tection of the courts. But language is at best a very imperfect instrument in the expression of thought, and the fundamental principles of government found in constitutions must necessarily be declared in terms very general, because they must be very comprehensive.

The ingenuity of casuists and linguists, the nice criticism of able counsel, the zeal which springs from a large pecuniary interest, and the appeal of injured parties against the bad faith of the legislatures who violate the constitution are easily invoked, and their influence persuasive with the courts, as they always must be.

And if language as plain as that we have been considering, a purpose so firmly held and clearly expressed is to be frittered away by construction, then courts themselves become but feeble barriers to legislative will and legislative corruption, and the interest of the people, which alone is to suffer, has but little to hope from the safeguards of written constitutions.

These instruments themselves, supposed to be the peculiar pride of the American people, and the great bulwark to personal and public rights, must fall rapidly into disrepute if they are found to be efficient only for the benefit of the rich and powerful, and the absolute majority on any subject will seek to enforce their views without regard to those restrictions on legislative power which are used only to their prejudice.

MORGAN *v.* CAMPBELL, ASSIGNEE.

1. Under the Landlord and Tenant Act of Illinois, which enacts in its seventh section that—

> "In all cases of distress for rent it shall be lawful for the landlord, by himself, his agent, or attorney, to *seize for rent any personal property of his tenant* that may be found in the county where such tenant shall reside, and in no case shall the property of any other person, although the same may be found on the premises, be liable to seizure for rent due from such tenant:"

And enacts in its eighth section that—

> "Every landlord shall have a *lien* upon the crops growing or grown upon the demised premises in any year for rent that shall accrue for such year;"

Statement of the case.

A landlord has no lien upon the personal property of his tenant prior to an actual levy of distress.

2. If proceedings of bankruptcy are begun by other persons against his tenant before such warrant of distress be actually levied, the subsequent assignment in bankruptcy—which assignment the fourteenth section of the Bankrupt Act declares "shall relate back to the commencement of said proceedings," and "by operation of law" vest in the assignee, the title to all the bankrupt's property and estate, "although the same is then attached on mesne process as the property of the debtor"—will vest the personal property of the tenant in the assignee, to the exclusion of the landlord's right to levy on it.

3. It was the object of this fourteenth section to prevent any particular creditor asserting any lien but such as existed when the petition in bankruptcy was filed.

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

This was a contest between a landlord of demised premises claiming rent, and the assignee in bankruptcy of his tenants, claiming certain personal property on the premises, out of which the landlord by distress expected to get his rent.

The case, which depended more or less upon statute law of Illinois, in force at the time of the landlord's levy, was thus:

A statute of Illinois known as its Landlord and Tenant Act,* enacts as follows, in certain sections its enactments bearing on the subject of rent, distress, &c.:

"SECTION 6. In all cases of distress for rent, the person making the same shall immediately file with some justice of the peace, in case the amount claimed does not exceed $100, or with the clerk of the Circuit Court in case it exceeds that sum, a copy of the distress warrant, together with an inventory of the property levied upon; and thereupon the party against whom the distress warrant shall have been issued shall be duly summoned, and the amount due from him assessed and entered upon the records of the court finding the same. The said court shall certify to the person or officer making the same the amount so found due, together with the costs of court, and said officer

* Chapter 60, 1 Gross's Statutes, 412.

shall thereupon proceed to sell the property so distrained and make the amount thus certified to him, and return the certificate so issued to him with an indorsement thereon of his proceedings, which return and certificate shall be filed in the proper court.

"SECTION 7. In all cases of distress for rent it shall be lawful for the landlord, by himself, his agent, or attorney, to seize for rent any personal property of his tenant that may be found in the county where such tenant shall reside, and in no case shall the property of any other person, although the same may be found on the premises, be liable to seizure for rent due from such tenant.

"SECTION 8. Every landlord shall have *a lien* upon the crops, growing or grown upon the demised premises in any year, for rent that shall accrue for such year.

"SECTION 9. In case of the removal or abandonment of the premises by such tenant, all grain or vegetables grown or growing upon any part of the demised premises so abandoned may be seized by the landlord, before the rent is due, and the landlord so distraining shall cause the grain or vegetables so growing to be properly cultivated and perfected, and in all cases husband such grain or vegetables, grown or growing, until the rent agreed upon shall become due, when it shall be lawful for such landlord to sell and dispose of the same as in other cases of seizure, after the rent shall have become due," &c.

These enactments being in force, one Morgan, on the 18th of June, 1872, leased to Liebenstein & Spiegel certain premises in Chicago, Cook County, Illinois, at a rent of $750 per month, payable September 30th, 1872, and on the last day of every month thereafter. The lease provided that if default should be made in the payment of the rent, when due, Morgan might distrain upon any property belonging to lessees, whether exempt from execution and distress by law or not, and the lessees waived all right to hold or retain any such property under any exemption laws then in force in the State of Illinois, or in any other way; "*meaning and intending hereby*," said the lease, "*to give the said party of the first part, his heirs, executors, administrators, or assigns a valid and first lien, upon any and all goods and chattels,*

and other property belonging to the said party of the second part, as security for the payment of said rent in manner aforesaid, anything hereinbefore contained to the contrary notwithstanding."

Liebenstein & Spiegel entered into possession of the premises, but paid only one month's rent.

On the 14th of May, 1873, a petition was filed in the District Court for the Northern District of Illinois, by one Harrington, charging Liebenstein & Spiegel with having committed acts of bankruptcy, and praying that they might be declared bankrupts.

Three days afterwards, that is to say on the 17th of May, —between seven and eight months' rent ($5250) being now due—Morgan, the landlord, issued his warrant to the sheriff of Cook County for distraining the goods and chattels of his tenants, then on the premises, to pay the rent due; and on the same day the sheriff did levy the warrant upon them, and held them under the warrant, on the premises. On the 16th of June, 1873, he filed in the proper court an inventory of them, and caused a summons in the matter to be issued against the tenants in the way prescribed by the sixth section of the above-quoted Landlord and Tenant Act, and served upon them.

Liebenstein & Spiegel, the tenants, were afterwards declared bankrupts, and one Campbell was appointed their assignee. After his appointment he demanded of Morgan, the landlord, and his bailiff, possession of the chattels taken by them in distress, and held under Morgan's warrant of distress; and against the protest of both Morgan and his bailiff, took the same and was about to sell them.

Thereupon Morgan filed a bill in the court below to enjoin him.

The assignee in bankruptcy demurred to the bill.

The question of course was: Did the law of Illinois, in force on the 14th of May, 1873, when the petition in bankruptcy was filed, confer on a landlord a lien on the personal property of his tenant independently of and prior to the levy of a warrant of distress?

If it did, then, under the settled rule of bankruptcy law,

the lien would not be divested; proceedings in bankruptcy never divesting existing liens.*

But if it did not so exist, then the assignee in bankruptcy would take the property for distribution among the creditors generally; it being equally settled that no lien can be acquired after the filing of a petition in bankruptcy;† this, in virtue of the provision of the fourteenth section of the Bankrupt Act, which enacts that on the appointment of an assignee, and on the assignment to him of the bankrupt's property and estates, the—

"Assignment shall relate back to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on *mesne* process as the property of the debtor."

The court below sustained the demurrer, thus deciding that prior to and independently of an actual levy of the warrant of distress, a landlord had not in Illinois any *lien* on his tenant's personal property.

Morgan, the landlord in this case, appealed to this court.

Mr. J. A. Sleeper, for Morgan, the appellant:

1. We submit that by the common law, and the statute of the State of Illinois and the law of the State, as expounded and interpreted by its Supreme Court, the lien of the landlord on the property of the tenant for rent due is paramount and superior to the right of an execution or attaching creditor, a general assignee for the benefit of creditors, or an assignee in bankruptcy.

In *Penny* v. *Little*,‡ A.D. 1841, the Supreme Court of Illinois had under consideration the question of the right of the landlord to distrain for rent, and held that the right ex-

* Ex parte Dalby, *re* Griffiths, 1 Lowell, 431; Winsor, Assignee of McLellan, 2 Story, 492.

† Stuart *v.* Hines & Eames, 33 Iowa, 60; Peck *v.* Jenness, 7 Howard, 612; In re Wynne, 4 Bankruptcy Register, 5; In re Patterson, Id. Supplement, 27.

‡ 3 Scammon, 301.

isted independently of the statute and in virtue of the common law.

The same court had the question of the right of a landlord in, and lien upon, the property of his tenant, under consideration in *O'Hara* v. *Jones*,* and referring to *Penny* v. *Little*, say:

"Under our law the landlord has the lien and the right to distrain in all cases where the rent is certain, whether the right to distrain is reserved in the lease or not. And this statutory lien in favor of the landlord is superior to other junior liens, and may be enforced against all but prior liens and *bonâ fide* purchasers without notice; and if the goods of a tenant are seized under execution or attachment, the landlord's lien for his rent is superior and will hold the property."

And upon these principles, thus laid down, the court decided that an assignee for the benefit of creditors, takes the property as a mere volunteer, and subject to all liens to which it is then liable; and that if liens exist upon the property when the assignment is made, they must be first discharged, in the order of their priority, and the remainder applied in execution of the trusts.

This decision, we submit, controls the subject.

We do not seek to maintain that, before the rent becomes due, the landlord has either a superior lien over execution or attaching creditors, or the right to distrain the property for the rent; but that he, all along, has an inchoate right, which may not be asserted, and cannot be, until all the conditions upon which his right to distrain are fulfilled; and that when the conditions are fulfilled, by rent becoming due and being unpaid, then *eo instanti* he may issue his distress warrant and seize the property.

As the court in *O'Hara* v. *Jones*,† says:

"The landlord's lien is like the lien of an execution on personal property of the tenant. . . . He has the power, *when the rent falls due, to issue his execution* to his bailiff for collection of his rent by levy and sale of the tenant's property. The land-

* 46 Illinois, 288.

† Id. 291, 292.

lord's lien is of common-law growth, and does not depend upon statutory enactments for its creation. . . . But the landlord's right to distrain is coeval with the entire history of the common law, and has maintained its energy to the present time."

If anything previously said in *Rogers* v. *Dickey** is different from this—which we do not think is the case—it is overruled by the later decision.

In *O'Hara* v. *Jones* the court supply the reasoning which follows from the facts in *Rogers* v. *Dickey*, and hold that *inasmuch as the rent was due* March 1st, 1867, and the assignment was made March 9th, 1867, the landlord's lien was superior to the claim of the assignee. The court put the decision upon the ground that the rent was due. If the rent had been due in *Rogers* v. *Dickey* we have no doubt that the landlord's lien would have preceded the execution lien, whether the distress warrant had been then issued and levied or not, provided the distress had been levied before actual sale, to a *bonâ fide* purchaser without notice, by the sheriff under his execution.

2. No language could be clearer or more comprehensive than the language of the lease under consideration in this case. It is undeniable that, by it, the tenants intended to give the landlord, and that the landlord intended to take and receive a valid and specific first lien on the property of the tenants, as his security for the payment of this rent, in addition to the lien thereon created by the common law and the statute.

It may be argued that the distress warrant is mesne process, or in the nature of an attachment. Judge Drummond so held *In re Joslyn*.† The Supreme Court of Illinois, in *O'Hara* v. *Jones*, say it is an execution issued by the landlord. They also have said substantially that it is not the commencement of a suit; that the statute which requires proceedings in court to ascertain the amount of rent due, is only in restraint of the execution of the distress warrant, but that the sale, when made, is made under and by virtue

* 1 Gilman, 636.

† 2 Bissell, 235.

of the landlord's writ of seizure, which the Supreme Court calls his execution.

Mr. Adolphe Moses, contra, for the assignee:

We think it plain that by the Landlord and Tenant Act of Illinois, no *lien* is created as to the personal property of a tenant; and that the act simply recognizes the common-law right of distress, and attempts to regulate it. We concede that as to crops and agricultural products, the statute, acting upon consideration of public policy, grants a lien.

Our case concerns personal property alone.

In *Volney Stamps* v. *Gilman & Co.*,* it is said:

"The distress at common law was a dormant right to take the thing into possession as a pledge. *If this right was not made active by actual seizure, it was utterly impotent.* The landlord's right (however it may be described) is not a *jus in rem;* it does not amount to a legal or equitable title."

This, we submit, is the rule of the common law.

O'Hara v. *Jones* is much relied on by opposite counsel as changing in Illinois this rule.

The priority of liens under the eighth section of the Landlord and Tenant Law of Illinois had been, previously to that case, passed upon in *Miles* v. *James*, as affecting crops. The question as to the lien *on personal property* came up for the first time before the court in *O'Hara* v. *Jones*, and it was evidently misled by the case of *Miles* v. *James*, which represents the difference between *a statutory lien on crops and the right to distrain* on personal property at common law, recognized by the statute. The court inaccurately and loosely speaks of the "landlord's lien," "statutory lien."

A careful reading of the case of *Penny* v. *Little* will show that the court in that opinion carefully treats simply of *the right to distrain* for rent, and the phrase "landlord's lien" is not used in the opinion.

In re Joslyn,† Drummond, J., then district judge, and since made circuit judge, reviewed this whole subject-matter

* 43 Mississippi, 466.

† 2 Bissell, 138

in 1870, for the guidance of the practice in the Northern District of Illinois. His conclusions, which have always been regarded as satisfactory to the bar, were, on appeal, affirmed in the Circuit Court.

He says:

"It is to be remembered that in equity the landlord may have no just preference over the many general creditors of the bankrupt, and, in view of the general scope and spirit of the Bankrupt Law itself, and of the effect which it was to have on the rights of creditors, I have thought that unless the intention of the statute was clear to allow the common law or statutory lien of the landlord to have a priority over the general creditor, it ought not to be so regarded, and, looking at the statutes in our State, bearing upon the right of the landlord to distrain for rent, it seems to me that fairly construing the two laws together, and the effect which one has upon the other it must be said that under the Bankrupt Law, as operating upon the State law, the landlord, except in the particular case referred to, must be treated as being upon the same footing as the general creditors of the bankrupt, and can only have a right to come in like them, and prove his debt in the usual way."

Equality is the equity of the Bankrupt Law. The decree of the Circuit Court dismissing the bill should, therefore, be affirmed.

Mr. Justice DAVIS delivered the opinion of the court.

The bill in this case cannot be sustained unless the laws of Illinois conferred upon the landlord a statutory lien upon the personal property of the tenant in the county prior to the levy of the warrant. If the lien existed independently of the warrant, and the warrant was used merely as a means of enforcing it, then the theory of the bill is correct. On the contrary, if no lien could be acquired until at least the warrant was actually levied, the court below did not err in dismissing the bill.

The sixth and seventh sections of the Illinois Landlord and Tenant Statute speak of distress for rent. The sixth section prescribes the manner of proceeding, but the seventh

recognizes the existence of the right itself, and is in these words: "In all cases of distress for rent it shall be lawful for the landlord, by himself, his agent, or attorney, to seize for rent any personal property of his tenant that may be found in the county where such tenant shall reside, and in no case shall the property of any other person, although the same may be found on the premises, be liable to seizure for rent due from such tenant." The eighth section declares that "every landlord shall have a lien upon the crops growing or grown upon the demised premises in any year for rent that shall accrue for such year."

These are the only provisions of the statute material to the present inquiry, and they indicate clearly enough the intention of the legislature on the subject. Manifestly it was the purpose to make a distinction in this regard between agricultural products raised on the farm and the general personal property of the tenant in the country. If this were not so, why introduce the eighth section into the law at all, for the right of distress was conferred without it. The distinction was doubtless owing to the fact that agriculture is *now*, and was at the passage of the law, the chief industry of the State. It could work no serious injury to trade if one kind of property alone were subject to a statutory lien, but to extend this lien to all the personal property owned by a tenant in the county would interfere with it very materially. Be this as it may, the statute does in express terms confer a lien upon the crops growing or grown upon the demised premises in any year for the rent of that year, and recognizes for other personal property in the county the right of distress as it existed at common law. At common law the landlord could distrain any goods found upon the premises at the time of the taking, but he had no lien until he had made his right active by actual seizure. A statutory lien implies security upon the thing before the warrant to seize it is levied. It ties itself to the property from the time it attaches to it, and the levy and sale of the property are only means of enforcing it. In other words, if the lien is given by statute, proceedings are not necessary

to fix the status of the property. But in the absence of this statutory lien it is necessary to take proceedings to acquire a lien on the property of the tenant for the benefit of the landlord. This the landlord is enabled to do in a summary way to satisfy the rent which is due him, and in this he has an advantage as creditor over creditors at large of the tenant. It is difficult to see why the tenant, subject to this dormant right of the landlord, is not as much the owner of his effects as any other person would be who owned property and owed debts.

The statute we are considering has been the subject of consideration at the hands of the Supreme Court of Illinois. And it is contended that *O'Hara* v. *Jones** is authority for the position assumed by the appellant. The point decided in that case was that the landlord had a right to distrain for rent upon the property of the tenant even after he had made a general assignment for the benefit of creditors of all his property, real and personal, on the ground that the assignee of the tenant could not hold the goods free from the lien of the landlord; that the assignee took the goods of the assignor as a volunteer, and subject to all the liens to which they were then liable.

This decision evidently proceeds on the idea that the statute created a greater and different lien in favor of the landlord than is given by the common-law right of distress. But the court, in the recent case of *Hadden* v. *Knickerbocker*,† while adhering to the point actually decided in *O'Hara* v. *Jones*, repudiate this idea and say that the lien is given the landlord upon growing crops, "but no specific lien is given upon other property of the tenant." This case protects *bonâ fide* purchasers who have paid value for the property, with notice that rent was due the lessor and that he was about to distrain, although in *O'Hara* v. *Jones* it would seem that purchasers are not to be treated as *bonâ fide* unless they bought without notice.

It is argued that the basis of the decision in *O'Hara* v.

* 46 Illinois, 291. † — Id. —; not reported when this case was argued.

Jones is that the landlord's lien for rent is superior to that of a creditor holding under execution or attachment, and there are expressions in the opinion which tend in that direction, but the court to reach that conclusion would be obliged to overrule *Rogers* v. *Dickey*,* and this case is not even noticed in the opinion of the court.

The question in *Rogers* v. *Dickey*, as stated by the court, was "whether an execution delivered to the sheriff and in his hands at the time a distress warrant was levied took precedence of the levy by the constable, where there had been no sale of the property levied upon." The property levied on was on the demised premises, and the court, on full consideration, held that the sheriff, who had in the meantime taken the property from the constable, was justified in the proceeding, and this, too, on the general principles of law, for no point is made of superior right in the levy of the constable by virtue of the Landlord and Tenant Act. This decision could not have been reached if, in the opinion of the court, the landlord had a lien on the property prior to the seizure under the warrant, for the court, in *Miles* v. *James*,† held that the statutory lien of the eighth section on growing crops was a prior lien to an execution.

But it is unnecessary to consider the cases further, for whatever may be the scope of some of the decisions in the State, the exact point we are considering was decided, as we understand it, in the recent case of *Hadden* v. *Knickerbocker*,‡ and, indeed, the question does not seem to have been passed upon in any other case. If, as is said in that case, the statute creates no lien in favor of the landlord on the general property of the tenant in the county, until the levy of the distress warrant, then the question arises, whether the appellant acquired any right to the property in question by reason of his levy as against the assignee of the bankrupts and against the rights of the other creditors. It may become important in other cases to determine whether the lien acquired by the levy, to become operative, must not be

* 1 Gilman, 636. † 36 Illinois, 401. ‡ *Supra.*

perfected in conformity with the provisions of the statute on the subject, but in the view we take of the rights of the parties to this suit, it is not necessary to consider the question. The question might arise where the levy was before the filing of the petition in bankruptcy, and the subsequent proceedings, taken after this was done, were not in conformity with the provisions of the statute. The levy in this case was, however, made after the institution of bankruptcy proceedings, but before the decree in bankruptcy was rendered.

The fourteenth section of the Bankrupt Act declares that the assignment in bankruptcy shall relate back to the commencement of proceedings, and by operation of law vest the title of the estate of the bankrupt in the assignee, notwithstanding the same is then attached on mesne process as the property of the debtor. It is argued that a distress warrant, being the act of the landlord himself, is not an attachment upon mesne process. This is true according to the technical signification of the term, but the meaning of the term in this connection embraces any proceeding by which a lien is first acquired. The object of the law was evidently to prevent any one procuring a lien after the filing of the petition who had not got it before. If the lien existed before the filing of the petition, it could be enforced in the bankrupt court; but if it did not exist the purpose of the law was to prevent its being brought into existence by any proceeding whatever. If this were not so, as soon as it was known that the petition was filed the provisions of the law might be easily evaded. The main purpose which the Bankrupt Act seeks to accomplish is to distribute the property of the bankrupt equally among his creditors, and in order to do this the creditor who has not, when proceedings are begun, such a security as binds the property is prevented from obtaining it, and thus securing a preference over another creditor. There is no good reason why the law should protect a landlord in the issuing of a distress warrant, and repudiate an equally meritorious creditor in the levy of an attachment. If a distress warrant, where no further proceedings are nec-

essary to perfect the lien, is not, strictly speaking, an attachment upon mesne process, yet, under the Illinois statute, as has been remarked by an eminent judge,* it is in the nature of mesne process. The statute requires that a copy of the distress warrant be immediately filed in court; the party against whom it issues summoned; the amount due from him ascertained and entered upon the records of the court. It is then made the duty of the court to certify to the officer making the levy, the amount of the debt, and this certificate is his authority to make the sale, which certificate, with the proceedings indorsed upon it, must be returned into court.

It will thus be seen that the landlord, after he levies his warrant, can progress no further until the court has sanctioned the proceeding. The certificate that is issued, if not final process in the ordinary sense of the term, resembles it, and the distress warrant, if not mesne process issuing out of a court, is similar to it. The effect of the distress warrant is to seize the property and hold it for the purpose of enforcing the claim of the landlord upon it, and an ordinary attachment upon mesne process does nothing more for the general creditor. Both have to be returned into court and action taken on them before the property can be sold. Each is process through which a lien is obtained, but by neither can the lien be made available, unless through some final proceeding. There is, therefore, sufficient similarity between these processes for the distress warrant to be treated as a writ in the nature of an attachment upon mesne process.

But we do not want to rest our decision on this point alone, for the fourteenth section of the Bankrupt Law is not levelled at the mode of doing a thing, but at the thing itself. It was the object of this section to prevent the acquisition of any other liens than such as existed when the petition in bankruptcy was filed, and any proceeding by which this is attempted is within the condemnation of the law.

JUDGMENT AFFIRMED.

* Drummond, J., In re Joslyn, 2 Bissell, 241.—REP.