7 Wallace, 364.

Statement of the case.

ERROR to the Circuit Court for Indiana; the case, as appeared by a special finding of the court, being thus:

John May, a manufacturer of tobacco, at Indianapolis, in the sixth collection district of Indiana, had a quantity of plug tobacco in his store on which he had not paid the government taxes. Representing to the assessor and collector of his district that he wished to "transport" it from his factory to a bonded warehouse, Class B, in New York, he got permission to do so, on executing the usual transportation bond with surety.* He did accordingly execute such bond, in the penalty of $10,000, with one Ryan and another as his sureties. The condition of the bond was:

"That if the above-bounden John May shall transport or cause to be transported, and within twenty days from the date hereof shall complete the transportation of the *following described merchandise*, viz.,

Marks.	Serial numbers.	No. of packages.	Articles.	No. of lbs.	Rate of tax.	Amt. of tax.
∧ B ∨		110 boxes	PLUG TOBACCO.	11,928	40c.	$4771 20

from the manufactory owned by John May, at Indianapolis, directly to the thirty-second district of the State of New York, and shall deliver the same to the collector of said district, and store or cause the *same* to be stored in a bonded warehouse, Class B, in said district, according to law, then this obligation is to be void; otherwise to abide and remain in full force and virtue."

Before executing and delivering the bond, May exhibited 110 boxes to the inspector of tobacco and represented to him that they contained plug tobacco of a quality subject to a duty of 40 cents a pound. The inspector did not examine the contents of the boxes, the same being closed and nailed up so as to exclude a view of the contents. The boxes were

* The reader is aware, of course, that the effect of a "transportation" is to relieve the property from tax at the place where it is manufactured, and to make it subject to the tax at that place to which it is transported.

duly branded by the inspector as containing plug tobacco. After the execution of the bond, and after its delivery to the officers of the United States, May shipped to the thirty-second collection district of New York the identical 110 boxes exhibited as aforesaid to the inspector, the same being the boxes branded by him, and the boxes were delivered in a bonded warehouse, Class B, in said thirty-second district of New York. The collector of that district certified to the collector of the sixth collection district of Indiana that the boxes had been so received, and the usual bond executed therefor by the consignee, and thereupon the collector of the collection district of Indiana entered the transportation bond given by May and his sureties "cancelled." The certificate of the collector of the collection district of New York, and the entry of cancellation by the collector of the district of Indiana, were made without knowing what the boxes contained.

The boxes, after their delivery in the bonded warehouse, New York, were discovered to contain nothing but ashes, brickdust, brickbats, tobacco remnants, &c. They contained no tobacco in plug. The sureties had no knowledge of the contents of the boxes at any time before their arrival and inspection in the bonded warehouse at New York; they executed the bond in good faith. The thing, in short, was a fraud practiced by May, who, by means of this pretence of transporting the plug tobacco to New York, was enabled to withdraw it from the manufactory at Indianapolis and cheat the government out of its revenue. For after the bond was given, and the 110 boxes sent off, May could, without observation, *smuggle* away as much plug tobacco still in his factory as the 110 boxes would hold (about 12,000 lbs.) the tax upon which was still unpaid. By pretending to remove to New York what the 110 boxes would hold he could obtain credit for it on the assessor's lists, and then its *disappearance* would be a matter of course. The bond enabled him to remove not only the boxes, but the tobacco as well, *and the latter need not go to New York.*

Being indicted for this fraud, May fled the country; and

being wholly insolvent, the United States sued Ryan and the other surety upon the transportation bond already mentioned. The court below, on the case as above stated, gave judgment against them and they took this writ of error.

Messrs. McDonald and Butler, for the plaintiffs in error, argued that inasmuch as the court found that the boxes were delivered at the proper place in New York, in the precise condition in which they were when they left the manufactory, the sureties had complied with the condition of their bond; that the fraud committed by May was unknown to them, and was successful only by reason of the negligence of the revenue officer who examined the boxes before they left the factory, and who branded them as containing plug tobacco.

The learned counsel appended to their brief certain "Rules" prescribed by the Internal Revenue Bureau, a strict observance of which, they conceived, might have prevented the fraud.

Mr. S. F. Phillips, Solicitor-General, contra.

Mr. Justice MILLER delivered the opinion of the court.

The condition of the bond describes the subject of it with great particularity. It calls it merchandise, and besides giving the number of boxes, calls it plug tobacco. It also gives the precise number of pounds, the tax for which each pound was liable, and the aggregate of the tax. The condition is that this *tobacco* shall be transported from the manufactory where it then was to the proper warehouse in New York, and on the performance of this condition the bond for $10,000 was to be void, and not otherwise. That the condition was to transport the plug tobacco, and not the boxes in which it was supposed to be, is too obvious for argument. Who is to be responsible for the fact that the tobacco was never in the boxes; the persons who gave this bond binding themselves that May would deliver 11,928½ pounds of plug tobacco in New York, or the party for whose security it was given, and who was to lose if it was not so

delivered? The question admits of but one answer. When the sureties joined their principal in such a bond, it was their duty to protect themselves by seeing that the tobacco for which they were responsible was so transported, and if they trusted to him instead of making the requisite examination and supervision of the transaction, they must bear the loss sustained by this misplaced confidence.

It is urged, however, that the officer whose duty it was to examine these boxes did it in such a negligent manner that the success of the fraud is to be attributed to his carelessness.

The finding of the court is, that the inspector did not examine the contents of said boxes, the same being closed and nailed up so as to exclude a view of the contents, and that they were duly branded by him as containing plug tobacco.

The Circuit Court does not find that this was negligence, and we are not prepared here to say on this slight statement, as matter of law, that it was negligence. But if it were negligence we are of opinion that it was not such as would relieve the sureties from an obligation to the United States, voluntarily assumed by them, that 110 boxes containing 11,928½ pounds of plug tobacco should be delivered by their principal in New York. The very purpose of their bond was to secure the United States against the fraud of their principal, and the fraud was committed by him, in the very matter which the bond was designed to guard against. To say that the carelessness of the revenue officer made this fraud easier of accomplishment, can be no release of the sureties from their obligation. Some rules prescribed by the Internal Revenue Bureau for the guidance of these officers in reference to transportation of tobacco in bond, are annexed to the brief of the plaintiffs in error. They are not made a part of the record by bill of exceptions or otherwise, and are not, we think, matter for our judicial cognizance. If they were, we see nothing in them to change the opinion we have formed without them, that the judgment of the Circuit Court holding the sureties liable on their bond was right. It is, therefore,

AFFIRMED.

BURKE *v.* MILTENBERGER.

1. The Provisional Court of Louisiana, established by President Lincoln on the 20th of October, 1862, did not cease to exist until July 28th, 1866, when Congress by statute of that day provided for the transfer of cases pending in it, and of its judgments and decrees, to the proper courts of the United States.
2. This court does not take judicial notice of the various orders issued by a military commander in the exercise of the military authority conferred upon him.

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

During the recent rebellion, which broke out in the spring of 1861, the State of Louisiana having involved herself in it, the courts of the United States, in the year just named, were excluded from her limits. On the 1st of May, 1862, however, the government troops had captured and occupied the city of New Orleans, and held military possession of it and of certain small parts of the State which had submitted themselves to the lawful authority. But everything was unsettled and insecure. In this condition of things, President Lincoln, on the 20th of October, 1862, issued an executive order, establishing a Provisional Court in Louisiana. It ran thus:

"The insurrection which has for some time prevailed in several of the States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that State, including the judiciary and the judicial authorities of the Union, so that it has become necessary to hold the State in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a Provisional Court, which shall be a court of record for the State of Louisiana, and I do hereby appoint Charles A. Peabody, of New York, to be a provisional judge to hold said court, with authority to hear, try, and determine, all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such

powers and jurisdiction as belong to the District and Circuit Courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana; his judgment to be final and conclusive. And I do hereby authorize and empower the said judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal, and clerk of the said court, who shall perform the functions of attorney, marshal, and clerk, according to such proceedings and practice as before mentioned, and such rules and regulations as may be made and established by said judge. These appointments are to continue during the pleasure of the President, *not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the State of Louisiana.* A copy of this order, certified by the Secretary of War, and delivered to such judge, shall be deemed and held to be a sufficient commission. Let the seal of the United States be hereunto affixed."

This court having been thus established, one Miltenberger sued a certain Tregre in it, and on the 26th of April, 1865, got judgment against him. On execution issued on the judgment, a plantation near New Orleans, belonging to Tregre, was seized and on the 3d of June, 1865, sold by the marshal of the court. The *fi. fa.* was regular, apparently, in form. The plantation was bought in by Miltenberger, who took and kept possession of it.

Subsequently to this, one Burke having got judgment against this same Tregre, was about to sell the plantation as if still owned by Tregre. Miltenberger intervened, claiming the plantation as owner under the sale to him, already mentioned, as made on the 3d of June, 1865. And the question was whether that sale was valid or void. Tregre asserted that it was void, because by the terms of the executive order constituting the Provisional Court, the appointment of the judge and of the officers, in other words, the existence of the court was not to extend "beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the State of Lou-

isiana;" which military occupation, he alleged, had ceased before the sale was made, or even the judgment signed; civil authority being then restored, as he alleged, in the State and city. The Provisional Court itself having been declared by this tribunal to have been constitutionally established,* the matter to be now settled was when did the authority of the court end? or rather, had it ended on the 3d of June, 1865, when the plantation which Burke sought to charge as against Miltenberger was sold by the person assuming to act as marshal of the court?

This, to some extent, was a matter of historical fact. The order of events seemed thus:

1862. May 1. The military occupation of New Orleans, already spoken of as having been first made on this day, continued uninterrupted.

1863. The District Court of the United States was reorganized and a judge appointed.

1864. July. The loyal people of the State, assuming to be its true population, met in convention and adopted a constitution in harmony with the supremacy of the Union, and with lawful government.

1864. A legislature under this constitution was elected and soon after assembled and passed laws; one of its acts being a ratification of the thirteenth amendment. Other acts reorganized the Supreme and District Courts of the State.

[These political acts of the State, however, were accomplished by but a comparatively small part of the actual population of the State; and in the presence of the superior military forces of the government.]

1865. April 9. The rebel Lee surrendered.

1865. May. The cases reported in Seventeenth Annual Reports begin.

1865. May 10. The President proclaimed† that the insurrection in the several States "may be regarded as virtually at an end."

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* The Grapeshot, 9 Wallace, 130.

† 13 Stat. at Large, 757.

1865. May 17. *As was said by the counsel of Burke.* Major-General Banks, commanding the headquarters of the Gulf, issued a general order thus, suspending the collection of claims upon plantation property:

"To secure the payment of wages and other expenses incident to the cultivation of the soil, the sale of the property used for this purpose, on execution or other process of law, *is hereby prohibited and suspended until the 1st day of February,* 1866. The intention of this order being not to prejudice just claims, but to suspend their collection until the crops of the year can be matured."

Nothing on this matter, however, appeared in the record, and there was nothing to show that this order had been brought to the attention of any court below.

1865. May 26. The rebel Johnston surrendered.

1865. May 26. Kirby Smith, the last of the rebel leaders, surrendered in Texas.

1865. June 3. The sale in dispute was made; the city of New Orleans being still and for some time afterwards occupied by the troops of the United States.

1866. April 2. In the case of *The Protector*,* where a motion was made to dismiss a writ of error on the ground that more than five years had elapsed between the date of the decree appealed from and the filing of the appeal, allowing the suspension of time produced by the war, this court held that in certain States, including Louisiana, the war was to be taken to have ended when the President proclaimed it ended, which in those States was the day just mentioned, April 2d, 1866. And in *Adger* v. *Alston*,† the same date was fixed on a plea of the statute of limitations on a bond.

1866. July 28. Congress passed an act‡ by which all pending suits in the Provisional Courts were directed to be transferred to the Circuit and District Courts of the United States, to be proceeded with as if originally commenced therein.

The court below sustained the validity of the sale, and Burke appealed.

* 12 Wallace, 700. † 15 Id. 560. ‡ 14 Stat. at Large, 344.

Argument against the validity of the sale.

Mr. P. Phillips, with whom was Mr. J. B. Beckwith, for the appellant:

I. The Provisional Court was a court engendered of revolution and war. It was constituted in the face of the words of the Constitution. Every intendment against its acts performed in a time when revolution was no longer going on, and when war had completely ceased is to be made. The constitutionality of the court was indeed settled in *The Grapeshot;* but that was its constitutionality within the exact limits mentioned.

Now, on the 3d of June, 1865, when this sale was made, every general of the Confederate forces had surrendered; the forces themselves were dispersed and wandering to their homes or fleeing to foreign lands. The war had been officially proclaimed to be "virtually ended." The court, therefore, had expired, and its judge, prosecuting attorney, marshal, and clerk, were in the *status* of unofficial life. The fact that the government troops remained in New Orleans and feebly imitated military occupation, does not greatly help the opposing case. The troops had to be somewhere, and there had to be a commander over them.

II. But if the sale is defended on the grounds of a military occupation of the city, the answer is that the order of General Banks of May 17th, 1865, made the sale unlawful. It was a military order, in full force, known to the officers of the Provisional Court. As was said in *Humphreys* v. *Browne:**

"It was an injunction issued by competent and paramount authority, and did not authorize the sale to be made on the day which had been fixed. Whether the cause was sufficient or insufficient, the order had the effect of staying all proceedings."

In any view, therefore, the sale was void. If the civil authority had, on the 3d of June, 1865, superseded military rule, then the Provisional Court had ceased to exist by the terms of the organizing act. If, on the contrary, military rule still existed on that date, then the order of General Banks was obligatory.

* 19 Louisiana Annual, 158.

The act of Congress of July 28th, it may be added, did not give validity to any judgment or pending proceeding in the Provisional Court. It simply directs their transfer to tribunals unquestionably lawful.

Mr. T. J. Durant, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The only question in this case for our consideration is, whether the Provisional Court of Louisiana, established by the President on the 20th of October, 1862, had ceased to exist, by the terms of the order creating it, on the 3d day of June, 1865, when the plantation in dispute was sold by the marshal of that court, on a *fi. fa.* regularly issued, and purchased by Miltenberger, who took immediate possession of it, and has remained in possession ever since.

The institution of this court was a necessity, on account of the disturbed state of affairs in Louisiana, caused by the civil war, and the authority of the President to establish it was sustained in the case of *The Grapeshot*, reported in 9th Wallace.* The duration of the court was limited to the restoration of civil authority in the State, and it is insisted that this limitation expired when the last Confederate general, Kirby Smith, surrendered, which was on the 26th of May, 1865; but this position is inconsistent with the fact conceded on the argument, that military rule prevailed in the city of New Orleans, and the State of Louisiana, for a long time after this event, and after the sale in controversy was made. This in itself is conclusive proof that civil authority was not then restored, and that the Provisional Court was in the rightful exercise of its jurisdiction.

We do not care, however, to rest our decision on this ground alone, although it is sufficient to dispose of this case, as that court may have transacted business after the military occupation ceased, and it is important, therefore, to settle when its jurisdiction terminated.

* Page 130.

Opinion of the court.

It is very clear that the restoration of civil authority in any State could not take place until the close of the rebellion in that State; and the point of time at which this occurred has been the subject of consideration by this court in several cases involving the application of statutes of limitation.* The principle established by these cases is, as the war did not begin or close at the same time in all the States, that its commencement and termination in any State is to be determined by some public act of the political departments of the government. This action has fixed the 2d day of April, 1866, as the day in which the rebellion closed in all the States but Texas, and the 20th of August following, as the date of its entire suppression.

It does not, however, follow that the President's proclamation of April 2d, 1866, *ipso facto*, dissolved the Provisional Court of Louisiana, although it unquestionably authorized its dissolution. It is plain to be seen that its dissolution, without proper provision for the business before it, as well as that which had been disposed of, would have produced serious injury, and this state of things, requiring the action of Congress, was doubtless recognized by the President, as nothing is said in the proclamation about this court. If it was subject to be dissolved as soon as the proclamation appeared, and was no longer a court *de jure*, it still had a *de facto* existence until its actual dissolution. This took place on the 28th of July, 1866,† when Congress provided for the transfer of cases pending in that court, and of its judgments and decrees, to the proper courts of the United States. The power of Congress to do this was recognized in *The Grapeshot*, and, indeed, we do not see how it could be questioned, if, as we have decided, its establishment was a rightful exercise of the constitutional authority of the President, during a state of war.

It is contended by the plaintiff in error that an order of General Banks, in military command at New Orleans, during

* United States *v.* Anderson, 9 Wallace, 56; The Protector, 12 Id. 700; Adger *v.* Alston, 15 Id. 560.

† 14 Stat. at Large, 344.

the period of this controversy, which is set out at length in the brief of counsel, operated as an injunction upon the proceedings of the marshal, and that, therefore, the sale of the plantation was unauthorized. The answer to this position is that, in the state of the pleadings and evidence, we are not at liberty to pass upon the legality of this order, or to determine what effect should be given to it if properly issued. It is not in the record at all, and for aught that appears, was never brought to the notice of either of the courts in Louisiana engaged in the decision of the case.

It may be that the courts of the country would take judicial notice that Louisiana, at the time mentioned, was in the military occupation of our forces, under General Banks, but we know of no rule of law or practice requiring this, or any other court, to take notice of the various orders issued by a military commander in the exercise of the authority conferred upon him.

JUDGMENT AFFIRMED.

HEAD *v.* THE UNIVERSITY.

Where in a university of learning, belonging to the State, and which the State was in the habit of governing through curators appointed by itself (such as the University of Missouri), a person was appointed by the curators a professor and librarian, for six years from the date of his appointment, "*subject to law*," *held* that the legislature could vacate his office, appoint new curators, and without fault on the part of the professor assigned, order a new election of a professor to the same professorship, and of a librarian, before the expiration of the six years.

ERROR to the Supreme Court of Missouri.

Head, late professor of mathematics and also librarian in the University of Missouri, brought suit against the said university to recover salary, alleged by him to be due to him. The case was thus:

In 1820 the United States made a grant of land for the purpose of enabling the State of Missouri to establish and support an institution of learning. The title to the grant

was vested in the legislature of the State to be by it applied solely to the use of a seminary of learning. The legislature complied with the conditions of the act of Congress making the donation and established the University of the State of Missouri.

The university was supported from the interest on its endowment fund, and from the tuition fees of its patrons, and from appropriations of the State legislature. The citizens of Boone County, and a college there previously established, made a contribution of money and property, to induce the legislature to fix the university in Boone County, and it was fixed there accordingly. None of its funds were derived from private citizens or other corporations as stockholders. There were no dividends made. The management of its funds was intrusted to the board of curators, or directly controlled by the legislature. The State owned the entire university, and had always exercised the absolute control over it ever since its incorporation. The legislature elected the board of curators, and increased or diminished the number at will. Thus, by an act of March 3d, 1845, the number was twenty, which was changed by an act of the 10th of March, 1849, to eighteen. By an act of 1845, the governor, the secretary of state, the auditor of public accounts, the State treasurer, and the president of the university were made curators by virtue of their respective offices. By an act of 1849, that portion of the law of 1845 was so changed as to make the entire board elective by the State legislature. By an act of the 4th of December, 1855, the entire board of curators was removed and a new one elected, and the length of time they should serve fixed. The chairs of the president and of all the professors and tutors were vacated by the act from the 4th of July, 1856; and the act directed elections to be held in order to fill the offices thus made vacant, and empowered the curators to fix the term of the president and professors, not to exceed six years for any one term, with authority to remove any one of them from office "for incompetency, wilful neglect, or refusal to discharge the duties of his office, and for no other cause."

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But no such removal was to be made until the accused should "have had ten days' written notice of the proposed cause of removal, and reasonable time to answer the same, before the board, by the introduction of testimony or otherwise."

In this state of things, on the 10th of July, 1856, by resolution of the board of curators, certain professorships were established. Mr. W. W. Hudson was elected president, and Mr. Bolivar Head elected professor of mathematics and librarian in the said university, other professors being elected at the same time. The salaries of the president and different newly elected professors were fixed by resolution, and these further resolutions passed:

"*Resolved*, That the secretary be required to inform Messrs. Hudson, Head (and others), of their election to office, and request their acceptance.

"*Resolved*, That the president and professors just elected shall hold office for six years, from 5th July, 1856, *subject to law*."

On the same 10th day of July, 1856, the secretary of the board of curators informed Mr. Head in writing of his election to the professorship of mathematics, at the salary and for the term of six years, abovementioned, and requested his acceptance. On the same day Mr. Head replied to the secretary, and in writing accepted the appointment tendered. He entered immediately after upon the discharge of his duties, and continued to perform the same from that time to July 5th, 1860.

In this further state of things the legislature of 1859 passed, on the 17th of December, another act vacating, from the 4th day of July, 1860, the offices of all the professors, tutors, and teachers connected in any manner with the university, and providing also that a new board of curators should be elected in the place of the existing board, and that elections should be had to fill the offices by the act made vacant.

This new board being elected, notice was sent to Mr. Head from them that his office having been vacated by the

legislature it became their duty to fill the same, and that they would accordingly do so at a meeting which they would hold on 15th May, 1860. At their meeting, the curators accordingly elected a professor of mathematics in place of Mr. Head, for four years from July 5th, 1860, and on the 2d of October, 1860, publicly installed the new professor in place of Mr. Head, and delivered to him possession of the rooms and apparatus belonging to said professorship. On 2d October, 1860, they appointed another person librarian, and gave him possession of the library.

Head hereupon brought this suit in one of the Circuit Courts of the State of Missouri; alleging that his amotion from his offices without any trial or hearing, as provided in the act of 1855, was illegal in form and spirit as well as tyrannical and oppressive in fact; and claiming salary for both the offices to which he had been elected from the time when he was displaced to the end of the six years for which he had been elected. That court held that the university was a public corporation, and therefore subject to the unrestrained control of the State legislature; that the resolution of the curators, of 10th July, 1856, that the president and professors then elected should hold their offices "for six years from the 5th of July, 1856, *subject to law*," meant subject to whatever law the State legislature might think fit to pass, as there was no body that could enact laws except the legislature of the State; that the relation between the university and the plaintiff did not result from any contract between the parties, but from the law establishing the university, creating the professorships and providing for the manner of filling them.

Judgment being given accordingly, against the plaintiff, and that judgment being affirmed in the Supreme Court of the State, he brought the case here.

Mr. Head, *propriâ personâ*, iterating the argument below, made the following points: That although the university may be a public corporation, the professors therein are not public officers; that they are mere servants for hire, with

whom contracts for service may be made, and which are binding upon the corporation; that they have a vested right and legal property in their salaries and offices, of which they can be divested only by legal proceedings; that a contract for such service, at a fixed salary, and for a stipulated period, is as much within the purview of the constitutional provision which prohibits the violation of contracts by the passage of a law, as if made between individuals, subject to the legislative power to abolish the office.

No opposing counsel.

Mr. Justice HUNT delivered the opinion of the court.

We are of the opinion that the questions raised by the plaintiff in error are not presented by the facts of the case before us.

The plaintiff was elected a professor of mathematics in the University of Missouri, and it was resolved that he should hold his office for six years from July 5th, 1856, "subject to law." The judge at the circuit held, and we think correctly, that this expression meant subject to whatever law the State legislature might think fit to pass.

On the 17th of December, 1859, the legislature did pass an act, vacating the offices of all "the professors, tutors, and teachers connected in any manner with the university," and providing also that a new board of curators should be elected in the place of the existing board. It was by the authority of this statute that the board of curators elected a successor to the plaintiff, and placed him in the possession of the professorship. The plaintiff accepted his office subject to the laws then in existence, and subject to the passage of such subsequent laws as should seem wise to the legislature. If it had not been intended to place the control of his office at the disposition of the legislature, the words "subject to law" would have been quite unnecessary in the resolution. That he and his office and contract were subject to the laws in existence at the time of making it, was sufficiently evident without any declaration on the point. All

persons and all contracts are in that condition. But that he would be subject to future legislative action, to the extent of an immediate removal and without cause, was not so evident. It was to make that point clear, and for no other possible purpose, that his employment for six years from July 5th, 1856, was declared to be "subject to law."

If further evidence to this effect is needed, it is found in the manner in which the plaintiff received his appointment in 1856. It was by virtue of a statute of 1855, which declared that the offices of the president, professors, and tutors of the university should be vacant on the 4th day of July, 1856, and enacted that elections should be held to fill the offices thus made vacant. The legislature, by its own unquestioned authority, made a vacancy in the office of professor of mathematics. The vacancy thus created by law was filled by the election of the plaintiff. When it was, at the same time, declared, that this position should be held by him for six years, "subject to law," it cannot be doubted that he understood it to be a part of the contract that the legislature could, at their discretion and in their pleasure, bring it to an earlier end.

Without discussing other questions, for the reasons thus given, the judgment must be

AFFIRMED.

Dissenting, Mr. Justice BRADLEY.

INSURANCE COMPANY *v.* SEAVER.

1. Where two persons were driving sulkies in competition alongside of each other at a horse-race for money,—which sort of race was made illegal by statute,—and on a collision ensuing, one jumped to the ground from his sulky, and was clear from the sulky, harness, and reins, on his feet and uninjured, and instantly spoke to his horse to stop, and then started forward to get hold of the reins, which were hanging across the axletree; and when ahold of, or attempting to get hold of them, was killed by getting tangled in them, falling down and being dragged against a

Statement of the case.

stone. *Held*, on a suit upon a policy of insurance on the life of the person killed, which made it a condition of paying the sum assured that the contract should not extend to a case of death caused by "duelling, fighting, or other *breach of the law on the part of the assured, or by his wilfully exposing himself to any unnecessary danger or peril*"—that this death was within the condition; and that the leap from the sulky and securing the reins, and the subsequent fall and injury, were so close and immediate in their relation to the racing, and all so manifestly part of one continuous transaction, that it could not be said that there was a new and controlling influence to which the disaster should be attributed.

2. On a suit for the insurance-money on such a policy as the one above-mentioned, and where the language of the condition was the matter referred to by the court, it was error to tell the jury that they were to consider "how ordinary people in the part of the country where the insured reside, in view of the state of things then existing,—the frequency of such races, and the way in which such matches are usually regulated,—would naturally understand such language, whether as precluding such driving or not."

ERROR to the Circuit Court for the District of Vermont.

Mrs. Elizabeth Seaver sued the Travellers' Insurance Company of Hartford on a policy of insurance, which insured her against loss of life of her husband—described in the policy as a livery-stable keeper—caused by any accident within the meaning of the policy and conditions thereto annexed. Among these conditions was one that the insurance should "not extend to death or injury caused by duelling or fighting, *or other breach of the law on the part of the assured, . . . or by his wilfully exposing himself to any unnecessary danger or peril.*" Seaver, the husband, was killed suddenly at Morrisville, Vermont, immediately after jumping from a sulky, in which he was driving in a match race, on the event of which a considerable sum of money was wagered. The defence of the company, as the case was submitted to the jury, was, that his death was caused by a breach of the law, and by his wilfully exposing himself to unnecessary danger.

The plaintiff's evidence, as the bill of exceptions showed, tended to prove that at the race Seaver was driving a mare and sulky; that one Gilmore was driving a horse and sulky in competition alongside; that the track was "in form like the link of a chain," in other words was an oval track; and

that soon after leaving the judge's stand, Seaver having the inside track, and his mare and Gilmore's horse being nearly abreast, Seaver's mare broke and fell back, and that Gilmore's horse got a little ahead; that Gilmore thereupon reined in towards the inside track, apparently to get the inside track—his team being then about half its length ahead of Seaver's mare—that Seaver's mare at that moment regained her speed, and, gaining on the other horse, the sulkies came into collision. That the wheel of Seaver passed over the near wheel of Gilmore, and that Seaver instantly jumped from his sulky, and struck upon the grass-ground off the track, upon his feet, uninjured, some two or three feet from his sulky, and entirely free from it; that if he had remained standing where he struck, he would have received no injury; that he instantly spoke to his mare, and that the mare slackened her speed, and that Seaver started to catch her, and, with that purpose, ran a distance of some twenty feet by her side, trying to get hold of the reins to stop her; that the reins were hanging loosely across the axletree of the carriage; that when Seaver ran the distance as aforesaid, and while thus running with one hand either ahold of or grasping for the reins, the mare turned in upon the grass-ground and towards Seaver, throwing him down, when in some way he became entangled in the reins, and was dragged along a few feet until his head struck a stone with great force; that Seaver was immediately taken up insensible and carried into the house, and that he died the next morning from the injury.

The plaintiff's evidence further tended to show that by the rules of the trotting course Gilmore had not the right to attempt to take the inside track until he had passed Seaver a distance equal to the whole length of Seaver's team.

The defendant gave in evidence section nine of chapter cxix of the General Statutes of Vermont, which was as follows:

"All racing, running, trotting, or pacing of any horse or horse kind for any bet or wager of money or other valuable

thing, or for any purse or stake made, is hereby declared a misdemeanor, and the parties, contrivers, aiders and abettors thereof, shall pay a fine not exceeding $500."

The court charged as follows:

"That, for the purposes of this trial, the jury were to regard the trotting race in which the insured was engaged when he jumped from his sulky and was killed, as a breach of the law within the meaning of the conditions of the policy.

"That the jury were, therefore, to inquire whether the death of the insured was occasioned by the breach of the law; that this was a question for the jury.

"That if the jury should find that Seaver was killed by the race itself, by an ordinary accident of the race, so that the race was the proximate cause of the death, the plaintiff could not recover; but if the jury should find that Gilmore turned his horse intentionally and tortiously, with the purpose of winning the race at all hazards, whether he should crowd Seaver from the track or not, then that the conduct of Gilmore and not the race would be the proximate cause of the death, and the plaintiff would be entitled to recover.

"That the plaintiff's evidence showed that Gilmore, turning in as he did, was in violation of the rules of the race; that a man was usually to be taken as intending the natural and necessary consequences of his own acts. And that if the jury were of opinion that Gilmore drove, as he did tortiously, and with the intention of winning the race in any event, even though in his so doing he should crowd Seaver from the track and upset him, and that such driving caused the death of Seaver, then the jury should find for the plaintiff.

"That if the death of the insured was caused by the wilful exposure of himself to an unnecessary danger or peril within the meaning of the other clause in the policy relied on by the defendants, the plaintiff would not be entitled to recover.

"That upon this part of the case, it was to be considered, however, that the language of this clause must be taken most strongly against the defendant, because used in their policy, and for the purpose of inducing parties to take policies;

"And that it was further to be considered how ordinary people in the part of the country where the insured reside, in view of the state of things then existing, the frequency of such

races, and the way in which such matches are usually regulated, would naturally understand such language, whether as precluding such driving or not.

"That the jury should also consider the nature of the business of the insured, as set forth in the application, and therefore known to the defendant,—that of livery-stable keeper,—which, of course, embraced the management and driving of horses.

"That the question was not what construction would be given to the language at Hartford, where the defendants' company was located, but, in view of all the circumstances and conditions above alluded to, whether intelligent, fair-minded people in the vicinity of the insured where the contract was made, would regard it as excluding the driving of such a race, and, if not, that the case would not come within the proviso of that clause in the policy, and the plaintiff would, so far as that is concerned, be entitled to recover."

The jury found a general verdict for the plaintiff, and found, in addition, in answer to questions specially submitted, a special finding thus:

"That when the sulky of Seaver came into collision with the sulky of Gilmore, Seaver jumped to the ground and was entirely clear from the sulky, harness, and reins, upright and uninjured, and spoke to his horse to stop, and then started forward to get hold of the lines to stop him, and in that attempt was killed."

The company excepted to the charge of the court, and, judgment going for the plaintiff, it brought the case here.

Mr. E. J. Phelps, for the insurance company, plaintiff in error:

1. The death of the assured was caused by the race. No new event intervened. The plain terms of the policy are not to be evaded by metaphysical subtlety.

The distinction adopted by the court below between an accident resulting from the race, and an accident resulting from the carelessness of the driver at the race, cannot be maintained. An accident is never the *necessary* consequence of a race; *some* incident or other must intervene to produce it; the misconduct of the driver, a defect in the vehicle, the harness, or the track, a fright or stumbling of the horse.

In all these cases, might it be argued with the same propriety, that the injury was not caused by the race, but by the intervening incident that immediately occasioned it. If such were its interpretation no death could ever be caused by a breach of the law. Recklessness and unfairness in driving are natural incidents in such a contest, frequently occurring, and reasonably to be expected. They are perhaps the principal source of danger. The court will not investigate whether a transaction that was criminal throughout, was conducted according to the rules established for its management by those engaged in it. The case of *Insurance Company* v. *Tweed** is decisive to show that the race was the cause of the death.

2. The jury should have been instructed that the driving of the race by the assured was a wilful exposure of himself to "an unnecessary danger or peril," within the meaning of the terms of the policy; and the instruction given was erroneous. The voluntary engagement of the assured in an illegal act of a dangerous character will be conceded. He lost his life by the danger thus incurred. The term "*necessary*" should doubtless receive a reasonable rather than a literal definition. But not even upon the most liberal construction can it be maintained, that an act which is criminal, is reasonably necessary; or that the peril thereby incurred under the circumstances of this case was not an apparent peril, obvious to the common sense, and shown by the common experience of mankind. The evidence on this point raised no question proper to be submitted to a jury. The construction of the policy upon the conceded facts was for the court and not for the jury. But if any question should have been submitted at all, the rule laid down by the court was wrong. Under the rule laid down, evidence to prove the opinion entertained on the subject by "fair-minded and intelligent" citizens, would necessarily become admissible. And the opinion of the majority would determine the point.

* 7 Wallace, 44.

Argument for the assured.

Messrs. G. F. Edmunds and H. H. Powers, contra:

1. The object of life insurance being to provide for the necessities of the family, the object is a meritorious one, and courts so construe such contracts as to effectuate the object, if possible. An exception in a policy is to be taken strongest against the company; and if the exception is susceptible of different constructions, that must be taken which is most liberal to the policy-holder.

2. The policy in question insured Seaver against *all accidents* causing *personal injury;* and it was made known to the company, in the application, that Seaver was a livery-stable keeper; concerned, of course, in the management of horses. He so pays the consideration of an assurance against *any accident* occurring in *that business* as well as any other. The death was occasioned by an *accident* in that business, "an event happening unforeseen, casualty, chance."*

If Gilmore while riding by Seaver's side had suddenly drawn a pistol and shot him, the death of Seaver would be an accidental death. Now, it makes no difference how Gilmore kills Seaver, whether by shooting him, or, unexpectedly to Seaver, driving intentionally and tortiously against him. In either event his injuries were accidental.

3. The proviso in the policy is that the insurance shall not extend to "any death or injury *caused* by duelling or fighting, or other breach of the law on the part of the assured." Now, where general words follow special words of confined meaning, the general words are limited to subjects *ejusdem generis.* By this proviso the company seek to exempt themselves from their liability for *personal injuries only*, which liability is the very thing Seaver contracts for. The special words, "duelling" and "fighting," refer to acts which necessarily import *personal injury.* In either case the party engaged inflicts, and expects to receive such injury. The *general* words "or other breach of the law" must be confined to such illegal acts as naturally, legitimately, and usually result in personal injury. The statute of Vermont

* Johnson's Dictionary; Worcester, *in verbo.*

does not make the act of driving a race illegal. It is the *wager of money* that taints the transaction. The breach of such a law in no sense naturally or usually imports or results in personal injury.

4. The maxim "*Non remota causa sed proxima spectatur*" applies. It is clear that a relation must exist between the violation of law and the death, to make the defence; that the death must have been caused by the violation of law to exempt the company from liability. It cannot be the true meaning of the proviso that the policy is to be avoided by the mere fact that at the time of the death the assured was violating the law, if the death occurred from some cause other than such violation.*

Seaver's death, if happening while violating a law, was in no legal sense *caused* by such violation. Suppose Seaver and Gilmore on Monday drive a race for pleasure, with no wager depending, as they may lawfully do, and a collision occurs by the wrongful act of Gilmore, and Seaver is injured in all respects precisely in the manner shown in this case, what is the cause of his injuries? No law is being violated, and some cause, of necessity, exists. A personal injury like this must have some efficient working cause; obviously, the wrongful act of Gilmore is the proximate working cause of such injury. Could the cause be different if on Tuesday they drive a race, with a wager depending, and so unlawfully, and Seaver is injured, in all respects, the same as on Monday?

Again, in New York, racing for a purse is not illegal. A., insured by this company, rides a race there for a purse, and is injured. B., holding a policy of this company *ver-*

* Ionides *v.* Insurance Company, 108 English Common Law, 259; Marsdon *v.* City and County Assurance Company, 1 Law Reports Common Pleas, 232; Patrick *v.* Com. Insurance Company, 11 Johnson, 14; Waters *v.* Louisville Insurance Company, 11 Peters, 213; Harper *v.* Insurance Company, 19 Missouri, 506; Breasted *v.* Farmers' Loan and Trust Company, 8 New York, 304; Cluff *v.* Mutual Benefit Life Insurance Company, 13 Allen, 309, and 99 Massachusetts, 317; Bradley *v.* Mutual Benefit Life Insurance Company, 45 New York, 422.

batim like A.'s, rides a race in Vermont for a purse, and is injured in precisely the same manner as A. The company say the cause of A.'s injury is different from B.'s.

In *Insurance Company* v. *Tweed*, this court says:

"If a new force or power has intervened of itself, sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

A new force did here intervene after Seaver commenced the race, sufficient to stand as the cause of the misfortune. This is found as a fact in the special finding of the jury, *supra*, p. 535. It shows that when Seaver was injured he had ceased all connection with the race. The accident of the race was the collision. By *that* accident Seaver was uninjured. He jumped to the ground, and had he remained standing where he landed he would have been unhurt. He then sets out upon a new undertaking, and in a *foot race* after his horse, when, of course, the race was broken up and ended, he first and alone was injured.

Reply: The argument of the other side is that as, under the statute, the illegality of the race consisted in its being run for money, and as the *wager* was not the cause of the death but, at most, the *race*, therefore, the death was not caused by any breach of the law. But the whole transaction must be taken together. If there had been no purse there would, doubtless, have been no race. At any rate there was money staked here, and it was in *racing for the money* that the death occurred.

Mr. Justice MILLER delivered the opinion of the court.

The statutes of Vermont make all horse-racing for any bet or wager a misdemeanor, and impose a fine not exceeding $500 for the offence.

In regard to this branch of the defence the court instructed the jury that they were to regard the trotting race, in which the insured was engaged when he jumped from the sulky and was killed, as a breach of the law within the meaning

of the clause of the policy on that subject. As the plaintiff below took no exception to this ruling and had a verdict, no error can be assigned on it here, and we need not further examine the argument of her counsel, which controverts that proposition.

The court further instructed the jury on this branch of the subject, as follows:

"That if the jury should find that Seaver was killed by the race itself, by an ordinary accident of the race, so that the race was the proximate cause of the death, the plaintiff could not recover; but if the jury should find that Gilmore turned his horse in intentionally and tortiously, with the purpose of winning the race at all hazards, whether he should crowd Seaver from the track or not, then that the conduct of Gilmore and not the race would be the proximate cause of the death, and the plaintiff would be entitled to recover.

"That the plaintiff's evidence showed that Gilmore, turning in as he did, was in violation of the rules of the race; that a man was usually to be taken as intending the natural and necessary consequences of his own acts. And that if the jury were of opinion that Gilmore drove, as he did, tortiously, and with the intention of winning the race in any event, even though in his so doing he should crowd Seaver from the track and upset him, and that such driving caused the death of Seaver, then the jury should find for the plaintiff."

In regard to this the plaintiff in error contends that no evidence was given tending to show that Gilmore intentionally and tortiously turned his horse, with the purpose of winning the race at all hazards, whether he should crowd Seaver from the track or not. All that the bill of exceptions discloses on this point is, that Seaver, having the inside track, his mare broke and fell back a little; "that Gilmore thereupon reined in towards the inside of the track, apparently to get the inside track, his team being then about half its length ahead of Seaver's mare; that Seaver's mare at

that moment regained her speed, and, gaining on the other horse, the sulkies came into collision."

We think this a very slender foundation to put to the jury the question of Gilmore's tortious intention to drive Seaver from the track at all hazards, and to rest upon that possible secret intention the proposition that the race was not the proximate cause of the death, but that Gilmore's act was. It was well calculated to mislead, and no doubt did mislead, the jury. If the legal proposition was sound, the state of the testimony, as given in the bill of exceptions, on which it was founded, could hardly justify it. It would have been much nearer sound principle to have said to the jury that if Seaver saw that Gilmore was ahead of him ever so little, his persistence in so running his horse as to bring about a collision was wilfully exposing himself to danger within the meaning of the policy.

But we are of opinion that if the testimony raised the point the instruction was erroneous. The company in protecting themselves against accident or death caused by a violation of law, acted upon a wise and prudent estimate of the dangers to the person generally connected with such violations. And in the class of cases under consideration we have no question that the sum of money often at stake stimulates to further acts of carelessness in the way of violence, fraud, and a disregard of the rules of fair racing, which increase largely the dangers always attendant on that sport. The class of men who collect on such occasions, and who often become the leading parties in the conduct of the affair when large sums of money are wagered, have led to its denunciation by many wise and thoughtful people, and very surely adds to the risk of personal injury to the rider or driver. It was against this general species of danger, attending nearly all infractions of the law, that the company sought to protect itself by the clause of the policy in question, and of this class was the reckless driving of Gilmore. If his intentions were as bad as the instructions imply, they did not take the case out of the protection of the clause.

If Seaver had died the moment he was thrown from the

sulky, his death would have been caused by a violation of the law, though Gilmore may have disregarded the rules of the course, and may have intentionally sought to run Seaver off the track.

The jury, in response to a request to find specially on certain points, did, in addition to a general verdict in favor of the plaintiff, make the following special finding:

"And the jury further find, that when the sulky of Seaver came into collision with the sulky of Gilmore, Seaver jumped to the ground and was entirely clear from the sulky, harness, and reins, upright and uninjured, and spoke to his horse to stop, and then started forward to get hold of the lines to stop him, and in that attempt was killed."

It is said that this verdict is conclusive that the death of the deceased was not caused by the violation of the law in trotting for a wager, but by his own voluntary act when he was not trotting; and both parties appeal to the case of *Insurance Company* v. *Tweed*,* where it is said that when a new force or cause of the injury intervenes between the original cause and the accident, the former is the proximate cause.

But we do not think this new force or cause is sufficiently made out by this verdict. The leap from the sulky and securing the reins, and the subsequent fall and injury to Seaver are so close and immediate in their relation to his racing, and all so manifestly part of one continuous transaction, that we cannot, as this finding presents it, say there was a new and controlling influence to which the disaster should be attributed. If he had been landed safely from his sulky and, after being assured of his position, had, with full knowledge of what he was doing, gone to catch the animal, his death in that pursuit when the race was lost might have been too remote to bring the case within the exception.

But as the finding presents it, we cannot say that the accident was not caused by the race which was itself a violation of the law, and which might still have gone on had he caught his mare in time.

* 7 Wallace, 44.

And we are to consider that both this special finding and the general verdict were probably influenced by the erroneous instruction we have already considered, and by that we are now about to mention.

The jury were told that if the death of the insured was caused by the wilful exposure of himself to an unnecessary danger or peril within the meaning of the other clause in the policy relied on by the defendants, the plaintiff would not be entitled to recover. The court added:

"Upon this part of the case, it was to be considered, however, that the language of this clause must be taken most strongly against the defendant, because used in their policy, and for the purpose of inducing parties to take policies.

"It was also further to be considered how ordinary people in the part of the country where the insured resided, in view of the state of things then existing, the frequency of such races, and the way in which such matches are usually regulated, would naturally understand such language, whether as precluding such driving or not.

"The jury should also consider the nature of the business of the insured, as set forth in the application, and, therefore, known to the defendant, that of a livery-stable keeper, which of course embraced the management and driving of horses.

"That the question was not what construction would be given to the language at Hartford, where the defendant's company is located, but, in view of all the circumstances and conditions above alluded to, whether intelligent, fair-minded people in the vicinity of the insured where the contract was made, would regard it as excluding the driving of such a race, and, if not, that the case would not come within the proviso of that clause in the policy, and the plaintiff would, so far as that is concerned, be entitled to recover."

We are of opinion that the language of this policy is to be construed by the court, so far as it involved matters of law, and by the jury aided by the court when it involved law and fact, and that in neither view of it was the opinion of ordinary people in view of the state of things where the deceased resided, or their understanding of its language in view of the

circumstances of the case, any sound criterion by which the judgment of the jury should be formed, and the instruction in this branch of the case was unwarranted and misleading.

The jury should have been left to decide for themselves, under all the facts before them attending the death of the insured, whether it was caused by his wilful exposure to an unnecessary danger or peril. Such light as the court as a matter of law could give them, on the subject of the wilfulness of his conduct, or the presence or absence of any necessity or the character of the necessity which would justify him, might be proper, but this general reference to what ordinary people in a particular locality might think about it, was clearly not so.

For the errors here considered, the JUDGMENT IS REVERSED, with direction to

GRANT A NEW TRIAL.

BUTT *v.* ELLETT.

1. Although an instrument which purports to mortgage a crop the seed of which has not yet been sown, cannot at the time operate as a mortgage of the crop, yet when the seed of the crop intended to be mortgaged has been sown and the crop grows, a lien attaches.
2. When property which the owner has leased is sold at sheriff's sale, on execution against the owner, the sheriff's deed conveys the reversion and the rent follows as an incident.
3. Accordingly, where a lease of a cotton plantation, made in January, 1867, in order to secure the rent, mortgaged the crop of that year, *Held*, that although the seed of that crop had not yet been sown, a purchaser of the land at sheriff's sale could charge as trustee of it for him, a person to whom the tenant had transferred the crop, after it had grown and was gathered, such purchaser having taken with notice of the landlord's mortgage.

APPEAL from the Circuit Court for the District of Louisiana; the case was thus:

Sillers, the owner of a plantation in Mississippi, leased

the same, on the 15th of January, 1867, to Graham, for one year, from January 1st, of that year, Graham giving his own note, payable to Sillers, for $3500, for the rent. And to secure payment of the note embodying in the lease by which the plantation was let to him a mortgage of all the crops raised on the plantation in the year 1867. The mortgage was immediately recorded in due form. The note was never paid.

On the 3d of June, 1867, one Ellett, having recovered a judgment against Sillers, sold the plantation at a sheriff's sale under the judgment, and bought it; and Sillers transferred to him the note of Graham for $3500, due November 1st, 1867, the rent to be paid.

Notwithstanding this, Graham, in November of 1867, transferred the whole crop to certain correspondents of his, Butt & Co., who were heavily in advance for him on then existing transactions. They sold the crop and applied the proceeds in account to the payment of Graham's debt to them.

Hereupon Ellett filed a bill in the court below against Butt & Co., to charge them, as trustees for him, with the proceeds of the crop.

The evidence showed—

On the one hand, that planting never begins in Mississippi earlier than March; and,

On the other,

That on the 6th of February, 1867, the defendants had seen the lease with the mortgage provision in it, but apparently that they regarded the provision as void. It also showed that on learning that Graham had transferred the crop of 1867 to Butt & Co., Ellett immediately wrote to them, informing them that the lease with the mortgage in it had been at once duly recorded; that, besides, they had express notice of its existence, and that he would hold them accountable as trustees for the proceeds of the crop if they sold it.

The court below decreed in favor of the complainant, and the defendant brought the case here.

Argument for the mortgagee.

Messrs. R. H. Marr and T. A. Clarke, for the appellants:

The crop of 1867 was not susceptible of sale or mortgage, in January, 1867. The seed was not in the ground. Planting could commence at the earliest in March. The crop had no potential existence. The land had no power of itself to bring forth cotton. The *seed* was the essential potential agency to produce cotton. This differs from the existence of a crop of hay, or a fleece of sheep. The roots of the former are either natural to the soil or may be perennial. The fleece is a necessary consequence of the natural healthful existence of the sheep.

The cases on the question at issue are collected and reviewed in Hilliard on Mortgages.* Citing *Milliman* v. *Neher*† and *Comstock* v. *Scales*,‡ that author says: "A mortgage of future crops is held void."

In *Cudworth* v. *Scott*:§ "A mortgage was given in January, 1859, of 'all the hay and grain that grows on the farm on which I now live, the present year:' *Held*, to be good for the hay and winter rye, which were *in esse* at the time of the execution of the mortgage, but not for the grain crop of the spring of 1859."

So, in Massachusetts, that which is not *in esse* cannot be mortgaged.‖

Messrs. Estes, Jackson, and Ellett, contra:

Notwithstanding some want of harmony in the authorities it is believed to be the settled doctrine, especially in the courts of the United States, that a mortgage, such as this was, is perfectly good.¶ When the parties intend to create

* Vol. ii, chap. 42, 4th edition, pp. 414, 416, §§ 12, 18.

† 20 Barbour, 37.

‡ 7 Wisconsin, 159.

§ 41 New Hampshire, 456.

‖ Moody *v.* Wright, 13 Metcalf, 17,

¶ Pennock *v* Coe, 23 Howard, 117; Dunham *v.* Railway Co., 1 Wallace, 254; Tedford *v.* Wilson, 3 Head, 311; Robinson *v.* Mauldin, 11 Alabama, 980; Bryan *v.* Smith, 22 Id. 534; Floyd *v.* Morrow, 26 Id. 353; Curtis *v.* Auber, 1 Jacob & Walker, 510; Sillers *v.* Lester, 48 Mississippi, 513; Smithurst *v.* Edmunds, 1 McCarter, 408.

a lien upon property not then in actual existence, it attaches in equity as soon as the person who grants the lien acquires the property. In this case, the making of the crop was the end and object of the lease, and it was the express intention of both parties that the lessor should have a lien upon the crop to be grown, as security for the payment of the rent.

Mr. Justice SWAYNE delivered the opinion of the court.

The mortgage clause in the contract of lease of the 15th of January, 1867, executed by Sillers and Graham, could not operate as a mortgage, because the crops to which it relates were not then in existence. When the crops grew, the lien attached and bound them effectually from that time.

It is admitted that the cotton in question was one of those crops.

Ellett having bought the premises became clothed with all the rights of Sillers, touching the rent stipulated to be paid by Graham. The sheriff's deed conveyed the reversion, and the rent followed it as an incident. The lease passed by assignment to the grantee, and all its provisions in favor of the lessor enured to the benefit of the assignee. The appellants had full notice of the rights of Sillers. They read the lease a few days after its execution. Ellett also notified them of his rights and claim. The cotton went impressed with his lien into their hands. When they sold it they took the proceeds in trust for his benefit, and became liable to him for the amount.

DECREE AFFIRMED.

Syllabus.

THE CONFEDERATE NOTE CASE.

THE ATLANTIC, TENNESSEE AND OHIO RAILROAD COMPANY, THE CHARLOTTE AND SOUTH CAROLINA RAILROAD COMPANY, JOSEPH WILSON AND ANDERSON MITCHELL,

v.

THE CAROLINA NATIONAL BANK OF COLUMBIA, SOUTH CAROLINA, L. D. CHILDS, AND C. H. MANSON.

1. Notes issued by the Confederate government having become the currency in which contracts were made and business conducted in the insurrectionary States, during the recent civil war, and such notes having been designated by general custom as notes for so many "dollars," parol evidence is admissible, where suit is brought . . . to enforce a contract payable in "dollars," and made during the war, to prove—the above condition of things being first shown—that the term "dollars" as used in the contract meant, in fact, Confederate notes. In the absence of such evidence the presumption of law would be that by the term "dollars," the lawful currency of the United States was intended. *Thorington* v. *Smith* (8 Wallace, 1) explained.
2. The ordinance of North Carolina of 1865 declared that all existing contracts solvable in money, whether under seal or not, made after the depreciation of Confederate currency, before the 1st day of May, 1865, and then unfulfilled (except official bonds, and penal bonds payable to the State), should "be deemed to have been made with the understanding that they were solvable in money of the value of the said currency;" but at the same time provided that it should be "competent for either of the parties to show, by parol or other relevant testimony, what the understanding was in regard to the kind of currency in which the same were solvable," and that in such case "the true understanding" should regulate the value of the contract. *Held*, That the understanding of the parties might be shown from the nature of the transaction, and the attendant circumstances, as satisfactorily as from the language used; and particularly that it might be shown from the length of time during which the contracts had to run before maturing; and that accordingly when bonds of a railroad company were issued in May, 1862, payable at dates varying from seven to thirteen years afterwards, the inference was justified that the company intended at the time of issuing them, that the bonds should be paid in lawful money instead of Confederate notes.
3. The interest payable on a bond, issued as abovementioned, follows the character of the principal, and is payable in like currency.
4. Usury, as a defence, must be specially pleaded or set up in the answer to entitle it to consideration.

Statement of the case.

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

In May, 1862, the Atlantic, Tennessee and Ohio Railroad Company, a corporation chartered by the State of North Carolina, issued its coupon bonds, in sums of $500, to the amount of $151,000, payable at different periods from November, 1869, to November, 1875, with interest at the rate of six per cent. a year, payable semi-annually. The bonds were indorsed and their payment guaranteed by the Charlotte and South Carolina Railroad Company, a corporation also chartered by the State of North Carolina; and they stated on their face that they might be converted into the stock of the company issuing them, at par, by the holder. The bonds were payable to the company last abovementioned, or bearer, and were secured by a deed of trust of the railroad, buildings, and franchise of the company executed to Joseph Wilson and Anderson Mitchell. The deed stipulated that, in case the company failed to pay the principal and interest on the bonds as they became due, the trustees should, upon request of the holders of the bonds, or of their guarantor, proceed to sell the property, or so much thereof as might be necessary, and apply the proceeds of the sale to the payment of the bonds.

The Carolina National Bank, L. D. Childs, and C. H. Manson, having become the holders and owners of $25,000 of these bonds, and the railroad company having failed to pay either principal or interest, they requested the trustees to proceed and sell the property covered by the trust deed, and to distribute the proceeds pursuant to its provisions. With this request the trustees declined to comply, alleging as a reason that the parties differed as to the amount to be paid. The above-named holders of the bonds, accordingly filed a bill in the court below against the two railroad companies, and the trustees, Wilson and Mitchell, to enforce the execution of the trusts of the deed.

In their answer, the railroad companies averred that they had at all times been and now were both able and ready to adjust their debt to the complainants upon a just basis of

the value of their bonds and of the coupons due in lawful money of the United States, as soon as their value could be ascertained; but that the complainants demanded payment in full of said bonds and all accrued interest in the said lawful money, with which demand the defendants had refused to comply.

The trustees in their answer admitted that they had received notice from the complainants of the default of the Atlantic, Tennessee and Ohio Railroad Company, in paying its alleged debt to the complainants, and that for the payment thereof they, the trustees, had been requested to take steps for the sale of the property conveyed to them by the deed of trust; but that they had been prevented from so doing on account of the conflict between the complainants and the officers of the said company as to the measure of value of the bonds; the complainants claiming payment in full in lawful money of the United States, and the former asserting that the bonds were solvable in Confederate currency, and, as such, were legally liable to be scaled to their true value in money of the United States.

By a convention assembled in North Carolina in October, 1865, an ordinance was on the 18th of that month adopted, bearing the title of "*An ordinance declaring what laws and ordinances are in force, and for other purposes.*" The third section was as follows:

"It shall be the duty of the General Assembly to provide a scale of depreciation of the Confederate currency from the time of its first issue to the end of the war; and all executory contracts, solvable in money, whether under seal or not, made after the depreciation of said currency before the 1st day of May, 1865, and yet unfulfilled (except official bonds and penal bonds payable to the State) shall be deemed to have been made with the understanding, that they were solvable in money of the value of the said currency; it shall be competent for either of the parties to show by parol or other relevant testimony, what the understanding was in regard to the kind of currency in which the same are solvable; and in such case, the true understanding shall regulate the value of the contract: *Provided*, That in case

the plaintiff in any suit upon such contract, will make an affidavit that it was solvable in other currency than that above referred to, then such presumption shall cease, and it shall be presumed to be payable in such currency as shall be mentioned in the affidavit, subject to explanation by evidence as aforesaid."

The legislature, on the 12th of March in the ensuing year, passed two acts connected with the subject. The first was as follows:

"*An Act relating to Debts contracted during the late War.*

"WHEREAS a great many debts, which were contracted during the war are yet unsettled, said debts having been incurred for property bought at irregular and extravagant prices, or for currency of a depreciated value. And whereas the late State convention made it obligatory on this General Assembly to provide a scale of depreciated currency for the settlement of these debts. And whereas this General Assembly finds great difficulty in fixing a scale which will secure justice to citizens of all sections of the State. And whereas, in the opinion of this General Assembly, no scale which will do justice to all sections of the State can be adopted, therefore,

"SECTION 1. Be it enacted, That in all civil actions which may arise in courts of justice for debts contracted during the late war, in which the nature of the obligation is not set forth, nor the value of the property for which said debts were created is stated, it shall be admissible for either party to show on trial by affidavit or otherwise, what was the consideration of the contract, and the jury in making up their verdict shall take the same into consideration and determine the value of said contract in present currency, in the particular locality in which it is to be performed, and render their verdict accordingly."

The second act, after reciting the terms of the ordinance, was entitled and enacted thus:

"*An Act to establish a scale of depreciation of Confederate currency.*

"Be it enacted, &c., That the following scale of depreciation be and the same is hereby adopted and established as the measure of value of one gold dollar in Confederate currency for each month, and the fractional parts of the month of December

1864, from the 1st day of November, 1861, to the 1st day of May, 1865, to wit:

Scale of Depreciation of Confederate Currency, the Gold Dollar being the Unit and Measure of Value from November 1st, 1861, to May 1st, 1865.

Months.	1861.	1862.	1863.	1864.	1865.
January,	. . .	$1 20	$3 00	$21 00	$50 00
February,	. . .	1 30	3 00	21 00	50 00
March,	. . .	1 50	4 00	23 00	60 00
April,	. . .	1 50	5 00	20 00	100 00
May,	. . .	1 50	5 50	19 00	. . . .
June,	. . .	1 50	6 50	18 00	. . . .
July,	. . .	1 50	9 00	21 00	. . . .
August,	. . .	1 50	14 00	23 00	. . . .
September,	. . .	2 00	14 00	25 00	. . . .
October,	. . .	2 00	14 00	26 00	. . . .
November,	$1 10	2 50	15 00	30 00	. . . .
December,	1 15	2 50	20 00	. . . .	. . . .
December 1st to 10th, inclusive,	. . .	. . .	. . . .	35 00	. . . .
" 10th to 20th, "	. . .	. . .	. . . .	42 00	. . . .
" 20th to 30th, "	. . .	. . .	. . . .	49 00	. . . .

In repeated instances, after the issue of the bonds and up to July, 1863, the officers of the Atlantic, Tennessee and Ohio Railroad Company in dealing in its bonds spoke of them as having a superior value, and as not being subject to the fluctuations of Confederate currency. The following was one instance of several.

The president, William Johnson, in March, 1863, upon a settlement as guardian of his ward, upon his coming of age, paid over to him thirteen of these bonds, and assured him at the time that they were worth more than their face in good money, and that he would put nothing of a Confederate value upon him; that they were so good that he would not let him have them unless he would also take $5000 of the stock of the company. The ward took the bonds and stock at their par value. This was less than one year from their date.

The treasurer, who countersigned these bonds, seemed never to have "understood" that they were to be charged as Confederate paper, and a subsequent treasurer stated that this view of the subject was never taken by the officers or

Argument in favor of payment in Confederate notes.

board of directors until May, 1870, when the president decided that the bonded debt was subject to the Confederate scale. Prior to that time, under the supervision of the president, he had submitted his printed exhibits of the condition of the company, stating their bonds as liabilities at their "face value." These exhibits were approved by the stockholders in convention assembled.

The Circuit Court, after declaring "that the bonds and coupons issued by the Atlantic, Tennessee and Ohio Railroad Company, in the pleadings mentioned, were not issued as payable in the paper currency of the late Confederate States, and are not subject to any deduction on that account, but that the same are payable in good and lawful money of the United States, and should have been discharged in such money when payment was demanded of said railroad company," decreed a reference to the clerk to ascertain the amount due the complainants, and others holding similar bonds of the company, and that upon default in payment of the amount found due for thirty days after report made and notification thereof, the property described in the trust-deed be sold by the trustees, and that the proceeds upon confirmation of the sale be applied by them, after discharging the expenses of executing their trust, to the payment of the amount reported due. From this decree the defendants appealed to this court.

Mr. W. W. Boyce, for the appellants:

Obligations simply to pay "dollars" during the war, made within the Confederate States, should be taken to intend Confederate currency. That currency was the only currency in general use. All taxes, all salaries, all debts were paid in it. The army was paid in it; trust funds were invested in it; the banks received and paid it out universally. Contracts during that period were based on it.* In the disordered condition of the currency, the presumption of the

* Pharis *v.* Dice, 21 Grattan, 309; Hilb *v.* Peyton, Ib. 395; Walker *v.* Pierce, Ib. 726; Hale *v.* Wilkinson, Ib. 88; Dearing's Admr. *v.* Rucker, 18 Id. 439; Neely *v.* McFadden, 2 Richardson's Law (New Series), 174.

common law as to promise to pay "dollars" would have been a presumption contrary to fact. The form of almost every contract to pay Confederate money was to pay so many "dollars" generally, but certainly no one supposed that the dollars intended were dollars in Federal money.

Thorington v. *Smith*,* in this court, seems to settle the question in issue. This court, speaking by Chase, C. J., and referring to these Confederate notes there says:

. . . "*They were the only measure of value which the people had*, and their use was a matter of almost absolute necessity. *In the light of these facts, it seems hardly less than absurd to say that these dollars must be regarded as identical in kind and value with the dollars which constitute the money of the United States.* We cannot shut our eyes to the fact that they were essentially different in both respects."

The ordinance of the convention of North Carolina of October, 1865, establishes, as a presumption of law, that contracts to pay "dollars" made during the war, are presumed to be payable in Confederate currency, subject to evidence of a different intent. And the valuation by statute of North Carolina of value of Confederate currency for month of May, 1862, shows that the demand of the complainants is unreasonable.

The learned counsel then went into argument based on a special history, which he gave of the bonds, to show that if payable in full, in lawful money of the United States, they were void as usurious.

[In view of the decision hereinafter made, p. 560, on the point thus set up, the Reporter has not in his statement given any special history of the bonds; and now does not give any argument on the point as made.]

Mr. H. W. Guion, *contra*, who contended among other things—if the facts of the case did not repel all presumptions that the bonds were payable in Confederate notes, and if these bonds were within the meaning of the statutes of

* 8 Wallace, 13.

North Carolina—that those statutes impaired the obligation of contracts, and so were unconstitutional; that the parties had made in 1862 a contract, using in it the well-known word of "dollars;" that it was for the courts to interpret the meaning of the word in accordance with the settled rules of law and evidence; that these acts passed in 1866 changed this state of things, and assumed that the parties meant not what the words, judicially interpreted, declared, but what the legislature determined to be the presumable and presumed meaning; that the acts put the whole burden of proof upon him who previously was not called on to make any proof; that they thus changed both the meaning which the law gave to words, the tribunal which should settle that meaning and the rules of evidence to ascertain it; that the acts were retrospective; operating on existing contracts, and as a practical result converting valuable securities into worthless paper.

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

The question presented, and the sole question under the pleadings, is whether the bonds issued in May, 1862, of the Atlantic, Tennessee and Ohio Railroad Company, a corporation created by the State of North Carolina, were solvable in Confederate notes or in the legal currency of the United States. The company, in its answer, expresses a readiness to pay in legal currency the equivalent of the bonds, if their values be estimated upon the assumption that the bonds were payable in Confederate notes.

In support of the position taken by the company, and the trustees representing the company, reliance is placed upon the decision of this court in *Thorington* v. *Smith*,* and the ordinance of North Carolina of October, 1865, relating to contracts made during the war, and the Scaling Act of the State passed in 1866.

The treasury notes of the Confederate government were

* 8 Wallace, 1.

issued early in the war, and, though never made a legal tender, they soon, to a large extent, took the place of coin in the insurgent States. Within a short period they became the principal currency in which business in its multiplied forms was there transacted. The simplest purchase of food in the market, as well as the largest dealings of merchants, were generally made in this currency. Contracts thus made, not designed to aid the insurrectionary government, could not, therefore, without manifest injustice to the parties, be treated as invalid between them. Hence, in *Thorington* v. *Smith*, this court enforced a contract payable in these notes, treating them as a currency imposed upon the community by a government of irresistible force. As said in a later case, referring to this decision, "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 reference to the insurrectionary government."*

The Confederate notes, being greatly increased in volume from time to time as the exigencies of the Confederate government required, and the probability of their ultimate redemption growing constantly less, necessarily depreciated in value as the war progressed, until, in some portions of the insurgent territory, at the close of the year 1863, $20 in these notes, and at the close of the year 1864, $40 possessed only the purchasing power of $1 in lawful money.† The precious metals, however, still constituted the legal money of the insurgent States, and alone answered the statutory definition of dollars, but in fact had ceased in nearly all, certainly in a large part of the dealings of parties, to be the

* Hanauer *v.* Woodruff, 15 Wallace, 448.

† According to the Scaling Act of North Carolina one dollar in gold in that State was worth, at the close of 1863, twenty dollars, and at the close of 1864, forty-nine dollars in Confederate notes. According to the Scaling Act of South Carolina one dollar in gold in that State was worth at those periods respectively, thirteen dollars and ninety cents and twenty-two dollars and twenty-two cents in Confederate notes.

measures of value. When the war closed, these notes, of course, became at once valueless and ceased to be current, but contracts made upon their purchasable quality, and in which they were designated as dollars, existed in great numbers. It was at once evident that great injustice would in many cases be done to parties if the terms used were interpreted only by reference to the coinage of the United States or their legal-tender notes, instead of the standard adopted by the parties. The legal standard and the conventional standard differed, and justice to the parties could only be done by allowing evidence of the sense in which they used the terms, and enforcing the contracts thus interpreted. The anomalous condition of things at the South had created in the meaning of the term "dollars" an ambiguity which only parol evidence could in many instances remove. It was, therefore, held in *Thorington* v. *Smith*, where this condition of things, and the general use of Confederate notes as currency in the insurgent States were shown, that parol evidence was admissible to prove that a contract between parties in those States during the war payable in "dollars," was in fact made for the payment of Confederate dollars; the court observing, in the light of the facts respecting the currency of the Confederate notes, which were detailed, that it seemed "hardly less than absurd to say that these dollars must be regarded as identical in kind and value with the dollars which constitute the money of the United States."

The decision upon which reliance is placed, as thus seen, only holds that a contract made during the war in the insurgent States, payable in Confederate notes, is not for that reason invalid, and that parol evidence, under the peculiar condition of things in those States, is admissible to prove the value of the notes, at the time the contract was made, in the legal currency of the United States. In the absence of such evidence the presumption of law would be that by the term "dollars," the lawful currency of the United States was intended. This case affords, therefore, no support to the position of the appellants here, for no evidence was produced by them that payment of the bonds in Con-

federate notes was intended by the railroad company when they were issued, or by the parties who purchased them.

The ordinance of North Carolina of October, 1865, recognized the difference between the standard of value existing in that State during the war, and usually referred to in the contracts of parties, and the legal standard adopted by the government of the United States. It required that the legislature should provide a scale of depreciation of the Confederate currency from the time of its first issue to the end of the war; and declared that all existing contracts solvable in money, whether under seal or not, made after the depreciation of that currency, before the 1st day of May, 1865, and then unfulfilled (except official bonds, and penal bonds payable to the State), should "be deemed to have been made with the understanding that they were solvable in money of the value of the said currency;" but at the same time provided that it should be "competent for either of the parties to show, by parol or other relevant testimony, what the understanding was in regard to the kind of currency in which the same were solvable," and that in such case "the true understanding" should regulate the value of the contract. The act of the legislature of the State, passed in 1866, adopted a scale of depreciation of Confederate currency as required by the ordinance, designating the value in such currency of the gold dollar on the first day of each month, from November, 1861, to April, 1865.

The ordinance and act require the courts, in the construction of contracts made in the insurgent States between certain dates, to assume as a fact that the parties intended by the term "dollars" Confederate notes, and understood that the contracts were solvable in that currency; and they thus throw upon the party contesting the truth of the assumed fact the burden of establishing a different understanding. It is contended by the complainants that the ordinance and statute in thus giving a supposed conventional meaning to the terms used, in the absence of any evidence on the subject, instead of the meaning which otherwise would attach to the terms, impair the obligation of the contracts

between them and the railroad company, and are, therefore, void. Upon this question we refrain from expressing any opinion. It is unnecessary that we should do so, for there is sufficient in this case to rebut the presumption required by the ordinance and statute.

The understanding of the parties may be shown from the nature of the transaction, and the attendant circumstances, as satisfactorily as from the language used. A contract, for example, to pay $50 for a night's lodging at a house of public entertainment, where similar accommodation was usually afforded for one-twentieth of that sum in coin, accompanied by proof of a corresponding depreciation of Confederate notes, would leave little doubt that the parties had Confederate money in contemplation when the contract was made. In *Thorington* v. *Smith* the land was sold for the nominal sum of $45,000, when its value in coin was only $3000, a most persuasive fact to the conclusion that Confederate notes were alone intended in the original transaction. So, on the other hand, contracts made payable out of the Confederate States, or at distant periods, such as may be supposed to be desired as investments of moneys, or given upon a consideration of gold, would, in the absence of other circumstances, justify the inference that the parties contemplated payment in the legal currency of the country.

In the present case the intention of the railroad company that the principal of its bonds should be paid in lawful money instead of Confederate notes may justly be inferred, we think, from the nature of the contracts, particularly the long period before they were to mature. When they were issued, in May, 1862, it could not have been in the contemplation of the parties that the war would continue from seven to thirteen years. It is well known that at that time it was the general expectation on all sides that the war would be one of short duration. The Confederate notes were only payable by their terms after a ratification of peace between the Confederate States and the United States. The bonds of the railroad were intended for sale in the markets of the world generally, and not merely in the Confederate States;

they were payable to bearer, and, therefore, transferable by delivery. They state on their face that they may be converted into the stock of the company, at par, by the holder. The declarations of the officers of the company up to July, 1863, show that the company treated the bonds as having an exceptional value, and not subject to the fluctuation of Confederate currency. Repeated declarations of the officers were made to that import.

There is sufficient in these circumstances to repel the presumption created by the ordinance and act of North Carolina, and that being repelled, the ordinary presumption of law as to the meaning of the parties in the terms used must prevail.

With reference to the interest payable semi-annually a different presumption cannot be allowed, as the interest must follow the character of the principal.

The other questions presented by counsel are not raised on the pleadings. Usury, as a defence, should have been specially pleaded or set up in the answer to entitle it to consideration.

DECREE AFFIRMED.

NUNEZ v. DAUTEL.

1. A paper dated in one of the Southern States and promising to pay with interest, a sum of money specified and acknowledged to be due, "as soon as the crop can be sold or the money raised from any other source," is not in either form or effect a promissory note.
2. It is a promise to pay the money specified upon the occurrence of either of the events named in the paper, OR after the lapse of a reasonable amount of time within which to procure, in one mode or in the other, the means necessary to meet the liability.
3. It does not mean that if the crop should be destroyed or could never be sold, and the parties promising could not procure the money from any other source, the debt should never be paid.
4. The question of what was a reasonable time (there being no evidence in the case but the written promise itself), was a question for the court.
5. Five years and more is much more than a reasonable time.

Statement of the case.

ERROR to the Circuit Court for the Southern District of Georgia.

Joseph Dautel sued in the court below, I. M. Nunez and others, trading in partnership as I. M. Nunez & Co. The action was assumpsit, and the suit was brought on the 10th of September, 1870. The declaration contained two counts. The first was upon an instrument described as a due bill, whereby the defendants acknowledged to be due and promised to pay to the plaintiff the sum of $1619.66. The second count claimed the same amount upon an account stated. It appeared by the bill of exceptions that upon the trial the plaintiff gave in evidence an instrument, which was as follows:

"COLUMBUS, GA., September 1st, 1865.

"Due Joseph Dautel, or order, $1619.66, being balance of principal and interest for four years and six months' services. This we will pay as soon as the crop can be sold or the money raised from any other source, payable with interest.

"I. M. NUNEZ & Co."

The execution of the instrument was admitted. The plaintiff gave no other evidence.

The defendants thereupon "requested the court to charge the jury that if the plaintiff had proved a special agreement which was still operative, he could not recover for an account stated; whereupon the court charged the jury that the paper introduced did not prove such special agreement, and directed the jury upon the evidence to find a verdict for the plaintiff." The jury found accordingly, and judgment was entered upon the verdict.

The only point presented for the consideration of this court was whether this instruction was properly given.

Mr. R. J. Moses, for the plaintiff in error, contended that the instruction was erroneous; that in *indebitatus assumpsit*, the promise, either express or implied, was the gist of the action;* that in this case, there being an express promise,

* Buller's Nisi Prius, 129.

none could be implied; that the express promise in the case being conditional, would not alone support the verdict; and that the question in issue had been, as he conceived, adjudged in *Tanner* v. *Smart.**

Messrs. J. D. Pope and R. McPhail Smith, contra, citing *Smith* v. *Forty*,† and other cases.‡

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

The paper was clearly not a promissory note, because it was not payable at a time certain, and it was not such a due-bill as the law regards as in effect a promissory note for the same reason.§ It was made up of the following particulars: It acknowledged the amount specified, consisting of principal and interest, to be due to the plaintiff for four years and six months' services, and promised to pay him that sum, with interest, as soon as the crop could be sold, or the money could be raised from any other source.

No time having been specified within which the crop should be sold or the money raised otherwise, the law annexed as an incident that one or the other should be done within reasonable time, and that the sum admitted to be due should be paid accordingly. Payment was not conditional to the extent of depending wholly and finally upon the alternatives mentioned. The stipulations secured to the defendants a reasonable amount of time within which to procure in one mode or the other the means necessary to meet the liability. Upon the occurrence of either of the events named or the lapse of such time, the debt became due. It could not have been the intention of the parties that if the crop were destroyed, or from any other cause

* 6 Barnewall & Creswell, 609.

† 4 Carrington & Payne, 126.

‡ Gibson *v.* Renne, 19 Wendell, 389; McLemore *v.* Powell, 12 Wheaton, 554; Creath's Admr. *v.* Sims, 5 Howard, 192.

§ Story on Promissory Notes, § 27; Salinas *v.* Wright, 11 Texas, 575; Ex parte Tootell, 4 Vesey, 372.

could never be sold, and the defendants could not procure the money from any other source, the debt should never be paid. Such a result would be a mockery of justice.* The question of reasonable time, as the case was presented, was one to be determined by the court.† When the suit was instituted more than five years had elapsed from the date of the instrument. This was much more than a reasonable time for the fulfilment of the undertaking of the defendants, and the plaintiff was entitled to recover.

The Circuit Court instructed the jury correctly, and the judgment is

AFFIRMED.

WILLIAMS ET AL. *v.* BANKHEAD.

1. The bare title of a cause at the head of one or two orders of court—these being the only parts of a record in a concurrent proceeding sent here—in which orders the defendant is stated to be G. M. "*et al.*" is not sufficient to show that a partner of G. M., to wit, one J. B.—not anywhere named in any portion of the record sent, was a defendant and party to the proceeding.
2. Where a proceeding in equity concerns the disposal of a specific fund, a person claiming the fund, and liable by a decree to have it wholly swept from him, is an indispensable party.
3. The general rules in equity relative to parties and the qualifications to the rules stated.

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

In 1853, James H. Branch, a cotton planter, in Desha County, Arkansas, opened an account with George McGregor, Nathan Alloway, and James Bankhead, of New Orleans, partners, under the name of McGregor, Alloway

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* Hicks *v.* Shouse, 17 Ben Monroe, 487; Ubsdell et al. *v.* Cunningham, 22 Missouri, 124.

† Frothingham *v.* Dutton, 2 Greenleaf, 255; Kingsley *v.* Wallis, 14 Maine, 57; Manning *v.* Sawyer, 1 Hawks, 37; Cocker et al. *v.* Franklin Hemp and Flax Manufacturing Company, 3 Sumner, 530.

& Co., commission merchants, and in that and subsequent years became largely indebted to them for advances and supplies. In 1854 he executed to them an open mortgage on his plantation and slaves to secure all balance of indebtedness, whatever it might be from time to time. In 1859 the firm sued him in the Circuit Court of the United States for the Eastern District of Arkansas for an alleged balance of $20,000. He denied that he owed more than $8000, and in 1860 he filed a bill in the court below for an injunction and an account, referring incidentally to the mortgage which he had given, as part of the history of their transactions. Bankhead, already mentioned as a member of the firm of McGregor, Alloway & Co., and who finally succeeded to the entire interest in it, filed an answer to the bill, giving his version of the accounts, and praying a foreclosure of the mortgage and sale of the plantation to pay the balance due. It seemed that a cross-bill was also filed by him, but it was not contained in the record as it came to this court. The civil war having suspended the proceedings, the case was redocketed in 1866. Branch died in 1867, and his administrator, one McNiell, revived the original chancery suit in his own name. In 1870 Bankhead filed a supplemental cross-bill, alleging that he had learned that Branch, when he gave the mortgage, did not have a complete title to the plantation, but only a contract for the purchase thereof, which he had not complied with, and that by proceedings in the State court of Desha County it had been decreed that, unless the balance of purchase-money was paid, the property must be delivered up to the vendor (one Isaac Bolton), and that the payments which Branch had made, amounting to $3666.66, with interest from 1854, should be refunded to his said administrator, McNiell; and that by subsequent proceedings in the same case, wherein the administrator had allowed a decree to be taken against him *pro confesso*, this sum was directed to be paid to Mary, the widow of the said James H. Branch, under a pretended marriage settlement. This supplemental bill of Bankhead submitted *that the decree did not conclude his, Bankhead's, rights, "as he was not a party*

thereto, and the merits of *his* cause were not in fact adjudicated by the court, as he in fact knew nothing of the pendency of the claim or suit at the time." He now prayed, therefore, that this money might be paid to him on his claim. McNiell, the administrator of Branch, Seth Bolton (devisee of Isaac Bolton, the vendor of the plantation), and one Williams, the tenant in possession of the plantation, were made parties to this supplemental cross-bill. They answered it and excepted to it, and it was ordered to be struck from the files.

McNiell, in his answer, referring to the $3666.66, and undertaking to give a history of it, and mentioning as part of the same that Bolton had agreed to sell to Branch for a much larger sum, payable in instalments, a plantation on which James H. Branch paid the $3666.66 on account, giving bond with a certain Joseph Branch as security for the remaining instalments, continued thus:

"The remaining instalments upon said land being due and remaining unpaid, Bolton commenced a suit in chancery in the Desha Circuit Court to enforce their payment against said land, and made the said James H. Branch, Joseph Branch, George McGregor, Nathaniel Alloway, and said *James Bankhead, all parties defendant to said suit*, the said James H. and Joseph Branch as resident, and the said McGregor, Alloway & Bankhead as non-residents of the State of Arkansas, and filed with his bill the proper affidavit that said McGregor, Alloway & Bankhead were non-residents; that *all* of said defendants were *notified of said suit according to law*, the resident defendants by process, and the said non-resident defendants by order of publication, duly executed by advertisement, as required by law, and proof thereof regularly made and filed with the papers of the cause."

It appeared from the answers of McNiell and Williams to the supplemental cross-bill, and to a subsequent petition filed by Bankhead, that the plantation had come to the possession of Williams under the widow of Branch, and that he held by virtue of a lease from her, at the same time having a contract for the purchase of the property from the administrator as soon as the widow's claim should be satisfied.

A portion of the proceedings and a copy of the decree in the Desha County Court were annexed to the said cross-bill. It showed quite clearly that the widow and minor children of Branch had appeared in that suit, and that the former had filed a cross-bill setting up her claim to the land or to the fund in question, which had been adjudicated in her favor. But the name of *Bankhead* was nowhere specifically mentioned as a party to the proceeding. There did, however, appear these following orders of court, in the caption or style of which the name of his partner, McGregor, was mentioned:

"STATE OF ARKANSAS,
COUNTY OF DESHA.

"Be it remembered that at a Circuit Court begun and held in and for the county of Desha, on the chancery side thereof, &c. . . . present and presiding, the Hon. W. M. Harrison, judge.

"Court was proclaimed in due form of law, when the following proceedings were had, to wit:

ISAAC BOLTON
v.
JAMES H. BRANCH, JOSEPH BRANCH, AND *George McGregor.*

"On this day, on motion, the mandate and opinion of the Supreme Court of Arkansas is filed, which opinion and mandate is in the words and figures following, to wit:

"STATE OF ARKANSAS,
IN THE SUPREME COURT, SCT.

"Be it remembered, that at a term of the Supreme Court of the State, begun and held at the court-house in the city of Little Rock, on the first Monday in October, A.D. 1866, among others were the following proceedings had, to wit:

ISAAC BOLTON, APPELLANT,
v.
JAMES H. BRANCH, JOSEPH BRANCH, *George McGregor et al.*, APPELLEES.
} Appeal from Desha Circuit Court, chancery.

"This cause came on to be heard upon transcript of the record of the Circuit Court of Desha County, in chancery, and was argued in this court by the solicitors of the parties. On consideration whereof," &c.

In April, 1871, a decree was pronounced in the Circuit

Court below, in favor of Bankhead for $8000, with interest from 1860, with a direction that McNiell, the administrator of Branch, as soon as he should receive from Bolton the sum of $3666.66, and the interest thereon, which by the State court had been decreed to be refunded, should pay it over to Bankhead, and leave was given to the latter to institute such further proceedings against Bolton, or others in possession of the plantation, as might enable him to obtain the benefit of this decree.

In pursuance of this last permission, Bankhead immediately filed a petition against McNiell, Bolton, and Williams, alleging a conspiracy between them and the widow of James H. Branch, and one Cash, administrator of Isaac Bolton, the vendor, to defraud him, Bankhead, out of the said sum of $3666.66, by procuring the same to be paid over to the said widow, upon a pretended claim set up by her. The petition further alleged that the decree made by the Desha County Court, awarding the said money to her, was fraudulently procured, he, Bankhead, not being a party to the proceedings. The petition prayed for a decree against Bolton, to compel him to pay the money into court or to the petitioner, and for a receiver to take possession of the land and receive the rents. The widow and Cash were not made parties, because, as the petition alleged, they did not reside in the State of Arkansas. The defendants who were made parties answered the petition, setting up, amongst other things, that the widow was an indispensable party to the proceedings, and that the decree of the Desha County Court was conclusive in her favor.

The court below decreed in favor of Bankhead, and that unless the defendants should pay to him the said sum of $3666.66, with the interest due thereon, by a certain day, the plantation should be sold to satisfy the original decree.

Appeals were taken from both the original and supplemental decrees.

Mr. A. H. Garland, for the appellants:

1. The court below had no jurisdiction. The whole ques-

tion had been settled by a decree in the State court for Desha County, in no wise annulled. Though the extracts which the record before this court give us of the proceedings in the State court are not full, they are enough to show that Bankhead was a party. The captions or titles to the orders are sufficient proof of who the parties to the case were. In the title to the mandate of the Supreme Court George McGregor *et al.* are expressly mentioned as the defendants. Who were these "*al.?*" Who could they be but the other partners of the firm? Bankhead, of course, included as the one chiefly or alone interested. Although in the caption of the case in the Desha County Court, the "*al.*" is omitted, yet the suit is palpably that same one which has come down from the Supreme Court, where the "*al.*" is set forth. The omission is a plain clerical error, amendable, and to be amended, by what appears in the caption meant to be copied; for the caption in the inferior court was to be the same as that in the superior, if the last was right. That the last was right is certain, for McGregor had nothing to do with the suit but in connection with the firm of which Bankhead was a member even more than he.

2. But, however this may be, it is quite plain that the widow should have been made a party. She claimed this money, and had a judicial decree awarding it to her. The proceeding below sweeps it all away from her, without her having had a chance to be heard. The law will not endure this.

Messrs. Clark and Williams, contra:

1. The captions or titles to the orders of court prove nothing but that the clerk made such captions. Even if James Bankhead's name was set out specifically and at large, as a defendant, the fact would not show either that he was served or that he voluntarily, in some way, personally or by counsel, appeared. And unless he did so in some way appear, he is not concluded by the decree in the Desha County Court.

2. The widow is not a necessary party to the present suit.

This court would only refuse to proceed when it is evident that the subject-matter cannot be disposed of, and ample justice done.* Her interest is set out fully in the record, and being junior to that of the appellee cannot be maintained here, unless this court shall consider itself *absolutely concluded* by the State court decree, in which event the relief prayed would be refused on that account, whether or not she was a party.

The most that could happen by her not being made a party would be the exposure of Bolton and McNiell, to be called on by her after having paid the money to Bankhead. But the facts of the case, and the decree of this court, would be their answer.

Mr. Justice BRADLEY delivered the opinion of the court.

In this case James Bankhead obtained a decree for $8000 due him from James H. Branch, and for the specific application by way of payment to him on said decree of $3666.66 due to Branch's estate, for the reimbursement of money paid by the latter on a plantation which he had mortgaged to Bankhead, but for which he had never acquired full title. The State court of Desha County, in a suit brought therein, had decreed that the plantation must be delivered back to the vendor, and that the latter must refund the amount paid on it, which was the sum above stated. The State court, on a cross-bill filed by Branch's widow, had also decided that the reimbursement-money was in equity payable to her as her separate property under a marriage settlement. But the Circuit Court in this case, in which the widow was not a party, decreed that the same fund should be paid to Bankhead, to whom Branch had mortgaged the plantation, and, in case it was not paid by the vendor in a certain time, the plantation should be sold to raise the amount due on the mortgage. The excuse for not making the widow a party was that she did not reside in Arkansas and could not be served with process.

* Payne *v.* Hook, 7 Wallace, 431.

The parties actually before the court were one McNiell, the personal representative of Branch, Bolton, the devisee of the vendor of the plantation, and Williams, the tenant in possession of the plantation, who had rented it from the widow of Branch, she having retained possession under the alleged marriage settlement. On the other hand, the defendants contended (and that is one ground of appeal) that Bankhead *was* a party to the proceedings in the State court and was bound by the decree there made. This, however, was controverted by him.

The other ground is that the widow of Branch is an indispensable party in this case.

As to the first ground, it is undoubtedly true that Bankhead would be bound by the decree of the State court if he was a party to the proceedings. But he alleges that he was not a party, and the proof on the subject is not sufficient to show that he was a party. The record of the proceedings in the Desha County Court (since the war) was put in evidence, and is before us. It contains nothing to show that Bankhead, or his copartners, were parties to the suit, except the bare title of the cause at the head of one or two orders, in which the names of George McGregor, in one case, and George McGregor *et al.* in another, appear as defendants. Neither the original petition nor complaint, the process, nor anything else that would give light on the subject, is contained in the record as given to us. In the answer of McNiell to Bankhead's amended and supplemental cross-bill, which was struck from the files, it is positively alleged that he and his partners were made parties to the proceedings in the Desha County Court as non-resident defendants, and that a regular order of publication for their appearance was made and published, and that they actually knew of the suit and took part in it. But these allegations were not responsive to the bill, and we have nothing else on the subject sufficiently explicit to show the truth of the case.

The other ground of appeal, namely, that the widow was an indispensable party, presents a more serious question. On the one hand it is said that, not being a party, her rights

were not concluded; and that the only inconvenience arising from proceeding with the case without her was the double liability to which Bolton and the administrator of Branch became exposed by having to pay her and Bankhead both, under contrary decrees of different courts. The general rule as to parties in chancery is, that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First. Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Thirdly. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant.

In the present case, if the question were one of mere personal liability on the part of Bolton, McNiell, and Williams, it might have been admissible to proceed without making the widow of Branch a party, inasmuch as she was not a resident of Arkansas, and could not at the time be made a party in the Circuit Court without being served with process in the district of Arkansas or voluntarily appearing to the suit. The act to further the administration of justice, by which an order of publication for the appearance of non-resident defendants is provided for, if it would apply to the case, had not then been passed. But this is not a case of mere personal liability. It concerns the disposal of a specific fund, in which the widow claims an interest. If the sum of $3666.66 mentioned in the decree is not paid, the plantation is directed to be sold in order to raise the amount of

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Bankhead's claim. And this plantation is in the possession of the widow by her tenants. She is to receive the rents and profits thereof until her claim is satisfied by the payment of the said sum of $3666.66 and the interest due thereon, awarded her by the Desha County Court. Her interests, therefore, are directly affected by the decree.

Under these circumstances we think that she was an indispensable party. The decree, therefore, must be REVERSED, and the cause remanded to be proceeded in

ACCORDING TO LAW.

STEVENSON *v.* WILLIAMS.

1. The act of Congress of March 2d, 1867, under which a removal may be had of causes from a State to a Federal court, only authorizes a removal where an application is made before final judgment in the court of original jurisdiction, where the suit is brought. It does not authorize a removal after an appeal has been taken from such judgment of the court of original jurisdiction to the Supreme Court of the State.
2. Where the judgment of a State court was annulled by the decree of a court of the same State, on the ground that the notes on which the judgment was rendered were given for a loan of Confederate money, and that the transactions which resulted in the acquisition of the notes were had between enemies during the late civil war, in violation of the proclamation of the President forbidding commercial intercourse with the enemy, this court cannot review the ruling in these particulars. It conflicts with no part of the Constitution, laws, or treaties of the United States, and presents no Federal question.

ERROR to the Supreme Court of Louisiana.

Alfred Williams, of Louisiana, a person with no property, married in 1842 Catharine Stewart, the possessor of a large estate there. Three children were the fruit of the marriage. The wife died in 1854; the husband in 1863. During Mrs. Williams's life her husband managed her property. There was no marriage settlement; and the community of acquests and gains which existed among them under the Louisiana Code, though terminating with the wife's death, was never settled by the husband.

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By the death of his wife, Williams became, by operation of the Code, the natural guardian or tutor of his minor children. He died without having rendered any account of his administration as such.

Prior to the 21st March, 1862, a certain Stevenson, resident in Nashville, Tennessee, then within the Union lines, sent to his agent in New Orleans, which at the time and till about the end of April, 1862, was in the rebel lines, a quantity of checks on banks, drafts, and some Confederate notes to invest for him. The agent deposited all to his own credit in a bank, which collected the drafts and checks, and afterwards, March 21st, 1862, he bought from indorsers of them, who had them, twelve notes of Williams for $5000 each, in all $60,000, giving a check for them on the bank of New Orleans, which check was paid in Confederate money; the only currency of New Orleans at that time. The notes themselves the agent sent to Stevenson. The notes, which had one, two, and three years to run, not being paid, Stevenson sent them to New Orleans to be collected by suit, and suit was brought on them prior to November 28th, 1863. On that day, a computation being made, $79,800 was found due on them. An arrangement was made, however, by which it was agreed $3000 should be paid in cash, with an understanding that $65,000 should be payable in two, three, four, five, and six years, with interest in full of the balance claimed.

On the 21st December, 1865, judgment was entered up in favor of Stevenson, *with privilege upon the whole succession*, movable and immovable. Stevenson's claim was thus put upon the same footing as funeral charges and other privileged debts.

On the 21st March, 1867, the children of Mr. and Mrs. Williams brought suit to annul the judgment thus rendered in favor of Stevenson. They alleged their father's debt to them for his management of the community of acquests and gains, for which debt they asserted that they had a legal privilege on all his property over all other creditors. They further alleged that Stevenson, residing at Nashville, then

within the Federal lines, sent to New Orleans, when the city was in the possession of the insurgents, to an agent of his there, a quantity of Confederate notes—"notes issued by a government, 'so called,' the Confederate States of America, . . . who had combined to dissolve the Union,"—and that this agent had lent $60,000 of such notes to the decedent, Williams, their father; that such loan was illegal and void, because the notes were an instrument of treason. They accordingly prayed that Stevenson's judgment be declared void. Stevenson filed his answer; and on the 22d March, 1869, the case was submitted to the Second District Court of New Orleans. By its decree the judgment of Stevenson was annulled, and the judicial mortgage resulting from the recording of it ordered to be cancelled. The grounds on which the judgment was annulled were:

1st. That the notes on which the judgment was rendered were given for a loan of Confederate money; and,

2d. That the transactions between Williams and Stevenson were had while one resided within the Federal and the other within the Confederate lines.

The court, in giving its decision, said:

"It is clear from the testimony that the consideration [of the notes] was Confederate money. Article 127, constitution of 1868, prohibits the courts of this State from enforcing such agreements as this is found to be.

"On the remaining ground it is clearly established that Williams was a citizen of this State, and that Stevenson had for a long time been a citizen of Nashville, Tennessee. Nashville was taken by the Federal forces on the 23d of February, 1862, and it remained under their domination until the close of the war. New Orleans was under Confederate rule until its fall, on the 25th of April, 1862, and between these dates, on the 21st March, 1862, Stevenson sent his Confederate currency to Williams, in New Orleans, for which he gave his notes.

"This transaction was not only in violation of the laws of war, but in disobedience of the President's proclamation, in conformity with an act of Congress."

Stevenson applied for a new trial, which was refused on

11th June, 1869, and he then appealed to the Supreme Court of Louisiana.

While the case was pending on appeal he filed a petition, professedly under the act of March 2d, 1867,* for the removal of the record of appeal from the Supreme Court of Louisiana to the Circuit Court of the United States for the Circuit and District of Louisiana. The act under which the petitioner sought to remove the case enacts that—

"Where a suit is brought in any State court in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, &c., such citizen of another State, whether he be plaintiff or defendant, &c., may *at any time before the final hearing or trial of the suit*, file a petition for removal," &c., and that when the papers get to the Circuit Court of the United States, "the suit shall there proceed in the same manner as if it had been brought there by original process."

The petition for removal was refused, and the judgment of the District Court was affirmed. From this judgment of affirmance by the Supreme Court of Louisiana the case was brought here, as within the twenty-fifth section of the Judiciary Act.

Messrs. J. A. and D. G. Campbell, for the plaintiff in error; Messrs. Durant and Horner, contra.

Mr. Justice FIELD delivered the opinion of the court.

The application of the appellant for the removal of the suit from the Supreme Court of Louisiana to the Circuit Court of the United States was made too late, and was properly refused on that ground. The act of Congress of March 2d, 1867,† under which the removal was asked, only authorizes a removal where an application is made "before the final hearing or trial of the suit," and this clearly means before final judgment in the court of original jurisdiction, where the suit is brought. Whether it does not mean still

* 14 Stat. at Large, 558. † Ib.

more—before the hearing or trial of the suit has commenced which is followed by such judgment—may be questioned; but it is unnecessary to determine that question in this case.

After a final judgment has been rendered in the State court, the case cannot be removed to the Circuit Court of the United States, and "there proceed," as the statute provides, "in the same manner as if brought there by original process," without setting aside the trial and judgment of the State court as of no validity. No such proceeding is contemplated by the act; and since the decision of *The Justices* v. *Murray*, reported in 9th Wallace, legislation directed to that end, where, at least, the trial has been by jury, would be of doubtful validity.

The judgment recovered by Stevenson against the succession of Williams, appears to have been annulled on two grounds: 1st, that the notes on which the judgment was rendered were given for a loan of Confederate money; and 2d, that the transactions which resulted in the acquisition of the notes were had between enemies during the late civil war, in violation of the proclamation of the President forbidding commercial intercourse with the enemy.

The first ground would not be deemed, in a Federal court, sufficient to set aside a judgment rendered for the cash value, in National currency, of the Confederate money, especially when, as in this case, the judgment was entered upon a stipulation with the executor of the estate for an extended credit. And the evidence in the record leads us to doubt whether the transactions detailed properly fall within the rule of public law, or the proclamation of the President, forbidding commercial intercourse with the enemy.

But the ruling of the State court in these particulars, however erroneous, is not the subject of review by us. It presents no Federal question for our examination. It conflicts with no part of the Constitution, laws, or treaties of the United States.

Had the State court refused to uphold the judgment because of the provision in the constitution of the State, sub-

sequently adopted, prohibiting the enforcement of contracts founded upon Confederate money, a Federal question would have been presented. That provision, however, although referred to, does not appear to have caused the ruling. The court only followed its previous adjudications, that contracts of the character mentioned were invalid.*

JUDGMENT AFFIRMED.

OSBORNE *v.* UNITED STATES.

1. A distiller's bond taken in pursuance of the act of July 20th, 1868, imposing taxes on distilled spirits, and which enacts "that a distiller shall on filing with the assessor notice of an intention to commence business, make a bond with sureties, to be approved by the assessor, and that no bond of a distiller shall be approved unless he is the owner in fee, unincumbered, of the land on which the distillery is, or unless he files with the assessor, in connection with his notice, the written consent of the owner of the fee, and of any person having a lien thereon, that the premises may be used for the purpose of distilling spirits, subject to the provisions of law, and stipulating that the lien of the United States for taxes and penalties shall have priority of such incumbrance, and that in case of the forfeiture of the distillery premises, the title of the same shall vest in the United States, discharged from such incumbrance," is not void, even as against sureties to the bond, because the ground was incumbered, and because it being so the bond was approved without the consent of the incumbrancers to postpone their liens; the bond not having been delivered as an escrow simply.
2. This is not altered by the fact that if the consent of the incumbrancers had been got to postpone their liens, the ground on which the distillery stood was of sufficient value to discharge the taxes due by the distiller and so relieve the sureties from their personal obligations.

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

The United States brought suit in the court below against Ann Osborne, administratrix of Joseph Osborne, deceased, upon a distiller's bond, executed by Samuel McMillan as principal, and by Robert Fletcher and the decedent, the said Joseph Osborne, as sureties, in pursuance of the provisions

* West Tennessee Bank *v.* Citizens' Bank, 13 Wallace, 432; Bethell *v.* Demaret, 10 Id. 537.

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of the seventh section of the act of July 20th, 1868,* "Imposing taxes on distilled spirits, and for other purposes." This section enacts:

"That every distiller shall, on filing his notice of intention to continue or commence business, make and execute a bond in form prescribed by the commissioner of internal revenue, with at least two sureties, to be approved by the assessor of the district."

The eighth section of the act further enacts:

"That no bond of a distiller shall be approved unless he is the owner in fee, unincumbered by any mortgage, judgment, or other lien, of the lot or tract of land on which the distillery is situated, or unless he files with the assessor, in connection with his notice, the written consent of the owner of the fee and of any mortgagee, judgment creditor, or other person having a lien thereon, duly acknowledged, that the premises may be used for the purpose of distilling spirits subject to the provisions of law, and expressly stipulating that the lien of the United States for taxes and penalties shall have priority of such mortgage, judgment, or other incumbrance, and that in case of the forfeiture of the distillery premises or any part thereof, the title of the same shall vest in the United States, discharged from any such mortgage, judgment, or other incumbrance."

When the bond upon which this action was brought was delivered to and approved by the assessor, the distillery premises were incumbered by certain judgment liens, and the bond was approved and McMillan permitted to commence and continue his business without their release or a stipulation for their postponement. The distillery and the ground on which it was would have been of sufficient value to secure the claim now set up by the government (which was for unpaid internal revenue taxes), if the claim for the government taxes had had priority of the judgment liens; but, postponed by them, it was insufficient. The defendant pleaded these facts, but none others, in bar to a recovery against her.

* 15 Stat. at Large, 127.

To the plea thus made the United States demurred. The court below sustained the demurrer, and gave judgment upon the bond. To reverse this judgment this writ of error was prosecuted.

Mr. D. W. Sellers, for the plaintiff in error:

All *statutory* bonds are executed with relation to the statutes under which they are given, and their obligation is the same as it would be if the statute were inserted in them. In the present case no bond could *be approved by the assessor* until the lien of the United States for taxes should have priority, and no distiller could lawfully commence to distil until the assessor had approved the bond. Till then all was *in fieri*. An execution and a delivery of a bond which the assessor could not lawfully approve until the distillery premises were subject to the lien of taxes before all other liens, was accordingly the execution and delivery of nothing but an *escrow*. The demurrer admits that the distillery and ground whereon it was erected, was sufficient to secure the debt due the United States. Whatever loss thereon has occurred to the government has occurred, therefore, by the assessor's neglect of his duty. He is the servant of the United States. For loss accruing to the United States, he has given bond. The surety has no action against him on that bond, and he cannot compel the United States to subrogate.

This disregard of the law, by the assessor, was not of a matter formal and directory, but substantial and mandatory. The license of the assessor would not have justified the distiller, if he had been indicted for violating the law.

The provisions avoided by the assessor and distiller ought to be enforced against the government in the collection of the present tax, as those of a tax law were under circumstances very similar in principle in *French* v. *Edwards*.*

We submit, therefore, that the court below erred in sustaining the demurrer to the plea.

* 13 Wallace, 506.

Mr. C. H. Hill, Assistant Attorney-General, citing *United States* v. *Hodson*,* and *Dair* v. *United States*,† contended, *contra*, that the demurrer was rightly sustained.

The CHIEF JUSTICE delivered the opinion of the court.

The Circuit Court did not err in sustaining the demurrer to the plea of the plaintiff in error. The object of the eighth section of the act of Congress was to protect the government, not the sureties upon the bond. By that section the assessor was not permitted to approve a distiller's bond unless the distillery property was unincumbered as against the United States. If he did he made himself liable to the government for his default, but he violated no duty he owed the sureties. He was under no obligation to protect the signers of the bond. If the sureties insisted upon a release of the incumbrances as a condition to their becoming bound, they should have taken care to see that the bond was not approved until all the requirements of the statute in favor of the government had been complied with. The assessor was in no respect called upon to act for them. If they failed to secure all the indemnity they might have had it was their fault, and not that of the United States. As to them certainly this section of the act is directory to the assessor and not mandatory.

But it is directory also as to the United States. The assessor is a ministerial officer. He is directed not to approve a distiller's bond until the distillery property is made free from incumbrances as against the claims of the government. He ought to insist upon this. If he fails to perform this duty the government will lose a part of the security it was entitled to have, but this will not prevent it from availing itself of so much as it has obtained.

It is not averred in the plea that the bond was delivered to the assessor as an escrow, to be approved and made binding upon the obligors only when the incumbrances were released. It is not even averred that the assessor, when he

* 10 Wallace, 395. † 16 Id. 1.

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approved the bond, had actual knowledge of the existence of the alleged incumbrances. But the theory of the plea is that the act of Congress made the United States a guarantor to the surety that the distillery property was free from incumbrances at the time of the approval of the bond. In our opinion such is not the law.

JUDGMENT AFFIRMED.

PEETE v. MORGAN.

A State cannot, in order to defray the expenses of her quarantine regulations, impose a tonnage tax on vessels owned in foreign ports, and entering her harbors in pursuit of commerce.

APPEAL from the Circuit Court for the Eastern District of Texas.

The Constitution ordains as follows:

"No State shall without the consent of Congress lay any duty on tonnage.

"Congress shall have power to regulate commerce between the States."

With these provisions of the Constitution in force, the legislature of Texas, by an act of August 13th, 1870, enacted that every vessel arriving at the quarantine station of any town on the coast of Texas, should pay $5 for the first hundred tons, and one and a half cents for each additional ton.

In this state of things Morgan, a citizen of New York—and the owner of two lines of steamers, registered and enrolled in that city, and running from ports in Louisiana to ports in Texas, and back to the ports whence they sailed,—filed a bill in the court below to enjoin one Peete, health officer at the port of Galveston, from the future collection of quarantine fees, exacted under the act abovementioned, from all his vessels coming to the quarantine ground of the said port.

The enactment laying the tax was apparently passed on

an assumption that it was justified by the language of this court in *Gibbons* v. *Ogden*,* and where in speaking of inspection laws, this court say:

"They form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the General government, all which can be most advantageously exercised by the States themselves. Inspection laws, *quarantine laws*, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike-roads, ferries, &c., are component parts of this mass."

The court below granted a perpetual injunction, and Peete, the health officer, brought the case here on appeal from this decree.

The question was:

Can a State levy a tonnage tax on vessels owned in foreign ports, and entering her harbors in the pursuit of commerce, in order to defray the expenses of her quarantine regulations?

Mr. P. Phillips, for Morgan, the appellee; no counsel appearing for the health officer, Peete, the appellant.

Mr. Justice DAVIS delivered the opinion of the court.

That the power to establish quarantine laws rests with the States, and has not been surrendered to the General government is settled in *Gibbons* v. *Ogden*. The source of this power is in the acknowledged right of a State to provide for the health of its people, and although this power when set in motion may in a greater or less degree affect commerce, yet the laws passed in the exercise of this power are not enacted for such an object. They are enacted for the sole purpose of preserving the public health, and if they injuriously affect commerce, Congress, under the power to regulate it, may control them. Of necessity, they operate on vessels engaged in commerce, and may produce delay or in-

* 9 Wheaton, 203.

convenience, but they are still lawful when not opposed to any constitutional provision, or any act of Congress on the subject.

It is evident that the power to establish quarantine regulations cannot be executed without the State possesses the means to raise a revenue for their enforcement, but it is equally evident that the means used for this purpose must be of such a character as the restrictions imposed by the Federal Constitution upon the taxing power of the States authorize. We are not called upon in this case to go into the general subject of the limitations imposed by these restrictions, because the tax in question is manifestly outside the jurisdiction of the State to impose; as it is a "duty of tonnage," within the meaning of the Constitution.

This duty was doubtless imposed to raise revenue, but Chief Justice Marshall, in commenting on this subject in *Gibbons* v. *Ogden*, says: "It is true, that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution to prohibit the States from exercising this power." This power cannot be exercised without the permission of Congress, and Congress has never consented that the States should lay any duty on tonnage. On the contrary, so apprehensive was Congress that its legislation in 1799,* directing the collectors of customs and officers commanding forts and revenue cutters to aid in the execution of the quarantine and health laws of the States, rendered necessary on account of the prevalence of yellow fever in New York, might be construed into an admission of the right of the States to lay this duty, that it used the following words of exclusion: "That nothing herein shall enable any State to collect a duty of tonnage or impost, without the consent of the Congress of the United States thereto."

It is, however, not necessary to discuss this subject, as it has been recently fully considered by this court in the *State*

* 1 Stat. at Large, 619.

Tonnage Tax Cases, reported in 12th Wallace.* In these cases the law of Alabama levied a tax at so much per ton on all steamboats. The boats on which the tax was levied were owned by citizens of the State, and were employed exclusively in the internal commerce of the State, over which Congress has no control. This court, while conceding the full power of the State to tax the property of its citizens, held that the inhibition in the Federal Constitution prevented the State from taxing in this mode. Much more does this inhibition apply when the vessels are owned by citizens of another State, and are engaged in commerce between the States, over which Congress has control.

DECREE AFFIRMED.

RAILROAD COMPANY *v.* RICHMOND ET AL.

1. The act of Congress of June 15th, 1866, authorizing every railroad company in the United States, whose road was operated by steam, and its successors and assigns, to carry upon and over its road, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property, on their way from one State to another State, and to receive compensation therefor, and to connect with roads of other States so far as to form continuous lines for the transportation of the same to their place of destination; and the act of July 25th, 1866, authorizing the construction of certain bridges over the Mississippi River, and among others a bridge connecting Dubuque with Dunleith, in the State of Illinois, and providing that the bridges, when constructed, should be free for the crossing of all trains of railroads terminating on either side of the river, for reasonable compensation, were designed to remove trammels upon transportation between different States, interposed by State enactments or by existing laws of Congress, and were not intended to interfere with private contracts and annul such as had been made on the basis of existing legislation and existing means of interstate communication.
2. Contracts valid when made, continue valid, and capable of enforcement, so long as peace lasts between the governments of the contracting parties, notwithstanding a change in the conditions of business which originally led to their creation.

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* Page 204.

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3. The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation; it was not intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse.
4. Accordingly, a contract between a railroad company and an elevator company, that the latter company, in consideration of erecting and using for that purpose an elevator, should have for a prescribed term the handling, at a stipulated price, of all grain brought by the railroad company in its cars to the city of Dubuque, on the Mississippi River, to be transmitted to a place beyond, did not cease to be valid and binding upon the parties because afterwards, by the construction of a railroad bridge across the Mississippi at Dubuque it became unnecessary for the railroad company or its lessee, and a useless expense to it, to have the grain brought by it to Dubuque handled at that place. The enforcement of the contract after the construction of the bridge was not an interference with the power of Congress to regulate commerce between the States.

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

On the 22d of August, 1860, the Dubuque and Sioux City Railroad Company and the Dubuque Elevator Company, corporations, created both by the laws of Iowa, entered into a contract by which the elevator company was to construct an elevator for receiving, storing, handling, and delivering grain brought by the cars of the railroad company to Dubuque City. On the 2d of January, 1861, a supplemental agreement relating to the same subject was entered into between the same companies; the two contracts, as the court held, being, to be considered together as forming one.

By that contract the elevator company, on its part, stipulated, among other things, to erect on land leased from the railroad company, situated at Dubuque, in the State of Iowa, a building suitable for receiving, storing, delivering, and handling all grain that should be received by the cars of the railroad company, not otherwise consigned, and to make such additions to the building from time to time as the business of the company might require; to receive and discharge at Dubuque for the company all *through grain*—by which was meant all grain transmitted, by the terms of shipment,

through that place to some point beyond—at one cent a bushel, and make no charge for storage unless the grain was in store more than ten days, and then only at certain specified rates; and, at the end of fifteen years, the term of the lease, to renew the contract for another fifteen years, or, at the option of the railroad company, accept payment for its buildings, machinery, and other property used in conducting its business.

And the railroad company, on its part, stipulated that it would not erect a similar building for receiving, storing, delivering, and handling grain at Dubuque, or lease to any others the right to erect any such building; that the elevator company should have the handling at Dubuque of all through grain, and be paid one cent a bushel for receiving and discharging the same, and the compensation designated for storage when it exceeded ten days.

The elevator company erected the buildings required, sufficient and suitable for the purposes intended, and had always been ready to carry out its stipulations.

On the 13th of September, 1867, the Dubuque and Sioux City Railroad Company leased its road and other property to the Illinois Central Railroad Company. In this lease the Illinois company expressly assumed the contract mentioned, made with the elevator company, and soon afterwards entered into possession of the leased property, and commenced transferring grain from Dubuque across the Mississippi River, which had been brought to that point in the cars of the Dubuque and Sioux City Railroad Company. But it did not regard the stipulations of the contract with the elevator company, or only partially performed them; grain was shipped through Dubuque without being delivered to or handled by that company, and without payment of the charges which it claimed as entitled to under the contract; and the present suit was brought in a District Court of the State of Iowa by one Richmond, who had succeeded to the rights of the elevator company, to enforce the contract.

The defence was that the contract as now sued on was repugnant to what is called "the commercial power of Con-

gress" (the power given to Congress by the Constitution "to regulate commerce among the several States"), as that power had been exercised in two several acts now to be spoken of: one was "An act to facilitate commercial, postal, and military communication among the several States,"* passed June 15th, 1866, the preamble and part of the first section of which were as follows:

"Whereas, the Constitution of the United States confers on Congress, in express terms, the power to regulate commerce among the several States, to establish post-roads, and to raise and support armies; therefore,

"Be it enacted, That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, 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 was "An act to authorize the construction of certain bridges, and to establish them as post-roads," passed July 25th, 1866,† and authorizing any person or corporation, with the consent of the two States named, to construct and maintain a bridge across the Mississippi, between Dubuque in Iowa and Dunleith in Illinois; "and to lay on and over said bridge railway tracks *for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point, and when constructed all trains of all roads terminating at said river at or opposite said point, shall be allowed to cross said bridge for reasonable compensation* to be made to the owners of said bridge," under certain conditions which the act provided.

The District Court denied the force of the defence set up as abovementioned, and gave a judgment in favor of the elevator company for a part of the money claimed.

* 14 Stat. at Large, 66. † Ib. 244.

The case coming for review to the Supreme Court, that court also denied the validity of the defence, and adjudged that the Constitution and the acts of Congress relied on by the railroad company did not in any manner affect the validity or force and effect of either of the contracts.

To review this judgment the defendants sued out a writ of error from this court under the twenty-fifth section of the Judiciary Act, and contended here, as in the court below, that the contract sued on was repugnant to the commercial power of Congress as exercised in the passage of the two acts referred to, and in contravention of the public policy established thereby.

Mr. J. F. Wilson, for the plaintiff in error; Messrs. Platt Smith and J. M. Griffith, contra.

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

There is no question about the power of the Dubuque and Sioux City Railroad Company to make the contract in controversy with the elevator company; and if there were any, it would not be one within our province, upon the present appeal, to decide. The railroad company was obliged to discharge the grain it carried in its cars at the terminus of its road; and in securing the use of an elevator it provided the least expensive and the most expeditious mode for that purpose. The period for which the contract should be made, like other contracts for service, was one which rested in the discretion of the companies. No rule of law limited the period of its continuance. The occurrence of subsequent events, rendering it of more or less value to either of the parties, could not affect its validity or justify any violation of its provisions.

The plaintiffs in error contend—we quote their own language—"that the contract sued on in this action is repugnant to the commercial power of Congress, as exercised in the passage of the acts of June 15th, 1866, and July 25th, 1866, and in contravention of the public policy established

thereby." The act of Congress of June 15th, 1866, authorized every railroad company in the United States, whose road was operated by steam, and its successors and assigns, to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property, on their way from one State to another State, and to receive compensation therefor, and to connect with roads of other States so far as to form continuous lines for the transportation of the same to their place of destination. The act of July 25th, 1866, authorized the construction of certain bridges over the Mississippi River, and among others a bridge connecting Dubuque with Dunleith, in the State of Illinois, and provided that the bridges, when constructed, should be free for the crossing of all trains of railroads terminating on either side of the river, for reasonable compensation.

These acts were passed under the power vested in Congress to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States, which had previously existed, and to prevent the creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi. But they were intended to reach trammels interposed by State enactments or by existing laws of Congress. They were not intended, even if it were competent for Congress to authorize any such proceeding, to invade the domain of private contracts, and annul all such as had been made on the basis of existing legislation and existing means of interstate communication. Contracts valid when made, continue valid, and capable of enforcement, so long, at least, as peace lasts between the governments of the contracting parties, notwithstanding a change in the conditions of business which originally led to their creation.

The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation; it was never intended that the power should be

exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse.

The argument of the plaintiffs in error would lead to the abrogation of all contracts of the Iowa Railroad Company which might prove from subsequent events to be more onerous than contracts made after such events had happened. A contract, for example, for the supply of coal for the engines of the company, made upon terms which were at the time reasonable, might be felt to be very hard and oppressive if, before its termination, the discovery of new fields of coal in the vicinity of the road should reduce the market price of the article one-half. To assert that the enforcement of a contract of this kind would be repugnant to the commercial power of Congress, because the expenses of transportation would be less if the contract were annulled, would not be more extraordinary than the position assumed by the appellant in the present case, and would be equally entitled to consideration.

When counsel speaks of the public policy established by the acts of Congress mentioned, he must mean nothing more than that the acts were intended to facilitate commercial intercourse among the States. Undoubtedly such was the case, and it is of great public interest that such intercourse should be free and untrammelled. But if comparisons may be made with respect to a subject of this nature, we should say that the observance of good faith between parties, and the upholding of private contracts, and enforcing their obligations, are matters of higher moment and importance to the public welfare, and far more reaching in their consequences.

DECREE AFFIRMED.

UNITED STATES *v.* COOK.

1. Timber standing on lands occupied by the Indians cannot be cut by them for the purposes of sale alone; though when it is in their possession having been cut for the purpose of *improving* the land—that is to say, better adapting it to convenient occupation—in other words, when the timber has been cut incidentally to the improvement, and not cut for the purpose of getting and selling it—there is no restriction on the sale of it.
2. The Indians having only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber. Every purchaser from them is charged with notice of this presumption. To maintain his title it is incumbent on him to show that the timber was rightfully severed from the land.
3. The United States may maintain an action for unlawfully cutting and carrying away timber from the public lands.

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

The Menomonee Indians by agreement and treaty, negotiated on the 8th and 17th February, 1831, set apart and ceded to the United States certain of their lands in Wisconsin as a home for such of the New York Indians as might remove to and settle upon them. As the lands were intended for a home for the New York Indians, it was provided that the President should prescribe the time for the removal of the Indians to and settlement upon them, and, at the expiration of the time, apportion the lands among the actual settlers in such manner as he should deem equitable and just. If within the time prescribed they refused to accept the provisions of the treaty made for their benefit, or, having accepted, refused to remove from New York and settle on the lands, then the lands were to be and remain the property of the United States. It was also distinctly understood that the lands ceded were to be held by the tribes of New York Indians, under such tenure as the Menomonees held their lands, subject to such regulations and alterations of tenure as Congress and the President might direct. For this cession the United States paid the Menomonees $20,000.*

* 7 Stat. at Large, 343, 347.

On the 3d of February, 1838, the first Christian and Orchard parties of the Oneida Indians, to whom a part of the Menomonee cession had been apportioned, ceded to the United States all the lands set apart to them, except a tract containing one hundred acres for each individual, or in all about 65,000 acres, which they reserved to themselves, to be held as other Indian lands are held. Of this tract some three or four thousand acres have been occupied and cultivated as farming lands by individuals of the tribe in severalty with the consent of the tribe. Many of the Indians, including most of the young men, do not cultivate any of the lands as their own. A small number of the tribe cut timber from a part of the reservation not occupied in severalty, and made it into saw-logs, which they removed and sold to a certain George Cook. The United States brought this action of replevin against the said Cook to recover possession of these logs, and upon trial in the Circuit Court the facts here stated were established by the testimony; and, in addition, evidence was offered tending to prove that timber on the reservation had been cut and sold by the Indians of the tribe continually since 1838, with the tacit consent of the officers of the tribe.

Upon this state of facts the counsel of the United States asked the court to instruct the jury that the action could be brought and maintained. Upon the question of giving this instruction the judges were divided in opinion, and it was certified to this court for decision.

Mr. S. F. Phillips, Solicitor-General, for the United States; no opposing counsel.

The CHIEF JUSTICE delivered the opinion of the court.

We think the action was properly brought, and that it may be maintained.

The right of the Indians in the land from which the logs were taken was that of occupancy alone. They had no power of alienation except to the United States. The fee was in the United States, subject only to this right of occu-

pancy. This is the title by which other Indians hold their lands. It was so decided by this court as early as 1823, in *Johnson* v. *McIntosh*.* The authority of that case has never been doubted.† The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy.‡ The possession, when abandoned by the Indians, attaches itself to the fee without further grant.§

This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them. But to justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land. The improvement must be the principal thing, and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized.

The timber while standing is a part of the realty, and it can only be sold as the land could be. The land cannot be sold by the Indians, and consequently the timber, until rightfully severed, cannot be. It can be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale. Its severance under such circumstances is, in effect, only a legitimate use of the land. In theory, at least, the land is better and more valuable with the timber off than with it on. It has been *improved* by the removal. If the timber should be severed for the purposes of sale alone—in other words, if the cutting of the timber was the principal thing and not the incident—then

* 8 Wheaton, 574.

† 1 Kent, 257; Worcester v. Georgia, 6 Peters, 580.

‡ Cherokee Nation v. Georgia, 5 Peters, 48. § Ib. 17.

the cutting would be wrongful, and the timber, when cut, become the absolute property of the United States.

These are familiar principles in this country and well settled, as applicable to tenants for life and remainder-men. But a tenant for life has all the rights of occupancy in the lands of a remainder-man. The Indians have the same rights in the lands of their reservations. What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservations, but no more.

In this case it is not pretended that the timber from which the saw-logs were made was cut for the purpose of improving the land. It was not taken from any portion of the land which was occupied, or, so far as appears, intended to be occupied for any purpose inconsistent with the continued presence of the timber. It was cut for sale and nothing else. Under such circumstances, when cut, it became the property of the United States absolutely, discharged of any rights of the Indians therein. The cutting was waste, and in accordance with well-settled principles, the owner of the fee may seize the timber cut, arrest it by replevin, or proceed in trover for its conversion.

The Indians having only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber. Every purchaser from them is charged with notice of this presumption. To maintain his title under his purchase it is incumbent on the purchaser to show that the timber was rightfully severed from the land.

That the United States may maintain an action for cutting and carrying away timber from the public lands was decided in *Cotton* v. *United States*.* The principles recognized in that case are decisive of the right to maintain this action.

The answer of the court, therefore, to the question propounded by the Circuit Court, is

IN THE AFFIRMATIVE.

* 11 Howard, 229.

UNITED STATES *v.* INNERARITY.

Under the act of June 22d, 1860, "for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri," &c. (a temporary act, which having expired was *temporarily* revived by an act of March 2d, 1867), a person who files his petition in time, claiming land to which he afterwards discovers that he has no title, cannot, by a supplemental petition acknowledging his mistake and showing who the right owner is, make his petition enure to the benefit of such right owner, who has let pass the time for asserting his title under the act.

APPEAL from the District Court for Louisiana.

An act of Congress, passed June 22d, 1860,* provided for the adjustment of land claims in Louisiana, emanating from foreign governments prior to the cession of the region to the United States. The act was temporary in its nature, and, having expired, was revived for three years by an act of March 2d, 1867.† This new act having also expired, a revivor was again made for three years by an act of June 10th, 1872.‡ Under the second of these acts, Eloise Innerarity and others, alleging that they were the sole heirs of James Innerarity, deceased, on the 1st of March, 1870, filed their bill in the court below, averring that they as such sole heirs were entitled to a judicial recognition of a Spanish patent of 20,000 arpents of land in the present parish of East Baton Rouge, Louisiana, made to one Ramos, and that after the issuing of the patent the land became the property of their ancestor.

To this petition there was a general demurrer filed.

Subsequently, on the 27th of November, 1871, a supplemental petition was filed, alleging that since the filing of the original petition the petitioners had discovered that the true right to the lands claimed and to such confirmation existed, not in themselves, as they had heretofore averred and had sufficient reasons to believe, but in other persons, to wit, the heirs of John Watkins.

To this supplemental petition the United States demurred,

* 12 Stat. at Large, 85, § 11. † 14 Id. 544. ‡ 17 Id. 378.

for the reason that the time within which by the act of 1860 and the act of 1867, petitions for the confirmation of titles thereunder could be brought, had expired at the time of filing the supplemental petition, and that no new parties could be substituted thereafter; and that the heirs of Innerarity, in and by their supplemental petition, judicially confessed that they had not, and had not at the time of filing their original petition, any right to the lands claimed therein.

This demurrer was overruled, and a decree was made in favor of the representatives of John Watkins for a portion of the land.

From this decree the United States took this appeal.

Mr. C. H. Hill, Assistant Attorney-General, for the United States:

Suits of this kind are matters of strict right, and entirely dependent upon the statutes authorizing them to be brought, and parties must bring themselves clearly within those acts.

There is nothing in the petition to show any connection or joint interest between the heirs of Innerarity, who first filed the petition, and the other parties in whose behalf the supplemental petition was filed. And allowing an amendment at the time the supplemental petition was filed, bringing in new parties, was really extending, as to them, the time within which an action could be brought, beyond the period mentioned in the act of 1867, and ought not to have been allowed.

As to the heirs of Innerarity, the supplemental petition admits that they have no title to the property, and the decree entered was only in favor of the heirs of Watkins.

Messrs. R. H. and J. L. Bradford, contra:

The court should give a liberal construction of the liberal statute of 1860 as revived. It is an act of indemnity. The objection of Mr. Attorney-General is purely technical. The merits of our case are not denied. The case relates, of course, to very ancient transactions, which the interests of the government and the necessities of aged claimants make

it desirable to bring to a conclusion. If dismissed now our case must come up here again at multiplied costs, under the new act of 10th of June, 1872. Such delay, circuity, and expense should be avoided by affirming the decree below.

Mr. Justice HUNT delivered the opinion of the court.

It appears that the allegations of the petition were made in ignorance of the facts, and that Innerarity really had no claim in law or in equity to the land described. This necessarily disposes of the case as to his heirs.

The attempt to set up a claim under this petition or a supplemental petition by Innerarity's heirs in favor of the heirs of John Watkins, cannot be sustained. It does not appear that Watkins derived title from Innerarity, or that Innerarity ever had any title. The case is simply this: Innerarity's heirs have filed their petition in time, but have no title. Watkins's heirs have a title, but have not filed a petition for its allowance. Watkins's title cannot be interposed by the present petitioners. Such practice is unknown. If a suit be commenced by A. to recover land or money, he failing on the merits, cannot bring into his suit a new plaintiff, especially one whose action, if then commenced, would be barred by the statute of limitations. If otherwise, the same suit can be continued indefinitely, constantly making new plaintiffs, until some one shall be found who has a meritorious claim. It would be a practical abrogation of the limitation of the statute. The act of 1867 has been further extended, and the heirs of Watkins must make an original application in their own names. We understand the case of *United States* v. *Patterson** to be a decisive authority against the present claim.

DECREE REVERSED, and the case remitted to the District Court of Louisiana, with directions to

DISMISS THE PETITION.

* 15 Howard, 12.

UNITED STATES *v.* JONAS.

1. The act of March 3d, 1863, entitled "An act to prevent and punish frauds upon the revenue, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes;" authorizing the Solicitor of the Treasury, "with the approval of the Secretary of the Treasury," to sell at public sale, after three months' advertisement, certain lands acquired by the United States, for debt, &c., qualifies and limits the powers of the said solicitor, given to him by the act of May 29th, 1830, creating his office and prescribing his duties, and authorizing him to sell such lands at private sale; and *pro tanto* repeals it.
2. The former act being thus repealed, and the latter one only in force, the approval of the Secretary of the Treasury is an indispensable condition to the validity of a sale made under the act by the solicitor.
3. The purchaser is not bound to accept a deed unless there be written evidence of this approval.
4. The approval of the secretary is not a fact to be presumed because the deed of the solicitor is the deed of an official person, nor even because it recites that the sale was made in pursuance of the act of 1863.

ERROR to the Circuit Court for the District of Louisiana.

An act of May 29th, 1830,* authorized "the appointment of a Solicitor of the Treasury," prescribed his duties, &c.; and enacted, among other things, that—

"*The said solicitor* shall have charge of all lands and other property which have been or shall be assigned, set off, or conveyed to the United States in payment of debts; . . . and to sell and dispose of lands assigned or set off to the United States in payment of debts."

An act of March 3d, 1863, entitled "An act to prevent and punish frauds on the revenue, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes,"† in its ninth section, enacts:

"That for the purpose of realizing as much as may properly be done, from *unproductive lands* and other property of the United States, acquired under judicial proceedings or otherwise, in the

* 4 Stat. at Large, 414.

† 12 Id. 740, § 9.

collection of debts, the Solicitor of the Treasury be, and he is hereby authorized, *with the approval of the Secretary of the Treasury*, to rent for a period not exceeding three years, or sell any *such* lands, or other property, at public sale, after advertising the time, place, and conditions of such sale for three months preceding the same, in some newspaper published in the vicinity thereof, *in such* manner and upon such terms as may *in his judgment* be most advantageous to the public interests."

These acts being in force, the Solicitor of the Treasury put up for sale at auction certain land, with houses upon it, in New Orleans, which a debtor of the United States had conveyed to it in payment of debt. The land was bid off by George Jonas for $30,000. A deed was tendered to him. The deed purported to be made between—

"E. C. Banfield, Solicitor of the Treasury of the United States, duly appointed and qualified as such, and herein acting in such capacity for and on behalf of the United States of America, party hereto of the first part, and George Jonas, of the city of New Orleans, State of Louisiana, party hereto of the second part."

It properly recited that the land had been transferred and set over to the United States in payment of a debt due to it. It further recited that "under the provisions of section nine of an act of the Congress of the United States of America, entitled 'An act to prevent and punish frauds upon the revenue, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes,' approved March 3d, 1863," and after due and legal notice on certain days and in certain newspapers (all particularly specified), the land had been exposed to sale at public auction, at the St. Charles Auction Exchange, and that Jonas had bought it.

It concluded:

"In witness whereof the said E. C. Banfield, Solicitor of the Treasury, as aforesaid, hath hereunto set his hand and caused his seal of office to be affixed the day and year first abovementioned."

Statement of the case.

And E. C. Banfield, Solicitor of the Treasury, signed it. But there was nothing in, on, or about, with or apart from the deed, to show that the sale was made with the approval of the Secretary of the Treasury. This deed Jonas refused to accept. The land was thereupon again put up for sale "on account and at the risk of the said George Jonas," and sold for $21,500; and the United States sued Jonas in the court below for $8500, the difference between the sums bid at the sales.

The point of the controversy was whether the consent and approval of the Secretary of the Treasury is necessary to authorize the sale and conveyance of property acquired by the United States under judicial proceedings, or otherwise, in the collection of debts.

The government contended, and asked the court so to charge, that the law did not require "a tender to defendant, as a part of the proof of title, of the *written approval* or *consent* of the Secretary of the Treasury to said sale or transfer of said property, *in any form*, in order to convey a complete title." This the court declined to do, and charged "that unless the deed of conveyance of the property executed by the solicitor, tendered by the United States to Jonas, at the time when it was tendered to him, bore upon its face, or by means of papers connected therewith, written proof, certain and patent to the defendant, that the Secretary of the Treasury had, in accordance with section nine of the act of March 3d, 1863, approved and authorized the sale of the property at auction by the Solicitor of the Treasury, then that no such deed was tendered as would convey to him a complete and undoubted title," and that he "could not be compelled to pay the loss in price resulting from the second sale." The United States excepted; and judgment having gone for the defendant the government brought the case here.

The question, therefore, for decision was, whether the approval of the Secretary of the Treasury was necessary to the sale or transfer of the property in question, and if so, whether it was incumbent on the plaintiffs to produce this

approval when the deed was tendered, in order to put the defendant in fault so as to subject him to suit.

Mr. C. H. Hill, Assistant Attorney-General, for the United States:

1. Had the act of 1863 not been enacted, the sale to Jonas would have been clearly binding on him, and the deed offered to him clearly good. Then the question is, whether the act of 1863 was intended to qualify and limit the powers originally given by the act of 1830, or whether rather it was intended to confer additional powers upon the Solicitor of the Treasury?

Repeals by implication of acts are not favored,* and yet if the act of 1863 has the force which the defendant contends it has, it must have repealed in a manner only implied, a large part of the act of 1830.

The two statutes may be reconciled by confining the act of 1863 to unproductive property only, which may be done by construing the words "and other property" as *ejusdem generis* with the property first mentioned, namely, *unproductive land;* that is to say, property of an uncertain value, which it is best should be sold at public auction; and leaving the powers of the Solicitor of the Treasury, under the act of 1830, to dispose generally of the property of the United States, unaffected by the later statute.

If the power conferred by the act of 1830 to sell this land remains unimpaired, then the recital in the deed that it was done under the act of 1863 cannot affect the validity of the sale, if the Solicitor of the Treasury had power to make it; nor would the fact that it was sold by auction; for the act of 1830 is silent as to the mode of sale.

If, however, the act of 1863 repeals the act of 1830, or qualifies it, the Solicitor of the Treasury has no longer power to sell any of the property of the United States by private sale. This restriction would cripple his power to an extent that it can be well conceived would often be very detrimental to the public.

* United States *v.* Tynen, 11 Wallace, 92.

2. But if this sale, in order to be sustained, must have been made in conformity with the act of 1863, then the court will presume the approval of the Secretary of the Treasury. It is not necessary that his approval should appear either in the conveyance or be matter of record in any respect.

The Solicitor of the Treasury is a public officer performing public duties, and it is a very maxim of the law that where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favor of their due execution. In these cases the rule is "*Omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium.*"*

The approval of the Secretary of the Treasury is not a muniment of title, but is a matter collateral to the title, with which the grantee of the property had nothing to do. The deed of conveyance of the Solicitor of the Treasury transferred the title. The question whether the secretary had approved it, is a matter between the government and the solicitor, and not a thing essential in order to make title.

Mr. P. Phillips, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is quite apparent that the law will not compel the purchaser in this case to comply with the terms of sale and accept the deed offered, unless the Solicitor of the Treasury, who made the sale and executed the deed, has undoubted authority to do both these things. The officer was created by act of Congress of 29th of May, 1830, and among the duties assigned to him by the first section is the charge of property conveyed to the United States in payment of debts, with power to sell and dispose of the same. It may be that it was the intention of Congress that the important powers thus conferred should be exercised independently of the

* Bank of the United States *v.* Dandridge, 12 Wheaton, 69, 70; Apthorp *v.* North, 14 Massachusetts, 167; Broom's Maxims (6th American edition), 908, 909, and cases there collected.

Secretary of the Treasury, although it is clearly the policy of the law to hold the head of the department responsible for the proper administration of the governmental functions which pertain to it. It is, however, not necessary to consider the point, because the act of the 3d of March, 1863, to "prevent frauds on the revenue and provide for the certain and speedy collection of claims in favor of the United States," has not only in terms placed the Solicitor of the Treasury in subordination to the secretary in the matter of selling the property of the United States taken in payment of debts, but has deprived him of the power of selling at private sale at all—a power liable to abuse, and which the interests of the government require should not be confided to any one. In the ninth section of this act the solicitor is authorized to sell, with the approval of the secretary, and not then except at public sale, on three months' notice of the time, place, and terms of sale, advertised in some newspaper published in the vicinity of the property. It is clear that this latter act was intended to qualify and limit the powers given by the act of 1830. It covers the whole subject of the disposition of lands acquired for debts due the government, and embraces new and salutary provisions in relation to their sale, and shows clearly that Congress, instead of conferring additional powers, intended to limit those already conferred.

Such being the case, the latter act must operate as a repeal *pro tanto* of the act of 1830.

It is urged that the two acts can be reconciled if the latter one is confined to unproductive property, but neither the letter nor spirit of this act would warrant any such interpretation. It is true the sale or lease for a limited period of unproductive lands is provided for, but the same provisions apply to other property obtained by the government in payment of debts due it. Indeed, no good reason can be assigned why the disposition of unproductive lands should be subject to the approval of the secretary, and other property, which, in this case, consisted of valuable real estate in the city of New Orleans, with buildings on it, be left to the sole disposal of a subordinate officer. All property of what-

ever kind obtained in the way pointed out is embraced within the scope of the statute. If the Congress of 1830 intended that the Solicitor of the Treasury should be the sole judge of the propriety of selling the property of the United States taken in payment of debts, the Congress of 1863 thought proper to abandon that policy, and to declare that in no case should there be a sale without the approval of the Secretary of the Treasury. It went further and said that all sales should be at public auction, and gave the power to lease for a limited time, but whether the property were leased or sold, the secretary should be first consulted and his consent obtained, and all persons given a fair and equal opportunity of buying. The system thus inaugurated did away with the objections to private sales, and made the Secretary of the Treasury responsible, as he should be, for the proper administration of this branch of the public service.

The next point to be considered is, whether the defendant was obliged to comply with the terms of sale on tender of the deed. This deed was executed by E. C. Banfield, and recites that, acting in the capacity of Solicitor of the Treasury, under the ninth section of the act of 1863, he had caused the property to be exposed at public sale, but it does not contain any recital that the secretary authorized the sale, nor was any evidence offered to the defendant in connection with the deed that this authority had been obtained.

It is manifest, if any effect is to be given the act invoked by the solicitor as the basis of his authority, that he could not proceed at all without the approval of his superior. The legislation of Congress would be wholly ineffectual to prevent the evils which it was designed to remedy, if this approval should not be treated as a substantial requirement, a thing essential to give validity to the sale. The question is one of power, and the power is given to sell when the secretary thinks it advisable to do so. His approval is a condition precedent, without which the solicitor has no authority whatever to act.

It is said, however, if this be so, that the court will pre-

sume this approval, and that it is not necessary that it should appear either in the conveyance or in any other mode. It would defeat the obvious purpose of Congress, which is to be considered in the construction of a statute, to dispense with proof of this approval. One of the main objects of the statute was to subject the action of the solicitor to the control of the secretary in a matter of great public concern, in which he had heretofore acted without control. This change of the system contemplated a change in the mode of proceeding on the part of the solicitor. If this were not so, there would be no security that the solicitor would not continue to sell property as he had been accustomed to sell it. Indeed, the very sale in question is defended on the ground that the power conferred by the act of 1830 remains unimpaired by the act of 1863, and the action of the solicitor in this case furnishes a potent argument against the rule of presumption contended for. As the important power of selling the property of the United States acquired in payment of debts can only be exercised by the solicitor with the approval of the secretary, there would seem to be the best of reasons for requiring some written evidence of this approval, not only for the security of the purchaser, but for the protection of the government.

The defendant, therefore, is not in default, because there is nothing in the record to show that this consent of the secretary had been obtained.

If the authority to make the sale had been delegated to the solicitor alone, and its exercise confided to his discretion, his acts would carry with them *primâ facie* evidence that they were within the scope of his authority. But where the power is divided there must be joint action before any presumption can arise.

JUDGMENT AFFIRMED.

HOLLADAY v. DAILY.

A power of attorney to sell and convey real property, given by a husband and his wife, in general terms, without any provision against a sale of the interest of either separately, or other circumstance restraining the authority of the attorney in that respect, authorizes a conveyance by the attorney of the interest of the husband by a deed executed in his name alone.

ERROR to the Supreme Court of the Territory of Colorado; the case being thus:

The statute of the Territory just named regulating the subject of dower, enacts that "a widow shall be endowed of the third part of all the lands whereof her husband shall die seized of an estate of inheritance."

This statute being in force, and Ben Holladay being, as it seemed, owner in fee of a piece of land there, he and *his wife* executed a power of attorney to one Hughes to sell it. The power ran thus:

"Know all men, &c., that *we*, Ben Holladay and *N. A. Holladay, his wife*, have constituted and appointed B. M. Hughes our true and lawful attorney in fact, *for us and in our names* to sell and convey all or any lots of ground in said Territory, the title to which is *now vested in said Ben Holladay;* and the said Ben Holladay and *N. A. Holladay, his wife, do* hereby authorize said Hughes to proceed to sell said property on such terms as he may consider best for their interest. And it is provided that in case of the death of either of the said parties making this power of attorney, no further power shall be necessary to our said attorney in fact and agent, to enable him to complete conveyances for property then sold, or to proceed to sell the same or any part thereof thereafter; but he shall proceed, notwithstanding, to sell and convey said property until the same is all disposed of by him. Hereby ratifying and confirming all that the said Hughes may do and perform in the premises *under this power of attorney* to him given, *we* have hereunto set our hands and seals this 13th February, A.D. 1866.

"BEN HOLLADAY, [SEAL.]
"N. A. HOLLADAY, [SEAL.]"

Statement of the case.

In September of the year in which the power was executed Hughes made a conveyance of some of the land meant to be conveyed. The deed began thus:

"This indenture, made this 27th day of September, A.D. 1866, between *Ben Holladay*, of the city and State of New York, by B. M. Hughes, *his* duly authorized attorney in fact, party of the first part, and Richard Whitsitt, of the city of Denver, Territory of Colorado, party of the second part, witnesseth, &c.:

"That the said party of the first part, for and in consideration of the sum of $30,000, &c., has granted, bargained, sold, and conveyed," &c.

[Here followed a description of the premises. The deed ended thus:]

"And the said party of the first part, the aforesaid pieces, parcels, or lots of land unto the said party of the second part, his heirs and assigns, against the claim or claims of all and every person whatsoever, doth and will warrant and forever defend by these presents.

"In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

"BEN HOLLADAY, [SEAL.]

"By his attorney in fact:

"B. M. HUGHES, [SEAL.]"

The possession of the land passed from Whitsitt to one Daily; and in December, 1870, Ben Holladay, alleging that he had never received any of the consideration-money recited in the deed, sued Daily to recover possession of the land.

The only question was the sufficiency in law of the power of attorney from Ben Holladay and *wife* to Hughes, and the deed thereunder made from Holladay by Hughes, his attorney in fact, to Whitsitt, to pass the title of the said Holladay in the land to the said Whitsitt.

The court below gave judgment for the defendant, and the plaintiff brought the case here on error.

Argument for the principal.

Mr. G. H. Williams, for the plaintiff in error:

Hughes was invested with a special power to sell and convey certain lands in the joint names of Ben Holladay and N. A. Holladay, his wife. All the expressions in the power of attorney are full and clear to this effect. Provision is even made for the death of one of the donors of the power, in which event alone the power is to be exercised in the name of the survivor, clearly implying that before that event it is to be exercised in their joint names. Hughes violated the spirit and letter of his warrant of attorney. The power which he exercised to sell the land of another was never created.*

It is impossible to say that the deed was made in substantial compliance with the warrant of attorney.

The deed is not so much a departure from the mode prescribed of exercising a power, as the exercise of a power different from the one conferred. The power was to make a deed in the name of two persons. The power exercised was the making of a deed in the name of one person. This was not a legal and valid compliance with the authority granted.† An attorney acting under a written authority cannot substitute what in his judgment is substance for the forms required in the execution of the power.

Nor can it be said that the legal title was in Holladay, and, therefore, that it was only necessary to execute a deed in his name. If Holladay owned the property, he had a perfect right to say upon what terms and with what forms it should be sold and conveyed. If he had provided in the power that the deed made under it should have three witnesses, the deed would not be valid with two. He gave Hughes no authority to execute the deed in question. No inquiry can legally be made into Holladay's motives or reasons for requiring a joint deed in order to convey the property. Does the power of attorney require it? If so, and it was not done, that is the end of controversy.

* Snow *v.* Perry, 9 Pickering, 542; Chase *v.* Dana, 44 Illinois, 262.

† Batty *v.* Carswell, 2 Johnson, 49; Gibson *v.* Colt, 7 Id. 393; Rossiter *v.* Rossiter, 8 Wendell, 494, 499.

Mr. P. Phillips, *with whom was Mr. J. W. Denvers*, *contra*, citing *Dolton* v. *Cain** and *Dodge* v. *Hopkins*.†

Mr. Justice FIELD delivered the opinion of the court.

In February, 1866, Ben Holladay and his wife gave to one Hughes a power of attorney to sell and convey certain real property, situated in Denver City, in the Territory of Colorado, the title to which was stated in the power to be in Holladay. In September following Hughes sold and conveyed in the name of Holladay alone, and as his attorney, the premises in controversy. The question presented is whether the deed thus executed in the individual name of Holladay, and not in the joint names of himself and wife, was sufficient to pass his title.

In most of the States a married woman cannot, in the absence of statutory authority, execute, either alone or in connection with her husband, a valid power of attorney to convey her interest in real property. She can pass her interest only by uniting personally in a conveyance with her husband, and acknowledging upon a separate examination apart from him, before a public officer, that she executes the conveyance freely, without any fear of him, or compulsion from him. The private examination is required to protect her from the coercion or undue influence of her husband, and her acknowledgment is therefore considered as an essential preliminary to the validity of any transfer by her. The private examination is in its nature personal; it is a matter in which she cannot be represented by another. A privy acknowledgment by attorney, as observed by Bishop,‡ would seem to involve a contradiction, and certainly would in a great degree defeat the object which her personal examination was intended to secure.§

Whether any statute exists in Colorado which authorizes a married woman to convey her interest in real property by

* 14 Wallace, 478. † 14 Wisconsin, 635.

‡ On the Law of Married Women, § 602.

§ Sumner *v.* Conant, 10 Vermont, 19; Mott *v.* Smith, 16 California, 533; Lewis *v.* Coxe, 5 Harrington, 401.

attorney we are not informed. Counsel, whose attention was called on the argument to the matter, were not aware that any such statute exists.

Assuming, however, that such statute does exist, or that, without any such statute, the authority of a married woman to convey, in connection with her husband, which is conferred, implies a power to appoint an attorney for that purpose—and there are adjudged cases which proceed upon that theory—we do not see any objection to the validity of the deed actually executed in the name of Holladay alone, or to its operation in passing the title. The wife of Holladay evidently joined in the power upon the supposition that she might, in case of surviving her husband, have a right of dower in the real property of which he was seized during her coverture, and that the release of such right might be required for an advantageous sale of the property. But in fact she could not in any event have had a right of dower in his real property in Colorado after its sale by him, although she did not unite in the sale. By a statute of that Territory the right of dower of the widow attaches only to lands of which the husband dies seized. Her joint execution with him, whether in person or by attorney, of the deed of the premises in controversy, would not therefore have imparted any greater interest, present or prospective, than his separate conveyance.

Undoubtedly it is a rule that a special power of attorney is to be strictly construed, so as to sanction only such acts as are clearly within its terms; but it is also a rule of equal potency that the object of the parties is always to be kept in view, and where the language used will permit, that construction should be adopted which will carry out, instead of defeating, the purpose of the appointment. Here the object, and the sole object, of the power was to enable the attorney to pass the title freed from any possible claim of the wife; and under the law of Colorado that result could be accomplished by the deed of the husband alone as fully without as with her signature.

A power of attorney created by two or more persons pos-

sessing distinct interests in real property may, of course, be so limited as to prevent a sale of the interest of either separately; but in the absence of qualifying terms, or other circumstances, thus restraining the authority of the attorney, a power to sell and convey real property, given by several parties, in general terms, as in the present case, is a power to sell and convey the interest of each, either jointly with the interests of the others, or by a separate instrument. The cases are numerous where a power given by several has been held invalid as to some of the parties, and yet sufficient to authorize a transfer of the title of the others. The decision of those cases has proceeded on the doctrine stated, that where a power is given by several the interest of each in the property, to which the power refers, may be separately transferred.

It is proper to state that in sustaining the deed executed in the present case we confine ourselves to its operation in passing the existing title of Holladay. It contains a covenant of general warranty, and we express no opinion on the question whether the power authorized the attorney to make any such covenant for his principal.

JUDGMENT AFFIRMED.

PACKET COMPANY *v.* SICKLES.

1. Whilst the right to plead the statute of limitations is no more within the discretion of the court than other pleas, when the refusal of the court to permit that plea to be filed is based on the allegation that it is not filed within the time prescribed by the rules of practice adopted in that court, it is necessary that the party excepting to the refusal shall incorporate the rule in his bill of exceptions, or this court will presume that the court below construed correctly its own rules.
2. Such rules are indispensable to the dispatch of business and the orderly administration of justice, and it must be presumed that the court below is familiar with the construction and course of practice under them.
3. The rule of damages in actions at law for infringement of the rights of patentees has long been established in this court to be the customary

price at which the patentee has licensed the use of his invention, where a sufficient number of licenses or sales have been made to establish a market value.

4. The reason for this rule is still stronger when the use of the patented invention has been with the consent of the patentee, express or implied, without any rate of compensation fixed by the parties.

ERROR to the Supreme Court of the District of Columbia.

This suit was part of a litigation of twenty-five years' standing, which was now in this court for the fourth time.

The controversy arose out of the use by the defendants below of an improvement in the steam-engine known as the Sickles cut-off, an apparatus for lifting and tripping the valves of steam-engines, and also an improved water reservoir and plunger, for which F. E. Sickles, one of the plaintiffs, had, on the 20th May, 1842, received a patent.

All the trials in the court below previous to the one under review had been founded on a special count, the substantial allegations of which were that after an experiment to ascertain the saving in fuel due to the use of the patented invention, the defendants would pay to the plaintiffs three-fourths of the value of said saving of fuel during the existence of the patent, if the vessel on which it was to be used should last so long. Very large savings were proved to the satisfaction of juries, and several heavy verdicts and judgments rendered, which were reversed on different grounds in this court. The last of these reversals was in the present case, and is reported in 5th Wallace, 580.

It was there held that this special contract, on which the case had always been previously tried, was void under the statute of frauds, because it was not to be performed within one year and was not in writing. This was in 1867, and the case being remanded, the plaintiffs, by leave of the court, filed, on 4th March, 1868, the following amendment to the declaration:

"The plaintiffs sue the defendants for money payable to the plaintiffs, for the use of a certain apparatus patented by one F. E. Sickles on the 20th day of May, 1842, for lifting and tripping

the valves of steam-engines, and also an improved water reservoir and plunger.

"And the plaintiffs sue the defendant for money received by the defendant for the plaintiffs; and the plaintiffs claim $25,000."

To this the defendants, on the 1st day of March, 1871, three years afterwards, without leave of the court, filed a plea of non-assumpsit, and two pleas of the statute of limitations. On motion of the plaintiffs the two latter pleas were stricken from the files, on the ground that not having been filed within time, *according to the rules of the court*, the court would, in furtherance of the ends of justice, refuse to permit them to stand as part of the issue to be tried.

The defendants excepted; but whether their exception exhibited to this court in the full, clear, and regular way in which, according to immemorial practice, it was proper to exhibit it, the action of the court below, which they wanted to bring here, was not so clear. The bill of exceptions, signed by the judge and sealed, ran in this way; the rule of court which it was said that the defendant had violated, not being incorporated into the exception, but appearing (just as it appears on the page of this volume) in a *footnote* on the page in the printed transcript; leaving it open, of course, to a question who put it on the record or transcript, though not the least question of that sort was made, at any time, in this case.

"Deposition of Thomas Worthington was read, and it was shown to the court that a copy of the amended declaration was served on the attorney of the defendant, but without the notice to plead required by the rule of court No. 15,* and was as follows: [The exception then set out the amended declaration in the words already above given.] Nor was any rule to plead, laid

* RULE 15. A notice to plead shall be subscribed to every declaration in the following form:

"The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment, P. Q. attorney for plaintiff."

Except this notice to plead, subscribed to the declaration, no rule to plead or demand of plea shall be necessary.

in the cause after the amended declaration. Therefore the court ordered that the second and third pleas be stricken out; to which ruling the defendant excepts and prays the court to sign, seal, and cause to be enrolled this its first bill of exceptions, which is done accordingly, this 2d of March, 1871."

These pleas of the statute being struck out, the case was tried on the plea of non-assumpsit.

The plaintiff, under objection by the defendant, proved his special contract, how much fuel had been saved by the use of his apparatus, and how long the defendant used it. The defendant excepted to this proof.

The defendant gave evidence to show every sale made during the existence of the patent, of the license to use the patent on board of different boats; and that the patent fee charged to licensees under said sales, which were numerous, ranged from $250 to $1500, but, on no occasion, exceeded the latter sum; and further, that the owners of the patent did not keep the patent-right off the market, but, on the contrary, availed of all opportunities offered of disposing of licenses to use the patent.

The defendant, in substance, asked the court to charge,

"That the measure of damages was the established rate for the license to use their invention, as ascertained by the sales made by plaintiff of such license to others."

The court refused thus to charge, and charged thus:

"In estimating the amount which the plaintiff is entitled to recover, the jury will take into consideration the value of the use of this machine, as far as the proof enables them to ascertain its value from the sale of the machine itself, from the license of its use, from the capacity of the machine to economize the expenditure of fuel, in the expression of the power of the engine, and from any other testimony that they may find developed in the case bearing upon the value of its use; the conclusion of value not to be confined to the price of the patent when sold, the license for its use, or the value of its economies, but to be a deduction from all, under the rule of equity and justice between parties dealing with each other in contract, and where it is expected that both are to derive advantages from their dealings."

To the refusal and to the charge exceptions were taken.

The jury found a verdict of $11,333 with interest, from the day when the suit was brought, December 11th, 1855, to the day when the verdict was rendered, March 15th, 1871.

The case was now here on exceptions; errors among others being assigned:

In striking out the pleas of the statute of limitations.

In admitting evidence to show the saving qualities of the Sickles apparatus, as compared with others, whose merits were not shown.

In refusing to instruct the jury as requested that, in an action for the use of a patented machine, the measure of damages is the license fee or what others pay for the same use about the same time.

And in charging the jury in respect of damages as it did.

Messrs. T. J. D. Fuller and W. D. Davidge, for the plaintiff in error; Messrs. J. H. Bradley and E. N. Dickerson, contra.

Mr. Justice MILLER delivered the opinion of the court.

The ruling of the court below, in striking out the two pleas of the statute of limitations, is the ground of the first exception and of one of the assignment of errors.

The rule of that court is not made a part of the bill of exceptions. What purports to be a rule on the general subject of notice to plead is put at the bottom of the page in a note, a mode of making up records on writs of error which is quite novel. What these rules are cannot be judicially noticed by this court, and we are much embarrassed as to the effect of the reference to those rules in the bill of exceptions. The right to plead the statute of limitations, like any other defence, does not depend on the pleasure or discretion of the court. And if the action of the court was rested solely on that ground we should have no hesitation in reversing it. But there are other considerations to be weighed. The right of a court to prescribe rules to regulate the time and manner of filing pleas is beyond question, if they are reasonable, and

such rules are indispensable to the dispatch of business and the orderly administration of justice.

When in a bill of exceptions the court places its action on such rules, with the construction of which, and the course of practice under them, it must be familiar, it would seem that the party assigning error on such rulings should be bound to exhibit in his bill of exceptions so much of the rule or rules as affects the question. No little weight is added to these views by the fact that the defendants did not file their pleas until three years after the filing of the amended declaration, to which they were answers, and until the day before the case was tried by the jury. In addition to this, while it may be true that the amended declaration, as a general rule, is to be taken as the commencement of the suit, in reference to the defence of the statute, it may be doubted whether in this particular case, where, after years of fierce litigation, only a common count is added, which is intended to cover the same subject-matter, justice will be promoted by allowing this plea, which can only be valid by reason of the time elapsed pending the litigation. On the whole we do not think, as the case appears before us, that the exception is well taken.

The case went to trial on the plea of non-assumpsit to the amended declaration. Evidence was admitted, to which defendants excepted, proving the special contract, the value of the saving in fuel made by the use of the patented improvement, and the length of time it was in use by defendants. Evidence was also given by defendants that the plaintiffs had sold a great many licenses for the use of the patent on steamboats, that the patent fees were numerous, and ranged from $250 to $1500 for the use of the patent during its existence, and that though they had produced evidence of all the sales made of licenses for the use of the patent on steamboats during its existence, the fee in no case exceeded the latter sum. Notwithstanding this testimony, which seems to have been uncontradicted, the verdict of the jury and the judgment of the court was for $11,333, with interest from the date of the commencement of the suit.

Opinion of the court.

The defendants in various forms prayed the court to instruct the jury that the measure of damages was the established rate for the license to use their invention, as ascertained by the sales made by plaintiffs of such license to others. If this was the true rule of estimating the damage the bill of exceptions shows that a sufficient number of such licenses, and the prices at which they were granted, were in evidence to enable the jury to apply the principle to the case before them.

And we are of opinion that this was the sound rule, and that in refusing the prayers for instruction based on it, as well as in admitting evidence of the saving of fuel and its value as affecting the amount of the verdict, the court below was in error. And the same error is to be found in the charge of the court to the jury on that subject.

In the case of *Seymour* v. *McCormick*,* this court, on full consideration, and without dissent, laid down the proposition that in suits at law for infringement of patents, where the sale of licenses by the patentee had been sufficient to establish a price for such licenses, that price should be taken as the measure of his damages against the infringer. The rule thus declared has remained the established criterion of damages in cases to which it was applicable ever since.†

"In cases where there is no established patent or license fee in the case," says the court in the *Suffolk Company* v. *Hayden*, "or even an approximation to it, general evidence must necessarily be resorted to."

In the case of *Seymour* v. *McCormick*, a charge very similar to the one given in the present case was held erroneous and the principles we have stated established.

The rule in suits in equity, of ascertaining by a reference to a master the profits which the defendant has made by the use of the plaintiff's invention, stands on a different principle. It is that of converting the infringer into a trustee for the patentee as regards the profits thus made; and the

* 16 Howard, 480.

† Sickels *v.* Borden, 4 Blatchford, 14; The Suffolk Company *v.* Hayden, 3 Wallace, 315; Livingston *v.* Jones, 3 Wallace, Jr., 330.

adjustment of these profits is subject to all the equitable considerations which are necessary to do complete justice between the parties, many of which would be inappropriate in a trial by jury. With these corrective powers in the hands of the chancellor, the rule of assuming profits as the groundwork for estimating the compensation due from the infringer to the patentee has produced results calculated to suggest distrust of its universal application even in courts of equity.

Certainly any unnecessary relaxation of the rule we have laid down in cases at law, where the patentee has been in the habit of selling his invention or license to use it, so that a fair deduction can be made as to the value which he and those using it have established for it, does not commend itself to our judgment, nor is it encouraged by our experience.

If such be the proper rule in case of the infringer who uses the invention without license and against the consent of the owner, it should not be harsher against the party who uses it with consent of the owner, express or implied, but without any agreement as to the rate of compensation. In such case nothing can be more reasonable than that the price fixed by the patentee for the use of his invention, in his dealings with others, and submitted to by them before using it, should govern.

The case was tried in the court below upon an entirely different theory, against the steady remonstrance and exceptions of the defendants.

With the special contract eliminated from the case, it seems to us to be a very simple one. The defendants have used, or are charged with using, the invention of plaintiffs, with their consent, until the expiration of the patent. If this is proven to the satisfaction of the jury, the plaintiffs have furnished the rule which must measure their compensation, in the prices at which they have sold the same privilege to others, and they must be bound by it.

JUDGMENT REVERSED, with directions to order

A NEW TRIAL.

Syllabus.

MACKAY *v.* EASTON.

1. On the 16th of November, 1815, one J. Smith was the owner of two arpents of land, in the village of Little Prairie, in the county of New Madrid, in the State of Missouri, which had been confirmed to him by the commissioners appointed under the act of Congress of March 2d, 1805, "to ascertain and adjust the titles and claims to land, in the Territory of Orleans, and District of Louisiana," out of which region the State of Missouri was carved. The certificate of confirmation was numbered 1116. The village of Little Prairie was nearly destroyed by earthquakes in 1811 and 1812, and the two arpents being thus materially injured, the recorder of land titles, at St. Louis, on the 16th of November, 1815, under the act of Congress of February 17th, 1815, upon proof of the injury, gave to J. Smith a certificate to that effect; and *that he or his legal representatives* were entitled, under the said act of Congress, to locate any quantity of land, not exceeding one hundred and sixty acres, on any of the public lands of the Territory of Missouri, *the sale of which was authorized by law.* On the 22d of October, 1816, one *James Smith* (blacksmith), and Sarah, his wife, describing themselves as of the county of Cape Girardeau, executed a deed to one Rufus Easton, in terms conveying the two arpents (aptly describing them), and stating that they had been confirmed to him by the commissioners for the adjustment of land titles in the Territory, by the name of J. Smith, and were known on their books as claim and certificate number 1116; and that the land had been materially injured by earthquakes. The deed also conveyed to Easton, the right to locate other lands in lieu of those injured, under the act of Congress, and the lands which might be thus located. The deed was acknowledged before a judge of the Circuit Court of the Territory on the day of its date, and was on the following month recorded in New Madrid County. Under the certificate thus issued, a location was made on the application of Easton, and in March, 1818, the tract located was surveyed by the deputy surveyor-general of the Territory, and on the 23d of February, 1823, the survey was returned to the recorder of land titles. Easton conveyed his interest to one William Russell prior to 1827, and on the 27th of May, of that year, a patent of the United States was issued, granting the tract thus located and surveyed, to J. Smith, or his legal representatives. This patent was transmitted to Russell, and he afterwards conveyed his interest in the land to the defendant. More than fifty years after the date of the conveyance to Easton, by James Smith and wife, an instrument, dated March 5th, 1819, purporting to be a conveyance of the two arpents of land in Little Prairie, signed by J. Smith with his mark, and describing himself as *lately* of that village, was produced and placed on record. In an action of ejectment, in which the plaintiff traced his title through the recently discovered instrument, the defendant offered the deed of James Smith,

in 1816, to Easton, through whom he traced his title; and it was admitted in evidence against the objection, that "it could not be presumed that a deed from James Smith, blacksmith, of Cape Girardeau, was a deed from J. Smith, of New Madrid." *Held*, That the court below ruled correctly in admitting the deed; and that the fact, that the grantor described himself at the time as of Cape Girardeau, after Little Prairie had been abandoned, was an immaterial circumstance, his identity with the original owner of the land being stated in the body of the deed.

2. The reports of cases in Howard's Supreme Court Reports may be referred to as expositions of law upon the facts there disclosed, but they are not evidence of those facts in other cases. The decisions in *Easton* v. *Salisbury*, in the 21st of Howard, in *Stoddard* v. *Chambers*, in the 2d of Howard, and in *Mills* v. *Stoddard*, in the 8th of Howard, commented upon and distinguished from the case at bar.
3. The act of Congress of February 17th, 1815, for the relief of the inhabitants of the county of New Madrid, Missouri, who had suffered by earthquakes, contemplated that the title of the owners of the land injured in that county should pass to the United States, at the same time that the title to the land located in lieu thereof passed to the claimant, or rather the right to the title, for the strict legal title did not pass until the patent issued; and that this exchange of titles should take place when the claimant obtained his patent certificate, or the right to such certificate, which he could not acquire until the plat of the survey was returned to the recorder of land titles. Until the plat was placed in the public depository in the Territory, of evidences of title issuing from the United States, there was no official recognition of the proceedings taken by the claimant, for the location of his New Madrid certificate, which bound the government.
4. The act of April 26th, 1822, "to perfect certain locations and sales of public lands in Missouri," refers in its first section to actual locations made by the deputy surveyor at the request of the claimant, and not to the perfected locations which appropriate the land on the return of the plat of the survey to the recorder of land titles. It cured any defects in such actual locations prior to its passage, arising from their being made upon lands which had not been surveyed by the government, or if surveyed, from want of conformity in the locations to the sectional and quarter-sectional lines of the surveys.

ERROR to the Circuit Court for the Eastern District of Missouri:

George Mackay brought ejectment against Alton Easton for the possession of one hundred and sixty acres of land in the city of St. Louis, State of Missouri. Both parties traced their title to the demanded premises through one J. Smith, who asserted a claim to two arpents of land in the village of

Little Prairie, in the district, now county, of New Madrid, in that State, by virtue of his settlement thereon under permission from the Spanish authorities, previous to the year 1800, and his inhabitation and cultivation of the same prior to and on the 20th of December, 1803. His claim was recognized as valid, and on the 9th of July, 1811, was confirmed by the commissioners appointed under the act of Congress of March 2, 1805, to ascertain and adjust the titles and claims to land in the Territory of Orleans and the District of Louisiana,* who decided that he was entitled, under the provisions of the act, to a patent for the two arpents. The commissioners' certificate of this confirmation is numbered 1116.

In the years 1811 and 1812 a large part of the land in the county of New Madrid was injured by earthquakes; and on the 17th of February, 1815, Congress passed an act for the relief of parties who had suffered in this way.† By this act any person owning land in the county which had been materially injured was authorized to locate a like quantity of land on any of the public lands of the Territory of Missouri, *the sale of which was authorized by law.* And whenever it appeared to the recorder of land titles for the Territory, by the oath or affirmation of a competent witness, or witnesses, that any person was entitled to a tract of land under the provisions of the act, it was his duty to issue to such person a certificate to that effect. Upon this certificate, on the application of the claimant, a *location* of the land was to be made by the principal deputy surveyor for the Territory, or under his direction, who was required to have the location surveyed, and a plat of the survey returned to the recorder, with a notice designating the tract and the name of the claimant.

The act also provided for the transmission by the recorder to the Commissioner of the General Land Office of a report of the claims allowed, and locations made, and for the delivery to the claimant of a certificate of his claim and loca-

* 2 Statutes at Large, 324. † 3 Id. 211.

tion, which would entitle him, on being forwarded to the commissioner, to a patent of the United States. The act declared that in all cases when the location was made under its provisions the title of the claimant to the injured lands should revert to, and vest in, the United States.

The two arpents of land in New Madrid claimed by J. Smith and confirmed to him were injured by earthquakes, and upon proof of the fact the recorder of land titles at St. Louis, on the 16th of November, 1815, gave him a certificate to that effect, and that he or his legal representatives were entitled, under the act of Congress, to locate any quantity of land, not exceeding 160 acres, on any of the public lands of the Territory of Missouri, the sale of which was authorized by law. This certificate was numbered 159.

Afterwards, on the 22d of October, 1816, one James Smith (blacksmith), and Sarah, his wife, describing themselves as of the county of Cape Girardeau, executed a deed to Rufus Easton, in terms conveying the two arpents, aptly describing them, and stating that they had been confirmed to him by the commisioners for the adjustment of land titles in the Territory, by the name of J. Smith, and were known on their books as claim and certificate number 1116; and that the land had been materially injured by earthquakes. The deed also conveyed to the said Rufus Easton the right to locate other lands in lieu of those injured, under the act of Congress, and the lands which might be thus located. This deed was acknowledged before a judge of the Circuit Court of the Territory on the day of its date, and was on the following month recorded in New Madrid County. It was produced and given in evidence subject to the objection hereinafter mentioned.

Under the certificate thus issued a location was made on the application of Rufus Easton, and in March, 1818, the tract located was surveyed by the deputy surveyor-general of the Territory, and on the 23d of February, 1823, the survey was returned to the recorder of land titles. This survey was numbered 2491.

Rufus Easton conveyed his interest to William Russell

prior to 1827, and on the 27th of May of that year a patent of the United States was issued, granting the tract thus located and surveyed to J. Smith, or his legal representatives. This patent was transmitted to Russell, and he afterwards conveyed his interest in the land to the defendant. The patent embraced the premises in controversy, and it was admitted that the defendant was possessed of whatever title passed by the conveyance of James Smith to Rufus Easton in 1816, and that he had been in the adverse possession of the premises for more than ten years prior to the commencement of the present action.

The statute of limitations in Missouri, it is proper here to say, enacted that "no action for the recovery of lands shall be maintained unless the plaintiff, or person under whom he claims, was seized or possessed of the premises within ten years before the commencement of such action."

On the 30th of June, 1864, Congress passed an act, by which it was enacted that all the right, title, and interest of the United States

"In and to all the lands within the respective boundaries of the following described locations in township forty-five north of the base line, in range seven east, of the principal meridian line of the State of Missouri, made by virtue of certificates issued under the Act of Congress, approved February the 17th, 1815, entitled '*An Act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes*,' shall be, and the same are hereby granted, relinquished, and conveyed by the United States in fee simple and in full property, to the following mentioned persons respectively, or their respective legal representatives, in whose names said locations were severally made, to wit: *Location under certificate number* 159, *being survey* 2491, *in the name of J. Smith, or his legal representatives*. . . . .

"*Provided*, however, that nothing contained in the foregoing provisions of this act shall, directly or indirectly, comprehend, include, extend to, grant, relinquish, or convey the whole or any part of any lot, tract, piece, or parcel of land in said township, which has heretofore been confirmed and surveyed by the United States, to any person or persons, or to the legal representatives

of any person or persons. And provided further, that nothing in this act shall in any manner abridge, divest, impair, injure, or prejudice any adverse right, title, or interest of any person or persons in or to any portion or part of the aforesaid lots, tracts, pieces, or parcels of land which are granted, relinquished, or conveyed by this act."

The plaintiff, relying upon this act of 1864, produced an instrument purporting to be a contract between one J. Smith and one A. P. Gillespie, dated on the 14th of April, 1816, by which the said Smith agreed to sell and convey to Gillespie, for the consideration of $100 already paid, and $50 to be thereafter paid, all his lots in the village of Little Prairie; and a deed from him to Gillespie, dated on the 5th of March, 1819, in terms conveying the two arpents of land in the village, and any certificate of location on land in the Territory, the sale of which was authorized by law. These instruments purported to be signed by the *mark* of J. Smith, and in the deed he described himself as of the county of New Madrid, *lately* of the village of Little Prairie. Fifty-two years afterwards these instruments were placed on record in the recorder's office of the county. The plaintiff contended that the grantor in this deed was the veritable J. Smith, who was the owner, in 1811, of the two arpents in the village of Little Prairie, and when the defendant produced the deed to Easton from James Smith abovementioned, he objected to its admission in evidence on the ground that it could not be presumed that a deed from James Smith, blacksmith, of Cape Girardeau, was a deed from J. Smith, of New Madrid; and now insisted that the court erred in admitting it. It was admitted that the plaintiff was possessed of whatever title passed by the deed to Gillespie.

The defendant also introduced in evidence the patent of the United States, issued as abovementioned on the 27th of May, 1827, and to its introduction the plaintiff objected, 1st, because the said patent was void in consequence of having been located upon land the sale of which was not authorized by law; 2d, because said patent had been judicially decided by the Supreme Court of the United States to be null and

void, in the case of *Easton* v. *Salisbury*,* *Stoddard* v. *Chambers*,† and *Mills* v. *Stoddard*;‡ 3d, because it was located upon land reserved from sale, and was not located in accordance with sectional and quarter-sectional lines, and was upon land not surveyed, and was not located in season to be validated by the act of Congress approved April 26th, 1822.

The act here referred to was thus:

"*An Act to perfect certain Locations and Sales of Public Lands in Missouri.*

"*Be it enacted, &c.*, That the locations heretofore made of warrants issued under the act of the 15th of February, 1815, entitled 'An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes,' if made in pursuance of the provisions of that act, in other respects, shall be perfected into grants in like manner as if they had conformed to the sectional or quarter-sectional lines of the public surveys; and the sales of fractions of the public lands heretofore created by such locations shall be as valid and binding on the United States as if such fractions had been made by rivers or other natural obstructions.

"SECTION 2. That hereafter the holders and locators of such warrants shall be bound, in locating them, to conform to the sectional or quarter-sectional lines of the public surveys, as nearly as the respective quantities of the warrants will admit; and all such warrants shall be located within one year after the passage of this act; in default whereof the same shall be null and void."

[The more specific character of some of these three objections appears in the argument, as below given, for the plaintiff in error.]

The court overruled the objections, and permitted the patent to be read in evidence, and overruled the objection taken to the introduction of the deed from James Smith to Easton; and to the ruling of the court in each particular the plaintiff's counsel excepted at the time.

The court then instructed the jury of its own accord that

* 21 Howard's Reports. † 2 Howard. ‡ 8 Id.

upon the evidence offered, and under the proof by plaintiff that the survey on which the patent issued was filed with the recorder within one year from the date of the act of 26th April, 1822, the patent issued to J Smith, in 1827, offered in evidence was a good and valid patent, and passed the title of the United States; and that if the jury believed from the evidence that the defendant had been in open, notorious, and continuous possession of the premises described in the declaration for ten years next before the commencement of this suit, claiming title under said patent, they should find a verdict for the defendant. To these instructions the plaintiff, by his counsel, excepted. The jury found for the defendant, and judgment being entered accordingly, the plaintiff brought the case here on error.

Messrs. B. A. Hill and J. F. Darby, for the plaintiff in error:

I. There is no evidence whatever to prove, or tending to prove, that "James Smith, blacksmith," of Cape Girardeau, ever lived in the village of Little Prairie, or even in the county of New Madrid, or that he ever owned any land there. The necessary conclusion is that he fraudulently personated the real J. Smith.

The next question is, as to the validity of the patent of 1827. If that patent is valid, the defendant has acquired the title by the statute of limitations, and if it be void, the title to the land sued for remained in the United States until the 30th June, 1864, and plaintiff was entitled to recover.

II. It is matter of professional notoriety that on the 17th February, 1815, and on the 26th April, 1822, when the New Madrid acts were passed, the sale of the public lands was authorized by law to be made, only in accordance with the sectional and quarter-sectional lines of the United States surveys. The acts of 17th February, 1815, and of 26th April, 1822, were passed to carry out the donations contemplated, in accordance with the existing laws for the sale of the public lands. Inextricable confusion would have resulted, if these provisions of the land laws had not been complied with by New Madrid claimants, and it is on this

account that the act of 17th February, 1815, therefore, requires that New Madrid locations shall be made only "on lands the sale of which is authorized by law."

Now, the J. Smith survey of March, 1818, was not made on any quarter-sectional lines. It was made *before* the public surveys of township 45, range 7 east, were executed, and before that township was sectionized. The survey was, therefore, a nullity.

If, indeed, a New Madrid location had been made upon this illegal survey of 1818, by filing it with the recorder of land titles *before* the passage of the act of 26th April, 1822, the first section of that act would have cured the illegality of the location, and the fractions created by it, in the quarter sections it cut into, could have been sold. But no *location*, as we assume the meaning of that word to be, of the J. Smith survey of 1818 was made until 1823, after the act of 1822 took effect; and the second section of the act of 1822 expressly barred the location of that survey after the passage of the act, that is to say, after 26th April, 1822.

The argument of the other side will be that the New Madrid *location* of J. Smith was made by the survey of March, 1818, and therefore, that the first section of the act of 1822 cured the fatal defect, that it did not conform to sectional lines, and was not made "on lands the sale of which was authorized by law." But the uniform decisions of this court from the case of *Barry* v. *Gamble** (A.D. 1843), down to *Rector* v. *Ashley*† (A.D. 1867), have established the law to be that a New Madrid *location* is *not* made by the survey, but is made only by filing the survey in the office of the recorder of land titles. It is, therefore, to be taken that the New Madrid location of J. Smith was made on the 26th February, 1823, when the survey of 1818 was filed in the office of the recorder of land titles, and was not made before. It is, therefore, void, because it was not made on sectional or quarter-sectional lines.

III. In *Stoddard* v. *Chambers*, reported by Mr. Howard,‡

* 3 Howard, 52-3. † 6 Wallace, 149. ‡ 2 Howard, 284.

Argument for the plaintiff in error.

this court decided, and on the ground that the land had been in fact and by law expressly reserved from sale, that a patent issued to Eustache Peltier, under a New Madrid location, *which*, as Mr. Howard's report of the case shows, *covered the greater part of the identical piece of land covered by the survey in this suit, and on the very same quarter-section*, was void.

The case of *Mills* v. *Stoddard*, in 8th Howard,* decides equally, that any location of land while it was reserved from sale is void. But this identical patent, now set up in this suit, has been adjudged void by this court in *Easton* v. *Salisbury*, also reported by Mr. Howard.† The report states the case was an ejectment brought by Alton Easton against Salisbury to recover certain lots in St. Louis County (the lots now in controversy), that the plaintiff claimed under a New Madrid patent, issued in 1827 to J. Smith or his legal representatives, and the defendant under a Spanish concession for three hundred and fifty arpents (including the premises then in controversy), which was confirmed to one Mordecai Bell in 1836.

The Supreme Court of Missouri decided against Easton, and he brought the case here. This court, referring to well-known facts in the history of the public lands, said:

"It will be observed, that this controversy arises between a New Madrid title and a Spanish concession. A holder of a New Madrid certificate had a right to locate it on any of the public lands which had been authorized to be sold. This claim came into the hands of Easton, the plaintiff in error. It was surveyed in March, 1818, and on the 28th May, 1827, the United States issued a patent to *J. Smith* or his legal representatives.

"From 1808 to the 26th of May, 1829, reservations were made from time to time to satisfy certain claims, but from that time they ceased, until renewed by the act of the 9th of July, 1832.

"During this period, it is understood by the plaintiff in error, the land in question was subject to be disposed of to any person, or in any manner, and was then open to entry or location. And it is urged that the plaintiff had the right during *this* time to perfect his title.

* Page 345.

† 21 Howard, 426.

"The President of the United States has no right to issue patents for land, the sale of which is not authorized by law.

"Nothing was done to give Easton's title validity, from the cessation of the reservation in 1829, until its revival in 1832. His entry was made in 1818, and on the 28th of May, 1827, his patent was issued. The land located and patented having been reserved, was not liable to be appropriated by his patent.

"But it seems by the act of the 26th of April, 1822, it was provided that all warrants under the New Madrid act of the 17th of February, 1815, which shall not be located within one year, shall be held null and void. This law is decisive upon this point; all New Madrid warrants, not located within one year from the 26th of April, 1822, are null and void. Smith's or Easton's certificate for the New Madrid claim was void, and also his patent when issued, under the paramount claim of Bell, whose title was confirmed by the act of the 4th of July, 1836.

"There was no period from the entry and patent of the New Madrid claim in which the claim was valid. The location was not only voidable, but was absolutely void, as it was made on land subject to a prior right. And under the act of April 26th, 1822, all New Madrid warrants, not located within a year from that date, were declared to be void. Whether we look at the confirmatory act of 1836, which vested the title in the confirmee, *or to the New Madrid title asserted against it*, it is clear that the New Madrid title is without validity, and that the fee is vested in the grantee of Bell."

The Easton, party in that suit, was the Easton, party in this; and the report as given in Howard shows that the land was the same land.

IV. The true owner of the New Madrid title, finding that the patent to J. Smith was void under these decisions, did not attempt to enter upon the land that belonged to the United States, nor was he bound to regard the trespass of Easton thereon as a matter of any moment.

When Congress passed the act of 30th June, 1864, the title of plaintiff's grantors vested for the first time in him, under that act of Congress, and his right of action then accrued. He had no right of action before.

The defendant's possession of ten or fifty years signifies

nothing. He was not in by color of title, and could not be, for the land belonged to the United States. The true owner could not be aware of any title vesting until the act of 1864 was passed.

No time runs against the government. The case of *Gibson* v. *Chouteau** settles all questions on the statute of limitations.

Mr. C. Gibson (with whom were Messrs. E. Casselberry and W. B. Thompson), contra.

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

We are of opinion that the court ruled correctly in admitting the deed of James Smith to Easton. The deed describes the property as that claimed by J. Smith; it declares that the property was confirmed to the grantor by that name, and it gives the number of the certificate of confirmation. It was acknowledged before a judge of the Circuit Court and immediately placed on record, where it was open to inspection by every one. Easton acted openly upon the supposition that he had acquired the title of the two arpents, and the right of location on other lands, in consequence of their being materially injured by earthquakes. Upon his application such location was made in the immediate vicinity of St. Louis. He had a survey made of the land located by the official surveyor of the government. He had the survey transmitted to the recorder of land titles; and his successor in interest prosecuted the matter until he obtained a patent of the United States. In the meantime a severe and protracted litigation grew up between claimants under the deed and claimants under Spanish concessions, and in none of the controversies was any suggestion made that the grantor to Easton was not the veritable J. Smith who owned the two arpents of land in Little Prairie. It would have been manifest error if, in the face of these facts, after the lapse of half

* 13 Wallace, 93.

a century, when the property acquired under the deed has become of immense value, and the city of St. Louis has extended over it, the court had held that the deed to Easton is not to be presumed to be the deed of J. Smith, of Little Prairie, because the grantor describes himself as James Smith, of the county of Cape Girardeau. The real Smith had undoubtedly removed from the village of Little Prairie before the date of this deed. That village had been greatly injured, if not destroyed, by the earthquakes, and the inhabitants had been authorized by Congress, in consequence of the injuries thus received, to select lands elsewhere. Cape Girardeau, until 1813, was a part of the county of New Madrid, and the simple fact that the grantor describes himself as of that place after Little Prairie had been abandoned, is of little consequence, as his identity with the original owner of the land is sufficiently stated in the body of the instrument.*

In the deed to Gillespie the grantor describes himself as *lately* of the village of Little Prairie, and this description is open to the same objection as the description of the residence of James Smith in his deed. The reasonable and natural presumption arising from all the circumstances is, that Gillespie, finding, after receiving his deed, that Smith had already conveyed the property to Easton, and the right of location on other lands in consequence of its injury, did not assert any claim to the land, and that thus the deed had been suffered to remain without any attempt to enforce it until the increased value of the land located had tempted speculators to test its efficacy by litigation. The execution of the contract and the second deed of Smith, with his mark, is a circumstance, but in the light of the facts following their execution, a slight one against the theory of identity of the grantors in the two deeds. The use of a mark for his name may have resulted from temporary causes, or difficulty in writing, and not inability to write. But whatever the cause, the use of the mark in the one case, and of

* See Mott *v.* Smith, 16 California, 554.

the name in the other, before a public officer, was sanctioned by the acknowledgment of the grantor, whether made by his own hand or by another in his presence and by his direction.

The objections taken to the admission of the patent in evidence were: 1st, that the patent was void, because located upon land the sale of which was not authorized by law; 2d, that the patent had been decided by the Supreme Court of the United States to be null and void in *Easton* v. *Salisbury*, reported in the 21st of Howard; in *Stoddard* v. *Chambers*, reported in the 2d of Howard, and in *Mills* v. *Stoddard*, reported in the 8th of Howard; and, 3d, that the patent was located upon land reserved from sale; was not located in accordance with sectional and quarter-sectional lines, but upon land not surveyed; and was not located in season to be validated by the act of Congress of April 26th, 1822.

The first objection may be disregarded, for there was no evidence of the fact, upon the supposed existence of which the objection is founded.

The cases cited under the second objection are not evidence in this case; the records of them are not before us. The reports of their decision in Howard may be referred to as expositions of law upon the facts there disclosed, but they are not evidence of those facts in other cases. In *Easton* v. *Salisbury* the controversy was between a Spanish concession to Mordecai Bell, and the title of Easton under the location upon the New Madrid certificate issued to Smith. The claim under the Spanish concession was confirmed by act of Congress to the legal representatives of Bell. The land claimed under this concession was reserved from sale, and could not, therefore, be covered by the New Madrid certificate. So far as the location interfered with the concession it was void, and to that extent the patent was void also, but no further. And that is all there is in the decision in that case. The general language of the opinion must be construed and limited by the facts of the case.

It is true the court said that by the act of April, 1822, it was provided that all warrants under the New Madrid act which were not located within one year were void; and it would seem that the court supposed that the warrant issued to Smith had not been located within that period. The court was speaking at the time of a completed and not an initiatory location, one which would appropriate the land; and evidently considered that there could be no such appropriation until the survey was returned to the recorder of land titles, as had been held in several cases.* Of such return after the passage of the act of 1822, there was no evidence in the record in that case. In this case it is admitted that the survey was thus returned within the year; and, consequently, the location of the tract was completed.

In *Stoddard* v. *Chambers*, and *Mills* v. *Stoddard*, the controversy was also between a Spanish concession and a New Madrid certificate. The patent issued in those cases upon the location of the New Madrid certificate, was held void because it covered land reserved from sale. There is nothing in that ruling which bears upon the question presented in the case at bar.

In several cases which were before this court prior to that of *Easton* v. *Salisbury*, it was held, as already stated, that there could be no effectual appropriation of the land located under a New Madrid certificate until the survey made by the officer of the government was returned to the recorder of land titles. The act of Congress, as will be seen by a reference to a prior page,† declared that when a location was made under its provisions, the title of the person to the land injured should vest in the United States. It contemplated that there should be a concurrent investiture of title; that the title of the owners of the land injured in New Madrid County should pass to the United States, and that at the same time the title to the land located in lieu thereof should pass to the claimant, or rather the right

* Barry *v.* Gamble, 3 Howard, 52; Lessieur *v.* Price, 12 Id. 74.

† *Supra*, p. 622.

to the title, for the strict legal title did not pass until the patent issued; and that this exchange of titles should take place when the claimant obtained his patent certificate, or the right to such certificate, and that he could not acquire until the plat of the survey was returned to the recorder of land titles. Until the plat was placed in the public depository in the Territory, of evidences of title issuing from the United States, there was no official recognition of the proceedings taken by the claimant which bound the government.

It often happened that the location made at the request of claimants by deputy surveyors were upon lands which had not been surveyed by the government, or if surveyed the locations did not conform to the sectional and quarter-sectional lines of the surveys. To remedy defects of this character Congress passed the act of April 26th, 1822. That act refers in its first section to the actual locations made by the deputy surveyor at the request of the claimant, and not to the completed appropriation of the land by the return of the plat of the survey to the recorder of land titles.

The actual location of the New Madrid certificate issued to Smith, was made and approved in 1818; and any objection to it for want of conformity to the lines of the public surveys, was removed by the first section of the act of 1822. This actual location became a perfected location so as to appropriate the land on the return of the survey to the recorder in 1823, except as against the Spanish concession, which was confirmed to the representatives of Bell. Besides this, a defect in a survey is cured by the issue of a patent thereon.

It follows from the views expressed that the Circuit Court did not err in its rulings, and its judgment must be

AFFIRMED.

Statement of the case.

AICARDI *v.* THE STATE.

1. Whether the legislature of a State has authority under the constitution of the State to pass a particular statute, what is the true interpretation of any statute passed by it for a purpose specified, and what acts will be justified under the statute, are matters which lie exclusively within the determination of the highest court of the State.
2. Statutes which allow gaming are to be construed strictly.

ERROR to the Supreme Court of Alabama.

The Revised Code of Alabama, section 3621, in force before and in the year 1868, enacts that,

"Any person who keeps or exhibits, or is interested or concerned in keeping or exhibiting, any table for *gaming*, of whatsoever name, kind, or description, not regularly licensed under the laws of the State, must, on conviction, be fined not less than $100," &c.

This section of the code being in force, the legislature, on the 31st of December, 1868, passed an act which enacted,

"SECTION 1. That Clifton Moses & Co. shall have the full right and authority to form themselves into a partnership association, for the purpose of receiving subscriptions, and to sell and dispose of certificates of subscription which shall entitle the holder thereof to such prizes as may be awarded to them, which distribution of award shall be fairly made in public, by *casting of lots, or by lot, chance, or* OTHERWISE, *in such manner as to them may seem best* to promote the interest of the school fund of Mobile County, which said distribution of award and prizes shall be made at their office in the city of Mobile," &c.

"SECTION 2. That before commencing business under the provisions of this act, said partners shall pay to the board of school commissioners of Mobile County, for the use of the public schools of said county, the sum of $1000; and *annually thereafter* a like amount, for the term of ten years, or so long *as said partnership shall choose* to do business under the provisions of this act; it being understood and agreed, that said payment of $1000 per annum is the consideration upon which this privilege is granted.

"SECTION 4. That this act shall remain in full force and effect

for ten years, upon the consideration herein contained, during which time said partnership company shall have the right to exercise the privilege and franchise herein given, any law to the contrary notwithstanding."

Under this act J. C. Moses & Co. formed a partnership, which gave to one Aicardi its authority to keep or exhibit what was clearly a roulette-table, or "a table for gaming."

On the 8th of March, 1871, the legislature repealed the above-quoted act.

Moses & Co., however, still paid the $1000 a year, and kept the table open to the public.

Aicardi being now indicted under the section of the code already quoted, set up an authority under the license from Moses & Co., and that the act of the 8th of March, 1871, which he alleged gave Moses & Co. the right to keep such a table as he did, was void, as violating the obligation of contracts. The court in which he was indicted held that it was not thus void, and Aicardi was there convicted.

The Supreme Court of the State affirmed that judgment on the authority of *Mayor, Aldermen, and Council of Mobile* v. *Clifton Moses et al.*, a case decided at the same term.

In that case the said court held the act of 31st of December, 1868, unconstitutional and void under the constitution of the State; moreover that it did not authorize a gaming-table. Aicardi now brought the case here on error.

Messrs. J. A. Elmore and S. F. Rice, for the plaintiff in error, contended that the legislature had full power to take away either by general law or otherwise all indictable quality from gambling; that they had here done so, so far as Moses & Co. were concerned; and that as to them the section 3621 of the code had been repealed for a valuable consideration paid to the State. That if the act of December, 1868, was valid, it was impossible to argue that its broad language did not confer upon Moses & Co. the franchise or privilege to do everything which Aicardi did, and to *select any mode* they deemed best for the distribution of awards and prizes; that

Recapitulation of the case in the opinion.

the act of 1871 plainly impaired the obligation of the contract made with Moses & Co., and liberally paid for by them.

Mr. P. Phillips, *contra*, argued that no question was before this court as to whether the repealing act of 1871 violated the obligation of contracts; that the decision by the Supreme Court of Alabama, on its own constitution and statutes, had obviated the necessity of question here on that point, and was beyond the revisory power of this court.

Reply: This court will decide for itself whether there was a contract to be impaired, what were its terms, and what its obligations, even though the contract have been a legislative contract, or one which arises from the acceptance of the provisions of an act of a State legislature.* State courts are not permitted to evade or elude the jurisdiction of this court, by deciding that to be no contract which this court knows to be a contract, or by any other mistake or device.

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

The record discloses, so far as is necessary to state it, the following case:

The plaintiff in error was indicted for keeping a gaming-table.

The legislature of Alabama passed an act, approved December 31st, 1868, entitled "An act to establish the Mobile Charitable Association, for the benefit of the common-school fund of Mobile County, without distinction of color." It authorized certain persons therein named to form themselves into a partnership association, under the name and style of J. C. Moses & Co., and to establish and carry on the business specified. Before commencing business they were required to pay to the board of school commissioners of Mobile County, for the use of the public schools of that county,

* Delmas *v.* Insurance Company, 14 Wallace, 661; Olcott *v.* The Supervisors, 16 Id. 678.

Recapitulation of the case in the opinion.

the sum of $1000, "and annually thereafter a like amount for the term of ten years, or so long as said partnership shall choose to do business under the provisions of this act; it being understood and agreed that said payment of $1000 per annum by said partnership to said common-school fund, is the consideration upon which this privilege is granted, and whenever said company shall fail to pay said sum according to the provisions of this act, then and in that case the right to do business shall cease." The last section declared "that this act shall remain in full force and effect for ten years upon the consideration herein contained, during which time said partnership company shall have the right to exercise the privilege and franchise herein given, any law to the contrary notwithstanding."

On the 8th of March, 1871, the legislature repealed the act.

Moses & Co. paid the amount required as a condition precedent, and continued to pay from time to time thereafter as if the repealing act had not been passed.

It was admitted that the defendant in keeping the gaming-table acted under the authority of Moses & Co., and as their agent. The offence was charged to have been committed on the 2d of December, 1871.

The bill of exceptions sets forth fully the evidence given at the trial. The table was "a table similar in many respects to a table commonly known and called a roulette-table, or table and wheel similar to a roulette-table, at which money was bet by persons operating at said table; that the money was bet in this manner." The manner of using the wheel and table and of conducting the gaming process are then fully described.

The court instructed the jury in substance that if the defendant had kept a gaming-table they should find him guilty. The defendant excepted. He thereupon asked certain instructions, which were refused, and he excepted to the refusal.

The Supreme Court of the State affirmed the judgment, and this writ of error has been prosecuted to bring the judg-

ment of affirmance before this court for review. The plaintiff in error insists that the act of December 31st, 1868, was, when the repealing act was passed, as between Moses & Co. and the State, a contract, and that the repealing act was a violation of that contract within the meaning of the Constitution of the United States, and therefore void.

Our attention has been called to the opinions of the judges of the Supreme Court of Alabama in the case of *The Mayor, Aldermen, and Common Council of Mobile* v. *Clifton Moses et al.* That case involved the same statutes and presented the same questions as the case before us. In that case a majority of the judges held that the act was unwarranted by the constitution of the State, and therefore void. But a majority also held that keeping a gaming-table was not within the purview of the act, and that the act did not affect the pre-existing provision of the code upon that subject. One of the judges, holding this latter view, said: "The act declares that the association was allowed to be formed for the purpose of receiving subscriptions, and to sell and dispose of certificates of subscription, which shall entitle the holders thereof to such prizes as may be awarded to them. This is the means provided by the law to carry on 'business' under the franchise. This may be done, whatever it may mean, without the violation of the statutes against gambling; that is, without keeping a gaming-table in the manner forbidden by the revised code. The scheme of operations set out in the bill is clearly that of keeping or exhibiting 'a table for gaming.' The legislature did not intend to repeal this section of the code by the law allowing the formation of this association, and turn loose upon society the evils thus restrained."

This construction of the statute is authoritative in this court. We concur in the views expressed by the learned judge from whose opinion we have quoted. Such an act should be construed strictly. Every reasonable doubt should be so resolved as to limit the powers and rights claimed under its authority. Implications and intendments should

have no place except as they are inevitable from the language or the context. But aside from these views it is not to be supposed that it was the purpose of the act to give to the association the power to carry on, throughout the State, for the period of ten years, gaming in the form disclosed in this record, in defiance of the legislative authority, and without any check or limitation save such as they might choose to impose upon themselves.

This conclusion renders it unnecessary to consider the constitutional validity of the original act or the effect of the repealing act. We have not found it necessary to consider those subjects.

JUDGMENT AFFIRMED.

INSURANCE COMPANY *v.* FOGARTY.

1. The cases in reference to the line of distinction between a total and a partial marine loss examined, and the principle announced that it is not necessary to a total loss that there should be an absolute extinction or destruction of the thing insured, so that nothing of it can be delivered at the point of destination.
2. A destruction in specie, so that while some of its component elements or parts may remain, while the thing which was insured, in the character or description by which it was insured, is destroyed, is a total loss.
3. Hence, where machinery was insured, to wit, the parts of a sugar-packing machine, and no part of the same was delivered in a condition capable of use, it is a total loss, though more than half the pieces in number and value may be delivered, and would have some value as old iron.

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

Fogarty sued the Great Western Insurance Company on a policy of marine insurance and recovered a judgment for $2611.95 and costs. The policy was an open one, and the indorsement procured by the plaintiff on it was of insurance for $2250, on machinery on board the bark Ella Adele, at and from New York to Havana, free from particular average. The memorandum clause of the policy provided that ma-

Statement of the case.

chines and machinery of every description were warranted by the assured free from average unless general. The machinery insured consisted of the various parts necessary for a complete sugar-packing machine, including, as part of it, three sets of truck-irons, and also other extra truck-irons. It was described in the bill of lading and invoice as eight pieces and eight boxes, composing one sugar-packer and three trucks.

The vessel on which these articles were being transported from New York to Havana, just before reaching the latter city, was driven on rocks in a violent gale, was filled with water, and finally became a total wreck, and was abandoned to the underwriters. Their agent at Havana took possession, and was engaged about a month in raising the cargo. A large number of the pieces composing the plaintiff's machinery was recovered and tendered to him at Havana, which he refused to receive, on the ground that the insurance company was liable to him as for a total loss. They denied that under the circumstances of the case there was a total loss within the meaning of the policy; and the soundness of the instruction to the jury on that point, given and refused by the Circuit Court on the trial, was the only question now before this court.

There was very little conflict of testimony as to what was recovered and what was its condition when tendered to plaintiff. It was all of iron About half of it in weight was saved, and the remainder left at the bottom of the sea. That which was saved was entirely useless as machinery, and was of no value except as old iron, for which purpose it would sell for about $50. The machinery in working order was worth $2250. That which was saved was much broken and rusted, so that it would cost more to repair it, polish it, and put it in order for use than to buy a new machine.

Upon the testimony offered by the plaintiff the counsel for the defendant moved the court to instruct the jury that the action could not be sustained, because it showed that there was not a total loss. The court declined to do this, and the request was renewed at the conclusion of the de-

fendant's evidence, and again declined. Several prayers for instruction were then presented by the defendant, based upon the leading proposition, that if any of the pieces of the machinery insured was recovered and tendered in specie to the assured, there was no total loss. These were refused and exceptions taken to all these refusals, on which error is assigned here. An exception was also taken as to the charge of the court laying down the law by which the jury were to decide the question of total loss submitted to them. That charge was in the following words:

"The meaning of the term 'free from particular average,' used in the policy, was that the defendants should be liable only for a total loss of the subject insured; that the subject insured was not machines but machinery, by which is generally understood the several parts or portions of machines, adapted and fitted to be put together so as to constitute a machine (in this case a sugar-packing machine), and, applying the rule of law as to what constitutes a total loss to this particular subject insured, the jury will find whether any piece or portion of the machinery insured arrived at its destination in a perfect condition, so that it could have been used with its corresponding or connecting pieces had they also arrived in good condition; in that case the plaintiffs could not recover, as the loss would not be total; but that if every piece of the machinery was so damaged by the perils insured against as to be entirely unfit for use on being supplied with its corresponding or connecting pieces, then there was a total loss of the subject insured as machinery, although the material itself might still exist; and if they so found, they would find a verdict for the plaintiff for the sum named in the policy with interest from the tenth day of September, 1868."

Verdict and judgment having gone for the plaintiff, the insurance company brought the case here.

Mr. W. M. Evarts, for the plaintiff in error; Mr. S. P. Nash, contra.

Mr. Justice MILLER delivered the opinion of the court.

The question presented in this case for consideration has been often in the courts, and the discriminations between

what is total loss and what is not are frequently very nice and delicate. The authorities are by no means uniform or consistent with each other, when, as in the present case, the line of distinction is very narrow. Several cases bearing upon the one before us have been decided in this court, and perhaps a short review of them may aid us here better than a more extended examination of the numerous other authorities on the subject.

In the case of *Biays* v. *Chesapeake Insurance Co.*,* the plaintiff was insured upon hides, the whole number of which was 14,565. Of these, 789 were totally lost by the sinking of a lighter, and 2491 of those sunk were fished up in a damaged condition and sold. The hides were memorandum articles, and this court held that inasmuch as less than 800 hides insured as part of a much larger number of the same kind was lost, it could not be a total loss, and overruled the argument that it was a total loss as to the 789 hides.

In the case of *Marcardeir* v. *Chesapeake Insurance Co.*,† it is said that "it seems to be the settled doctrine that nothing short of a total extinction either physical or in value of memorandum articles at an intermediate port would entitle the insured to term the case a total loss, where the voyage is capable of being performed. And perhaps even as to an extinction in value, where the commodity *specifically* remains, it may yet be deemed not quite settled whether, under like circumstances, it would authorize an abandonment for a total loss."

In the case of *Morean* v. *The United States Insurance Co.*,‡ more than half of a cargo of corn was thrown overboard and lost. The remainder was saved in a damaged condition and sold at about one-fourth the market value of sound corn. This was held not to be a total loss, because part of the corn was saved, and though damaged was of some value. It was, therefore, only a partial loss.

The next case is that of *Hugg* v. *The Augusta Insurance Co.*§

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* 7 Cranch, 415.
† 8 Id. 47.
‡ 1 Wheaton, 219.
§ 7 Howard, 595.

The question there arose on an insurance of jerked beef of four hundred tons, part of which was thrown into the sea and part of the remainder so seriously damaged that the authorities of the city of Nassau refused to allow more than 150 of it to be landed. This was wet and heated, and not in a condition for reshipment. In answer to a question on this subject, certified to this court by the judges of the Circuit Court, it was replied, "that if the jury found that the jerked beef was a perishable article within the meaning of the policy, the defendant is not liable as for a total loss of the freight, unless it appears that there was a destruction in *specie* of the entire cargo so that it had lost its original character at Nassau, or that a total destruction would have been inevitable from the damage received if it had been reshipped before it could have arrived at Matanzas, the port of destination." And though there are some very strong expressions of the judge who delivered the opinion as to the necessity of the total destruction of the thing insured to establish a total loss in memorandum articles, no doubt the language here certified is the true expression of the court's opinion. And it will be observed that in this case, as in the case of *Marcardeir* v. *Chesapeake Insurance Co.*, the destruction spoken of is destruction as to species, and not mere physical extinction. Indeed, philosophically speaking, there can be no such thing as absolute extinction. That of which the thing insured was composed must remain in its parts, though destroyed as to its specific identity. In the case of the jerked beef, for instance, it might remain as a viscid mass of putrid flesh, but it would no longer be either beef or jerked beef. And when the case went back for trial in the Circuit, the charge of Taney, C. J., to the jury places this point in a very clear light.* He says there was not a total loss at Nassau, because a part of the jerked beef remained in specie, and had not been destroyed by the disaster. And if there was reasonable ground for believing that a portion of this beef could, by repairing the vessel, have been transported to

* Taney's Decisions, 168.

Matanzas, although it might arrive there in a damaged condition, but yet retaining *the character of jerked beef*, there was no total loss. The jury found there was a total loss. The case of *Judah* v. *Randal*,* where a carriage was insured and all was lost but the wheels, is another illustration of the principle. A part of the carriage, namely, the wheels, a very important part, was saved; but the court held that the thing insured, to wit, the carriage, was lost—that it was a total loss. Its specific character as a carriage was gone.

In the case of *Wallerstein* v. *The Columbian Insurance Co.*,† the whole doctrine is ably reviewed with a very full reference to previous decisions, and it is there shown that there is far from unanimity in the language in which the rule is expressed; and the extreme doctrine of an absolute extinction or destruction of the thing insured is not the true doctrine, or, at least, is not applicable in all cases as a criterion of total loss.

The Circuit Court was right in holding that what was insured was machinery—pieces or parts of a machine—pieces made and shaped to unite at points with other pieces, so as to make a sugar-packing machine. If parts of them were absolutely lost, and every piece recovered had lost its adaptability to be used as part of the machine; had lost it so entirely that it would cost as much to buy a new piece just like it, as to repair or adapt that one to the purpose, then there was a total loss of the machinery. If no piece recovered was of any use, or could be applied to any use connected with the machine of which it was a part, without more expense on it than its original cost, then there was no part of the *machinery* saved, however much of rusty iron may have been taken from the wreck. The court went quite as far in behalf of the defendant as the law justified, when it told the jury that the plaintiff could not recover if any piece or portion of the machinery insured arrived at its destination in a condition so perfect that it could have been used with its corresponding or connecting pieces, had they also arrived in good condition.

* 2 Caine's Cases, 324.

† 44 New York, 204.

Syllabus.

We are of opinion that the charge of the court put the case very fairly to the jury, as we understand the law, and the judgment is, therefore,

AFFIRMED.

WARREN *v.* VAN BRUNT.

1. Where two persons, before a public survey of it, made a settlement in Minnesota on the same forty acres of land (a quarter of a quarter-section and the smallest legal subdivision allowed by statute), which settlement was *in point of fact* made at the *same* time—a joint settlement therefore—the circumstance that in his declaratory statement, one of the settlers has stated that his settlement was made on a day anterior to the day which the other in his declaratory statement fixed as the date of *his*, is not a circumstance which will induce this court to reverse a decision of the register and receiver of the land office, affirmed by the Secretary of the Interior, awarding the tract to him who the other alleges made the later settlement; there being no fraud, imposition, or mistake in the case. The court will regard the facts of the case, not the allegations of the parties.
2. Where two joint settlers on such a piece of land, built from joint means and for a time jointly occupied a house there, which house—on a misunderstanding between them and the running of a line apportioning the land between them—was found to be on the land of one who now removed from and remained away from the land for several months, leaving the other in possession of the house (not as his tenant but as part owner, and till he—the one on whose land it was—could pay to the other half the sum which its erection had cost), and then, on payment of this money, evicted the co-settler and put his own tenants in (he himself occupying a wholly different forty acres, while the co-settler remained in effect on the old tract, and built and afterwards occupied a house for himself and family on it), *held*—on a bill which set up a superior right of pre-emption to the whole forty acres and not an equitable right to a joint ownership, or an ownership to part as settled by the dividing line—that this court would not reverse a decision of the register and receiver affirmed by the Secretary of the Interior which on a similar claim by the party who had removed, awarded the whole to the other party who with his family remained.
3. A party cannot set up in his replication a claim not in any way made in his bill, and the granting of which he asks in his replication only in the event that the case made in his bill fails.
4. An entry of the public land by one person in trust for another being forbidden by statute, equity will not, on a bill to enforce such a trust, decree that any entry in trust was made.

Statement of the case.

ERROR to the Supreme Court of Minnesota.

This was a contest between two pre-emption claimants, Warren, on the one hand, and the representatives of Van Brunt, deceased, on the other, for the ownership of the southeast quarter of the northeast quarter, section 13, township 108 N., R. 27 W. (forty acres), in the State of Minnesota. These last had the legal title under a patent from the United States, issued upon the claim of Van Brunt. Warren, alleging that he had an elder and better right of pre-emption, sought by his action in the court below to charge the representatives of Van Brunt as his trustees, and to compel them to convey to him the title they acquired by the patent.

The case was decided below upon facts found by the court, and stated in the record. No exception was taken to the finding, and the question presented, therefore, for the determination of this court was, whether upon the facts as found there was error in the decree.

These facts were substantially as follows: Warren and Van Brunt being each, in May, 1853, and thereafter until the death of Van Brunt, legally competent to avail themselves of the pre-emption laws of the United States, in the said month jointly selected for occupancy about two hundred and eighty acres of *unsurveyed* public lands in Minnesota, to which the Indian title had been extinguished.* They settled upon the forty acres in dispute, and after ploughing and planting two or three acres, proceeded with their joint means and labor to erect thereon a house for a residence, into which they moved with their families in June. They occupied this house together until the 18th of July, when, a difficulty having arisen between them, a contract of partition was entered into, by which, after establishing a dividing line, which ran diagonally across the premises in controversy and through the ploughed lands, it was agreed that Warren should have the sole and exclusive use of all the lands

* This was, of course, meant to correspond with seven tracts of forty acres each, *i. e.*, seven quarters of quarter-sections.

selected for occupancy situated on the east side of the line, and Van Brunt of all on the west. The house they had built was on the part set off to Warren, but by the agreement Van Brunt was to have the exclusive use of it until May 1st, 1854, when, on the payment to him of one-half its cost, he was to surrender the possession to Warren for his exclusive use thereafter. Upon the execution of this contract, Warren went with his family to the town of Mankato—a town in the neighborhood of the two hundred and forty acres of land, but not on any part of it—leaving Van Brunt in the house. Soon after, and within a reasonable time, he began the erection of a new house on a part of the premises set off to him, adjoining the disputed property, into which he moved in the autumn of 1853 with his family.

Van Brunt continued to occupy the first house in accordance with the terms of the contract of partition until May 1st, 1854, when Warren, having paid him for one-half its cost, evicted him by legal proceedings. After his eviction, he went into an abandoned "claim-shanty" on the part of the premises set off to him, and remained there from two to four weeks, during which time he erected a new house upon the disputed property, but on his side of the dividing line. As soon as this house was completed he moved into it with his family and resided there until his death, on the 5th of January, A. D. 1856. His family occupied the same house as their residence after his death, until their title was perfected under his claim. In 1853 and 1854 he ploughed and cultivated about twenty acres of the land occupied by him, seventeen of which were on the disputed forty. In 1854 and 1855, he ploughed a few acres more and cultivated all his improved lands. In 1855 he inclosed all his improvements with a fence, and dug some ditches. In addition to his house, he put up on the disputed property a large corn-crib, a cow-house, and other outbuildings.

After the eviction of Van Brunt from the first house, Warren moved into it and resided there until the autumn of 1854. He then went back to the house he built after the partition, and remained there until after Van Brunt's heirs

perfected their title. He cultivated and improved his lands upon the east of and up to the agreed division line, by fencing, ploughing, and planting, and kept tenants in thefirst house all the time after he left it until the commencement of the action in the court below. Neither of the parties disputed the right of the other to occupy and cultivate up to the line of division until after the title of the Van Brunt heirs was perfected.

The township lines were surveyed through the public lands, which included the premises in dispute, in 1854, and the subdivision lines in 1855. When the township lines were run, Warren was residing with his family in the first house, and his improvements on the disputed forty, including the house, were then equal to, if not greater in value, than those of Van Brunt.

On the 19th July, 1855, Van Brunt filed in the land office his declaratory statement under the pre-emption laws, claiming the right to enter and purchase the north half of the southeast quarter and south half of the northeast quarter, section 13, T. 108 N., R. 27 W., containing one hundred and sixty acres. His claim included the forty acres in dispute. In his statement he gave the *4th of June*, 1855, *as the date of his settlement.*

It appeared from the pleadings and the statements of the counsel for the plaintiff, in the argument, that in December, 1855, Warren filed his declaratory statement, also claiming the right under the pre-emption laws to enter and purchase the disputed premises, and the northwest quarter, southwest quarter, and south half of the northwest quarter, section 18, T. 108 N., R. 26 W., in all one hundred and sixty acres. He gave the date of *his settlement as November 17th*, 1853. On the 7th March, 1856, Warren served a notice upon the widow and administratrix of Van Brunt, that he should contest her claim to the pre-emption of the forty acres in controversy, and, in consequence of this notice, both claimants appeared before the register and receiver of the land office and produced and examined their witnesses. After a full

hearing, these officers were unable to agree upon a decision, and the papers and proofs were thereupon sent to the Commissioner of the General Office, who, on the 4th of April, 1857, decided in favor of the Van Brunt claim. Warren appealed to the Secretary of the Interior, who, on the 31st of October, A. D. 1857, affirmed the decision of the commissioner. On the 15th of May, 1860, a patent was issued to the heirs of Van Brunt for the whole one hundred and sixty acres claimed by him. In January, 1857, Warren received a patent for the one hundred and twenty acres claimed by him in section 18, and in February, 1865, filed a bill in one of the State courts of Minnesota to recover from Van Brunt's heirs the disputed forty acres.

The bill prayed a decree that Van Brunt's representatives should convey to Warren the *whole forty acres.*

The answer—which mentioned as part of a history of things which it gave, that the parties had divided their claims by running a line, which line they supposed when they made it would correspond with the east line of the forty acres, as that line would be laid down by the government survey—resisted this claim of the plaintiff and asserted title in the whole forty acres in Van Brunt's representatives.

The replication, denying that the division-line as thus agreed on gave Van Brunt any title to the forty acres, thus continued:

"And the plaintiff prays in addition to the prayer of original complaint, that, in case the court should not find for the plaintiff that he is entitled to a decree for a release of the *whole* disputed forty acres, that then the court may ascertain *how the said alleged division-line divides said forty acres*, and that the defendants, on terms of payment of the original cost of the same, be decreed to convey *so much thereof as may be found to have been assigned to him, to the plaintiff.*"

The Supreme Court of Minnesota, to which the case finally got, adjudged the title to be in the heirs of Van Brunt, and Warren brought the case here on error.

Messrs. M. S. Wilkinson and C. K. Davis, for the plaintiff in error:

1. Warren, in his declaratory statement, dates his settlement as of November 17th, 1853. Van Brunt does not pretend that *his* was made prior to June 4th, 1855. Warren's settlement was thus anterior to Van Brunt's. Where two or more persons have settled on the same quarter-section the right of pre-emption belongs to him who has made the first settlement.

2. If, in this view of the case, Warren is not entitled to the whole forty acres, a joint entry should have been allowed by the land department. There is nothing in the pre-emption laws which forbids a joint settlement, declaration, and purchase. The admitted rule, "that where two or more persons have settled upon the same quarter-section each shall be permitted to enter his improvement as near as may be by legal subdivisions," is very well so far as it goes, but it will not apply where both claimants have their improvements on the same quarter of the quarter-section, or forty acres, the smallest legal subdivision. In such a case exact justice would seem to require that they enter jointly the whole.*

3. Finally. The very least that Warren is entitled to is the part of what now turns out to be the quarter of a quarter-section; that would fall to him by giving effect to the dividing-line agreed on by the parties before the government survey. That is what he asks for, as an alternative.

Messrs. J. M. Carlisle and J. D. McPherson, contra.

The CHIEF JUSTICE, having stated the case, delivered the opinion of the court.

When Warren and Van Brunt made their settlement upon the lands, in 1853, they acquired no right of pre-emption, as the act of Congress then in force only gave that right to settlers upon lands in the then Territory of Minnesota which

* Opinion of the Secretary of the Interior; Laughton *v.* Caldwell, 1 Lester's Land Laws, p. 387, Nos. 430, 431.

had been surveyed.* On the 4th of August, A.D. 1854, the provisions of the Pre-emption Act were extended to unsurveyed lands in that Territory; but it was further provided that if, when the lands were surveyed, it should appear that two or more persons had settled upon the same quarter-section, each should be permitted to enter his improvements as near as might be by legal subdivisions.†

There is no legal subdivision of the public lands less than a quarter of a quarter-section, or forty acres, except in the case of fractional sections. The lands in controversy, therefore, could not have been subdivided for the purposes of entry and purchase. The forty acres must be taken as a whole or not at all.

Warren and Van Brunt each claimed the right to purchase the whole. There could be no entry by either until the questions arising between them had been settled. To meet such a case, the act of Congress under which they each made claim, provided that the register and receiver of the land district in which the land was situated should make such settlement, subject to an appeal to, and revision by, the Secretary of the Interior.‡ The Commissioner of the General Land Office exercised a supervision over this action of the register and receiver under his general powers in respect to private land claims and the issuing of patents.§ The issue of the patent upon the award of these officers was final and conclusive as between the United States and the several claimants. It passed the legal title to the patentee. The remedy of the defeated party, if any thereafter, was by a proceeding in the courts against the patentee or those claiming under him.

It is claimed on the part of the defendants in error that the decision of the government officers in this case is conclusive as between the claimants themselves, inasmuch as there was an actual submission of the controversy by both, and the court has found that there was no fraud, unfairness,

* 5 Stat. at Large, 455, § 10. † 10 Id. 576.

‡ 5 Id. § 11; 9 Id. 395, § 3.

§ 5 Id. 107, § 1; Barnard's Heirs *v.* Ashley's Heirs, 18 Howard, 44.

or misconduct in the hearing or in the production of the testimony, either on the part of Van Brunt or his heirs, or the several officers who were called upon to act.

This question has recently been fully considered by this court, in the case of *Johnson* v. *Towsley*,* and it was there held† that "when those officers decide controverted questions of fact, in the absence of fraud or impositions, or mistake, their decision on those questions will be final," but‡ that "it was the right of the proper courts to inquire, after the title had passed from the government and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own or as trustee for another." We are satisfied with this ruling, and this leads us to inquire whether, upon the facts as found by the court, the officers of the government did err in awarding the patent to Van Brunt. The record does not disclose the facts found by the officers.

It is first contended by Warren that the patent should have been issued to him, because his settlement upon the disputed premises was both in fact and by the declaratory statements of the respective parties anterior to that of Van Brunt, and because by the act of Congress the first settlement gives the better right. It is not important for us to know what the claims of the parties have been. We must look to the facts as they actually existed, and from these it appears that neither of the parties had an advantage over the other by reason of a prior settlement. They both went upon the premises at the same time and, for awhile, their occupancy was joint. After the partition, Van Brunt remained in the house alone. He was there in no respect as the tenant of Warren, but by reason of his right as part owner. His short absence after his eviction upon his lands adjoining, cannot be considered an abandonment of his possession, for he must have been all the time at work upon his new house, which was finished and ready for occupation in

* 13 Wallace, 72. † Page 86. ‡ Page 87.

from two to four weeks. Warren was absent at Mankato, after the partition, from July until October, and he did not actually reside himself on the disputed forty acres many months. He had, therefore, no claim superior to that of Van Brunt on account of his possession.

It is next insisted that a joint entry of the forty acres by the two should have been permitted. No such demand was made upon the government by Warren. He claimed the right to enter the whole, and upon that claim the parties went to a hearing. He might have asked to make his entry jointly with Van Brunt, but he did not. He is concluded by his election made at the time. Having been defeated upon his claim as made, he cannot, in the absence of fraud or surprise, come into court and ask relief upon another, which he might have urged then. Besides, he asks no such relief in his bill, which is the foundation of the present proceeding. He there claims a superior right of pre-emption to the whole, and not an equitable right to a joint ownership.

It is again insisted that a decree should have been entered in favor of Warren, charging the heirs of Van Brunt as his trustees for all that part of the premises situated on the east side of the partition-line. This claim was not made in the bill, but the contract of partition having been set out in the answers for the purpose of explaining the character of the occupancy of Van Brunt, Warren asked in his replication to be allowed the benefit of it in case he failed to maintain his right to the whole. He was willing to repudiate the contract if by so doing he could get an advantage, but if he failed in that, insisted upon its enforcement. But such a contract cannot be enforced to any extent. The pre-emption laws provided, at the time of this entry and purchase, that before any person should be allowed to enter lands upon a claim for pre-emption he must make oath that he had not directly or indirectly made any agreement or contract in any way or manner with any person, by which the title he might acquire by his purchase should enure in whole or in part to the benefit of any person except himself.

Forfeiture of title to the land purchased, and of the money paid for it, was made the penalty of false swearing in this particular. An entry could not have been made, therefore, by Van Brunt in trust for Warren; and if it could not have been made, a court of equity will not decree that it was. All contracts in violation of this important provision of the act are void and are never enforced. It has been so decided many times by the Supreme Court of Minnesota.* We are satisfied with these decisions.

In our opinion, there was no error in the decision of the government officers, or in the decree of the Supreme Court of Minnesota.

DECREE AFFIRMED.

HEINE v. THE LEVEE COMMISSIONERS.

1. There can be no jurisdiction in equity to enforce the payment of corporation bonds until the remedy at law has been exhausted.
2. Where the law has provided that a tax shall be levied to pay such bonds, a mandamus after judgment to compel the levy of the tax, in the nature of an execution or process to enforce the judgment, is the only remedy.
3. The fact that this remedy has been shown to be unavailing does not confer upon a court of equity the power to levy and collect taxes to pay the debt.
4. The power to levy and collect taxes is a legislative function in this country and does not belong to a court of equity, and can only be enforced by a court of law, through the officers authorized by the legislature to levy the tax, if a writ of mandamus is appropriate to that purpose.
5. Taxes are not liens unless declared so by the legislature under whose authority they are assessed. Still less can a lien be created by the mere duty to assess taxes, which has not been performed.

APPEAL from the Circuit Court for the District of Louisiana.

This was a suit in chancery brought by Heine and others, holders of bonds issued by what is called the board of levee

* St. Peter Co. *v.* Bunker, 5 Minnesota, 199; Evans *v.* Folsom, Ib. 422; Bruggerman *v.* Hoerr, 7 Id. 343; McCue *v.* Smith, 9 Id. 259.

commissioners of the levee district for the parishes of Carroll and Madison of the State of Louisiana. The board thus described was made a *quasi* corporation by the legislature of Louisiana, with authority to issue the bonds and provide for the payment of interest and principal by taxes levied upon the real and personal property within the district. The bill alleged a failure to levy these taxes and to pay the interest on any part of said bonds, that the persons duly appointed levee commissioners had pretended to resign their office for the purpose of evading this duty, and that the complainants had applied in vain to the judge of the District Court, who was by statute authorized to levy a tax on the alluvial lands to pay the bonds if the levee commissioners failed to do so. The prayer for relief was that the levee commissioners be required to assess and collect the tax necessary to pay the bonds and interest, and if, after reasonable time, they failed to do so, that the district judge be ordered to do the same; and for such other and further relief as the nature of the case required.

No judgment at law had been recovered on the bonds or any of them, nor any attempt to collect the money due by suit in the common-law court.

A demurrer to the bill was sustained in the Circuit Court, and the plaintiffs appealed from the decree of dismissal rendered on that demurrer.

Mr. Thomas Allen Clarke, for the appellants, contended:

That the commissioners having resigned could no longer in their corporate capacity be sued at law.

That there was a contract between the bondholders and the corporation not unlike an equitable mortgage; for that the contract was not simply an agreement to pay money but one to pay money out of a fund under the control of the commissioners; that it belonged specially to equity to enforce such a contract.

That it was part of the contract that the taxes should pay these bonds; that the holders had, therefore, a species of

lien on the lands on which the taxes were to be laid; this again being a matter specially of equitable cognizance.

That though the suit was by a bill in equity, yet that it might be taken (other grounds of relief failing) as a petition for mandamus.

That the case, in short, was a very complicated case, such as the law afforded no relief for; and that one was to be worked out through equitable mechanism unless a shocking injustice was to be tolerated.

Messrs. S. R. Walker, W. Tunstall, and J. E. Leonard, contra.

Mr. Justice MILLER delivered the opinion of the court.

The question presented by the present case is not a new one in this court. It has been decided in numerous cases, founded on the refusal to pay corporation bonds, that the appropriate proceeding was to sue at law and by a judgment of the court establish the validity of the claim and the amount due, and by the return of an ordinary execution ascertain that no property of the corporation could be found liable to such execution and sufficient to satisfy the judgment. Then, if the corporation had authority to levy and collect taxes for the payment of that debt, a mandamus would issue to compel them to raise by taxation the amount necessary to satisfy the debt.*

Unless, then, there is some difficulty or obstruction in the way of this common-law remedy, chancery can have no jurisdiction.

It is said that by reason of the resignation of the levee commissioners no suit can be sustained against them so as to procure a judgment on which the mandamus may ultimately issue.

But the present suit is brought against these very men in

* Von Hoffman *v.* City of Quincy, 4 Wallace, 535; Supervisors *v.* United States, Ib. 435; Riggs *v.* Johnson County, 6 Id. 166; City of Galena *v.* Amy, 5 Id. 705, and many other cases in this court, and especially the case of Walkley *v.* City of Muscatine, 6 Id. 481.

their official character, and no difference can be seen in their capacity to be sued in a court of law and a court of equity. The same service of process is required in each. The same officers serve the process, and the jurisdiction of the court over the person is governed by precisely the same principles in each case. The court of chancery possesses no extraordinary powers to compel persons to submit to its jurisdiction and litigate before it, not possessed by a common-law court, when the latter is competent to give relief.

This proposition was directly in issue and distinctly settled in the case of *Rees* v. *City of Watertown*, at the present term.* In that case the plaintiff had obtained judgment, issued execution, which was returned *nulla bona*, and had then procured a writ of mandamus, ordering the aldermen of the city to levy the tax. The aldermen resigned before the writ could be served, with intent to evade its effect. After other aldermen were elected, a new writ was served on them, and they in turn resigned, after an order to show cause why they should not be punished for a contempt in failing to obey the writ of mandamus. Notwithstanding all this, we held that chancery had no jurisdiction, by a direct proceeding, to levy the tax or to seize the property of the citizens and sell it for the satisfaction of the judgment.

That case was much stronger than the one before us, and is unquestionably decisive of this. It is very clearly shown that the total failure of ordinary remedies does not confer upon the court of chancery an unlimited power to give relief. Such relief as is consistent with the general law of the land, and authorized by the principles and practices of the courts of equity, will, under such circumstances, be administered. But the hardship of the case, and the failure of the mode of procedure established by law, is not sufficient to justify a court of equity to depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles.

It is attempted in argument to support this exercise of

* *Supra*, p. 107.

authority by reference to some of the acknowledged grounds of equity jurisdiction. One of these is the doctrine of specific performance of contracts. But while equity has, in some cases, enforced in this manner a contract to deliver specific stocks, there is no such case here. The plaintiffs have their bonds or stocks. It is the money due on them which they want now. And in this respect the case is one of compensation in damages for a failure to pay the money due on the bond. All that plaintiffs can get is this money and interest, and that is precisely what a court of law would give them. The almost universal rule on the subject of specific performance, as regards contracts other than those for real estate is, that where adequate compensation can be made by the damages recoverable at law, equity will not interfere.

It is said in argument that plaintiffs have a lien upon the taxable property of the district for the payment of these bonds, and that equity always enforces liens where no other mode of enforcing them exists. Whether this be the true doctrine of a court of equity to the full extent here claimed we need not decide. Nor need we decide whether taxes once lawfully levied are, until paid, a lien on the property against which they are assessed, though it is laid down in the very careful work of Judge Dillon, that taxes are not liens upon the property against which they are assessed, unless made so by the charter, or unless the corporation is authorized by the legislature to declare them to be liens.* But here no taxes have been assessed except those which have been released by the bondholders accepting new bonds for the interest of the year so assessed. And it is too clear for argument that taxes not assessed are no liens, and that the obligation to assess taxes is not a lien on the property on which they ought to be assessed. This was one of the points urged and overruled in the case of *Rees* v. *Watertown*.

The court is asked if it should fail to find any principle peculiar to courts of equity on which the bill can be sustained, to treat it as a petition for the writ of mandamus.

* 2 Dillon on Corporations, 659.

This would ignore the well-established principle of the Federal courts that the line between the equitable and common-law jurisdiction must be maintained, and that a suit must be of the one character or the other, and be prosecuted by pleadings and processes belonging to each class of jurisdiction.

Mandamus is essentially and exclusively a common-law remedy and is unknown to the equity practice. But if this were otherwise it is the well-settled doctrine of this court that the Circuit Courts cannot use the writ of mandamus as an original and independent remedy, but are limited to its use as a process in the enforcement of rights when jurisdiction has been already acquired for other purposes. In fact, in the class of cases in which it is here sought it is a writ in execution of the judgment of the court already rendered, and can only be used because it is an appropriate process for that purpose.*

The Circuit Court cannot, therefore, issue the writ if the bill could be treated merely as a petition on the common-law side of the court, praying for that remedy.

There does not appear to be any authority founded on the recognized principles of a court of equity on which this bill can be sustained. If sustained at all it must be on the very broad ground that because the plaintiff finds himself unable to collect his debt by proceedings at law, it is the duty of a court of equity to devise some mode by which it can be done. It is, however, the experience of every day and of all men, that debts are created which are never paid, though the creditor has exhausted all the resources of the law. It is a misfortune which in the imperfection of human nature often admits of no redress. The holder of a corporation bond must in common with other men submit to this calamity, when the law affords no relief.

The power we are here asked to exercise is the very deli-

* McIntire *v.* Wood, 7 Cranch, 504; McClung *v.* Silliman, 6 Wheaton, 601; Kendall *v.* United States, 12 Peters, 526; Riggs *v.* Johnson County, 6 Wallace, 197; The Secretary *v.* McGarrahan, 9 Id. 311; Bath County *v.* Amy, 13 Id. 244.

cate one of taxation. This power belongs in this country to the legislative sovereignty, State or National. In the case before us the National sovereignty has nothing to do with it. The power must be derived from the legislature of the State. So far as the present case is concerned, the State has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the legislature either to assess the tax by special statute or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal court. It is unreasonable to suppose that the legislature would ever select a Federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee.

In the case of *Walkley* v. *City of Muscatine* and *Rees* v. *City of Watertown*, already cited, we have distinctly refused to enter upon this course, and we see no reason in the present case to depart from the well-considered judgment of the court in those cases, especially the latter.

DECREE AFFIRMED.

Dissenting, Mr. Justice CLIFFORD and Mr. Justice SWAYNE.

Mr. Justice BRADLEY did not sit.

BOARD OF COMMISSIONERS *v.* GORMAN.

1. A writ of error or appeal may operate as a supersedeas under the eleventh section of the act of June 1st, 1872, "to further the administration of justice" (and which allows any person desiring to have a judgment, decree, or order, &c., reviewed on error or appeal, and to stay proceedings during the pendency of such writ of error or appeal, to "give the

security required by law therefor within sixty days after the rendition of such judgment, decree, or order," &c.), when it is applied for and bond is filed within *sixty* days from the rendition of the judgment or decree.

2. But this does not prevent an execution from being issued after the lapse of ten days, as contemplated by the twenty-third section of the Judiciary Act of 1789.
3. The supersedeas under the act of 1872, by filing the bond within sixty days, stays *further proceedings*, but does not interfere with what *has already been done.*

   Thus where one has been ousted from office by virtue of a writ on a judgment rendered on the 20th of January, and the writ was executed by ousting him on the 3d of February, and on the latter day a supersedeas bond was filed, but subsequently to the execution of the writ, *Held* that no relief could be had under the act of 1872.
4. In calculating the lapse of time, the date of the *entry* of judgment governs, and not the date when the judgment was read to and signed by the judges.

IN this case, which came here on error to the Supreme Court of the Territory of Idaho, the board of commissioners of Boise County and B. T. Davis, plaintiffs in error, asked that a writ might issue from this court commanding the restoration of the said Davis to the office of assessor and tax collector of Boise County for the reason, as was alleged, that he had been ousted from that office by virtue of a writ issued upon the judgment in the court below, after the allowance of a writ of error to this court, which operated as a supersedeas.

The application was founded on the supposed effect which the eleventh section of an act of June 1st, 1872, entitled "*An act to further the administration of justice*," had upon certain provisions of the Judiciary Act.

This last-named act, it will be remembered, after enacting by its twenty-second section that final judgments in the Circuit Court may be examined and reversed or affirmed in the Supreme Court, the citation being in such case signed by a judge of the Circuit Court or justice of the Supreme Court, and the adverse party having at least thirty days' notice, . . . continues:

"And every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that

the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good."

The next section proceeds:

"SECTION 23. A writ of error, as aforesaid, shall be a *supersedeas and stay of execution* in cases *only* where the writ of error is served by a copy thereof being lodged in the clerk's office, where the record remains, within *ten* days (Sundays exclusive) after rendering the judgment complained of, until the expiration of which term of ten days executions shall not issue in any case where a writ of error may be a supersedeas."*

The eleventh section of the act of 1872, above referred to as the basis of the application now made, thus enacts:

"Any party or person, desiring to have any judgment, decree, or order of any District or Circuit Court reviewed on writ of error or appeal, and to stay proceedings thereon during the pendency of such writ of error or appeal, may give the *security* required by law therefor *within sixty days after the rendition of such judgment*, decree, or order, or afterward, with the permission of a justice or judge of the said appellate court."

The reader who has possessed himself of the case of *Telegraph Company* v. *Eyser*, reported at much length in a former part of this volume,† will, of course, see that the case now reported presents a sort of complementary one to that, and disposes of one of the questions there mentioned, the third, as being involved in the new enactment.

Mr. H. E. Prickett, in support of the motion; Messrs. H. S. Foote and G. W. Paschal, contra.

The CHIEF JUSTICE delivered the opinion of the court, stating the facts of the case in it.

In order that a writ of error may operate as a supersedeas, it is necessary that a copy of the writ should be lodged for

* By an act of 1803, amendatory of the Judiciary Act, "appeals" were made subject to the same rules, regulations, and restrictions as were prescribed in cases of writs of error.

† See page 419.

the adverse party in the clerk's office where the record remains, and that the bond approved by the judge allowing the writ should also be filed there.* Execution cannot issue upon the judgment until the expiration of ten days, exclusive of Sundays, from the entry thereof. If the writ of error and bond are filed before the expiration of the ten days, no execution can issue so long as the case in error remains undisposed of. After the expiration of the ten days an execution may issue. Notwithstanding this, under the provisions of the act of 1872,† upon the filing of the bond within sixty days from the time of the entry of the judgment a supersedeas may be obtained. Such a supersedeas, however, stays proceedings only from the filing of the bond. It prevents further proceeding under an execution which has been issued, but does not interfere with what has already been done.

In this case the record shows that the judgment was actually entered on the 20th day of January. The entry as made was read in court on the morning of the 21st and the record signed by the judges, but it was ordered to be made on the 20th. The ten days, exclusive of Sundays, prescribed by the act of Congress for delay of execution, expired on Saturday, the 31st of January. On Monday, the 2d of February, a majority of the judges of the court directed the clerk to issue a writ of restitution to carry the judgment into effect. On the same day the chief justice of the court allowed a writ of error and signed the necessary citation. A copy of the writ of error was filed in the clerk's office, and the writ and citation actually served upon the defendant in error before the clerk had completed the preparation of the writ of restitution. After he had completed its preparation he handed it to the attorney for the defendant in error, who had previously been served with the citation. No supersedeas bond was filed with the clerk on the 2d, and no notice was given that any had been approved. On the morning of the 3d of February the writ of restitution was served and Davis removed from his office. After this, and on the

* O'Dowd v. Russell, 14 Wallace, 405. † 17 Stat. at Large, 198, § 11.

same day, a bond approved by the chief justice was left in the clerk's office by him. It nowhere appears from the record when this bond was approved. It bears date the 2d of February, but there is no certificate of the time when the approval was entered. It is certain, however, that it was not filed in the clerk's office until after service of the writ of restitution. The writ of error operated as a supersedeas only from such filing. That was too late to prevent the removal of Davis from his office in pursuance of the authority of the judgment; and we cannot now order him to be restored.

It is claimed, however, that as the record of the judgment was not signed by the judges of the court until the 21st, the ten days did not commence to run until that date, and we are referred to the case of *Silsby* v. *Foote*,* as establishing such a rule. In that case the decision was actually rendered on the 28th August, but the decree was special in its terms, and was not settled or signed by the judge until the 11th December. Before any entry could be made it was necessary that the judge should pass upon its form. It was, therefore, quite right to delay the appeal until the exact character of the decree could be known.

Here, however, the form of the judgment was settled upon the announcement of the decision, and it was entered accordingly.

But the writ of restitution was not served until after the expiration of ten days from the 21st, and it does not appear that it was actually delivered to the sheriff for service before that time. There is nothing to prevent the preparation by the clerk of an execution before the expiration of the ten days. It cannot be issued before, and it is not issued until it is placed beyond the control of the clerk himself. So long as it remains with him, or under his control, it is like any other paper in his office.

We think the motion must be DENIED, and in accordance with the request of the parties made at the argument,

THE CASE IS DISMISSED.

* 20 Howard, 290.

TOWNSHIP OF PINE GROVE *v.* TALCOTT.

1. There is nothing in the constitution of Michigan (established A.D. 1850, and which ordains among other things that—

> "No person shall be deprived of property without due process of law. The credit of the State shall not be granted in aid of any person, association, or corporation. The State shall not be a party to or interested in any work of internal improvement")

which makes void the act of the legislature of that State passed March 22d, 1869, and by which it was enacted—

> "That it shall be lawful for any township or city to pledge its aid to any railroad company now chartered, organized, or that may hereafter be organized under or by virtue of the laws of the State of Michigan, in the construction of its road, by loan or donation, with or without conditions, for such sum or sums, not exceeding 10 per centum of the assessed valuation then last made of the real and personal property in such township or city, as a majority of the electors of such township or city voting shall, at a meeting or meetings to be called for that purpose, determine."

2. The decisions of the highest court of the State to the contrary will not be respected by this court when such decisions are not satisfactory to the minds of the judges here, and when the matter in question is bonds issued in negotiable form by a township of that State, and now in the hands of a citizen of another State or a foreigner, *bonâ fide* and for value paid.
3. Questions relating to bonds issued in a negotiable form, under such an act, involve questions relating to commercial securities; and whether under the constitution of the State such securities are valid or void belongs to the domain of general jurisprudence.
4. *County of Otoe* v. *Railroad Company* (16 Wallace, 667) and *Alcott* v. *The Supervisors* (Id. 678) affirmed.

ERROR to the Circuit Court for the Western District of Michigan, in which court Talcott brought *assumpsit* against the township of Pine Grove, one of the municipalities of the State of Michigan, to recover the amount of certain bonds issued by that township to aid in the construction of a railroad running through the said township, from Kalamazoo to South Haven, both places being in Michigan.

The constitution of Michigan (adopted A.D. 1850) thus ordains:

"ARTICLE VI, § 32. No person shall be compelled in any

criminal case to be a witness against himself, *nor be deprived of* life, liberty, or *property, without due process of law.*

"ARTICLE XIV, § 6. The credit of the State shall not be granted to or in aid of any person, association, or corporation.

"§ 8. The State shall not subscribe to or be interested in the stock of any company, association, or corporation.

"§ 9. The State shall not be a party to or interested in any work of internal improvement, nor engage in carrying on any such work, except in the expenditure of grants to the State of land or other property.

"§ 11. The legislature shall provide a uniform rule of taxation, except as to property paying specific taxes. Taxes shall be levied upon such property as shall be prescribed by law.

"ARTICLE XV, § 13. The legislature shall provide for the incorporation and organization of cities and villages, and shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit.

"ARTICLE XVIII, § 2. When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor (except when to be made by the State) shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law.

"§ 14. The property of no person shall be taken for public use without just compensation therefor. Private roads may be opened in the manner to be prescribed by law; but in every case the necessities of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders," &c.

These provisions of the constitution being in force, the legislature of Michigan, on the 22d of March, 1869, passed an act entitled "An act to enable any township, city, or village to pledge its aid, by loan or donation, to any railroad company now chartered or organized under and by virtue of the laws of the State of Michigan, in the construction of its road."

The act enacted:

"That it shall be lawful for any township or city to pledge its aid to any railroad company now chartered, organized, or that

may hereafter be organized, under and by virtue of the laws of the State of Michigan, in the construction of its road, by loan or donation, with or without conditions, for such sum or sums, not exceeding ten per centum of the assessed valuation then last made of the real and personal property in such township or city, as a majority of the electors of such township or city voting shall, at a meeting or meetings called for that purpose, determine."

The manner in which the vote should be taken and the bonds executed was provided for in subsequent sections.

Under this act the bonds on which the suit was brought were issued. The bonds, and the coupons attached to them, were made "payable to bearer." It was not denied that the directions given in the act were carried out.

The declaration set forth in special counts the cause of action. The township demurred on the sole ground that the law in question was in conflict with the constitution of the State, and judgment being given against the township, it brought the case here.

The act under which the bonds were issued had been the subject of very full consideration by the Supreme Court of Michigan, in *Bay City* v. *The State Treasurer*,* and an act of a similar character had been previously considered by the same court in *The People* v. *Salem*.† Both acts were declared to be in conflict with the constitution, and void.

In the former case (Graves, J., dissenting, and delivering an opinion in dissent), the unconstitutionality of the law was placed upon several distinct grounds, some of which were more fully insisted on than others.

In the latter case it was held (Cooley, J., delivering on this occasion, as he had done on the former, the opinion of the court), that the statute was in conflict with Article VI, section thirty-two, already quoted, which provides that no person shall be deprived of his property without due process of law, and also with the provisions of Article XIV, sections eight and nine, also already quoted, which prohibit the

* 23 Michigan, 499, 504.

† 20 Id. 452.

State from being a party to or interested in any works of internal improvement.

The court observes that the State had, prior to 1850, when the constitution was established, been engaged in works of the description named and had owned some of the principal railroads in the State. It refers to the history of the times in which the constitution was adopted, and points out how previously to that time the people had been fraudulently led into the creation of debts for railroads of which they denied the moral obligation, and in consequence of which their public credit had been impaired; and how — interpreting these provisions as effectually guarding them against the like evils and dangers for the future — the people were induced more than by any other motive to adopt the constitution. The court says:

"All these provisions were incorporated by the people in the constitution as precautions against injudicious action by themselves, if in another time of inflation and excitement they should be tempted to incur the like burdensome taxation in order to accomplish public improvement in cases where they were not content to wait the result of private enterprise. The people meant to erect such effectual barriers that if the temptation should return, the means of inflicting the like injury upon the credit, reputation, and prosperity of the State should not be within the reach of the authorities. They believed these clauses of the constitution accomplished this purpose perfectly; and none of its provisions had more influence in recommending that instrument to the hearty good-will of the people.

"In process of time, however, a majority in the legislature were found willing, against the solemn warning of the executive, to resort again to the power of taxation in aid of internal improvement. It was discovered that though 'the State' was expressly inhibited from giving such aid in any form, except in the disposition of grants made to it, the subdivisions of which the State was composed were not under the like ban. Decisions in other States were found which were supposed to sanction the doctrine that under such circumstances, the State might do indirectly through its subdivisions what directly it was forbidden to do. Thus a way was opened by which the whole purpose of

the constitutional provisions quoted might be defeated. The State could not aid a private corporation with its credit, but it might require each of its townships, cities, and villages to do so. The State could not load down its people with taxes for the construction of a public improvement, but it might compel the municipal authorities, which were its mere creatures, and which held their whole authority and their whole life at its will, to enforce such taxes, one by one, until the whole people were bent to the burden.

"Now, whatever might be the just and proper construction of similar provisions in the constitutions of States whose history has not been the same with our own, the majority of this court thought, when the previous case was before us, and they still think, that these provisions in our constitution do preclude the State from loaning the public credit to private corporations, and from imposing taxation upon its citizens, or any portion thereof, in aid of the construction of railroads. So the people supposed when the constitution was adopted. Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberate action; and it cannot be permissible to the courts that, in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was, to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power. In these cases we thought we could arrive at it from the public history of the times."

Notwithstanding these decisions, the court below gave judgment against the township, and it, accordingly, brought the case here.

Mr. J. A. Garfield, for the plaintiff in error:

The only point in issue below was the meaning of the constitution of the State, and on such a question it was the duty of the court below to have taken as true the meaning

put upon it by its highest judicial tribunal. If a contrary course of proceeding is permissible there is an end to the independence of the judiciary of the States, and the decisions of tribunals which are confessedly constitutional expositors of the local law, are reviewed and reversed by a tribunal possessing no authority to exercise such functions upon any theory of State and Federal jurisdiction hitherto recognized in our judicial history.

A long series of decisions in this court—of which *Nesmith* v. *Sheldon** is but one illustration of which there are infinite other ones from the first page of Dallas to the last of Wallace—stand out to witness that the Federal tribunals have ever recognized and felt bound by the decisions of the State courts in matters of local law. Although pressed on many occasions to "amplify the jurisdiction," the rule has been steadily adhered to, unless the case was within some of the recognized exceptions. This case falls within none of the exceptions. Nor is it in that class of cases where it has been held that "if a contract when made was valid under the laws and constitution of a State as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity." Neither the act under consideration nor any like act had ever been held valid. No exposition had ever been made of the constitution of 1850, from which it could be concluded that such legislation would be sustained. There was no previous course of decision which held even by inference that the constitutional prohibitions above referred to would authorize municipal taxation in aid of works of internal improvement.

The case of *Swan* v. *Williams*,† which might, at a hasty view, be taken as disproving what we say, was not a case arising under the present constitution. Indeed, it was a case which originated when an entirely different public policy prevailed, and under a constitution which permitted

* 7 Howard, 812.

† 2 Michigan, 427.

Recapitulation of the case in the opinion.

the legislature to make the public a party to such enterprises. What that case decides was this only, that a railroad was so far of public use as to justify the exercise of the power of eminent domain by allowing it to take private property upon payment of compensation.

Independently of all constitutional restraints, the bonds are void. The railroad was a private enterprise. It had no element of a public object, otherwise than as all manufactures, canals, steamboat lines, and other things open to persons generally to enjoy on payment of their money, are to be called public.

The present case, therefore, is that of a person buying bonds and running the risk of their being held valid.

Messrs. J. S. Black and C. A. Kent, with whom were Messrs. C. I. Walker and D. D. Hughes, contra.

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

The facts of the case are few and undisputed, and the legal question presented has been settled by this court.

On the 22d of March, 1869, the legislature of Michigan passed an act entitled "An act to enable any township, city, or village to pledge its aid, by loan or donation, to any railroad company now chartered or organized under and by virtue of the laws of the State of Michigan, in the construction of its road."

The plaintiff in error was the defendant in the court below. It is a body corporate in the county of Van Buren, in Michigan. The case made by the declaration is as follows:

The Kalamazoo and South Haven Railroad Company is a corporation organized under the laws of Michigan, having for its object the construction of a railroad from the village of Kalamazoo to the village of South Haven, in that State. The line of its proposed route passed through the township of Pine Grove. Pursuant to the act of the legislature before mentioned, a meeting of the electors of the township was called to vote upon the proposition whether the town-

ship should, in aid of the construction of the road, give to the company its coupon bonds to the amount of $12,000, bearing interest at the rate of ten per cent. per annum, one-sixth of the principal to be payable at the end of each succeeding year, from March 1st, 1870, until the whole amount was paid; the interest to be payable annually from that time. A majority voted for the proposition, and the bonds were issued. They bore date June 1st, 1869. The plaintiff, Talcott, was the holder and owner of a part of the bonds and coupons. They are described in the declaration, and were overdue. The township filed a demurrer. It was overruled by the court; and the township electing to stand by it, judgment was given for the plaintiff. The township thereupon sued out this writ of error, and has thus brought the case before this court for review.

It is not alleged that the bonds were not issued in conformity to the act, nor that there has been any want of good faith on the part of the railroad company, nor that the plaintiff, Talcott, was not a *bonâ fide* holder. But it has been argued that the act of the legislature was void. This presents the only question in the case, and it is fundamental. If the foundation fails the entire superstructure reared upon it must fall. It is said the act is in conflict with the constitution of the State.

It is an axiom in American jurisprudence that a statute is not to be pronounced void upon this ground, unless the repugnancy to the constitution be clear, and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment. The particular clause of the constitution must be specified and the act admit of no reasonable construction in harmony with its meaning. The judicial function involving such a result is one of delicacy, and to be exercised always with caution.* It must be admitted that the constitution here in question contains nothing directly adverse upon the subject. But we have been referred in

* Twitchell *v.* Blodgett, 13 Michigan, 127; Tyler *v.* The People, 8 Id. 320; People *v.* Mahany, 13 Id. 482.

this connection to the following provisions: The thirty-second section of Article VI declares that "no person, in any *criminal case*, shall be compelled to be a witness against himself, *or be deprived of life, liberty, or property without due process of law.*" Here there is no imputation of crime. The clause is confined to judicial proceedings. Article XIV, clauses six, eight, and nine, provide that the credit of the State shall not be granted to, or in aid of, any person, association, or corporation; that the State shall not be interested in the stock of any corporation, and that the State shall not subscribe to, or be interested in, any work of internal improvement, or engage in carrying on any such work, except in the expenditure of grants to the State of land or other property. In this case it is the township and not the State that is concerned. The State has done nothing, and is in nowise liable.

The present constitution was adopted in the year 1850. Before that time numerous acts involving the same principle with the one here in question had been passed by seventeen States. Congress, by the act of June 3d, 1856,* granted a large quantity of land to Michigan, to be used in aid of the construction of railroads. This land was appropriated by the State to several different companies, pursuant to the provisions of the act. Other companies were subsequently aided in the same way. In 1863 began a series of special legislative acts authorizing the municipal subdivisions of the State named therein to give their aid respectively to the extent and in the manner prescribed. Between that time and the year 1869 thirty such statutes were enacted. In the latter year the general law was passed under which the bonds in question were issued. This summary shows the understanding in the legislature, and out of it, in the State, that there was no constitutional prohibition against such legislation. It does not appear that its validity was ever in any instance judicially denied until the year 1870.

The case as to the constitution is a proper one for the ap-

* 11 Stat. at Large, 21.

plication of the maxim, *Expressio unius est exclusio alterius.* The instrument is drawn with ability, care, and fulness of details. If those who framed it had intended to forbid the granting of such aid by the municipal corporations of the State, as well as by the State itself, it cannot be that they would not have explicitly said so. It is not to be supposed that such a gap was left in their work from oversight or inadvertence.

The eleventh clause of the same article declares that the legislature shall provide a uniform rule of taxation, except as to property paying specific taxes, and that taxes shall be levied upon such property as shall be prescribed by law. The object of this provision was to prevent unjust discriminations. It prevents property from being classified and taxed as classed, by different rules. All kinds of property must be taxed uniformly, or be entirely exempt. The uniformity must be coextensive with the territory to which the tax applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout such county or city.* But the rule does not require that taxes for the same purposes shall be imposed in different territorial subdivisions at the same time. If so a county could not levy a tax to build a court-house, jail, or infirmary without rendering it necessary for every other county in the State to do the same thing without reference to the different circumstances of each one. So here one township through which the railroad was to pass, expecting to be largely benefited by its construction, might give its bonds and impose the tax requisite to meet the principal and interest, while another township similarly situated might refuse to do so. The rule would have no application to the latter.

The second and fourteenth clauses of Article XVIII prescribe that when private property is taken for public use just compensation shall be made to the owner. These provisions relate to the exercise of the right of eminent domain.

The thirteenth clause of Article XV declares that "the

* Gilman *v.* The City of Sheboygan, 2 Black, 514.

legislature shall provide for the incorporation and organization of cities and villages, and shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit." The power here in question was exercised by a township. The language of this clause clearly implies that the powers to be restricted may be exercised; and what is implied is as effectual as what is expressed.* Congress can pass no laws but such as the Federal Constitution expressly, or by necessary intendment, permits.

The legislative power of a State extends to everything within the sphere of such power, except as it is restricted by the Federal Constitution or that of the State. In the present case we have found nothing that in our judgment warrants the conclusion that the act in question is wanting in validity by reason of its unconstitutionality.

But it has been argued that aside from any constitutional prohibition the legislature had no power to authorize the imposition of a tax for any other than a public purpose, and that this act is not within that rule. Conceding for the purposes of this opinion the soundness of the first proposition, the second can by no means be admitted.

Though the corporation was private, its work was public, as much so as if it were to be constructed by the State. Private property can be taken for a public purpose only, and not for private gain or benefit. Upon no other ground than that the purpose is public can the exercise of the power of eminent domain in behalf of such corporations be supported. This view of the subject has been taken by the Supreme Court of Michigan.† But upon other grounds, we think the public character of such works cannot be doubted. Where they go they animate the sources of prosperity, and minister to the growth of the cities and towns within the sphere of their influence. Unless prohibited from doing so a municipal corporation has the same power to aid in their construction as to procure water for its water-works, coal

* United States *v.* Babbit, 1 Black, 61.

† Swan *v.* Williams, 2 Michigan, 427.

for its gas-works, or gravel for its streets from beyond its territorial limits.* Under the limited powers conferred by the Federal Constitution, Congress has frequently given aid in such cases. The Pacific railroads and the Louisville canal furnish instances of such action by that body. The gift to the sufferers from the overflow of the Mississippi, and prior acts of the kind, must also be borne in mind. Cannot a State legislature do the same things?

It does not belong to courts to interpolate constitutional restrictions. Our duty is to apply the law, not to make it. All power may be abused where no safeguards are provided. The remedy in such cases lies with the people, and not with the judiciary.

We pass by without remark the point whether in cases like this the public or private character of the work is not a legislative rather than a judicial question.

It is insisted that the invalidity of the statute has been determined by two judgments of the Supreme Court of Michigan,† and that we are bound to follow those adjudications. We have examined those cases with care. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. We think the dissenting opinion in the one first decided is unanswered. Similar laws have been passed in twenty-one States. In all of them but two, it is believed their validity has been sustained by the highest local courts. It is not easy to resist the force of such a current of reason and authority. The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here, commercial securities are involved. When the bonds were issued, there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in

* Meyer *v.* Muscatine, 1 Wallace, 389.

† The People *v.* Salem, 20 Michigan, 452; Bay City *v.* The State Treasurer, 23 Id. 499.

every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment, neither of the other departments of the government of the State lifted its voice against them. The acquiescence was universal.*

The general understanding of the legal profession throughout the country is believed to have been that they were valid. The National Constitution forbids the States to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective States, we should abdicate the performance of one of the most important duties with which this tribunal is charged and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery.†

The question here under consideration was fully considered by this court in *Railroad Company* v. *County of Otoe*,‡ and in *Olcott* v. *The Supervisors*.§ We have no disposition to qualify anything said in those cases. They are conclusive in the case before us.

In Sedgwick on Statutory and Constitutional Law,‖ it is said: "It must be further borne in mind that the invalidity of contracts made in violation of statutes is subject to the equitable exception, that although a corporation in making a contract acts in disagreement with its charter, where it is a simple question of capacity or authority to contract arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded on it to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate

* Gelpcke *v.* Dubuque, 1 Wallace, 175.
† Butz *v.* Muscatine, 8 Wallace, 579.
§ Ib. 678.
‡ 16 Id. 667.
‖ Page 90.

a contract the fruits of which he retains. And the principle of this exception has been extended to other cases. So a person who has borrowed money of a savings institution upon his promissory note, secured by a pledge of bank stock, is not entitled to an injunction to prevent the prosecution of the note upon the ground that the savings bank was prohibited by its charter from making loans of that description." The authorities referred to sustain the text.* But it is not necessary to place our judgment upon this ground. We rest it upon the other views which have been expressed, and the authority of our own preceding adjudications.

JUDGMENT AFFIRMED.

The CHIEF JUSTICE did not sit in this case, and took no part in its decision.

Justices MILLER and DAVIS dissented.

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* Palmer *v.* Lawrence, 3 Sandford's S. C. 162; Steam Navigation Co. *v.* Weed, 17 Barbour, 378; Chester Glass Co. *v.* Dewey, 16 Massachusetts, 94; Steamboat Co. *v.* McCutcheon, 13 Pennsylvania State, 13; Potter *v.* The Bank of Ithaca, 5 Hill, 490; Suydam *v.* Morris Canal and Banking Co., Ib. 491; Sacket's Harbor Bank *v.* Lewis County Bank, 11 Barbour, 213; Mott *v.* United States Trust Co., 19 Id. 568.

INDEX.

ACTION. See *Timber on the Public Lands*, 2.

ADMIRALTY. See *Collision; Jurisdiction*, 5, 6; *Practice*, 14, 15.

1. Where a libel in, alleged that a loss by the collision was substantially a total loss, and the answer in effect admitted this—the vessel having sunk in deep water, and it being clear that she could not have been repaired without a large expenditure—*held*, that the fact that she was finally raised and put in good condition, was no defence to a claim for a total loss;—especially as it did not appear at whose instance or at what cost this was done; nor by what right those in possession of her held her; and it not being either alleged or proved that she had been tendered to her original owners. *The Falcon*, 75.
2. But this decree for a total loss declared to bar any claim to the vessel by her former owners, and that their title should be remitted to the owners of the other vessel. *Ib.*

APPEAL. See *Bankrupt Act; Practice*, 14–16.

Does not lie to this court from an order of a District Court disbarring an attorney. *Ex parte Robinson*, 513.

ATTORNEY AT LAW. See *Appeal.*

1. The power to disbar an attorney can only be exercised where there has been such conduct on the part of the party complained of as shows him to be unfit to be a member of the profession; and before judgment disbarring him can be rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence. *Ex parte Robinson*, 505.
2. Mandamus is the appropriate remedy to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter. *Ib.*
3. The effect of the act of Congress of March 2d, 1831, entitled "An act declaratory of the law concerning contempts of court," and of the seventeenth section of the Judiciary Act, stated in relation to the general matter above passed on. *Ib.*

ATTORNEY IN FACT.

A power of attorney to sell and convey real property, given by a husband and wife, in general terms, without any provision against a sale of the interest of either separately, or other circumstance restraining the authority of the attorney in that respect, authorizes a conveyance by the attorney, of the interest of the husband, by a deed executed in his name alone. *Holladay* v. *Daily*, 606.

BANKRUPT ACT.

When, after opposition by a creditor to the discharge of a petitioner in bankruptcy, the District Court discharges him, and the opposing creditor files in the Circuit Court a petition setting forth the application for the benefit of the Bankrupt Act, the opposition, and discharge, and praying the Circuit Court for a reversal of the orders of discharge of the District Court—such petition must be regarded as being a petition for review under the first clause of the second section of the Bankrupt Act, which gives the Circuit Courts a general superintendence and jurisdiction of all cases and questions arising under the act; and on an affirmance by the Circuit Court of the decree of discharge by the District Court, no appeal lies to this court, though the debt of the opposing creditor discharged be more than $2000. *Coit* v. *Robinson*, 274.

BILL OF EXCEPTIONS. See *Practice*, 6.

CAUSE PROXIMATE AND REMOTE. See *Life Insurance.*

CERTIORARI. See *Practice*, 1–3.

CHANCERY. See *Equity.*

COLLISION. See *Admiralty.*

1. A steamer condemned for a collision with a sailing vessel, several witnesses on the sailing vessel swearing positively to courses and distances and times immediately prior to the collision, and these showing that the steamer was in fault; while, though there was strong evidence on the steamer's side to show that these courses, distances, and times could not have been truly stated by these witnesses, this evidence was inferential chiefly; consisting of conclusions or arguments drawn from other facts sworn to, as *ex gr.*, the lights which the steamer saw and the lights which she did not see on the sailing vessel; and the effect of giving credence to this inferential or argumentative testimony being to convict as of necessity the witnesses for the sailing vessel of perjury. *The Wenona*, 41.
2. A steamer running at the rate of from eight to ten knots an hour, on a bright moonlight night, in an open bay, with nothing to mislead her, condemned for the loss of a schooner sailing with a six-knot breeze, whose only fault was alleged to be a false manœuvre in the moment of impending collision. *The Falcon*, 75.
3. A steamer and a sailing vessel held jointly liable for injury by collision occurring in a very dense fog and in the neighborhood of a large port, in the track of vessels bound in and out; the steamer being here condemned for sailing in such a time and place at the rate of seven knots an hour, and the sailing vessel, though moving very slowly (about a mile an hour), for ringing a bell instead of using a fog-horn, as by statute she was bound to if "under way" in a fog. *The Pennsylvania*, 125.
4. Where a statute, in order to prevent collisions at sea, prescribes what vessels there shall do, a vessel which has committed a breach of the statute, the same being followed by a collision, must show not only

COLLISION (*continued*).
that probably her fault did not contribute to the disaster, but that it certainly did not; that it *could* not have done so. *The Pennsylvania*, 125.

COMMERCE AMONG THE SEVERAL STATES.
The act of Congress of June 15th, 1866, authorizing every railroad company in the United States, whose road was operated by steam, to carry upon its road, &c., all passengers, freight, and property, on their way from one State to another, and to connect with roads of other States so far as to form continuous lines for transportation to their place of destination; and the act of July 25th, 1866, authorizing the construction of certain bridges over the Mississippi River, were designed to remove trammels upon transportation between different States, interposed by State enactments or by then existing laws of Congress. *Railroad Company* v. *Richmond et al.*, 584.

COMMISSIONER OF INTERNAL REVENUE. See *Construction, Rules of*, 2.

CONDITION. See *Construction, Rules of*, 3, 4; *Release.*

CONFEDERATE NOTES. See *Evidence*, 10, 11.
When payment may, in contracts made during the civil war in the late insurrectionary States, be made in such notes, and when payment in lawful money is obligatory. This matter considered. *Confederate Note Case*, 548.

CONFLICT OF JURISDICTION. See *Constitutional Law*, 4; *Judicial Comity.*

CONSTITUTIONAL LAW. See *Illinois; Michigan; New York.*
1. An act of legislature, which has the effect to appropriate the assets of a bank whose stock is owned wholly by a State, to pay the debts of the State, to the prejudice of billholders and other creditors of the bank, is void, as repugnant to that clause of the Constitution which prohibits a State to pass any law impairing the obligation of contracts. *Barings* v. *Dabney*, 1.
2. An act of the legislature of a State authorizing the people of a town to decide whether they will "donate" its bonds to a railroad company, and collect taxes for the amount (the act being enabling merely and not mandatory), is not opposed to the Constitution of the United States. *Town of Queensbury* v. *Culver*, 83.
3. Where in a university of learning, belonging to the State, and which the State was in the habit of governing through curators appointed by itself, a person was appointed by the curators a professor and librarian, for six years from the date of his appointment, "*subject to law.*"—*Held* that the legislature could vacate his office, appoint new curators, and without fault on the part of the professor assigned, order a new election of a professor to the same professorship, and of a librarian, before the expiration of the six years. *Head* v. *The University*, 526.
4. A State cannot, in order to defray the expenses of her quarantine regula-

CONSTITUTIONAL LAW (*continued*).

tions, impose a tonnage tax on vessels owned in foreign ports, and entering her harbors in pursuit of commerce. *Peete* v. *Morgan*, 581.

5. The power vested in Congress to regulate commerce among the several States was not given to be exercised so as to interfere with private contracts, not designed at the time they were made, to create impediments to such intercourse. *Railroad Company* v. *Richmond*, 585.

CONSTRUCTION, RULES OF.

I. As applied to Contracts.

They are, when having nothing local or particular in them, to be construed by the settled rules of law. *Insurance Company* v. *Seaver*, 532.

II. As applied to Statutes.

1. A construction of a proviso to an act which makes the proviso plainly repugnant to the body of the act, is inadmissible. *The Dollar Savings Bank* v. *United States*, 227.
2. The construction given to the Internal Revenue Act by Commissioners of Internal Revenue, even though published, is not a construction of so much dignity that a re-enactment of the statute subsequent to the construction having been made and published, is to be regarded as a legislative adoption of that construction. *Ib.*
3. When statute authorizes an inferior public officer to make a sale "with the approval" of his superior, that approval is an indispensable condition to the validity of the sale and must appear in writing, and without its so appearing he cannot make a title which a purchaser is bound to accept. *United States* v. *Jonas*, 598.
4. Where a contract of insurance is by its terms made void upon the breach of certain conditions set forth in it,—such as that it shall not extend to death arising from breach of the law by the assured, or by his wilfully exposing himself to unnecessary danger or peril, and the assured is killed during a horse-race made illegal by statute, and in which he had been participating,—the meaning of the conditions must be settled by the rules of law. It is of no pertinence to consider "how ordinary people in the part of the country where the insured reside, in view of the state of things then existing,—the frequency of such races, and the way in which such matches are usually regulated,—would naturally understand such language, whether as precluding such driving or not." *Insurance Company* v. *Seaver*, 532.

CONTEMPT OF COURT. See *Attorney at Law.*

CONTINGENT REMAINDERS. See *Vested Remainder.*

CONTRACT. See *Constitutional Law*, 1, 3, 5.

1. When the government—under a contract with a person to carry a large amount of military supplies (not binding itself, however, to furnish any specified amount of them), has a right, upon giving to him notice of the amount to be carried, to call upon such person to carry the full amount—gives notice to him to carry the full amount, but sends to him to be carried only a part of such amount, the contractor

CONTRACT (*continued*).
is entitled to be reimbursed all expenses to which he is put in getting ready to carry the full amount; but is not entitled to compensation as if he had actually carried it. *Bulkley* v. *United States*, 37.

2. Conditions in a contract of insurance, the same being of no peculiar or local kind, are not to be interpreted by reference to the way in which a jury might assume that ordinary people in the part of the country where the insured resides would, in view of the state of things there existing, understand them; nor interpreted otherwise than by the settled rules of law. *Insurance Company* v. *Seaver*, 532.

3. A promise made in one of the Southern States to pay a sum of money specified (and acknowledged to be due) "as soon as the crop can be sold or the money raised from any other source," is a promise to pay the money specified upon the occurrence of either of the events named in the paper, OR after the lapse of a reasonable amount of time within which to procure, in one mode or in the other, the means necessary to meet the liability. *Nunez* v. *Dautel*, 560.

4. Contracts valid when made, continue valid, and capable of enforcement, so long as peace lasts between the governments of the contracting parties, notwithstanding a change in the conditions of business which originally led to their creation. *Railroad Company* v. *Richmond*, 584.

CORPORATION. See *Municipal Bonds; Municipal Corporations; Municipal Subscriptions.*

Although a bank, on the expiration of its charter, or the trustees who liquidate its affairs, may be deprived by statute, of power to take or hold real estate, this does not prevent either's making an arrangement through the medium of a trustee, by which, without ever having a legal title, control, or ownership of such estate, they yet secure a debt for which they had a lien on such estate, and have the estate sold so as to pay the debt. *Zantzingers* v. *Gunton*, 32.

COUPONS. See *Municipal Bonds*, 1, 2.

COURT AND JURY. See *Jurisdiction*, 4; *Practice*, 9, 17.

On a promise to pay a certain sum of money after the lapse of a reasonable time, the question of what was a reasonable time (there being no evidence in the case but the written promise itself), is a question for the court. *Nunez* v. *Dautel*, 560.

CREDITOR, ASSIGNMENT FOR BENEFIT OF. See *Debtor and Creditor; Trust.*

DEBTOR AND CREDITOR. See *Corporation.*

Though the stock of a bank be altogether owned by a State, if the bank is insolvent its assets cannot be appropriated by legislative act or otherwise to pay the debts of the State, as distinguished from the debts of the bank Those assets are a trust fund first applicable to the payment of the debts of the bank. *Barings* v. *Dabney*, 1.

DEED. See *Solicitor of the Treasury.*

DELINQUENT REVENUE OFFICER. See *Evidence*, 2–4.

DISTILLER'S BOND.

1. One taken in pursuance of the act of July 20th, 1868, imposing taxes on distilled spirits is not void, even as against sureties to the bond, because the ground on which the distillery was, was incumbered, and because it being so the bond was approved without the consent of the incumbrancers to postpone their liens; the bond not having been delivered as an escrow simply. *Osborne* v. *United States*, 577.
2. This is not altered by the fact that if the consent of the incumbrancers had been got to postpone their liens, the ground on which the distillery stood was of sufficient value to discharge the taxes due by the distiller and so relieve the sureties from their personal obligations. *Ib.*

DISTRICT OF COLUMBIA. See *Practice*, 7.

EQUITY. See *Parties; Pleading; Public Lands*, 3.

1. Equity does not possess power to order the levy of a tax to pay municipal debts, simply because, in point of fact, the creditor cannot get payment by the usual processes of law, these being theoretically perfect; though, practically, from special circumstances, unavailing so far as sought to be used. *Rees* v. *City of Watertown*, 107; *Heine* v. *Levee Commissioners*, 655.
2. Will not relieve against representations (which prove untrue) of facts yet to come into existence; representations based upon general knowledge, information, and judgment, as distinguished from representations, which from knowledge, peculiarly his own, a party may certainly know whether they will be true or false. *Sawyer* v. *Prickett and Wife*, 147.
3. Will not relieve a party against his own representations of the class last abovementioned, where another person has acted upon them, to the inconvenience or injury of the party who made them and is now seeking relief. *Kitchen* v. *Rayburn*, 254.

ESTOPPEL.

1. A principal in a power of attorney to collect money from the government, and give release, and do other things necessary, &c., may be estopped from a further assertion of his claims by his own action in regard to a suit brought, and a compromise made of it under the power, though the power itself be in a form which the statute declares shall make it "null and void." *Stowe* v. *United States*, 13.
2. An act of Congress allowing and reinstating an entry and location by A. on the public lands which was wholly void, "so that title to said lands may enure to the benefit of A.'s grantee, *as far as he may have conveyed the same*," *held* to vest, through the process of estoppel, a remote grantee who took by a *mere quit-claim* from a nearer grantee who had an ordinary sort of deed with warranty and full covenants. *McCarthy* v. *Mann*, 20.

EVIDENCE. See *Collision*, 4; *Omnia rite esse acta, &c.; Personal Identity; Statutes.*

1. Strong inferential testimony disregarded, where the effect of giving

EVIDENCE (*continued*).

credit to it would be to show that other witnesses who swore positively to facts which the tendency of such testimony was to disprove, must have committed perjury. *The Wenona*, 41.

2. Under the act of March 3d, 1797, enacting that in suits against delinquent revenue officers, "a transcript *from* the books and proceedings of the treasury shall be evidence," an extract may be given in evidence if not garbled or mutilated, and if it gives both sides of the account as it stands upon the books of the treasury. *United States* v. *Gaussen*, 198.
3. Such a transcript, however, will be but *primâ facie* evidence. *Ib.*
4. A transcript of the accounts rendered by a collector himself (when not partial or fragmentary), is evidence against the surety on his official bond. *Ib.*
5. Where, on a question of novelty in a patented process, a witness has stated that soon after the patent was granted he was using a particular process which he had been using for twenty years before (a process which the defendant affirmed to be the same as the one patented), it is allowable to ask him whether the patentee had not forbid him to use what he was then using (the purpose of the question being to show that the patentee had forbid him); and that the witness then disclaimed using the patented process, and said that he had "a way of his own" which he was using. *Klein* v. *Russell*, 433.
6. Also to ask a witness of the opposite side, who was referred to and said that he had seen and copied a paper in reference to the expenses of the suit, subscribed by various persons, what were the contents of the paper; the purpose of the question being to show that the defendants' witnesses were in a combination to defeat the plaintiff and to share the expense of the opposition. It was not necessary prior to the question to call on any one to produce the original paper. *Ib.*
7. Reports of adjudged cases, no evidence in other cases of facts stated in the report. *Mackay* v. *Easton*, 619.
8. Courts will not take judicial notice of the various orders issued by a military commander in the exercise of the military authority conferred upon him. *Burke* v. *Miltenberger*, 519.
9. The bare title of a cause at the head of one or two orders of court—these being the only parts of a record in a concurrent proceeding sent here—in which orders the defendant is stated to be G. M. "*et al.*," is not sufficient to show that a partner of G. M., to wit, one J. B.—not anywhere named in any portion of the record sent, was a defendant and party to the proceeding. *Williams et al.* v. *Bankhead*, 563.
10. Parol evidence is admissible (proper ground being first laid), where suit is brought on a contract which was made in the late rebellious States . . . to enforce a contract payable in "dollars," and made during the war, to prove that the term "dollars" as used in the contract meant, in fact, Confederate notes. *The Confederate Note Case*, 548.
11. On a question arising on such a contract as to whether lawful money or Confederate notes were intended as the sort of money in which payment was to be made, the understanding of the parties may (under

EVIDENCE (*continued*).
statute which authorizes either party to show what the true understanding was in regard to this matter), be shown from the nature of the transaction, and the attendant circumstances, as satisfactorily as from the language used. *The Confederate Note Case*, 548.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS. See *Municipal Bonds*, 2.

"FINAL DECREE."
An order of the Circuit Court on an appeal in admiralty from a decree of the District Court, simply affirming that decree, is not a "final decree" from which an appeal lies to this court *The Lucille*, 73.

"FINAL TRIAL." See *Removal of Causes.*
What sort of trial is "final" and what not within the language of the act of March 2d, 1867, authorizing a removal from a State court to a Federal court, of a cause "at any time before the final hearing or trial of the suit." *Insurance Company* v. *Dunn*, 214; *Stevenson* v. *Williams*, 572.

"FLORIDA, LOUISIANA, AND MISSOURI." See *Private Land Claims.*

GOVERNMENT CONTRACTOR. See *Contract*, 1.

HUSBAND AND WIFE. See *Attorney in Fact.*

ILLINOIS.
The act of the legislature of, passed June 13th, 1867, providing for the taxation of the owners of shares of the capital stock of a National bank in that State, at the place, within the State, where the bank was located, without regard to their places of residence, was valid under the constitution of the State established in 1848. *Tappan, Collector*, v. *Merchants' National Bank*, 491.

INDIANS.
1. Timber standing on lands occupied by the Indians cannot be cut by them for the purposes of sale alone; though when it is in their possession having been cut for the purpose of *improving* the land, there is no restriction on the sale of it. *United States* v. *Cook*, 591.
2. The presumption is against the authority of Indians to cut and sell timber on the public lands. Every purchaser from them is charged with notice of this presumption. *Ib.*

INSURANCE. See *Life Insurance.*
1. It is not necessary in a case of marine insurance, to make a total loss, that there should be an absolute extinction or destruction of the thing insured, so that nothing of it can be delivered at the point of destination. *Insurance Company* v. *Fogarty*, 640.
2. A destruction in specie, so that while some of its component elements or parts may remain, while the thing which was insured, in the character or description by which it was insured is destroyed, is a total loss. *Ib.*

INTERNAL REVENUE. See *Construction, Rules of*, 2; *Distiller's Bond; Stamp; "Transportation Bond."*

1. The ninth section of the Internal Revenue Act of July 13th, 1866, subjects to the tax of five per cent. laid on the undistributed sum or sums made and added during the year to their surplus or contingent funds, by banks and savings institutions generally, such sum or sums, when made and added to such funds even by savings banks without stockholders or capital stock, and which do the business of receiving deposits to be lent or invested for the sole benefit of their depositors. *The Dollar Savings Bank* v. *United States*, 227.
2. The United States are not prohibited from adopting the action of *debt* or any other common-law remedy for collecting what is due to them. This is true on general principles, and under the abovementioned act of July 13th, 1866, it is expressly enacted that "taxes may be sued for and recovered in the name of the United States in any proper form of action." *Ib.*
3. The requirement by statute on all banks to pay a tax of a certain sum, per cent., on all undistributed earnings made or added during the year to their contingent funds, is a charge of a certain sum upon the banks, and without assessment makes the banks a debtor for the sum prescribed. *Ib.*

INTERPRETATION OF LANGUAGE. See *Construction, Rules of.*

1. In a contract made for the transportation of military supplies and stores in the Western country, and in the presence of actual war, between the military department of the government and a private party, the terms "posts, depots, and stations" are to be taken in their military sense and not in the sense of railway posts, depots, and stations. *Caldwell's Case*, 264.
2. When such a contract speaks of military posts or depots ON the west bank of a river, posts, one of which is 92 miles west of the river, and another 132 miles, and a third 191 miles, cannot be considered as within the designation. *Ib.*
3. Conditions in a policy of insurance having nothing local in their character, are not to be interpreted by reference to the way in which a jury might assume that "ordinary people in the part of the country where the insured resides, in view of a state of things there existing at the time," would naturally understand them; nor interpreted otherwise than by the settled rules of law. *Insurance Company* v. *Seaver*, 532.

JUDICIAL COMITY.

1. Whether the legislature of a State has authority under the constitution of a State to pass a particular statute, what is the true interpretation of any statute passed by it for a purpose specified, and what acts will be justified under the statute, are matters which lie exclusively within the determination of the highest court of the State, and its judgment is final. *Aicardi* v. *The State*, 635.
2. But the decisions of even such a court upon the construction and statutes of its own State, will not be followed by this court when they are

JUDICIAL COMITY (*continued*).

disapproved of by it, and when the matter in question is the obligation to pay bonds issued in negotiable form by a township of that State, and now in the hands of a citizen of another State or a foreigner, *bonâ fide*, and for value. *Township of Pine Grove* v. *Talcott*, 666.

JUDICIAL NOTICE.

Not taken of the various orders issued by a military commander in the exercise of his military authority. *Burke* v. *Miltenberger*, 519.

JURISDICTION. See *Bankrupt Act; Waiver.*

1. A return to a summons by the sheriff that he has served the defendant personally therewith is sufficient, without stating that the service was made in his county. This will be presumed. *Knowles* v. *The Gaslight and Coke Company*, 58.
2. But, in an action on a judgment rendered in another State, the defendant, notwithstanding that the record shows a return of the sheriff that he was personally served with process, may show that he was not served, and that the court never acquired jurisdiction of his person. *Ib.*
3. Where a citizen of one State as indorsee of inland bills, drawn or accepted by a citizen of another—the plaintiff claiming through the indorsement of the payee, or of the payee and subsequent indorsers—sues the drawer or acceptor, in the Circuit Court, the citizenship of such payee, or of such payee and subsequent indorsers, must be alleged to be different from that of the defendant. *Morgan's Executor* v. *Gay*, 81.
4. It is not competent for a Circuit Court to determine, without the intervention of a jury, an issue of fact in the absence of the counsel of the party and without any written agreement to waive a trial by jury. *Ib.*
5. If the interest allowed by the Circuit Court on an appeal in admiralty, added to the original amount claimed, exceed $2000, exclusive of costs, an appeal will lie to this court. *The Rio Grande*, 178.
6. Under the act of March 3d, 1825, § 22, by which an assault on a person upon the high seas with a dangerous weapon is made an offence against the United States, and the trial of the offence is to be "in the district where the offender is apprehended, OR into which he may first be brought," a person is triable in the Southern District of New York who, on a vessel owned by citizens of the United States, has committed on the high seas the offence specified; has been then put in irons for safe-keeping; has, on the arrival of the vessel at anchorage at the lower quarantine in the Eastern District of New York, been delivered to officers of the State of New York, in order that he may be forthcoming, &c.; and has been by them carried into the Southern District and there delivered to the marshal of the United States for that district, to whom a warrant to apprehend and bring him to justice was first issued. *United States* v. *Arwo*, 486.
7. This court has no jurisdiction to review a decree of the Supreme Court of a State annulling a judgment of a court of the same State, on the

JURISDICTION (*continued*).
ground that the notes on which the judgment was rendered were given for a loan of Confederate money, and that the transactions which resulted in the acquisition of the notes were had between enemies during the late civil war, in violation of the proclamation of the President forbidding commercial intercourse with the enemy. The judgment presents no Federal question. *Stevenson* v. *Williams*, 572.

"LEGAL REPRESENTATIVES."
The meaning of the term in a patent upon an old Louisiana (French and Spanish) claim explained and applied. *Carpenter* v. *Rannels*, 138.

LIEN.
Taxes are not a, unless made so by statute. *Heine* v. *The Levee Commissioners*, 655.

LIFE ESTATE. See *Vested Remainder.*

LIFE INSURANCE.
1. A death occurring in driving a match at a horse-race forbidden by law, is a death caused by "breach of the law on the part of the assured, or by his wilfully exposing himself to any unnecessary danger or peril," within the condition of a policy of life insurance, restricting the policy against a death of that sort. *Insurance Company* v. *Seaver*, 531.
2. The fact that the person was not killed while in the very act of driving but was killed only after the race had been broken up by a collision, and in an endeavor to catch his horse, after he himself had been thrown out of his sulky, and been for a few seconds clear of it, and on his feet safe, does not make the driving in the illegal match less the cause of his death in point of law. The endeavor to catch the horse was not sufficiently disconnected with the illegal act of driving the match to make it do this. *Ib.*

LOUISIANA. See *Provincial Court of Louisiana.*

MANDAMUS,
And not appeal is the appropriate remedy to restore an attorney disbarred where the court below has exceeded its jurisdiction. *Ex parte Robinson*, 505, 513.

MICHIGAN.
There is nothing in the constitution of the State of, adopted in 1859, which made void an act of its legislature passed March 22d, 1869, "to enable any township, city, or village to pledge its aid by loan or donation to any railroad company now chartered or organized under and by virtue of the laws of Michigan in the construction of its road." *Township of Pine Grove* v. *Talcott*, 666.

MILITARY SUPPLIES.
Act of June 2d, 1862, requiring contracts for to be in writing, explained, and action of limited. *Salomon* v. *United States*, 17.

MORTGAGE OF FUTURE CROPS.
Although an instrument which purports to mortgage a crop the seed of which has not yet been sown, cannot at the time operate as a mortgage

MORTGAGE OF FUTURE CROPS (*continued*).

of the crop, yet when the seed of the crop intended to be mortgaged has been sown and the crop grows, a lien attaches. *Butt* v. *Ellett*, 544.

MUNICIPAL BONDS. See *Equity*, 1; *Judicial Comity*, 1; *Municipal Corporations; Municipal Subscriptions.*

1. Where a town, issuing bonds to which coupons are attached, acknowledges, in the body of the bond, that the town is indebted to the bearer or his assigns in such a sum of money, payable at a future day named, "with interest thereon at the rate of seven per cent., on presentation and delivery of the coupons for the same thereto attached," it may be sued on the coupons alone, though they may have been issued by commissioners specially made agents of the town by the legislature, and by it charged with the matter of issuing the securities, and so have not been made by the ordinary town authorities. *Town of Queensbury* v. *Culver*, 83.
2. This liability of the town is not taken away by the fact that the legislature has directed a special mode in which the money to pay the principal and interest of the bonds is to be raised; the directions being given to the town and county agents, and not to the holders of the bonds or coupons. *Ib.*
3. An act empowered commissioners to dispose of certain town bonds (whose issue for the benefit of a railroad company named, the act authorized), "to such persons or corporation and upon such terms as the commissioners should deem most advantageous for the town, but not for less than par;" and to "donate the *money* which should be so raised to the railroad company." The act, however, required that they should not "pay over any money *or bonds*" except upon certain conditions specified. The commissioners did not sell the bonds, but handed them over to the railroad company in discharge of the authorized donation. On suit against the town by a *bonâ fide* holder of the bonds, *held*, that there was no violation of the act by the commissioners in what they had done. *Ib.*
4. Questions relating to bonds issued in a negotiable form, under an act of a State legislature involve questions relating to commercial securities; and whether under the constitution of the State such securities are valid or void belongs to the domain of general jurisprudence. This court will, accordingly, not follow the decisions of the courts of the State where the bonds are issued, as to their validity and constitutionality under the laws and constitution of the State, if the judges here disapprove of those decisions. *Township of Pine Grove* v. *Talcott*, 666.
5. There can be no jurisdiction in equity to enforce the payment of municipal bonds until the remedy at law has been exhausted. *Heine* v. *The Levee Commissioners*, 655.
6. Where the law has provided that a tax shall be levied to pay such bonds, a mandamus after judgment to compel the levy of the tax, in the nature of an execution or process to enforce the judgment, is the only remedy. *Ib.*
7. The fact that this remedy has been shown to be unavailing does not

MUNICIPAL BONDS (*continued*).
confer upon a court of equity the power to levy and collect taxes to pay the debt. *Heine* v. *The Levee Commissioners*, 655.

MUNICIPAL CORPORATIONS. See *Municipal Bonds; Municipal Subscriptions.*
Their rights, powers, and obligations, especially in the issue of securities in form negotiable, fully discussed in an opinion, adverse to wide powers in this way, by four judges of the court; one short, however, of a majority of the court, and the judgment reversed, but not on any ground common to a majority of the court. *The Mayor* v. *Ray*, 468.

MUNICIPAL SUBSCRIPTIONS. See *Municipal Bonds; Municipal Corporations; Release.*
To works of public improvement—what constitutes. Need not be by act of chirographical subscription. A municipality may be estopped by matter *in pais* from denying a subscription. *Nugent* v. *The Supervisors*, 241.

NATIONAL BANKS. See *Illinois.*
1. Shares of stock in the National banks are personal property, and though they are a species of personal property which, in one sense, is intangible and incorporeal, the law which created them could separate them from the person of their owner for the purpose of taxation, and give them a *situs* of their own. *Tappan, Collector*, v. *Merchants' National Bank*, 490.
2. The forty-first section of the National Banking Act of June 3d, 1864—which in effect provided that all shares in such banks, held by any person or body corporate, may be included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed under State authority, at the place where the bank is located, and not elsewhere—did this. *Ib.*
3. This provision of the National Banking Act became a law of the property, and every State within which a National bank was afterwards located acquired jurisdiction, for the purposes of taxation, of all the shareholders of the bank, both resident and non-resident, and of all its shares, and power to legislate accordingly. *Ib.*

NEW MADRID. See *Personal Identity.*
1. In the State of Missouri. The act of February 17th, 1815, for the relief of its inhabitants who suffered by earthquakes, contemplated that the title of the owners of the land injured should pass to the United States, at the same time that the right to the title to the land located in lieu thereof passed to the claimant, and that this exchange of titles should take place when the claimant obtained his patent certificate, or the right to such certificate, which he could not acquire until the plat of the survey was returned to the recorder of land titles. *Mackay* v. *Easton*, 619.
2. The act of April 26th, 1822, "to perfect certain locations and sales of public lands in Missouri," refers in its first section to actual locations made by the deputy surveyor at the request of the claimant, and not

NEW MADRID (*continued*).

to the perfected locations which appropriate the land on the return of the plat of the survey to the recorder of land titles. *Mackay* v. *Easton*, 619.

NEW YORK.

An act simply *enabling* the people of a town, in the State of, to decide whether they will "donate" bonds of the town to a railroad company and collect taxes for the amount of them is not opposed to the constitution of the State of. *Town of Queensbury* v. *Culver*, 83.

NORTH CAROLINA. See *Evidence*, 10, 11.

OMNIA ESSE RITE ACTA PRESUMUNTUR.

Where an act of Congress authorizes the Solicitor of the Treasury to make a sale of land "with the approval of the Secretary of the Treasury," the approval of the secretary is not a fact to be presumed because the deed of the solicitor is the deed of an official person, nor even because it recites that the sale was made in pursuance of an act which authorizes him with such approval and in no other way to make it. There must be written evidence of the approval or the purchaser need not take the solicitor's deed. *United States* v. *Jonas*, 598.

"ON."

Meaning of the word when occurring in a contract about towns. "ON the banks of a river." *Caldwell's Case*, 264.

PARTIES. See *Evidence*, 9.

1. In proceedings in equity, sureties (who on default of a person proceeded against may have to pay his debt), persons proceeded against as liable because of collusion with others their collusion with whom would make *them* liable also, and generally all persons who by decrees against the persons proceeded against may become liable upon ulterior proceedings, in which the proceeding in hand, if a decree were made against the defendants, would be evidence against *them*, are indispensable parties. The general doctrine applied to a case somewhat complicated. *Robertson* v. *Carson*, 94.
2. Where a proceeding in equity concerns the disposal of a specific fund, a person claiming the fund, and liable by a decree to have it wholly swept from him, is an indispensable party. *Williams* v. *Bankhead*, 563.
3. The general rules in equity relative to parties and the qualifications to the rules stated. *Ib.*

PARTNERSHIP. See *Evidence*, 9.

PATENT. See *Evidence*, 5, 6; *Practice*, 8, 9.

I. GENERAL PRINCIPLES RELATING TO.

1. A "claim" of a patentee may be limited by his specification; even though the claim contain no reference to the specification. The reference may be implied. *Mitchell* v. *Tilghman*, 287.
2. A reissued patent is *primâ facie* presumed to be for the same invention as the original patent. *Klein* v. *Russell*, 433.

PATENT (*continued*).

3. The claim and specification of the former may be read by the light of the latter. *Klein* v. *Russell*, 433.
4. When a patent is on trial and the question in issue involves the matter of novelty, utility, and *modus operandi*, it is proper enough to ask what the effect of the patented invention has been. *Ib.*
5. In construing a patent courts should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee, if it can be done consistently with the language which he has employed; and this applies to a reissue as much as to an original patent. *Ib.*
6. A patent is not void because known to others than the inventor more than two years *before he applied for his patent*. *Ib.*
7. Specifications are to be taken in the sense in which the common knowledge of persons skilled in the art would understand them. *Ib.*
8. A claim for a compound is not void because the specification does not prescribe exact and unvarying proportions in the ingredients of a compound; some of the ingredients being, *ex. gr.*, coloring matter, which the specification says may "be omitted or modified as desired." *Ib.*
9. Where one claim of a patent was for treatment by a compound composed of a liquid and other ingredients mentioned, a request for an instruction that the addition to the liquid of the ingredients is not patentable if such addition does not change the properties of the liquid, or its effect or usefulness, when applied to the *purposes mentioned in the patent*, is rightly modified by charging as requested with the addition of the words "*or to other like purposes.*" *Ib.*
10. The rule of damages in actions at law for infringement of the rights of patentees is the customary price at which the patentee has licensed the use of his invention, where a sufficient number of licenses or sales have been made to establish a market value. *Packet Company* v. *Sickles*, 611.
11. The reason for this rule is especially strong when the use of the patented invention has been with the consent of the patentee, express or implied, without any rate of compensation fixed by the parties. *Ib.*

II. The Validity of Particular.

12. R. A. Tilghman's patent for obtaining fat-acids and glycerin valid, if limited to certain high degrees of heat. *Mitchell* v. *Tilghman*, 287.
13. Russell's reissue for the employment of fat liquor in the treatment of leather, and the treating of bark-tanned lamb or sheep skin, &c., valid. *Klein* v. *Russell*, 433.

PERSONAL IDENTITY.

A deed executed in 1816, by "James Smith," describing himself as "blacksmith, of Cape Girardeau," Missouri, and conveying land which had been previously granted by the government to "J. Smith, of New Madrid," in the same State—the deed of "James Smith, blacksmith, of Cape Girardeau," after describing the land and referring to the grant of the government as having been made to *him*, the grantor—may, *primâ facie*, on a suit arising fifty years afterwards be presumed,

PERSONAL IDENTITY (*continued*).

even as against a deed purporting to have been executed in 1819 by "J. Smith," describing himself as "*lately* of New Madrid," and executed only by a mark, to have been executed by the same and the veritable "J. Smith, of New Madrid;" New Madrid having been greatly injured in 1811 and 1812 by earthquakes, and persons having left it for different places in Missouri, in which Cape Girardeau was. *Mackay* v. *Easton*, 619.

PLEADING.

A party cannot set up in his replication a claim not in any way made in his bill, and the granting of which he asks in his replication only in the event that the case made in his bill fails. *Warren* v. *Van Brunt*, 646.

"POSTS, DEPOTS, AND STORES." See *Interpretation of Language*, 2.

POWER OF ATTORNEY. See *Attorney in fact; Estoppel*, 1.

PRACTICE. See *Equity*, 1; *Final Trial; Judicial Comity; Jurisdiction; Municipal Bonds*, 4–7; *Parties; Removal of Causes.*

I. IN THE SUPREME COURT.

(*a*) *In cases generally.*

1. When the only defect in a transcript sent to this court is that the clerk has not appended to it his certificate that it contains the full record (there being no allegation of contumacy), a *certiorari* is not the proper remedy for relief to the plaintiff in error. He should ask leave to withdraw the transcript to enable him to apply to the clerk of the court below to append thereto the necessary certificate. *Hodges* v. *Vaughan*, 12.
2. Deficiencies in a transcript of a record certified to be complete, may be supplied by means of a *certiorari*. A motion to dismiss denied. *The Rio Grande*, 178.
3. The certificate of the clerk of a court below sending up a transcript that it is full and complete is *primâ facie* evidence of that fact. *Ib.*
4. Where a jury is waived and the issues of fact submitted to the Circuit Court, under the act of March 3d, 1865, nothing is open to review by the losing party under a writ of error except the rulings of the Circuit Court in the progress of the trial. The phrase, "rulings of the court in the progress of the trial," does not include the general finding of the Circuit Court nor the conclusions of the Circuit Court embodied in such general finding. A mere report of the evidence is not such a special finding or authorized statement of the case as will allow this court to pass upon the judgment given. *Cooper, Executor*, v. *Omohundro*, 65; *Crews* v. *Brewer*, 70.
5. A party alleging that the stamp on a deed was too small (he being by the law of the State where the deed was made obliged to put on the stamps), because the consideration of the deed was paid in gold dollars of the United States, and the stamp was the same as if the consideration had been paid in treasury notes, then inferior in value to gold, but a legal tender, and who brought such a question here, delay-

PRACTICE (*continued*).

ing the judgment below for two years and a half, was punished under the Twenty-third Rule, by a judgment of ten per cent. damages in addition to interests and costs. *Hall* v. *Jordan*, 271.

6. When the refusal of a court below to permit a plea to be filed is based on the allegation that it is not filed within the time prescribed by the rules of practice adopted in that court, it is necessary that the party excepting to the refusal shall incorporate the rule in his bill of exceptions, or this court will presume that the court below construed correctly its own rules. *Packet Company* v. *Sickles*, 611.

7. A writ of error lies (by virtue of early decisions of this court on an act of 1801, still governing the matter) from this court to the Supreme Court of the District of Columbia on a judgment confirming an assessment for damages by the use of the street in front of the property of defendants in error, although the proceedings before the jury and the marshal, and in the Supreme Court, are governed by a statute of Maryland, which, by the construction of the courts of that State, does not allow an appeal or writ of error. *Railroad Company* v. *Church*, 62.

8. Where a defendant requests a direction to the jury on certain specified grounds, to bring in a verdict for him, and the request is refused, he cannot assign the refusal for error, and allege a wholly different ground why the direction should have been given. *Klein* v. *Russell*, 433.

9. A direction to find for one party or the other can only be given where there is no conflict of evidence. *Ib.*

10. Under the eleventh section of the act of June 1st, 1872, "to further the administration of justice" it is not necessary to make it a supersedeas that the writ of error be served as was required by the twenty-third section of the Judiciary Act, or the supersedeas *bond* be filed, within ten days (Sundays excepted) after the rendering of the judgment complained of. The supersedeas bond may be executed within sixty days after the rendition of the judgment, and the writ may be served at any time before or simultaneous with the filing of the bond. *Telegraph Company* v. *Eyser*, 419.

11. But this does not prevent an execution from being issued after the lapse of ten days, as contemplated by the twenty-third section of the Judiciary Act of 1789. *Board of Commissioners* v. *Gorman*, 661.

12. The supersedeas under the act of 1872, by filing the bond within sixty days, stays *further proceedings*, but does not interfere with what *has already been done*. *Ib.*

13. In calculating the lapse of time, the date of the *entry* of judgment governs, and not the date when the judgment was read to and signed by the judges. *Ib.*

(*b*) *In Admiralty.*

14. An order of the Circuit Court on an appeal in admiralty from a decree of the District Court, simply affirming that decree, is not a final decree from which an appeal lies to this court. *The Lucille*, 73.

15. Where the interest given by a Circuit Court on an appeal in admi-

PRACTICE (*continued*).

ralty to it, added to the amount originally claimed, exceeds $2000 exclusive of costs, an appeal will lie. *The Rio Grande*, 178.

II. In Circuit Courts.

16. An appeal in admiralty from the District to the Circuit Court in effect vacates the decree of the District Court, and a new trial in all respects, and a new decree, are to be had in the Circuit Court. The latter must execute its own decree, and the District Court has nothing more to do with the case. An order of the Circuit Court merely affirming the decree of the District Court is not such a decree as the Circuit Court should give; nor a decree from which an appeal lies. *The Lucille*, 73.

17. A court is not bound to comply with requests for charges on points not raised by the evidence; nor when it has charged generally on the subject in its general charge, to repeat itself by answering requests for the same instructions. *Klein* v. *Russell*, 433.

PRESUMPTION. See *Omnia esse rite acta presumuntur.*

PRIVATE ENTRY. See *Public Lands*, 1.

PRIVATE LAND CLAIMS.

Under the act of June 22d, 1860, "for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri," &c. (a temporary act, which, having expired, was *temporarily* revived by an act of March 2d, 1867), a person who files his petition in time, claiming land to which he afterwards discovers that he has no title, cannot, by a supplemental petition acknowledging his mistake and showing who the right owner is, make his petition enure to the benefit of such right owner, who has let pass the time for asserting his title under the act. *United States* v. *Innerarity*, 595.

PROMISSORY NOTE.

1. A paper dated in one of the Southern States and promising to pay with interest a sum of money specified and acknowledged to be due, "as soon as the crop can be sold or the money raised from any other source," is not either in form or effect a promissory note. *Nunez* v. *Dautel*, 560.

2. What sort of contract it is. This matter stated. *Ib.*

PROVISIONAL COURT OF LOUISIANA, THE,

Established by President Lincoln on the 20th of October, 1862, did not cease to exist until July 28th, 1866. *Burke* v. *Miltenberger*, 519.

PROXIMATE AND REMOTE CAUSE.

The distinction between the two taken and explained in a case of life insurance, where a condition of the policy was that it should not extend to a case where the insured committed a breach of the law or wilfully exposed himself to unnecessary danger, and where he was killed driving a match at a horse-race made illegal by statute; his death occurring not in the very act of driving in the match, but immediately after a race had been broken up by a collision, and he was trying to

PROXIMATE AND REMOTE CAUSE (*continued*).
stop his horse, having once and for a few seconds been clear of his horse and sulky, and out of all danger. *Insurance Company* v. *Seaver*, 531.

PUBLIC LANDS. See *Indians; "Legal Representatives;" New Madrid; Solicitor of the Treasury; Timber on the Public Lands.*

1. The principle established by the act of Congress of April 24th, 1820, that private entries are not permitted until after the lands have been exposed to public auction at the price for which they are afterwards sold, *held* to be of a fundamental nature and applicable to a case where if it were not so, a departure from it might possibly have been allowed. *Eldred* v. *Sexton*, 189.
2. What constitutes superior right as between parties originally joint settlers on the same tract of land, who built, out of joint means, a house for some time jointly occupied by them, and where one removed leaving the other in possession, not as his tenant but as part owner; and afterwards repossessed himself of the house. The whole matter considered in a case, having several special circumstances. *Warren* v. *Van Brunt*, 646.
3. An entry of the public land by one person in trust for another being forbidden by statute, equity will not, on a bill to enforce such a trust, decree that any entry in trust was made. *Ib.*
4. In cases where there is no fraud, imposition, or mistake, this court respects to a large degree the decision of the Register and Receiver, affirmed by the Secretary of the Interior, on questions between persons claiming as pre-emptors. *Ib.*

QUARANTINE LAWS. See *Constitutional Law*, 4.

QUIT-CLAIM, DEED OF. See *Estoppel*, 2.

"REASONABLE TIME." See *Court and Jury.*
Where a promise has been given to pay, "within a reasonable time," a sum of money acknowledged to be due, the payment must be regarded as having become obligatory much before the lapse of five years. *Nunez* v. *Dautel*, 560.

REBELLION, THE. See *Evidence*, 10, 11.
When in contracts made in the Southern States during the late rebellion, a right exists to pay in Confederate notes, and when on the contrary, payment must be made in lawful money. This matter considered. *The Confederate Note Case*, 548.

REGISTER AND RECEIVER OF THE LAND OFFICE. See *Public Lands*, 4.

RELEASE.
Although a subscriber for stock in a company is released from his subscription by a subsequent alteration of the organization or purposes of the company, this is only when such alteration is a fundamental one, and when, in addition, it is not provided for or contemplated by either the charter itself or the general laws of the State. *Nugent* v. *The Supervisors*, 241.

REMAINDER.
When vested. *Cooper* v. *Cropley*, 167.

REMOTE AND PROXIMATE CAUSE. See *Proximate and Remote Cause.*

REMOVAL OF CAUSES. See *Waiver.*
1. The word "final" in the language—"at any time before the final hearing *or trial* of the suit"—of the act of March 2d, 1867, must be taken to apply to the word "trial" as well as to the word "hearing." What sort of trial is final and what not. *Insurance Company* v. *Dunn*, 214.
2. The act only authorizes a removal where an application is made before final judgment in the court of original jurisdiction where the suit is brought. *Stevenson* v. *Williams*, 572.

RENT AND REVERSION. See *Sheriff's Sale.*

REPORTS OF JUDICIAL DECISIONS.
May be referred to as expositions of law upon the facts set forth in cases which they undertake to report; but they are not, even when made by an official reporter (as the late Mr. Howard in this court), evidence of those facts in other cases. *Mackay* v. *Easton*, 619.

REVENUE OFFICERS, DELINQUENT. See *Evidence*, 2-4.

RULES OF COURT. See *Practice*, 6.
It will be presumed in this court that other courts are familiar with the construction of their own rules and of the practice under them. *Packet Company* v. *Sickles*, 611.

SECRETARY OF THE TREASURY.
Must approve, in writing, all sales of land conveyed for debt, &c., to the government, made by the Solicitor of the Treasury, under the acts of May 29th, 1830, and March 3d, 1863. Unless there be written evidence of this approval the purchaser is not bound to accept the solicitor's deed. *United States* v. *Jonas*, 598.

SERVICE OF WRIT. See *Jurisdiction*, 1, 2

SETTLEMENT. See *Public Lands.*

SHERIFF'S SALE. See *Mortgage of Future Crops.*
When property which the owner has leased is sold at such a sale, on execution against the owner, the sheriff's deed conveys the reversion and the rent follows as an incident. *Butt* v. *Ellett*, 544.

SOLICITOR OF THE TREASURY.
Cannot, under the act of March 3d, 1863, make a valid title to lands acquired by the United States for debt, and which the act of May 29th, 1830, authorizes him to sell, unless he can give to the purchaser written evidence that the sale is made "with the approval of the Secretary of the Treasury." This approval will not be presumed. A purchaser is not bound to accept a deed unless there be written evidence of it. *United States* v. *Jonas*, 598.

STAMP.

Where the consideration in a deed is expressed to be so many dollars, the stamp required is the same whether in point of fact the sum named be paid in gold or in notes of the United States, made by law a legal tender. *Hall* v. *Jordan*, 271.

STATUTES.

Where a statute, meant to regulate a subject (such as collisions at sea), prescribes what vessels liable to interfere with each other shall there do, and what they shall not do, courts will look unfavorably at evidence introduced by either to show that although he committed a plain breach of the statute, that breach did not in any way cause a disaster which it was the purpose of the statute by its enactments to prevent. *The Pennsylvania*, 125.

STATUTES OF THE UNITED STATES.

The following, among others referred to, commented on and explained:

1789.	September 24.	See *Attorney at Law*, 3; *Final Decree; Jurisdiction*, 3, 4, 5, 7; *Practice*, 10–16.
1797.	March 3.	See *Evidence*, 2–4.
1801.	February 27.	See *Practice*, 7.
1805.	March 2.	See "*Legal Representatives.*"
1815.	February 17.	See "*Legal Representatives;*" *New Madrid.*
1820.	April 24.	See *Public Lands.*
1822.	April 26.	See *New Madrid.*
1825.	March 3.	See *Jurisdiction*, 6.
1830.	May 29.	See *Solicitor of the Treasury.*
1831.	March 2.	See *Attorney at Law*, 3.
1836.	July 4.	See *Patent.*
1860.	June 22.	See *Private Land Claims.*
1862.	June 2.	See *Military Supplies.*
1863.	March 3.	See *Solicitor of the Treasury.*
1864.	April 29.	See *Collision*, 3, 4.
1864.	June 30.	See *Stamp.*
1865.	March 3.	See *Practice*, 4.
1866.	June 15.	See *Commerce among the several States.*
1866.	July 13.	See *Internal Revenue.*
1866.	July 25.	See *Commerce among the several States.*
1866.	July 27.	See "*Final Trial.*"
1867.	March 2.	See *Bankrupt Act;* "*Final Trial;*" *Private Land Claims.*
1868.	July 20.	See *Distiller's Bond.*
1872.	June 1.	See *Practice*, 10–13.

STOCK, SUBSCRIPTION TO. See *Municipal Corporations; Practice*, 10–13; *Release; Supersedeas.*

SURETIES. See *Distiller's Bond.*

TAXATION. See *Equity*, 1; *Internal Revenue; National Banks.*

1. The power to levy and collect taxes is a legislative function, and does not belong to a court of equity. It can only be enforced by a court

TAXATION (*continued*).
of law through the officers authorized by the legislature to levy the tax, if a writ of mandamus is appropriate to that purpose. *Heine* v. *The Levee Commissioners*, 655.
2. Taxes are not liens unless declared so by the legislature under whose authority they are assessed. *Ib.*

TIMBER ON THE PUBLIC LANDS.
1. Such timber cannot be cut by the Indians for purposes of sale, but when in their possession incidentally to their improvement of the land, they may sell it. The presumption is against their right to cut timber, and a purchaser of it, to maintain a title, must overcome the presumption by evidence. *United States* v. *Cook*, 591.
2. The United States may maintain an action for unlawfully cutting and carrying away timber from the public lands. *Ib.*

TOTAL LOSS. See *Admiralty; Insurance.*

TRANSCRIPT FROM TREASURY BOOKS. See *Evidence*, 2–4.

"TRANSPORTATION BOND."
1. Sureties on a bond for the transportation of tobacco from one district to another, in the condition of which the number of boxes and pounds of tobacco are given, and the kind of tobacco described, are responsible for the delivery at the proper place of the *tobacco*, and not of the boxes in which it was supposed to be, but never was. *Ryan et al.* v. *United States*, 514.
2. The fraud of the principal in filling the boxes with other substances than tobacco before they left his warehouse, does not release the sureties from this obligation. *Ib.*
3. Nor does the carelessness of the inspecting officer, though it made the fraud of the principal in the bond *easier* of accomplishment, release the sureties on his transportation bond. *Ib.*

TREASURY SALES. See *Solicitor of the Treasury.*

TRUST. See *Corporation; Debtor and Creditor; Mortgage of Future Crops; Public Lands.*
An act of legislature requiring the managers of an insolvent bank belonging to the State to hold its assets appropriated to the payment of certain specified debts, creates a trust in favor of the creditors holding said debts, and, if assented to by them, amounts to a contract with them to carry out said trust. *Barings* v. *Dabney*, 1.

USURY.
Usury, as a defence, must be specially pleaded or set up in the answer to entitle it to consideration. *The Confederate Note Case*, 548.

VESTED REMAINDERS.
The rules defining them, and distinguishing them from contingent remainders, stated and explained; and under a last will and testament of a person having children, some married, one not, and making various remainders devises among his children and a grandchild. *Cooper* v. *Cropley*, 167.

WAIVER.

Where, after a suit has been properly removed from a State court into the Circuit Court of the United States, under the act of March 2d, 1867, which allows such removal, in certain cases specified by it, "at any time before the final hearing or trial of the suit," the State court still goes on to adjudicate the case, against the resistance of the party who got the removal, the fact that such a party has contested the suit in such State court, does not, after a judgment against him, on his bringing the proceedings here for reversal and direction to proceed no further, constitute a waiver on his part, of the question of the jurisdiction of the State court to have tried the case. *Insurance Company* v. *Dunn*, 214.

WRIT OF ERROR. See *Practice*, 7, 8.

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