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ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1875.

REPORTED BY

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JUSTICES

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. EDWARDS PIERREPONT.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

ALLOTMENT, ETC., OF THE JUSTICES

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 JUSTICE, AND STATE FROM WHENCE APPOINTED.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE OF COMMISSION, AND BY WHOM APPOINTED.
CHIEF JUSTICE.	FOURTH.	1874.
Hon. M. R. WAITE, Ohio.	Maryland, West Virginia, Virginia, N. Carolina, and S. Carolina.	Jan. 21. President Grant.
ASSOCIATES.	FIRST.	1858.
Hon. N. CLIFFORD, Maine.	Maine, New Hampshire, Massachusetts, and Rhode Island.	Jan. 12. President Buchanan.
	SECOND.	1872.
Hon. WARD HUNT, New York.	New York, Vermont, and Connecticut.	Dec. 11. President Grant.
	THIRD.	1870
Hon. WM. STRONG, Pennsylvania.	Pennsylvania, New Jersey, and Delaware.	Feb. 18. President Grant.
	FIFTH.	1870.
Hon. J. P. BRADLEY, New Jersey.	Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.	March 21. President Grant.
	SIXTH.	1862.
Hon. N. H. SWAYNE, Ohio.	Ohio, Michigan, Kentucky, & Tennessee.	Jan. 24. President Lincoln.
	SEVENTH.	1862.
Hon. DAVID DAVIS, Illinois.	Indiana, Illinois, and Wisconsin.	Dec. 8. President Lincoln.
	EIGHTH.	1862.
Hon. S. F. MILLER, Iowa.	Minnesota, Iowa, Missouri, Kansas, Arkansas, & Nebraska.	July 16. President Lincoln.
	NINTH.	1863.
Hon. S. J. FIELD, California.	California, Oregon, and Nevada.	March 10. President Lincoln.

MEMORANDA.

THE Bar of the Supreme Court of the United States met in the court-room, in the Capitol, Washington, on Friday morning, Feb. 18, 1876, at 10 o'clock, to pay respect to the memory of the late REVERDY JOHNSON.

On motion, Mr. M. H. CARPENTER was appointed chairman, and Mr. D. W. MIDDLETON, secretary.

Mr. CARPENTER, on taking the chair, addressed the meeting as follows: —

GENTLEMEN: We have met to express our sorrow at the death of Reverdy Johnson, who *long ago* was Attorney-General of the United States, and who, amid the cares and responsibilities of many high political stations, at home and abroad, never abandoned the practice of his profession. For more than fifty years he steadily advanced in professional reputation, and came at length to be regarded as one of the leaders of this Bar.

Beginning his practice here in early life, he became the worthy successor of Harper, Martin, Pinkney, and Wirt, men who added so much to the glory of the Old Maryland. And considering the extent and variety of his practice; his natural resources and professional attainments; his thorough self-possession and steadiness of nerve, when the skill of an opponent unexpectedly brought on the crisis of a great trial, — an opportunity for feeble men to lose first themselves and then their cause; his fidelity to the oath which was anciently administered to all the lawyers of England, — to present nothing false, but *to make war* for their clients; the audacity of his valor when the fate of his client was trembling in the balance, — he believing his client to be right, while every one else believed him to be wrong; — remembering all these traits, we must rank him with the greatest lawyers and advocates of this or any other country.

He retained full possession of his faculties to the moment of his death, and not long since appeared to argue some important causes at this bar; and although his eye was dim, all who heard him felt that his natural force was not abated. As with Milton, from his natural eye, the beauties of the earth and the heavens were excluded; to him, as to Milton, there returned not

> "Day, or the sweet approach of ev'n or morn,
> Or sight of vernal bloom, or summer's rose,
> Or flocks, or herds, or human face divine;" —

but upon his intellectual comprehension, upon his mind and heart, the light of heaven never ceased to shine.

Nature sets indelible marks upon the productions of which she is proudest. His outward form proclaimed the man. His compact, firm-knit frame, his heavy shoulders, his round head, his striking face, bearing the furrows of many sharp professional and political conflicts, but from which there still shone his gentle, kindly nature, — all indicated a man of genial nature, yet resolute of purpose, — a man easy to court, but dangerous in conflict.

We are taught to pray for deliverance from "*sudden death.*" But the life of our eminent brother had been long extended, — even to nine years beyond "threescore and ten;" and without pain, without death-bed parting from those he loved (more painful than death itself), possessing all his faculties in full vigor, rich in honors and glorious with praise, he passed in an instant from the known to the unknown, from earth to the hereafter of hope and faith. And if it was ordered that the scene of his mortal life must end that moment, who can say that the manner of its close was not also ordered, *in mercy*, by that God *who doeth* ALL *things well!*

I should do violence to my feelings if I did not say one thing more. I *loved* that old man. When I came first here, with the trembling inspired by the glorious memories of this court, over which John Marshall so long presided, Mr. Johnson took me by the hand, gave me fatherly recognition, became my adviser, and ever after remained my friend. For all his kindness, professional and social, I would be less than a man did I not cherish the profoundest gratitude.

Mr. GEORGE F. EDMUNDS. — Mr. Chairman: Certainly what you have said, sir, is so complete a generalization of the character and of the life of Mr. Johnson, that little else need be said in that respect; and so at this moment, in coinciding in every thing that the chairman has stated to us, I venture to move that a committee be appointed by the chair to prepare and report presently such resolutions as it may be thought fit to adopt.

The motion of Mr. Edmunds was agreed to, and the following gentlemen were appointed by the chair to constitute the committee: —

Committee on Resolutions.

Mr. GEORGE F. EDMUNDS, Chairman.

Mr. PHILIP PHILLIPS.
Mr. R. T. MERRICK.
Mr. A. G. THURMAN.
Mr. W. D. DAVIDGE.
Mr. WM. PINKNEY WHYTE.
Mr. GEO. TICKNOR CURTIS.
Mr. J. H. B. LATROBE.
Mr. S. TEACKLE WALLIS.
Mr. WM. PITT LYNDE.
Mr. J. RANDOLPH TUCKER.
Mr. T. O. HOWE.
Mr. JOHN T. MORGAN.
Mr. J. A. GARFIELD.
Mr. T. J. DURANT.

The Committee thereupon retired; and, on returning, reported, through Mr. Edmunds, the following resolutions for adoption: —

Resolved, That the bar of the Supreme Court of the United States has received with deep sorrow the intelligence of the death of Reverdy Johnson, for more than half a century an eminent and honored practitioner in this court.

Resolved, That the memory of Mr. Johnson deserves to be cherished by the bar, as most honorable to the profession of which he was a distinguished member, as dear to the court that has benefited by his great contributions to the science of jurisprudence, and as valuable to the Republic, in whose service, as citizen, attorney-general, senator, and diplomatist, he was wise and faithful.

Resolved, That the Attorney-General be requested to communicate these resolutions to the court, and to move that they be entered of record; and

Resolved, That they be communicated to the family of Mr. Johnson, with the expression of the earnest condolence of the bar.

The CHAIRMAN: The resolutions, having been reported from the Committee, are now before the meeting, subject to amendment and subject to debate.

REMARKS OF MR. G. F. EDMUNDS.

Mr. CHAIRMAN: In presenting these resolutions on behalf of the Committee of the Bar, I only feel competent myself to say a single word.

When I was a mere lad and visited this city, I used often to come into the then Supreme Court room, which is below us now, where great causes of public and national concern were being almost daily heard; and one of the chief and most interesting figures that, to my young eye, appeared as lawyer, and, I may say, sometimes as orator, in that court was Mr. Johnson. Although I had not then the pleasure of knowing him personally, when afterwards I came here and made his acquaintance, I soon learned enough of him to be able to second with all my heart what the chairman has said in the opening of this meeting; for to every young lawyer who came to this bar I am sure Mr. Johnson gave that wise and kindly intercourse which is so encouraging to those who deserve it, and is so justly, I may say, conservative, in toning down the sometimes exuberant fancies of young lawyers, — quite as necessary to them sometimes as the encouragement to those who have less force and more modesty.

Mr. Johnson has been so long known to the bar of the United States, that it is quite a work of supererogation to name the extensive and varied contributions that he has made to jurisprudence and to its application to the affairs of men. In looking through the reports of this court alone, to

say nothing of those of the various States, in which, from time to time, he has been called upon to practise, you find that his great mind has been brought to the consideration of every variety of question that can arise in the affairs of men, from the lowest and simplest to the highest and most complex; and, I think, it is perhaps a somewhat significant commentary upon his recognized force and greatness, that the first cause he ever argued in this court was with Mr. Taney, afterwards Chief Justice of the United States, against Mr. Wirt and Mr. Meredith, of Baltimore, — the case of *Brown* v. *The State of Maryland*, that great leading cause, in which the lines of political power and of political jurisprudence, if I may use such a phrase, were so stoutly contested between the States and the United States. And although in that particular case Mr. Johnson failed to convince the court that he was right, I think that, as we look back upon the events that have since taken place, it is not altogether certain that if the question were now new, it might not have been decided the other way.

But time does not allow me to go into these recollections of his great services to the nation and to civilization everywhere, which performing the high duties and the true duties of a barrister have given him the opportunity to do; for I think I need not say to the bar, or to you, sir, what perhaps is so much felt and yet so little understood in this country and every other, that the civilization and the progress of a people are almost exactly measured by the degree of vigor, prudence, and purity that characterizes the administration of its laws in courts of justice; and, as we all know, the laws cannot be administered without the arguments of impartial and learned advocates upon both sides.

But as we say these things, sir, there comes back to us the recollection that Mr. Johnson has gone, and that he cannot profit, if he should have needed ever to profit, by the admiration, or the solicitudes, or the grateful memories of his fellow-men.

Id cinerem aut manes, credis curare sepultos? was said of a great man who many centuries ago departed suddenly from life.

But for our own consolation, and for that high duty that we owe everywhere to society, to make prominent and to give honor to those names that have done great service to the cause of civilization and of society, it is every thing; and as such, with the contribution that my admiration for Mr. Johnson enables me most sincerely to offer, I join gladly in these memorial services.

REMARKS OF MR. P. PHILLIPS.

Mr. Chairman: A little over a year ago the members of the Bar assembled to do honor to the memory of the distinguished jurist, Judge Curtis. On that occasion Reverdy Johnson, on my motion, was selected as the proper representative of the profession to express their profound respect for the deceased, and fittingly did he discharge the duty. Now we are called on to mourn the death of Mr. Johnson himself. Thus, one after another, we pass from the sunlight of day into the shadows of night.

Mr. Johnson and Mr. Curtis were the recognized leaders of the American Bar, and their experience, learning, and intellectual power justified fully the high position which by common consent was awarded to them.

Long associated with Mr. Johnson, I can speak truly of the ability he uniformly displayed in the argument of his causes in the Supreme Court, and of the amiability which marked his intercourse with his professional brethren.

It is seldom allotted to one man to be distinguished in more than one sphere, but it may be said of our departed brother, that he was as equally eminent as legislator and jurist.

In honoring the memory of such a man we honor ourselves.

I do not rise, Mr. Chairman, to multiply words, which at best are but feeble exponents of feeling, but merely to move the adoption of the resolutions.

REMARKS OF MR. F. T. FRELINGHUYSEN.

Mr. PRESIDENT: I do not feel that I can suffer this occasion to pass without saying a word expressive of my appreciation of Mr. Johnson and my regard for him. Of course this is not the time to delineate a character of which so much might be said, or to review a life which, for half a century, was so intimately connected with the history of our country. There are striking features in his character to which I call attention.

As a statesman he had large views, and compassed the interests of his whole country. Eminently familiar with and learned in international law, in constitutional law, in the history of his times and of his country, at any moment and on any emergency he was ready to come to the front, and there courageously and ably contend for what he believed the best interests of his country.

He was an able lawyer; not in my opinion that he always appeared the best equipped and prepared on a given occasion, but he was full of his profession and of its learning, and was ever ready to communicate instruction or enter the arena. He was eminently a ready man.

He was a patriot, with whom the love and the duty he owed his country was paramount to any allegiance he owed to a party. You and I, sir, have seen him push away the demands of party that he might better meet the demands of his country, as readily as he would wipe the moisture from his brow.

But I do not stand here to delineate his excellencies. They were impressed upon and realized by us much more readily than they can be depicted. But if I was called upon to state the marked moral characteristics of Mr. Johnson, I should say that they were courage and generosity, — two attributes that always command the admiration of mankind. We know that with the ancients courage was the acme of the virtues. Christianity has inculcated the virtue of meekness, and modified our views of what constitutes true courage ; but it has not detracted from it, for all of us know that that Being who had the most of meekness had also the most of

courage, and we do not at this day remove that virtue from the high niche it held in the days of the Cæsars.

Mr. President, last Sunday morning I saw in the city of Baltimore the avenues leading from Mr. Johnson's dwelling to his tomb lined with citizens, that, as his funeral car passed, they might manifest the high respect and regard they felt for one they so well knew. A friend with whom I was riding then pointed me to the site of the dwelling formerly occupied by Mr. Johnson, which years ago was demolished by the excited violence of the populace. He had faced the storm of popular prejudice, and had calmly and resolutely waited until public opinion came to do him homage. He had the courage to stand and wait.

But it was his generosity that made him friends. He delighted in words and acts of kindness, and he withheld his sympathy from no one in trouble. There are men in this world who are respectable, honest, circumspect, but from whom we instinctively turn away, because we feel that they love themselves supremely, and care for no one else. But to the whole-souled, the genial, the generous man, we open wide the portals of our hearts. This is the tribute the world pays to that disinterestedness which is the crowning virtue of our holy religion. No man lives to himself; he certainly did not live to himself. No man dies to himself; he did not, for there is in his life and character much that we may all properly imitate, and thus perpetuate.

REMARKS OF MR. GEORGE TICKNOR CURTIS.

Mr. Chairman: I cannot allow this occasion to pass without adding my feeble tribute to what has been said concerning Mr. Johnson. I knew him well more than twenty years ago. It is about that period since it happened to me to take some part in the discussion at this Bar of that great cause which so much agitated the country, and the decision of which has so much affected its present and its future. Mr. Johnson shared the opinion that the welfare of the country required that the Supreme Court of the United States should arrive at the decision, which it reached by a majority, in the well-known Dred Scott case. It was his forcible presentation of the Southern view of our Constitution in respect to the relations of Slavery to the Territories and of the Territories to Slavery, that contributed more than any thing else to bring about the decision that was made in that cause. I believe that he held those opinions with entire sincerity; at any rate, he enforced them with great power. Those who were opposed to him (and I happened to be one of them) felt the force of his arguments, and foresaw what their effect would be upon a majority of the court. The judgment of the country very speedily may be said to have reversed that decision; but in my opinion it becomes us all, in the view that we may take of this great man's efforts, and of the sincerity with which he held and enforced his opinions upon constitutional questions, to recognize the patriotism that lay at the bottom of the whole effort that he made on that occasion, and to give it its just due.

Mr. Chairman, in listening to the beautiful remarks with which you opened this meeting, I was struck by your reference to the sudden death of Mr. Johnson. I happened quite recently to have seen a couple of verses written by one who, in middle life, had reason to anticipate, and who met with, a sudden death: —

"While others' set, thy sun shall fall;
Night without eve shall close on thee;
And He who made, with sudden call,
Shall bid, and thou shalt cease to be.

"So whispers Nature, whispers Sorrow,
And I could greet the things they say,
But for the thought of those whose morrow
Hangs trembling on my little day."

But, sir, in the case of a man so aged as Mr. Johnson, of a man whose fame was gathered and full, who had no occasion to look back over a long life, save with gratitude for the mercies and distinctions by which it had been marked, sudden death comes not as a calamity, but may be welcomed as a blessing.

REMARKS OF MR. E. N. DICKERSON.

Twenty years ago, Mr. Chairman, in the argument of an important cause before Judge McLean, four lawyers, from remote parts of the country, met at Cincinnati, of whom one was unknown, and two but little known; but three of those four men were destined to occupy exalted places in our nation's stormy history. They were Mr. Lincoln, Mr. Stanton, Mr. Johnson, and myself. At that time Mr. Lincoln had not been heard of very far beyond the limits of his native State; Mr. Stanton was practising law in Ohio; and Mr. Johnson was in the maturity of his strength, and with a reputation secured and safe. Three of those men have passed away. Mr. Lincoln lives in history, and in the hearts of his countrymen, as a statesman whose political sagacity was only excelled by his philanthropy, and whose philanthropy was the embodiment of the Golden Rule. Mr. Stanton is remembered and admired as the vigorous administrator, whose iron will braced up the tender and yielding heart of the beloved President in the trying hours of the nation's struggle for existence; and now Mr. Johnson, last of all, leaves to us the reputation of a profound jurist, a wise legislator, and a noble, generous-hearted friend. When we contemplate the characters and virtues of these three distinguished men, it is to us, as Americans, a proud satisfaction that we need not look beyond that trio, — that we need not open the pages of history, nor search beyond the confines of our own country, for examples worthy of imitation and sufficient for our guidance, whether we are statesmen, or administrators, or lawyers; for I believe that in these three can be found the very excellence of those qualities which have distinguished the great rulers of men throughout all time.

Since that long-past encounter, in which these three dissimilar great men met in friendly strife, Mr. Johnson's fame has steadily increased and

widened, until to-day it fills the whole country, and is cherished wherever men rely upon law for safety and protection.

With feelings of the most profound regret, softened by recollections of many years of agreeable personal associations with this great man, I have risen to add my tribute of respect for his memory, and to recall the incident I have mentioned, that it may suggest at once those three departed friends as examples for our admiration and our guidance, whether we would climb ambition's paths or labor where Mr. Johnson earned his great reward.

REMARKS OF MR. J. RANDOLPH TUCKER.

Mr. CHAIRMAN: It would not be proper that this meeting should pass away without Virginia adding the tribute of her admiration to the great lawyer of her sister State, Maryland. It was my pleasure, sir, to know Mr. Johnson but a very brief period while I lived temporarily in the city of Baltimore, several years ago. I can bear testimony to that generosity of disposition of which gentlemen have spoken, and which then manifested itself to me, a stranger and a younger member of the profession; and while I can unite in the tribute which has been paid to him as a great constitutional lawyer, and an eminent lawyer in other branches of jurisprudence, it is a peculiar pleasure to me to testify to the warmth of the friendship which he showed towards me at that time and ever since.

To any man who looks upon the law as the necessary companion of all progress, he who for nearly threescore years has stood as an advocate at the American Bar in the maintenance of constitutional principles and in the development of every other department of jurisprudence, must occupy a most important position in the advancement of our race. And although a man who is merely at the Bar and has never been elevated to the Bench may not go down to future times with the fame and the distinction which attaches to that more distinguished position, yet, like the stones in a great edifice which are not seen, he may still be as important to the strength of its structure and to the beauty of its outward appearance. And it is a consolation to those of us who occupy a more humble position in the ranks of the profession, that while we may not be known in the future, we may at least feel that we have played our part, a very humble one it may be, but still a valuable part, in the promotion of liberty and civilization.

I felt, sir, that it was due from me, as a Virginian, that I should say thus much in testimony of the great and eminent character of Mr. Johnson.

REMARKS OF MR. HENRY S. FOOTE.

Mr. CHAIRMAN: After so much has been said on the interesting subject which has drawn us together in the presence of so large a number of the learned and distinguished members of the bar of the Supreme Court of the United States, I know it would be unbecoming for me, deeply as I feel interested in the proceedings now in progress, to do more than offer a few brief suggestions.

I had the honor of knowing Mr. Johnson for more than thirty years. In the winter of 1847–48 there was a banquet given in this city in honor of certain distinguished commanders of the American army, just returned from Mexico. At that banquet Mr. Johnson was present, and I for the first time heard him speak. A more patriotic and eloquent production I never listened to, nor one that was more universally admired and commended; for on that occasion he rose above his party for the purpose of maintaining the vital interests of his country.

A few weeks thereafter I heard for the first time an elaborate speech from the lips of Mr. Johnson in this hall, then, as you well know, occupied by the Senate of the United States. As a member of that body, he spoke for two days upon the great questions then at issue in the country, in a manner that commanded the respect, the sympathy, and the intense admiration of all who listened to his remarks, not only by reason of the extraordinary ability displayed by him, but on account of those noble attributes which he exhibited so resplendently on that occasion, — his ardent patriotism, his manly independence, his high moral courage.

I may be permitted to extend my remarks for a few minutes only, whilst I state the deliberate opinion which I formed of Mr. Johnson at that time, and which I have ever entertained up to the present moment. And by way of illustration, Mr. Chairman, of what I have already said, and of what has fallen from the lips of others as to his extraordinary merits, I may mention a rather curious historical fact: When General Taylor was elected to the presidency of the Union, the programme of his cabinet was made known a day or two before the inauguration occurred. In that programme Mr. Johnson's name was not mentioned, but it was made known to some who were then members of the Senate, that if it should so happen that a bill which had passed the House of Representatives for the establishment of the Department of the Interior, and which had thus far failed to pass the Senate, should, upon a motion for reconsideration, be taken up and passed, General Taylor would take delight in adding Mr. Johnson to his cabinet as attorney-general. It did so happen that the individual now addressing you, with his associate in the body of that period, admiring Mr. Johnson very highly, having but slight objections to the bill for the establishment of the Department of the Interior, but objections sufficiently strong to have induced us to vote against the bill originally, determined upon that information to change our votes. We did change our votes; and by that change was the Department of the Interior established and the way made open for Reverdy Johnson to become Attorney-General of the United States, an office to which he lent such extraordinary dignity during the period that he held it.

I have said that for nearly thirty years of his splendid and useful public life he was known to me more or less familiarly. I first saw him, as I have said, some thirty years ago, and it was my fortune to behold him when acting amidst various scenes here of high responsibility, in which all the attributes almost that can possibly be imagined as dignifying humanity

were put to a thorough test. Nor ever was he found wanting. His learning, his high powers as a reasoner, his acknowledged skill as an advocate, his remarkable moral courage, which has been so happily remarked upon, his freedom from all party or sectional bias, his noble fidelity in friendship, his kindness in social intercourse, — these qualities have given to Reverdy Johnson, him whose sudden death we all so deeply deplore, and which has embalmed him in the affectionate recollection of his countrymen of all parties ; these qualities, which it will never be in the power of detraction to enfeeble, or even of time itself altogether to obliterate, I need not dwell upon. They constitute a splendid portion of the history of this Republic. No words which I could use, especially after what has been said on this occasion, could add to the splendor of his fame or give full expression to the sense of national bereavement which at this moment everywhere is manifesting itself. In the unhappy days upon which we have now fallen, the disappearance from the public arena of one so gifted, so pure, so magnanimous, so free from petty jealousies of every kind, from low and over-selfish schemes for the acquisition of illicit gain or for the attainment of official station, may be well looked upon, in my judgment, as one of the severest national calamities which have of late fallen upon the American people. May we, who are now present, long continue to cherish the recollection of the virtues, and be vigilant and assiduous in avoiding those vices, which Reverdy Johnson, while living, is known ever to have held in unmeasured contempt and detestation.

REMARKS OF MR. J. A. GARFIELD.

Mr. Chairman: The career of Mr. Johnson affords a new and striking illustration of the fact that the profession of the American lawyer is becoming a much more prominent element in our national life and thought than at any other period in our history. In the remarks to which we have just listened, far more emphasis has been laid on Mr. Johnson's career as a lawyer than upon all else he achieved, however conspicuous and valuable to the nation.

Very recently we have seen the public sympathy profoundly aroused for the personal safety of an eminent citizen, who, I believe, has never held any public office, but who has won a foremost place in the affections of the nation, by worthily and honestly discharging the high duties of an American lawyer. The announcement that he was about to die awakened the deepest and tenderest solicitude in millions of American hearts. The daily bulletins that told us of his slowly returning health, and gave hopes of his complete recovery, were read by the American people with a gratification as sincere and as universal as though he had held the highest official station.

In the career of Reverdy Johnson we see united the eminent citizen, the public servant, and the great lawyer. But great as was his fame as Attorney-General, as Senator of the United States, as Minister to England, greatest of all was his fame as citizen and lawyer.

In all his service in official position, a part of his honor may be said to have been conferred upon him by his country. His fame as a citizen and a lawyer was all his own.

Perhaps there is no severer test of the stuff of which a man is made, than that he shall try conclusions with the men who meet in this great tribunal, — this court, against which, we may say with truth and gratitude, the waves of popular passion and political strife have dashed in vain. Within this sacred circle Truth, Law, Justice, the rights of citizens, and the superintending power of our Constitution, are the great factors; and in this forum our departed friend found his chief eminence, his greatest honor. To me, the most impressive lesson of his life is this, — that, more than any man we have known, Mr. Johnson has illustrated the truth that the highest human symbol of omnipotence is to be found in the power of unremitting, hard work. His monument was builded by his own hands. He made his fortune and his fame by powerful, continuous, earnest, honest work.

During the fourteen years of my acquaintance with Mr. Johnson, I never looked upon his face without feeling that he was a Roman of the elder days, — the very embodiment of rugged force and of that high culture which comes from continuous, persistent work.

If these are not the elements of genius, they are the best possible substitutes for it.

To the younger members of the profession no better path to success can be pointed out than the high and rugged one by which he ascended to that proud eminence where there is always recognition and room.

In this forum, I cannot doubt his memory will be for ever cherished, by Bench and Bar alike, as a noble embodiment of honor, of virtue, of power.

The resolutions were agreed to unanimously; and thereupon, on motion of Mr. PHILLIPS, the meeting adjourned.

On the 23d of February, Mr. ATTORNEY-GENERAL PIERREPONT addressed the court as follows: —

MAY IT PLEASE YOUR HONORS, — When an eminent citizen of the Republic, whose eminence has been achieved by an honorable career in the public service, in professional life, or in the less conspicuous but not less useful walks of private benevolence, dies, it is fit that some public notice be taken of the event, and that some permanent record be made to encourage and inspire those who are to come after us.

Reverdy Johnson, who recently departed, full of years and of honors, was, during a long period, one of the most eminent lawyers of this country, and one of the very foremost counsellors of this high court. He held with distinguished ability and honor, respectively, the great offices of Minister to England, Senator, and Attorney-General of the United States. He has

left a fame and an honored memory of which his descendants and his country may be justly proud.

The Bar of the Supreme Court met to do honor to his name, and passed resolutions which I now present, and which I ask this Honorable Court to receive as a tribute to the memory of a great lawyer and an eminent public man, and to order them to be entered in its permanent records.

Mr. CHIEF JUSTICE WAITE responded as follows: —

The court gives its ready assent to the sentiments so well expressed in the resolutions of the Bar. Mr. Johnson was admitted to practise here on the first day of March, 1824. The first case in which he appeared as counsel was that of *Brown* v. *The State of Maryland*, argued and decided at the January Term, 1827. Associated with him was the late Chief Justice Taney, and, opposed, were Mr. Wirt, then the Attorney-General, and Mr. Meredith, — all names familiar in history. The opinion was delivered by Chief Justice Marshall, and it stands to-day as a monument marking the boundary line between the powers of the United States under the Constitution, on the one hand, and those of the States on the other.

From the commencement of his practice here until his death, Mr. Johnson was extensively employed, with scarcely an interruption, in the most important causes. He was always welcome as an advocate, for he was always instructive. His friendship for the court was open, cordial, sincere. We mourn his loss both as counsellor and friend.

The request of the Bar is cheerfully acceded to. The resolutions are received in the same spirit they have been presented, and the clerk will cause them to be entered upon the records of the court.

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REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1875.

BLEASE *v.* GARLINGTON.

1. Cases in equity come here from the circuit courts, and the district courts sitting as circuit courts, by appeal, and are heard upon the proofs sent up with the record. No new evidence can be received here.
2. So much of the Judiciary Act of 1789 as relates to the oral examination of witnesses in open court in causes in equity was not expressly repealed until the adoption of the Revised Statutes, sect. 862 of which provides that "the mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to the rules now or hereafter prescribed by the Supreme Court, except as herein specially provided."
3. While this court does not say, that, even since the Revised Statutes, the circuit courts may not in their discretion, under the operation of existing rules, permit the examination of witnesses orally in open court upon the hearing of cases in equity, it does say that they are not now by law required to do so; and that, if such practice is adopted in any case, the testimony presented in that form must be taken down, or its substance stated in writing and made part of the record, or it will be entirely disregarded here on an appeal.
4. If testimony is objected to and ruled out, it must still be sent here with the record, subject to objection, or the ruling will not be considered. A case will not be sent back to have the rejected testimony taken, even though this court might, on examination, be of opinion that the objection ought not to have been sustained.
5. As this cause is in equity, the act of 1872 (17 Stat. 197; Rev. Stat., sect. 914) has no application to it.
6. Where a party, knowing the pecuniary condition of a debtor, purchased a claim against him of an ascertained amount, an opinion, however erroneous, expressed by the seller as to the value of the claim, does not affect the validity of the sale. Under such circumstances, each party is presumed to rely upon his own judgment.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

Mr. James Lowndes for the appellant.

Mr. W. W. Boyce for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This suit was brought for the foreclosure of a mortgage made by Blease to Garlington. The bill is in the ordinary form. Blease, in his answer, admits the execution of the note and mortgage, but insists, by way of defence, that Garlington "deceived him as to the value of the consideration of the said note and mortgage, and has not complied with his positive agreement." The history of the transaction, he says, is as follows: —

"The complainant, as the administrator of J. M. Young, deceased, held a large claim against the estate of John B. O'Neall, deceased, who had been the guardian of the said J. M. Young; and Robert Stuart and H. H. Kinard were the sureties on his bond. The complainant had commenced suit on said bond against Robert Stuart, and proceedings to force him into bankruptcy; and his life seemed to be endangered by the excitement which this last proceeding produced, he being naturally in very feeble health. Under these circumstances, negotiations were commenced between the complainant and this respondent, the friend of the said R. Stuart, in regard for the sale of the claim of the said complainant against the said Robert Stuart, as surety on the said guardianship-bond of said J. B. O'Neall, deceased; and this respondent was induced to purchase said claim at $6,000 ($4,000 of which was paid in cash, and the note described in bill given for $2,000) by the assurance of the complainant that said claim was worth at least $6,000, and he made some calculations to show this, and said, as this claim was worth $6,000, it would not be right for him to take less than that sum, and that he would not do it. This purchase was made upon the further assurance and undertaking of the complainant that he would obtain judgment for this respondent. This defendant avers that said purchase would not have been made by him at that price but for the said assurance and promise of the complainant, in which this respondent put implicit confidence. This respondent, further answering, states, that the said Robert Stuart died before judgment was obtained on said claim; and this respondent has been informed and believes that his

estate is so utterly insolvent that it will not pay any thing like the sum of $6,000 on said claim, and he asks that this case be not tried until the true condition of said estate can be ascertained. This defendant further submits to this honorable court, that the complainant, having deceived this defendant as to the value of said claim against Robert Stuart, and not having complied with his part of the contract to obtain judgment on said claim, is not entitled to enforce collection of said note and mortgage in this court, where equity is administered, and asks that the whole contract may be set aside, and the complainant required to deliver up to this defendant the said note and mortgage to be cancelled, and to refund the $4,000 paid in cash to him on said contract, with interest."

Upon the hearing in the court below, after the plaintiff had submitted his case upon the pleadings and his mortgage, the defendant presented himself as a witness to be examined orally in open court, and proposed to testify to the following facts, to wit: —

"1. That one of the conditions of the original agreement for the sale of the liability of Robert Stuart, as one of the sureties on the bond of J. B. O'Neall, as guardian of J. M. Young, plaintiff's intestate, to the defendant, was that the plaintiff should obtain judgment against the said R. Stuart; and that, when the agreement was drawn up and presented to the defendant, he called attention of plaintiff to the fact that that part of the agreement which obligated him to get judgment had been left out, and insisted that it should be inserted; and he was assured that that condition should be carried out, and that it was not necessary to rewrite the agreement for the purpose of putting it in.

"2. That, during the negotiations for the sale of the aforesaid liability of R. Stuart, the plaintiff represented to the defendant that said liability or claim was worth at least $6,000; and that, in fact, it is not worth $2,500.

"3. That the defendant did not know the then financial condition of R. Stuart, and put implicit confidence in the promises and representations of the plaintiff, and would not have made the trade but for such assurance."

His proposition, made in writing, is sent here as part of the record. The court refused to receive the testimony, and it was not taken. A decree having been entered in favor of Garlington, Blease brings the case here by appeal.

Cases in equity come here from the circuit courts, and the district courts sitting as circuit courts, by appeal, and not by writ of error. Rev. Stat., sect. 692. They are heard upon the proofs sent up with the record from the court below. No new evidence can be received here. Rev. Stat., sect. 698.

The facts relied upon by Blease were neither proved nor admitted in the court below. Testimony in support of them was offered; but it was not received. We do not know, that, if it had been received, it would have been sufficient. If we find that the court erred in refusing the testimony, we shall be compelled to affirm the decree because of the lack of proof, or send the case back for a new hearing.

An important question of practice is thus presented for our consideration.

The Judiciary Act of 1789 (1 Stat. 88, sect. 30) provided that the mode of proof by oral testimony and examination of witnesses in open court should be the same in all the courts of the United States, as well in the trial of causes in equity as of actions at common law. By sect. 19 of the same act, it was made the duty of the Circuit Court, in equity cases, to cause the facts on which they founded their decree fully to appear upon the record, either from the pleadings and decree, or a statement of the case agreed upon by the parties or their counsel, or, if they disagreed, by a stating of the case by the court. Subsequently, in 1802 (2 Stat. 166, sect. 25), it was enacted that in all suits in equity the court might in its discretion, upon the request of either party, order the testimony of witnesses therein to be taken by depositions. In 1803 (2 Stat. 244, sect. 2) an appeal was given to this court in equity cases, and it was provided, that, upon the appeal, a transcript of the bill, answer, depositions, and all other proceedings in the cause, should be transmitted here. The case was to be heard in this court upon the proofs submitted below.

In *Conn. et al.* v. *Penn.*, 5 Wheat. 424, decided in 1820, this court held that a decree founded in part upon parol testimony must be reversed, because that portion of the testimony which was oral had not been sent up. For this reason, among others, the cause was sent back for further proceedings according to equity. Chief Justice Marshall, in delivering the opinion of the court, said (p. 426), —

"Previous to this act (that of 1803), the facts were brought before this court by the statement of the judge. The depositions are substituted for that statement; and it would seem, since this court must judge of the fact as well as the law, that all the testimony which was before the Circuit Court ought to be laid before this court. Yet the section (of the act of 1789) which directs that witnesses shall be examined in open court is not, in terms, repealed. The court has felt considerable doubt on this subject, but thinks it the safe course to require that all the testimony on which the judge founds his opinion should, in cases within the jurisdiction of this court, appear in the record."

Under the authority of the act of May 8, 1792 (1 Stat. 276, sect. 2), this court, at its February Term, 1822, adopted certain rules of practice for the courts of equity of the United States. 7 Wheat. v. Rules 25, 26, and 28 related to the taking of testimony by depositions, and the examination of witnesses before a master or examiner; but by Rule 28 it was expressly provided that nothing therein contained should "prevent the examination of witnesses *viva voce* when produced in open court."

These rules continued in force until the January Term, 1842, when they were superseded by others then promulgated, of which 67, 68, 69, and 78 related to the mode of taking testimony, but made no reference to the examination of witnesses in open court, further than to provide, at the end of Rule 78, that nothing therein contained should "prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable."

Afterwards (in August, 1842) Congress authorized this court to prescribe and regulate the mode of taking and obtaining evidence in equity cases. 5 Stat. 518, sect. 6. While these Rules remained in force substantially as originally adopted, and before any direct action of the court under the special authority of this act of Congress, the case of *Sickles* v. *Gloucester Co.*, 3 Wall., Jr., 186, came before Mr. Justice Grier on the circuit; and he there held, that, notwithstanding the rules, witnesses might still be examined in open court. It was his opinion that the act of 1789 guaranteed to suitors the right to have their witnesses so examined, if they desired it; that Rule 67

did not affect or annul the act of Congress or the policy established by it; and that a party had therefore the right to demand an examination of witnesses within the jurisdiction of the court *ore tenus*, according to the principles of the common law, either by having them produced in court, or by having leave to cross-examine them, face to face, before the examiner.

This case was decided in 1856; and at the December Term, 1861, of this court, Rule 67 was amended so as to provide for the oral examination of witnesses before an examiner. The part of the rule as amended, pertinent to the present inquiry, is as follows: —

"Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally; and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be in the mode now used in common-law courts. The depositions taken upon such oral examinations shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances, and, when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend; provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same: and the examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just."

The act of 1789, in relation to the oral examination of witnesses in open court, was not expressly repealed until the adoption of the Revised Statutes, sect. 862 of which is as follows: —

"The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to the rules now or hereafter prescribed by the Supreme Court, except as herein specially provided."

Since the amendment of Rule 67, in 1861, there could never have been any difficulty in bringing a case here upon appeal, so as to save all exceptions as to the form or substance of the testimony, and still leave us in a condition to proceed to a final determination of the cause, whatever might be our rulings upon the exceptions. The examiner before whom the witnesses are orally examined is required to note exceptions; but he cannot decide upon their validity. He must take down all the examination in writing, and send it to the court with the objections noted. So, too, when depositions are taken according to the acts of Congress or otherwise, under the rules, exceptions to the testimony may be noted by the officer taking the deposition, but he is not permitted to decide upon them; and when the testimony as reduced to writing by the examiner, or the deposition, is filed in court, further exceptions may be there taken. Thus both the exceptions and the testimony objected to are all before the court below, and come here upon the appeal as part of the record and proceedings there. If we reverse the ruling of that court upon the exceptions, we may still proceed to the hearing, because we have in our possession and can consider the rejected testimony. But under the practice adopted in this case, if the exceptions sustained below are overruled here, we must remand the cause in order that the proof may be taken. That was done in *Conn. et al.* v. *Penn.*, *supra*, which was decided before the promulgation of the rules. One of the objects of the rule, in its present form, was to prevent the necessity for any such practice.

While, therefore, we do not say, that, even since the Revised Statutes, the circuit courts may not in their discretion, under the operation of the rules, permit the examination of witnesses orally in open court upon the hearing of cases in equity, we do say that now they are not by law required to do so; and that, if such practice is adopted in any case, the testimony presented in that form must be taken down or its substance stating in writing, and made part of the record, or it will be entirely disre-

garded here on an appeal. So, too, if testimony is objected to and ruled out, it must still be sent here with the record, subject to the objection, or the ruling will not be considered by us. A case will not be sent back to have the rejected testimony taken, even though we might, on examination, be of the opinion that the objection to it ought not to have been sustained. Ample provision having been made by the rules for taking the testimony and saving exceptions, parties, if they prefer to adopt some other mode of presenting their case, must be careful to see that it conforms in other respects to the established practice of the court.

The act of 1872 (17 Stat. 197, Rev. Stat., sect. 914) providing that the practice, pleadings, and forms and modes of proceeding, in civil causes in the circuit and district courts, shall conform, as near as may be, to the practice, &c., in the courts of the States, has no application to this case, because it is in equity, and equity and admiralty causes are in express terms excepted from the operation of that act.

We might, therefore, affirm the decree below, because there is no testimony before us in support of the defence; but, if we waive this question of practice, — which, on account of its importance, and the misapprehension that exists in respect to it in some of the circuits, we have thought it proper at some length to consider and determine, — and look to the merits of the case, we find no error.

The defence, as stated in the answer, amounts to nothing more than that Garlington, in the progress of the negotiations for the sale of the claim against Stuart to Blease, stated that the claim was worth $6,000, and undertook to obtain judgment upon it for Blease, and that Stuart died before a judgment was obtained, and his estate was so utterly insolvent that it would not pay any thing like $6,000 on the claim. There is no pretence that there was not at least $6,000 due from Stuart, or that Garlington had any better means of knowing his pecuniary condition than Blease had: on the contrary, it appears that Blease made the purchase because he was the friend of Stuart, and desired to put a stop to the proceeding on the part of Garlington to force him into bankruptcy, which seemed to be endangering his life in his then feeble state of health. Cer-

tainly, under such circumstances, it would have been easy for Blease to test the truth or falsehood of the statement made by Garlington; and, if he did not, it was his own fault. He had no right to rely upon the representations of Garlington. It was his duty to use reasonable diligence to inquire and ascertain for himself whether Garlington's estimate of the value of the claim was correct or not.

But again: from the answer itself, it is apparent that the statement relied upon was only an expression of opinion as to the value of the claim, and that Blease had no right to consider it as any thing else. The language is, that "this respondent was induced to purchase said claim at $6,000 by the assurance of the complainant that said claim was worth at least $6,000; and he made some calculations to show this, and said, as this claim was worth $6,000, it would not be right for him to take less than that sum, and that he would not do it." There seems to have been no dispute as to the amount. All depended upon the ability of Stuart to pay. Each of the parties had equal opportunity of judging as to that. Certainly there is nothing to show that Garlington had any advantage over Blease in this respect. Garlington was pressing Stuart into bankruptcy to coerce payment. This Blease desired to prevent, and for that purpose was willing to purchase the debt, and pay for it as much as it was worth. The parties were engaged in endeavoring to ascertain what this was, and the whole subject was equally open to both for examination and inquiry. Under such circumstances, neither party is presumed to trust the other, but to rely upon his own judgment. *Smith* v. *Richards*, 13 Pet. 37.

So, too, as to the alleged undertaking on the part of Garlington to obtain judgment on the claim. There is no allegation that he was not proceeding for that purpose, without unnecessary delay, up to the time of the death of Stuart, or that Blease, when Stuart did die, was not in as good condition, for all the purposes of collection, without a judgment, as he could have been with. We are clearly of the opinion, therefore, that the answer, if taken as true, did not present a valid defence; and, as the defendant could not make any defence by his proof different from that set out in his pleading, the court below very properly refused to hear any testimony in support of the answer.

This makes it unnecessary to consider the questions presented in the argument as to the competency of the proof offered.

Decree affirmed.

GAINES *v.* FUENTES ET AL.

1. In cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different States, it rests with Congress to determine at what time and upon what conditions the power may be invoked, — whether originally in the Federal court, or after suit brought in the State court; and, in the latter case, at what stage of the proceedings, — whether before issue or trial by removal to a Federal court, or after judgment upon appeal or writ of error.
2. As the Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended, Congress may provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal judiciary.
3. The act of Congress of March 2, 1867 (14 Stat. 558), in authorizing and requiring the removal to the Circuit Court of the United States of a suit pending or afterwards brought in *any* State court involving a controversy between a citizen of the State where the suit is brought and a citizen of another State, thereby invests the Circuit Court with jurisdiction to pass upon and determine the controversy when the removal is made, though that court could not have taken original cognizance of the case.
4. A suit to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate, is, in essential particulars, a suit in equity; and if by the law obtaining in a State, customary or statutory, such a suit can be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the Circuit Court of the United States, if the parties are citizens of different States.

ERROR to the Supreme Court of the State of Louisiana.

This is an action in form to annul an alleged will of Daniel Clark, the father of the plaintiff in error, dated on the 13th of July, 1813, and to recall the decree of the court by which it was probated. It was brought in the Second District Court for the Parish of Orleans, which, under the laws of Louisiana, is invested with jurisdiction over the estates of deceased persons, and of appointments necessary in the course of their administration.

The petition sets forth, that on the 18th of January, 1855, the plaintiff in error applied to that court for the probate of the alleged will; and that, by decree of the Supreme Court of

the State, the alleged will was recognized as the last will and testament of the said Daniel Clark, and was ordered to be recorded and executed as such; that this decree of probate was obtained *ex parte*, and by its terms authorized any person at any time, who might desire to do so, to contest the will and its probate in a direct action, or as a means of defence by way of answer or exception, whenever the will should be set up as a muniment of title; that the plaintiff in error subsequently commenced several suits against the petitioners in the Circuit Court of the United States to recover sundry tracts of land and properties of great value, situated in the parish of Orleans and elsewhere, in which they are interested, setting up the alleged will as probated as a muniment of title, and claiming under the same as instituted heir of the testator; and that the petitioners are unable to contest the validity of the alleged will so long as the decree of probate remains unrecalled. The petitioners then proceed to set forth the grounds upon which they ask for a revocation of the will and the recalling of the decree of probate; these being substantially the falsity and insufficiency of the testimony upon which the will was admitted to probate, and the *status* of the plaintiff in error, incapacitating her to inherit or take by last will from the decedent.

A citation having been issued upon the petition, and served upon the plaintiff in error, she applied in proper form, with a tender of the necessary bond, for removal of the cause to the Circuit Court of the United States for the District of Louisiana, under the twelfth section of the Judiciary Act of 1789, on the ground that she was a citizen of New York, and the petitioners were citizens of Louisiana. The court denied the application, for the alleged reason, that, as she had made herself a party to the proceedings in the court relative to the settlement of Clark's succession by appearing for the probate of the will, she could not now avoid the jurisdiction when the attempt was made to set aside and annul the order of probate which she had obtained. The court, however, went on to say, in its opinion, that the Federal court could not take jurisdiction of a controversy having for its object the annulment of a decree probating a will.

The plaintiff in error then applied for a removal of the action

under the act of March 2, 1867, on the ground, that, from prejudice and local influence, she would not be able to obtain justice in the State court, accompanying the application with the affidavit and bond required by the statute. This application was also denied, the court resting its decision on the alleged ground that the Federal tribunal could not take jurisdiction of the subject-matter of the controversy.

Other parties having intervened, the applications were renewed, and again denied. An answer was then filed by the plaintiff in error, denying generally the allegations of the petition except as to the probate of the will, and interposing a plea of prescription. Subsequently a further plea was filed, to the effect that the several matters alleged as to the *status* of the plaintiff in error had been the subject of judicial inquiry in the Federal courts, and been there adjudged in her favor. Upon the hearing a decree was entered, annulling the will, and revoking its probate. The Supreme Court of the State having affirmed this decree, this writ of error was sued out.

The act of March 2, 1867 (14 Stat. 558), is as follows: —

"That where a suit is now pending, or 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, and the matter in dispute exceeds the sum of $500 exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit stating that he has reason to and does believe that from prejudice or local influence he will not be able to obtain justice in such State court, may, at any time before 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 offer good and sufficient surety for his entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as, by the act to which this act is amendatory, are required to be done upon the removal of a suit into the United States Court: and it shall be thereupon the duty of the State court to accept the surety, and proceed no further in the suit; and, the said copies being entered as aforesaid in such court of the United States, the suit shall there proceed in the same manner as if it had been brought there by

original process; and all the provisions of the act to which this act is amendatory, respecting any bail, attachment, injunction, or other restraining process, and respecting any bond of indemnity or other obligation given upon the issuing or granting of any attachment, injunction, or other restraining process, shall apply with like force and effect in all respects to similar matters, process, or things in the suits for the removal of which this act provides."

Mr. Jeremiah S. Black and *Mr. George W. Paschal* for the plaintiff in error.

Two objections are made to the right of the plaintiff in error to remove this suit from the Second District Court of the Parish of Orleans to the Circuit Court of the United States. (1.) That said District Court has exclusive original jurisdiction of the subject-matter in controversy. (2.) That the Circuit Court of the United States has no original jurisdiction of a suit of this description; and it could, therefore, not be removed thereto.

The first objection is grounded upon a mistaken assumption. It is settled by repeated adjudications in Louisiana that such a suit might be brought in her courts of ordinary jurisdiction. *Reals* v. *McKnight*, 5 Mart. N. S. 9; *Cull* v. *Phillips*, 6 id. 304; *Palmer* v. *Palmer*, 1 L. R. 100; *Casanova* v. *Acosta*, id. 183; *Sharp* v. *Knox*, 2 id. 23, 25, 26; *Kemp* v. *Kemp*, 11 id. 22; *O'Donogan* v. *Knox*, id. 384; *Trahen's Heirs* v. *Arden's Heirs*, id. 393; *Clark* v. *Christine*, 12 id. 396. But, were it otherwise, State legislation could not limit the jurisdiction and remedies conferred upon the Federal tribunals by the constitution and statutes of the United States. *Cowles* v. *Mercer County*, 7 Wall. 118; *Payne* v. *Hook*, id. 425; *Railway Company* v. *Whitton*, 13 id. 270.

The answer to the second objection is as obvious as it is conclusive. This proceeding, by whatever name known in Louisiana, is, in its prominent characteristics, a suit in equity; and the relief thereby sought falls within a recognized head of equity jurisdiction. It might, therefore, have been brought in the Circuit Court; but, however this may be, the right to remove it there does not depend upon the question, whether its subject-matter is within the original jurisdiction of that court. No such condition or qualification is imposed by the act of 1872. *Any* suit

in a State court, in which there is a controversy between a citizen of the State where it is brought and a citizen of another State, if the matter in dispute exceeds the sum of $500, may be removed whenever the prescribed requirements as to the affidavit, petition, and bond, are fulfilled. This suit, therefore, was rightfully subject to removal under existing laws.

Mr. Thomas J. Durant and *Mr. James McConnell*, *contra.*

The second section of the third article of the United States Constitution declares that "the judicial power shall extend to . . . controversies between . . . citizens of different States."

The word "controversies" is here evidently used in the sense of "suits;" but does this mean all controversies?

If not, what are the exceptions?

To give jurisdiction, the Constitution and the acts of Congress which apportion the judicial power to the several courts of the United States must concur.

The eleventh section of the Judiciary Act of 28th September, 1789 (1 Stat. 78), says, —

"That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of a State where the suit is brought and a citizen of another State."

No suit can be removed to the national courts which might not by the Constitution of the United States have been originally commenced in one of these courts. Conkling's Treatise, 177; *Smith* v. *Rines*, 2 Sumn. C. C. 345; *Beardsley* v. *Torrey*, 4 Wash. C. C. 288. Congress never intended to authorize the defendant to remove any suit or proceeding before a State court, unless the Circuit Court of the United States had jurisdiction of the subject-matter of such suit, and had the power to do substantial justice between the parties. *Rogers* v. *Rogers*, 1 Paige, 183.

In order, therefore, that a suit may be transferred from a State to a National court, it must be of a civil nature, either at common law or in equity, between a citizen of the State where

the suit is brought and a citizen of another State, or against an alien; and the matter in dispute must exceed $500.

The expressions of the Judiciary Act refer to the systems of law prevailing in the country from which the Colonies mainly derived their jurisprudence; but in England there were several laws. Goold, J., in *Regina* v. *Paty et als.*, 2 Ld. Raym. 1106.

"*Lex terræ* is not confined to the common law, but takes in all the other laws which are in force in this realm, as the civil and canon law," &c. Id. 1108.

Probate proceedings were not matters either of common-law or equity cognizance, but appertained to the canon or ecclesiastical law.

"The executor must prove the will of the deceased, which is done either in common form, which is only upon his own oath before the ordinary or his surrogate, or *per testes*, in more solemn form of law, in case the validity of the will be disputed. When the will is proved, the original must be deposited in the registry of the ordinary." 2 Bl. Com. 508. "The prerogative court is established for the trial of all testamentary causes where the deceased has left *bona notabilia* in two different dioceses; in which case the probate of the wills belongs to the archbishop of the province, by way of special prerogative," &c. Id. 3, 65, 66.

It follows, therefore, that this proceeding is not a suit or controversy at common law or in equity, and hence not within the jurisdiction conferred upon the courts of the United States. This court has, in effect, so decided. Mr. Justice Davis, in delivering its opinion in *Gaines* v. *New Orleans*, 6 Wall. 642, uses this striking language: —

"The attempt to impeach the validity of this will shows the importance attached to it by the defence in determining the issue we are now considering. But the will cannot be attacked here. When a will is duly probated by a State court of competent jurisdiction, that probate is conclusive of the validity and contents of the will in this court.

"But why, if the will is invalid, has the probate of it rested for twelve years unrecalled, when express liberty was given by the Supreme Court of Louisiana for any one interested to contest it in a direct action with the complainant? If, with this clear indication of the proper course to be pursued, the probate of the will still

remains unrevoked, the reasonable conclusion is that the will itself could not be successfully attacked."

The defendants in error, being thus advised, brought this direct proceeding for revocation in the Probate Court. No other State court had jurisdiction. *McCombs* v. *Dunbar*, 1 La. 21; *Graham's Heirs* v. *Gibson*, 14 id. 150; *Aden* v. *Cabouret*, 1 La. Ann. 171. The right of removal cannot apply. Notwithstanding the decree admitting the will to probate authorized any person to contest the will and its probate as a means of defence by way of answer or exception, whenever it should be set up as a muniment of title, yet, when the case actually arose, the courts of the United States, for want of jurisdiction, denied the parties a hearing upon such a defence by way of answer, and declared that we must resort to a proceeding which could be only maintained in a State court of a peculiar and limited jurisdiction. When this opinion was given, the act of March 2, 1867, was in force, and it does not authorize the removal of any *suits* not provided for by former legislation. This court would not have declined to allow us to contest the validity of this pretended will in a Federal court, if jurisdiction over such a matter could have been subsequently acquired by removing under that act a case involving the identical questions. If the Federal courts have no original jurisdiction whatever in matters of probate, can it be exercised by them in a suit removed thereto from a State court merely on account of alleged local influence and prejudice? Such jurisdiction must be derived from express grant, and not from implication or inference. Before it can be wrested from the courts of probate, and be thus indirectly conferred upon the courts of the United States, the jurisprudence established by the following decisions of this and of other tribunals must be overthrown. *Case of Broderick's Will*, 21 Wall. 503; *Gaines* v. *New Orleans*, 6 id. 642; *Gaines* v. *Chew & Relf*, 2 How. 619; *Fonvergne* v. *City of New Orleans*, 18 id. 473; *Tarver* v. *Tarver*, 9 Pet. 179; *Adams* v. *Preston*, 22 How. 488; *Florentine* v. *Barton*, 2 Wall. 216; *Thompson* v. *Tolmin*, 2 Pet. 166; *Osgood* v. *Breed*, 12 Mass. 533; *Gelston* v. *Hoyt*, 3 Wheat. 316; *Tompkins* v. *Tompkins*, 1 Story, 552; *Armstrong* v. *Lear*, 12 Wheat. 175; *Laughton* v. *Atkins*, 1 Pick. 541; *Inhabitants of Dublin* v. *Chadbourne*, 16 Mass.

441; *Lalanne Heirs* v. *Moreau*, 13 La. 436; *Lewis's Heirs* v. *His Executors*, 5 id. 394; *Derbigny* v. *Pierce*, 18 id. 551; *Graham Heirs* v. *Gibson*, 14 id. 149; *Box* v. *Lawrence*, 14 Tex. 545; *Tibbatts* v. *Berry et al.*, 10 B. Mon. 490.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

In the view we take of the application of the plaintiff in error to remove the cause to the Federal court, no other question than the one raised upon that application is open for our consideration. If the application should have been granted, the subsequent proceedings were without validity; and no useful purpose would be subserved by an examination of the merits of the defence, upon the supposition that the State court rightfully retained its original jurisdiction.

The action is in form to annul the alleged will of 1813 of Daniel Clark, and to recall the decree by which it was probated; but as the petitioners are not heirs of Clark, nor legatees, nor next of kin, and do not ask to be substituted in place of the plaintiff in error, the action cannot be treated as properly instituted for the revocation of the probate, but must be treated as brought against the devisee by strangers to the estate to annul the will as a muniment of title, and to restrain the enforcement of the decree by which its validity was established, so far as it affects their property. It is, in fact, an action between parties; and the question for determination is, whether the Federal court can take jurisdiction of an action brought for the object mentioned between citizens of different States, upon its removal from a State court. The Constitution declares that the judicial power of the United States shall extend to "controversies between citizens of different States," as well as to cases arising under the Constitution, treaties, and laws of the United States; but the conditions upon which the power shall be exercised, except so far as the original or appellate character of the jurisdiction is designated in the Constitution, are matters of legislative direction. Some cases there are, it is true, in which, from their nature, the judicial power of the United States, when invoked, is exclusive of all State authority. Such are cases in which the United States are parties, — cases of

admiralty and maritime jurisdiction, and cases for the enforcement of rights of inventors and authors under the laws of Congress. *The Moses Taylor*, 4 Wall. 429; *Railway Co.* v. *Whitton*, 13 id. 288. But, in cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different States, it rests entirely with Congress to determine at what time the power may be invoked, and upon what conditions, — whether originally in the Federal court, or after suit brought in the State court; and, in the latter case, at what stage of the proceedings, — whether before issue or trial by removal to a Federal court, or after judgment upon appeal or writ of error. The Judiciary Act of 1789, in the distribution of jurisdiction to the Federal courts, proceeded upon this theory. It declared that the circuit courts should have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, involving a specified sum or value, where the suits were between citizens of the State in which they were brought and citizens of other States; and it provided that suits of that character by citizens of the State in which they were brought might be transferred, upon application of the defendants, made at the time of entering their appearance, if accompanied with sufficient security for subsequent proceedings in the Federal court. The validity of this legislation is not open to serious question, and the provisions adopted have been recognized and followed with scarcely an exception by the Federal and State courts since the establishment of the government. But the limitation of the original jurisdiction of the Federal court, and of the right of removal from a State court, to a class of cases between citizens of different States involving a designated amount, and brought by or against resident citizens of the State, was only a matter of legislative discretion. The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal judiciary.

As we have had occasion to observe in previous cases, the

provision of the Constitution, extending the judicial power of the United States to controversies between citizens of different States, had its existence in the impression that State attachments and State prejudices might affect injuriously the regular administration of justice in the State courts. It was originally supposed that adequate protection against such influences was secured by allowing to the plaintiff an election of courts before suit; and, when the suit was brought in a State court, a like election to the defendant afterwards. *Railway Co.* v. *Whitton*, 13 Wall. 289. But the experience of parties immediately after the late war, which powerfully excited the people of different States, and in many instances engendered bitter enmities, satisfied Congress that further legislation was required fully to protect litigants against influences of that character. It therefore provided, by the act of March 2, 1867 (14 Stat. 558), greater facilities for the removal of cases involving controversies between citizens of different States from a State court to a Federal court, when it appeared that such influences existed. That act declared, that where a suit was then pending, or should afterwards be brought in *any* State court, in which there was a controversy between a citizen of the State in which the suit was brought and a citizen of another State, and the matter in dispute exceeded the sum of $500, exclusive of costs, such citizen of another State, whether plaintiff or defendant, upon making and filing in the State court an affidavit that he had reason to believe, and did believe, that from prejudice or local influence he would not be able to obtain justice in the State court, might, at any time before final hearing or trial of the suit, obtain a removal of the case into the Circuit Court of the United States, upon petition for that purpose, and the production of sufficient security for subsequent proceedings in the Federal court. This act covered every possible case involving controversies between citizens of the State where the suit was brought and citizens of other States, if the matter in dispute, exclusive of costs, exceeded the sum of $500. It mattered not whether the suit was brought in a State court of limited or general jurisdiction. The only test was, did it involve a controversy between citizens of the State and citizens of other States? and did the matter in dispute exceed a specified

amount? And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of the litigation, and was presented by the pleadings for judicial determination.

With these provisions in force, we are clearly of opinion that the State court of Louisiana erred in refusing to transfer the case to the Circuit Court of the United States upon the application of the plaintiff in error. If the Federal court had, by no previous act, jurisdiction to pass upon and determine the controversy existing between the parties in the parish court of Orleans, it was invested with the necessary jurisdiction by this act itself so soon as the case was transferred. In authorizing and requiring the transfer of cases involving particular controversies from a State court to a Federal court, the statute thereby clothed the latter court with all the authority essential for the complete adjudication of the controversies, even though it should be admitted that that court could not have taken original cognizance of the cases. The language used in *Smith* v. *Rines*, cited from the 2d of Sumner's Reports, in support of the position that such cases are only liable to removal from the State to the Circuit Court as might have been brought before the Circuit Court by original process, applied only to the law as it then stood. No case could then be transferred from a State court to a Federal court, on account of the citizenship of the parties, which could not originally have been brought in the Circuit Court.

But the admission supposed is not required in this case. The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief, — to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony. There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if by the law obtaining in the State, customary or statutory, they can be maintained in a State court, whatever designation that court may bear, we think they may

be maintained by original process in a Federal court, where the parties are, on the one side, citizens of Louisiana, and, on the other, citizens of other States.

Nor is there any thing in the decisions of this court in the case of *Gaines* v. *New Orleans*, reported in the 6th of Wallace, or in the case of *Broderick's Will*, reported in the 21st of Wallace, which militates against these views. In *Gaines* v. *New Orleans*, this court only held that the probate could not be collaterally attacked; and that, until revoked, it was conclusive of the existence of the will and its contents. There is no intimation given that a direct action to annul the will and restrain a decree admitting it to probate might not be maintained in a Federal as well as in a State court, if jurisdiction of the parties was once rightfully obtained.

In the case of *Broderick's Will*, the doctrine is approved, which is established both in England and in this country, that by the general jurisdiction of courts of equity, independent of statutes, a bill will not lie to set aside a will or its probate; and, whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country, from the full jurisdiction over the subject of wills vested in the probate courts, and the revisory power over their adjudications in the appellate courts. But that such jurisdiction may be vested in the State courts of equity by statute is there recognized, and that, when so vested, the Federal courts, sitting in the States where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties.

There are, it is true, in several decisions of this court, expressions of opinion that the Federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties: indeed, in the majority of instances, no such controversy exists. In its initiation all persons are cited to appear, whether of the State where the will is offered, or of other States. From its nature, and from the want of parties, or the fact that all the world are parties,

the proceeding is not within the designation of cases at law or in equity between parties of different States, of which the Federal courts have concurrent jurisdiction with the State courts under the Judiciary Act; but whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.

But, as already observed, it is sufficient for the disposition of this case that the statute of 1867, in authorizing a transfer of the cause to the Federal court, does, in our judgment, by that fact, invest that court with all needed jurisdiction to adjudicate finally and settle the controversy involved.

It follows from the views thus expressed that the judgment of the Supreme Court of Louisiana must be reversed, with directions to reverse the judgment of the parish court of Orleans, and to direct a transfer of the cause from that court to the Circuit Court of the United States, pursuant to the application of the plaintiff in error. *Judgment reversed.*

MR. JUSTICE BRADLEY, with whom concurred MR. JUSTICE SWAYNE, dissenting.

The question, whether the proceeding in this case, which was instituted in the State Court of Probate, was removable thence into the Circuit Court of the United States, depends upon the true construction of the acts of Congress which give the right of removal. The first act on this subject was the twelfth section of the Judiciary Act of 1789, which declares "that if a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State" [and certain conditions and security specified in the act be performed and tendered], "it shall be the duty of the State court to . . . proceed no further in the cause, . . . which shall then proceed in the United States Court in the same manner as if it had been brought there by original process." This twelfth section cannot be entirely understood without reference to the preceding section, by which

the original jurisdiction of the Circuit Court was conferred. That section declares that the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State; . . . but that "no civil 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."

Now, the question arises, What proceedings are meant by the phrase "suits of a civil nature at common law or in equity," in the latter section, conferring original jurisdiction, and the phrase "a suit," in the former section, giving the right of removal? A "suit of a civil nature at common law or in equity" may, by virtue of the eleventh section, be brought in a circuit court if the parties are citizens of different States, and one of them is a citizen of the State where the suit is brought. "A suit" commenced in any State court by a citizen of that State against a citizen of another State may be removed into the Circuit Court; and, when removed, it is directed that "the cause shall then proceed in the same manner as if it had been brought there by original process." By this act, therefore, any "suit" which could have been originally brought in the Circuit Court may be removed there from the State court, if brought by a citizen of the State against a citizen of another State; and it was always supposed, that, if it could not be originally brought there, it could not be removed there, because it is to be proceeded in "as if it had been brought there by original process." Mr. Justice Story, in a case before him decided in 1836, in reference to this section used the following language: "It is apparent, from the language of the closing passage of the section above quoted, that it contemplates such cases, and such cases only, to be liable to removal, as might under the law, or at all events under the Constitution, have been brought before the Circuit Court by original process."

Judge Conkling, in his "Treatise on the United States Courts" (a work long used with approbation by the profession), says, "It is obvious, from the language of the twelfth section of the Judicial Act, that it was not intended by it to extend the jurisdiction of these courts over causes brought before them on removal beyond the limits prescribed to their original jurisdiction; and such, as far as it goes, is the judicial construction which has been given to this section." Congress, undoubtedly, might authorize, and in special cases has authorized, the removal of causes from State courts to the United States Court which could not have been originally brought in the latter. An instance of the kind is found in this very twelfth section, in a special case where a suit respecting the title to land has been commenced in a State court between two citizens of the same State, and one of the parties, before the trial, states to the court by affidavit that he claims title under a grant from another State. In *Bushnell* v. *Kennedy*, 9 Wall. 387, however, this court held, that a citizen of one State sued in another State by a citizen thereof on a claim which had belonged to a citizen of the latter State, and had been assigned to the plaintiff, might have the cause removed to the Circuit Court of the United States, although, perhaps, it might not have been originally cognizable therein; but it still remains to determine what kinds of controversies are intended by the act.

Now, the phrase, "suits at common law and in equity," in this section, and the corresponding term "suit," in the twelfth, are undoubtedly of very broad signification, and cannot be construed to embrace only ordinary actions at law and ordinary suits in equity, but must be construed to embrace all litigations between party and party which in the English system of jurisprudence, under the light of which the Judiciary Act, as well as the Constitution, was framed, were embraced in all the various forms of procedure carried on in the ordi nary law and equity courts, as distinguished from the ecclesiastical, admiralty, and military courts of the realm. The matters litigated in these extraordinary courts are not, by a fair construction of the Judiciary Act, embraced in the terms "suit at law or in equity," or "suit," unless they have become

incorporated with the general mass of municipal law, and subjected to the cognizance of the ordinary courts.

Now, it is perfectly plain that an application for the probate of a will is not such a subject as is fairly embraced in these terms. This court has in repeated instances expressly said that the probate of wills and the administration of estates do not belong to the jurisdiction of the Federal courts under the grant of jurisdiction contained in the Judiciary Act; and it may, without qualification, be stated, that no respectable authority, in the profession or on the bench, has ever contended for any such jurisdiction. Whether, after a will is proposed for probate, and a *caveat* has been put in against it, and a *contestatio litis* has thus been raised, and a controversy instituted *inter partes*, Congress might not authorize the removal of the cause for trial to a Federal court, where the parties *pro* and *con* are citizens of different States, is not now the question. The question before us is, whether Congress has ever done so; and it seems to me that it has not. The controversy is not of that sort or nature which belongs to the category of a suit at law or in equity, as those terms were used in the Judiciary Act.

It is not intended to say that the validity of a will may not often come in question, and require adjudication in both a court of law and a court of equity. It does come in question frequently. *Devisavit vel non* is an issue frequently made at law, and directed in equity; and there are special cases, also, where the validity of a will may be investigated in equity, as shown in the case of *Broderick's Will*, lately decided by this court. But that is a very different thing from hearing and determining a question of probate, even when the question becomes a litigated one. This question belongs to special courts, having a special mode of procedure, and is subject to rules that took their origin in the ecclesiastical laws; and it certainly cannot be seriously contended, that, if the Federal courts have no jurisdiction of the probate of wills, they nevertheless have jurisdiction of proceedings to revoke the probate. This would be to assume the whole jurisdiction of the subject.

The proceeding in the case below was one to revoke the probate of a will; simply that, and nothing more. It was not merely to set aside the will so far as it affected the defendants

in error. Not at all. It brought up the question of probate under a form of proceeding peculiar to the course of justice in Louisiana, called an action of nullity. This action may undoubtedly be entertained in the Federal courts in that State; at all events, to set aside their own judgments. But can it be entertained when the object is to revoke the probate of a will by a decree to annul the judgment of probate? That is the precise question to be determined here.

It is contended, however, that the act of March 2, 1867, which gives the right of removal to the Federal court of a suit in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, where the latter makes affidavit that he has reason to and does believe, that, from prejudice or local influence, he will not be able to obtain justice in the State court, extends the jurisdiction of the Circuit Court to cases of every kind of controversy which may be litigated between parties. But I cannot perceive any such intention in the act. There is no indication that the jurisdiction of the Federal court was meant to be extended to any class of cases to which it did not extend before. It authorizes the removal at any time before trial, and gives the right to the plaintiff as well as the defendant. These are the only changes that seem to have been in the mind of Congress.

If it is desirable that the right of removal should be extended to cases like the present, it is easy for Congress to legislate to that effect. Until it does so, the right in my judgment does not exist. Perhaps it is desirable that the law should be as the plaintiff in error contends it is; but it is not for the court to make the law, but to declare what law has been made. I cannot free myself from the conviction, that the decision of the court in this case is based rather upon what it is deemed the law should be than upon a sound construction of the statutes which have been actually enacted.

In my opinion, the judgment of the Supreme Court of Louisiana ought to be affirmed.

MR. CHIEF JUSTICE WAITE also dissented from the judgment of the court.

HALL v. UNITED STATES. — UNITED STATES v. ROACH.

Prior to the abolition of slavery in Mississippi, a contract there made between a slave and his master neither imposed obligations nor conferred rights upon either party.

APPEALS from the Court of Claims.

The facts are stated in the opinion of the court.

Mr. C. F. Peck, for the appellant Hall, cited *Williamson* v. *Daniel*, 12 Wheat. 568; *Menard* v. *Aspasia*, 5 Pet. 513; *McCutchen* v. *Marshall*, 8 id. 220; *Fowler* v. *Merrill*, 11 How. 375; 1 Pars. on Contr. 329; *Butler* v. *Craig*, 2 H. & McH. 216, 236; *Rawlings* v. *Boston*, 3 id. 139; *Hudgins* v. *Wright*, 1 Hen. & Munf. 134; *Pallas et al.* v. *Hill et al.*, 2 id. 149; *Gregory* v. *Bough*, 2 Leigh, 686; *Leiper* v. *Hoffman et al.*, 26 Miss. 623; *Pepoon* v. *Clarke*, 1 Const. Ct. Rep. (S. C.) 137; *Matilda* v. *Crenshaw*, 4 Yerg. 299; *Herod et al.* v. *Davis*, 43 Miss. 102; *Morgan* v. *Nelson*, 43 Ala. 587.

Mr. Assistant Attorney-General Edwin B. Smith for the United States.

Mr. T. H. N. McPherson for the appellee Roach.

Hall, being a slave, was not entitled to political or civil rights while subject to his condition of servitude. *Amy* v. *Smith*, 1 Litt. 326; *Lenoir* v. *Sylvester*, 1 Bail. (S. C.) 633; *Catche* v. *The Circuit Court*, 1 Miss. 608; *Vincent* v. *Duncan*, 2 id. 214; *Hall* v. *Mullin*, 5 Har. & J. (Md.) 190; *The State* v. *Hart*, 4 Ired. (N. C.) 256; *Gist* v. *Coby*, 2 Rich. (S. C.) 244; *Jenkins* v. *Brown*, 6 Humph. (Tenn.) 299. His acquisitions belonged to his master. 5 Cow. (N. Y.) 397; 2 Hill, Ch. (S. C.) 397; 1 Bail. (S. C.) 633; 2 Rich. (S. C.) 424; 6 Humph. (Tenn.) 299; 2 Ala. 320; 5 B. Monr. (Ky.) 186.

He had not the ability to contract or be contracted with (*Hall* v. *Mullin*, 5 Har. & J. 190; *Gregg* v. *Thompson*, 2 Const. Ct. Rep. (S. C.) 331; *Jenkins* v. *Brown*, 6 Humph. 299, 5 Cow. 397; *Emerson* v. *Howland et al.*, 1 Mas. 45; *Bland and Others* v. *Dowling*, 9 Gill & J. 27), and could, therefore, make no binding contract with his master. 11 B. Monr. 239; 9 Gill & J. 19; 3 Bos. & P. 69; 8 Mart. 161.

MR. JUSTICE SWAYNE delivered the opinion of the court.

Hall filed his petition in the Court of Claims.

By leave of the court, Benjamin Roach filed a petition of interpleader. Subsequently Roach died, and his executrix was made a party. Both parties are pursuing the proceeds of the same cotton. The cotton was raised, ginned, and baled on Roach's plantation, known as Bachelor's Bend, in the State of Mississippi. About the 17th of April, 1863, it was seized by Lieutenant Barlow of the United States army, and subsequently converted into money, and the proceeds paid into the treasury of the United States. About these facts there is no controversy. It is admitted that the cotton belonged originally to Roach. It is clear, therefore, that the claim on behalf of his estate must prevail, unless Hall, the adverse claimant, has shown a better title. Hence it is unnecessary to remark further in regard to the title asserted by the executrix. The United States have no interest in the controversy. The government is merely a fund-holder for the benefit of the one of the two other parties who shall succeed in this litigation. The controversy turns upon the claim of Hall, and our remarks will be confined to that subject.

In considering the case in this aspect, we must look to the findings of the court, and we cannot look beyond them. The court says, "The evidence is not only voluminous, but exceedingly conflicting, and much of it wholly irreconcilable."

The findings as to this part of the case are as follows: —

Hall is a man of color, of Indian and African descent, and claims to have been free born. His mother was of Indian extraction, residing at the time of his birth in the city of Alexandria as a free woman.

"8. Hall, with other slaves, was taken from a slave-market in Washington, D. C., by one Thomas Williams, to New Orleans, La.; and there he, with other slaves, was sold by a trader to the claimant Roach's father, who sent him up to the Bachelor's Bend plantation, in Mississippi. Hall was sent to the plantation in 1844, and remained there as the slave of Roach's father until the latter's death in 1847, and after that as the slave of the claimant Roach, who succeeded to the estate of his father, and remained there until after the cotton in question was seized in 1863. He was treated all the

time as a slave, fed and clothed by his master, and worked with the other slaves, sometimes as a field-hand, and at others as a stock-minder.

"9. On the contrary, Hall now claims to have been a free man while living with claimant Roach, and that, as such, Roach was justly indebted to him on account of stock, hogs, pork, &c., which he had raised on Roach's plantation, and sold and delivered to him, and that the cotton now in suit was given him by Roach in discharge of his indebtedness.

"10. Hall, under this claim of title, followed the cotton, after its seizure, to the river, and made affidavit that he was the lawful owner thereof. Roach's overseer, McDowell, hearing of Hall's claim to the cotton, immediately contested his right to it before the officers of the United States having it in charge; and Hall afterward admitted to McDowell, the overseer, that the cotton was not his, and that his oath, in which he asserted a claim thereto, was false.

"Afterward, however, Hall continued to prosecute his efforts to obtain the release of the cotton, and finally brought suit to recover the proceeds in this court.

"I. On the foregoing facts, the court holds as conclusions of law, that, under the laws of the State of Mississippi, the claimant Hall, in his condition of servitude, could not lawfully contract with his master, or hold the property he claims to have given in consideration of the cotton, and that no title to it was ever vested in Hall."

It is one of the findings of fact that Hall admitted that he had no title to the cotton, and that he had perjured himself in swearing that he had such title; and the finding is without explanation or qualification. This would seem, under the circumstances, to have rendered it unnecessary further to consider the case. But the court placed its judgment upon the conclusion of law, that Hall, being a slave, could not contract. There is no finding of facts as to the making of the alleged contract. Perhaps the reason was, that, conceding the facts to be as claimed by Hall, still the court was of opinion that his having been then a slave was fatal to his claim. If such were the law, the facts were immaterial; for, whatever they were, they could not avail him. As the record stands, this is the controlling point in the case. We have examined the subject with care, and think the court came to the proper conclusion.

In order to see the proposition in its true light, it is necessary, as it were, to roll back the tide of time, and to imagine ourselves in the presence of the circumstances by which the parties were surrounded when and where the contract is said to have been made. Slavery then existed in Mississippi, and her laws upon the subject were as they had been for years. Hall was brought to the State, and there sold, bought, held, and treated as a slave. He belonged ostensibly for years to the father of Roach, the claimant; and, upon the death of the father, the son succeeded to the father's rights. Hall held the same relations to the latter which he had held to the former. In this respect there was no change. His color was presumptive proof of bondage. The law of the State provided a way in which he could establish his freedom. He could assert his claim in no other way. The remedy was exclusive. Until he had vindicated his right to freedom in the mode prescribed, the law regarded him as a slave; and it would not allow the question to be collaterally raised in his behalf by himself, or any one else in any other proceeding. Rev. Code of Miss. of 1857, c. 33, sect. 3, arts. 10, 11, pp. 236, 237; *Thornton* v. *Demoss*, 5 Sm. & Mar. 618; *Randall* v. *The State*, 4 id. 349; *Peters* v. *Van Sear*, 4 Gill, 249; *Queen* v. *Neale*, 3 H. & J. 158; *Peters* v. *Hargrave*, 5 Gratt. 14.

It was an inflexible rule of the law of African slavery, wherever it existed, that the slave was incapable of entering into any contract, not excepting the contract of marriage. Stephens on West Ind. Slav., 58; *Hall* v. *Mullin*, 5 Har. & J. 190; *Gregg* v. *Thompson*, 2 Const. Ct. Rep. (S. C.) 331; *Jenkins* v. *Brown*, 6 Humph. 299; *Jackson* v. *Lewey*, 5 Cow. 397; *Emerson* v. *Howland*, 1 Mas. 45; *Bland* v. *Dowling*, 9 Gill & J. 27.

This regulation was harsher than that which obtained in regard to the Roman bondman, the Saxon villein, Russian serf, and the German and Polish slave. Cobb on Slav., sect. 266.

In the light of these authorities, it is clear that if Hall did contract with Roach, as he alleges he did, the contract was an utter nullity. In the view of the law, it created no obligation, and conferred no rights as to either of the parties. It was as if it were not. This case must be determined as if slavery had not been abolished in Mississippi, and the laws referred to were

still in force there. The destruction of the institution can have no effect upon the prior rights here in question.

In *Osborn* v. *Nicholson et al.*, 13 Wall. 654, this court held, upon the fullest consideration, that, where a note sued upon was given for the purchase-money of slaves subsequently emancipated by the national government, the plaintiff was entitled to recover.

The Court of Claims adjudged correctly in deciding against Hall upon the ground we have considered, and also in deciding in favor of the executrix of Roach. *Judgments affirmed.*

THE "CITY OF WASHINGTON."

Sailing rules and regulations prescribed by law furnish the paramount rule of decision, whenever they are applicable; but where, in any case, a disputed question of navigation arises, in regard to which neither they, nor the rules of this court regulating the practice in admiralty, have made provision, evidence of experts as to a general usage regulating the matter is admissible.

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

Mr. James W. Gerard for the appellants.

Mr. Henry J. Scudder for the appellees.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Usages, called sea laws, having the effect of obligatory regulations, to prevent collisions between ships engaged in navigation, existed long before there was any legislation upon the subject, either in this country or in the country from which our judicial system was largely borrowed.

Plenary jurisdiction was conferred upon the courts in such controversies; and the judicial reports show, beyond peradventure, that the courts, both common-law and admiralty, were constantly in the habit of referring to the established usages of the sea as furnishing the rule of decision to determine whether any fault of navigation was committed in the particular case; and, if so, which of the parties, if either, was responsible for the consequences.

Examples of the kind are quite too numerous for citation, and they are amply sufficient to prove that the usages of the sea, antecedent to the enactment of sailing rules, constituted the principal source from which the rules of decision, in such controversies, were drawn by the courts of admiralty and all the best writers upon the subject of admiralty law. Maclachlan on Ship., 2d ed., 280; Williams & Bruce's Prac., pp. 4, 15.

Sailing rules and other regulations have since been enacted; and it is everywhere admitted that such rules and regulations, in cases where they apply, furnish the paramount rule of decision; but it is well known that questions often arise in such litigations, outside of the scope and operation of the legislative enactments. Safe guides, in such cases, are often found in the decisions of the courts, or in the views of standard text-writers: but it is competent for the court, in such a case, to admit evidence of usage; and, if it be proved that the matter is regulated by a general usage, such evidence may furnish a safe guide as the proper rule of decision.

Compensatory damages are claimed by the libellants for the value of the schooner "John D. Jones," employed as a pilot-boat, which it appears was sunk and became a total loss in a collision that occurred on the 28th of March, 1871, between the schooner and the steamship "City of Washington," the latter being on her return voyage from Europe to the port of New York. Just prior to the collision, it appears that the schooner was lying-to, some two hundred miles off Sandy Hook, with her helm lashed on her starboard tack, and with her jib-sheet to the windward. While lying in that condition, the wind being north-west by north, a light was reported bearing from the schooner south by east, off the port quarter of the schooner. It appears that the schooner was a pilot-boat, with foresail, mainsail, and jib; and that her sails, except the jib-sheet, were closely reefed, as she was waiting for employment as a pilot-boat. Seeing the light, the first act of those in charge of her navigation was to give sail, put up her helm, and let her fall off; and in the mean time they showed her flash-light, that the approaching vessel might know that the schooner was a pilot-boat waiting for employment.

Such lights are shown, under such circumstances, to disclose

the special character of the vessel; and the evidence shows that the approaching vessel immediately displayed a blue light, which is the proper signal to show to a pilot-boat to signify that the light of the pilot-boat is seen, and that her services as such are wanted. Such a signal shows that the flash-light is seen, that the character of the boat displaying the same is known, and that the vessel displaying the blue light is coming up to secure a pilot.

When the master of the schooner first discerned the blue light of the approaching vessel, the schooner bore from the blue light, about west by north, as near as those in charge of the schooner could judge. Enough appears to warrant the conclusion that the schooner kept her course to the southward and westward, and that those in charge of her very soon discovered the signal-lights of the approaching vessel. Beyond doubt, they first made the green light; but it appears, that, shortly after that, they made all three of the approaching signal-lights, and became convinced that it was a steamship heading directly towards the schooner for the purpose of securing the assistance of a pilot. Pursuant to that obvious purpose, the steamship continued to keep that course until she got within about a quarter of a mile of the schooner, when she ported her helm, the effect of which was to close her green light, and to show her red light and masthead-light, indicating that the steamship would cross the stern of the schooner.

Considerable change must have been made in the course of the steamship, as the master of the schooner testifies that he could even see the glimmerings of the side-lights of the windows on the side of the vessel, showing that she was crossing the stern of the schooner. Throughout this period the evidence shows that those in charge of the schooner continued to show the flash-light to indicate their position and the course of the schooner.

Both parties concede that the wind was north-west by north; and it follows that the change in the course of the steamship, effected by porting her helm, was to constitute the starboard side of the vessel her lee side, which is the side where a pilot properly goes on board. With that object in view the schooner continued her course, constantly showing the flash-light, until

the two vessels were within five or six lengths of each other, when the schooner launched her yawl, manned by a pilot and two seamen, whose destination was to the lee side of the steamship. It appears that the yawl carried a light, and that she headed for the light hung over the lee side of the steamship to indicate the place where the pilot might ascend the stairs and go on board the approaching steamship.

All agree, it is presumed, that the preparations to send the pilot on board were judicious and proper, except that the owners of the steamship insist that the schooner was not in a proper position when those in charge of her launched the yawl and despatched the pilot, as requested by the customary signal from the steamship. Signals of the kind, it is admitted, were given; and the master of the schooner testifies that the schooner, at the time she launched the yawl, was crossing the bows of the steamship, and that the steamship, before the yawl reached her destination, starboarded her helm, and changed her course, so that she headed directly towards the schooner.

Nothing could have been more injudicious, as the two vessels were then close together; and it appears that the steamship was still under considerable headway, and that she struck the schooner on her port side just abaft the mainmast, cutting five or six feet into the hull of the vessel. Convincing proof is also exhibited that the steamship approached the schooner at an obtuse angle towards the stem; that her bowsprit hit the mainmast of the schooner, and broke it into three pieces; that the concussion of the two vessels careened the schooner over, so that the water flowed down the weather-hatches; and that the master was knocked overboard by the falling spar. Immediate assistance was furnished, and he was rescued from danger but the schooner sank in less than fifteen minutes.

Service was made, and the owners of the steamship appeared and filed an answer. Testimony was taken; and the District Court, having first heard the parties, entered a decree in favor of the libellants for the value of the schooner. No question being made as to the amount awarded, it is not necessary to refer to the proceedings before the master. Appeal was taken by the respondents to the Circuit Court, where the parties were again heard; and the Circuit Court affirmed the decree of

the District Court. Still dissatisfied, the respondents removed the case into this court for re-examination.

Sufficient appears, in the statement of facts exhibited in the preliminary summary of the evidence, to show that the steamship was proceeding westward to her port of destination, and that the schooner, though lying-to when the light of the steamship first became visible, was, in fact, on a cruise in pursuit of employment as a pilot-boat. Pilot-boats, it should be remarked, are required to carry a masthead-light; and the evidence shows that the schooner did not display any such light, as prescribed by the rules of navigation. 13 Stat. 59.

Flash-lights were constantly exhibited by the schooner; and it is fully proved that the steamship showed, in reply, a blue light, to signify that the flash-light was seen, and that a pilot was wanted. These signals having been exchanged, the steamship altered her course to north-west by north, which was a proper manœuvre to meet the schooner; and it appears that the schooner bore away to the southward and westward for the reciprocal purpose of meeting the steamship, to comply with her request for a pilot.

Apparently, each understood the purpose and intent of the other; nor are any remarks necessary to show that the course adopted by the respective vessels, if pursued for any considerable distance, would cross each other as the vessels advanced; and the proofs show, that, when they had approached within a quarter of a mile of each other, the steamship ported her helm sufficiently to make her starboard side her lee side, and that those in charge of her navigation showed a light over her lee side to guide the pilot as to the place where he should board the steamship. Pursuant to that signal, the schooner, as she was crossing the bow of the steamship, launched the yawl, as before explained, and despatched the pilot for the steamship.

Complete success attended the launching of the yawl; and it appears that the pilot, aided by two seamen, rowed the yawl directly for the light suspended over the lee side of the steamship. Equipped as the yawl was with a good light, it was the duty of those in charge of the steamship's navigation to make the necessary preparations to receive the pilot on board: but, before he had time to reach the point of destination in the

yawl, the steamship starboarded her helm; and, failing to stop, she advanced and struck the schooner in the manner antecedently described, injuring her to such an extent that she sank, and became a total loss.

Two faults are charged against the steamship: (1.) That she starboarded her helm, which is admitted; and of course it requires no argument to establish the charge. (2.) That she did not stop, so as to give the schooner the opportunity to send a pilot on board, without being run down while endeavoring to perform that duty.

Argument to show that the faults imputed to the steamship, if proved, were culpable faults, is hardly necessary, as it is clear that each tended, beyond all doubt, to promote the collision. Discussion as to the first charge is unnecessary, as it is admitted; and the evidence to prove the other is too decisive to require comment, when considered in connection with the effects produced by the concussion.

Suppose that is so: still it is insisted by the respondents that the schooner was also in fault; and they make two charges against the schooner, which are the only questions that remain to be considered. They are as follows: (1.) That the schooner did not show any masthead-light. (2.) That she was guilty of negligence in attempting to cross the bows of the steamship.

Masthead-lights should be displayed by pilot-boats in such a case; and it follows that such an omission of duty casts upon the schooner the burden of proving that the omission in that regard did not occasion or contribute to the collision. *The Farragut*, 10 Wall. 338; *The Miranda*, 6 McLean, 221; *Bulloch* v. *Lamar*, 8 Law Rep. 275; *The Louisiana*, 6 Am. Law Reg. 422; 1 Pars. on Ship. 577, 595; *Waring* v. *Clark*, 5 How. 465; *The Vanderbilt*, 16 Conn. 420.

Lights of the kind are required as one of many precautions which prudent navigators are expected to provide; but it would be unreasonable to hold that the owners of a pilot-vessel should be adjudged liable for the consequences of a collision by reason of not having a masthead-light, where it appeared, beyond all doubt, that she constantly showed flash-lights, which were seasonably seen by the other vessel, and that the absence of the

masthead-light had nothing to do with the collision. *The Panther*, Spink's Adm. 31; *Morrison* v. *Nav. Co.*, 8 Exch. 733.

Sailing pilot-boats are required to carry the masthead-light, besides displaying the flare-up light, in order that they may be seen by approaching vessels, and that the approaching vessel may not be misled in respect to the character of the vessel showing such a light. *The Trident*, Spink's Adm. 223; *The Telegraph*, id. 431.

Clear proof is exhibited that the schooner did not carry the required masthead-light; but it is equally clear that she was seasonably seen by the steamship, and that those in charge of the navigation of the steamship were not misled, even for a moment, as to the character of the schooner. *The Livingstone*, Swabey, 520. Instead of that, the evidence is full to the point that they immediately replied to the signal of the flash-light by showing the blue light, and in due season showed the lee side of the ship, and lowered a light over the rail on that side as a signal to the pilot to approach the ship at that point, in order to come on board.

Proof more satisfactory than what is given in this case cannot be required to show that the absence of the masthead-light did not contribute in any degree to the collision. Such an omission to comply with the rules of navigation, where it clearly appears that it had nothing to do with the disaster, is not sufficient to exonerate the culpable party from any portion of the damages.

Grant all that, and still it is contended by the respondents that the schooner was guilty of negligence in attempting to cross the bows of the steamship. What they insist is, that the schooner, inasmuch as she was on her starboard tack when the steamship approached, should have put her helm up, and gone round on the lee side of the steamship. Difficulty might have attended that manœuvre, as the purpose was to despatch the yawl with the pilot on board to the lee side of the approaching vessel; and, if the schooner had followed the yawl on the same side of the steamship, she might have become unmanageable, as in a calm; or, if the wind continued to fill her sails, she might have run down the yawl, or have prevented the yawl from reaching her precise point of destination.

Opposed to that suggestion, it is maintained by the libel-

lants that the manœuvre of the schooner was in all respects correct, and the most judicious which could have been adopted. Gross fault, it is clear, was committed, either by the steamship or by the schooner. If the manœuvre of the schooner was correct, then it is clear that the steamship ought to have stopped, and backed, if necessary, to prevent her from making headway, to enable the schooner to despatch the pilot in safety and without danger to the steamship.

Reasonable doubt upon that subject, it would seem, cannot be entertained by any one having much nautical experience; and it would seem to follow, if the steamship might, under the circumstances, continue to make headway, that it was bad seamanship for the schooner to attempt to cross her bows, as the attempt, under such circumstances, would expose her in every case to the danger of collision.

Neither party controverts these propositions; but the libellants contend that it was a gross error on the part of the steamship to starboard her helm at that moment, and that it was her duty to have stopped, and backed if necessary, so as to have given the schooner a safe opportunity to despatch the pilot to the steamship, without danger of being run down by the forward movement of the steamship. Apart from that, they also insist that it was proper and customary that the schooner, after she had despatched the pilot, should cross the bows of the steamship and proceed to her windward side, in order to pick up the yawl, under the stern of the steamship, as she moved forward from where she stopped to receive the pilot.

Support to that theory is also attempted to be drawn from the danger, if a different course should be pursued, that the yawl and the schooner would become separated in the darkness, to the great peril of the seamen sent in the yawl to assist in despatching the pilot. Extreme difficulty attends the solution of the question, as nothing is found in the sailing rules enacted by Congress to assist in determining which theory is correct. Questions of the kind, if presented in the admiralty court of England, would doubtless be submitted, in the first instance, to the Trinity Masters for their consideration and advice; and it cannot be doubted that much aid would be derived, in such an investigation, from the experience and nau-

tical knowledge of such a board of judicial assistants: but the acts of Congress, regulating the practice and proceedings of the district courts sitting in admiralty, have not made any provision for any such board of assistants, to sit with the district judges, in the adjudication of such controversies. Nor do the rules regulating the practice of the admiralty courts, as framed by this court, make any such provision. Parties litigant, however, are allowed in such controversies to call and examine persons of nautical skill and experience as expert witnesses; and they may, if they can, prove by them what the general usage is in respect to any disputed question of navigation not controlled by the sailing rules prescribed by Congress; and in certain cases, where better guides are not furnished by law, they may inquire of such witnesses what is and what is not good seamanship in a supposed state of the case, if the supposed state of the case is within the general scope and range of the evidence submitted for the consideration of the court. Nor is such a course of investigation without its advantages, even as compared with the foreign system, as it secures to the parties the right of cross-examination, which is always a right of great value, and more especially so where the witness is allowed to give his opinion to influence the judgment of the court in determining the merits of the controversy.

Valuable aid, also, is sometimes obtained, in such an investigation, by referring the cause to a special master, or masters, of nautical experience, with power to examine witnesses, and to report the facts to the court. Such a proceeding, though not specifically authorized by law or the rules prescribed by this court, cannot be considered irregular, as the power of final decision is still in the tribunal to which the report is made.

Expert witnesses were examined in the case. They testified to the effect that the pilot-boat, in such cases, approaches directly ahead of the steamship; that the steamship makes either side of her the lee side, as under the circumstances is most convenient; that the steamship indicates the place on the lee side where the pilot may come on board by suspending a bright light over the lee side at the proper place, down near the water; that the steamship then stops, to enable the small boat to approach the side of the steamship, and to allow the pilot to

ascend the stairs without danger. When asked why it was that the pilot-boat went ahead of the steamship, the witnesses answered that it was because they could see both sides of the ship, and that they might conveniently pick up the yawl on the lee quarter of the steamship.

Among others, the pilot who was despatched to the steamship was examined. He testified that it was customary to get directly ahead of the steamship before dropping the yawl; that it is pretty difficult to overtake the steamship unless she stops still; and that there would not have been any collision if the steamship had stopped, as she should have done. Mosly, another pilot, testifies, that, when they first see the steamship, the pilot-boat shows a flash-light, and that the steamship, in reply, shows a blue light or rocket; that the pilot-boat advances nearly ahead of the steamship; and, if the white light is shown over the lee side of the steamship, the pilot-boat drops a small boat, with a pilot on board, and that those manning it pull for the steamship, heading for the white light suspended over the lee side, which should be down near the water; and they all concur that the steamship, after showing the light over her lee side, should remain without headway; and some of them add, that, if she changes her position, it is at her own risk.

They all agree, except the master of the steamship, that the manœuvres of the schooner were correct; but he insists that the schooner should have put up her helm, dropped the yawl, and run down under the lee of the steamship. His testimony supports the theory of the respondents; but the great weight of the evidence is the other way.

Both of the courts below decided against the respondents; and the court here is of the opinion, that the usage, as proved in the case, warrants the conclusion that the course pursued by the schooner, under the circumstances, was correct.

Viewed in the light of these suggestions, the court here concurs with the Circuit Court, that it is impossible to say that the collision was in any degree due to the want of a masthead-light on the schooner, or to negligence on the part of those in charge of her navigation: on the contrary, it is clear that the steamship is guilty of both charges preferred against her by the

libellants. She improperly starboarded her helm after the yawl was launched, and she continued to advance; whereas she should have stopped and backed, if it was necessary to back, to prevent any forward movement. *Decree affirmed.*

ROBERTS ET AL., TRUSTEES, *v.* UNITED STATES.

Contractors for the transportation of the mails between New York and New Orleans, touching at Havana, and between Havana and Chagres, having subsequently established a direct line between New York and Chagres, which made the passage between the latter points in a shorter time, by two days, than the mail-ships running under the contract by way of Havana, consented to take the Chagres and California mails outward and homeward by the direct steamers, without requiring from the Post-Office Department a prior stipulation to pay for the extra service, but without precluding themselves from applying to Congress for such compensation as it might deem just and reasonable. To this arrangement the Postmaster-General assented, with the understanding that his department did not thereby become responsible for any additional expense. Application was made to Congress for equitable relief, and an act passed referring the claim to the Court of Claims, with directions to examine the same, and determine and adjudge what, if any, amount was due for extra service. *Held*, that the Court of Claims is authorized to adjudge such an allowance as is required *ex æquo et bono* by all the circumstances of the case.

APPEAL from the Court of Claims.

Submitted on printed arguments by *Mr. Thomas Wilson* for the appellant, and by *Mr. Solicitor-General Phillips* for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Immediately after the conquest of California, the government of the United States, through its various departments, made arrangements for the transportation of the mails between that territory and the Atlantic ports by way of Panama. By an act of Congress, passed March 3, 1847, it was, amongst other things, enacted as follows: —

"SECT. 4. *And be it further enacted*, That, from and immediately after the passage of this act, it shall be the duty of the Secretary of the Navy to contract, on the part of the government of the United States, with A. G. Sloo, of Cincinnati, for the transportation of the United States mail from New York to New Orleans

twice a month and back, touching at Charleston (if practicable), Savannah, and Havana; and from Havana to Chagres and back, twice a month. The said mail to be transported in at least five steamships of not less than fifteen hundred tons burden, and propelled by engines of not less than one thousand horse-power each, to be constructed under the superintendence and direction of a naval constructor in the employ of the Navy Department, and to be so constructed as to render them convertible, at the least possible expense, into war-steamers of the first class; and that the said steamships shall be commanded by officers of the United States navy not below the grade of lieutenant, who shall be selected by the contractor, with the approval and consent of the Secretary of the Navy, and who shall be suitably accommodated without charge to the government. Each of said steamers shall receive on board four passed midshipmen of the United States navy, who shall serve as watch-officers, and be suitably accommodated without charge to the government; and each of the said steamers shall also receive on board and accommodate, without charge to the government, one agent, to be appointed by the Postmaster-General, who shall have charge of the mails to be transported in said steamers. *Provided* the Secretary of the Navy may, at his discretion, permit a steamer of not less than six hundred tons burden, and engines in proportion, to be employed in the mail-service herein provided for between Havana and Chagres; *provided further*, that the compensation for said service shall not exceed the sum of $290,000, and that good and sufficient security be required for the faithful fulfilment of the stipulations of the contract."

In pursuance of this act, on the 20th of April, 1847, a contract was made by the Navy Department with Sloo, whereby he agreed to build five naval steamships, capable of being converted to the purposes of naval warfare, of which four were to be not less than fifteen hundred tons burden, and one to be not less than six hundred. The four larger ones were to carry the mails between New York and New Orleans, touching at Charleston, Savannah, and Havana, twice a month and back; and the smaller one was to be run from Havana to Chagres and back twice a month, carrying the mails for the Pacific. The compensation was to be $290,000 per annum, and the period of service was to be ten years. The contract, amongst other things, contained the following provision: —

"And it is further agreed by and between the parties aforesaid, that on tender of compensation by the said government of the United States, not exceeding a due proportion of the pay herein stipulated, the said A. G. Sloo, contractor, shall convey any mail or mails of the said United States which he may be required to convey on any steamship which he, the said Sloo, may own, run, or control on the routes aforesaid beyond the number of trips herein specified."

At that time the mail-service between New York and New Orleans was evidently regarded as the more important; that between Havana and Chagres being provided for by a branch line served by a single small vessel twice a month. But after the discovery of gold in California, and the rush thither of emigration and trade, the aspect of things was greatly changed. The assignees of Sloo (now represented by the appellants) purchased additional ships, and established a direct line between New York and Chagres, which made the passage two days sooner than was done by the mail-ships running under the contract by way of Havana, and which, therefore, could start two days later, and, on the return, arrive two days sooner. By this means the private despatches by the direct line had an advantage over communication by the mails, and some public dissatisfaction arose in consequence. Thereupon a correspondence on the subject ensued between the contractors and the Post-Office Department. The postmaster of New York having, by direction of the Postmaster-General, laid before George Law, president of the United States Mail Steamship Company (at that time beneficially interested in Sloo's contract), a letter complaining of the existing arrangement, Mr. Law, on the 25th June, 1851, wrote to the postmaster a letter, in which, amongst other things, he said, —

"The mails for California, *viâ* Chagres, and back, are despatched by the mail-steamships of this company twice each month, on the days originally arranged with the department. Being required to go and return by way of Havana, and to receive and discharge there the mails from and for New Orleans, Charleston, &c., the passage is usually two days longer than the direct passage to and from Chagres and this port.

"In addition to the mail-steamers, we despatch also, twice a

month, a steamer from this port and Chagres direct. These leave here usually two days later than the mail-steamers *viâ* Havana, so as to make the arrival at Chagres at about the same time. Of course, the return steamer, with the mail from Chagres, is usually two days later in arriving here, coming *viâ* Havana, than the steamer starting at the same time and coming direct. The mail to and from Chagres will, therefore, be carried with greater despatch by the direct line; while the mails for New Orleans, Charleston, &c., must necessarily be carried by the Havana route. If the department desires the Chagres and California mails, outward or homeward, to be sent by the direct steamers, I shall be happy to direct the commanders of the ships to receive them on board."

This letter was communicated to the Postmaster-General, who, in answer, declared it satisfactory, but intimated his understanding that the proposed arrangement should make "no difference in respect to the expense of the service." This intimation was met by a reply from Mr. Law correcting any such understanding. After explaining what the mail company proposed to do, — namely, to run their steamers twice a month each way directly between New York and Chagres, twice between New York and New Orleans, touching at Havana, and twice between New Orleans and Chagres, — he said, —

"In expressing in my letter of the 25th ultimo the readiness of this company to instruct the commanders of their steamers, direct as well as by the way of Havana, to convey the California mails, if desired by the department, it was not my intention to preclude a claim for reasonable additional compensation for such service. Although we desire to meet fully the requirements of the service and the wishes of the department, it is not expected, I presume, that the mails can be carried outward and homeward six times per month, with the necessary additional clerks or agents, for the same sum for which we contract to carry them twice monthly. Still desirous of promoting to the utmost the interest and convenience of the public, we are entirely willing to perform the additional service, in the confident expectation that a sense of justice will induce Congress to make such further provision as may be considered a suitable compensation for it."

After the receipt of this letter, the Postmaster-General, on the 7th of August, 1851, in answer to a letter of the postmaster of New York asking whether he should send the mails

by the steamers going direct to Chagres, wrote as follows: "In answer to your letter of the 7th instant, I have to say that you will make up and forward mails by Mr. Law's direct steamers to Chagres; with this understanding, however, that *this department* does not thereby become responsible for any additional expense." On the 9th of August, 1851, Marshall O. Roberts, on behalf of the contractors, informed the postmaster at New York, by letter, that the mails for Chagres, both direct and *viâ* Havana, would be carried by the United States Mail Steamship Company upon the terms and in the manner theretofore stated to the Post-Office Department; viz., compensation for any extra or additional mail-service to be submitted to Congress without requiring a prior stipulation to pay from the department. This letter being transmitted to the Postmaster-General, with a request for directions as to sending the mails by the direct steamers, he returned a despatch giving directions to send them.

Upon the footing of this correspondence, the extra service by the direct steamers was commenced on the 13th of August, 1851.

A temporary suspension of the trips having occurred from some cause, further correspondence on the subject took place in 1852, in which the Secretary of the Navy, as well as the Postmaster-General, participated. But the general result was, that the matter was left substantially in the same position as before; namely, that, while the departments declined to make themselves responsible for any compensation for the extra service, the contractors were to be left free to apply to Congress for such allowance as it might deem just and reasonable. The contractors never gave up a claim for an allowance; but they consented to perform the service in reliance upon the justice of Congress, and with the distinct understanding that they should not prefer any claim against the departments. It is unnecessary to reproduce all the correspondence that ensued. Its general purport and effect are as stated. Mr. Law, in a letter to the Postmaster-General dated 15th of June, 1852, referred to his previous letter of July 21, 1851, quoting the passage relating to compensation, in which he said, "We are entirely willing to perform the additional service, in the confident expectation that a sense of justice will induce Congress

to make such further provision as may be considered a suitable compensation for it;" and, to avoid any misunderstanding which might arise from expressions contained in the Postmaster-General's communication, he adds, —

"While it has not been the intention of this company to hold either of the departments liable, directly or indirectly, for any additional mail-service beyond the conditions of the contract, but to perform it subject entirely to the decision of Congress, I desire respectfully to say that I do not feel authorized to place the company in a position that would preclude it from applying for or accepting such additional allowance *as in the judgment of Congress might be considered equitable.*"

Upon this understanding, the service in question continued to be performed until September, 1859; and no compensation therefor has ever yet been allowed by Congress, although application has persistently been made.

From the tenor of this correspondence, it is clear that the proprietors of the Sloo contract did not rely upon that clause in it (which has been referred to) providing extra compensation for conveying mails, when required by the government, on any steamship which might be run on the routes named in the contract, beyond the number of trips therein specified. Had they relied on this clause, they would not have relinquished their claim against the department, and consented to look to Congress. Indeed, the service performed by the steamers running on the direct route between New York and Chagres, or Aspinwall, was not embraced in the terms of that provision. The route was not the same, but a different one. The question, therefore, is, whether, doing the service they did, upon the footing on which they did it, and supposing it not to be embraced within the letter of the contract, the contractors are entitled in law or equity to compensation for that service. The service performed directly under the contract, and within its terms, has all been settled for, and the accounts closed. This is specifically found by the Court of Claims. But the question of this extra service has never been settled, but is still open and undetermined. Application, as before stated, was persistently made to Congress for an equitable allowance; but, for some reason or other, the subject was always postponed or

delayed, until finally, on the 14th of July, 1870, Congress passed an act entitled "An Act for the relief of the trustees of Albert G. Sloo," the tenor of which is as follows: —

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of the trustees of Albert G. Sloo, for compensation for services in carrying the United States mails by steamers direct between New York and Chagres, and New Orleans and Chagres, in addition to the regular service required under the contract made between the said Albert G. Sloo and the United States, be, and the same is hereby, referred to the Court of Claims; and the said court is hereby directed to examine the same, and determine and adjudge whether any, and, if any, what amount is due said trustees for said extra service; provided that the amount to be awarded by said court shall be upon the basis of the value of carrying other first-class freight of like quantity with the mails actually carried between the same ports at the same time."

In the mean time, several years prior to the passage of this act (to wit, in 1866), as soon as the disturbances incident to the civil war had been allayed, the appellants had presented their claim before the Court of Claims. But they were met by embarrassments arising from the peculiar form which their stipulations with the government had assumed. They had agreed to submit to the arbitrament of Congress, and Congress had never acted in their case. Under these circumstances, the act referred to was passed. The claimants thereupon filed an amended petition, setting up the act.

The counsel for the government contend, that, whilst this act might be used to support proceedings commenced after its passage, it cannot aid proceedings already commenced. We think, that under the peculiar circumstances of this case, its well-known history, and its frequent consideration by Congress itself, the act was intended to validate the application to the Court of Claims then in progress, and to refer the whole matter to that court. It enacts that the claim be, and it hereby is, referred to the Court of Claims; and that the said court is hereby directed to examine the same, and determine and adjudge, &c. The words of that act are apposite to validate the proceedings already commenced; and, as those proceedings

had in view the very object sought by the act, it would be a strain of technicality to turn the claimants out of court, and to compel them to commence anew.

In view, then, of the circumstances and history of this case, the correspondence between the parties, and the act of Congress referred to, what are the rights of the appellants?

If this were a controversy between private parties, we do not think that there could be a particle of doubt that the contractor would be entitled to demand compensation upon a *quantum meruit* for the performance of the service in question. Circumstances arose after the performance of the contract had commenced, which neither of the parties had anticipated or dreamed of, requiring an increase in the amount of service, and a change in the manner of performing it, which could not be brought under the literal provisions of the contract. But it was of the greatest consequence that the service should be performed; and the contractors, under the exigencies of the case, were willing to depart from the literal stipulations of the instrument, and do the necessary work, relying upon Congress to provide suitable compensation. As before said, if this were a controversy between individuals, there could not be the slightest hesitation on the subject. It would present a clear case of departure from the terms of a contract by the mutual consent of the parties, and the performance of extras by the contractor, for which he would be entitled to the reasonable value of the work performed. The service was performed on one side; it was accepted and received on the other; and, whilst the agents of the government declined to incur any specific responsibilities, they agreed that the question of compensation should be settled between the contractors and their principal.

This is, in short, the whole case; and whilst, as a general thing, it may be true that government ought not to be bound unless prescribed rules and forms are complied with, yet where a necessary public service has been performed at the request of the proper government agents and under the expectation of compensation, and with reliance upon Congress to fix the amount, and where Congress, upon application made to it, has referred the matter to the Court of Claims, we think that that court is authorized to make and adjudge such an allowance as

is required, *ex æquo et bono*, by all the circumstances of the case.

It is true that Congress did not determine, in express terms, that the parties were entitled to any compensation, but referred it to the court to decide "whether any, and, if any, what amount is due." Still we think it is plain that Congress principally intended to refer to the adjudication of the Court of Claims the amount of compensation to which the claimants were entitled, and for that purpose prescribed the principle by which it should be estimated; but even if it was intended to refer the whole subject, the right to compensation, as well as the amount, the claimants, under the circumstances of the case, are, in our judgment, entitled to compensation.

The decree is reversed, and the record remanded, with directions to proceed according to law, and award compensation to the claimants upon the principles directed by the act of 1870.

MR. JUSTICE SWAYNE, with whom concurred MR. JUSTICE DAVIS and MR. JUSTICE STRONG, dissenting.

I dissent from the judgment of the court in this case. In my opinion, it makes a contract where the parties made none.

FARNSWORTH ET AL., TRUSTEES, *v.* MINNESOTA AND PACIFIC RAILROAD COMPANY ET AL.

1. On the 3d of March, 1857 (11 Stat. 195), Congress passed an act granting certain lands to the Territory of Minnesota, for the purpose of aiding in the construction of several lines of railroad between different points in the Territory. The act declared that the lands should be exclusively applied to the construction of that road on account of which they were granted, and to no other purpose whatever; and that they should be disposed of by the Territory or future State only as the work progressed, and only in the manner following: that is to say, a quantity of land, not exceeding one hundred and twenty sections for each of the roads, and included within a continuous length of twenty miles of the road, might be sold; and when the governor of the Territory or the future State should certify to the Secretary of the Interior that any continuous twenty miles of any of the roads were completed, then another like quantity of the land granted might be sold; and so, from time to time, until the roads were completed. *Held*, that the

construction of portions of the road on account of which lands were granted, as thus designated, was a condition precedent to a conveyance by the Territory or future State of any of the lands beyond the first one hundred and twenty sections. Accordingly, an act of the Territory, transferring to a railroad company these lands in advance of any work on its road, only conveyed title to the first one hundred and twenty sections.

2. Where a grant of land and connected franchises is made to a corporation for the construction of a railroad by a statute, which provides for their forfeiture upon failure to perform the work within a prescribed time, the forfeiture may be declared by legislative act without judicial proceedings to ascertain and determine the failure of the grantee. Any public assertion by legislative act of the ownership of the State after the default of the grantee — such as an act resuming control of the road and franchises, and appropriating them to particular uses, or granting them to another corporation to perform the work — is equally effective and operative.

APPEAL from the Circuit Court of the United States for the District of Minnesota.

On the 3d of March, 1857 (11 Stat. 195), Congress passed an act granting certain lands to the Territory of Minnesota, for the purpose of aiding in the construction of several lines of railroad between different points in the Territory. These lands were to consist of the alternate sections, designated by odd numbers, for six sections in width, on each side of the several lines of road, and were to be selected within fifteen miles therefrom. The act declared that the lands should be exclusively applied to the construction of that road on account of which they were granted, and to no other purpose whatever; and that they should be disposed of by the Territory or future State only as the work progressed, and only in the manner following: that is to say, a quantity of land, not exceeding one hundred and twenty sections for each of the roads, and included within a continuous length of twenty miles of the road, might be sold; and when the governor of the Territory or the future State should certify to the Secretary of the Interior that any continuous twenty miles of any of the roads were completed, then another like quantity of the land granted might be sold; and so, from time to time, until the roads were completed; and that, if any of the roads were not completed within ten years, no further sales should be made, and the lands unsold should revert to the United States.

On the 19th of May of the same year the Territory accepted the grant thus made upon the terms, conditions, and re-

strictions contained in the act of Congress, and, on the 22d of the month, passed an act for the execution of the trust. By that act it authorized four different companies to construct the roads in aid of which the congressional grant was made, each company a distinct road. Three of these companies were at the time in existence: one of them, the Minnesota and Pacific Railroad Company, was created by the act. This latter company was authorized to construct the road from Stillwater, by way of St. Paul and St. Anthony, to the town of Breckenridge, on the Sioux Wood River, with a branch from St. Anthony to St. Vincent, near the mouth of the Pembina River; and, for the purpose of aiding in its construction, the act granted to the company the interest and estate present and prospective of the Territory and of the future State in the lands granted by Congress along the line of the road, subject, however, to the proviso that the title of the lands should vest in the company, as follows: Of the first one hundred and twenty sections, whenever twenty or more continuous miles of the road should be located, and the governor should certify the same to the Secretary of the Interior; and afterwards of a like number of sections, whenever and as often as twenty continuous miles of the road should be completed so as to admit of running regular trains, and the governor should certify the fact to the Secretary.

By the same act, the company was authorized to borrow money and to execute its bonds and mortgages and other obligations for the same, or for any liabilities incurred in the construction, repair, equipment, or operating of the line, upon any part of its railroad or branches, and upon the estate granted by the act, and upon any or all of its other property.

The company organized under the act, and accepted the grant made by its provisions upon the terms and conditions mentioned, and, during the year, had the greater part of the line of its road surveyed and located, and maps of the same filed with the governor of the Territory and the commissioner of the General Land-Office at Washington. The location was approved by the Secretary of the Interior; and, by his directions, the lands granted along the line were withdrawn from sale and settlement. A contract, as alleged, was also made with a responsible party for the construction of the main line

of the road; but work under it was only prosecuted for a month, when it was abandoned. No portion of the road was completed; and the failure of the company in this respect was ascribed to the general embarrassed financial condition of the country, in consequence of which it was unable to raise the necessary funds to proceed with the work.

The Territory of Minnesota became a State in October, 1857, though not admitted into the Union until May, 1858. Its constitution prohibited the loan of the State credit in aid of any corporation; but the first legislature assembled under it, being desirous of expediting the construction of the lines of the road in aid of which the congressional grant was made, proposed, in March, 1858, an amendment to the constitution, removing this prohibition so far as the four companies named in the act of May 22, 1857, were concerned. The amendment was submitted to the people, and, on the 15th of April of the same year, was adopted. This amendment provided that the governor should cause to be issued and delivered to each of the four companies special bonds of the State to the amount of $1,250,000, in instalments of $100,000, as often as any ten miles of its road was ready for placing the superstructure thereon, and an additional instalment of the same amount as often as that number of miles of the road was fully completed and the cars were running thereon, until the whole amount authorized was issued. The bonds were to be denominated Minnesota State Railroad Bonds; were to draw interest at the rate of seven per cent per annum, payable semi-annually in the city of New York; were to be transferable by indorsement of the president of the company, and redeemable at any time after ten and before the expiration of twenty-five years from their date; and for the payment of the interest and the redemption of the principal the faith and credit of the State were pledged. The amendment at the same time with this pledge declared that each company should make provision for the redemption of the bonds received by it, and payment of the interest accruing thereon, so as to exonerate the treasury of the State from any advances of money for that purpose; and, as security therefor, required the governor, before any bonds were issued, to take from each company an instrument pledging the net profits of

its road for the payment of the interest, and a conveyance to the State of the first two hundred and forty sections of land, free from prior incumbrances, which the company was or might be authorized to sell, to protect the treasurer against loss on the bonds; and also required, as further security, that an amount of first-mortgage bonds on the roads, lands, and franchises of the company, corresponding in amount to the State bonds issued to it, should be transferred to the treasurer of the State with the issue of the State bonds. The amendment declared, that, in case either company made default in the payment of the interest or principal of the bonds issued to it, no more State bonds should be thereafter issued to that company, and that the governor should proceed to sell, in such manner as might be prescribed by law, its bonds, or the lands held in trust, or require a foreclosure of the mortgage executed to secure the bonds. The amendment further provided, that, in consideration of the loan, each company which accepted the bonds should, as a condition thereof, complete not less than fifty miles of its road on or before the expiration of the year 1861, and not less than one hundred miles before the year 1864, and four-fifths of the entire length of its road before the year 1866; and that any failure on the part of the company to complete the number of miles of its road in the manner and within the several times thus prescribed should forfeit to the State all the rights, title, and interest of any kind whatsoever in and to any lands granted by the act of May 22, 1857, together with the franchises connected with the same, not pertaining or applicable to the portion of the road by it constructed, and a fee-simple to which had not accrued to the company by reason of such construction.

The Minnesota and Pacific Railroad Company, after the proclamation of the governor of its adoption, accepted the amendment, and gave notice to the governor of its acceptance, and that it proposed to avail itself of the loan which the amendment provided.

On the 31st of July, 1858, the company executed to certain trustees named therein a deed of all that portion of its lines of road in aid of which the lands had been granted, and of the lands and alienable franchises connected therewith, in

trust for the holders present and prospective of twenty-three millions of bonds to be issued under certain restrictions. Nine hundred of these bonds were subsequently issued as therein provided, and some of them were put in circulation. The present suit is brought by the surviving trustees to obtain a decree that this deed is a valid and subsisting lien prior to all other liens and incumbrances upon all the lands, property, and franchises described therein, and to enforce the same.

Subsequently, during that year, the company graded thirty miles of its road, and made it ready for the superstructure, and thereupon executed the pledge of net profits, and the conveyance of two hundred and forty sections as provided by the constitutional amendment. But, in place of first-mortgage bonds secured by a separate deed of trust, the company offered $300,000 of its bonds secured by the trust-deed mentioned of July 31, 1858, and applied for State bonds of an equal amount. The governor refused to issue the State bonds until a deed of trust was executed specifying a priority of lien of the bonds which the company might deliver to the State. This refusal led to a great deal of controversy and some litigation with the governor; but ultimately, on the 27th of November, 1858, a supplemental deed of trust was executed by the company, authorizing and directing, in case of default in the payment of the interest or principal of its bonds delivered to the State, a foreclosure and sale by the trustees upon the demand of the governor, and, in case of their failure or refusal upon his demand, authorizing the governor to make such foreclosure and sale. The governor then issued to the company bonds of the State to the amount of $300,000. Subsequently, during that and the following year (1859), thirty-two and one-half miles more of the road were graded and ready for its superstructure, and $300,000 more of bonds of the State were issued to the company, and a corresponding amount of the first-mortgage bonds of the company were delivered to the treasurer. The interest on the State bonds was payable on the first days of June and December, and the interest on the company's bonds was payable on the first days of February and August, of each year.

The company made default in the payment of interest on

the State bonds delivered to it, falling due in December, 1859; and the governor demanded of the trustees, in the deed of July 31, 1858, that they should proceed to foreclose the same, and sell the trust-property. With this demand the trustees never complied.

The company also made default in the payment of interest upon its own bonds delivered to the State, due on the 1st of February, 1860. The legislature accordingly, in March following, passed an act making it the duty of the governor to foreclose the deed of trust, if in his opinion the public interest required it, and, upon a sale of the property, rights, and franchises covered by the deed, to bid in the same for the State.

The legislature at about the same time proposed an amendment of the constitution of the State prohibiting any law, which levied a tax or made other provisions for the payment of interest or principal of the State bonds issued to the company, from taking effect until the same had been submitted to a vote of the people and been adopted; and also prohibiting any further issue of bonds to the company under the amendment of April 15, 1858, and abrogating that amendment with a reservation to the State of all rights, remedies, and forfeitures accruing thereunder. This amendment was adopted in November, 1860. Whilst it was pending before the people, the governor proceeded under the act of the legislature, and had the property covered by the trust-deed of the company, with the connected franchises, advertised and sold, the same being purchased on behalf of the State. The sale took place on the 23d of June, 1860.

In March, 1861, the legislature passed an act, by which the road, lands, rights, and franchises possessed by the company previous to the sale, and all bonds and securities of the company held by the State, were upon certain conditions "released, discharged, and restored" to the company, free from all liens or claims of the State. These conditions required the construction and equipment of certain portions of the road within designated periods. One of the conditions provided that the company should construct and put in operation, and fully equip for business, that portion of the main line extending from St. Paul to St. Anthony, on or before the first day of the following January, in default of which all the rights

and benefits conferred upon the company by virtue of the act should be "forfeited to the State absolutely, and without further act or ceremony whatever;" and, in case the company should fail to construct the other and further portions of the road and branches within the time or times designated, it should forfeit to the State, in like manner, all the lands, property, and franchises pertaining to the unbuilt portions of the road and branch; and in either case, or in any forfeiture under the provisions of the act, the State should hold and be possessed of all the lands, property, and franchises forfeited, "without merger or extinguishment, to be used, granted, or disposed of, for the purpose of aiding and facilitating the construction of said road and branch."

This act the company accepted with all its conditions; but it never completed the portion of the road there designated to be put into operation before the first of the following January, or any portion of its road, as there provided, or as provided in the constitutional amendment of 1858; and on the 10th of March, 1862, the legislature, acting upon the forfeiture accruing, or supposed to be accruing, from the failure of the company in this respect, passed an act creating the St. Paul and Pacific Railroad Company, and granted to it all the rights, benefits, privileges, property, franchises, and interests of the Minnesota and Pacific Railroad Company acquired by the State by virtue of any act or agreement of the company, or any thing done or suffered by it, or by virtue of any law of the State or Territory, or of the constitution of the State, or from the sale made by the governor, and also all the rights, privileges, franchises, lands, and property granted to the company by the act of May 22, 1857. The new company, and a division company subsequently created out of it, have since constructed the main line of the road and a portion of the branches, and, to enable them to do so, have made various deeds of trust and mortgages upon the assumption that the rights of the old Minnesota and Pacific Railroad Company had ceased. These deeds of trust and mortgages amount to many millions of dollars, and are outstanding. These companies and the holders of their bonds, of course, resist the enforcement of the deed of trust in suit. The questions for determination relate, *first*, to the validity of this

deed at the time it was executed, or rather to the right of the company to include therein and bind all the lands granted by the act of the Territory of May 22, 1857; and, *second*, to the effect of the act of March 10, 1862, upon the title of the property and connected franchises embraced in the deed of trust.

Mr. Henry F. Masterson for the appellant.

The court below erred in holding, that, under the act of Congress, the legislature could not authorize the trust-deed, in advance of the construction of the road, so as to give a lien on all the lands, as against the State and her subsequent grantees "who actually built the road and earned the land," with notice of said deed.

As the lands were granted "to aid in the construction of the road," they could not effectually be so used except as a basis of credit and security. All previous grants for similar purposes, covering a period of over thirty years, had been made available and used in this way. *Trustees of Wabash & Erie Canal Co.* v. *Beers*, 2 Black, 448. Congress must, therefore, have intended such use.

The act of March 3, 1871 (16 Stat. 588), is a construction by Congress of the act making the grant, and shows that it was understood as authorizing the incumbering of the lands in advance of the construction of the road. A like legislative construction will be found in the act of March 3, 1873. 17 id. 634.

If, therefore, by the true construction of the act of March 3, 1857 (11 Stat. 195), it was lawful to mortgage, or to convey in trust, the lands, in order to raise money with which to construct the road, it then follows that such an instrument is an effectual and valid security for such money, whether the road was wholly completed with it or not; otherwise a subsequent lender and junior mortgagee would not only have the first lien, but the whole security. *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459; *United States* v. *New Orleans Railroad*, 12 id. 362; *Dunham* v. *Railroad Company*, 1 id. 254. The true construction, however, of the act of Congress, in this regard, is immaterial. The United States does not complain, and no other party can. *Baker* v. *Gee*, 1 Wall. 333–337; 2 Bl. Com. 155; 4 Kent, 127; *Nicoll* v. *N. Y. & Erie Railroad Co.*, 2 Kern. 121–140; *Lamb* v. *Davenport*, 18 Wall. 307.

If the lenders took the risk of losing their security by reason of a forfeiture or a reversion to the United States, they assumed no such risk toward the State. Such title as she might acquire by forfeiture would be subject to the lien, (2 Bl. Com. 267; 4 id. 381–384; 4 Kent, 427); and the twenty-first section of the act incorporating the Minnesota and Pacific Railroad Company especially estopped her from claiming adversely to the trust any of the fund. A contract at once arose between the lenders and the State that she would not withdraw any of the fund, or impair their security. *Curran* v. *Arkansas*, 15 How. 304; *Hawthorn* v. *Calef*, 2 Wall. 10; *Von Hoffman* v. *City of Quincy*, 4 id. 535; *Woodruff* v. *Trapnal*, 10 How. 190; *Barings* v. *Dabney*, 19 Wall. 9; *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518.

The State having, by the sixteenth section of the charter, granted all her expectant or prospective interest in the land, she and her subsequent grantees are estopped from denying her title or that of her original grantee. If these sections have no other force and effect, they operate as a lawful and sufficient power to create the lien; and the State is equally bound as if the trust had been made by one of her executive officers acting under like legislative authority.

The court erred in holding that the State of Minnesota, or any one but the United States, could take advantage of the breach of conditions of the congressional grant, or be heard to object that said trust-deed was not authorized by the act. The United States was the grantor. Conditions can only be reserved for the benefit of the grantor and his heirs: these conditions will be held to have been waived, unless re-entry or its equivalent is made. 2 Bl. Com. 155; 4 Kent, 127; *Baker* v. *Gee*, 1 Wall. 333; *Smith* v. *Sheeley*, 12 id. 358; *Lamb* v. *Davenport*, 18 id. 307; *Nicoll* v. *N. Y. & E. R.R. Co.*, 2 Kern. 121–140.

The estoppel which precluded the State from denying the validity of the trust-deed extended to her subsequent grantees, because they not only took with notice, but paid nothing for the franchises, road-bed, and property acquired before the passage of the act of 1862.

The court was in error in holding, in effect, that the legislature could not authorize such trust-deed in advance of the

construction of the road and the acquisition of other property than that derived through the United States, so as to be a lien upon the road when constructed, and upon said other property when acquired.

It is settled law, that a railroad mortgage like that in question, although made before the construction of the road, attaches itself thereto as the work thereon is built, and to all subsequently acquired property of the company. *Galveston Railroad* v. *Cowdrey*, and *Dunham* v. *Railway Company*, *supra*.

The court was also in error in holding that there was or could be any forfeiture under or by force of the constitutional amendment in any way when taken in connection with the facts stated in the bill, and in holding, that, in any event, title could be acquired by such forfeiture without judicial process and judgment.

The constitutional amendment is not a deed or a legislative grant. Its conditions are, therefore, not conditions in deed. It created no estate whatever in any thing embraced by the trust-deed, as the condition of forfeiture is not attached to and does not accompany the grant upon which it is to operate, and cannot be taken advantage of by re-entry or legislative act. Litt., sect. 325; 2 Bl. Com. 154; 4 Kent, 123. Nor is it a condition in law in the sense that it is *implied* (Litt., sect. 378; 2 Bl. Com. 153; 4 Kent, 120; *Davis* v. *Gray*, 16 Wall. 223), or one which the State may in its own right annex to any or all property which a person has or may acquire, whether from her or another source; *ex. gr.*, a condition of forfeiture for crime or negligence. 2 Bl. Com. 267, 420; 4 Kent, 426. Even if it were a condition in law, in this sense, the forfeiture would not avoid the incumbrance. 2 Bl. Com. 421; 4 id. 381, 387; 4 Kent, 427.

The amendment was a contract of lending. The thing loaned was the credit of the State. The security was a pledge of the net profits of the road, a conveyance in trust of the first two hundred and forty sections of land under the congressional grant, and a portion of the first-mortgage bonds of the company to be issued under sect. 21 of its charter. The provision, that, in consideration of the loan, the company should construct its roads within a specified time, was intended as a penal pro-

vision *in terrorem*, and not for the purpose of further security and indemnity against loss on account of the loan, but as security for an *extra* diligent user of the franchises, and indemnity for a *non-extra* diligent use.

The forfeiture being for a non-extra diligent use, and no special remedy or mode of taking advantage of it provided, the State was left to the common-law remedy of judicial process and judgment. It could be enforced in no other way. *Davis* v. *Gray*, 16 Wall. 232; *Curran* v. *Arkansas*, *supra*; *Mumma* v. *Potomac Co.*, 8 Pet. 281.

Conceding that this provision for forfeiture was of the nature of a condition in deed, and could be taken advantage of without judicial action, it still remains true that the State lost the right to it, and barred even the judicial remedy, by her own illegal acts, and first and continued breach of the contract which created the condition.

The act of March 8, 1861, with its acceptance by the company, was a mutual rescission, and an agreed abandonment of all prior contracts, engagements, and obligations; a waiver and release of all previous defaults and forfeitures, if any there were; and a new contract in the premises, taking the place of the constitutional amendment.

The court erred in holding that the act of March 10, 1862, was intended as an enforcement or taking advantage of the condition of forfeiture in the constitutional amendment, because the State wished and intended to take under the act of 1861 "without merger or extinguishment."

This act of 1862 cannot stand as an equivalent for re-entry for a breach of condition in a deed, because the constitutional amendment was not such an instrument. It is not competent for the legislature, by its own act, to seize property for a breach of conditions which are imposed by a statute. While a legislative declaration may be equivalent to re-entry, a re-entry will not avoid a grant from strangers; nor an estate from the grantor, except it be conveyed by his deed containing the condition.

The only ground upon which the act of 1862 can be upheld is, that it was taking advantage of the forfeiture provided in the act of 1861, which took effect of itself, upon the happening

of the event. This forfeiture, it is conceded, would not affect the rights of bondholders secured by the prior deed of 1858.

The court erred in holding that the act of March 10, 1862, created a new corporation; and that the St. Paul and Pacific Company is not the same corporate entity as the Minnesota and Pacific Company, and so liable for its debts. The State, by the act of March, 1861, evidently intended, if she should take by forfeiture at all, to take under the provisions of that act. A change in the succession of corporators does not change the corporation in its existence or liabilities, no matter how such change is brought about; and because the St. Paul and Pacific Railroad Company and its successors have succeeded to and hold the franchise to be a corporation, created by the charter of May 22, 1857, they are in law the same being; the same invisible, incorporeal, personal entity; and so liable for its debts. 2 Kent Com., Lect. 33; 2 Bl. Com. c. 18; id. c. 3, p. 37. Story, J., in *Trustees of Dartmouth College* v. *Woodward*, *supra*.

Two things should be presumed by this court: first, that the legislature did not intend a violation of the provision of the Constitution which prohibited the formation of corporations of this character by special act (Const. of Minn., art. 10, sect. 2); second, that it intended that the grantees of said act of 1862, and their successors, perpetually, should have and enjoy all the rights and franchises conferred on the stockholders of the Minnesota and Pacific Company by the act of 1857. These premises necessitate the conclusion, that the grantees and their successors of the act of 1862 stand in the shoes of the corporators of the act of 1857.

If this is not the logical, legal conclusion from the premises, where and how do the stockholders and their successors of the St. Paul and Pacific Railroad Company get their corporate entity?

The State authorized the trust in question, and took the property charged with it. If the supplement and foreclosure were valid as between the State and the company, the lien of other bondholders was unaffected thereby, that is, all that the State did or could acquire were the rights and interests of the mortgagor, the company; because she paid nothing, but took

or attempted to take the whole trust-fund for the interest due upon her own bonds, without payment, or provision for payment, or *pro rata* payment, of the interest due to other bondholders. "It would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment." *Gue* v. *Tide-Water Canal Co.*, 24 How. 263.

Mr. H. R. Bigelow and *Mr. William H. Scott* for the appellees.

No part of the lands embraced by the congressional grant vested in the Minnesota and Pacific Railroad Company, inasmuch as the road was not *constructed*. *Schulenberg* v. *Harriman*, 21 Wall. 44.

But conceding that, at the date of the trust-deed, the company possessed a mortgageable interest in the lands and in her franchises and present and future property, they all became forfeited to the State under the constitutional amendment of April 15, 1858, by reason of the non-completion of the road within the specified time.

This forfeiture is a complete bar and defence to the present action.

The constitutional amendment, the acceptance thereof by the company, and her receipt of State bonds thereunder, amounted together to an amendment, with her consent, of her charter, whereby the provision of forfeiture was incorporated in that instrument. The rule in *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, and other decided cases, that no alteration impairing the obligations of the charter of a corporation can be made by the legislature of a State, is laid down with the express qualification that such alteration must be "without the consent of the corporation." The consent was, in this case, founded upon a valuable consideration, — the issue of State bonds to the amount of $600,000.

If the ancient rule of the common law — that, as to things executed, a condition must be created and annexed to the estate at the time of the making of it, and not at any time thereafter — is still in force, this case, even viewed as between individuals, is still within the distinction laid down by Coke (Inst. 236). The grant was entirely conditional upon the re-

quired completion of the road. The estate of the company was, therefore, a purely "executory inheritance." Even if the rule could be held to apply to a grant by a *State*, its application is entirely superseded by the provisions of the constitutional amendment. They were designed to secure the completion of the road, or specified portions, within the time prescribed, by enabling the State, in case of default, to resume the franchises and lands pertaining to the uncompleted portion, or the whole if twenty miles had not been completed, and to seek other agencies or means for accomplishing the end in view. The reversion to the general government, provided for in the act of Congress making the grant, might be thus prevented.

The forfeiture is, moreover, maintainable upon strictly equitable grounds. It was the express contract of the parties, based upon a good, valuable, and adequate consideration. Respecting the State, the company was a mere donee. It received a most liberal grant of franchises and lands, and a loan of the credit of the State, upon the sole condition that it should proceed with the construction and completion of the road with the despatch required by the Territorial and State grants. This it undertook to do. Such completion within the time prescribed was not a collateral or incidental, but the exclusive, purpose of the amendment. Any default in this respect admitted neither compensation nor restoration of the *status in quo*. 2 Story's Eq. Jur., sects. 1314, 1316, 1324; *Peachy* v. *The Duke of Somerset*, 1 Str. 447, 453.

The forfeiture will be sustained (1.) because it was imposed by statute. 2 Story's Eq. Jur., sect. 1326; *Peachy* v. *The Duke of Somerset*, *supra*; *Keating* v. *Sparrow*, 1 Ball & B. 373. (2.) Upon considerations of public policy. Upon the same principle, courts of equity have refused relief against forfeitures incurred under the by-laws of corporations for the non-payment of stock-subscriptions. 2 Story's Eq. Jur., sect. 1325; *Sparks* v. *Liverpool Waterworks Company*, 13 Ves. 428. (3.) Because the case was one where time was emphatically of the essence of the contract. *Dunklee* v. *Adams*, 20 Vt. 415; *Baldwin* v. *Van Vorst*, 2 Stock. Ch. 517; 3 Lead. Cas. in Eq. 672. (4.) On account of the insolvency of the Minnesota and Pacific Railroad Company at the time the forfeiture was asserted

and declared by an act of the legislature of the State of Minnesota of the 10th of March, 1862, and of its conceded inability to complete the road as required. *Dunklee* v. *Adams*, *supra*.

In so far as the present action seeks to establish a lien in favor of the complainants, as trustees, upon the railroad constructed, and the property and appurtenances acquired by the St. Paul and Pacific Railroad Company, it must wholly fail. There is no privity whatever between that company and the Minnesota and Pacific Railroad Company in respect to the railroad, property, or acquisitions of the former company.

Although it must now be regarded as the settled doctrine of this court, that a mortgage executed by a railroad company, conveying and covering its subsequently acquired property, will render such property subject to the mortgage, *pari passu*, with its acquisition, yet it is equally well settled that this is so only "as against the company and its privies," and only as fast as the property covered by the terms of the mortgage "comes into existence as property of the company." *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459.

Even this doctrine is somewhat of an innovation upon the established maxim of the common law, that "a person cannot grant a thing which he has not." It has been allowed, in regard to railroad mortgages, upon considerations compounded both of equity and of public policy; and is, therefore, not to be extended.

The St. Paul and Pacific Railroad Company is in no privity whatever with the Minnesota and Pacific Railroad Company. It derives its title to all its property and franchises by a grant from the State of Minnesota in hostility to and in forfeiture of the title of the latter company.

The two companies are not, under different names, the same company. This has been expressly determined by the highest court of the State of Minnesota; and that adjudication, involving as it does a direct construction of the object and effect of an act of the legislature of that State, will be adopted and followed by this court.

MR. JUSTICE FIELD, after making the foregoing statement of the case, delivered the opinion of the court.

The act of Congress granting lands to the Territory of Minnesota imposed conditions upon their alienation, except as to the first one hundred and twenty sections, which the Territory could not disregard. It declared that the lands should be exclusively applied to the construction of the road in aid of which they were granted, and to no other purpose whatever, and should be disposed of only as the work progressed. It provided that their sale should be made in parcels as specified portions of the road were completed, and only in that manner. The evident intention of Congress was to secure the proceeds of the lands for the work designed, and to prevent any alienation in advance of the construction of the road, with the exception of the first one hundred and twenty sections. The act made the construction of portions of the road a condition precedent to a conveyance of any other parcel by the State. No conveyance in disregard of this condition could pass any title to the company. It was so held by this court in *Schulenberg* v. *Harriman*, 21 Wall. 44, where we had occasion to consider provisions of a statute identical in terms with the one before us.

The act of May 22, 1857, passed in advance of any work on the road, conveyed, therefore, no title to the Minnesota and Pacific Railroad Company in the lands granted by Congress beyond the first one hundred and twenty sections. Of course, the mortgage, or deed of trust, subsequently executed by that company, so far as it covered such lands, was inoperative for any purpose.

Whatever interest passed to the company in the one hundred and twenty sections was subject to forfeiture under the constitutional amendment of April 15, 1857. That amendment, which the company voluntarily accepted, provided, as already stated, that upon failure to complete certain portions of the work within prescribed periods it should forfeit these lands, and all other lands held by it, with the connected franchises, except such lands as were acquired by construction of portions of the road. The parcels thus earned were excepted from forfeiture. It was certainly competent for the company to subject its property, rights, and franchises conferred, or attempted to be conferred, by the act of May 22, 1857, or derived from any other source, to this liability. Its assent in this respect was one of

the conditions upon which it received the loan of the State credit provided by the constitutional amendment. When the assent was given, the relation of the State to the land and connected franchises was precisely as though the condition had been originally incorporated into the grant. The mortgage or deed of trust not having been executed until after the amendment was accepted, and the holding of the lands of the company, with its rights, privileges, and franchises, having been thus made dependent upon the completion of the road within the periods prescribed, the beneficiaries under that instrument took whatever security it afforded in subordination to the rights of the State to enforce the forfeiture provided. That forfeiture was enforced by the act of the legislature of March 10, 1862; unless we are to presume that at the sale made in 1860 by the governor, under the act of March of that year, and the supplemental deed of trust, the entire interest and right of the company were acquired by the State. It is averred in the bill of complaint that this sale was void, and that it was so adjudged by a district court of the State. If this adjudication was valid, and the sale was void, the forfeiture provided by the constitutional amendment was enforced by the act mentioned. A forfeiture by the State of an interest in lands and connected franchises, granted for the construction of a public work, may be declared for non-compliance with the conditions annexed to their grant, or to their possession, when the forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination — that is, by judicial proceedings — is attended with many conveniences and advantages over any other mode, as it establishes as matter of record, importing verity against the grantee, the facts upon which the forfeiture depends, and thus avoids uncertainty in titles, and consequent litigation. But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned, and is made by a law which expressly provides for the forfeiture when that object is not accomplished. Where land and franchises are thus held, any public assertion by legislative act of the ownership of the State, after default of the grantee, —

such as an act resuming control of them and appropriating them to particular uses, or granting them to others to carry out the original object, — will be equally effectual and operative. It was so decided in *United States* v. *Repentigny*, 5 Wall. 211, and in *Schulenberg* v. *Harriman*, 21 Wall. 44, with respect to real property held upon conditions subsequent. In the former case, the court said that "a legislative act directing the possession and appropriation of the land is equivalent to office found. The mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings." And there would seem to be no valid reason why the same rule should not apply to franchises held in connection with real property, and subject to like conditions, where the franchises were created for the purpose of carrying out the public object for which the real property was granted.

In this case there were special reasons for the provision for a forfeiture, and for its immediate enforcement by the State, in case of the grantee's failure to construct designated portions of the road within the time prescribed. The act of Congress provided, that, in case the road was not completed within ten years, the lands of the grant then remaining unsold should revert to the United States. It was, therefore, necessary for the State to see that the construction of the road was commenced and pushed forward without unnecessary delay, to prevent a possible loss of portions of the grant. By the clause of forfeiture, the State was enabled to retain such a control over the lands and connected franchises, that, in case the company failed to build the road in time, it could make arrangements with other companies or parties for that purpose. This control would have been defeated if the State had been subjected to the delay of judicial proceedings before a forfeiture could have been enforced. The entire grant would have been lost to the State whilst such proceedings were pending. A more summary mode of divestiture was therefore essential, and was contemplated by the parties.

The only inconvenience resulting from any mode other than by judicial proceedings is that the forfeiture is thus left open

to legal contestation, when the property is claimed under it, as in this case, against the original holders.

But it is said that provisions for forfeiture are regarded with disfavor and construed with strictness, and that courts of equity will lean against their enforcement. This, as a general rule, is true when applied to cases of contract, and the forfeiture relates to a matter admitting of compensation or restoration; but there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work, in which the public is interested, where compensation cannot be made for the default of the party, nor where the forfeiture is imposed by positive law. "Where any penalty or forfeiture," says Mr. Justice Story, "is imposed by statute upon the doing or omission of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture, if incurred; for it would be in contravention of the direct expression of the legislative will." Story's Eq. Jur., sect. 1326. The same doctrine is asserted in the case of *Peachy* v. *The Duke of Somerset*, reported in 1st Strange, and in that of *Keating* v. *Sparrow*, reported in 1st Ball & Beatty. In the first case, Lord Macclesfield said that "cases of agreement and conditions of the party and of the laws are certainly to be distinguished. You can never say that the law has determined hardly; but you may that the party has made a hard bargain." In the second case, Lord Manners, referring to this language and taking the principle from it, said that "it is manifest, that, in cases of mere contract between parties, this court will relieve when compensation can be given; but against the provisions of a statute no relief can be given."

For these reasons, the forfeiture in this case declared by the legislature cannot be interfered with by the court. But, as stated by counsel, the forfeiture will also be upheld on considerations of public policy, as well as from the impossibility of obtaining compensation from the railroad company for its default, on the same principle upon which courts of equity refuse to relieve against forfeitures incurred under the by-laws of corporations for the non-payment of stock-subscriptions. To this subject Mr. Justice Story refers in his Commentaries, and after stating the general doctrine, that courts of equity will not

interfere in cases of forfeiture for the breach of covenants and conditions where there cannot be any just compensation for the breach, says, —

"It is upon grounds somewhat similar, aided also by considerations of public policy, and the necessity of a prompt performance in order to accomplish public or corporate objects, that courts of equity, in case of the non-compliance by stockholders with the terms of payment of their instalments of stock at the times prescribed, by which a forfeiture of their shares is incurred under the by-laws of the institution, have refused to interfere by granting relief against such forfeiture. The same rule is, for the same reasons, applied to cases of subscriptions to government loans, where the shares of the stock are agreed to be forfeited by the want of a punctual compliance with the terms of the loan as to the time and mode and place of payment."

The case of *Sparks* v. *The Liverpool Waterworks Company*, cited by counsel, is a strong illustration of this doctrine. 13 Ves. 428. The company there was incorporated to supply the town and port of Liverpool with water; and the property in and the profits of the undertaking were vested in the company in such shares and subject to such conditions as should be agreed upon. By articles of agreement, a committee of the company was authorized to call upon the shareholders for the several sums payable by them on their respective shares; and it was, among other things, provided, that in case any shareholder made default in the payment of his calls for twenty-one days after the time appointed, and for ten days after subsequent notice addressed to his then or last usual place of abode, his share or shares should be absolutely forfeited for the benefit of the other members of the corporation. The plaintiff was the owner of certain shares of stock in the company, upon which payment had been made upon thirty-four calls. The payment of the thirty-fifth call was omitted through his failure to receive personal notice of the call; it having been sent to his town residence whilst he was absent in the country, and not having been forwarded to him. For the non-payment upon the call his shares were declared forfeited. Immediately upon receiving information of the call, on his return to the city, he gave directions for its payment; and on the following day

the amount was sent to the bankers of the company. The committee of the company, however, informed him that they could give him no relief, as they had acted according to the laws of the company, from which no deviation could be made. The plaintiff thereupon filed a bill for relief against the forfeiture, on the grounds of accident, and that compensation might be made, and no injury be sustained by the company; his counsel also insisting upon the invalidity of the by-law, as unreasonable, exorbitant, and uncertain: but the court dismissed the bill, for the reason that the enterprise was a public undertaking, requiring for its successful prosecution punctuality of payment from the shareholders. Considerations of public policy forbade the granting of relief; for, as the court observed, "if this species of equity is open to the parties engaged in these undertakings, they could not be carried on."

The act of March 10, 1862, is a clear assertion of forfeiture of the estate, rights, privileges, and franchises of the Minnesota and Pacific Railroad Company. It grants all of them in express terms to the new company, and makes them in its possession subject to be forfeited to the State if the conditions annexed are not performed. And the failure of the original company to complete any portion of the road, as provided in the amendment of 1858, is not questioned by the complainants. Their position is, that the State had previously lost the right to a forfeiture by her own breaches of the amendment; that forfeiture could not be effected without judicial process and judgment; and that the forfeiture, if any accrued, was waived by the act of March 8, 1861, and its acceptance by the company.

The alleged breaches of the amendment by the State, at least such as are entitled to notice, consist in the refusal of the governor to receive the bonds of the company secured by the trust-deed of July 31, 1858, as the first-mortgage bonds required to be delivered to the treasurer in exchange for the State bonds, the exaction of the supplemental trust-deed, and the adoption of the constitutional amendment of November, 1860, abrogating the amendment of 1858, and prohibiting any law which levied a tax or made other provisions for the payment of the bonds of the State from taking effect until submitted to a vote of the people and adopted.

The amendment of 1858 evidently contemplated that the first-mortgage bonds of the company delivered to the treasurer in exchange for State bonds should be secured by a separate deed of trust, or at least by a deed which could be enforced by the governor, and not by a deed executed to parties over whom he could exercise no control. Whether the supplemental deed of trust was a sufficient compliance with the provision of the amendment, and whether it could create a priority of lien in favor of the bonds transferred to the State over bonds previously issued by the company to other creditors, it is unnecessary to determine. If defective or inoperative in either of these particulars, the objection cannot be raised by the company. Besides, if it could be considered as a matter of serious doubt whether the State was entitled to require a separate instrument of the character executed, its voluntary execution and acceptance by the governor and the subsequent exchange of bonds would seem to be a settlement of the question.

The adoption of the constitutional amendment of November, 1860, certainly had the effect to impair the value of the bonds of the State. But it is the holders of those bonds who had a right to complain of this proceeding, not the company or the trustees under the deed in suit. The holders of those bonds looked, in the first instance, to the State for their payment: the State was primarily liable to them; and they were, therefore, injuriously affected by the amendment. Whether the company was liable at all to the bondholders on the bonds from the indorsement of its president, it is unnecessary to determine: but, assuming such liability, then, as between the company and the State, the company was the principal debtor, and the State only a surety; and, with that relation existing, the company could not complain that the State, its surety, did not pay the bonds, interest or principal. And the trustees could not complain; for no right or contract between them and the company, or between them and the State, was impaired by the proceeding.

The amendment of 1858 prohibited any further issue of State bonds, whenever the company made default in meeting the interest on those issued. The withholding, therefore, of any further bonds, after such default, violated no contract of the State with the company; nor did it impair the right of the

State to enforce a forfeiture of its grant if the stipulated conditions as to the completion of the road were not complied with. After such default (no redemption from it having been made), all obligation of the State to the company ceased: its obligation remained only to its bondholders. That obligation still remains, and will remain until the pledge of its faith for the payment of the bonds is redeemed.

As to the alleged waiver of the forfeiture by the act of March 8, 1861, and its acceptance by the company, only a word need be said. The waiver, if the provisions of the act can be construed as such, was only conditional; and the condition was not complied with. There had previously been, as already stated, a foreclosure and sale of the property, rights, and franchises of the company under its supplemental deed of trust, pursuant to the act of the legislature of the previous year; and, at the sale, the State had become the purchaser. The act of March 8, 1861, released and restored to the company the road, lands, rights, and franchises which it had possessed previous to the sale, and all bonds and securities of the company held by the State, free from all liens or claims thereon. The release and restoration were upon express conditions, one of which was that the company would construct and put into operation before the following January a designated portion of its road; and the act declared, that, upon the default of the company in this respect, all the rights and benefits conferred by virtue of the act should be "forfeited to the State absolutely, and without any further act or ceremony whatever," to be held by the State "without merger or extinguishment, to be used, granted, or disposed of, for the purpose of aiding and facilitating the construction of said road and branch." The designated portion of the road was not constructed within the prescribed period, and never has been constructed; and it was with reference to the forfeiture provided for its default in this respect, as well as the forfeiture provided by the amendment of 1858, that the act of March 10, 1862, was passed. That act operated to divest the company of all interest in the one hundred and twenty sections of land and connected franchises transferred to it by the Territory in 1857, or subsequently acquired.

It follows from these views that the court below properly sustained the demurrer to the bill. *Decree affirmed.*

SHUEY, EXECUTOR, *v.* UNITED STATES.

1. Where a "liberal reward" was offered for information leading to the apprehension of a fugitive from justice, and a specific sum for his apprehension, — *Held*, that a party giving the information which led to the arrest was entitled to the "liberal reward," but not to the specific sum, unless he, in fact, apprehended the fugitive, or the arrest was made by his agents.
2. Where the offer of a reward is made by public proclamation, it may, before rights have accrued under it, be withdrawn through the same channel in which it was made. No contract arises under such offer until its terms are complied with. The fact that the claimant of such reward was ignorant of its withdrawal is immaterial.

APPEAL from the Court of Claims.

Henry B. Ste. Marie filed his petition in the Court of Claims to recover the sum of $15,000, being the balance alleged to be due him of the reward of $25,000 offered by the Secretary of War, on the 20th of April, 1865, for the apprehension of John H. Surratt, one of Booth's alleged accomplices in the murder of President Lincoln.

The court below found the facts as follows: —

1. On the 20th April, 1865, the Secretary of War issued, and caused to be published in the public newspapers and otherwise, a proclamation, whereby he announced that there would be paid by the War Department "for the apprehension of John H. Surratt, one of Booth's accomplices," $25,000 reward, and also that "liberal rewards will be paid for any information that shall conduce to the arrest of either of the above-named criminals or their accomplices;" and such proclamation was not limited in terms to any specific period, and it was signed "Edwin M. Stanton, Secretary of War." On the 24th November, 1865, the President caused to be published his order revoking the reward offered for the arrest of John H. Surratt. 13 Stat. 778.

2. In April, 1866, John H. Surratt was a zouave in the military service of the Papal government, and the claimant was also a zouave in the same service. During that month he communicated to Mr. King, the American minister at Rome, the fact that he had discovered and identified Surratt, who had confessed to him his participation in the plot against the life of President Lincoln. The claimant also subsequently commu-

nicated further information to the same effect, and kept watch, at the request of the American minister, over Surratt. Thereupon certain diplomatic correspondence passed between the government of the United States and the Papal government relative to the arrest and extradition of Surratt; and on the 6th November, 1866, the Papal government, at the request of the United States, ordered the arrest of Surratt, and that he be brought to Rome, he then being at Veroli. Under this order of the Papal government, Surratt was arrested; but, at the moment of leaving prison at Veroli, he escaped from the guard having him in custody, and, crossing the frontier of the Papal territory, embarked at Naples, and escaped to Alexandria in Egypt. Immediately after his escape, and both before and after his embarkation at Naples, the American minister at Rome, being informed of the escape by the Papal government, took measures to trace and rearrest him, which was done in Alexandria. From that place he was subsequently conveyed by the American government to the United States; but the American minister, having previously procured the discharge of the claimant from the Papal military service, sent him forward to Alexandria to identify Surratt. At the time of the first interview between the claimant and the American minister, and at all subsequent times until the final capture of Surratt, they were ignorant of the fact that the reward offered by the Secretary of War for his arrest had been revoked by the President. The discovery and arrest of Surratt were due entirely to the disclosures made by the claimant to the American minister at Rome; but the arrest was not made by the claimant, either at Veroli, or subsequently at Alexandria.

3. There has been paid to the claimant by the defendants, under the act of 27th July, 1868 (15 Stat. 234, sect. 3), the sum of $10,000. Such payment was made by a draft on the treasury payable to the order of the claimant, which draft was by him duly indorsed.

The court found as a matter of law that the claimant's service, as set forth in the foregoing findings, did not constitute an arrest of Surratt within the meaning of the proclamation, but was merely the giving of information which conduced to the arrest. For such information the remuneration allowed to him

under the act of Congress was a full satisfaction, and discharges the defendants from all liability.

The petition was dismissed accordingly: whereupon an appeal was taken to this court.

Ste. Marie having died *pendente lite*, his executor was substituted in his stead.

Mr. D. B. Meany and *Mr. F. Carroll Brewster*, for the appellant, cited 14 Pet. 448; 15 id. 337; 18 How. 92; 2 Curt. 617; 1 How. 290; 7 Wall. 666; 1 Nott & H. 292; 4 S. & R. 241; 14 id. 267; 4 Watts, 317; 7 Casey, 263; 4 Barr, 353; 3 P. F. Smith, 207; 15 id. 269; 2 id. 484.

Mr. Assistant Attorney-General Edwin B. Smith, contra.

The offer of a reward, general or special, is a promise conditional upon the rendition of the proposed service *before the offer is revoked.* Such an offer is revocable at any time before performance; and it is only by performance that it becomes a binding contract. *Freeman* v. *Boston*, 5 Met. 57; *Loring* v. *Boston*, 7 id. 409; *Cummings* v. *Gann*, 52 Penn. St. 590; *Ryer* v. *Stockwell*, 14 Cal. 137; *Gilmore* v. *Lewis*, 12 Ohio, 285; *Crocker* v. *N. L. R.R. Co.*, 24 Conn. 261; *Janorin* v. *Exeter*, 48 N. H. 83; *Jones* v. *Phenix Bank*, 4 Seld. 228; *Fitch* v. *Snedaker*, 38 N. Y. 248.

This offer was revoked Nov. 24, 1865. Ste. Marie had rendered no service to the United States: he, at least, had performed no condition of that promise before that date. The revocation was as public, and certainly as authentic, as the original promulgation of the proclamation.

According to the terms of the original offer, Ste. Marie never did that which would have entitled him to $25,000, or any thing more than a "liberal reward," had there been no revocation. The terms of such an offer are rightly prescribed by the person offering it, and must be strictly complied with by him who claims the reward. *Jones* v. *Phenix Bank*, 4 Seld. 228; *Fitch* v. *Snedaker*, 38 N. Y. 248; *Clinton* v. *Young*, 11 Rich. (S. C.) 546.

His receipt of the $10,000 was in full of all equitable claim: legally, he had none. *Marvin* v. *Treat*, 37 Conn. 96; *Sholes* v. *State*, 2 Chand. (Wis.) 182; *Calkins* v. *State*, 13 Wis. 389.

MR. JUSTICE STRONG delivered the opinion of the court.

We agree with the Court of Claims, that the service rendered by the plaintiff's testator was, not the apprehension of John H. Surratt, for which the War Department had offered a reward of $25,000, but giving information that conduced to the arrest. These are quite distinct things, though one may have been a consequence of the other. The proclamation of the Secretary of War treated them as different; and, while a reward of $25,000 was offered for the apprehension, the offer for information was only a "liberal reward." The findings of the Court of Claims also exhibit a clear distinction between making the arrest and giving the information that led to it. It is found as a fact, that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequence of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest, — persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were. We think, therefore, that at most the claimant was entitled to the "liberal reward" promised for information conducing to the arrest; and that reward he has received.

But, if this were not so, the judgment given by the Court of Claims is correct.

The offer of a reward for the apprehension of Surratt was revoked on the twenty-fourth day of November, 1865; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before any thing had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did any thing to

entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made.

Judgment affirmed.

UNITED STATES v. LANDERS.

1. An honorable discharge of a soldier from service does not restore to him pay and allowances forfeited for desertion.
2. Under the term "allowances," bounty is included.

APPEAL from the Court of Claims.

Landers enlisted for three years; was enrolled Jan. 1, 1864; and mustered into service Jan. 16, 1864, to take effect from the date of his enrolment. He deserted Nov. 12, 1864; was arrested June 2, 1865; restored to duty, with the loss of all pay and allowances due or to become due during the term of his enlistment; and honorably discharged on the 8th of August, 1865. The Court of Claims rendered judgment in his favor for an amount equal to his pay and bounty. The United States appealed.

Mr. Assistant Attorney-General Edwin B. Smith for the United States.

The Court of Claims erroneously assumes that this court held in *United States* v. *Kelly*, 15 Wall. 34, that the offence of desertion was purged by an honorable discharge. Such is not the case. Power to try the soldier, or, further, to punish him for the desertion, is lost by his restoration to duty. Thenceforth there is nothing to be purged. As part and condition of that restoration "by competent authority," forfeiture may, however, be decreed of his pay and allowances. Army Reg. 159, 160; R. S. 4749; Judge Ad.-Gen. Holt's Op., p. 139, sects. 7, 9; p. 136, sect. 1.

If the restoration be, in effect, a pardon (as treated by the Court of Claims), then it can only be authorized by the Presi-

dent, who is solely invested with the power to grant an absolute or conditional pardon. *Ex parte Wells*, 18 How. 307, 314.

Mr. Thomas J. Durant and *Mr. A. A. Hosmer*, *contra*.

The plain and definite language adopted by this court in *United States* v. *Kelly*, 15 Wall. 34, establishes the *presumptio juris et de jure* of the thing adjudged; that is, the honorable discharge is a formal, final judgment in favor of the soldier upon his entire military record. This discharge cannot be impeached collaterally; nor can any officer of the pay department disregard its contents, or refuse to give it its legal effect.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action in the Court of Claims by the petitioner for pay and bounty as a soldier in the army of the United States. It appears from the findings of the court that the petitioner enlisted in the army for three years; and was enrolled on the 1st of January, 1864; that he was mustered into service on the 16th of the month, his service to take effect from the enrolment; that he deserted on the 12th of November following; and was arrested on the 2d of June, 1865; and was restored to duty, with the loss of all pay and allowances due or to become due during the term of his enlistment; and that he was honorably discharged on the 8th of August, 1865. His claim was for pay for the whole period from his enlistment to his discharge, including the time of his absence by desertion, and for the bounty allowed to a soldier upon his honorable discharge at the expiration of his service.

The Court of Claims held that he was entitled both to pay and bounty, and gave judgment for the whole amount claimed; being of opinion that his offence of desertion was purged by his honorable discharge within the decision of this court in *United States* v. *Kelly*, 15 Wall. 34, and that his case was not covered by the joint resolution of Congress of March 1, 1870. 16 Stat. 370.

We have looked into the record in Kelly's case, and we find it entirely different from this case. Kelly had served from February, 1864, until October, 1865, during the active operations of the war, and then deserted to visit his parents, reported to be seriously ill at their home. After an absence of some

weeks he voluntarily returned, and subsequently made up for the time lost by his absence. The fact that the war had virtually closed at the time, the motives which caused the desertion, and his voluntary return to duty, no doubt had their influence with his commander, upon whose recommendation he was restored to duty without trial, subject only to the condition that he should make good the time lost by his desertion. It was not pretended that his honorable discharge, subsequently granted, gave him a right to pay during the period of his absence from the service, or would have dispensed with the forfeiture of pay prescribed by the army regulations had any pay been due at the time. Army Regulations, 158, 1358. He only claimed subsequent pay and the bounty, after serving the full period of his enlistment and the additional time lost by his desertion.

In this case the petitioner deserted at a time when the war was at its height; and no palliation was proffered for the offence, if any could possibly exist. He kept out of the service, and thus out of danger, during the severest period of the war, and was only returned to his company under arrest; and, though he was restored to duty, it was with the forfeiture of his pay and allowances for the entire period of his enlistment.

It does not appear, from the record before us, whether this forfeiture was imposed by order of the commander of the forces from which he deserted, or by the judgment of a court-martial. Forfeiture of pay and allowances up to the time of desertion follows from the conditions of the contract of enlistment, which is for faithful service. The contract is an entirety; and, if service for any portion of the time is criminally omitted, the pay and allowances for faithful service are not earned. And, for the purpose of determining the rights of the soldier to receive pay and allowances for past services, the fact of desertion need not be established by the findings of a court-martial: it is sufficient to justify a withholding of the moneys that the fact appears upon the muster-rolls of his company. If the entry of desertion has been improperly made, its cancellation can be obtained by application to the War Department. But forfeiture of pay and allowances for future services, as a condition of restoration to duty, can only be imposed by a court-martial.

Winthrop's Digest of Opinions of the Judge-Advocate General, p. 269, par. 27. The validity of the forfeiture here is not raised by counsel. We must, therefore, presume, as the case is presented to us, that the petitioner was brought to trial for his offence before such a court, and was convicted, and that the forfeiture imposed was the sentence of the court.

In Kelly's case, as already stated, the deserter was restored to duty without trial, upon his voluntary return; and it was with reference to a case of that kind that the Judge-Advocate General gave the opinion, which is cited with approval by this court. In such a case, an honorable discharge of the soldier, as held by that officer, dispensed with any formal removal of the charge of desertion from the rolls of his company, and amounted of itself to a removal of any impediment arising from the fact of desertion to his receiving bounty. But neither the Judge-Advocate General, nor this court in adopting his opinion, went to the extent of holding that an honorable discharge of a soldier dispensed with all the conditions attached to his restoration to duty which a military tribunal may have imposed upon him for a previous military offence. An unconditional restoration, or one with conditions subsequently complied with, may leave the soldier who has deserted in as favorable condition for subsequent pay and bounty as though no offence had been committed by him; but it is otherwise when conditions inconsistent with such pay or bounty are attached to the restoration, or are imposed as a punishment for a previous military offence. Assuming that the conduct of the soldier in this case, subsequent to his restoration to duty, may have entitled him to an honorable discharge, and that such discharge was not inadvertently granted, the discharge could not relieve him from the consequences of the judgment of the military court, and entitle him to the pay and allowances which that court had adjudged to have been forfeited. The forfeiture must first be removed, either by its remission in terms, or by the reversal of the judgment, or the pardon of the President.

The bounty which the petitioner claimed was included in the allowances forfeited. Under the term "allowances," every thing was embraced which could be recovered from the government by the soldier in consideration of his enlistment and

services, except the stipulated monthly compensation designated as pay. This is substantially the conclusion reached by the late Attorney-General, Mr. Hoar, after full consideration of the statutes bearing upon the question (Opinions of Attorneys-General, vol. xiii. pp. 198, 199); and such, we are informed, has been the uniform ruling of the War Department.

The conclusion we have thus reached renders it unnecessary to determine whether the case of the petitioner is covered by the joint resolution of Congress of March 1, 1870, forbidding the payment of moneys withheld from a deserter from the volunteer forces, unless the record of his desertion has been cancelled because made erroneously, and contrary to the facts.

Judgment reversed.

O'BRIEN v. WELD ET AL.

1. W. & Co., having recovered judgment in a State court, sued out an execution thereon, which was levied upon the property of the defendant. He was subsequently declared a bankrupt, and an injunction issued by the District Court of the United States restraining W. & Co. and the sheriff from disposing of that property. W. & Co. thereupon filed their petition in the latter court, praying that the injunction be so modified as to allow the sheriff to sell. An order was made granting the prayer of the petition, prescribing the time and manner of the sale, and directing that the proceeds should be brought into the District Court. This order was served upon the sheriff, who, pursuant thereto, sold the property, and paid the proceeds into court. *Held*, that the sheriff was not liable to W. & Co. for not paying the money to them upon their execution.
2. The question, whether, under the Bankrupt Act, the District Court had authority to make the order, and the decision of the highest State court adverse to that authority, are sufficient to sustain the Federal jurisdiction.

ERROR to the Supreme Court of the State of New York.

Mr. A. J. Vanderpoel for the plaintiff in error.

Mr. Granville P. Hawes for the defendants in error.

MR. JUSTICE HUNT delivered the opinion of the court.

This is an action brought to recover $4,404.72 collected by the plaintiff in error, as sheriff of the city and county of New York, under three executions, two of which were issued on judgments entered in favor of the defendants in error against Frederick Wiltse and Albert Wiltse jointly and severally, and

one of which was issued on a judgment entered in their favor against Frederick Wiltse alone.

The defence relied upon is, that the plaintiff in error, under certain orders made by the United States District Court for the Southern District of New York, in a proceeding in bankruptcy against Frederick Wiltse, paid over to the clerk of that court the moneys arising from the sale of the property levied on by him under said execution.

Several points have been argued, which it will not be necessary to consider under the view we take of the principal question in the case.

On the 24th of March, 1870, Frederick Wiltse was thrown into bankruptcy upon the petition of one of his creditors. Prior to this time, Weld & Co., the defendants in error, had obtained against the Wiltses the judgments above mentioned; and executions upon the same were in the hands of O'Brien, who was then the sheriff of the city and county of New York.

The petitioning creditor in bankruptcy, on the 24th of March, 1870, obtained from the District Court an injunction order, directed to Weld & Co., and to the sheriff, O'Brien, restraining them from disposing of Frederick Wiltse's property until the further order of the court. This order was duly served on Weld & Co. and on the sheriff.

On the sixth day of July, 1870, Weld & Co. presented a petition to the District Court, asking that the injunction be so modified as to allow the sheriff to sell the property of Frederick Wiltse levied on by the sheriff previously to filing the petition in bankruptcy. On this petition of Weld & Co. an order was made, granting its prayer, directing the time and manner of sale, and ordering, that, after deducting costs and charges, the avails of the sale should be brought into the District Court to await its further orders. This order was entered with the clerk of the District Court by and upon the motion of the counsel of Weld & Co., and served upon the sheriff.

A sale was made in pursuance thereof; and the money resulting from the sale was paid into court by the sheriff, as therein required. Weld & Co. now sue the sheriff for not paying this money to them upon their executions, instead of paying it into court. To a plea setting up the facts above stated a demurrer

was interposed by the plaintiffs, which was sustained by the Supreme Court and Court of Appeals of the State of New York, and judgment rendered against the sheriff. The writ of error before us is to review that judgment.

In support of this judgment, it is contended that the United States District Court is a court of limited jurisdiction; that it has not the power to divest a State court of its jurisdiction; that the title to the property levied on by virtue of the judgment and execution from the State courts was superior to that derived from the orders of the District Court; and that the orders directing the payment of the money in question into the District Court were without jurisdiction, and void.

It is further contended in support of this judgment, that, if the bankrupt court had authority to take the custody and control of the property from the State court, it could only do so by a suit at law or in equity, and not by summary proceedings; and that an order made in such summary proceeding is absolutely void. To this point is cited the case of *Marshall* v. *Knox*, 16 Wall. 551.

If these propositions are conceded to the fullest extent, the case of the defendants in error is not aided thereby.

In *Marshall* v. *Knox*, *supra*, the sheriff had seized and held certain property at the suit of Marshal against Smith and others. Proceedings in bankruptcy were taken against Smith; and his assignees, by rule obtained from the District Court and served upon the sheriff, compelled the delivery of the property into the District Court, to be disposed of under the bankrupt proceedings. We held that the District Court had no jurisdiction to proceed by rule where neither Marshal nor the sheriff was a party to the proceeding, and where no process had been served upon either of them. *Smith* v. *Mason*, 14 Wall. 419, was a similar case; and it was there held that the assignee in such case, if he desired to obtain the property held under State authority, must litigate his claim by a plenary suit either at law or in equity, and that it could not be done by a mere rule. We adhere to these decisions.

This court, however, has never held that where the plaintiff in the execution himself took the proceeding in the bankrupt court, and there obtained rules and orders, he was not bound

by them: the contrary is plainly intimated in the language used by the court in the cases cited. So the contrary has been expressly held in *The People ex rel. Jennys* v. *Brennan*, reported 10 N. Y. Sup. Ct. (3 Hun) 666, and in 12 Nat. Bk. Reg. 567. There the parties appeared in court, and consented to an order of reference to a register to determine the disposition of the money. The execution creditor, on appearing before the register, took the objection that the assignee should have filed a bill, and that the court was without jurisdiction. Recognizing the authority of *Marshall* v. *Knox*, *supra*, the Supreme Court of New York held that the voluntary appearance in the bankrupt court, and consent to the order of reference, gave jurisdiction, and that the payment by the sheriff under the order of the register was valid.

The case we are considering falls under the same principle. Weld & Co., the plaintiffs in the execution, made an application in their own name to the bankrupt court. They obtained an order that certain notices of sale in addition to those required by the statute of New York should be given by the sheriff; that he should make sale of the property levied on by him, and, after paying certain expenses, should deposit the proceeds of the sale in the bankrupt court, to await its further order. This order was entered by the plaintiffs in the execution; served on the sheriff by them; and, in pursuance of its direction, the sheriff made the sale, and deposited the money in the bankrupt court. That the plaintiffs in the executions under these facts can maintain a suit against the sheriff for paying the money into court in pursuance of the order obtained by them, instead of paying it to them, is sustained by no authority, and is in violation of the principles of right and justice.

In many particulars, and where it is not in violation of his legal duty, the sheriff is deemed the agent of the plaintiff in the execution. The directions of the plaintiff will not only excuse the sheriff from his general duty, but ordinarily he is bound to obey such directions. *Root* v. *Wagner*, 30 N. Y. 17.

If the execution creditor, upon the claim of the assignee, had simply directed the sheriff, without the form of an order of the court, to pay the money into bankruptcy, the sheriff would have been justified in complying with the direction. A party

cannot even encourage an act to be done, and then exercise a legal right in hostility to such act, to the injury of the party obeying his intimations. *Swain* v. *Seamen*, 9 Wall. 254, 274.

Especially is he bound, when, as in the present case, his direction is clothed with the solemnity of a legal proceeding, and the money is received and distributed under the forms of law.

The question, whether, under the Bankrupt Act, the District Court had authority to make the order in question, and the decision of the State court thereon, are sufficient to sustain the Federal jurisdiction. *Judgment reversed.*

CHEATHAM ET AL. *v.* UNITED STATES.

A party, against whom an assessment was made in 1865 for an income-tax, appealed therefrom to the Commissioner of Internal Revenue, who, Oct. 7, 1867, set it aside, and ordered a new one, which was made March 15, 1868. The sum thereby assessed, with interest and penalty, was paid in instalments. Suit to recover the money so paid was brought Jan. 15, 1869. *Held*, that the party had no right of action, inasmuch as he failed to sue within six months from the date of the decision of the commissioner on the appeal, and had taken no appeal from the second assessment.

ERROR to the Circuit Court of the United States for the Middle District of Tennessee.

Mr. Henry Cooper for the plaintiff in error.

Mr. Assistant Attorney-General Edwin B. Smith, *contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

Plaintiffs in error paid to the defendant, who was collector of internal revenue, the sum of $32,074 under protest, and brought their suit to recover the money, on the ground that the tax, as assessed, was illegal. It was assessed as income-tax for the year 1864 against the female plaintiff, who was then a widow, named Acklin. The tax originally assessed amounted to $99,726. From this assessment Mrs. Acklin appealed to the Commissioner of Internal Revenue, who, on the 7th of October, 1867, rendered his decision, setting aside that assessment, and directing the local assessor to make a new one, and

giving him directions as to the principles on which it should be made. On the fifteenth day of March, 1868, the new assessment was made at the sum of $29,971.91. This sum, with interest and penalty, was paid at three different times, as follows: —

April 30, 1868	$3,799.00
July 25, 1868	20,000.00
Oct. 29, 1868	8,275.00
	$32,074.00

The present suit for the recovery of the money so paid was commenced by a writ of summons, issued Jan. 15, 1869.

The cause being transferred from the State court in which it was commenced to the Circuit Court of the United States for the Middle District of Tennessee, that court, on the trial, instructed the jury that the nineteenth section of the act of July 13, 1866, imposed a condition, without which the plaintiffs could not recover, and was not merely a statute of limitation; and as plaintiffs had not brought this suit within six months from the decision of the commissioner on their appeal, and had taken no appeal from the second assessment, made March 15, 1868, they had no right of action.

The soundness of this construction of the statute is the only question in the case.

The section under consideration (14 Stat. 152) is as follows: —

"That no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect; *provided* that if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal."

It is quite clear that this suit was not brought within six months from the time of the decision of the commissioner on the appeal of Mrs. Acklin. No appeal was taken at all from the second assessment, under which the money was paid.

The argument of plaintiffs' counsel is, that the appeal was taken from the first assessment; and this is the only appeal necessary to give them a right of action, which right they preserved by paying the modified assessment under protest. As to the period of six months prescribed by the statute within which the suit must be brought, it is said that this is a mere statute of limitation, and that the time under it cannot begin to run until the cause of action accrued, which in this case was not until the money was paid. It is insisted that plaintiffs were not in condition to bring suit until the tax was paid; and that it could not have been intended by Congress that the very short limitation of six months should include any time before the money was paid, during which they had no right of action.

Considered as a statute of limitation, and nothing more, the proposition is not without weight; but we think there are two sufficient answers to it: —

1. The assessment on which this money was paid was a different assessment from the one upon which the appeal to the commissioner was taken. That assessment was wholly set aside. The matter was referred to the local assessor, with directions to make a new assessment. The rules by which this new assessment was to be made were prescribed for him, and differed materially from those which governed the first assessment. The commissioner did not pretend to modify the original, or to reduce it, and let it stand as so modified or reduced. He did not even fix the amount to be assessed. It was an entirely new and distinct assessment, based on different principles, which resulted in a sum not one-third as large as the assessment which had been set aside. From this assessment plaintiffs had an undoubted right to appeal to the commissioner, and urge any of the reasons which they now rely on to show that it was illegal. They paid it without such appeal; and, in doing so, we think they come within the provisions of the section which forbids suit, unless an appeal has been taken.

But suppose that the two assessments could be treated as one

transaction, and that the appeal taken was sufficient to authorize the action, if the suit had been brought within six months after the decision of the commissioner: we are still of opinion that it cannot be maintained, because it was not brought within that time.

All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes, and to be rigid in the enforcement of them.

These measures are not judicial; nor does the government resort, except in extraordinary cases, to the courts for that purpose. The revenue measures of every civilized government constitute a system which provides for its enforcement by officers commissioned for that purpose. In this country, this system for each State, or for the Federal government, provides safeguards of its own against mistake, injustice, or oppression, in the administration of its revenue laws. Such appeals are allowed to specified tribunals as the law-makers deem expedient. Such remedies, also, for recovering back taxes illegally exacted, as may seem wise, are provided. In these respects, the United States have, as was said by this court in *Nichols* v. *United States*, 7 Wall. 122, enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal-revenue branches. That system is intended to be complete. In the customs department it permits appeals from appraisers to other appraisers, and in proper cases to the Secretary of the Treasury; and, if dissatisfied with this highest decision of the executive department of the government, the law permits the party, on paying the money required, with a protest embodying the grounds of his objection to the tax, to sue the government through its collector, and test in the courts the validity of the tax.

So also, in the internal-revenue department, the statute which we have copied allows appeals from the assessor to the commissioner of internal revenue; and, if dissatisfied with his decision, on paying the tax the party can sue the collector; and, if the money was wrongfully exacted, the courts will give him relief by a judgment, which the United States pledges herself to pay.

It will be readily conceded, from what we have here stated,

that the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues.

If there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary. *Dows* v. *The City of Chicago*, 11 Wall. 108. While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. In the internal-revenue branch it has further prescribed that no such suit shall be brought until the remedy by appeal has been tried; and, if brought after this, it must be within six months after the decision on the appeal. We regard this as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is not a hard condition. Few governments have conceded such a right on any condition. If the compliance with this condition requires the party aggrieved to pay the money, he must do it. He cannot, after the decision is rendered against him, protract the time within which he can contest that decision in the courts by his own delay in paying the money. It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable. That such was the intention of Congress, in the sixteenth section, is further shown by the provision, that even the delay of the commissioner in deciding the appeal shall not enlarge the time for suit beyond twelve months from the date of taking the appeal.

The objecting party can take his appeal. He can, if the decision is delayed beyond twelve months, rest his case on that decision; or he can pay the amount claimed, and commence his suit at any time within that period. So, after the decision, he can pay at once, and commence suit within the six months; or he can have such delays in payment as he can obtain; and, if

this carries him beyond the six months, it is his own fault, and he should not complain. *Brown* v. *Sauerwien*, 10 Wall. 218; *The Collector* v. *Hubbard*, 12 id. 1. We find no error in the record. *Judgment affirmed.*

WALKER v. SAUVINET.

1. A trial by jury in suits at common law pending in the State courts is not a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment of the Constitution of the United States to abridge.
2. Questions presented by the assignment of error cannot be considered here, unless the record shows that they were brought to the attention of the court below.

ERROR to the Supreme Court of the State of Louisiana.

This is an action brought by Sauvinet against Walker, a licensed keeper of a coffee-house in New Orleans, for refusing him refreshments when called for, on the ground that he was a man of color.

Art. 13 of the Constitution of Louisiana provides that "all persons shall enjoy equal rights and privileges upon any conveyance of a public character; and all places of business or of public resort, or for which a license is required by either state, parish, or municipal authority, shall be deemed places of a public character, and shall be open to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color." On the 23d February, 1869, an act was passed by the general assembly of the State, entitled "An Act to enforce the thirteenth article of the Constitution of this State, and to regulate the licenses mentioned in said thirteenth article." Sect. 3 of this act is as follows: —

"SECT. 3. That all licenses hereafter granted by this State, and by all parishes and municipalities therein, to persons engaged in business, or keeping places of public resort, shall contain the express condition, that the place of business or public resort shall be open to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color; and any

person who shall violate the condition of such license shall, on conviction thereof, be punished by forfeiture of his license, and his place of business or public resort shall be closed, and, moreover, [he] shall be liable at the suit of the person aggrieved to such damages as he shall sustain thereby, before any court of competent jurisdiction."

On the 27th February, 1871, another act was passed, entitled "An Act to regulate the mode of trying cases arising under the provisions of article thirteen (13) of the Constitution of Louisiana, or under any acts of the legislature to enforce the said article thirteen of the said Constitution, and to regulate the licenses therein mentioned."

Sects. 1 and 2 of this act are as follows: —

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in general assembly convened*, That all cases brought for the purpose of vindicating, asserting, or maintaining the rights, privileges, and immunities guaranteed to all persons under the provisions of the article thirteen of the Constitution of Louisiana, or under the provisions of any acts of the legislature to enforce the said article thirteen, and to regulate the licenses therein mentioned, or for the purpose of recovering damages for the violation of said rights, privileges, and immunities, shall be tried by the court, or by a jury if any party to the suit prays for a trial by jury.

"SECT. 2. *Be it further enacted, &c.*, That if the jury do not agree, or fail to render a verdict, either for the plaintiff or defendant, the jury shall be discharged, and the case shall be immediately submitted to the judge upon the pleadings and evidence already on file, as if the case had been originally tried without the intervention of a jury; and it shall be the duty of the judge to decide the case at once, without any further proceedings, arguments, continuance, or delay; each party having the right to appeal to the Supreme Court in all cases where an appeal is allowed by law."

Walker in his answer denied all the allegations in the petition, and prayed for a trial by jury. The cause was thereupon tried by a jury, who failed to agree. This having been entered upon the minutes, Sauvinet, by his counsel, moved that the court proceed to decide the case under the provisions of sect. 2 of the act of 1871. To this Walker objected, alleging for cause that the act was unconstitutional, but without specifying

in what particular. Time was given counsel to file briefs upon the constitutional question; and at a later day, after consideration, a judgment was rendered against Walker for $1,000. That judgment was affirmed upon appeal to the Supreme Court of the State: whereupon Walker sued out this writ of error.

Mr. C. W. Hornor for the plaintiff in error.

The act of the legislature of Louisiana of Feb. 27, 1871, under which the proceedings in this case were had, abridges the privileges and immunities of citizens of the United States, and is, therefore, in violation of the Fourteenth Amendment of the Constitution. *Slaughter-House Cases*, 16 Wall. 72 *et seq.*; *Bartemeyer* v. *Iowa*, 18 id. 129.

Mr. J. Q. A. Fellows, *contra*.

MR. CHIEF JUSTICE WAITE, after stating the case, delivered the opinion of the court.

So far as we can discover from the record, the only Federal question decided by either one of the courts below was that which related to the right of Walker to demand a trial by jury, notwithstanding the provisions of the act of 1871 to the contrary. He insisted that he had a constitutional right to such a trial, and that the statute was void to the extent that it deprived him of this right.

All questions arising under the Constitution of the State alone are finally settled by the judgment below. We can consider only such as grow out of the Constitution of the United States. By art. 7 of the amendments, it is provided, that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This, as has been many times decided, relates only to trials in the courts of the United States. *Edwards* v. *Elliot*, 21 Wall. 557. The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the

State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee* v. *Hoboken L. & I. Co.*, 18 How. 280. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land, — that is to say, with the Constitution and laws of the United States made in pursuance thereof, — or with any treaty made under the authority of the United States. Art. 6 Const. Here the State court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States.

The other questions presented by the assignment of errors and argued here cannot be considered, as the record does not show that they were brought to the attention of either of the courts below. *Judgment affirmed.*

MR. JUSTICE FIELD and MR. JUSTICE CLIFFORD dissented from the opinion and judgment of the court.

MAGEE ET AL. *v.* MANHATTAN LIFE INSURANCE COMPANY.

In a suit by a company organized under the laws of the State of New York against citizens of the State of Alabama, on a bond conditioned for the faithful performance of duty, and the payment of money received for it, executed by the agent of the company who transacted business as such in the city of Mobile, where he resided, and by them as his sureties, the latter pleaded that the company, as a condition upon which it would retain in its employment the agent then largely indebted to it, required such bond, and also his agreement to apply all his commissions thereafter earned to his former indebtedness to it; that the agreement was made, and the commissions were so applied; that the company knew that the agent had no property, and depended upon his future acquisitions for the support of himself and family; that the defendants were ignorant of such indebtedness and agreement; that, had they been informed thereof, they would not have executed the bond; that the agreement as to the commissions and its performance were a fraud on them; and that the bond as to them was thereby avoided. *Held*, that the plea was bad, as it set forth neither the circumstances attending the delivery of the bond, nor averred misrepre-

sentations, fraudulent concealment, opportunities to make disclosure on the part of the company, inquiries by the sureties before the bond was delivered, or knowledge by the company that the sureties were ignorant of the facts complained of. *Held*, further, that this agreement had no such connection with the undertaking of the sureties as to give them a right to be informed thereof, except in answer to inquiries. As none were made, the company was under no obligation to volunteer the disclosure.

ERROR to the Circuit Court of the United States for the Southern District of Alabama.

This is a suit by The Manhattan Life Insurance Company of the city of New York against the plaintiffs in error, sureties on the bond of one Henry V. H. Voorhees, who was the agent of the company at Mobile, Ala.

The bond sued on is as follows: —

"Know all men by these presents, That we, Henry V. H. Voorhees, as principal, and Jacob Magee and Henry Hall, as securities, of the town of Mobile, and State of Alabama, are held and firmly bound unto the Manhattan Life Insurance Company of the city of New York in the sum of $5,000; for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

"The condition of this obligation is such, that if the above-bounden Henry V. H. Voorhees, who has been appointed an agent of the said The Manhattan Life Insurance Company, shall faithfully conform to all instructions and directions which he, as such agent, may at any time receive from the said The Manhattan Life Insurance Company, and shall on the first day of each month remit to the office of said company all moneys received by him (not previously remitted) as such agent, less his commissions, together with his account of the same, then the above obligation to be void; otherwise to remain in full force and virtue."

The breach assigned was the agent's withholding from the company moneys received by him subsequently to the date of the bond, as well as other moneys remaining in his hands at the time it was executed.

The defendants pleaded three pleas. Upon the first and second, issue was joined.

The third plea was as follows: —

"For a further plea, the defendants say, that, before the execution and delivery of said bond, said Henry Voorhees was largely

indebted to said plaintiffs for moneys before that time received by him belonging to plaintiffs, in conducting their business as agent in Mobile, of which these defendants had no notice; and the plaintiffs required of him the bond described in the complaint as a condition on which only they would retain him in their employment, as agent in Mobile, in conducting their business; and, besides the bond, the plaintiffs required of said Voorhees a promise or agreement that all his future commissions and interest he might acquire and earn in conducting their business afterwards, he, the said Voorhees, should pay to the plaintiffs, to be applied to his then past indebtedness, for which said plaintiffs had no security.

"The plaintiffs then well knowing, for so the fact was, that said Voorhees had no property or means of his own by or out of which his said past indebtedness could be paid. They also well knew, and so the fact was, that he could not support himself and family but by means of his future acquisitions by his labor; and therefore the appropriation of his commissions and interest in all his future acquisitions in conducting plaintiffs' business would compel him, said Voorhees, to appropriate a similar amount to his support out of moneys received by him belonging to plaintiffs.

"And they further aver that said Voorhees did promise and agree with said plaintiffs, before said bond was executed, that he would pay said plaintiffs all his commissions on the moneys that he might afterwards receive in conducting their business, to be applied to the then past indebtedness of said Voorhees to said plaintiffs. And these defendants further aver, that at the time they executed said bond, which was as the securities of said Voorhees, they had no notice or knowledge of said agreement between said Voorhees and said plaintiffs, nor any notice or knowledge that he, said Voorhees, had fallen behindhand, or had become indebted to plaintiffs; and, if they had been informed of said agreement or of said indebtedness, they would not have executed said bond.

"And these defendants further allege, that, in pursuance of said agreement, the said Voorhees did pay said plaintiffs all his commissions afterwards earned and acquired in the business of the plaintiffs, which was carried to the credit of his past indebtedness to them, in pursuance of said agreement, but retained a corresponding amount from the moneys of the plaintiffs he afterwards received, as he was compelled from necessity to do. And they further aver that said agreement and its execution, as set forth in this plea, was a fraud on these defendants, and therefore they are not bound by said writing obligatory, but the same, as to them, is void; and of this they are ready to verify."

To which plea the plaintiff demurred. The court sustained the demurrer.

The jury found for the plaintiffs below, and judgment was rendered accordingly: whereupon the defendants brought the case here, and assigned for error the judgment of the court in sustaining the demurrer.

Mr. P. Phillips for the plaintiffs in error.

The sureties were discharged, because the non-communication to them of the past indebtedness of the agent was, under the circumstances stated in the plea, an undue concealment. 1 Story's Eq., sect. 215; *Smith* v. *Bank Scotland*, 1 Dowl. 272; *Railton* v. *Mathews*, 10 Cl. & Fin. 934; *Montague* v. *Titcomb*, 2 Vern. 518; *Shepherd* v. *Beecher*, 2 P. Wms. 288; *Rees* v. *Barrington*, 2 Ves., Jr., 540; *Thompson* v. *Bank Scotland*, 2 Shaw's App. Cas. 316; *Lee* v. *Jones*, 7 C. B. N. S. 500; *Phillips* v. *Foxhall*, Law Rep. 7 Q. B. 666. And because the agreement to appropriate the commissions to such indebtedness was a material variation of the obligation on which they consented to be bound, and it tended to increase the risk they had assumed. 1 Story's Eq., sects. 218, 324; *Pidcock* v. *Bishop*, 3 B. & C. 605; *North-western R.R.* v. *Whinray*, 26 Eng. Law & Eq. 488; *Miller* v. *Stewart*, 9 Wheat. 682; *Peck* v. *Durett*, 9 Dana, 488; *McWilliams* v. *Mason*, 6 Duer, 276; *Mayhew* v. *Boyd*, 5 Md. 102; Burge on Suretyship, 15.

The defence set up in the plea is available at law as well as in equity. *King* v. *Baldwin*, 2 Johns. Ch. 556; *People* v. *Jansen*, 7 Johns. 332; *Swayn* v. *Burke*, 12 Pet. 23.

Mr. J. M. Carlisle and *Mr. John D. McPherson* for the defendant in error.

The acts referred to do not amount to fraud; and, as the plea does not charge an *intent* to defraud, it is insufficient.

When the facts set forth in the plea do not constitute fraud, the intention to defraud must be averred. *Moss* v. *Riddle*, 5 Cranch, 351.

Mere non-communication is not concealment. Concealment is a failure to communicate when one has the opportunity to communicate. There may be non-communication without concealment, and there may be concealment without fraud.

"It is now regarded as settled that there must be something

which amounts to fraud to enable the surety to say that he is released from his contract on account of misrepresentation or concealment." Story's Eq. Jur., 325 *a;* De Gol. on Guar., p. 362, and cases cited; Kerr on Frauds, pp. 94, 122, and cases cited; *Hamilton* v. *Watson*, 12 C. & L. 109; *Burks* v. *Wonterlein*, 6 Bush, 20; *Ham* v. *Greve et al.*, 34 Ind. 18; 2 Kent, 482, 483; *United States* v. *Boyd*, 5 How. 29.

The alleged agreement between Voorhees and the company as to the application of the money remitted worked no injury to the sureties. When the money was remitted, their liability was at an end.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The defendant in error sued the plaintiffs in error upon a bond, which recited that Henry V. H. Voorhees had been appointed an agent of the insurance company, and was conditioned for his paying over to the company all moneys belonging to it which he should receive.

The breach alleged was that he had received such moneys, which he had failed to pay over.

The defendants pleaded three pleas: —

(1.) That Voorhees had paid over all moneys belonging to the company which he received after the execution of the bond.

(2.) That, at the time of the execution of the bond, Voorhees, as such agent, was indebted to the company, and that there was an agreement between him and the company that all moneys received by Voorhees should be credited upon this indebtedness; that these facts were concealed from the defendants, and that all the moneys so received were so credited.

(3.) That the plaintiffs required the giving of this bond as a condition on which only they would retain Voorhees in their employment as such agent; that they required, further, an agreement by Voorhees that all his commissions thereafter earned should be applied to his past indebtedness to the company; that they were so applied; that the defendants were ignorant of the indebtedness and of this agreement; that, if they had been informed of them, they would not have executed the bond; and that the agreement as to the commissions and its execution

were a fraud on them, and that the bond, as to them, was thereby avoided.

The third plea was demurred to, and the demurrer was sustained. Issue was taken upon the first and second pleas. The jury found for the plaintiff, and the court gave judgment accordingly.

The only question presented for our determination is as to the sufficiency of the third plea.

The demurrer admits the substantial facts which the plea avers. Do the agreement as to the commissions, and the circumstances that it was unknown to the sureties and not communicated to them by the company, exonerate the sureties from liability upon the bond?

A surety is "a favored debtor." His rights are zealously guarded both at law and in equity. The slightest fraud on the part of the creditor, touching the contract, annuls it. Any alteration after it is made, though beneficial to the surety, has the same effect. His contract exactly as made is the measure of his liability; and, if the case against him be not clearly within it, he is entitled to go acquit. *Ludlow* v. *Symonds*, 2 Caine's Cas. 1; *Miller* v. *Stewart*, 9 Wheat. 681.

But there is a duty incumbent on him. He must not rest supine, close his eyes, and fail to seek important information within his reach. If he does this, and a loss occurs, he cannot, in the absence of fraud on the part of the creditor, set up as a defence facts then first learned which he ought to have known and considered before entering into the contract. Kerr on Fraud and Mistake, 96.

Vigilantibus et non dormentibus jura subveniunt.

Where one of two innocent parties must lose, and one of them is in fault, the law throws the burden of the loss upon him. *Hearne* v. *Nichols*, 1 Salk. 289.

It may be well, before examining the question arising upon the plea, to advert to some of the points bearing upon the subject which have been adjudged in authoritative cases.

A fraudulent concealment is the suppression of something which the party is bound to disclose. Kerr, *supra*, 95.

To constitute fraud, the intent to deceive must clearly appear. *Spofford* v. *Newson*, 9 Ired. Law, 507.

The concealment must be wilful and intentional. De Gol. on Guar. and Sur. 366.

The test is, whether one of the parties knowingly suffered the other to deal under a delusion. 2 Kent's Com. (Comst. ed.) 643.

The mere relation of principal and surety does not require the voluntary disclosure of all the material facts in all cases. The same rule as to disclosures does not apply in cases of principal and surety as in cases of insurance on ships or lives. *North Brit. Ins. Co.* v. *Loyd*, 10 Exch. 533.

In this case a former guarantor was discharged, and others taken in his place. The fact of the prior guaranty was not disclosed. The subsequent guarantors made no inquiry, and they were held to be liable. If the surety desires information, he must ask for it. The creditor is not bound to volunteer it. An undisclosed prior debt will not affect the validity of the contract. *Hamilton* v. *Watson*, 12 Cl. & F. 119.

If the creditor be applied to, he must make a full and frank communication. De Gol., *supra*, 367.

One took a note from another whom he knew to be insolvent, and did not disclose that fact to a person who became surety. It was held that the surety was bound, and that the payee had a right to presume he was aware of the insolvency of the principal. *Ham* v. *Greve*, 34 Ind. 18.

To render the general allegation of concealment sufficient in a pleading, it is necessary also to aver that the creditor either procured the surety's signature, or was present when the instrument was executed, and then misrepresented or concealed essential facts which should have been disclosed; otherwise the allegation of fraud is only the pleader's deduction. *Burks* v. *Wonterlein*, 6 Bush, 24.

In this case the court said, "The principal may have presented her" (the payee) "the note, signed in her absence, when she could have made no communication to the surety, and could, therefore, have been guilty of neither misrepresentation nor concealment; and the general allegation of concealment does not negative the idea of her absence." Id.

In such circumstances, the creditor is under no obligation, legal or moral, to search for the surety, and warn him of the

danger of the step he is about to take. No case has gone so far as to require this to be done. *Wyethes* v. *Labouchere*, 3 De G. & J. 609.

The creditor is not bound to inform the intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transaction in which he is about to engage. Id.

It appears by the record in this case that the plaintiff was a corporation of the city of New York; that Voorhees was the agent of the company at Mobile, in the State of Alabama; and that the parties to the bond were all of that city.

The plea does not set forth any of the circumstances attending the execution and delivery of the bond. It does not aver that there was any misrepresentation, any thing fraudulently kept back, or any opportunity to make disclosures on the part of the company, or any inquiry by the sureties, before the bond was delivered. Nor is it averred that the company was aware that the sureties were ignorant of the facts complained of. It is, perhaps, to be inferred from the plea that the fact was — as the record, aside from the plea, shows it to have been — that the bond was executed at Mobile, and sent by Voorhees by mail to the company in New York. If this were so, the company, upon receiving it, was under no obligation to make any communication to the sureties. The validity of the bond could not depend upon their doing so. The company had a right to presume that the sureties knew all they desired to know, and were content to give the instrument without further information from any source. Under these circumstances, it was too late, after the breach occurred, to set up this defence.

There is another objection to the plea. There was nothing fraudulent in the agreement. The obligation of the agent was simply to pay over the money of the company which he should receive. This the sureties guaranteed that he would do. To do it was a matter of common honesty; not to do it was a fraud. The agreement of the agent to apply money belonging to him derived from any source in payment of a pre-existing debt to the company had no such connection with what the sureties stipulated for as gave them a right to be informed on the subject, except in answer to inquiries they might have made.

They made none, and there was no obligation on the part of the company to volunteer the disclosure.

On both these grounds the plea was bad, and the demurrer was properly sustained. *Judgment affirmed.*

NEBLETT *v.* MACFARLAND.

Where a conveyance of a plantation had been obtained by fraud, and the only consideration alleged by the grantee was the cancellation of a certain bond executed by the grantor, and the court below set aside the deed, and ordered that the bond, unaffected by any indorsement of credit or payment thereon, should be returned, and that it and the mortgage therewith given should have the same force and effect as if the conveyance had not been made and the bond had not been cancelled, — *Held*, that the decree was proper in not making the payment of the bond a condition precedent to the reconveyance of the plantation.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

This is a suit in equity to set aside a deed of conveyance of a plantation known as "Mossland," in the State of Louisiana, executed by the appellee on the 19th of September, 1868, when temporarily residing in England. Macfarland, the complainant, who is the appellee in this court, alleged that the conveyance had been procured by the false and fraudulent representations of the appellant and his father, Sterling Neblett.

The appellant, in his answer, alleged that the consideration for such conveyance was the surrender and cancellation of a bond for $14,464.51 executed by the appellee to Sterling Neblett, and by the latter indorsed to the appellant. The court below decreed that the deed of the complainant, conveying to the defendant the plantation in the bill of complaint described and designated as "Mossland," be, and the same is, declared null and void and of no effect, and that the title to the said plantation is declared to be vested in the said complainant to the same extent as if said deed had never been executed.

That within thirty days the defendant make, execute, and deliver to the complainant a deed reconveying said plantation to him in fee-simple; and, in default thereof, that the decree

shall have the same operation and effect as the execution and delivery of said deed.

But neither the execution and delivery of such deed nor this decree shall in any wise affect the lien of said defendant on said plantation, created by the deed of trust thereon to secure the said bond for $14,464.51.

That the original of said bond, now on file in this cause, be delivered up to the defendant, unaffected by any indorsement of credit or payment thereon; but this decree shall be without prejudice to any right which the defendant has under the bond and mortgage which he derived by the assignment of Sterling Neblett, but they shall have the same force and effect as if the deed had not been made, or any cancellation of the bond taken place.

From this decree Neblett appealed to this court, on the ground that the payment of Macfarland's bond was not made a condition precedent to the reconveyance of the property to him.

Mr. W. Alex Gordon for the appellant.

Mr. John A. Campbell, *Mr. E. M. Hudson*, and *Mr. Walker Fearn*, for the appellee.

MR. JUSTICE HUNT delivered the opinion of the court.

The allegation of error in this case is confined to a single point. In his brief the counsel for the appellant says, "The court erred in not making the payment of our bond a condition precedent to the reconveyance of the plantation, as set forth in our motion for a new trial; and on this ground, and from this point of the decree, do we appeal and ask for relief."

The action was brought to set aside the conveyance of a plantation in Louisiana, made by Macfarland to the appellant Neblett, upon the allegation that the conveyance was obtained by the fraudulent acts and representations of Neblett and his father.

The only consideration given, or professed to be given, by Neblett for the conveyance, was the cancellation of a certain bond for the sum of $14,464.51, executed by Macfarland to Sterling Neblett, the father, and alleged to be the property of Henry Neblett.

The court below adjudged the transaction to be fraudulent,

directed the execution of a deed reconveying the property, and ordered the return and redelivery of the bond for $14,464.51, unaffected by any indorsement of credit or payment thereon, and the same, with the mortgage made for its security, to retain the same lien thereon and the same force and effect as if the deed had not been made, or any cancellation of the bond taken place.

The complaint now made is, that, instead of directing a return of the bond in specie as a condition for the return of the land, the court should have directed the payment of the amount of money secured thereby.

In cases of this character the general principle is, that he who seeks equity must do equity; that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. The court proceeds on the principle, that, as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction. *Bellamy* v. *Sabine*, 2 Phil. 425; *Samy* v. *King*, 5 H. L. 627; *W. B. of Scotland* v. *Addie*, L. R. 1 Scotch App. Cas. 162; *Gatley* v. *Newell*, 9 Ind. 572; *Johnson* v. *Jones*, 13 Sm. & M. 580; Kerr on Fraud, 335, 343. This is, no doubt, the general rule.

We do not, however, perceive that the principle will benefit the complaining party in this suit.

1. He is restored here to his property that he had and parted with when he received his deed; to wit, his bond and mortgage. If he had paid $14,500 in money, and received in return only a bond for the like amount, of doubtful security and impaired by the lapse of time, he might well have complained. But he paid no money. He surrendered a bond against an insolvent debtor who had left the country, and a mortgage upon an estate abandoned by the owner, and in relation to which the Nebletts, father and son, make the most bitter complaints of its insufficient security.

In his letter of Sept. 29, 1869, Henry Neblett says, "Your deed lay in the hands of your uncle as an escrow. . . . I have hesitated whether to abandon the place, or struggle to save something by borrowing a large sum, and risk of forced culture

in latitude 30¼." Sterling Neblett, the father, writes, "If Mendoza be correct, as he just advised, that there are numerous debts and some judgments against Mossland" (the plantation in question), "liens on the property that Henry nor I did not know of, the trust-deed on record at St. Martin's give the only protection against them. . . . Henry is absent, and has long been the true owner of James Edward's bond. I thought of you if interested and my deed to Henry could arrange matters. But alas! so far unsuccessful, — debts to others, less and less probability of buying the Bruossade bonds. . . . How much money will you provide Henry if he decides to go?"

The letter of the same person of February, 1869, is filed with the accounts of the embarrassments and difficulties, of the depreciation of the estate, the claims for taxes, judgments, and general creditors. Among other things, he says, "I know Henry would let you have his debt" (the bond in question) "for fifty cents on the dollar."

We are not able to say, nor is it very material to know, whether these statements were false and fraudulent, or whether the security was really so inadequate as is here represented. Whether good or bad, he receives now the same security that he then gave to his vendor. It would be a perversion of justice to give him the full amount in money for a security then worth but fifty cents on the dollar. If, on the other hand, it was then an adequate security, it is the same now.

2. It is no objection to a restoration of property received on a fraudulent sale that it has fallen in value since the date of the transaction. *Blake* v. *Morrell*, 21 Beav. 613; *Veazie* v. *Williams*, 8 How. 134, 158. Nor, if the property is of a perishable nature, is the holder bound to keep it in a state of preservation until the bill is filed. *Scott* v. *Perrin*, 4 Bibb, 360; Kerr, 337.

A party seeking to set aside a sale of shares is not bound to pay calls on them to prevent forfeiture after filing his bill; nor is it fatal to his right of rescission that some of the shares have been thus perfected.

We have no means of knowing whether there can be a defence made to the bond arising from the Statute of Limitations. When the bond has been so recently adjudged by the

court to be a subsisting security, and to be a lien upon the plantation directed to be reconveyed, — the party in substance redelivering the bond as a condition of obtaining such reconveyance, — it would seem that a defence of this character could not be a good one. But of this the appellant must take his chance. If the bond has become thus impaired, it is no worse than the loss of a perishable article, or the forfeiture of shares during the litigation. These circumstances do not alter the rule of law. In *Gatley* v. *Newell*, *supra*, it is said, "The party defendant is not bound to rescind until the lapse of a reasonable time after discovering the fraud. Hence the parties cannot be placed *in statu quo* as to time."

Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the courts. If they are caught in their own toils, and are themselves the sufferers, it is a legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty. *Decree affirmed.*

TOTTEN, ADMINISTRATOR, v. UNITED STATES.

An action cannot be maintained against the government, in the Court of Claims, upon a contract for secret services during the war, made between the President and the claimant.

APPEAL from the Court of Claims.

Mr. Enoch Totten for the appellant.

Mr. Assistant Attorney-General Edwin B. Smith, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

This case comes before us on appeal from the Court of Claims. The action was brought to recover compensation for services alleged to have been rendered by the claimant's intestate, William A. Lloyd, under a contract with President Lincoln, made in July, 1861, by which he was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial

to the government of the United States, and report the facts to the President; for which services he was to be paid $200 a month.

The Court of Claims finds that Lloyd proceeded, under the contract, within the rebel lines, and remained there during the entire period of the war, collecting, and from time to time transmitting, information to the President; and that, upon the close of the war, he was only reimbursed his expenses. But the court, being equally divided in opinion as to the authority of the President to bind the United States by the contract in question, decided, for the purposes of an appeal, against the claim, and dismissed the petition.

We have no difficulty as to the authority of the President in the matter. He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy; and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control. Our objection is not to the contract, but to the action upon it in the Court of Claims. The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of deal-

ings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.

Judgment affirmed.

STOTT ET AL. v. RUTHERFORD.

1. The words "grant" and "demise" in a lease for years create an implied warranty of title and a covenant for quiet enjoyment.
2. Where the lessors executed a lease and demised the lands in their own names, and not as agents, and the covenants of the lessee were all to them personally, and he entered into the lands, and remained in possession during the time specified in the lease, — *Held*, notwithstanding the recital in the lease that "the lessors were acting as a church-extension committee by authority and on behalf of the General Assembly of the Presbyterian Church, Old School," that the lease was competent evidence in an action brought by the lessors in their individual right to recover the rent; and that the lessee, having had the full benefit of the contract, could not dispute the title of the lessors. *Held further*, that the recital is not inconsistent with a holding of the

legal title by the lessors in trust to enable them to better discharge their duties touching the property; and, as their act presupposes the prior act necessary to make it effectual, every reasonable presumption is to be made in favor of the validity of the lease.

ERROR to the Supreme Court of the District of Columbia.

Mr. W. A. Meloy for the plaintiff in error.

Mr. Walter S. Cox and *Mr. L. G. Hine*, *contra.*

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an action of covenant brought upon an indenture of lease executed by the plaintiffs in error, and one P. D. Gurley, since deceased, to the defendant in error. The declaration sets out sundry breaches of stipulations contained in the lease. The defendant pleaded *non est factum*, and satisfaction of the claim of the plaintiffs by payment. Upon the trial, several bills of exception were taken by the defendant. They show that he made numerous points, all of which were overruled by the court. Only one of them requires consideration. He objected to the admission of the lease in evidence, upon the ground that it showed upon its face that the lessors had no title to the premises, and that the instrument was, therefore, a nullity. The court admitted the evidence, and an exception was regularly taken.

A verdict was rendered for the plaintiffs. The defendant moved for a new trial, and the case was heard by the full court in general term. That court ordered a judgment to be entered for the defendant, *non obstante veredicto*. The plaintiffs have brought the case before this court for review. The judgment of the court below proceeded solely upon the ground of the invalidity of the lease, and that subject is the only one argued here.

The lease created a term beginning on the first day of February, 1864, and to continue five years. It recites that the lessors, in making the lease, "were acting as a church-extension committee by authority and on behalf of the General Assembly of the Presbyterian Church, Old School." The leasehold premises are described as "being lot number four and part of lot number five," &c., "as now held by the parties of the first part," &c. The lessee covenants, among other

things, "that he will well and truly surrender and deliver up the possession of said premises to the said parties of the first part, their successors and assigns, in accordance with the stipulations herein contained, whenever this lease shall terminate."

It was provided that the lessors might terminate the lease for non-payment of rent, or otherwise, at their option, by giving the requisite notice. The language of the grant was, "have granted, demised, and to farm let." The words "grant" and "demise" in a lease for years create an implied warranty of title and a covenant for quiet enjoyment. *Burney* v. *Keith*, 4 Wend. 502; *Grannis* v. *Clark*, 8 Cow. 36; *Young* v. *Hargrave's Adm.*, 7 Ohio Rep., pt. 2, 68.

The declaration avers, "that, by virtue of which said indenture, the said defendant immediately thereupon entered into the occupancy and enjoyment of said premises and appurtenances, and was possessed thereof until about the first day of October, 1869, when he vacated such possession and occupancy, and the term of said lease was determined." This is not denied by the defendant's pleas, and is, therefore, according to a settled rule of the law of pleading, to be taken as admitted. The lessors executed the lease in their own names, and not as agents. They demised the premises in the same way. The rent was stipulated to be paid to them in their own right. The covenants of the lessee were all to them personally. If there had been a breach of the covenants of title and for quiet enjoyment, they would have been personally liable for the damages. The lessee entered into possession, and remained in possession, enjoying that possession as long as he chose to do so. He had, on his part, the full benefit of the contract.

When called upon to pay and perform as he had covenanted to do, he answered that the lessors had no title, and that he was in no wise responsible to them.

In *Laws* v. *Purser*, 6 Ell. & Bl. 932, the plaintiff, a patentee, had licensed the defendant to manufacture the article covered by the patent. After having done so, he refused to pay the royalty. The patentee sued him. He pleaded "that the letters-patent were void, and that he had a right to make and sell the article without the plaintiff's permission." The plaintiff demurred. The court said, "It would be monstrous

if the defendant, after such an agreement acted upon, could on this ground refuse payment." The demurrer was sustained.

There are two answers to the defence relied upon in this case.

The recital in the lease as to the character in which the lessors acted, and all that is said upon the subject in the bill of exceptions, are not inconsistent with their holding the legal title in trust to enable them the better to discharge the duties touching the property with which they were clothed. Every reasonable presumption is to be made in favor of the validity of the instrument which they executed. The act done presupposes the prior act necessary to give it validity. It is not stated in the bill of exceptions that the lessors had no paper title, but "that they possessed no estate whatever in said lands except such as pertained to the office of such committee, and have no estate therein in their individual capacity." The legal title in trust would be just such an estate as is here exceptionally and negatively indicated. We are all of the opinion that it is a fair inference from this language that the lessors had such an estate, or some other title in trust, sufficient to warrant their giving the lease and to render it valid.

We think the principle, that the lessee cannot dispute the title of his lessor, also applies. We see nothing to take the case out of this long-settled and salutary rule. *Williams* v. *Mayor, &c.*, 6 H. & J. 529; *Stewart* v. *Roderick*, 4 W. & S. 189; *Coburn* v. *Palmer*, 8 Cush. 627. The rule applies with peculiar force where the lessor was in possession, and transferred that possession upon his faith in the validity of the lease to the lessee. Taylor's Land. and Ten., sect. 707.

Whether the testimony set forth in the bill of exceptions, as to the title of the plaintiffs in error, was competent, is a question not raised before us, and upon which we therefore express no opinion.

According to the views upon which the judgment below was given, the lessee could not only refuse performance of all his covenants, but, at the end of the term, he could have held possession in defiance of his lessors, and he could have continued to hold possession until they showed a valid title in a suit brought to enforce it, or until such a title in such a suit

was shown by some other party. This, we think, would be contrary alike to reason, justice, and the law.

Judgment reversed; and cause remanded with directions to enter a judgment upon the verdict in favor of the plaintiffs in error.

HARRISON v. MYER, EXECUTRIX.

1. Certain premises in Louisiana, belonging to a citizen of that State, were, during his absence therefrom, seized as abandoned property by the military authorities of the United States, who compelled the lessee then in possession to enter into a new lease, and to pay to them the rent thereafter due. *Held*, that the owner could not recover of the lessee the rent for the period during which he had paid it to the military authorities.
2. Where suit was commenced, Nov. 16, 1868, for rent claimed to be due up to Aug. 8, 1865, and where, throughout the whole intervening time, the district within which the cause of action, if any arose, was under the control of the Federal authorities, and the defendant could be served there with process, — *Held*, that the decision of the Supreme Court of the State, that the suit was barred by the Statute of Limitations, is not subject to re-examination here.

ERROR to the Supreme Court of the State of Louisiana.

Mr. D. C. Labatt for the plaintiff in error.

Mr. Thomas J. Durant and *Mr. C. W. Hornor*, *contra*.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Certain brick tenements situated in New Orleans, and more particularly described in the record, were, on the 13th of June, 1859, leased by the plaintiff to the testator of the defendant for and during the full term of five years, to begin on the 1st of October in the same year, and to terminate at the end of five years from the commencement of the term; and, in consideration thereof, the lessee covenanted and agreed to pay to the lessor the annual rent of $2,000, payable in monthly instalments at the end of each and every month.

Monthly payments were punctually made from the expiration of the first month until the 1st of May, 1862, when he ceased to make the required payments. Pursuant to the lease,

the decedent, then in full life, entered into the immediate possession of the premises; and it appears that he continued in the possession of the same until the 8th of August, 1865, as alleged by the plaintiff.

Payments subsequent to May 1, 1862, were refused, because the premises were on that day seized by the military authorities of the United States as abandoned property, and the lessee was compelled to pay rent to those military authorities. Notwithstanding that, rent was still claimed by the plaintiff as the lessor of the premises; and, payment having been refused, he instituted the present suit to recover the unpaid instalments, amounting in the whole to $8,103.25, together with lawful interest.

Service was made; and the defendant, as the widow and executrix of the testator, appeared and filed an answer, setting up three defences: (1.) That all and singular the allegations contained in the petition are untrue. (2.) That the military authorities of the United States seized the premises as abandoned property, and that the lessee was compelled to pay rent to those authorities during the whole period for which the rent was not paid to the plaintiff. (3.) That the cause of action is barred by the prescription of three years.

Proofs were introduced on both sides in the State District Court, where the suit was commenced; and the court, having heard the parties, rendered judgment for the defendant. Three exceptions were filed by the plaintiff, and he appealed to the Supreme Court of the State, where the parties were again heard; and the Supreme Court overruled the exceptions filed by the plaintiff, and affirmed the judgment rendered by the District Court. Immediate steps were taken by the plaintiff to remove the cause into this court; and the errors assigned in the argument here are substantially the same as those assigned in the Supreme Court of the State.

1. Much discussion of the first defence set up in the answer is unnecessary, as it is clear that the theory of fact which it assumes cannot be sustained. Sufficient appears to show that the lease was duly executed, that the lessee took possession of the premises, and that he continued to occupy the same during the whole period alleged in the petition.

Suppose that is so: still it is insisted by the defendant that the second defence pleaded is fully sustained; and the court here concurs in that proposition.

2. Conclusive proof is exhibited in the record that the premises were seized by the orders of the military authorities of the United States, and that the lessee, during the absence of the lessor from the State, was compelled to pay rent to the military authorities commanding the district; that the lessee of the plaintiff, then in full life, was formally ejected from the premises by the military authorities; and that his agent then and there found it necessary, in order to preserve his effects and to enable him to retain possession of the tenements and to continue his business, to enter into a new contract of lease with the military authorities, by whom the premises had been seized as abandoned property, and who were in the supreme control of all such matters within the district where the premises were situated.

Evidence was also introduced to show that the rent, as stipulated in the new contract of lease, was subsequently paid by the agent of the decedent to the military authorities of the United States throughout the whole residue of the period during which the premises were occupied by the testator of the defendant. Satisfactory proof was also introduced by the defendant, and is exhibited in the transcript, that the military commander of the district, prior to that time, published a military order, commanding all tenants in possession of properties belonging to persons not known by them to be loyal citizens not to pay over rents for the same, but to retain in their hands all moneys due to such persons; warning such tenants, in case they paid such moneys to such persons without authority, that they would be held personally responsible for the amount so paid; and directing that all rents due, or to become due, by tenants of property belonging to such persons, should be paid to the financial clerk of the district.

All rent due to the military authorities of the United States has been paid; and it is admitted that all rent for the premises to the 1st of May, 1862, was duly paid to the plaintiff, his claim now being for the rent of the premises for the period subsequent to the time when the decedent was ejected from the

premises, and for the period during which the decedent paid rent under the new contract of lease with the military authorities of the United States.

Enough appears to show beyond all doubt that the premises were seized as abandoned property, and that decedent was compelled to pay rent to the military authorities of the United States under a new contract of lease. Collusion is not even suggested; and, inasmuch as the decedent was obliged to render obedience to the paramount authority, it was entirely competent for him to enter into a new contract to protect his interest.

Grant that, and still it is insisted by the plaintiff that he is entitled to recover the rent under his lease, deducting the amount of the rent paid by the decedent to his new lessors; but the court here is entirely of a different opinion. His property was seized as abandoned property, he, the plaintiff, having left the jurisdiction; and the effect of the seizure was to deprive the decedent of all right of possession or occupancy; and of course he was obliged to leave the premises, or make a new contract with those having the dominion over the same; and, having made such new contract with those having and exercising such dominion over the premises, all that can be required of him, or his legal representative, is to fulfil that new contract. Such payments having been made, the legal representative of the decedent may well claim to be exempt from any further demand. La. Code 1875, art. 2696.

From the very nature of the contract, it is held by the law of that State that the lessor is required to maintain the thing in such a condition as to serve the use for which it is hired, and to cause the lessee to be in the peaceable possession of the thing, during the continuance of the lease; and the provision is, that if the thing be totally destroyed during the lease by an unforeseen event, or if it be taken for a purpose of public utility, the lease is at an end. Id., arts. 2692, 2697.

Seizure, and eviction from the premises, it is insisted by the defendant, are, under the circumstances, equivalent to sequestration to support the war; and that the decedent, inasmuch as he was compelled to give up the possession of the premises to the ruling military power, is thereby discharged from all obligation to pay the future rent to the plaintiff.

3. Suppose, however, that the second defence is insufficient: then it becomes necessary to examine the third, which is the defence sustained by the Supreme Court of the State.

By the record, it appears that rent is claimed to the 8th of August, 1865; and that the suit was not commenced until the 16th of November, 1868, — more than three years subsequent to the time when, by the terms of the lease, the whole rent became due. Two objections are taken by the plaintiff to the sufficiency of that defence: —

1. That he commenced a prior suit, which was discontinued; and he suggests, rather than argues, that the statute ceased to run from the commencement of the first suit.

Statutes exist in some of the States, providing that where a first suit is abated, and a second suit is brought within a prescribed time, the Statute of Limitations shall cease to run from the date of the first suit; but the court is not referred to any such enactment as applicable to this case, and it is believed that none such exists, as the code of the State provides, that if the plaintiff, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened. Code, art. 3485; *Levy* v. *Stewart*, 11 Wall. 252.

2. Grant that: still the defendant insists that the war of the rebellion did not close until the 20th of August, 1866; and that the time from the date of the last charge in the claim to the close of the war should be deducted from the period which has elapsed since the cause of action accrued, in computing the time fixed by the Statute of Limitations. But the court here is of the opinion that the rule does not apply in the case before the court. Beyond doubt, it does apply in a suit in the Circuit Court of the United States where the suit is between a citizen of the State where the suit is brought and a citizen of another State. *Hanger* v. *Abbot*, 6 Wall. 532; *Levy* v. *Stewart*, 11 id. 249; *Adger* v. *Alston*, 15 id. 560.

Repeated decisions of this court have established the rule, as applied in the Circuit Courts of the United States, in controversies between citizens of different States; but the case under examination was brought here by a writ of error to the State court, and it appears that the suit and controversy were between citizens of the same State. *United States* v. *Willey*, 11 Wall. 512; *The Protector*, 12 id. 700.

Congress has provided to the effect that where the defendant cannot be served with process, by reason of resistance to the execution of the laws or the interruption of the ordinary course of judicial proceedings, the time during which the defendant shall be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action. 13 Stat. 123.

Cases falling within that provision, whether in the State or Federal courts, are governed by it: but the difficulty which the plaintiff has to encounter is, that the district where the cause of action, if any, arose, was within the control of the United States throughout the whole period; nor does the record contain any evidence whatever to show either that the defendant was at any time beyond the reach of process, or that the insurgents were in a condition to occasion any interruption of the ordinary course of judicial proceedings in that district. *Stewart* v. *Kahn*, 11 Wall. 506.

Viewed in the light of these suggestions, it is quite clear that it was competent for the Supreme Court of the State to construe and apply the Statute of Limitations enacted by the State legislature, and that their decision in that regard is not subject to re-examination here under a writ of error to a State court.

Judgment affirmed.

KITTREDGE v. RACE ET AL.

1. Under the Code of Practice in Louisiana, a suit may be brought and distinct judgments rendered against a defendant, as administratrix of her deceased husband, as widow in community, and as tutrix of his minor heirs.
2. There was no error in this case in rendering judgment against the minor heirs, declaring that each is liable for his or her proportional share of the father's half of the estate, with benefit of inventory. The legal effect is the same as if the judgment had been against the defendant as tutrix; nor was there error in rendering judgment for all the costs against her and the minor heirs *in solido*.
3. As an objection to the institution of the suit against the defendant in three distinct capacities, even if it would have been valid, was not taken in the court below at any stage in the case, it cannot be taken here.
4. The exception, that a suit in equity was pending in which the plaintiffs asked for a decree for the same money, was no ground for abatement of this action at law, as the result of the action may be necessary for the perfecting of a decree in that suit.
5. An exception is waived by going to trial on the merits.

ERROR to the Circuit Court of the United States for the District of Louisiana.

Mr. T. J. Durant and *Mr. C. W. Hornor* for the plaintiff in error.

Mr. E. T. Merrick, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This suit was brought in the court below by Mrs. Olivia C. Race and her husband against Mrs. Ann E. Kittredge, widow of Dr. E. E. Kittredge, administratrix of his succession, and tutrix of his minor children, to recover the balance due on two promissory notes given by Dr. Kittredge to the plaintiff, Olivia C. Race, before his death. The notes were originally for nearly $8,000 each, and were given to Mrs. Race, who was a daughter of Dr. Kittredge by a former wife, in settlement of her share of her mother's estate. The defendant was his second wife, by whom he also had several children. The notes were given in 1862; and several payments of interest had been made, and $2,500 of the principal was paid on each note in February, 1868, as appears by indorsements thereon. This payment and two of the payments of interest were made by the defendant herself after her husband's death. The petition alleges that Dr. Kittredge's succession was opened in the Probate Court for the Parish of Assumption, in Louisiana, with the defendant, the widow in community, and tutrix of the minor children, as administratrix, and that she has frequently acknowledged the correctness of the notes and the liability of the succession to pay them; that she placed the payments made by her as aforesaid on the first provisional account filed by her on the 9th of July, 1869, in said succession, which account was homologated; and that in a compromise between the defendant as widow in community, tutrix, and all the heirs (except the petitioner), made in and by a document which was duly passed by public act before a notary, it was stipulated as follows: viz., "That the following debts due by the succession of said Dr. E. E. Kittredge shall be assumed and placed at the charge of the parties of the second part; and the said parties of the second part warrant and guarantee said parties of the first part against all liabilities from the same; viz., 'a debt of

about $11,000, due Olivia Corinne Race, balance due her from her mother's succession.' "

The petition was filed Aug. 16, 1872.

The defendant, as administratrix and tutrix, filed an exception and an answer. The former sets up the prescription of five years, and the pendency of a suit in equity in the same court, instituted by the petitioner against the defendant and the other heirs of Dr. Kittredge, in which she prays a decree for the same identical demand. The answer is a general denial to the petition, accompanied by an answer to interrogatories admitting that Dr. Kittredge, shortly before his death, told defendant that he owed the petitioner, his daughter, $15,000.

As widow in community and individually, the defendant filed a second exception, alleging, —

First, That the petition does not disclose any right of action against her in those capacities.

Secondly, That, if any is disclosed, it is prescribed by the lapse of five years.

Thirdly, That the petitioner has a suit in equity pending in the same court against the defendant and the other heirs of Dr. Kittredge, in which she prays a decree for the same identical money claimed in this suit.

A jury being waived, the cause was tried by the court, which found generally in favor of the petitioner, and awarded her a judgment against the defendant as administratrix for the amount of the notes and interest, with all costs of suit, to be paid out of the assets of the succession; and adjudged her to be bound in her individual capacity, and as widow in community, for one half of said debt and interest; and also gave judgment against each of the minors, with benefit of inventory of their virile shares of said debt, for one-eleventh of the remaining half, and against all the defendants *in solido* for all costs.

In view of the general finding against petitioner, the allegations of the petition must be regarded as true, and all the issues of fact as found in her favor; and there is no bill of exceptions to call the result of the trial in question. The only errors that can avail the plaintiff in error here are those which are apparent on the face of the record, if any such there be. The alleged errors to which our attention has been specially called will be now considered.

It is contended that the institution of the suit against the defendant in three distinct capacities, as administratrix, as widow in community, and as tutrix of the minor heirs, was error. Supposing her to be bound and liable in these several capacities, the error, if one has been committed, is one of form rather than of substance. In common-law actions, it is not unusual to render two distinct judgments against an executor, — one directing money to be levied of the goods of the deceased in his hands to be administered, and the other (if he has made himself personally liable, and there are not sufficient goods of the testator) directing the same money to be levied of his own proper goods. This is always the case with regard to the costs of the suit. In Louisiana, where the course of procedure is more flexible and more closely adapted to the nature of the case, it is not an unusual thing to render distinct judgments against the same person in several capacities. It is, really, a question of joinder of parties; and the objection should have been taken *in limine*. But it was not taken at all in the court below; and it is too late to take it here for the first time, even if it would have been valid in the court below at any stage in the cause. In the case of *Saloy* v. *Chaixnaidre*, 14 La. Ann. 574, — a judgment on a mortgage of the decedent against the widow in community as to one half, and against her, as tutrix for her minor children, as to the other half, — the judgment was reversed, and the cause remanded in order that the petition might be amended by making the widow a party as administratrix of the succession; the succession being the principal debtor, and liable for the whole amount. This case, if we understand it correctly, shows that the form of action adopted in this case is perfectly correct in Louisiana.

But it is alleged to be error in the judgment in finding the defendant liable in the several capacities specified. The plaintiff in error has failed, however, to sustain this allegation. That the succession is liable for the whole debt there cannot be a doubt. That the widow in community is liable for one-half the amount is equally clear. Art. 2378 of the Code says, "In the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage." Of course,

she might have renounced the benefit of community; but she did not do so. That the heirs are liable for their proportional share of the deceased father's part, so far as they have assets, is also clear from art. 1376 (or 1427 of the Revised Code), taken in connection with arts. 1025 and following. No attempt has been made to show that these provisions of the Code are not applicable to the case.

As to the alleged error that a judgment was given against the minor heirs, although they were not parties to the suit, it is sufficient to quote the hundred and fifteenth article of the Code of Practice, which says that "actions against interdicted persons or minors must be brought directly against the tutor of the minor or the curator of the interdicted person." The suit was instituted against the defendant as tutrix of the minor heirs; and the judgment expresses the legal effect of a judgment against her in that capacity. It declares that those heirs (naming them) are liable each for his or her proportional share of the father's half of the estate, with benefit of inventory. The judgment seems to be in exact accordance with the law and justice of the case. It might have been against the defendant as tutrix; but the legal effect would have been the same. See *Labauve* v. *Goodbee*, 25 La. Ann. 483.

The allegation, that it is for too large an amount, is equally untenable. It awards interest on the amount due upon the notes at the rate of eight per cent per annum; and this is the rate provided for in the notes themselves. But the defendant alleges, that, after the maturity of the notes, the debt can draw interest only at the rate prescribed by law, which is five per cent. Conventional interest is allowed in Louisiana to the amount of eight per cent, and an article of the Code declares that conventional interest is due without any demand from the time stipulated for its commencement until the principal is paid (Civil Code, art. 1931); and the Supreme Court of Louisiana has decided that this law operates after the maturity of the principal. *Barbarin* v. *Daniels*, 7 La. 482.

The other assignments of error require but a passing notice. One is, that judgment is rendered for all the costs against the defendant and the minor heirs *in solido*. If judgment may be entered against the minor heirs at all in the case, there is no

error in this part of it. In actions at law, it is a general rule, that the losing parties, or the parties against whom judgment is rendered, are to pay the costs; and no apportionment of the costs is made between them. Each is liable for all, whatever may be their respective interests in the subject-matter of the suit. In equity it is different. There the court has a discretion as to the costs, and may impose them all upon one party, or may divide them in such manner as it sees fit. We perceive no error in this particular in the judgment.

Another error alleged is, that the court took no notice of the exceptions put in by the defendants. The defendants waived the exceptions by going to trial on the merits. *Long* v. *Long*, 3 Rob. 108; *Reynolds* v. *Rowley*, id. 202; *Phoebe* v. *Vienne*, 11 La. Ann. 688; *York* v. *Scott*, 23 id. 54. But, if this were not so, it is to be presumed that the exceptions resting upon allegations of fact, such as that of prescription, were found to be against the defendants on the evidence. The exception, that a suit in equity was pending in which the plaintiffs asked for a decree for the same money, was no ground for abatement of this suit. This was an action at law, and the result of it may be necessary for the perfecting of a decree in the equity suit. Nothing else appears to be presented by the exceptions but what must have been taken into consideration in rendering the judgment.

The objection that the succession of Dr. Kittredge must be settled in due course of administration in the proper probate or parish court in Louisiana, and that such court has exclusive jurisdiction of the case, is answered by the case referred to by the counsel of plaintiffs in error; namely, *Yonley* v. *Lavender*, 21 Wall. 276. That decision is, that a judgment may be rendered for the amount due in order to have it judicially ascertained, even though it may be that the judgment can only be collected through the local court in due course of administration.

Judgment affirmed.

First National Bank of Charlotte v. National Exchange Bank of Baltimore.

1. In adjusting and compromising contested claims against it growing out of a legitimate banking transaction, a national bank may pay a larger sum than would have been exacted in satisfaction of them, so as to thereby obtain a transfer of stocks of railroad and other corporations, in the honest belief, that, by turning them into money under more favorable circumstances than then existed, a loss, which it would otherwise suffer from the transaction, might be averted or diminished. So, also, it may accept stocks in satisfaction of a doubtful debt, with a view to their subsequent sale or conversion into money in order to make good or reduce an anticipated loss.
2. Such transactions would not amount to dealing in stocks, and they come within the general scope of the powers committed to the board of directors and the officers and agents of a national bank. Subject to such restraints as its charter and by-laws impose, they may do in this behalf whatever natural persons can lawfully do.
3. Dealing in stocks by a national bank is not expressly prohibited; but such a prohibition is implied from the failure to grant the power.

Error to the Court of Appeals of the State of Maryland.

The plaintiff, a national bank organized under the laws of the United States, and doing business at Charlotte, N.C., desiring to increase its capital stock, and for that purpose to deposit with the treasurer of the United States at Washington $50,000 in bonds of the United States, employed Bayne & Co., of Baltimore, as its agent, to procure and deliver them at the treasury. Not having money to pay for them at the time, the plaintiff sent its president, Wilkes, to Baltimore, with a certificate previously prepared in Charlotte, as follows:—

"First National Bank of Charlotte, N.C.,
"Charlotte, Dec. 15, 1865.

"Received on deposit, from Bayne & Co., fifty-five thousand United States 5-20 bonds, third issue, payable to the order of themselves on return of this certificate.

"John Wilkes,
"*Pres. First Nat. Bk., Charlotte, N.C.*"

This certificate was delivered by Wilkes to Bayne & Co. in Baltimore; and on the 18th of December, 1865, they, having indorsed the same, deposited it, together with other securities,

with the National Exchange Bank of Baltimore, as collateral security for a call loan of $80,000 then made by that bank to said firm of Bayne & Co.

A few days after the delivery of said certificate, the plaintiff deposited in New York, to the credit of Bayne & Co., a sum sufficient to pay the same, and received, in January, 1866, oral notice from them that the certificate was discharged, and subject to its order. In March, 1866, the plaintiff received a written notice to the same effect, but did not apply for the surrender of said certificate. In April following, Bayne & Co. failed; and the plaintiff was then notified by the defendant that it held the certificate of deposit for value, and demanded the delivery of the bonds therein mentioned.

Wilkes, the president, was sent by the plaintiff to Baltimore to negotiate for the return of said certificate. He informed the defendant that it had been satisfied by the payment to Bayne & Co., and disavowed any legal liability on account of same to the defendant. To avoid suit, however, Wilkes offered to pay $5,000 upon the delivery of the certificate; which defendant refused, but offered to take $20,000, and threatened suit unless so settled. Wilkes declined to pay this sum, but asked for delay until he could return to Charlotte and consult the directors of his bank. He again returned to Baltimore, and new negotiations for compromise of the controversy between the two banks in regard to their respective rights to the certificate were opened. Wilkes ascertained that the defendant held, among its collaterals from Bayne & Co., a large number of shares of Washington, Alexandria, and Georgetown Railroad stocks, the market-value of which had been seriously depressed by the failure of Bayne & Co. Having informed himself in regard to the condition of the stock and its supposed value, and after one or two interviews with the president and directors of the defendant, it was finally agreed that the plaintiff should take four hundred shares of the Washington, Alexandria, and Georgetown Railroad stock, and one thousand shares of the Maryland Anthracite stock, the same being valued at $40,000; and one hundred and twenty-five shares of the stock of the plaintiff, valued at $15,000, — the latter, inasmuch as he was advised that a national bank could not buy its own stock, to be taken by

Wilkes himself; thus making $55,000. Upon the basis of this settlement, the defendant was to deliver to Wilkes the certificate held by it for the $55,000 United States bonds. The plaintiff paid to the defendant the sum of $40,000 according to the terms of the above settlement, and received the certificates for one thousand shares coal stock. The four hundred shares of railroad stock were not then delivered, there being a suit about it at the time of the agreement which prevented all transfers; but it was regarded and treated by both parties as belonging to the plaintiff.

In September, 1869, nearly three years after the date of the settlement, suit was brought by the plaintiff in the Superior Court of Baltimore City to recover the $40,000 paid by it to the defendant in pursuance of the arrangement above stated. At the request of the plaintiff, the court granted the following propositions of law: —

First, That if the plaintiff agreed to purchase for $40,000 the railroad and coal stock, and paid that sum, then the court must find for the plaintiff for that amount; provided the court shall find that the defendant knew the plaintiff to be a national bank, and shall further find that the certificate of deposit was delivered up in consequence of said contract, if by said contract no part of the $40,000 was to be paid for the certificate.

Second, That if the plaintiff agreed to purchase the said stock for $40,000, and Wilkes also agreed to purchase for $15,000 one hundred and twenty-five shares of plaintiff's stock, and the inducement to both agreements was Wilkes's desire to obtain the certificate of deposit, and he did so obtain it, that does not inure to make the first contract valid, provided the court shall find, that, by the first-mentioned contract, the consideration for which the sum of $40,000 was to be paid was the railroad and coal stock, and that no part of said sum was to be paid for the certificate of deposit.

Third, That if the plaintiff, in order to compromise the certificate of deposit, agreed to purchase it and the railroad and coal stock for 40,000, and paid the money, then the plaintiff is entitled to recover so much of said sum as the court shall find was paid for said stock.

The court found for the defendant, and rendered a judgment in its favor, which the Court of Appeals affirmed: whereupon the case was brought here by writ of error.

Mr. J. Upshur Dennis and *Mr. John Scott, Jr.*, for the plaintiff in error.

The determination of the validity of the transaction involved in this case must necessarily depend upon the construction of the National Banking Law.

The eighth section of that law enumerates the powers which a national bank can exercise. Every other power is as much withheld as if it was in express terms prohibited. *Pearce* v. *Mad. & Ind. R.R.*, 21 How. 442; *Bank of Augusta* v. *Earle*, 13 Pet. 587; *Perrine* v. *Ches. & Del. Canal Co.*, 9 How. 184; *Penn., Del., & Md. Steam Nav. Co.*, 8 G. & J. 319.

No clause gives it power to purchase stocks: on the contrary, the authority specifically conferred on it to buy exchange, coin, and bullion, raises the conclusive presumption that the omission of that power was intentional. *Expressio unius exclusio alterius.*

Conceding that the two agreements — the one for the abandonment of the claim, and the other for the purchase of stock — may be inseparably united, it is insisted that the court below erred in holding that a power to *acquire* stocks is incidental to that of providing for the discharge of a disputed claim by way of compromise. Taking any thing from the defendant but a release or a discharge, transcends the limits of necessary powers, and enables a corporation to accomplish indirectly that which was intended to be prohibited. Upon the principle which underlies the opinion of the Court of Appeals, it may be said that a corporation has, as an incident to the power to discharge its indebtedness, that of acquiring the requisite funds; and, as a legitimate means of so doing, the privilege of engaging in business of any kind, provided its real and *bona fide* object is to meet outstanding demands against it. This line of argument would give these creatures of the statute every power, the exercise of which is not in positive terms forbidden.

The true doctrine is, that an implied or incidental power must be deducible from the grant, and fairly within its scope; partake of the same character as the specifically granted powers,

but not enlarge them; and tend *naturally* to secure the same result. A power to discharge may embrace that of making a payment of any kind whatever, but not that of purchasing or acquiring. That is a distinct and substantive power of an entirely different nature. *Pearce* v. *Mad. & Ind. R.R.*, *supra*; *East Anglican Rys.* v. *Eastern Counties Ry.*, 7 Eng. Law & Eq. 508; *Hood* v. *N. Y. & N. H. R.R.*, 22 Conn. 1 id. 502; *Russell* v. *Topping*, 5 McLean, 197; *Clark* v. *Farrington*, 11 Wis. 323; *Beatty* v. *Knowles*, 4 Pet. 167.

The precise proposition involved in this controversy has been decided in *Talmage* v. *Pell*, 3 Seld. 328. See also *Fowler* v. *Scully*, 72 Penn. 461; *Shoemaker* v. *National Mechanics' Bank*, 2 Abb. C. C. 422; *Shinkle* v. *First National Bank of Ripley*, 22 Ohio, 516; *Wiley* v. *First National Bank of Brattleboro'*, 47 Vt. 552; *First National Bank of Lyons* v. *Ocean National Bank*, N. Y. Ct. of Ap., Albany Law Jour., April 17, 1875.

The Court of Appeals of Maryland, in *Weckler* v. *First National Bank of Hagerston*, decided at the April Term, 1875, but not yet reported, has changed its former views, and recognizes and enforces the doctrine announced in *Talmage* v. *Peel*, *supra*.

Mr. William F. Frick, *contra*.

Mr. Chief Justice Waite delivered the opinion of the court.

The question presented for our consideration in this case is, whether a national bank, organized under the National Banking Act, may, in a fair and *bona fide* compromise of a contested claim against it growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations; it being honestly believed at the time, that, by turning the stocks into money under more favorable circumstances than then existed, a loss, which would otherwise accrue from the transaction, might be averted or diminished. Such, according to the finding below, was the state of facts out of which this suit has arisen. That finding is conclusive upon us.

A national bank can "exercise by its board of directors, or

duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes." Rev. Stat., sect. 5136, par. 7; 15 Stat. 101, sect. 8.

Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. Obligations may be assumed that result unfortunately. Loans or discounts may be made that cannot be met at maturity. Compromises to avoid or reduce losses are oftentimes the necessary results of this condition of things. These compromises come within the general scope of the powers committed to the board of directors and the officers and agents of the bank, and are submitted to their judgment and discretion, except to the extent that they are restrained by the charter or by-laws. Banks may do, in this behalf, whatever natural persons could do under like circumstances.

To some extent, it has been thought expedient in the National Banking Act to limit this power. Thus, as to real estate, it is provided (Rev. Stat., sect. 5137; 13 Stat. 107, sect. 28) that it may be accepted in good faith as security for, or in payment of, debts previously contracted; but, if accepted in payment, it must not be retained more than five years. So, while a bank is expressly prohibited (sect. 5201; 13 Stat. 110, sect. 35) from loaning money upon or purchasing its own stock, special authority is given for the acceptance of its shares as security for,

and in payment of, debts previously contracted in good faith; but all shares purchased under this power must be again sold or disposed of at private or public sale within six months from the time they are acquired.

Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in *Fleckner* v. *Bank U. S.*, 8 Wheat. 351, where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions. For this reason, among others, the acceptance of an indorsed note in payment of a debt due was decided not to be a "dealing" in notes. Of course, all such transactions must be compromises in good faith, and not mere cloaks or devices to cover unauthorized practices.

It is difficult to see how a debt due from, or a contested obligation resting upon, a bank, occupies any different position in respect to this power of adjustment and compromise from that of a debt owing to it. The object in both cases is to get rid of or reduce an apprehended loss growing out of legitimate business; and it would seem that whatever might be done in the one case ought not to be excluded from the other under the same circumstances. Often a discharge by a bank of its own obligation creates a debt due to it from another. Such was the case here. Bayne, without authority, transferred to the defendant, as collateral security for his indebtedness, a certificate of deposit issued to him by the plaintiff, and afterwards collected the money due upon the certificate from the plaintiff without disclosing the transfer. Any payment by the plaintiff to the defendant, therefore, in discharge of its liability upon the certificate, became a lawful charge against Bayne. He was insolvent. It was, on this account, not only the right, but

the duty, of the officers and agents of the plaintiff to protect by their arrangements, as far as possible, the stockholders whose interests they represented. This was necessarily left to their judgment and discretion. No question of good faith is involved. The transaction for all the purposes of this suit must be taken to have been, in fact, what it purports to be, — a fair and honest compromise of an outstanding claim, with a view to ultimate protection against an impending loss. As such, we think it was within the corporate powers of the bank, and that the Court of Appeals did not err in so holding.

Judgment affirmed.

ROCKHOLD *v.* ROCKHOLD ET AL.

This court has not jurisdiction to re-examine the decree of a State court affirming the non-liability of a trustee to his *cestui que trust* for the loss of a fund not occasioned by his laches or bad faith, but by his payment of the same into the hands of the receiver of the Confederate States in obedience to a military order which he could not resist.

MOTION to dismiss a writ of error to the Supreme Court of the State of Tennessee.

Mr. William W. Boyce for the defendants in error, in support of the motion.

Mr. Henry Cooper, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The object of this suit was to bring the executors of the will of Thomas Rockhold, deceased, to an account with the plaintiff, Charles Rockhold, one of the legatees. The defendant, William D. Blevins, one of the executors, answering the bill, said, in substance, that, contrary to his wishes, he was forced by a military power that he could not control to receive the sum of $5,004.74 from one of the debtors of the estate, in Confederate money, and pay it over to the receiver of the Confederate States. When this was done, the country was under complete military rule; and he acted, contrary to his wishes, under Confederate authority, which he was compelled to obey. This, he

claimed, excused him from accountability to the plaintiff for this amount; and the Supreme Court of the State has so decided.

To reverse this decision the present writ of error has been brought.

We cannot distinguish this case from *Bethel* v. *Demaret*, 10 Wall. 537; *Delmas* v. *Insurance Company*, 14 id. 661; and *Tarver* v. *Keach*, 15 id. 67. The State court has only decided, that, upon principles of general law, a trustee cannot be held responsible to his *cestui que trust* for the loss of a trust-fund, if the loss has not been occasioned by his own laches or bad faith; and that the delivery of the trust-fund in this case by the defendant into the hands of the Confederate authorities, under an order which he dared not disobey, excused him from liability to the plaintiff. This is not a Federal question.

Writ of error dismissed.

PHILLIPS v. PAYNE.

Since 1847, pursuant to the act of Congress of the preceding year, the State of Virginia has been in *de facto* possession of the county of Alexandria, which, prior thereto, formed a part of the District of Columbia. The political department of her government has, since that date, uniformly asserted, and the head of her judicial department expressly affirmed, her title thereto. Congress has, by more than one act, recognized the transfer as a settled fact. A resident of that county, in a suit to recover the amount by him paid under protest for taxes upon his property there situate, is, therefore, estopped from raising the question as to the validity of the retrocession.

ERROR to the Supreme Court of the District of Columbia.

Mr. W. Willoughby and *Mr. S. Shellabarger* for the plaintiff in error.

Mr. R. T. Daniel, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This suit was brought to determine the validity of the retrocession by Congress to the State of Virginia of that part of the District of Columbia, as originally constituted, which was ceded by Virginia to the United States. The plaintiff in error was the plaintiff in the court below. The case upon which he relies is thus set forth in his declaration: —

In pursuance of the Constitution of the United States, Virginia, by an act of her legislature of Dec. 3, 1789, ceded to the United States that part of her territory subsequently known as the county of Alexandria. Congress passed an act accepting the cession. Maryland ceded to the United States the county of Washington, and Congress accepted that cession also. The two counties constituted a territory ten miles square, which Congress set apart as the seat of the government of the United States, and organized as the District of Columbia, over which the Constitution of the United States required that Congress should exercise exclusive legislation in all cases whatsoever. Thereafter, on the 9th of July, 1846, Congress, in violation of the Constitution, passed an act purporting to authorize a vote to be taken by the people of Alexandria County to determine whether the county should be retroceded to the State of Virginia, and declaring, that, in case a majority of the votes should be cast in favor of retrocession, the county should be retroceded and for ever relinquished in full and absolute right and jurisdiction. A majority of the votes were cast for retrocession: whereupon, without any further action by Congress, the State of Virginia passed an act declaring that the county was reannexed, and formed a part of the State. Since that time the State has assumed to exercise full jurisdiction and control over the county, and to authorize the election of officers for the county, among whom is one known as the collector for the township of Washington. The defendant was elected such collector, and assumed to exercise the duties of his office. The State has also assumed to enforce the assessment and collection of taxes upon persons and property in the county. The plaintiff resides in the county, and owns a large amount of real estate and other property there. The defendant alleged that an assessment had been made upon this property; that there was payable to him as such collector, upon the assessment, the sum of $165.18; and he demanded payment. In the event of refusal to pay, he would have sold the property pursuant to the law of the State. To prevent the sacrifice which this would have involved, the plaintiff paid the money under protest; notifying the defendant at the time that he regarded the exaction as illegal and unauthorized, upon the ground that the county of

Alexandria was not within the jurisdiction of the State of Virginia, but that it was within the District of Columbia. He avers that the act of Congress of 1846, before mentioned, every thing done under it, and the law of Virginia reannexing the county to the State and extending her jurisdiction over it, are contrary to the Constitution of the United States, and illegal and void.

He therefore claims to recover the amount so paid to the collector.

The defendant demurred. The court below sustained the demurrer, and gave judgment for the defendant.

The question presented for our determination is, whether there was error in this ruling.

The law of prescription applies to nations with the same effect as between individuals. Lawrence's Wheat. 303, 304; Vattel, b. 2, c. 11, sects. 141, 146, 147, 149.

In cases involving the action of the political departments of the government, the judiciary is bound by such action. *Williams* v. *The Suffolk Ins. Co.*, 13 Pet. 420; *Garcia* v. *Lee*, 12 Pet. 511; *Kennet* v. *Chamberlain*, 14 How. 38; *Foster* v. *Nelson*, 2 Pet. 209; *Nabob of the Carnatic* v. *The East Ind. Co.*, 2 Ves., Jr., 60; *Luther* v. *Borden*, 7 How. 1; *Rhode Island* v. *Massachusetts*, 12 Pet. 714.

The judiciary recognizes the condition of things with respect to the government of another country which once existed as still subsisting, unless the political department of its own government has decided otherwise. *Kennet* v. *Chambers*, 7 How. 38.

For certain purposes, the States of the Union are regarded as foreign to each other. *Buckner* v. *Finley*, 2 Pet. 590; *Warden* v. *Arrel*, 2 Wash. (Va.) 298.

Under certain circumstances, a constitutional provision may, like a forfeiture, be waived by a party entitled to insist upon it. 6 Hill, 48; 24 Wend. 337; 3 Comst. 199, 511; 18 Barb. 585.

The acts of an officer *de facto*, within the sphere of the powers and duties of the office he assumes to hold, are as valid and binding with respect to the public and third persons as if they had been done by an officer *de jure*. *Elwood* v. *Monk*, 6 East, 235; *King* v. *Corp. Bedford*, 6 East, 368; *Tucker* v. *Aiken*, 7 N. H. 134; *Fowler* v. *Babe*, 9 Mass. 231; *Com.* v.

Fowler, 10 id. 291; *People* v. *Collins*, 7 J. R. 549. These propositions were referred to in the discussion at the bar, and we have not overlooked them.

But we do not invoke their aid, and have found it unnecessary to consider the effect of either of them in this case.

We shall place our judgment upon another and a different ground, and shall confine our further remarks to that subject.

The State of Virginia is *de facto* in possession of the territory in question. She has been in possession, and her title and possession have been undisputed, since she resumed possession, in 1847, pursuant to the act of Congress of the preceding year. More than a quarter of a century has since elapsed. During all that time, she has exercised jurisdiction over the territory in all respects as before she ceded it to the United States. She does not complain of the retrocession. The political departments of her government, by their conduct, have uniformly asserted her title; and the head of her judicial department has expressly affirmed it. *McLaughlin* v. *The Bank of Potomac*, 7 Gratt. 68. The United States have not objected. No murmur of discontent has been heard from them: on the contrary, Congress, by more than one act, has recognized the transfer as a settled and valid fact. Act of July 5, 1848, c. 92, 9 Stat. 244; Act of Feb. 2, 1871, c. 33, 16 Stat. 402; Rev. Stat. U. S., sect. 1795. Both parties to the transaction have been and still are entirely satisfied. If the objection taken by the plaintiff in error were maintained in the length and breadth insisted upon, serious consequences would follow. In that view, a part of them would be that all laws of the State passed since the retrocession, as regards the county of Alexandria, were void; taxes have been illegally assessed and collected; the election of public officers, and the payment of their salaries, were without warrant of law; public accounts have been improperly settled; all sentences, judgments, and decrees of the courts were nullities, and those who carried them into execution are liable civilly, and perhaps criminally, according to the nature of what they have severally done.

A government *de facto*, in firm possession of any country, is clothed, while it exists, with the same rights, powers, and duties, both at home and abroad, as a government *de jure*. It may

send ambassadors and make treaties. Such treaties bind the nation and descend in full force upon any succeeding government that may be established. The assailants of a king *de facto* in England are liable to be punished for treason. Such was the rule of the common law, and the celebrated statute of Henry VII. only reaffirmed it. The legislative and judicial authorities called into existence may proeeed as if the prior government had not been displaced. All municipal functions may be performed without regard to the origin of the new polity. Cromwell's ambassadors were received everywhere. Hale accepted from him the place of a judge of the common pleas. After the Restoration, Charles. II. made him Chief Baron of the Exchequer, and subsequently Chief Justice of the King's Bench. The Code Napoleon was the work of a ruler whose government rose amid the ruins of a revolution, and was subsequently overthrown. The governments of both these rulers were doubtless regarded by the other governments of Europe as only *de facto*. Whether they were or were not *de jure* also is a question, which, in this case, it is unnecessary to consider.

In all cases where the United States have been called upon to recognize the existence of the government or the independence of any other country, they have looked only to the fact, and not to the right. Such has been the uniform course of our government. 1 Kent's Com. (Comst. ed.), 170; Vattel, b. 2, c. 12, sects. 196, 197; id., b. 4, c. 2, sects. 14, 18; 1 Hale's P. C. 101; Foster's Crown Law, pp. 397, 399; Camp. Lives of Ch. Justices, 526; Lawrence's Wheat. 49, note; id. 471, note.

The plaintiff in error is estopped from raising the point which he seeks to have decided. He cannot, under the circumstances, vicariously raise a question, nor force upon the parties to the compact an issue which neither of them desires to make.

In this litigation we are constrained to regard the *de facto* condition of things which exists with reference to the county of Alexandria as conclusive of the rights of the parties before us.

Judgment affirmed.

WILLS ET AL. *v.* CLAFLIN ET AL.

1. By the statute of Illinois, the assignor of a promissory note is liable on his contract of assignment, only in case the assignee has, by the exercise of due diligence, obtained judgment against the maker, and a return of *nulla bona*, unless such suit would have been impracticable or unavailing.
2. Where the declaration avers that such suit would have been unavailing, and the defendant takes issue thereon, the record of an adjudication in bankruptcy against the maker of the note before suit could have been brought thereon is not only competent, but conclusive, evidence for the plaintiff.
3. The non-averment of any special fact or reason why such suit would have been unavailing renders the declaration bad on demurrer; but the defect is cured by verdict.

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

This is a suit by the defendants in error, as the assignees of certain promissory notes, against the plaintiffs in error as the assignors.

The statute of Illinois bearing upon the case is as follows: —

"SECT. 7. Every assignor or assignors, or his, her, or their heirs, executors, or administrators, of every such note, bond, bill, or other instrument in writing, shall be liable to the action of the assignee or assignees thereof, or his, her, or their executors or administrators, if such assignee or assignees shall have used due diligence, by the institution and prosecution of a suit against the maker or makers of such assigned note, bond, bill, or other instrument of writing, or against his, her, or their heirs, executors, or administrators, for the recovery of the money or property due thereon, or damages in lieu thereof; *provided*, that if the institution of such suit would have been unavailing, or that the maker or makers had absconded, or left the State, when such assigned note, bond, bill, or other instrument in writing, became due, such assignee or assignees, or his or her executors or administrators, may recover against the assignor or assignors, or against his or their heirs, executors, or administrators, as if due diligence by suit had been used." — *Gross's Compilation*, 1869, p. 462.

One of the notes sued upon was executed by Simeon Pickard, who resided in the State of Michigan; and the liability of the plaintiffs in error upon that note is conceded. The other three notes were executed by Kimball & Butterfield, were

assigned in Chicago by the plaintiffs in error, November, 1869; and fell due Jan. 18, Feb. 19, and March 19, 1870, respectively.

The declaration, after setting forth the execution and the assignment of the notes, proceeds, in the first count, as follows: —

"And the plaintiffs aver that the said Simeon Pickard, and the said Kimball, and the said Butterfield, were not, at the date of the aforesaid execution of their respective notes, residents of the State of Illinois; nor was either of them, at the date of such execution, a resident of said State; but that they were each and all, at the time of the execution by them of said notes respectively, ever since have been, and still are, non-residents of the State of Illinois; and were not, nor were either or any of them, within said State at the time when said notes, or any or either of them, became due and payable. Of all which several premises the said defendants afterwards — to wit, at the time aforesaid — had notice."

The averments in the second count are as follows: —

"And the plaintiffs aver, that, at the time when each of said promissory notes became by its terms due and payable, the said Simeon Pickard, and the said Kimball, and the said Butterfield, were each and all insolvent, and unable to pay the amount of the notes by them respectively subscribed as aforesaid, or any part thereof, and hitherto from thence have continued insolvent, and unable to pay the amount of the notes by them respectively subscribed as aforesaid, or any portion thereof; and the said plaintiffs aver, that the institution of a suit against the said Simeon Pickard, or against the said Kimball, or the said Butterfield, at the time the notes so by them as aforesaid respectively subscribed became due and payable, or at any time since, or now, would have been and would be wholly unavailing. Of all which the said defendants afterwards — to wit, at the time aforesaid, at the Northern District of Illinois aforesaid — had notice."

The defendants pleaded the general issue.

At the trial, the plaintiffs below offered in evidence the transcript of the record from the District Court of the United States for the Eastern District of Wisconsin, showing the petition in bankruptcy by certain creditors of Kimball & Butterfield, filed Jan. 20, 1870, against them, alleging that they had committed an act of bankruptcy the preceding month, and an order entered the 29th of January adjudicating them bankrupts; to which

the defendants objected, because it was irrelevant and incompetent upon the pleadings and issue. But the court overruled the objections, and allowed the transcript to be read in evidence to the jury. The defendants excepted.

The defendants offered parol testimony to show, that, after the adjudication in bankruptcy, the proceedings were dropped and dismissed by the attorneys who had prosecuted them, but without showing when such dismissal took place.

The court charged the jury upon this point as follows: —

"If you shall believe from the testimony, that, at the time these notes became due, — that is, during the months of January, February, and March, — this adjudication in bankruptcy, rendered by the United States District Court of the State of Wisconsin, was in force, that of itself would excuse the plaintiffs from the institution of a suit at law against the makers of these notes; and, if these parties were adjudged bankrupts, it was the duty of the creditors to present their claims to the court in bankruptcy in Wisconsin. They had no right to prosecute in this or any other State; and an injunction would have issued to prevent the prosecution of such a suit if it had been instituted."

To which charge the defendant excepted.

The court also charged, —

"If it appears from the evidence that the makers of these notes were adjudicated bankrupts, and the defendants wish to show or claim that this adjudication was at any time set aside, and the parties placed back upon the footing of a discharge from this adjudication, it was their duty to have established the fact, when the adjudication was set aside, by testimony which showed that it became operative, so that the plaintiffs in this suit could have brought their suit at law at the next term of the court succeeding the maturity of the note or notes; otherwise the plaintiffs were excused from the diligence that the law required."

The jury found a verdict for the plaintiffs, upon which judgment was rendered. The defendants sued out this writ of error.

Mr. W. C. Goudy for the plaintiffs in error.

The liability of assignors in Illinois is regulated by the statute of that State, and not by the general rules of commercial law. Rev. Stat. of Ill., 1845, p. 772; Gross's Comp., 1869, p. 462.

The construction of this statute has been settled in Illinois by numerous decisions. Those applicable to the questions in this case are *Hilborn* v. *Artus*, 3 Scam. 345; *Schuttler* v. *Piatt*, 12 Ill. 419; *Pierce* v. *Short*, 14 id. 146; *Mason* v. *Burton*, 54 id. 353; *Crouch* v. *Hall*, 15 id. 264; *Bledsoe* v. *Graves*, 4 Scam. 385.

The plaintiffs below filed two counts in their declaration, and in each of which they presented a ground of recovery on the assignment. No diligence to collect from the makers of the notes by suit was claimed; but reliance was placed on the other two branches of the statute as an excuse for not instituting a suit. The first count alleged as an excuse that they were not within the jurisdiction of the courts of Illinois when the notes matured. The second count alleged as an excuse, that when the notes matured, and ever since that time until the commencement of this suit, the makers were insolvent, and unable to pay, so that a suit against the makers would be unavailing. The general issue was interposed to the declaration; so that the plaintiff was required to prove one of these counts, in order to recover.

The statute, as construed by the Supreme Court of Illinois, makes an assignor of a promissory note liable only in the event of, 1. An exercise of diligence by the assignee to collect from the maker by the institution and prosecution of a suit to judgment, and a return of execution, *nulla bona*. 2. Where such a suit would be unavailing for any legal reason, the diligence by suit is excused. 3. Where the maker is out of the jurisdiction of the court, so that he cannot be served with process when the assigned note matures, and until the time arrives when a suit could be commenced, diligence by suit is excused.

The plaintiff cannot allege generally, in the language of the statute, that a suit would be unavailing, and prove on the trial any fact which shows that it would be unavailing; but he must aver in his declaration the specific fact or reason why it would be unavailing, and he is confined in his proof to the fact alleged. *Crouch* v. *Hall*, *supra*.

The court admitted evidence that the makers were in bankruptcy in Wisconsin directly after the first note of Kimball & Butterfield matured, as evidence tending to show that a suit against them would be unavailing when it was not set up in either

count of the declaration, and the only reason alleged was their insolvency, and instructed the jury that it devolved on the defendants to prove a termination of the proceedings in bankruptcy, so that a suit could be sustained on the notes when they fell due, and that the existence of the adjudication was sufficient evidence that a suit would be unavailing, while there was no such fact alleged in the declaration, and no issue of that kind submitted to the jury.

The ground of recovery set forth in the second count of the declaration can only be construed to be that a suit would be unavailing because of the insolvency of the makers, and not on account of the pendency of bankrupt proceedings. *Crouch* v. *Hall*, *supra*.

Mr. Cyrus Bentley for the defendants in error.

The case of *Crouch* v. *Hall*, 15 Ill. 264, cited by the plaintiffs in error, is not in point. The decision there rendered was upon a demurrer to the declaration.

In the case at bar, no objection of this kind was raised; and, the averment being left open, it was competent for the defendants in error to introduce any evidence competent to show any reason why a suit against the makers of these notes would be unavailing. If we are correct in this position, the record from Wisconsin was admissible under the second averment of the second count of the declaration, to show, that, for the reason that the makers of these notes were in bankruptcy, a suit against them would be unavailing; and the court committed no error in its admission, or in the charge to the jury in regard to it,—"If the defendant elect to plead and go to trial, he has no right to insist upon the exclusion of evidence because some necessary averment is omitted or defectively set forth." *Greathouse* v. *Robinson*, 3 Scam. 8.

MR. JUSTICE DAVIS delivered the opinion of the court.

Claflin & Co., assignees of certain promissory notes, sued Wills, Gregg, & Co., assignors of said notes, on their contract of assignment made in the State of Illinois. The inquiry is, whether a case of liability was made out on the trial, under the peculiar provisions of the statute of Illinois on the subject. This statute makes promissory notes assignable by indorsement

in writing, so as to vest the legal interest in the assignee; but the liability of the assignor is not absolute, but conditional. He agrees to pay the note, if the assignee, by the exercise of due diligence, prosecutes the maker to insolvency; but if the institution of a suit against the maker would be unavailing, or if the maker, when the note falls due, is out of the jurisdiction of the court, and therefore beyond the reach of legal process, the assignor is equally as liable as if due diligence by suit had been used. Gross's Comp., 1869, p. 462.

There was no attempt to coerce payment of the makers by suit; and the assignees assume that they were excused, under the circumstances, from instituting it. The declaration avers insolvency, non-residence, and that a suit would have been unavailing. On the trial, the Circuit Court, against the objection of the defendants, admitted evidence that a petition in bankruptcy was filed Jan. 20, 1870, in the District Court of the United States for the Eastern District of Wisconsin, against Kimball and Butterfield, the makers of the notes sued on; and that a judgment was rendered against them Jan. 29, 1870. The admission of this evidence is assigned for error on the ground that there was no allegation in either count of the declaration which justified it, or the charge of the court that the adjudication in bankruptcy excused the assignees from instituting suit against the makers.

There are two averments in the second count of the declaration, as follows: —

First, "And the plaintiffs aver, that at the time when each of said promissory notes became, by its terms, due and payable, the said Simeon Pickard, and the said Kimball, and the said Butterfield, were each and all insolvent, and unable to pay the amount of the notes by them respectively subscribed as aforesaid, or any part thereof, and hitherto from thence have continued insolvent, and unable to pay the amount of the notes by them respectively subscribed as aforesaid, or any portion thereof."

Second, "And the said plaintiffs aver that the institution of a suit against the said Simeon Pickard, or against the said Kimball, or the said Butterfield, at the time the notes so by them as aforesaid respectively subscribed became due and payable, or at any time since, or now, would have been and would be wholly unavailing."

It is contended that these two averments must be treated as one, and that they mean that a suit against the makers would have been unavailing by reason of their insolvency.

If this were so, it would by no means follow that the record was inadmissible to sustain that issue; but, be this as it may, these averments, as we construe them, are distinct, and independent of each other. The first is complete in itself, because, if the makers were insolvent, it would have been idle to bring a suit against them. But there are other things besides insolvency which might render a suit unavailing; as, for instance, want of consideration in the note, or, as in this case, an adjudication in bankruptcy.

The second averment was not limited to any particular cause, but was general in its character, and left the pleader free to show on the trial any reason why a suit would be unavailing. It does not contain specifications enough to enable the party to defend himself (*Crouch* v. *Hall*, 15 Ill. 264), and an objection by way of demurrer would have prevailed. But the question here is, not whether it is bad on demurrer, but whether it is good after verdict.

"At common law, after verdict, if the issue joined be such as necessarily to require on the trial proof of the facts defectively or imperfectly stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict." 1 Chitty's Plead. (10th Am. ed.) 673, and cases cited in note. And this rule is adopted in Illinois. In *Greathouse* v. *Robinson*, 3 Scam. 8, it was held that the defendant, to avail himself of a defective averment in a declaration, must demur to it. "If he elects to plead to the declaration, and go to trial, he has no right to insist upon the exclusion of evidence because some necessary averment is omitted or defectively set forth." There was, therefore, no valid reason why the record of the adjudication of bankruptcy should have been excluded. It was not only competent but conclusive evidence in support of the allegation, that a suit against the makers would have been unavailing; for the Bankrupt Act prevents the institution and prosecution of suits against parties in bankruptcy.

The first note was due Jan. 18, 1870, two days before the petition in bankruptcy was filed; and the first term of court held at Chicago, after the note became due, was on the first Monday of the following month. At this time the adjudication in bankruptcy was in force, and a suit against the bankrupts forbidden.

There was parol testimony (received without objection) to show that the debts of the petitioners were settled, and the proceedings in bankruptcy dismissed; but there was nothing to fix the time when the order of dismissal was made. The burden of doing this rested on the defendants, and so the jury were told.

As this view of the case is decisive of it, it is unnecessary to notice the other assignments of error. *Judgment affirmed.*

MARKEY ET AL. *v.* LANGLEY ET AL.

1. Where mortgaged property is sold under a power, the absence of objection on the part of the mortgagor to the sale as made cures any defect which exists therein, and gives it validity.
2. Where the mortgagees are expressly authorized to sell for cash or on credit, they may do either, or combine them in the sale; nor is a sale for part in cash and part on credit under a power requiring it to be made for cash invalid, if the departure from the terms of the power is beneficial to the mortgagor. It is immaterial whether such arrangement for payment is made before or after the sale.
3. Where property, subject to mortgage and other liens, is sold by the first mortgagee, he becomes the trustee for the benefit of all concerned. If he regards the interest of others as well as his own, seeks to promote the common welfare, and keeps within the scope of his authority, a court of equity will in no wise hold him responsible for mere errors of judgment or results, however unfortunate, which he could not reasonably have anticipated.
4. Upon the sale of such property, the liens attach to the proceeds thereof in the same manner, order, and effect as they bound the premises before the sale, the new securities standing in substitution for the old.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

The Kalmia Mills, a corporation under the laws of South Carolina, having commenced the erection of a factory, borrowed from W. C. Langley & Co. of New York, in July, 1866, $150,000 upon a mortgage of its entire property. The notes

given therefor were indorsed by B. F. Evans, president of the company, and by H. Cogswell and B. Mordecai, upon whom devolved the management of the mills, and the entire responsibility for the payment of its debts.

In October, 1866, an additional loan, secured in like manner, was made by Langley & Co. Both mortgages contain covenants, in case of default in the payment of either the principal or interest of the notes, that it should not be necessary to apply to a court for a foreclosure, but the mortgagees should have full power and authority to put the premises into the hands of some good broker and auctioneer, to be sold for cash or credit at their option and direction, at public sale, to the highest bidder, after thirty days' advertisement of the time and place of sale; the surplus from such sale, if any there should be after deducting expenses and the amount of the notes, to be paid to the said Kalmia Mills. To carry into effect this intent, the partners of the firm of Langley & Co. and the survivor were made the attorneys, irrevocable, of the corporation, to convey to the purchaser in fee-simple with such covenants of warranty as are usually inserted in conveyances of real estate; "and, further, to do and perform all and every other act and acts, thing and things, which shall or may be necessary and proper for the full and complete effecting and performing of the covenants and agreements herein contained."

No payment having been made, Langley & Co., on the 16th March, 1867, placed the property in the hands of Wardlaw & Carew, brokers, of Charleston, and duly advertised the same for sale. The terms were declared to be one-third of the purchase-money in cash; the remainder at six, nine, and twelve months, secured by a mortgage on the property.

The corporation seems to have been regarded as practically insolvent by its creditors, as well as by Evans, Cogswell, and Mordecai. The latter determined, in order to save themselves, to purchase the property at the sale. Advised that, being officers of the corporation, it was expedient, if not essential, that they should buy at such a sum as would, with the other assets of the company, be sufficient to pay all its debts, they announced their determination to the creditors to do so. Among them were Markey & Co., the contractors and builders engaged

in erecting the factory, who had a written contract with the corporation prior in date to its said mortgages, but which, not having been recorded at the time they were executed, was not a lien on the building. It was recorded a few days before the sale, and from that date took effect as a lien for no "greater sum than the just value which such building gave to the lands upon which it was erected:" it "impaired no prior lien." 6 Stat. S. C. 32.

Markey & Co., being informed by the counsel of Langley & Co. of the intention of Evans, Cogswell, and Mordecai, to purchase, and having obtained from the latter a guaranty, that, in case they became the purchasers, they would continue the contract, and indemnify them from any loss from the failure of the Kalmia Mills to pay the amount due thereon, made no objections to the sale.

Evans, Cogswell, and Mordecai computed that $20,000, in addition to the assets of the company not covered by Langley & Co.'s mortgages, would suffice to pay the creditors in full, and announced that they were prepared to bid that sum in excess of the mortgage-debts. This intention they communicated to the creditors generally, and explained to Langley & Co. that their purpose was to form a new company, and raise by subscriptions to the capital stock a sufficient amount to pay off all debts, and to put the factory into operation; that, of course, they would be dependent upon indulgence as to payment, and aid to enable them to carry out the intention. Langley & Co., without committing themselves to any definite promise of assistance, expressed a willingness to give any reasonable indulgence as to time, provided adequate security were given. The determination to bid a sum estimated to be sufficient to pay all the creditors, and the announcement to them, were based upon the opinion that Langley & Co. had the *authority* and *power* as well as the willingness to extend to them, if they should be the purchasers and give satisfactory security, more favorable terms as to payment than those formally announced in the advertisement. The sale was made on the 23d of April, 1867, without objection or protest, the auctioneers announcing the terms as advertised, and adding that they were authorized to say that "the purchasers will be

able to negotiate more favorable terms with the sellers, provided it is to their mutual interests." Langley & Co. had the property put up at the amount of the debt due to them. Cogswell, the only bidder, bid $20,000 over and above that amount, and became the purchaser "for and on behalf of himself, Evans, Mordecai, and such other persons as should contribute to the purchase-money, and come in and unite with them in the formation of a new company for the purpose of carrying out the contemplated enterprise."

The result of the sale being announced to Langley & Co., a personal negotiation was entered into between that firm and Cogswell, Evans, and Mordecai. The latter represented that they were unable to comply with the requirement as to the cash payment of $71,445.69, and asked for one year's indulgence, claiming that the expectation of receiving it had induced them to bid in the property. Langley & Co. reiterated their willingness to give it, provided their rights and interests were preserved and protected by additional adequate security.

This negotiation resulted in a written contract between the parties, in which were recited the sale, and the inability of the purchasers to comply with its terms; and it was agreed that Langley & Co. would "accept in payment of the debt due to them this day by the Kalmia Mills under the said mortgages — the following notes of the said Cogswell, Evans, and Mordecai, under seal — one note (for the principal of the said debt) for $180,000, payable on 12th January, 1868, with interest from date; and three other notes (for the interest), each for $4,779.02, payable at five, six, and seven months, with interest from date: and upon execution and delivery of the said notes, and also of another note for the sum of ——— dollars, — which, being for an amount over and above the debt of the Kalmia Mills to Langley & Co., is to be assigned by them to the Kalmia Mills, — the said Langley & Co. will, as the attorney of the Kalmia Mills, execute a conveyance to Harvey Cogswell, in trust, first to pay said notes for the purchase-money, and then in trust for such uses as he and the said Evans and Mordecai shall by deed declare; and will enter satisfaction on the two mortgages of the Kalmia Mills, provided that the said Cogswell, Evans, and Mordecai shall within a reasonable time execute to Langley & Co.

bonds and mortgages of their individual property therein specified, conditioned for the payment of all the notes given for the purchase-money."

This agreement was carried out, and Langley & Co. received the five notes stipulated to be given, — four for the amount of the mortgage-debt; and one for $20,000, which was intended to cover the other creditors, including Markey & Co., and which was assigned to the Kalmia Mills, and delivered to Evans, the president, to be held by him for the benefit of the creditors of said company. Evans, Cogswell, and Mordecai, in pursuance of the agreement, also executed to Langley & Co. a bond of indemnity for $100,000 with the stipulated condition, and mortgages of their individual property to secure it.

Notice of the willingness of Langley & Co. to modify the terms of sale was given openly at the sale; but the modifications above stated were made without consultation with, and, as far as the evidence shows, without the knowledge of, the other creditors.

The sale having been effected, Langley & Co., on the tenth day of May, 1867, in the exercise of the powers conferred upon them by the mortgages, executed and delivered a conveyance in fee-simple to Harvey Cogswell of the entire property covered by the mortgages *in trust*, out of and from the purchase-money, to pay *first* the costs and expenses of said sale, *then* to pay the several notes given for the purchase-money, and subject to the trusts for the payment of the entire amount of the purchase-money to and for such uses, intents, and purposes, and to and for such person or persons, and in such shares, estates, and proportions, as the said Cogswell Evans, and Mordecai shall by deed declare, limit, and appoint. The deed also contained a proviso, that in case of default of payment to the said Langley & Co. of the notes given for the purchase-money, or any or either of them, they should sell the mortgaged property without application to any court, and pay the notes from the proceeds. This deed having been duly recorded, the purchasers entered into possession, and carried on the work upon the factory. Markey & Co. having, on the 11th of June, 1867, entered into an agreement with Cogswell, trustee, stipulating for the payment of $18,000 for the work already done, and to be done,

by them, continued work under their contract, and received payments from time to time therefor. The purchasers discharged several debts due to operatives and other creditors of the Kalmia Mills, in all amounting to $16,674.21. They credited these payments on the $20,000 note, the amount of which had been made up by including the debts thus paid; and it is claimed that the payments should go to the extinguishment of the note, still leaving debts of the Kalmia Mills unpaid, amounting to $22,433.08. Many new debts were also contracted by Cogswell, trustee, in the course of the year during which the effort was made to carry on the enterprise. The purchasers failed in their attempt to form a new company; and, none of the notes given by them having been paid, they, in January, 1868, requested Langley & Co. to take possession of and sell the entire property conveyed by them to Cogswell, trustee, and also the individual property mortgaged to them, to make up any loss that they might sustain on the sale of the mill property. Langley & Co., accordingly, under the powers given to them, and in compliance with the prescribed terms, advertised the mill property for sale in Charleston on the 19th March, 1868.

Markey & Co. and other creditors of the Kalmia Mills opposed the sale, and threatened proceedings in the State court to enjoin it. Langley & Co. thereupon filed their bill in the Circuit Court, setting up their rights, and praying an injunction against proceedings on the part of the creditors to stop or interfere with the sale. Answers were filed; and Markey & Co. filed a cross-bill, praying that the sale be enjoined.

While the cases were under consideration, and before the argument was concluded, the day of sale arrived; and an order was made by consent, that the sale by Langley & Co., under their power, should proceed, "provided that the said property at said sale be not sold for a sum less than $160,000, and that $40,000 of the credit portion of the purchase-money be retained to stand in place of the property, and subject to the liens and equities of the several parties, and subject to the further order of the court."

William C. Langley became the purchaser for $160,000; and the sale was confirmed by the court, with the same condition

and proviso as to the $40,000 which was made a charge upon the property purchased by him. Langley having sold the mill property to the Langley Manufacturing Company, which has since completed the factory and put it in successful operation, an order was subsequently made by the court releasing the land from the said charge, and substituting instead his bond with approved sureties, conditioned for the payment of such portions of the purchase-money into court as it should order, not exceeding the sum of $40,000.

By order of court, with the consent of all parties, Langley & Co. proceeded to sell the individual property of Evans, Cogswell, and Mordecai, mortgaged to them to secure the bond of indemnity, and received therefrom $52,148.

The court below decreed that the arrangement made between the purchasers at the sale in 1867 and Langley & Co. was within the scope of the power, authority, and duty of the latter, and binding upon all parties; that their right to priority of payment out of the purchase-money accruing from the sale in 1868 was not waived, and that they were entitled to be paid in full before any of the creditors, either of the Kalmia Mills or of the purchasers in 1867, should receive any portion thereof; that the note for $20,000 did not rank *pari passu* with the notes for the rest of the purchase-money secured by the trusts of the conveyance by Cogswell; and dismissed the cross-bill.

Markey & Co. thereupon appealed to this court.

Mr. Samuel Lord, Jr., and *Mr. James Lowndes*, for the appellants.

Sufficient having been realized by the first sale of the property to pay both the liens of the appellees and the appellants, they were transferred to that fund, and continued upon it in the same order in which they subsisted on the premises previous to the sale. This is the settled rule of equity; and the mortgagees, having notice of the lien of the appellants, were bound to apply the fund as would a court of equity. *Olcott* v. *Bynum*, 17 Wall. 63.

The appellants insist that the appellees' control of the terms of sale ended when the property was knocked down to Cogswell, except for the purpose of executing a conveyance and receiving the purchase-money. But this the mortgagees could

not do; for a power to sell at public auction cannot be executed at private sale. *Greenleaf* v. *Queen*, 1 Pet. 138. Nor can property bound by two mortgages be sold under the first, so as to discharge the lien of the second, unless the holder of the latter be made a party.

The undisputed facts as to the arrangement referred to do not sustain the legal conclusion based upon them. That the departure from the terms of a specially delegated power cannot be justified upon the plea that the principal would be benefited thereby was expressly ruled in *Greenleaf* v. *Queen*, *supra*.

The appellants were *sui juris*, resided in the State, and were represented by counsel, who had conducted the negotiations preceding the sale. Upon what ground, then, could the appellees be justified in assuming to act for them, and determine what was best calculated to "protect their rights and further their interests"?

If the doctrine of the court below, in sustaining the transaction upon the ground "that it would have been sanctioned by the court if application had then been made to confirm it," be correct, it follows that the extent of a power depends, not upon the terms employed in its creation, but upon the arbitrary will of the court. There is no such principle in law; for the court had no power to sanction a departure from the terms and conditions of the instrument under which the appellees were acting. *Dolan* v. *The Mayor of Baltimore*, 4 Gill, 405.

Equity may aid a defective execution of powers, when the defect is only formal; but it cannot supply a defect in substance. *Piat* v. *McCullough*, 1 McLean, 69.

If the position we have assumed is untenable, it is submitted that the note for $20,000 is entitled to share *pari passu* with all the other notes in the proceeds, not only of the mill, but of the other property.

The sale in 1867 and the acceptance of the notes of the purchasers by the appellees extinguished their mortgage-debt, and with it the priority to which they had been entitled. 2 Hilliard on Mort., c. 36, sect. 1; *Dooley* v. *Hays*, 17 S. & R. 400; *Mohler's Appeal*, 5 Burr. 418; *Hancock's Appeal*, 34 Penn. 156.

Mr. Ch. Richardson Miles, contra.

The mortgage gave the mortgagees no power to vacate or abandon a sale made at auction, or to vary its terms. The arrangement made between them and the purchasers, after the sale, was not, therefore, within the scope of their power. 1 Hilliard, 138.

The rule is settled, that, in determining the extent of a power, the intention of the parties in its creation must constitute the guide. In the case at bar, the very nature of the power rendered its exercise necessary before the sale. *Montague* v. *Dawes*, 14 Allen, 369.

The mortgagees were not made the agents of the mortgagors for the purpose of a sale. Their power was studiously limited to the selection of a "good broker or auctioneer."

If the power to change the terms of sale, so as to bind the junior incumbrancers, existed at all, the conclusion is irresistible, that it was without limit so long as the mortgagees acted in good faith.

If the parties to a contract of sale which is still executory in any manner add to, subtract from, vary or qualify, its terms, the legal effect thereof is to rescind the original contract, and substitute a new one in its place. If new terms could be substituted, so could new prices or new qualities. *Stead* v. *Dawber*, 10 Adol. & Ell. 57; *Marshall* v. *Lynn*, 6 Mees. & Wels. 109.

If, then, the agreement be regarded as a change in the terms of sale, and binding on all parties having an interest in the proceeds, its legal effect was, necessarily, to annul the public sale, and make a private one of the mortgaged premises.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The statement of facts agreed upon by the counsel of the parties has abridged our labor in this case. We shall confine our remarks to the points, which, in our judgment, require consideration, referring to the facts only so far as is necessary for the elucidation of our views.

The validity of the two mortgages executed to Langley & Co., by the corporation known as the Kalmia Mills, is not questioned; nor can it be doubted that the power to sell, which they contained, was sufficient to warrant the sale of the mortgaged premises in the manner prescribed. *Olcott* v. *Bynum*,

17 Wall. 63. The good faith of Langley & Co. in making the sale, and of Cogswell, Evans, and Mordecai in making the purchase, are undisputed. No ground is disclosed for doubt as to either of these points. All concerned acquiesced at the time, and were apparently satisfied. This litigation has grown out of the large and unexpected depreciation of the property upon which both the appellants and appellees supposed their debts were abundantly secured, and out of the proceeds of which they expected to be paid, if a sale became necessary.

Upon the default of the mortgagor, the mortgages gave the mortgagees authority "to put the mortgaged premises into the hands of some good broker and auctioneer, to be sold for cash or credit, at the option and direction of the mortgagees, at public sale to the highest bidder, according to the custom of vendue, after advertising" as directed; and, further, "to do and perform all and every other act and acts, thing and things, which shall or may be necessary and proper for the full and complete effecting and performing of the covenants and agreements herein contained."

The terms of sale advertised were a cash payment of one-third of the amount bid, and the balance in six, nine, and twelve months, secured by notes and a mortgage upon the premises. At the sale, the auctioneers announced that they were authorized to state "that the purchasers would be able to negotiate more favorable terms with the sellers, provided it was to their mutual interests."

The property was sold to Cogswell, for himself, Evans, and Mordecai, upon a bid of the amount due Langley & Co., and $20,000 in addition. One-third of the amount bid to be paid in cash was $71,445.69. The buyers thereupon represented to Langley & Co. that it was impossible for them to make the cash payment, and asked for indulgence, and a change of the terms of the sale with respect to the times when the payments were to be made.

Langley & Co., rather than re-advertise the property and take the risk incident to offering it for sale again, entered into an agreement with the purchasers, whereby it was stipulated as follows: —

That the purchasers should give to Langley & Co. their four

several promissory notes, one for $180,000, payable on the 12th of January, 1868 (being for the principal of the debt then due to them), with interest; and three others, each for $4,779.92, payable respectively at five, six, and seven months, with interest (being for interest then due on the principal debt); and, in addition, another note for $20,000, payable with interest on the 3d of April, 1868.

The title to the mortgaged premises was to be conveyed to Cogswell, first to pay the several notes for the purchase-money, and then in trust for such uses and purposes as Cogswell, Evans, and Mordecai should appoint. They were also to give to Langley & Co. their bond, secured by several mortgages upon their individual property, conditioned to pay any residuum that might be left due on the notes after exhausting the property covered by the deed of trust to Cogswell. This agreement was in all things carried out by the parties. The note of $20,000 was intended to meet the liabilities of the Kalmia Mills to its creditors, other than Langley & Co. The debt due to Markey & Co. was one of those intended to be thus provided for.

A few days before the sale, Markey & Co. put on record a contract with the Kalmia Mills, under which they had been working upon the mortgaged premises. This gave them a mechanics' lien. They threatened to enjoin the proceedings to sell by Langley & Co. Cogswell, Evans, and Mordecai thereupon gave them a guaranty, that, if the guarantors became the purchasers of the premises, they would continue the contract under which Markey & Co. had been working, and indemnify them against any loss arising from the Kalmia Mills failing to pay the amount due on the contract. This being arranged, Markey & Co. interposed no obstacle to the sale. After the sale, they entered into a contract with Cogswell, the trustee, whereby it was stipulated that they should be paid the sum of $18,000 for their work done and to be done. They continued to work under this contract, and received payments from time to time.

The enterprise in which Cogswell, Evans, and Mordecai had engaged, with the premises they had bought as its basis, having failed, they requested Langley & Co. to take possession of the premises conveyed by the trust-deed to Cogswell, and of the premises covered by the mortgages given by Cogswell, Evans,

and Mordecai, and to proceed to sell under the powers contained in those instruments. Langley & Co. thereupon advertised the Kalmia Mills property to be sold on the 10th of March, 1868. Markey & Co. and other creditors threatened to interpose by injunction. Langley & Co. thereupon filed this bill to settle their rights and those of the adverse parties. On the day fixed for the sale, the Kalmia Mills property, by consent of parties, was bought by Langley for $160,000. Forty thousand dollars of the fund was reserved by order of the court to await the result of this litigation. Subsequently, by the like consent of parties, the property mortgaged by Cogswell, Evans, and Mordecai was sold, and yielded the net sum of $52,148. The proceeds of both sales were less than sufficient to satisfy the amount due Langley & Co. by $6,152.13, leaving nothing to be applied to any other liability of the Kalmia Mills.

The contest in the court below was as to the application of the proceeds of these sales. The defendants claimed that Langley & Co. should be charged with the amount of the cash bid of Cogswell at the sale under the original mortgages, $71,449.69, as so much paid to them, because they had no right to waive its payment at the time of the sale, and include it in the notes given for the purchase-money.

This, if done, would leave a residuum of the proceeds of the sales large enough to pay the balance due Langley & Co., and also the amount due on the trust-note of $20,000. Failing this, the defendants insisted that this note should be paid out of the proceeds of the Kalmia Mills property, and of the property mortgaged by Cogswell, Evans, and Mordecai severally, *pro rata* with the other notes given for the purchase-money.

The court below decided against them upon both points. Here the same propositions have been urged upon our attention.

The first one cannot be maintained, for several reasons.

The mortgagor makes no objection to the sale as made. If it were defective, this would cure the defect, and give it validity. *Taylor's Admr.* v. *Chowning*, 3 Leigh, 654; *Benham et al.* v. *Rowe et al.*, 2 Cal. 387. If the power require the sale to be for cash, and it is made for part cash and part credit, the departure from the power is beneficial to the mortgagor, and the sale is valid. *Hubbard* v. *Jarrell*, 23 Md. 75. When the

power is to sell for cash, and the sale is made accordingly, the mortgagee may allow time for the payment of the purchase-money; and whether this arrangement is made before or after the sale is immaterial. *Mahone* v. *Williams*, 39 Ala., N. S. 202.

Where mortgaged premises were offered for sale for cash under a power which required the sale to be so made, they were struck off for $2,375. The purchaser tendered $1,200 cash, and offered to give any security that might be required for the payment of the balance when the sale was confirmed. The mortgagee declined to receive the money and the security, as not in conformity with the terms of the sale. The property was offered for sale again, and bought by the mortgagee for $1,600.

The court said, —

"In determining upon the approval or rejection of the sale in such cases, the true question to be considered is, not so much whether there has been *a literal or technical, as a fair and reasonable, compliance with the terms of sale*, and a *bona fide* disposition of the property.

"Without intending to charge the mortgagee in this case with the wilful violation of his trust, the circumstances disclosed by the proof show reasonable ground for the inference that he misapprehended the nature of his duty as trustee, which required *an advantageous sale of the property for the benefit of all the parties interested.*"

The sale was vacated. *Horsey* v. *Hough*, 38 Md. 139. See also *Gibson's Case*, 1 Bland, Ch. 144; *Olcott* v. *Bynum*, 17 Wall. 63.

Where a power coupled with a discretion has been exercised, a court of equity, in the absence of fraud, very rarely interferes. *Olcott* v. *Bynum*, *supra*.

In this case, the mortgagees were expressly authorized to sell for cash or on credit. This gave them authority to do either, or to combine them in the sale. What was done was a simple exercise of the discretion with which they were clothed. It was in pursuance of the notice given at the vendue. It was intended to promote the sale of the premises upon the best terms that could be procured. Such an exercise of the power was as

competent after as before the property was struck off. In this respect, the power is without restriction. The arrangement was apparently greatly beneficial to Markey & Co. and the unsecured creditors, as well as to Langley & Co. It does not appear that there was any bidder but the purchasers. It is clear that they could not have made the cash payment. If insisted upon, the sale would have fallen through. Besides the mortgaged premises, a large amount of additional property was pledged for the payment of the purchase-money. The light thrown backward by subsequent events shows clearly that it was the only way to secure the payment of the debt due to Langley & Co., and leave any thing for the other creditors. The arrangement seemed to furnish the means of satisfying all demands. That it failed to do this was not the fault of Langley & Co.

A mortgagee, in such circumstances, is a trustee for the benefit of all concerned. He must regard the interests of others as well as his own. He should seek to promote the common welfare. If he does this, and keeps within the scope of his authority, a court of equity will in no wise hold him responsible for mere errors of judgment, if they have occurred, or for results, however unfortunate, which he could not reasonably have anticipated. *Hext* v. *Porcher*, 1 Strob. Eq. 172.

The second proposition is also untenable.

The liens of the mortgages and the mechanics' lien attached to the proceeds of the sales in the same manner, in the same order, and with the same effect, as they bound the premises before the sales were made. *Astor* v. *Miller and Others*, 2 Paige, 68; *Sweet* v. *Jacobs*, 6 id. 355; *Brown* v. *Stewart*, 1 Md. Ch. Decis. 87; *Olcott* v. *Bynum*, 17 Wall. 63.

In the view of equity, the new securities stood in substitution for the old ones; the liens of Langley & Co. being prior in point of time to all others, and first to be paid. As the case is developed in the record, such appears plainly to have been the intent of the parties. The note of $20,000 was the last to mature.

If the sale to Cogswell had been made by a master or a trustee other than those named in the power of sale, for cash or on credit, the money, when received, would have been paid over according to the priorities of the liens of the parties entitled to receive it. Langley & Co. would have been first paid.

The fact that the sale was made by the mortgagees, acting as trustees and performing the functions of a master, does not change the principle involved, nor affect its application.

It appears that a question was raised in the court below as to the right of the unsecured creditors of the Kalmia Mills to share with Markey & Co. in the proceeds of this note. As there can be no such proceeds, we need not consider that subject. *Decree affirmed.*

TERRY v. TUBMAN.

1. Where the charter of a bank contained a provision binding the individual property of its stockholders for the ultimate redemption of its bills in proportion to the number of shares held by them respectively, the liability of the stockholders arises when the bank refuses or ceases to redeem and is notoriously and continuously insolvent.
2. Such insolvency having occurred prior to June 1, 1865, an action against a stockholder, not commenced by Jan. 1, 1870, is barred by the Statute of Limitations of the State of Georgia of March 16, 1869.

ERROR to the Circuit Court of the United States for the Southern District of Georgia.

Mr. Harvey Terry for the plaintiff in error.

Mr. William H. Hull, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

The plaintiff, a citizen of Georgia, brings his action to recover from Mrs. Tubman the sum of $5,400. He alleges that he holds the circulating notes of the Bank of Augusta, Ga., to that amount; and that the defendant was, in June, 1862, and thenceforth, a holder of three hundred and seven shares of the stock of that bank, of the nominal value of $100 per share.

The Bank of Augusta was chartered Dec. 27, 1845, and its charter contained the following provision: —

"SECT. 3. That the individual property of the stockholders in said bank shall be bound for the ultimate redemption of the bills issued by said bank in proportion to the number of shares held by them respectively; and, in case of a failure of said bank, all transfers of stock made within six months prior to a failure or refusal

on the part of said bank to redeem its liabilities in specie when required shall be void, and the private property of the individual or individuals transferring said stock shall be liable for the redemption of the bills of said bank, as above stated."

The defendant pleaded the Statute of Limitations, alleging that all of the bank-notes sued on were issued by the Augusta bank prior to June 1, 1865; and that, before that date, the bank had become insolvent, unable to meet its liabilities, had voluntarily stopped payment and ceased to do business, and so continued down to the time of the plea. To this plea the plaintiff demurred. The Circuit Court rendered judgment for the defendant on this plea, from which the plaintiff brings his writ of error to this court.

The Statute of Limitations of the State of Georgia was passed on the 16th March, 1869, and is as follows, so far as this action is concerned; viz.: —

"SECT. 3. And be it further enacted, That all actions on bonds or other instruments under seal, and all suits for the enforcement of rights accruing to individuals or corporations under the statutes or acts of incorporation, or in any way by operation of law, which accrued prior to 1st June, 1865, not now barred, shall be brought by 1st January, 1870, or the right of the party, plaintiff or claimant, and all right of action for its enforcement, shall be for ever barred.

"SECT. 6. That all other actions on contracts, express or implied, or upon any debt or liability whatsoever due the public, or a corporation, or a private individual or individuals, which accrued prior to the 1st June, 1865, and are not now barred, shall be brought by 1st January, 1870, or both the right and the right of action to enforce it shall be for ever barred. All limitations hereinbefore expressed shall apply as well to courts of equity as courts of law; and the limitations shall take effect in all cases mentioned in this act, whether the right of action had actually accrued prior to the 1st June, 1865, or was then only inchoate and imperfect, if the contract or liability was then in existence."

The plea demurred to alleges, and it is to be here assumed to be true, that the bank-notes held by the plaintiff had been issued by the bank prior to June 1, 1865, — the time specified in the limitation act just quoted. It is further alleged, and to be taken as true, that, prior to that time, the bank had become

notoriously insolvent, unable to meet its liabilities, and had ceased to do business.

The question is, whether the right of action now sought to be enforced had, on or before June 1, 1865, by means of these facts, accrued to the plaintiff. If it had, the present action is barred by the statute; for it can hardly be contended that this is not one of the actions embraced within the terms of the statute.

The plaintiff insists that no cause of action against the stockholder existed on the 1st of June, 1865, and not until the bank had made its assignment in 1866, its affairs had been administered, and a demand of payment of the bills had been made upon the bank, and had been refused. His fourth point is this: —

"4th, That the liability of said defendant stockholder (had not attached, and did not attach, under said charter) to pay said bank bills before the assignment of said bank and the assets of said bank had been administered and applied to payment of its debts, and did not attach until demand for payment was made on said bank bills; and, therefore, said action did not accrue before the first day of June, 1865, but accrued since the assignment of said bank, and the administration of the assets, establishing the ultimate liability of said stockholders, and since the breach of contract to pay on demand, — to wit, on the day of commencement of this suit."

In this point the plaintiff alleges that the defendant's liability did attach when the assets of the bank had been administered and demand of payment made upon the bank, and that the defendant was not liable until that time.

The facts upon which he claims the benefit of this legal result he alleges in his complaint as follows: —

"And your petitioner avers that the said president, directors, and company of the Bank of Augusta afterwards — to wit, on the sixth day of January, A. D. 1866 — assigned and conveyed, for the benefit of its creditors, all of its property, both real and personal, its choses in action, claims and demands of every kind whatever, for the payment of its debts, in redemption of its bills, and so far as it could do so by its own act, and for all the purposes of the payment of its debts in the enforcement of the collection thereof, by suit or otherwise, and for the purpose of its creation, has become

and is a dissolved corporation; that it has no place of business, rendering a demand for payment of said bills and a suit against said corporation wholly futile and useless."

There is in the complaint no allegation that payment of the bills has ever been demanded of the bank; but presentment for payment is excused on the ground that the condition of the bank rendered a demand useless. There is no averment that a judgment had been obtained against the bank, or that a suit had been commenced upon the notes. It is excused on the ground that it had assigned all of its property, and was substantially dissolved.

There is no averment that its assets had been administered and applied to the payment of its debts in any other manner than that it was insolvent, and had made an assignment of its property.

The plaintiff's allegations fall far short of what, in his points, he insists is necessary to constitute a cause of action.

The concurrence of the facts alleged in the complaint and in the manner indicated brings into operation, as he insists, the provision of the charter that the individual property of the defendant is bound for the redemption of the bills of the bank, and authorizes the present suit against the defendant.

Upon the theory of the complaint before us, the ultimate redemption, for which the property of the stockholder is by statute made liable, is not that amount or proportion remaining after the assets of the bank have been applied, so far as they will go, in payment of the bills; for there is no averment that the trust under the assignment has been closed, or that a large proportion of the amount due upon the bills will not be paid from that source. The plaintiff, in his present suit, insists that the liability of the defendant has accrued to him for the reasons, 1st, That the bank did, in 1866, assign all of its property for the payment of its debts; 2d, That thereby, for all purposes of the payment of its debts, it has ceased to exist as a corporation; and, 3d, That a demand of payment and a suit against the bank for the recovery of the bills would be useless. These facts create a liability, he insists, which justify a suit against the defendant commenced in 1872. If they do not, he shows no cause of action in his complaint.

He has, however, demurred to the defendant's plea, which averred that the same facts existed, and justified the commencement of a suit on the first day of June, 1865; in other words, that his right of action had accrued prior to June 1, 1865, and that the same is barred by the statute quoted.

Thus, when the plaintiff avers that the bank made an assignment of all its property, and thereby ceased to exist as a corporation, the defendant makes an equivalent averment when he alleges that before the first day of June, 1865, the bank had notoriously stopped payment and ceased to transact business, and has thenceforth so continued. When the plaintiff alleges that for the reasons stated a demand upon the bank for payment, or a suit against it, would be useless, the defendant makes an equivalent averment when he alleges that on the first day of June, 1865, the bank "had become notoriously insolvent, and unable to meet its liabilities."

It seems to be quite clear that the same allegations made by the plaintiff to show that he had a cause of action when he brought this suit in 1872 are found in the plea he has demurred to, alleging that the cause of action was in existence on the first day of June, 1865. If his complaint is good, the plea is good; if the plea is bad, the complaint is bad.

A demurrer seeks the first fault in pleading, and it is with the plaintiff that the first error exists, if error there be.

We are of the opinion, also, that the facts alleged in the plea are sufficient to make it a good plea; in other words, that the cause of action, so far as there is a separate and distinct right of action in favor of each bill-holder, was in force on the 1st of June, 1865.

We are of the opinion that it is not necessary first to exhaust the assets of the bank by legal proceeding. The case is not so much like that of the guaranty of the "collection" of a debt, where the previous proceeding against the principal debtor is implied, as it is like a guaranty of "payment," where resort may be had at once to the guarantor without a previous proceeding against the principal. *Wadsworth* v. *Wadsworth*, 11 Wend. 100; 17 id. 103; 2 Pars. on Bills and Notes, pp. 142, 143.

A judgment and execution unsatisfied are evidence of insol-

vency, of inability to collect. They are, however, evidence only; and the fact may be established as well by other evidence, among other modes, by an assignment and continued suspension of business, or other notorious indications. *Camden* v. *Doremis*, 3 How. 533; *Reynolds* v. *Douglas*, 12 Pet. 497; 2 Am. Lead. Cas. 134–136.

We think the liability for the "ultimate redemption" of the bills, if properly enforced, arises when the bank refuses or ceases to redeem, and is notoriously and continuously insolvent.

Kimber v. *Bank of Fulton*, 49 Ga. 419, is a decision directly in point by the Supreme Court of the State of Georgia.

The case of *Pollard* v. *Bailey*, 20 Wall. 520, is an authority against the maintenance of a separate action by one creditor who seeks to obtain his entire debt to the possible exclusion of others similarly situated. The proper proceeding is in equity, where all the claims can be presented, all the liabilities of the stockholders ascertained, and a just distribution made.

Judgment affirmed.

HOFFMAN *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

An agreement between the agent of an insurance company and an applicant for insurance, whereby the former, without authority from the company, accepted, by way of satisfaction of a premium payable in money, articles of personal property, is a fraud upon the company, and no valid contract against it arises therefrom.

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

Mr. James A. Garfield, for the appellant, cited *Insurance Company* v. *Wilkinson*, 13 Wall. 222; *Masters* v. *Madison County Alert Insurance Co.*, 11 Barb. 624; May on Ins., sects. 134, 143; *Taylor* v. *Merchants' Fire Ins. Co.*, 9 How. 390; 42 N. Y. 54; 20 Barb. 468; 2 Ins. Law Jour. 23; 25 Barb. 189; *Hallock* v. *Commercial Ins. Co.*, 2 Dutch. 268; 25 Conn. 207; id. 542; 43 Barb. 351; *Cooper* v. *Pacific*, 3 J. C. R. 254;

3 Ohio St. 549; 4 id. 353; *Fraternal Life Ins. Co.* v. *Applegate*, 7 id. 292; Bliss on Life Ins., sect. 317.

Mr. H. L. Terrell for the appellee.

MR. JUSTICE SWAYNE delivered the opinion of the court.

There is a direct conflict in the testimony of the two principal witnesses in this case, and the discrepancies are irreconcilable. According to our view, the case must turn upon the application of legal principles to facts about which there is no controversy. An elaborate examination of the testimony is, therefore, unnecessary. A brief statement will be sufficient for the purposes of this opinion.

Justin E. Thayer was the general agent of the appellee at Cleveland, Ohio. He was authorized to appoint sub-agents; and on the 7th of April, 1869, appointed A. C. Goodwin such agent. This arrangement continued until the 7th of June, 1869. It was then put an end to by the parties; and they agreed that thereafter Goodwin should act as an insurance broker, and that he should receive for such applications as he might bring to Thayer thirty per cent of the first premium paid for the insurance.

On the 7th of August, 1869, Goodwin gave to Frederick Hoffman a receipt, signed by Goodwin as agent, setting forth that he had received from Hoffman $922.57, "being the first annual premium on an insurance of $8,000 on the life of Frederick Hoffman, for which an application is this day made to the John Hancock Mutual Life Insurance Company of Boston. The said insurance to date from Aug. 7, 1869, subject to the conditions and agreements of the policies of said company, provided that the said application shall be accepted by the said company, and a policy be by them granted thereon. The said policy, if issued, to be delivered by me, when received, to the holder of this receipt, which shall then be given up. It is expressly agreed and understood, that, if the above-mentioned application shall be declined by the said company, it shall be deemed that no insurance has been created by this receipt; but the amount above receipted shall be returned to the holder of this receipt, which shall then be given up."

The amount of the premium specified was paid by Hoffman to Goodwin as follows: —

A horse valued at	$400.00
A sixty-day note to Goodwin	100.00
A cancelled debt owing by Goodwin to Hoffman	53.57
A premium note of	369.00
	$922.57

Goodwin reported the application to Thayer, but said nothing of the receipt. Thayer forwarded the application, and in due time received the policy. Some time afterwards, Hoffman called for the policy. Thayer demanded the premium. Hoffman refused to pay it, and produced Goodwin's receipt. Thayer then, for the first time, learned the existence of the receipt and the particulars of the alleged payment of the premium. He refused to ratify the transaction.

Ineffectual attempts were made to sell the horse. Finally Thayer, to save trouble to his company, agreed, that if Hoffman would take back the horse, and pay in his stead $250 to the company, the transaction should be closed, and the policy be delivered. This Hoffman refused to do, and sued the company in the Court of Common Pleas of Cuyahoga County for what he had delivered to Goodwin. A verdict was found for the defendant. He took a new trial under the statute of Ohio. Upon the re-trial, a verdict was rendered in his favor. The defendant moved for a new trial, which was granted. In this condition of things, Hoffman died. The suit abated by his death, and was not revived. Thereupon his widow, Henrietta Hoffman, filed this bill. It prayed that the company should be compelled to deliver the policy to her, and to pay the amount of the insurance-money specified. The policy was upon what is known as the "endowment plan." It provided that the amount insured should be paid to Hoffman at the end of ten years, or to his wife in the event of his death in the mean time. No part of what was paid by Hoffman to Goodwin ever came into the hands of Thayer or the company, or inured in any wise to the benefit of either.

Goodwin testified that his share of the premium was "two hundred and seventy-six dollars and some cents;" and, further,

that Thayer assented to the transaction in advance, and, with full knowledge of the facts, ratified it subsequently.

If it be admitted that the facts as to assent and ratification by Thayer are as stated by Goodwin, — a concession by no means warranted, in our judgment, by the state of the evidence, — the question arises, What is the legal result?

Agencies are special, general, and universal. Story's Agency, sect. 21. Within the sphere of the authority conferred, the act of the agent is as binding upon the principal as if it were done by the principal himself. But it is an elementary principle, applicable alike to all kinds of agency, that whatever an agent does can be done only in the way usual in the line of business in which he is acting. There is an implication to this effect arising from the nature of his employment, and it is as effectual as if it had been expressed in the most formal terms. It is present whenever his authority is called into activity, and prescribes the manner as well as the limit of its exercise. *Upton* v. *Suffolk Co. Mills*, 11 Cush. 586; *Jones* v. *Warner*, 11 Conn. 48; Story's Agency, sect. 60, and note; 3 Chitt. Law of Com. & Manuf. 199; *U. S.* v. *Babbit*, 1 Bl. 61; 1 Pars. on Contr., 4th ed., pp. 41, 42.

Life insurance is a cash business. Its disbursements are all in money, and its receipts must necessarily be in the same medium. This is the universal usage and rule of all such companies.

Goodwin had settled his own debt to Hoffman of $53.67, and had appropriated to himself Hoffman's note of $100.

If he had the right to take his percentage in such way as he might think proper, this did not justify his taking the horse at $400. Nor, if Thayer had expressly agreed to take the horse in payment of the premium *pro tanto*, could that have given validity to the transaction. If the agent had authority to take the horse in question, he could have taken other horses from Hoffman, and have taken them in all cases. This would have carried with it the right to establish a stable, employ hands, and do every thing else necessary to take care of the horses until they could be sold. The company might thus have found itself carrying on a business alien to its charter, and in which it had never thought of embarking.

The exercise of such a power by the agent was liable to two objections, — it was *ultra vires*, and it was a fraud as respects the company. Hoffman must have known that neither Goodwin nor Thayer had any authority to enter into such an arrangement, and he was a party to the fraud. No valid contract as to the company could arise from such a transaction. This objection is fatal to the appellant's case.

It is insisted by the counsel for the appellee, that Hoffman, by bringing his action at law, repudiated and rescinded the contract, if there was one; and that the appellant is thereby estopped from maintaining this bill. Authorities are cited in support of this proposition. *Herrington* v. *Hubbard*, 2 Ill. 569; *Dalton* v. *Bentley*, 15 id. 420; *Smith* v. *Smith*, 19 id. 349; *Cooper* v. *Brown*, 2 McLean, 495; *Williams* v. *Washington Life Ins. Co.*, 4 Big. Life & Acc. Ins. Rep. 56.

As the point already determined is conclusive of the case, it is unnecessary to consider this subject. *Decree affirmed.*

WHITFIELD *v.* UNITED STATES.

A. sold cotton to the Confederate States, accepted their bonds in payment therefor, but remained in possession of it until its seizure by the agents of the United States, who sold it, and paid the proceeds into the treasury. *Held*, that A. cannot recover such proceeds in an action against the United States.

APPEAL from the Court of Claims.

During the war of the rebellion, Whitfield, a resident of the State of Alabama, being the owner of a hundred and seventy-seven bales of cotton raised by himself, sold it to the Confederate States, agreeing to receive in payment their eight per cent bonds. In January, 1865, payment of the purchase-price was made and accepted in bonds of the kind agreed upon, payable to bearer, and falling due in the years 1868, 1871, and 1880. Whitfield kept the bonds in his possession, and, at the trial of this case below, produced them in open court. The cotton was never taken away by the Confederate States authorities, but remained in his possession until Sept. 1, 1865, when it was

seized by the treasury agents of the United States, acting under color of the authority of the abandoned and captured property acts. After the seizure, fifty-nine bales were, pursuant to an arrangement, restored to him, as compensation for putting the cotton in good order, and the remaining one hundred and eighteen bales sent forward to New York, where they were sold by the cotton agent of the United States, and the proceeds paid into the treasury. This suit was brought to recover these proceeds.

In the Court of Claims, the petition was dismissed: whereupon Whitfield appealed to this court.

Mr. P. Phillips for the appellant.

There was no legal authority for the seizure of the cotton. It did not come within the definition of captured property as recognized in *United States* v. *Padelford*, 9 Wall. 537.

The Court of Claims, in *Sprott* v. *United States*, 8 Ct. of Cl. 499, decided that the government of the Confederate States was an unlawful assemblage, without power to take, hold, or convey real or personal property. If such be the law, the sale in question did not divest the title of the claimant.

Conceding, however, that they could enter into a contract of purchase recognizable in our courts, the question is then presented, whether property so purchased, the possession of which was never parted with by the owner, can be taken from him by the United States after the overthrow and dissolution of that government, he being then the holder of the securities given as the consideration of the purchase.

Let it be supposed that Whitfield had sold this cotton to A., and had received his bond for the purchase-money, but had never parted with the possession. A. becomes insolvent; but his property had been forfeited to the United States. Surely, under these circumstances, the government, asserting its claim through A., could never rightfully demand the cotton without paying the purchase-money.

There is no difference between this supposititious case and that now before the court, as the contract, under the same circumstances, was made with the Confederate government.

When a government enters into a contract of purchase or other mercantile operation, it puts off its sovereignty; and, in

such transactions, its rights and obligations are regarded by the court as standing on no higher ground than like transactions between individuals. 2 Story, Com., § 1330; *United States* v. *Buford*, 3 Pet. 12; *Davis* v. *Gray*, 16 Wall. 232.

Conceding the right of the government to exercise all powers necessary to carry on the war to a successful termination, we maintain that war does not operate *proprio vigore* a confiscation of the enemy's property.

It is for the legislative body to determine the *policy* on which the war shall be conducted.

Congress determined the question how far belligerent rights should be exercised.

The act 13th July, 1861, provides for the seizure of ships or vessels belonging to citizens of States engaged in insurrection, found at sea.

By the act 6th August, 1861, property sold or given, with intent to use or employ the same for the purpose of promoting the insurrection, is made subject to prize or capture.

By the act 17th July, 1862, the property of persons designated by six enumerated classes is, in a certain contingency, subject to confiscation.

In neither of these acts is the title of the owner divested by the seizure. This takes place only when judicial proceedings are instituted, and a judgment of condemnation is had. Then the property is sold, and the proceeds paid into the treasury.

With neither of these acts had the Treasury Department any concern. Its sole authority is under the act of 1863, which limits its power to captured or abandoned property.

As the government has not chosen to proceed against this cotton under the act of 6th August, 1861, as having been sold for the purpose of promoting the insurrection, in the mode pointed out in the act, it cannot now claim to hold it on that ground by virtue of the seizure made in this case.

If this cotton was neither captured, abandoned, nor condemned under any act of Congress directing its confiscation, the government of the United States can only claim title to it by virtue of its right to succeed to the property owned by the conquered government.

This right must rest alone upon general principles of international law.

It was on the theory of succession or representation alone that the suits brought in England by the United States against the agents of the Confederacy could be maintained.

The Vice-Chancellor, after announcing as a clear principle of public law, that any government which *de facto* succeeds to any other, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property of the displaced power, held that "this right is the right of succession. This right of representation is a right not paramount, but one derived through the displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights, as if that authority had not been suppressed, and was itself seeking to enforce it." *United States* v. *Prioleau*, 2 Hem. & M. Ch. Cas. 560; *United States* v. *McRae*, 8 L. R. Eq. 75.

It is admitted, that when terms of sale are agreed on, and every thing the seller has to do with the goods is complete, the contract of sale becomes absolute between the parties, without actual payment or delivery, and the property, and the risk of accident to the goods, vest in the buyer.

When the sale is for cash, the vendee, though he acquires a right of property by the contract, does not acquire the right of possession until he pays or tenders the price.

When it is on a credit, the vendee, in the absence of stipulation, is entitled to immediate possession, as the right of possession and the right of property vest at once in him.

But this doctrine is subject to the important qualification, that this right of possession is not absolute, and will be defeated if the buyer becomes insolvent before he obtains the actual possession: for though the buyer has the property vested in him, so as to subject him to the risk of any accident, he has not an indefeasible right to the possession; and his insolvency without payment defeats that right, equally after the *transitus* has begun as before the seller has parted with the actual possession. *Bloxam* v. *Saunders*, 6 B. & C. 941.

There is manifestly a marked distinction between those acts, which, as between vendor and vendee, go to make a constructive delivery, and vest the property in the vendee, and that actual delivery which puts an end to the right of the vendor to

hold the goods as security for the price. *Arnold* v. *Delano*, 4 Cush. 38; *D'Aquila* v. *Lambert*, 2 Eden, 77; *Kinloch* v. *Craig*, 3 T. R. 119; *Mason* v. *Lickbarrow*, 1 H. Bl. 357.

But the title of the vendor is not entirely divested until the goods have come into the possession of the vendee. He has, therefore, a complete right, for just cause, to retract the intended delivery, and stop the goods *in transitu*. The cases in our courts of law have confirmed this doctrine, and the same law obtains in other countries. Comm. of Gaius, p. 232; 1 Domat, Civ. Law, 202, note.

The right of the vendor is not affected by the fact that he received the note or bond of the vendee in payment of the price. *Bell* v. *Moss*, 5 Wheat. 204. Nor is his lien lost by an express agreement that he will retain the goods for the vendee, either with or without rent. *Townley* v. *Crump*, 4 Ad. & Ell. 63; *Miles* v. *Groton*, 2 Cr. & M. 511; *Winkes* v. *Hassels*, 9 B. & C. 372.

As the seizure did not displace the title of the claimant, he is entitled to recover.

Mr. Solicitor-General Phillips for the United States.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

In *United States, Lyon et al.* v. *Huckabee*, 16 Wall. 414, we held that real property purchased by and conveyed to the Confederate States during the war passed to the United States at the restoration of peace, by capture; and we sustained the title of the United States thus acquired against a claim made by the vendors of the Confederate States, that the conveyance was obtained from them by duress. The same principle was recognized and acted upon in *Titus* v. *United States*, 20 Wall. 475. We have thus decided that the Confederate States government could acquire title to real property by purchase; and it is not easy to see why a different rule should be applied to personal property. The ownership of that, even more than real property, was required for the operations of the Confederacy. Contracts of sale made in aid of the rebellion will not be enforced by the courts; but completed sales occupy a different position. As a general rule, the law leaves the parties to illegal contracts where it finds

them, and affords relief to neither. A sale of personal property, when completed, transfers to the purchaser the title of the property sold.

Whitfield's sale, in this case, was not on credit, but for bonds which passed from hand to hand as money. The transaction, in this respect, was not different from a sale to the United States for any of their public securities payable at a future day. The sale was complete when the bonds were accepted in payment. The title then passed to the Confederate States without a formal delivery. From that time, Whitfield ceased to be the owner of the cotton.

The claim, then, that he had the right to retain the possession of the cotton until the purchase-money was paid, because of the insolvency of the Confederate government, is not applicable to the facts established by the evidence, as the purchase-money had been paid before the insolvency. But, if this were otherwise, it is not easy to see how his claim, growing out of his illegal contract as it does, can be enforced against the United States in the Court of Claims. In *Sprott* v. *United States*, id. 459, it was decided that one owing allegiance to the government of the United States could not avail himself of the courts of the country to enforce a claim under a contract by which, for the sake of gain, he knowingly contributed to the "vital necessities of the rebellion." For that reason, we refused to give effect to a purchase of cotton from the Confederate government. This case is not distinguishable from that in principle. Cotton, as we have often said, was, during the late war, as much hostile property as the military supplies and munitions of war it was used to obtain. When Whitfield, therefore, sold his cotton to the Confederacy, and took their bonds in payment, he contributed directly to the means of prosecuting the rebellion. He says in his petition, it is true, that his sale was not made to aid the rebellion; but the purchase was clearly for that purpose, and no other. This he could not but have known. Under such circumstances, "he must be taken to intend the consequences of his own voluntary act." *Hanauer* v. *Doane*, 12 Wall. 347. By his sale, he knowingly devoted his cotton to the war; and his rights must follow its fortunes. The courts of the country would not relieve him against

one who held title by conveyance from the Confederate States, and under that title had obtained possession. Neither would they interfere in behalf of a purchaser from the Confederate States to enforce possession under his sale. But when his possession has been lost by reason of his sale, no matter how, the courts will afford him no relief against the loss. Having by his acts entered the lists against his rightful government, he cannot, if he loses, ask it for protection against what he has voluntarily done. In this case he seeks to enforce a right growing out of his contract of sale, which was tainted with the vice of the rebellion. It was a contract which could not have been enforced against him, and he is equally powerless under its provisions against others. He seeks in effect, by this action, to recover, in the courts of the United States, the purchase-money due from the Confederate States, upon the principle that a sale upon credit implies a guaranty of the solvency of the purchaser until the payment is made. We have already seen that such is not his position here; but if it were, having lost his possession, he has no standing in court for relief. He is not the owner of the property, and his lien is not one the courts of the United States will enforce. *Judgment affirmed.*

CAREY ET AL. *v.* BROWN.

1. Where a suit, brought by a trustee to recover trust-property, or to reduce it to possession, in no wise affects his relations with his *cestuis que trust*, it is unnecessary to make them parties.
2. Where the want of parties does not appear on the face of the bill, the objection must be set up by plea or answer, and cannot be made for the first time in this court.
3. A person cannot avail himself of a lien, the discharge of which has been fraudulently prevented by his own acts.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

Mr. Conway Robinson for the appellants.

Mr. Thomas J. Durant for the appellee.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The appellants were defendants in the court below. Tucker and Hoskins, the other defendants, declined to appeal.

The case was ably argued here by the counsel upon both sides.

It is insisted that the bill is fatally defective for want of parties. It alleges that the complainant was the owner and holder of the ten promissory notes which lie at the foundation of the case. In his testimony, he says he held the legal title to them, and that they were delivered to him by their respective owners, with power to settle and dispose of them at his discretion, and with no condition imposed but the implied one that he should account for the proceeds to those from whom he received them.

The transfer created a trust. Those who transferred them were the *cestuis que trust*, and Brown was the trustee.

The general rule is, that in suits respecting trust-property, brought either by or against the trustees, the *cestuis que trust* as well as the trustees are necessary parties. Story's Eq. Pl., sect. 207. To this rule there are several exceptions. One of them is, that where the suit is brought by the trustee to recover the trust-property or to reduce it to possession, and in no wise affects his relation with his *cestuis que trust*, it is unnecessary to make the latter parties. *Horsly* v. *Fawcett*, 11 Beav. 569, was a case of this kind. The objection taken here was taken there. The Master of the Rolls said, "If the object of the bill were to recover the fund with a view to its administration by the court, the parties interested must be represented. But it merely seeks to recover the trust-moneys, so as to enable the trustee hereafter to distribute them agreeably to the trusts declared. It is, therefore, unnecessary to bring before the court the parties beneficially interested." Such is now the settled rule of equity pleading and practice. *Adams* v. *Bradley et al.*, 6 Mich. 346; *Ashton* v. *The Atlantic Bank*, 3 Allen, 217; *Boyden* v. *Partridge et al.*, 2 Gray, 191; *Swift and Others* v. *Stebbins*, 4 Stew. & P. 447; *The Association, &c.* v. *Beekman, Adm'r, et al.*, 21 Barb. 555; *Alexander* v. *Cana*, 1 De G. & Sm. Ch. 415; *Potts* v. *The Thames Haven and Dock Co.*, 7 Eng. Law & Eq. 262; *Story* v. *Livingston's Ex'r*, 13 Pet. 359. Where the want of parties appears on the face of the bill, the objection

may be taken by demurrer. Where it does not so appear, it must be made by plea or answer. Here the defect, if there was one, did not appear in the bill, and no plea or answer setting it up was filed in the Circuit Court. It was first made here. A formal objection of this kind cannot avail the party making it, when made for the first time in this court. *Story* v. *Livingston's Ex'r*, *supra*.

It is said that Hoskins prescribed a condition precedent; and that Brown, not having complied with it, never acquired any right or title to the property in controversy. We had occasion to consider this head of the law in *Davis* v. *Gray*, 16 Wall. 230.

Hoskins executed a deed to Brown, and forwarded it to Parkerson, to be held by him until all the notes of Hoskins given for the purchase-money, still outstanding, were cancelled and delivered to Parkerson. Parkerson was the recorder of the parish where the land was situated. Brown then held ten of the notes. He and Hoskins believed they were all. Upon being advised by Tucker of the deposit of the deed, Brown wrote to have a copy of it forwarded to him for examination, and inquired, as he had done several times before, whether Hoskins had in any way incumbered the property. Parkerson thereupon sent him a copy of the deed, with a certificate, signed himself as recorder, setting forth, that, upon examining the records in his office, he found that "said Hoskins has not subjected said property to any mortgage except as forfeited taxes to the State."

There was an eleventh note, upon which, several years before, a judgment had been rendered in favor of Mrs. Knight. The judgment had been so inscribed in the office of Parkerson, that, under the law of Louisiana, it became a mortgage upon the premises. The certificate was false, and Parkerson knew it. It cannot be doubted that Tucker knew these facts also. The inscription was, as it had been, concealed from Brown. This was the beginning of the web of fraud woven by the confederates. Brown, being satisfied with the deed, transmitted the ten notes to Parkerson, with directions to cancel them, to record the deed, and to send it to him by mail. Instead of doing as directed, Parkerson handed over the letter and notes to Tucker, withheld the deed from record, and retained posses-

sion of it. Subsequently, Davis, the law partner of Tucker, visited Hoskins in Texas, where he lived, delivered up his deed to Brown, and procured from him a quitclaim-deed for the same property to Parkerson and himself for the consideration of $250. Later, they gave Hoskins, voluntarily, a guaranty against his liability upon all the outstanding notes. They conveyed the premises to Carey, a brother-in-law of Parkerson. Carey claims to have been a *bona fide* purchaser, without any notice of the rights of Brown. In order to strengthen his title, he took measures to have the premises sold under the judgment in favor of Mrs. Knight. Upon learning the existence of the judgment, Brown offered twice to furnish to Carey the means to discharge it. The money was refused. The property was sold under the judgment, and bought in by Carey. He paid the judgment and the costs. The balance of his bid, upon which the property was struck off to him by the sheriff, remained in his hands unpaid, and unaccounted for to any one. Public notice was given at the sale of the claim of Brown. Thereafter Carey claimed to hold under the sale, as well as under the deed from Parkerson and Davis.

It is not denied that Parkerson and Davis had full knowledge of all the facts touching the conveyance by Hoskins to Brown when they received the deed from Hoskins to them; and the evidence, both direct and circumstantial, is plenary to show that Carey, before Davis and Parkerson conveyed to him, was equally well advised. It is impossible to resist the conviction that there was a deliberate scheme; that all the appellants and Tucker were parties to it, and that every act of each of the Confederates touching the property, after the deposit of the deed to Brown with Parkerson, was done to give effect to the purpose of the conspiracy.

In the presence of these facts, the doctrine of conditions precedent can have no application. Sterner principles intervene, and become factors in the determination of the case.

The court decreed that the deed of Hoskins to Brown was, as against the subsequent deed of Hoskins to Parkerson and Davis, a valid subsisting title; that the deed of Parkerson and Davis to Carey was void, and of no effect; that the ten notes should be delivered up by Tucker, and cancelled; that Brown

should pay to Carey the amount Carey had paid in satisfaction of the judgment; that, upon such payment being made, Carey should convey the property to Brown as trustee for those whom Brown represented in the litigation; and that the decree should be without prejudice to Brown's claims for mesne profits, and to Tucker's claim against Brown for professional services.

It is said the decree is erroneous because it did not ascertain the amount proper to be allowed to Tucker, and order its payment.

It was not proper to deal with that subject in this suit. Tucker had no lien either upon the notes or the land. Not having appealed from the decree below, he cannot object to it here.

It is said, also, that the decree is erroneous as to the effect of the deed from Hoskins to Brown. Upon the delivery of the ten notes to Parkerson, the deed became effectual. He should have cancelled the notes, and put the deed on record.

The lien of the judgment was ample for the security and indemnity of Hoskins. Brown would have taken the title subject to the incumbrance. The light thrown backward by the subsequent events shows that he would have been ready and willing to satisfy the judgment whenever its existence was made known to him.

He was prevented from discharging the lien by the fraud of those who now seek to avail themselves of it. This they cannot be permitted to do.

It is insisted that the decree does injustice to Carey. It gave him all he was entitled to. He acquired whatever title he had *ex maleficio*, and held it as a trustee *in invitum* for Brown and his *cestuis que trust*. *Mongar* v. *Shirley*, not yet reported.

A case of clearer equity on one side, and of iniquity on the other, is rarely presented for the consideration of a court of justice.

Decree affirmed.

BAKER ET AL., ASSIGNEES, *v.* WHITE.

The judgment of a circuit court, reversing that of a district court and ordering a new trial, is not final; and this court has no jurisdiction to review it.

ERROR to the Circuit Court of the United States for the District of Connecticut.

Mr. Charles E. Perkins for the plaintiff in error.

Mr. A. P. Hyde, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The Odorless Rubber Company, being in an embarrassed condition, undertook to relieve itself by obtaining additional subscriptions to its capital stock. It was conceived, that, in order to do this, it was necessary that those holding the existing stock should submit to a reduction of its par value, as it was not really worth par at that time; and new subscribers could not be expected to take a stock which they knew to be below the value they were to pay for it. Accordingly, on the 10th June, 1872, at a meeting of the stockholders, "on motion of S. L. Warner, it was voted, that whereas the capital stock of this company now issued, and the assets of the same, have become impaired to the extent of thirty per cent on the whole amount of said stock, — to wit, the sum of $72,000.50, — therefore voted, that stock to the amount of $72,112.50 be called in and cancelled upon the books of this company."

At a former meeting it had been resolved that the capital stock of the company be increased to $200,000, or eight thousand shares.

The defendant, after these resolutions had been adopted, signed the following instrument, and set opposite his name two hundred and forty, as the number of new shares for which he subscribed: —

"We, the undersigned, hereby agree to take the number of shares of the capital stock of the Odorless Rubber Company placed opposite our respective names, and pay for the same as follows; to wit, $6.25 per share whenever cash subscriptions to the amount of $118,000 shall have been made, and the balance in equal monthly instalments of ten per cent each from the date of June 1, A.D. 1872. Said stock

to be fully paid whenever eighty-five per cent of the par value shall have been paid into the treasury of the company; it being understood that none of said subscriptions shall be valid or obligatory until at least said amount of $118,000 of stock shall have been subscribed as aforesaid, and that thirty per cent deduction is made on the old stock of this company, as per vote of stockholders June 10, 1872.

"Dated at Middletown, this tenth day of June, 1872."

He was elected a director, and acted as such for a short time, and paid his instalments regularly until he had paid $2,700. He then refused to pay any more; and, the corporation having been adjudged bankrupt, the plaintiffs, as assignees, brought the present suit to recover the unpaid instalments, amounting to $3,300.

Two defences were relied on by defendant: 1. That one of the conditions on which he agreed to pay was that thirty per cent of the old stock was to be deducted or extinguished, and this had not been done. 2. That the subscriptions had been obtained by fraudulent representations as to the condition of the company; that the whole proceeding was a fraudulent design to relieve the old stockholders of a broken corporation at the expense of the new subscribers; and that, as soon as he had learned enough of the condition of the company to become aware of this fraud, he abandoned the concern, and repudiated the contract.

This suit was brought in the District Court; and the judge of that court refused to charge the jury, when requested, that in the true construction of the subscription-paper, above quoted in full, the subscription was not obligatory until the thirty per cent reduction of old stock had been made, and also rejected evidence of the fraud in obtaining the defendant's subscription.

On a writ of error to the Circuit Court, where these matters were shown by a bill of exceptions taken in the District Court, the judgment of that court was reversed.

The Circuit Court rested its judgment on the construction of the subscription-paper; and as that is sufficient to dispose of the case, and as we concur in the view taken by that court, we shall only consider that question.

The counsel for plaintiffs in error construed the paper as if it read thus: —

"It being understood that none of the subscriptions shall be valid or obligatory until at least said amount of $118,000 of stock shall have been subscribed as aforesaid, and it being also understood that thirty per cent deduction is made on the old stock of this company, as per vote of stockholders June 10, 1872.

"Dated Middletown, the tenth day of June, 1872."

Reading it thus, they argue that the last clause, relating to the thirty per cent deduction, is only a representation of what was understood to be an existing fact at the time it was made, and not a condition like the one as to the amount of stock to be taken, without which the subscription was not obligatory.

It is possible so to construe the language of the instrument, if the surrounding circumstances demanded it. But to one who saw the paper for the first time, and knew nothing more, it would seem a forced, and not a natural, construction. If the word "that" just before "thirty per cent" were omitted in the original, the plain grammatical meaning would be, that the subscriptions were only obligatory in case the $118,000 of stock was subscribed, and the thirty per cent of the old stock called in or deducted.

We cannot give to the use of the word "that" such force as to destroy the natural and reasonable meaning which the sentence would have without it.

But when, leaving grammatical and verbal criticism, we look to the admitted surrounding circumstances of the case, what was meant is quite clear.

The paper bears the same date as the resolution to reduce the stock. That resolution did not profess to have the effect of reducing the stock of itself, but only declared that $72,112.50 of said *stock be called in*, — a thing to be done in future; and the bill of exceptions shows that the directors accordingly made an effort to get the stockholders to surrender and cancel stock to that amount, but failed to get it done.

When a subscriber put his name to the agreement to take new stock, the obtaining of the $118,000, on which his subscription depended for its validity, was a thing to be accomplished in the future: and so, on the tenth day of June, — the date of this paper, — a subscriber, looking to these two things promised, but yet to be performed, said, "I subscribe, but it is

upon condition that I am only to be liable when they are performed; that is, when $118,000 new stock is subscribed, and when thirty per cent of the old stock is called in and cancelled, as per resolution of the company of this date."

We are of opinion that the Circuit Court properly construed this instrument; and, as it is not proved or asserted that this stock ever was so reduced, the defendant was not liable on that contract.

But, when we come to look for the judgment of the Circuit Court which should be affirmed on these considerations, we find that there was in that court no *final* judgment. There exists in the record only an order reversing the judgment of the District Court. But, supposing a more formal entry to have been made, it could only be that the judgment and verdict in the District Court be set aside, and a new trial awarded.

We have so repeatedly decided that such an order as this is not a final judgment from which a writ of error lies to this court, that it needs no further discussion. *Parcels* v. *Johnson*, 20 Wall. 653; *Macomb* v. *Commissioners of Knox County*, 91 U. S. 1.

But the case was fully argued by counsel on the merits. The court, in conference, came to the conclusion (which was unanimous) indicated in this opinion; and we have concluded to let the opinion accompany the only judgment which we can render on this record. *Writ of error dismissed.*

BURBANK v. BIGELOW ET AL.

1. A bill in chancery was filed in the Circuit Court of the United States for the District of Louisiana by a citizen of Louisiana, the executrix of a deceased member of a firm, against the surviving partner, a citizen of Wisconsin, for an account as part of the partnership assets of the proceeds of a judgment recovered by the latter in said court, in his individual name, for a debt which she alleged was due the firm. The defendant, prior to the service of process on him, had on his petition been declared a bankrupt by the District Court of the United States for the District of Wisconsin; but, answering to the merits, he denied that the debt was due to the partnership. An amended and supplemental bill was afterwards filed, making a defendant the assignee in bankruptcy, who adopted in a separate answer the defence set up by the original defendant. He, in an answer subsequently filed, claimed

that the said District Court had exclusive jurisdiction in the cause. During its progress, a receiver was appointed, who collected the amount due on the judgment. The Circuit Court dismissed the cause for want of jurisdiction. *Held*, that notwithstanding the proceedings in bankruptcy, and although the assignee thereunder may have been appointed and the assignment made to him prior to filing said bill, the Circuit Court, having possession of the subject-matter in controversy as well as jurisdiction of the parties, had jurisdiction of the cause, and should have decided it upon its merits.

2. Under sect. 4979 of the Revised Statutes, the Circuit Court of the United States has, without reference to the citizenship of the parties, jurisdiction of a suit against an assignee in bankruptcy, brought by any person claiming an adverse interest touching any property, or rights of property, transferable to or vested in such assignee.
3. *Lathrop, Assignee*, v. *Drake et al.*, 91 U. S. 516, and *Eyster* v. *Gaff et al.*, id. 521, cited and approved.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

Mr. Benjamin F. Butler for the appellant.

Mr. Thomas J. Durant for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court of the United States for the District of Louisiana.

The appellant is the widow and executrix of Thomas S. Burbank, deceased, late of New Orleans, and tutrix of his minor children. She was complainant below, and filed her bill on the 8th of February, 1869, against Edmond B. Bigelow, of Wisconsin, for an account of a certain partnership which she alleges existed between her husband and said Bigelow; and, amongst other things, she specially prays that Bigelow may account for, as part of the partnership assets, the proceeds of a certain judgment for $13,864.34, which he recovered in his individual name against one Edward W. Burbank, on the twenty-seventh day of February, 1866, in the said Circuit Court. The complainant alleges that this judgment was for a debt due the partnership, and ought to be applied to the payment of the partnership debts, a portion of which, to a large amount, are pressing against her husband's estate.

The court below did not pass upon the merits of the case, but dismissed the bill for want of jurisdiction; upon what ground, there being no written opinion in the case, does not

distinctly appear. The only ground alleged in support of the decree is, that Edmond B. Burbank, the original defendant, together with one Hancock (a former partner of his), shortly before the filing of the bill in this case, filed their joint petition in the District Court of the United States for the District of Wisconsin to be declared bankrupts, and a decree of bankruptcy was rendered against them on the twenty-third day of January, 1869; but no assignment was made by the bankrupts until the 11th of February, 1869 (three days after filing the bill), when an assignment was made to George W. McDougall, of Wisconsin. In his schedule of assets in bankruptcy, Bigelow refers to the judgment recovered by him against Edward W. Burbank, but states that it had been assigned to W. W. Bigelow, and conditionally assigned to one Porter for the benefit of creditors.

The court below is supposed to have dismissed the bill for want of jurisdiction, on the ground that the controversy belonged exclusively to the Bankrupt Court in Wisconsin, as an incident to the proceedings in the bankruptcy of Burbank. It is not pretended that the court had not jurisdiction of the person of the defendants. Edmond B. Bigelow, the original defendant, was duly served with process in New Orleans, and put in an answer to the merits on the 1st of March, 1869. Thereupon an amended and supplemental bill was filed; and W. W. Bigelow, the alleged special assignee, and George W. McDougall, the assignee in bankruptcy, were made defendants, and duly appeared. W. W. Bigelow formally adopted the answer of Edmond B. Bigelow; and McDougall exhibited the proceedings in bankruptcy, and, having by order of the court been subrogated to the rights of Edmond B. Bigelow, filed a separate answer, adopting the defence set up by him. Subsequently he filed another answer, in which he claimed that the District Court of Wisconsin alone had jurisdiction of the case.

During the progress of the cause, on application of the complainant, a receiver was appointed by the court, who collected the amount due on the judgment referred to in the pleadings. The court, therefore, had possession of the subject-matter in controversy, as well as jurisdiction of the parties: so that the

only question remaining is, whether it had jurisdiction of the cause, or controversy.

Of this there does not seem to be the slightest doubt. What possible advantage could be gained by sending the parties to Wisconsin to litigate the questions raised in this suit we cannot perceive. A right of property is controverted. The complainant contends that the fruits of the judgment recovered by Bigelow, the bankrupt, against Edward W. Burbank, belong to the firm of which her husband was a partner. The bankrupt and his assignees deny this. It is a controversy, the determination of which is clearly embraced within the jurisdiction conferred upon the circuit courts by the second clause of sect. 2 of the original Bankrupt Act, now sect. 4979 of the Revised Statutes. We recently decided, in the case of *Lathrop, Assignee*, v. *Drake et al.*, 91 U. S. 516, that this jurisdiction may be exercised by any circuit court having jurisdiction of the parties, and is not confined to the court of the district in which the decree of bankruptcy was made. Therefore the time when the bankruptcy occurred or when the assignment was made is totally immaterial. The court, under the Bankrupt Act, has jurisdiction of the cause as between the assignee in bankruptcy and the complainant, without reference to the citizenship of the parties. As between the other parties and the complainant, of course, citizenship is material. But no objection to the jurisdiction exists on that account in point of fact, as the residence of the parties is such as is required in order to give it. Therefore, though the suit had not been commenced until after the appointment of the assignee, and after the assignment to him, the complainant might still have instituted the suit in the Circuit Court in Louisiana, if process could have been served upon the defendants.

But, inasmuch as the parties were citizens of different States, she might have done this without the aid of the section referred to. We recently held, in the case of *Eyster* v. *Gaff et al.*, id. 521, that the Bankrupt Law has not deprived the State courts of jurisdiction over suits brought to decide rights of property between the bankrupt (or his assignee) and third persons; and, whenever the State courts have jurisdiction, the circuit courts of the United States have it, if the proper citizenship of the

parties exists. In the case last referred to, a suit to foreclose a mortgage was commenced before the mortgagor went into bankruptcy; but the decree was not rendered until after that event and the appointment of an assignee. We decided that the validity of the suit or of the decree was not affected by the intervening bankruptcy; that the assignee might or might not be made a party; and, whether he was or not, he was equally bound with any other party acquiring an interest *pendente lite*.

As no other ground was assigned affecting the jurisdiction, we are of opinion that the court had jurisdiction of the case, and ought to have decided it upon its merits.

Decree reversed.

SMITH ET AL. *v.* VODGES, ASSIGNEE.

In order to defeat a settlement by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or those whose rights may and do supervene.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. N. H. Sharpless and *Mr. Richard C. McMurtrie* for the appellants.

Mr. William A. Manderson for the appellee.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The law of this case is too well settled to admit of doubt. In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do so supervene; the settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable. *Sexton* v. *Wheaton*, 8 Wheat. 229; *Mullen* v. *Wilson*, 8 Wright, 413; *Stileman* v. *Ashdown*, 2 Atk. 481.

Fraud is always a question of fact to be determined by the court or jury upon a careful scrutiny of the evidence before it.

The view which we take of this case renders it unnecessary to consider the objections urged by the counsel of the appellants against the reference to the master, the exceptions to the master's reports, and the questions raised by the demurrers to the original and the amended bill.

Passing by these subjects, and looking only to the merits of the controversy, two points to be examined arise. They involve questions of fact which must be solved in the light of the evidence found in the record. The burden of proof rests upon the appellee.

1. What was the pecuniary condition of the bankrupt when the property in question was bought at the sale under execution, and conveyed by the sheriff to Esther A. Smith?

The date of the transaction was the 2d of June, 1862. The amount paid was $1,450. The property consisted of a dwelling-house and store-room, which she had leased in the year 1859. The rent was $150 per year. She and her husband occupied the premises up to the time of the sale. She kept a dry-goods store and a millinery and dress-making establishment in her own name. She was eminently successful. The bill avers and admits, that, at the time of the purchase of the property, she had realized profits to the amount of $10,000, and that the property was paid for out of this fund. There is proof in the record to the same effect. In conducting her business, she paid promptly; and it does not appear that she then or subsequently owed any thing which is unpaid. The husband had paid all his debts except two. For those he had given extension notes, having short times to run; and they were paid at maturity.

This investment for the benefit of the wife was never challenged by any creditor of the husband or the wife; and it is not now challenged in behalf of any creditor whose debt subsisted then or accrued for a considerable time afterwards. Under the circumstances, the investment was moderate in amount, proper to be made, and, we think, liable to no legal objection as to its validity. The testimony to be considered in connection with the next point throws a backward light, which is also favorable to the wife with respect to this part of the case.

2. What was the pecuniary condition of the bankrupt when he extinguished the ground-rent by which the property was incumbered?

The money was paid about the 1st of January, 1866; and the amount was $3,000.

After the 1st of January, 1863, the business, which had before been carried on in the name of the wife, was conducted in that of the husband. It continued to be prosperous for several years. He thinks he made from $10,000 to $15,000 a year. He sold the first year from fifty to sixty thousand dollars' worth of goods. Such is his testimony, and it is uncontradicted. He paid all his debts, and considered himself in independent circumstances. His standing was such, that he had no difficulty in buying goods on credit. A merchant says, "His credit was good. I was willing and anxious to sell him all the goods I could" (Corbin's testimony). The cashier of the Fourth National Bank, speaking of his credit in that institution between the years 1864 and 1868, says, "He was able to get all he asked for, which was the greatest amount at one time, $5,000, only on account of his average good balance in bank" (McMullen's testimony).

No debt now exists which existed prior to 1868; and there is none now existing which can be said in any sense to stand in renewal or continuity of any such prior debt.

In the early part of 1867, there was a marked reflux in the tide of prosperity throughout the country. It swept many of those exposed to it into hopeless insolvency. The bankrupt became embarrassed and depressed. His wife proposed to relieve him by making a loan of $4,000, to be secured by a mortgage upon the property in question. This suggestion was carried out. The loan was made and the mortgage given in March, 1867. The money was paid over to his creditors. This enabled him for a time to weather the storm. But times grew worse. The shrinking in the value of dry-goods was immense. He testifies that muslins for which he paid seventy cents per yard he was compelled to sell for twenty.

His loss by shrinkage he estimates at $20,000. In 1868, when his stock had been reduced in value to about $20,000, he sold it for that sum to the clerks, all females and relatives, who

had been employed in the store, and took their notes accordingly. These notes he indorsed to his creditors. Some of them have been paid, and others not. When the stock in the hands of the vendees had been reduced to a remnant, worth about $2,000, it was sold under process in favor of his wife for the payment of the accumulated rents due to her.

The mortgage to secure the loan of $4,000 is still unsatisfied.

The bankrupt testifies that his failure was due to the losses of a firm of which he was a member; and that, but for that connection, he would still be in prosperous circumstances.

We think the payment of the $3,000 to extinguish the ground-rent was honestly made, and was warranted by the condition at that time of the bankrupt's affairs. They were then prosperous, and he had no reason to anticipate the reverses which followed. If there could otherwise be any doubt as to the integrity of this transaction, it is removed by the loan and mortgage and the application of the money borrowed. If there had been a purpose to defraud when the property was bought or the ground-rent extinguished, the mortgage would not have been given. It is entirely inconsistent with such an idea. The loan replaced the amount paid for the ground-rent, with an excess of $1,000; and it equalled the amount paid for both the property originally and in extinguishment of the ground-rent, less $450.

We hold the transactions both as to the ground-rent and the original purchase to have been honest and valid.

Where money has been misappropriated, the general rule of equity is, that those wronged may pursue it as far as it can be traced, and may elect to take the property in which it has been invested, or to recover the money. *Piatt* v. *Oliver*, 3 How. 401.

Lord Ellenborough held that the same rule is applicable at law. *Taylor* v. *Plummer*, 3 M. & S. 562.

It was claimed by the counsel for the appellants, that, if the transactions here in question should be adjudged fraudulent, the assignee would only have a lien upon the premises for the amount to which it might be held he was entitled with interest.

The conclusions at which we have arrived upon the facts render it unnecessary to consider the law of the remedy.

Decree reversed, and cause remanded, with directions to dismiss the bill.

LAMAR, EXECUTOR, *v.* BROWNE ET AL.

1. The United States, in the enforcement of their constitutional rights against armed insurrection, have all the powers not only of a sovereign, but also of the most favored belligerent. As belligerent, they may by capture enforce their authority; and, as sovereign, by pardon, and restoration to all rights, civil as well as political, recall their revolted citizens to allegiance.
2. Notwithstanding active hostilities had ceased in Georgia, cotton, although private property, seized there by the military forces of the United States, in obedience to an order of the commanding general, during their occupation and actual government of that State, was taken from hostile possession within the meaning of that term, and was, without regard to the *status* of the owner, a legitimate subject of capture.
3. What shall be the subject of capture, as against his enemy, is always within the control of every belligerent. It is the duty of his military forces in the field to seize and hold that which is apparently so subject; leaving the owner to make good his claim, as against the capture, in the appropriate tribunal established for that purpose. In that regard, they occupy on land the same position that naval forces do at sea.
4. Unless restrained by governmental regulations, the capture of movable property on land changes the ownership of it without adjudication. It was authorized by law, in any State or Territory in rebellion against the government of the United States. They (12 Stat. 820) provided as well for the collection of captured or abandoned property as for its conversion into money to be deposited in the national treasury, and allowed the claimant within a prescribed time to sue in the Court of Claims, and to receive the net proceeds, on proof to its satisfaction, of his loyalty, and of his right to them.
5. Neither the captors, nor the special agents of the treasury to whom they delivered the captured property, are liable to the owner thereof in an action at law for any thing by them done within the scope of their delegated powers. Acting for the government, they are protected by its authority; and he must look to it, and not to them, for indemnity.

ERROR to the Circuit Court of the United States for the District of Massachusetts.

Mr. George T. Curtis and *Mr. E. N. Dickerson* for the plaintiff in error.

Mr. Assistant Attorney-General Edwin B. Smith for the defendants in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was an action of trover, brought by Lamar, the plaintiff, to recover of the defendants the value of eighteen hundred bales of cotton alleged to have been taken and converted by

them. The defendants justified, as agents of the United States to receive and collect abandoned and captured property, under the several acts of Congress providing therefor. Upon the trial, Lamar introduced evidence tending to show, that, in the years 1861–1864, he stored certain cotton in warehouses in the town of Thomasville, Ga.; that on June 19, 1865, a part of this cotton was his individual property, and stored in his own name, and part was the property of the Importing and Exporting Company of the State of Georgia, and stored in his name as president of the company; that the defendants, in the autumn and December of the year 1865, took and carried the same away, and that the Importing and Exporting Company, though a blockade-running company, had never run any cotton through the blockade, but had, during the rebellion, bought several steamers in England, and brought them into Confederate ports for that purpose. He also gave evidence tending to show, that on Jan. 6, 1865, he, having been in rebellion against the United States, and residing in Georgia during the war, took and subscribed at Savannah the oath of amnesty under the President's proclamation of Dec. 8, 1863, and that this fact was known to the defendant Browne, Sen., shortly after it occurred.

In the course of the trial, William K. Kimball was called three times as a witness, — twice by the defendants, and once by the plaintiff. His testimony disclosed the following facts: Being in the military service of the United States, in Georgia, as colonel of the 12th Maine regiment, he was ordered by General J. M. Brannan, then in command of the first division of the department of Georgia, to Thomasville. He arrived at that place June 19, 1865, and was ordered by his immediate commander, General H. D. Washburn, to take and retain possession of the ordnance, ordnance-stores, quartermaster's stores, commissary-stores, and the cotton in the warehouses there. He was specially directed to seize what was known as "Lamar" cotton. Immediately or within a few days after his arrival, he stationed a guard at the several warehouses in the town in which cotton was stored, so as to control them, and prevent any thing from being removed. At that time there were no armed hostilities at Thomasville, and he was the first to take posses-

sion of the town. He took no account of the contents of the several warehouses, but, soon after his arrival, called upon the keepers to report the contents to him. Some did make a report, but others did not. Some, instead of reporting in writing, brought to him their books for examination. He continued his guard and the control of the warehouses; and on Aug. 9, 1865, General Brannan, then in command of the district, issued to him the following order: —

"HEADQUARTERS, DIST. OF SAVANNAH,
"1ST DIVISION, DEPT. OF GEORGIA.
"SAVANNAH, Aug. 9, 1865.

"COLONEL, —You will turn over to U. S. treasury agent, Mr. A. J. Browne, or such person as he may direct, all cotton and other seized property in the possession of the U. S. troops at Thomasville, or any other point within the limits of your command, except such as you are satisfied belongs to loyal citizens of the United States, who have taken the oath of allegiance, and who do not come under any of the exceptions of the President's proclamation of May 29, 1865. The cotton and other property claimed by persons whose loyalty you are convinced of (on sufficient proof of ownership) you will turn over to them.

"I am, colonel, very respectfully, your obedient servant,

"J. M. BRANNAN,
"*Brevet Maj.-Gen. U. S. Vols., Comd'g Dist.*

"To Col. W. K. KIMBALL,
"*Comd'g Sub-Dist. of the Atsamaha.*"

This order was delivered to Colonel Kimball, on or about Aug. 15, by the defendant, Albert G. Browne, Sen., then supervising special agent of the Treasury Department, appointed and acting under the authority of the abandoned and captured property acts. Upon its receipt, Kimball went with Browne to the warehouses, and turned over the control of both the warehouses and their contents to him, and at the same time executed a written transfer, as follows: —

"POST THOMASVILLE, GA., Aug. 15, 1865.

"Having, in obedience to orders of Brevet Brigadier-General H. D. Washburn, taken possession of certain warehouses containing cotton at this post, some of which I had reason to believe was the property of the so-called Confederate States, or of some corpo-

ration authorized by them, in violation of the laws of the United States, or of some individual whose property, by existing laws, is subject to confiscation, I hereby, in obedience to orders of Brevet Major-General Brannan, commanding 1st District of Georgia, turn over and deliver to A. G. Browne, Esq., supervising special agent Treasury Department United States, all of said cotton in my possession, custody, and control at this post, belonging to the State of North Carolina, the State of Georgia, G. B. Lamar, President of the Exporting and Importing Company of Georgia, and to G. B. Lamar, whose property, I am informed, is subject to confiscation, amounting in all to —— bales; to wit, —— bales, supposed to belong to the State of North Carolina; —— bales, supposed to belong to the State of Georgia; —— bales, supposed to be the property of G. B. Lamar, President of the E. and I. Co. of Georgia; and —— bales, supposed to be the property of G. B. Lamar. I also turn over and deliver to said A. G. Browne, agent as aforesaid, —— lbs. iron, —— lbs. lead, —— lbs. wool, &c., seized as Confederate property at this post.

"WILLIAM K. KIMBALL,
"*Col. 12th Maine, Comd'g Post.*"

Contemporaneously with the surrender of the possession and the execution of the transfer by Kimball, Browne executed to him a receipt, as follows: —

"POST OF THOMASVILLE, GA., Aug. 15, 1865.

"Received of Colonel William K. Kimball, commanding post, all the cotton stored in the warehouse of Evans & Parnell, and in the cotton-sheds of J. McKinnon & Co., and in the warehouse of Louis Goldsberry, which belongs to the State of North Carolina, State of Georgia, to G. B. Lamar, President of the Exporting and Importing Company of Georgia, and to G. B. Lamar personally, amounting to —— bales, of the several kinds and marks enumerated in the schedule herewith annexed; also ten bales, supposed to belong to the State of Georgia, in the possession of Judge Grover, at Groversville, Ga.; also fourteen (14) bales in the possession of Mr. Jones, near Groversville, supposed to belong to G. B. Lamar, president as aforesaid. All of said cotton having been seized by said Kimball as Confederate, captured or abandoned, property subject to confiscation.

"ALBERT G. BROWNE,
"*Supervis'g Spec. Agt., Treas. Dept. 5th Spec. Agency.*"

Kimball then detailed Lieutenant Johnson, of his command, to act in connection with Browne and his agents in making a

list of the contents of the warehouses as they were removed. Soon after, Kimball was relieved at Thomasville, and transferred to Savannah, where he took command of the military district. The cotton was afterwards removed to Savannah, and a full and complete detailed invoice made by Browne and Johnson. Subsequently, on Jan. 24, 1866, Kimball executed to Browne another transfer, as follows: —

"SAVANNAH, GA., Jan. 24, 1866.

"Invoice of 1,864 bales of cotton, weighing 928,106 lbs., turned over by the undersigned Aug. 15, 1865, to A. G. Browne, supervising special agent, fifth treasury agency, under orders from Brevet Major-General Brannan, commanding district Savannah; viz.: —

1,018	bales,	Importing & Exporting Co., State of Ga. . . .	513,799 lbs.
484	„	G. B. Lamar, or said Impt. & Exp't'g Co. of Ga.	246,328 „
331	„	State of North Carolina	154,403 „
31	„	State of Georgia	13,576 „
1,864		. . . . .	928,106 „

"A written transfer of this cotton in bulk was executed by me to said Browne, Aug. 15, 1865; it being then impossible to invoice it except in bulk, the marks and weights not having then been ascertained. Said property was situated at and near Thomasville, Ga.

"WILLIAM K. KIMBALL, *Col. 12th Me. Vols.*"

Upon the delivery of this paper, Browne executed to Kimball another receipt, as follows: —

"TREASURY DEPARTMENT, FIFTH SPECIAL AGENCY,
"CENTRAL OFFICE,
"SAVANNAH, GA., Jan. 24, 1866.

"Received on Aug. 15, 1865, from Colonel William K. Kimball, 12th Regiment Maine Volunteer Infantry, one thousand and eighteen bales of cotton, claimed to be property of the Importing and Exporting Company of the State of Georgia; four hundred and eighty-four bales of cotton, claimed to be property either of G. B. Lamar, or of the Importing and Exporting Company of the State of Georgia; three hundred and thirty-one bales of cotton, claimed to be property of the State of North Carolina; thirty-one bales of cotton, claimed to be property of the State of Georgia; being a total of 1,864 bales of cotton, marked and weighing as per schedule hereto annexed. The same having been seized under military orders on June 19, 1865, by the military forces of the United States,

at and near Thomasville, in the State of Georgia, upon the occupation of that region by said troops, and being now turned over by said Kimball, in obedience to orders of Major-General Brannan, U. S. Vols., commanding district of Savannah.

"This property I have received as special agent of the Treasury Department, appointed in pursuance of certain acts of Congress, approved July 13, 1861, May 20, 1862, March 12, 1863, and July 2, 1864. The said property to be transported and disposed of under the regulations of the Secretary of the Treasury, prescribed in pursuance of the authority conferred on him by said acts.

"For this property, a memorandum receipt, without annexed schedules, was given by me to said Kimball on said Aug. 15, 1865; it being then impossible for him to invoice to me said property, except in bulk, the marks and weights not then having been ascertained, and such invoice having now been given by him to me simultaneously herewith.

"ALBERT G. BROWNE, *Supervising Spec. Agent.*"

To each of these last two instruments was attached a schedule or invoice, giving the number, weight, and marks of each bale, classified as standing in the name of the Importing and Exporting Company of the State of Georgia; in the name of G. B. Lamar, or said Importing and Exporting Company; in the name of G. B. Lamar; in the name of the State of North Carolina, and in the name of the State of Georgia, — in all, 1,864 bales.

At the close of the evidence, the circuit judge ruled, that, assuming the testimony of Colonel Kimball to be true, upon the state of facts thereby disclosed, the action could not be sustained, and that this was so irrespectively of all questions relating to the loyalty or disloyalty of the plaintiff, and whether or not he fell within the exceptions of the President's proclamation of Dec. 8, 1863, and also irrespectively of the nature and operation of the Importing and Exporting Company of the State of Georgia. Under this ruling, a verdict was taken by agreement for the defendants; and the plaintiff in due form excepted.

The only error alleged here is upon this ruling.

The case has been argued, on the part of the plaintiff, as though the defendants, in order to relieve themselves from liability to him, must show that the cotton, which is the

subject-matter of the action, was, in fact, enemy property, and subject to capture as such, or abandoned property, within the meaning of the Abandoned and Captured Property Act. The defendants did not themselves seize the property: they received it from the military authorities, who had it in possession after a seizure made by them.

Property is captured on land when seized or taken from hostile possession by the military forces under orders from a commanding officer. *U. S.* v. *Padelford*, 9 Wall. 540; Treasury Regulations, under acts of March 12, 1863, 12 Stat. 820, and July 2, 1864, 13 Stat. 376. The testimony of Kimball shows conclusively that the cotton in question was seized by the military forces of the United States, in obedience to the orders of a commanding general. This is not seriously disputed; but it is contended, that, when seized, it was not in "hostile possession," and that, in consequence, the seizure, though made by the military, did not amount to a capture. It is true, as claimed, that, when the seizure was made, active hostilities in Georgia had entirely ceased. The last organized army of the rebellion east of the Mississippi had surrendered almost two months before, and a very large portion of the national forces had been disbanded. The blockade had been raised, and trade and commercial intercourse in that part of the insurgent territory again authorized; but still, in fact, a state of war existed. That continued until April 2, 1866 (*The Protector*, 12 Wall. 702); the territory within the limits of the State of Georgia being occupied by the national forces, and actually governed by means of that occupation.

From time to time during the war the military lines of the enemy were forced back; and, as they receded, the hostile territory was entered upon by the forces of the United States. It was thus taken out of hostile possession. Whenever, therefore, during this military occupation, enemy property found on the recovered territory was seized by the military forces, in obedience to orders, it was taken from hostile possession within the meaning of that term as used in respect to captures. Property taken on a field of battle is not usually collected until after resistance has ceased; but it is none the less on that account captured property. The larger the field, the longer the time

necessary to make the collection. By the battle, the enemy has been compelled to let go his possession; and the conqueror may proceed with the collection of all hostile property thus brought within his reach, so long as he holds the field. At the time this transaction occurred, the military lines of the enemy east of the Mississippi had been broken up, and its armies in that locality disbanded. Thus the whole of this insurgent territory was uncovered, and this part of the field of the battles of the entire war taken from the hostile possession of the enemy. It was at once occupied by the national forces; and they proceeded immediately to secure the results of the prolonged and stubborn conflict.

That cotton, though private property, was a legitimate subject of capture, is no longer an open question in this court. *U. S.* v. *Anderson*, 2 Wall. 404; *U. S.* v. *Padelford*, 9 Wall. 540; *Haycraft* v. *U. S.*, 22 Wall. 81. It was the foundation on which the hopes of the rebellion were built. It was substantially the only means which the insurgents had of securing influence abroad. In the hands of private owners, it was subject to forced contributions in aid of the common cause. Its exportation through the blockade was a public necessity. Importing and exporting companies were formed for that purpose. It is not too much to say that the life of the Confederacy depended as much upon its cotton as it did upon its men. If they had had no cotton, they would not have had, after the first year or two, the means to support the war. To a very large extent it furnished the munitions of war, and kept the forces in the field. It was, therefore, hostile property, and legitimately the subject of capture in the territory of the enemy.

For the purposes of capture, property found in enemy territory is enemy property, without regard to the *status* of the owner. In war, all residents of enemy country are enemies. Knowing this, but bearing in mind "the humane maxims of the modern law of nations, which exempt private property of non-combatant enemies from capture as booty of war" (*Klein's Case*, 13 Wall. 137), Congress passed the abandoned and captured property acts. 12 Stat. 820. The capture of hostile property was in this way authorized by the United States, even though it should be owned by private persons. The military

authorities were permitted to make their seizures; but careful provision was made for the collection of the property seized, its conversion into money to be deposited in the national treasury, there to remain, according to the ruling in *Klein's Case*, in trust "for those who were by that act declared entitled to the proceeds." Capture for private gain was not permitted. All went to the government.

By this legislation, the Court of Claims is invested with powers as to captures on land somewhat analogous to those possessed by the prize-courts as to captures at sea. Property captured at sea can never be converted by the captor until it has been brought to legal adjudication; and it is his duty, with all practicable despatch, to bring his prize into some convenient port for that purpose. Not so, in general, with regard to movable property on land. There the capture changes the ownership without adjudication, unless restrained by governmental regulations. What shall be the subject of capture, as against his enemy, is always within the control of every belligerent. Whatever he orders is a justification to his followers. He must answer in his political capacity for all his violations of the settled usages of civilized warfare. His subjects stand behind him for protection.

It is quite true that the United States, during the late war, occupied a peculiar position. They were, to borrow the language of one of the counsel for the plaintiff, both "belligerent and constitutional sovereign;" but, for the enforcement of their constitutional rights against armed insurrection, they had all the powers of the most favored belligerent. They could act both as belligerent and sovereign. As belligerent, they might enforce their authority by capture; and, as sovereign, they might recall their revolted subjects to allegiance by pardon, and restoration to all rights, civil as well as political. All this they might do when, where, and as they chose. It was a matter entirely within their sovereign discretion.

It was in this spirit that the Abandoned and Captured Property Act was passed. It gave the Court of Claims authority to adjudicate between the belligerent sovereign and the citizen, and to determine the question of capture or no capture. If the owner or claimant appearing there had been loyal, and his suit

was commenced in time, he was entitled to a judgment restoring him to the possession of that which represented his property in the national treasury. The captors were the agents of the government to make the seizure; and the special agents of the treasury, appointed under the act, gathered the product of the captures, and placed the proceeds in the treasury. All acted for the government, and, while acting within the scope of their powers, were protected by its authority. Those aggrieved must look to the government, and not to the agents, for their indemnity. The military forces act in the field according to the laws of war, and seize that which is apparently the subject of capture. They act upon appearances, not upon testimony. They occupy on land the same position that naval forces do at sea. Their duty is to seize and hold, leaving it to the owners to make good their claim, as against the capture, in the appropriate tribunal established for that purpose.

It needs but a moment's reflection to discover the importance of acting upon this theory at the close of the rebellion. Novel questions of public law were then presented, some of which were not easy of solution. An army in the field engaged in making captures could not be expected to stop and decide such questions, and the civil authorities were not in a condition to determine at once the rights of all parties under all circumstances. Hence the necessity for deliberation, and the adoption of measures conducive to that end. Actuated by this feeling, the United States disbanded their armies to a large extent. Only such force was retained as was necessary to occupy and hold the recovered territory, secure the results of the war, and aid in restoring the forms of civil government. The working machinery of the Confederate government was not then in all respects understood. It was not always easy to ascertain what was private property, and what was the public property of the Confederates. Neither was the exact *status* of all the residents of the enemy territory definitely settled. The proclamations of amnesty, and offers of pardon, issued at and before that time, excluded certain classes from their operation. For all the purposes of this case, we must consider the plaintiff as entitled to the benefit of the proclamation of Dec. 8, 1863; but in the consideration of this question we may bear in mind that upon the trial the defendants

offered evidence tending to show that he fell within the exceptions, and that contradictory evidence was submitted by him. Clearly, if there was room for reasonable doubt, the military forces were justified in making the seizure, and thus opening the way for the action of the Court of Claims to settle the controversy. So, too, as to the property itself, or a part of it. As late as Sept. 27, 1865, the government had not given up its claim of title to cotton belonging to exporting and importing companies; for on that day the Secretary of the Treasury issued a circular letter to the government agents, directing them to take charge of all such cotton, and "treat it as property which was used to aid the rebellion, and therefore belonging to the United States." The military forces, therefore, in taking possession of the cotton in controversy, were clearly acting within the general scope of their powers as an army still in possession of enemy territory under orders from their superiors.

At sea, the naval forces ought not to make capture of any thing not lawful prize; but if they do, and the captured property is restored to its owner by the prize-court, the captors are not liable to suit at common law for the trespass. The prize-courts alone have jurisdiction for the redress of such wrongs. This was decided, upon full consideration, as early as 1781, in *Le Caux* v. *Eden*, 2 Doug. 594. The opinion of Mr. Justice Buller, in this case, reviews all the authorities and precedents; and Lord Mansfield declared his assent to all it contained. Subsequently, in *Lindo* v. *Rodney*, reported as a note to *Le Caux* v. *Eden*, p. 612, Lord Mansfield himself gave an opinion upon the same question, in which he asserted the same doctrine with renewed emphasis. The authority of these cases has never been doubted.

Afterwards, in *Elphinstone* v. *Bedreechund*, 1 Knapp, P. C. 316, the same principle was applied to a case of booty in a Continental land war. There the private property of a citizen had been seized on land by the order of the provisional government of the conquered territory established by the military authorities, supposing it to be the property of the hostile sovereign or public moneys. This was done at a time when no active hostilities were being carried on in the immediate neighborhood of the seizure, though the war was not at an end.

The action was in trover, to recover the value of the property taken, against Elphinstone, who had been appointed "sole commissioner for the settlement of the territory conquered, . . . with authority over all the civil and military officers employed in it," and Robertson, who had been appointed by him "provisional collector and magistrate of the city . . . and the adjacent country," and who was, at the time of the seizure, in command of the guards there. The seizure was made under the orders of Robertson, who had been instructed by Elphinstone, among other things, "to deprive the enemy of his resources, and in this and all other points" to make every thing "subservient to the war." Sir James Scarlett, the then Attorney-General, in his argument before the Privy Council, after citing the case of *Le Caux* v. *Eden*, said, "Now, booty taken under the color of military authority falls under the same rule. If property is taken by an officer under the supposition that it is the property of a hostile State, or of individuals, which ought to be confiscated, no municipal court can judge of the propriety or impropriety of the seizure: it can be judged of only by an authority delegated by his majesty, and by his majesty ultimately assisted by your lordships as his council." And Lord Tenterden announced the action of the council in these words: "We think the proper character of the transaction was that of hostile seizure made, if not *flagrante*, yet *nondum cessante bello*, regard being had both to the time, the place, and the person; and consequently that the municipal court had no jurisdiction to adjudge upon the subject, but that, if any thing was done amiss, recourse could only be had to the government for redress." This case is singularly like the one now under consideration, both in its facts and circumstances. Acting upon the principle thus recognized in England, the United States delegated to the Court of Claims the necessary authority for the redress of grievances under such seizures by the military forces. Recourse could be had there by all who had suffered wrongs, if they had been loyal, or, having been disloyal, had been pardoned, and they appeared in time. A direct appeal against the government for the conduct of its armies could be made to a court specially directed to hear and decide upon all such complaints.

We are clearly of the opinion, that, under these circumstances, no action could have been maintained against Colonel Kimball for his acts in the premises. So far as he was concerned, the plaintiff could only look to the United States for redress. Down to this point, the case is nothing more than a capture of movable property on land by the military forces of one belligerent engaged in war with another.

The only remaining question to be determined is, whether these defendants occupy any different position, so far as this action is concerned, from the actual captors. They were the agents of the government, appointed under the authority of law "to receive and collect all . . . captured property." Their duty was to have it disposed of according to the requirements of the law, and to see that the proceeds went into the treasury. If they followed the law after the property came into their hands, they were no more liable to suit by the owners than were the original captors. They were a part of the machinery by which the government executed the trust it assumed at the time of the capture in favor of its loyal citizens. For their guidance, instructions were from time to time issued by the Treasury Department, in connection with the other executive departments of the government. These instructions were specific, and intended as well for the protection of the rights of the owners under the law as those of the government.

It is claimed, however, by the plaintiff, that under an order issued by the Treasury Department, bearing date June 27, 1865, Kimball was not permitted to turn the property over to Browne, and Browne was prohibited from receiving it. We do not so understand this order; for it was expressly provided that it was not to be construed as interfering with the operations of the agents then engaged in receiving or collecting the property recently captured by or surrendered to the forces of the United States, and that those so acting should continue to discharge the duties thus imposed until such property should all be received or satisfactorily accounted for, and until the amount so secured was shipped or otherwise disposed of under the regulations prescribed upon that subject. This property, as we have seen, had been captured by the military forces only a few days before the order was made, and was, therefore, expressly ex-

cepted from its operation. But, if it were not so, it is difficult to see how the plaintiff can complain. His property had been captured, and was in the possession of the military forces when delivered to Browne. General Brannan's order of Aug. 9, 1865, permitted Colonel Kimball, on sufficient proof of ownership, to give up cotton in his hands claimed by persons of whose loyalty he was convinced. It is not, however, claimed that Colonel Kimball knew of the pardon of the plaintiff, or that any demand was made on him for the property. He could not surrender any thing which he had taken and held, except upon sufficient proof of ownership and loyalty. He could not be personally accused of wrongful detention, therefore, until some attempt had been made to convince him of the "sufficient" claim of the owner.

After the cotton came into the hands of the defendants, they, and each of them, were expressly prohibited by the treasury regulations from releasing it, or any part of it, to any person whatever claiming to be the owner, except upon special authority from the Secretary of the Treasury. It was no part of their duty to make application for such authority. Being, therefore, bound to receive all property turned over to them by the military, and prohibited from surrendering it to the owners, except under orders from the Treasury Department, they occupy the same position as to the plaintiff that the military authorities did, and cannot be made liable unless they were before the transfer. It follows, that, in the ruling of the circuit judge complained of, there was no error.

Judgment affirmed.

MR. JUSTICE FIELD dissenting.

I am compelled to dissent from the judgment of the majority of the court in this case, for the following reasons: —

1st, The cotton for which the present action was brought was not, in my opinion, either abandoned or captured property within the meaning of those terms as defined by the legislation of Congress, or the circulars and regulations of the Treasury Department. The act of July 2, 1864, in its third section, declares that property "shall be regarded as abandoned when the lawful owner thereof shall be voluntarily absent therefrom,

and engaged, either in arms or otherwise, in aiding or in encouraging the rebellion." The owner here, whether voluntarily absent or not, was not engaged, in arms or otherwise, in aiding or in encouraging the rebellion at the time the cotton was taken: he had, months before, renounced all adhesion to the rebellion, and taken an oath of allegiance to the United States.

Captured property was defined by a circular of the Treasury Department, issued on the 3d of July, 1863, to be "that which has been seized or taken from hostile possession by the military or naval forces of the United States." This definition was repeated in subsequent treasury regulations, and was approved by this court in *Padelford's Case*, 9 Wall. 531. It is there said that this definition must be taken as the interpretation practically given to the act by the department of the government charged with its execution; and the court added, "We think it correct."

The cotton here in controversy was never seized or taken from any hostile possession. It was at the time stored, in the name of the plaintiff, in the warehouse at Thomasville; and, for many months previously, his *status* was that of a loyal citizen of the United States. He had taken, in January, 1865, the oath of amnesty under the President's proclamation of Dec. 8, 1863, by virtue of which a full pardon was extended to him, with "restoration of all rights of property;" and this fact was known to the special agent of the Treasury Department when the cotton was turned over to him.

2d, The defendant Browne had no authority, in my opinion, to meddle, as treasury agent, with the cotton in controversy, after the 30th of June, 1865, assuming it to have been captured or abandoned. The instructions of the Treasury Department, issued by the Secretary on the 27th of that month, directed the treasury agents to refrain, after the 30th of June, from receiving captured or abandoned property from the naval or military authorities, excepting in cases in which they were *then* engaged in receiving or collecting property recently captured or surrendered. The cotton of the plaintiff was not within this exception; for, on the 30th of June, the defendant was not engaged in receiving or collecting it. The command-

ing general did not order it to be turned over to him until the 9th of August, and it was not received by him until the 15th of the month. In receiving it then, he violated, in my judgment, the positive instructions of the department. After the 30th of June, 1865, the duty of receiving captured or abandoned property, not embraced within the exceptions stated, was devolved, by express direction of the Secretary of the Treasury, upon the usual and regular officers of the customs at the several places where they were located.

It is certainly desirable that full protection should be extended to the agents and officers of the Treasury Department, whilst engaged in executing during the war the commands of their superiors within the insurrectionary districts; but it is equally important that protection should not be extended to acts which were not only not authorized, but were expressly forbidden.

It seems to me that the ruling of the majority of the court has carried the principle of protection in this case beyond all former precedents; and that the reasoning of the opinion, in its logical consequences, will justify in many instances the most wanton interference with the private property of citizens.

WALLACH ET AL. v. VAN RISWICK.

1. The act of July 17, 1862 (12 Stat. 589), is an act for the confiscation of enemies' property, and it provides for the seizure and condemnation of all their estate. When it has been carried into effect by appropriate proceedings in any given case, the offender has no longer any interest or ownership in the thing forfeited which he can convey, or any power over it which he can exercise in favor of another.
2. The joint resolution of even date with that act was designed only to qualify, and not defeat it. The provision therein, that "no proceedings shall work a forfeiture beyond the life of the offender," obviously means that they shall not affect the ownership of the land after the termination of his natural life; and that, after his death, it shall pass and be owned as if it had not been forfeited. It was intended for the exclusive benefit of his heirs, and to enable them to take the inheritance after his death.
3. The maxim, that a fee cannot be in abeyance, is not of universal application;

nor has it any weight in an inquiry as to the intent and effect of said act and joint resolution.

4. The amnesty proclamation of the President of the United States of Dec. 25, 1868, did not give back property which had been sold under the Confiscation Act, or any interest in it, either in possession or expectancy.

5. *Day* v. *Micou*, 18 Wall. 156, and *Bigelow* v. *Forrest*, 9 id. 339, cited and explained.

APPEAL from the Supreme Court of the District of Columbia.

The complainants are children and heirs-at-law of Charles S. Wallach, who was an officer in the Confederate army during the late rebellion. While he was thus in that service, his real estate situate in the city of Washington was, by order of the President, seized under the Confiscation Act of July 17, 1862, and a libel for its condemnation duly filed. The lot of ground, respecting which the present controversy exists, was condemned as forfeited to the United States on the twenty-ninth day of July, 1863; and, on the ninth day of September next following, it was sold under a writ of *venditioni exponas*, the defendant Van Riswick becoming the purchaser. Prior to the seizure, the lot had been conveyed by Charles S. Wallach in trust to secure the payment of a promissory note for $5,000 which he had borrowed; and, at the time of the seizure, a portion of this debt remained unpaid and due to the defendant, to whom the note and the security of the deed of trust had been assigned. Wallach's interest in the property was, therefore, an equity of redemption; and, by the confiscation sale, the purchaser acquired that interest, and held it with the security of the deed of trust given to protect the payment of the promissory note. On the 3d of February, 1866, Wallach, having returned to Washington, made a deed purporting to convey the lot in fee-simple with covenants of general warranty to Van Riswick, the purchaser at the confiscation sale. His wife joined with him in the deed.

So the case stood until Feb. 3, 1872, when Wallach died. The complainants then filed this bill, claiming, that after the seizure, condemnation, and sale of the land, as the property of a public enemy engaged in the war of the rebellion, nothing remained in him that could be the subject of sale or conveyance; consequently, that nothing passed by the deed from Wallach and wife; and that they, being his heirs, had, upon his

death, an estate in the land, and a right to redeem, and to have the conveyance of their father to Van Riswick declared to be no bar to their redemption. The relief sought is redemption of the deed of trust, discovery (particularly of the amount remaining due upon Charles S. Wallach's note), an account of the rents and profits of the land since the death of Wallach, a decree that his deed of Feb. 3, 1867, is of no effect as against the plaintiffs, a decree for delivery of possession of the lot, and general relief.

To this bill the defendant Van Riswick demurred generally; and the court below sustained the demurrer, and dismissed the bill. Hence this appeal.

Mr. Albert Pike and *Mr. L. H. Pike* for the appellants.

Wallach's conveyance passed nothing. By the seizure and condemnation, all his estate vested in the United States.

The forfeiture is the same as that incurred by the tenant in the olden time who had violated his obligation of homage and fealty. If, at his death, his heirs were permitted to take, it was not because of any right in them, but out of grace and favor.

The whole estate of the offender vested in the crown in case of forfeiture. *Brown* v. *Waite*, 2 Mod. 130.

Congress, by the act of July 17, 1862, intended to take the whole estate, but, exercising by the joint resolution the discretion and grace which in England belonged to the king, caused it, at the offender's death, to pass to his heirs.

The act re-enacted the old English law in all its rigor. The joint resolution did not propose to do more than apply the constitutional saving. By virtue of it, the heirs, at the death of the ancestor, take the whole fee from the United States as by grant, and yet also as heirs by descent, the statute making to that end a new rule of law.

The declared purpose to "punish treason," and to "confiscate the property of rebels," would be defeated if the fee of the confiscated land were subject to the disposal of its rebel owner. It was seized as enemy property, because that enemy was a rebel. But, inasmuch as he was a citizen of the United States, President Lincoln was right in maintaining that the Constitution forbade a perpetual forfeiture of the property.

The words, "during the life of the person attainted," where they occur, so far from confining the forfeiture to his life-estate, leaving in him the fee, unquestionably mean, that whilst all his interest in, or alienating power over, the land, shall, during his life, be absolutely forfeited and extinguished, his treason shall not work the disinherison of the children.

If it were necessary to give effect to the act and joint resolution, the court would consider the forfeiture equivalent, by virtue of the law, to a conveyance by Wallach to the United States, to their use during his life, and to that of his heirs after his death.

The joint resolution is virtually a covenant to stand seized to uses.

Forfeiture is a kind of alienation. *Brown* v. *Waite*, *supra*.

The proceedings in question vested the whole estate and property of Wallach, in the land, in the United States. As, under an act of attainder, with a saving in favor of all others than the attainted party and his heirs, "the saving *removed* the fee-simple out of the person of the king, and *conveyed* it to the third person whose right was saved, so that he could have it by means of the saving, for it was in the king when the condition was performed, and it must go out of him to the person by the condition and by the saving;" so the whole fee was vested in the United States, and, at the death of Wallach, was *removed* out of the United States by the condition and saving in the joint resolution, and was thereby *conveyed* to his heirs. *Lord Lovel's Case*, Plowd. 488. See, further, History and Proceedings of the House of Lords, vol. ii. p. 261; Foster's Crown Law, 222; *Thornby* v. *Fleetwood*, 1 Comyns, 207; *Lord de la Warre's Case*, 11 Co. 1 *b*; *Earl of Derby's Case*, 1 Ld. Raym. 355; *Thornby* v. *Fleetwood*, Str. 363; *Wheatly* v. *Thomas*, 1 Lev. 74; *Burgess* v. *Wheate*, Eden, 128; *Sheffield* v. *Ratcliffe*, Hob. 335 *b*; 6 Hansard, Parl. Hist. 796; 2 Burnet, Hist. of His Own Times, 837, 838; 3 Macaulay, Hist. of Eng. 241, 242; *Dowtee's Case*, 3 Coke, 10; *Page's Case*, 5 id. 52; *The Lord Advocate* v. *Gordon*, 1 Craigie, 508.

Mr. T. J. Durant and *Mr. T. A. Lambert* for the appellee.

1. The bill is multifarious in this, that it asserts, 1st, Equity for an account, and to redeem from the operation of the deed

of trust of Sept. 28, 1854; 2d, Right to a rescission of the deed or so-called mortgage of Feb. 3, 1866, and to an avoidance of the sale of Aug. 23, 1867; and, 3d, Claim for the possession of the land, by virtue of an alleged settlement created by the act of July 17, 1862, in favor of the complainants, as the right heirs of Charles S. Wallach. Story, Eq. Pl., sects. 476, 530; *Loker* v. *Rolle*, 3 Ves. 4, 343.

2. This court has expressly declared, in passing upon the act and joint resolution which govern this case, that all "which could become the property of the United States was a right to the property seized, terminating with the life of the person for whose act it had been seized." *Bigelow* v. *Forrest*, 9 Wall. 339; cited and confirmed in *Day* v. *Micou*, 18 id. 156. The proceedings in confiscation, therefore, carved a life-estate out of the fee, leaving the latter vested where it had abided before they were instituted. No disability was, or could constitutionally be, imposed upon Wallach, incapacitating him from conveying the fee subject to his forfeited life-estate.

3. Under the decisions of this court, the fee did not for any purpose vest in the United States. It must remain somewhere. The doctrine of a fee in abeyance, or *in gremio legis*, or *in nubibus*, is not now the law of real property. Fearne on Cont. Rem., 351, 361; Wms. on Real Prop., 256; 1 Brown & Hudley's Com., 547. If, however, Wallach had, after the proceedings in question, no seisin of the inheritance, the heirs cannot take by descent.

4. Under the amnesty proclamation of Dec. 25, 1868, Wallach was completely restored to the enjoyment of his rights of property and person, however they may have been suspended by the rebellion, except in those cases where his property had by judicial proceedings vested in other persons. *Brown* v. *United States*, 2 Kan. 230. Whether he be regarded, therefore, as never having lost his entire estate in his landed property, or as having been restored to its possession by virtue of amnesty, his deed to Van Riswick was sufficient to convey the title in fee to the lot in controversy. Its covenants of warranty, general and special, are binding upon his heirs. If executed before the restoration of his title, the latter are estopped, equally as he would have been in his lifetime, from

questioning its operative force and effect. This familiar principle received forcible exposition in *McWilliams* v. *Nesley*, 2 S. & R. 507, 518.

MR. JUSTICE STRONG delivered the opinion of the court.

The formal objections to the bill deserve but a passing notice. It is not, we think, multifarious; and all persons are made parties to it who can be concluded or affected by any decree that may be made, — all persons who have an interest in the subject-matter of the controversy. The main question raised by the demurrer, and that which has been principally argued, is, whether, after an adjudicated forfeiture and sale of an enemy's land under the Confiscation Act of Congress of July 17, 1862, and the joint resolution of even date therewith, there is left in him any interest which he can convey by deed.

The act of July 17, 1862, is an act for the confiscation of enemies' property. Its purpose, as well as its justification, was to strengthen the government, and to enfeeble the public enemy by taking from the adherents of that enemy the power to use their property in aid of the hostile cause. *Miller* v. *United States*, 11 Wall. 268. With such a purpose, it is incredible that Congress, while providing for the confiscation of an enemy's land, intended to leave in that enemy a vested interest therein, which he might sell, and with the proceeds of which he might aid in carrying on the war against the government. The statute indicates no such intention. The contrary is plainly manifested. The fifth section enacted that it should be the duty of the President of the United States to cause the seizure of "*all the estate and property, money, stocks, credits, and effects*," of the persons thereinafter described (of whom Charles S. Wallach was one), and to apply the same and the proceeds thereof to the support of the army of the United States; and it declared that all sales, transfers, and conveyances of any such property should be null and void. The description of property thus made liable to seizure is as broad as possible. It covers the estate of the owner, — all his estate or ownership. No authority is given to seize less than the whole. The seventh section of the act enacted, that to secure the condemnation and sale of any such property (viz., the property

seized), so that it might be made available for the purpose aforesaid, proceedings should be instituted in a court of the United States; and if said property should be found to have belonged to a person engaged in the rebellion, or who had given aid or comfort thereto, the same should be condemned as enemies' property, and become the property of the United States, and might be disposed of as the court should decree, the proceeds thereof to be paid into the treasury of the United States for the purpose aforesaid. Nothing can be plainer than that the condemnation and sale of the identical property seized were intended by Congress; and it was expressly declared that the seizure ordered should be of all the estate and property of the persons designated in the act. If, therefore, the question before us were to be answered in view of the proper construction of the act of July 17, 1862, alone, there could be no doubt that the seizure, condemnation, and sale of Charles S. Wallach's estate in the lot in controversy left in him no estate or interest of any description which he could convey by deed, and no power which he could exercise in favor of another. This we understand to be substantially conceded on behalf of the defendant.

But the act of 1862 is not to be construed exclusively by itself. Contemporaneously with its approval, a joint resolution was passed by Congress, and approved, explanatory of some of its provisions, and declaring that "no proceedings under said act shall be so construed as to work a forfeiture of the real estate of the offender beyond his natural life." The act and the joint resolution are doubtless to be construed as one act, precisely as if the latter had been introduced into the former as a proviso. The reasons that induced the passage of the resolution are well known. It was doubted by some, even in high places, whether Congress had power to enact that any forfeiture of the land of a rebel should extend or operate beyond his life. The doubt was founded on the provision of the Constitution, in sect. 3, art. 3, that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted." It was not doubted that Congress might provide for forfeitures effective during the life of an offender. The doubt related to the possible duration of

a forfeiture, not to the thing forfeited, or to the extent and efficacy of the forfeiture while it continued. It was to meet the doubt which did exist that the resolution was adopted. What, then, is its effect? and what was intended by it? Plainly it should be so construed as to leave it in accord with the general and leading purpose of the act of which it is substantially a part; for its object was, not to defeat, but to qualify. That purpose, as we have said, was to take away from an adherent of a public enemy his property, and thus deprive him of the means by which he could aid that enemy. But that purpose was thwarted, partially at least, by the resolution, if it meant to leave a portion, and often much the larger portion, of the estate still vested in the enemy's adherent. If, notwithstanding an adjudicated forfeiture of his land and a sale thereof, he was still seized of an estate expectant on the determination of a life-estate which he could sell and convey, his power to aid the public enemy thereby remained. It cannot be said that such was the intention of Congress. The residue, if there was any, was equally subject to seizure, condemnation, and sale with the particular estate that preceded it. It is to be observed, that the joint resolution made no attempt to divide the estate confiscated into one for life, and another in fee. It did not say that the forfeiture shall be of a life-estate only, or of the possession and enjoyment of the property for life. Its language is, "No proceedings shall work a forfeiture beyond the life of the offender;" not beyond the life *estate* of the offender. The obvious meaning is, that the proceedings for condemnation and sale shall not affect the ownership of the property after the termination of the offender's natural life. After his death, the land shall pass or be owned as if it had not been forfeited. Nothing warrants the belief that it was intended, that, while the forfeiture lasts, it should not be complete; viz., a devolution upon the United States of the offender's entire right. The words of the resolution are not exactly those of the constitutional ordinance; but both have the same meaning, and both seek to limit the extent of forfeitures. In adopting the resolution, Congress manifestly had the constitutional ordinance in view; and there is no reason why one should receive a construction different from that given to the other.

What was intended by the constitutional provision is free from doubt. In England, attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinherison of his heirs, or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offence of their ancestor. When the Federal Constitution was framed, this was felt to be a great hardship, and even rank injustice. For this reason, it was ordained that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted. No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers. Its purpose has never been thought to be a benefit to the traitor, by leaving in him a vested interest in the subject of forfeiture.

There have been some acts of Parliament, providing for limited forfeitures, closely resembling those described in the act of Congress as modified by the joint resolution. The statute of 5th Elizabeth, c. 11, "against the clipping, washing, rounding, and filing of coins," declared those offences to be treason, and enacted that the offender or offenders should suffer death, and lose and forfeit all his or their goods and chattels, and also "lose and forfeit all his and their lands and tenements during his or their natural life or lives only." The statute of 18th Elizabeth, c. 1, enacted the same provision "against diminishing and impairing of the queen's majesty's coin and other coins current within the realm," and declared that the offender or offenders should "lose and forfeit to the queen's highness, her heirs and successors, all their lands, tenements, and hereditaments during his or their natural life or lives only." Each of these statutes provided that no attainder under it should work corruption of blood, or deprive the wife of an offender of her dower. The statute of 7 Anne, c. 21, is similar. They all provide for a limited forfeiture, — limited in duration, not in quantity. Certainly no case has been found, none, we think, has ever existed, in which it has been held that either statute intended to leave in the offender an ulterior estate in fee after a forfeited life-estate, or any interest whatever subject to his

disposing power. Indeed, forfeiture has frequently been spoken of in the English courts as equivalent to conveyance. It was in *Lord Lovel's Case*, Plowd. 488, where it was said by Harper, Justice, "The act (of attainder) is no more than an instrument of conveyance, when by it the possessions of one man are transferred over to another." And again: "The act conveys it (the land forfeited) to the king, removes the estate out of Lovel, and vests it entirely in the king." In *Burgess* v. *Wheate*, 1 Eden, 201, in discussing the subject of forfeiture, the Master of the Rolls said, "The forfeiture operated like a grant to the king. The crown takes an estate by forfeiture, subject to the engagements and incumbrances of the person forfeiting. The crown holds in this case as a royal trustee (for a forfeiture itself is sometimes called a royal escheat). . . . If a forfeiture is regranted by the king, the grantee is a tenant *in capite*, and all mesne tenure is extinct." See also *Brown* v. *Waite*, 2 Mod. 133. If a forfeiture is equivalent to a grant or conveyance to the government, how can any thing remain in the person whose estate has been forfeited which he can convey to another? No conceivable reason exists why the construction applied to the English statutes referred to should not be applied to our act of 1862 and the joint resolution. If, in the British statutes, the sole object of the limitation of the duration of forfeiture was a benefit to the heirs of the offender, it is the same in our statutes; and it is a perversion of the intent and meaning of the joint resolution to read it as preserving rights and interests in those who under the act had forfeited all their estate. What was seized, condemned as forfeited, and sold, in the proceedings against Charles S. Wallach's estate, was not, therefore, technically a life-estate. It is true, that in *Bigelow* v. *Forrest*, 9 Wall. 339, and *Day* v. *Micou*, 18 id. 156, some expressions were used indicating an opinion that what was sold under the confiscation acts was a life-estate carved out of a fee. The language was, perhaps, incautiously used. We certainly did not intend to hold that there was any thing left in the person whose estate had been confiscated. The question was not before us. We were not called upon to decide any thing respecting the quantity of the estate carved out; and what we said upon the subject had reference solely to its duration.

It is argued on behalf of the defendant, that because under a confiscation sale of land, or of estate therein, the purchaser takes an interest terminable with the life of the person whose property has been confiscated, the fee must be somewhere; for it is said that a fee can never be in abeyance; and as the fee cannot be in the United States, they having sold all that was seized, nor in the purchaser, whose interest ceases with the life, it must remain in the person whose estate has been seized. The argument is more plausible than sound. It is a maxim of the common law, that a fee cannot be in abeyance. It rests upon reasons that now have no existence, and it is not now of universal application. But if it were, being a common-law maxim, it must yield to statutory provisions inconsistent with it; and it is, therefore, of no weight in the inquiry what was intended by the Confiscation Act and concurrent resolution. Undoubtedly there are some anomalies growing out of the congressional legislation, as there were growing out of the statutes of 5th and 18th Elizabeth; but it is the duty of the court to carry into effect what Congress intended, though it must be by denying the applicability of some common-law maxims, the reasons of which have long since disappeared. It has not been found necessary in England to hold that a reversion remained in a traitor after his attaint, though the statutes declared that the forfeiture shall be during his natural life only.

We are not, therefore, called upon to determine where the fee dwells during the continuance of the interest of a purchaser at a confiscation sale, whether in the United States or in the purchaser, subject to be defeated by the death of the offender whose estate has been confiscated. That it cannot dwell in the offender, we have seen, is evident; for, if it does, the plain purpose of the Confiscation Act is defeated, and the estate confiscated is subject alike in the hands of the United States and of the purchaser to a paramount right remaining in the offender. If he is a tenant of the reversion, or of a remainder, he may control the use of the particular estate; at least, so far as to prevent waste. That Congress intended such a possibility is incredible.

If it be contended that the heirs of Charles S. Wallach cannot take by descent unless their father, at his death, was seized of

an estate of inheritance, — *e.g.*, reversion, or a remainder, — it may be answered, that, even at common law, it was not always necessary that the ancestor should be seized to enable the heir to take by descent. Shelley's case is, that, where the ancestor *might* have taken and been seized, the heir shall inherit. Fortescue, J., in *Thornby* v. *Fleetwood*, 1 Str. 318.

If it were true, that, at common law, the heirs could not take in any case where their ancestor was not seized at his death, the present case must be determined by the statute. Charles S. Wallach was seized of the entire fee of the land before its confiscation, and the act of Congress interposed to take from him that seisin for a limited time. That it was competent to do, attaching the limitation for the benefit of the heirs. It wrought no corruption of blood. In *Lord de la Warre's Case*, 11 Coke, 1 *a*, it was resolved by the justices "that there was a difference betwixt disability personal and temporary and a disability absolute and perpetual; as, where one is attainted of treason or felony, that is an absolute and perpetual disability, by corruption of blood, for any of his posterity to claim any inheritance in fee-simple, either as heir to him, or to any ancestor above him: but, when one is disabled by Parliament (without any attainder) to claim the dignity for his life, it is a personal disability for his life only, and his heir after his death may claim as heir to him, or to any ancestor above him." There is a close analogy between that case and the present. See also *Wheatley* v. *Thomas*, Lev. 74.

Without pursuing this discussion farther, we repeat, that to hold that any estate or interest remained in Charles S. Wallach after the confiscation and sale of the land in controversy would defeat the avowed purpose of the Confiscation Act, and the only justification for its enactment; and to hold that the joint resolution was not intended for the benefit of his heirs exclusively, to enable them to take the inheritance after his death, would give preference to the guilty over the innocent. We cannot so hold. In our judgment, such a holding would be an entire perversion of the meaning of Congress.

It has been argued that the proclamations of amnesty after the close of the war restored to Charles S. Wallach his rights of property. The argument requires but a word in answer.

Conceding that amnesty did restore what the United States held when the proclamation was issued, it could not restore what the United States had ceased to hold. It could not give back the property which had been sold, or any interest in it, either in possession or expectancy. *Semmes* v. *United States*, 91 U. S. 21. Besides, the proclamation of amnesty was not made until Dec. 25, 1868. *Decree reversed.*

CHAFFRAIX v. SHIFF.

The doctrine announced in the case of *Wallach et al.* v. *Van Riswick, supra*, p. 202, reaffirmed.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

Mr. Conway Robinson for the appellant, and *Mr. John A. Campbell* for the appellee.

MR. JUSTICE STRONG delivered the opinion of the court.

The court below decreed specific performance of a contract for the purchase of real estate, which expressly stipulated that the purchaser should not be bound to accept the sale if the titles were not good and valid. The title offered was that of a purchaser at a confiscation sale, to whom, after the sale, Surget, the person as whose property the land was confiscated, had released, without warranty. We decided, in *Wallach et al.* v. *Van Riswick*, *supra*, p. 202, that such a title is not a complete and valid one; that it is ineffective beyond the life of Surget; and that his release did not enlarge it. *Decree reversed.*

UNITED STATES v. REESE ET AL.

1. Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of that protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide, and may be varied to meet the necessities of a particular right.
2. The Fifteenth Amendment to the Constitution does not confer the right of suffrage; but it invests citizens of the United States with the right of

exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of servitude, and empowers Congress to enforce that right by "appropriate legislation."

3. The power of Congress to legislate at all upon the subject of voting at State elections rests upon this amendment, and can be exercised by providing a punishment only when the wrongful refusal to receive the vote of a qualified elector at such elections is because of his race, color, or previous condition of servitude.

4. The third and fourth sections of the act of May 31, 1870 (16 Stat. 140), not being confined in their operation to unlawful discrimination on account of race, color, or previous condition of servitude, are beyond the limit of the Fifteenth Amendment, and unauthorized.

5. As these sections are in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, and cannot be limited by judicial construction so as to make them operate only on that which Congress may rightfully prohibit and punish, — *Held*, that Congress has not provided by "appropriate legislation" for the punishment of an inspector of a municipal election for refusing to receive and count at such election the vote of a citizen of the United States of African descent.

6. Since the passage of the act which gives the presiding judge the casting vote in cases of division, and authorizes a judgment in accordance with his opinion (Rev. Stat., sect. 650), this court, if it finds that the judgment as rendered is correct, need do no more than affirm it. If, however, that judgment is reversed, all questions certified, which are considered in the final determination of the case here, should be answered.

ERROR to the Circuit Court of the United States for the District of Kentucky.

This case was argued at the October Term, 1874, by *Mr. Attorney-General Williams* and *Mr. Solicitor-General Phillips* for the United States, and by *Mr. Henry Stanbery* and *Mr. B. F. Buckner* for the defendants.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case comes here by reason of a division of opinion between the judges of the Circuit Court in the District of Kentucky. It presents an indictment containing four counts, under sects. 3 and 4 of the act of May 31, 1870 (16 Stat. 140), against two of the inspectors of a municipal election in the State of Kentucky, for refusing to receive and count at such election the vote of William Garner, a citizen of the United States of African descent. All the questions presented by the certificate of division arose upon general demurrers to the several counts of the indictment.

In this court the United States abandon the first and third counts, and expressly waive the consideration of all claims not arising out of the enforcement of the Fifteenth Amendment of the Constitution.

After this concession, the principal question left for consideration is, whether the act under which the indictment is found can be made effective for the punishment of inspectors of elections who refuse to receive and count the votes of citizens of the United States, having all the qualifications of voters, because of their race, color, or previous condition of servitude.

If Congress has not declared an act done within a State to be a crime against the United States, the courts have no power to treat it as such. *U. S.* v. *Hudson*, 7 Cranch, 32. It is not claimed that there is any statute which can reach this case, unless it be the one in question.

Looking, then, to this statute, we find that its first section provides that all citizens of the United States, who are or shall be otherwise qualified by law to vote at any election, &c., shall be entitled and allowed to vote thereat, without distinction of race, color, or previous condition of servitude, any constitution, &c., of the State to the contrary notwithstanding. This simply declares a right, without providing a punishment for its violation.

The second section provides for the punishment of any officer charged with the duty of furnishing to citizens an opportunity to perform any act, which, by the constitution or laws of any State, is made a prerequisite or qualification of voting, who shall omit to give all citizens of the United States the same and equal opportunity to perform such prerequisite, and become qualified on account of the race, color, or previous condition of servitude, of the applicant. This does not apply to or include the inspectors of an election, whose only duty it is to receive and count the votes of citizens, designated by law as voters, who have already become qualified to vote at the election.

The third section is to the effect, that, whenever by or under the constitution or laws of any State, &c., any act is or shall be required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of such citizen to perform the act required to be done "as aforesaid" shall, if it

fail to be carried into execution by reason of the wrongful act or omission "aforesaid" of the person or officer charged with the duty of receiving or permitting such performance, or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner, and to the same extent, as if he had, in fact, performed such act; and any judge, inspector, or other officer of election, whose duty it is to receive, count, &c., or give effect to, the vote of any such citizen, who shall wrongfully refuse or omit to receive, count, &c., the vote of such citizen, upon the presentation by him of his affidavit stating such offer, and the time and place thereof, and the name of the person or officer whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall, for every such offence, forfeit and pay, &c.

The fourth section provides for the punishment of any person who shall, by force, bribery, threats, intimidation, or other unlawful means, hinder, delay, &c., or shall combine with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote, or from voting, at any election.

The second count in the indictment is based upon the fourth section of this act, and the fourth upon the third section.

Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected.

The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, &c., as it was on account of age, property,

or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by "appropriate legislation."

This leads us to inquire whether the act now under consideration is "appropriate legislation" for that purpose. The power of Congress to legislate at all upon the subject of voting at State elections rests upon this amendment. The effect of art. 1, sect. 4, of the Constitution, in respect to elections for senators and representatives, is not now under consideration. It has not been contended, nor can it be, that the amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at State elections. It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment. If, therefore, the third and fourth sections of the act are beyond that limit, they are unauthorized.

The third section does not in express terms limit the offence of an inspector of elections, for which the punishment is provided, to a wrongful discrimination on account of race, &c. This is conceded; but it is urged, that when this section is construed with those which precede it, and to which, as is claimed, it refers, it is so limited. The argument is, that the only wrongful act, on the part of the officer whose duty it is to receive or permit the requisite qualification, which can dispense with actual qualification under the State laws, and substitute the prescribed affidavit therefor, is that mentioned and prohibited in sect. 2, — to wit, discrimination on account of race, &c.; and that, consequently, sect. 3 is confined in its operation to the same wrongful discrimination.

This is a penal statute, and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. *United States* v. *Wiltberger*, 5 Wheat. 85. If, taking the whole statute together, it is apparent that it was not the intention of Congress thus to limit the operation of the act, we cannot give it that effect.

The statute contemplates a most important change in the election laws. Previous to its adoption, the States, as a general rule, regulated in their own way all the details of all elections. They prescribed the qualifications of voters, and the manner in which those offering to vote at an election should make known their qualifications to the officers in charge. This act interferes with this practice, and prescribes rules not provided by the laws of the States. It substitutes, under certain circumstances, performance wrongfully prevented for performance itself. If the elector makes and presents his affidavit in the form and to the effect prescribed, the inspectors are to treat this as the equivalent of the specified requirement of the State law. This is a radical change in the practice, and the statute which creates it should be explicit in its terms. Nothing should be left to construction, if it can be avoided. The law ought not to be in such a condition that the elector may act upon one idea of its meaning, and the inspector upon another.

The elector, under the provisions of the statute, is only required to state in his affidavit that he has been wrongfully prevented by the officer from qualifying. There are no words of limitation in this part of the section. In a case like this, if an affidavit is in the language of the statute, it ought to be sufficient both for the voter and the inspector. Laws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. If this statute limits the wrongful act which will justify the affidavit to discrimination on account of race, &c., then a citizen who makes an affidavit that he has been

wrongfully prevented by the officer, which is true in the ordinary sense of that term, subjects himself to indictment and trial, if not to conviction, because it is not true that he has been prevented by such a wrongful act as the statute contemplated; and if there is no such limitation, but any wrongful act of exclusion will justify the affidavit, and give the right to vote without the actual performance of the prerequisite, then the inspector who rejects the vote because he reads the law in its limited sense, and thinks it is confined to a wrongful discrimination on account of race, &c., subjects himself to prosecution, if not to punishment, because he has misconstrued the law. Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.

But when we go beyond the third section, and read the fourth, we find there no words of limitation, or reference even, that can be construed as manifesting any intention to confine its provisions to the terms of the Fifteenth Amendment. That section has for its object the punishment of all persons, who, by force, bribery, &c., hinder, delay, &c., any person from qualifying or voting. In view of all these facts, we feel compelled to say, that, in our opinion, the language of the third and fourth sections does not confine their operation to unlawful discriminations on account of race, &c. If Congress had the power to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise without regard to such discrimination, the language of these sections would be broad enough for that purpose.

It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, &c.

There is no attempt in the sections now under consideration to provide specifically for such an offence. If the case is provided for at all, it is because it comes under the general pro-

hibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

We must, therefore, decide that Congress has not as yet provided by "appropriate legislation" for the punishment of the offence charged in the indictment; and that the Circuit Court

properly sustained the demurrers, and gave judgment for the defendants.

This makes it unnecessary to answer any of the other questions certified. Since the law which gives the presiding judge the casting vote in cases of division, and authorizes a judgment in accordance with his opinion (Rev. Stat., sect. 650), if we find that the judgment as rendered is correct, we need not do more than affirm. If, however, we reverse, all questions certified, which may be considered in the final determination of the case according to the opinion we express, should be answered.

Judgment affirmed.

MR. JUSTICE CLIFFORD and MR. JUSTICE HUNT dissenting.

MR. JUSTICE CLIFFORD: —

I concur that the indictment is bad, but for reasons widely different from those assigned by the court.

States, as well as the United States, are prohibited by the Fifteenth Amendment of the Constitution from denying or abridging the right of citizens of the United States to vote on account of race, color, or previous condition of servitude; and power is vested in Congress, by the second article of that amendment, to enforce that prohibition "by appropriate legislation."

Since the adoption of that amendment, Congress has legislated upon the subject; and, by the first section of the Enforcement Act, it is provided that citizens of the United States, without distinction of race, color, or previous condition of servitude, shall, if *otherwise* qualified to vote in state, territorial, or municipal elections, be entitled and allowed to vote at all such elections, any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Beyond doubt, that section forbids all discrimination between white citizens and citizens of color in respect to their right to vote; but the section does not provide that the person or officer making such discrimination shall be guilty of any offence, nor does it prescribe that the person or officer guilty of making such discrimination shall be subject to any fine, penalty, or

punishment whatever. None of the counts of the indictment in this case, however, are framed under that section; nor will it be necessary to give it any further consideration, except so far as it may aid in the construction of the other sections of the act. 16 Stat. 140.

Sect. 2 of the act will deserve more examination, as it assumes that certain acts are or may be required to be done by or under the authority of the constitution or laws of certain States, or the laws of certain Territories, as a prerequisite or qualification for voting, and that certain persons or officers are or may be, by such constitution or laws, charged with the performance of duties in furnishing to such citizens an opportunity to perform such prerequisites to become qualified to vote; and provides that it shall be the duty of every such person or officer to give all such citizens, without distinction of race, color, or previous condition of servitude, the same and equal opportunity to perform such prerequisites to become qualified to vote.

Equal opportunity is required by that section to be given to all such citizens, without distinction of race, color, or previous condition of servitude, to perform the described prerequisite; and the further provision of the same section is, that, if any such person or officer charged with the performance of the described duties shall refuse or knowingly omit to give full effect to the requirements of that section, he shall for every such offence forfeit and pay $500 to the person aggrieved, and also be deemed guilty of a misdemeanor, and punished as therein provided. Other sections applicable to the subject are contained in the Enforcement Act, to which reference will hereafter be made. 16 id. 141.

1. Four counts are exhibited in the indictment against the defendants; and the record shows that the defendants filed a demurrer to each of the counts, which was joined in behalf of the United States. Two of the counts — to wit, the first and the third — having been abandoned at the argument, the examination will be confined to the second and the fourth. By the record, it also appears that the defendants, together with one William Farnaugh, on the 30th of January, 1873, were the lawful inspectors of a municipal election held on that day in the city of Lexington, in the State of Kentucky, pursuant to

the constitution and laws of that State, and that they, as such inspectors, were then and there charged by law with the duty of receiving, counting, certifying, registering, reporting, and giving effect to the vote of all citizens qualified to vote at said election in Ward 3 of the city; and the accusation set forth in the second count of the indictment is, that one William Garner, at said municipal election, offered to the said inspectors at the polls of said election in said Ward 3 to vote for members of the said city council, the said poll being then and there the lawful and proper voting place and precinct of the said William Garner, who was then and there a free male citizen of the United States and of the State, of African descent, and having then and there resided in said State more than two years, and in said city more than one year, next preceding said election, and having been a resident of said voting precinct and ward in which he offered to vote more than sixty days immediately prior to said election, and being then and there, at the time of such offer to vote, qualified and entitled, as alleged, by the laws of the State, to vote at said election.

Offer in due form to vote at the said election having been made, as alleged, by the said William Garner, the charge is that the said William Farnaugh consented to receive, count, register, and give effect to the vote of the party offering the same; but that the defendants, constituting the majority of the inspectors at the election, and, as such, having the power to receive or reject all votes offered at said poll, did then and there, when the said party offered to vote, unlawfully agree and confer with each other that they, as such inspectors, would not take, receive, certify, register, report, or give effect to the vote of any voters of African descent, offered at said election, unless the voter so offering to vote, besides being *otherwise* qualified to vote, had paid to said city the capitation-tax of one dollar and fifty cents for the preceding year, on or before the 15th of January prior to the day of the election; which said agreement, the pleader alleges, was then and there made with intent thereby to hinder, prevent, and obstruct all voters of African descent on account of their race and color, though lawfully entitled to vote at said election, from so voting. Taken separately, that allegation would afford some support to the

theory of the United States; but it must be considered in connection with the allegation which immediately follows it in the same count, where it is alleged as follows: That the defendants, in pursuance of said unlawful agreement, did then and there, at the election aforesaid, wrongfully and illegally require and demand of said party, when he offered to vote as aforesaid, that he should, as a prerequisite and qualification to his voting at said election, produce evidence of his having paid to said city or its proper officers the said capitation-tax of one dollar and fifty cents for the year preceding, on or before the 15th of January preceding the day of said election; and the averment is to the effect that the party offering his vote then and there refused to comply with that illegal requirement and demand, or to produce the evidence so demanded and required.

Offences created by statute, as well as offences created at common law, with rare exceptions, consist of more than one ingredient, and, in some cases, of many; and the rule is universal, that every ingredient of which the offence is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad on demurrer, or it may be quashed on motion, or the judgment may be arrested before sentence, or be reversed on a writ of error. *United States* v. *Cook*, 17 Wall. 174.

Matters well pleaded, it is true, are admitted by the demurrer; but it is equally true, that every ingredient of the offence must be accurately and clearly described, and that no indictment is sufficient if it does not accurately and clearly describe all the ingredients of which the offence is composed.

Citizens of the United States, without distinction of race, color, or previous condition of servitude, if *otherwise* qualified to vote at a state, territorial, or municipal election, shall be entitled and allowed to vote at such an election, even though the constitution, laws, customs, usages, or regulations of the State or Territory do not allow, or even prohibit, such voter from exercising that right. 16 Stat. 140, sect. 1.

Evidently the purpose of that section is to place the male citizen of color, as an elector, on the same footing with the white male citizen. Nothing else was intended by that pro-

vision, as is evident from the fact that it does not profess to enlarge or vary the prior existing right of white male citizens in any respect whatever. Conclusive support to that theory is also derived from the second section of the same act, which was obviously passed to enforce obedience to the rule forbidding discrimination between colored male citizens and white male citizens in respect to their right to vote at such elections.

By the charter of the city of Lexington, it is provided that a tax shall be levied on each free male inhabitant of twenty-one years of age and upwards, except paupers, inhabiting said city, at a ratio not exceeding one dollar and fifty cents each. Sess. Laws 1867, p. 441.

Such citizens, without distinction of race, color, or previous condition of servitude, in order that they may be entitled to vote at any such election, must be free male citizens "over twenty-one years of age, have been a resident of the city at least six months, and of the ward in which he resides at least sixty days, prior to the day of the election, and have paid the capitation-tax assessed by the city on or before the 15th of January preceding the day of election." 2 Sess. Laws 1870, p. 71.

White male citizens, not possessing the qualifications to vote required by law, find no guaranty of the right to exercise that privilege by the first section of the Enforcement Act; but the mandate of the section is explicit and imperative, that all citizens, without distinction of race, color, or previous condition of servitude, if *otherwise* qualified to vote at any state, territorial, or municipal election, shall be entitled and allowed to vote at all such elections, even though forbidden so to do, on account of race, color, or previous condition of servitude, by the constitution of the State, or by the laws, custom, usage, or regulation of the State or Territory, where the election is held.

Disability to vote of every kind, arising from race, color, or previous condition of servitude, is declared by the first section of that act to be removed from the colored male citizen; but, unless *otherwise* qualified by law to vote at such an election, he is no more entitled to enjoy that privilege than a white male citizen who does not possess the qualifications required by law to constitute him a legal voter at such an election.

Legal disability to vote at any such election, arising from race, color, or previous condition of servitude, is removed by the Fifteenth Amendment, as affirmed in the first section of the Enforcement Act: but the Congress knew full well that cases would arise where the want of other qualifications, if not removed, might prevent the colored citizen from exercising the right of suffrage at such an election; and the intent and purpose of the second section of the act are to furnish to all citizens an opportunity to remove every such other disability to enable them to become qualified to exercise that right, and to punish persons and officers charged with any duty in that regard who unlawfully and wrongfully refuse or wilfully omit to co-operate to that end. Hence it is provided, that where any act is or shall be required to be done as a prerequisite or qualification for voting, and persons or officers are charged in the manner stated with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite or to become qualified to vote, it shall be the duty of every such person and officer to give all citizens, without distinction of race, color, or previous condition of servitude, the same and equal opportunity to perform such prerequisite, and to become qualified to vote.

Persons or officers who wrongfully refuse or knowingly omit to perform the duty with which they are charged by that clause of the second section of the Enforcement Act commit the offence defined by that section, and incur the penalty, and subject themselves to the punishment, prescribed for that offence.

Enough appears in the second count of the indictment to show beyond all question that it cannot be sustained under the second section of the Enforcement Act, as the count expressly alleges that the defendants as such inspectors, at the time the complaining party offered his vote, refused to receive and count the same because he did not produce evidence that he had paid to the city the capitation-tax of one dollar and fifty cents assessed against him for the preceding year, which payment, it appears by the law of the State, is a prerequisite and necessary qualification to enable any citizen to vote at that election, without distinction of race, color, or previous condition of servitude; and the express allegation of the count is, that the party offering his vote then and there refused to comply with that prerequisite,

and then and there demanded that his vote should be received and counted without his complying with that prerequisite.

Argument to show that such allegations are insufficient to constitute the offence defined in the second section of the Enforcement Act, or any other section of that act, is quite unnecessary, as it appears in the very terms of the allegations that the party offering his vote was not, irrespective of his race, color, or previous condition of servitude, a qualified voter at such an election by the law of the State where the election was held.

Persons within the category described in the first section of the Enforcement Act, of whom it is enacted that they shall be entitled and allowed to vote at such an election, without distinction of race, color, or previous condition of servitude, are citizens of the United States *otherwise qualified to vote* at the election pending; and inasmuch as it is not alleged in the count that the party offering his vote in this case was *otherwise* qualified by law to vote at the time he offered his vote, and inasmuch as no excuse is pleaded for not producing evidence to establish that prerequisite of qualification, it is clear that the supposed offence is not set forth with sufficient certainty to justify a conviction and sentence of the accused.

2. Defects also exist in the fourth count; but it becomes necessary, before considering the questions which those defects present, to examine with care the third section of the Enforcement Act. Sect. 3 of that act differs in some respects from the second section; as, for example, sect. 3 provides that whenever under the constitution and laws of a State, or the laws of a Territory, any act is or shall be required to be done by any such citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, *if it fail to be carried into execution* by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and *being otherwise qualified*, shall be entitled to vote in the same manner and to the same extent as if he had, in fact, performed the said act. By that clause of the section, it is enacted that the offer of the party interested to

perform the prerequisite act to qualify or entitle him to vote shall, if it fail for the reason specified, have the same effect as the actual performance of the prerequisite act would have; and the further provision is, that any judge, inspector, or other officer of election, whose duty it is or shall be to receive, count, certify, register, report, or give effect to the vote of such citizen, upon the presentation by him of his affidavit, stating such offer and the time and place thereof, and the name of the officer or person whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall for every such offence forfeit and pay the sum of $500 dollars to the person aggrieved, and also be guilty of a misdemeanor.

Payment of the capitation-tax on or before the 15th of January preceding the day of the election is beyond all doubt one of the prerequisite acts, if not the only one, referred to in that part of the section; and it is equally clear that the introductory clause of the section is wholly inapplicable to a case where the citizen, claiming the right to vote at such an election, has actually paid the capitation-tax as required by the election law of the State. Voters who have seasonably paid the tax are in no need of any opportunity to perform such a prerequisite to qualify them to vote; but the third section of the act was passed to provide for a class of citizens who had not paid the tax, and who had offered to pay it, and the offer had failed to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting the performance of such prerequisite.

Qualified voters by the law of the State are male citizens over twenty-one years of age, who have been residents of the city at least six months, and of the ward in which they reside at least sixty days, immediately prior to the day of the election, and who have paid the capitation-tax assessed by the city on or before the fifteenth day of January preceding the day of the election. Obviously, the payment of the capitation-tax on or before the time mentioned is a prerequisite to qualify the citizen to vote; and the purpose of the second section is to secure to the citizen an opportunity to perform that prerequisite, and to punish the persons and officers charged with the duty of

furnishing the citizen with such an opportunity to perform such prerequisite, in case such person or officer refuses or knowingly omits to do his duty in that regard. Grant that, still it is clear that the punishment of the offender would not retroact and give effect to the right of the citizen to vote, nor secure to the public the right to have his vote received, counted, registered, reported, and made effectual at that election.

3. Injustice of the kind, it was foreseen, might be done; and, to remedy that difficulty, the third section was passed, the purpose of which is to provide that the offer of any such citizen to perform such prerequisite, if the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance, shall be deemed and held as a performance in law of such act and prerequisite; and the person so offering to perform such prerequisite, and so failing by reason of the wrongful act or omission of the person or officer charged with such duty, if *otherwise* qualified, shall be entitled to vote in the same manner and to the same extent as if he had, in fact, performed such prerequisite act. Nothing short of the performance of the prerequisite act will entitle any citizen to vote at any such election in that State, if the opportunity to perform the prerequisite is furnished as required by the act of Congress; but if those whose duty it is to furnish the opportunity to perform the act refuse or omit so to do, then the offer to perform such prerequisite act, if the offer fails to be carried into execution by the wrongful act or omission of those whose duty it is to receive and permit the performance of the prerequisite act, shall have the same effect in law as the actual performance.

Such an offer to perform can have the same effect in law as actual performance *only* in case where it fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance; from which it follows that the offer must be made in such terms, and under such circumstances, that, if it should be received and carried into execution, it would constitute a legal and complete performance of the prerequisite act. What the law of the State requires in that regard is, that

the citizen offering to vote at such an election should have paid the capitation-tax assessed by the city, which in this case was one dollar and fifty cents, on or before the 15th of January preceding the day of election. Unless the offer is made in such terms and under such circumstances, that, if it is accepted and carried into execution, it would constitute a legal and complete performance of the prerequisite act, the person or officer who refused or omitted to carry the offer into execution would not incur the penalty nor be guilty of the offence defined by that section of the act; for it could not be properly alleged that it failed to be carried into effect by the wrongful act or omission of the person or officer charged with the duty of receiving and permitting such performance.

Viewed in the light of these suggestions, it must be that the offer contemplated by the third section of the act is an offer made in such terms, and under such circumstances, that, if it be accepted and carried into execution by the person or officer to whom it is made, it will constitute a complete performance of the prerequisite, and show that the party making the offer, if *otherwise* qualified, is entitled to vote at the election.

Evidence is entirely wanting to show that the authors of the Enforcement Act ever intended to abrogate any State election law, except so far as it denies or abridges the right of the citizen to vote on account of race, color, or previous condition of servitude. Every discrimination on that account is forbidden by the Fifteenth Amendment; and the first section of the act under consideration provides, as before remarked, that all citizens, *otherwise* qualified to vote, . . . shall be entitled and allowed to vote, . . . without distinction of race, color, or previous condition of servitude, any constitution, law, &c., to the contrary notwithstanding. State election laws creating such discriminations are superseded in that regard by the Fifteenth Amendment; but the Enforcement Act furnishes no ground to infer that the law-makers intended to annul the State election laws in any other respect whatever. Had Congress intended by the third section of that act to abrogate the election law of the State creating the prerequisite in question, it is quite clear that the second section would have been wholly unnecessary, as it would be a useless regulation to provide the

means to enable citizens to comply with a prerequisite which is abrogated and treated as null by the succeeding section. Statutes should be interpreted, if practicable, so as to avoid any repugnancy between the different parts of the same, and to give a sensible and intelligent effect to every one of their provisions; nor is it ever to be presumed that any part of a statute is supererogatory or without meaning. Potter's Dwarris, 145.

Difficulties of the kind are all avoided if it be held that the second section was enacted to afford citizens an opportunity to perform the prerequisite act to qualify themselves to vote, and to punish the person or officer who refuses or knowingly omits to perform his duty in furnishing them with that opportunity, and that the intent and purpose of the third section are to protect such citizens from the consequences of the wrongful refusal or wilful omission of such person or officer to receive and give effect to the actual offer of such citizen to perform such prerequisite, if made in terms, and under such circumstances, that the offer, if accepted and carried into execution, would constitute an actual and complete performance of the act made a prerequisite to the right of voting by the State law. Apply these suggestions to the fourth count of the indictment, and it is clear that the allegations in that regard are insufficient to describe the offence defined by the third section of the Enforcement Act.

4. Beyond all doubt, the general rule is, that, in an indictment for an offence created by statute, it is sufficient to describe the offence in the words of the statute; and it is safe to admit that that general rule is supported by many decided cases of the highest authority: but it is equally certain that exceptions exist to the rule, which are as well established as the rule itself, most of which result from another rule of criminal pleading, which, in framing indictments founded upon statutes, is paramount to all others, and is one of universal application, — that every ingredient of the offence must be accurately and clearly expressed; or, in other words, that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted. *United States* v. *Cook*, 17 Wall. 174.

Speaking of that principle, Mr. Bishop says it pervades the

entire system of the adjudged law of criminal procedure, as appears by all the cases; that, wherever we move in that department of our jurisprudence, we come in contact with it; and that we can no more escape from it than from the atmosphere which surrounds us. 1 Bishop, Cr. Pro., 2d ed., sect. 81; Archbold's Crim. Plead., 15th ed., 54; 1 Stark Crim. Plead., 236; 1 Am. Cr. Law, 6th rev. ed., sect. 364; *Steel* v. *Smith*, 1 Barn. & Ald. 99.

Examples of the kind, where it has been held that exceptions exist to the rule that it is sufficient in an indictment founded upon a statute to follow the words of the statute, are very numerous, and show that many of the exceptions have become as extensively recognized, and are as firmly settled, as any rule of pleading in the criminal law. Moreover, says Mr. Bishop, there must be such an averment of facts as shows *prima facie* guilt in the defendant; and if, supposing all the facts set out to be true, there is, because of the possible non-existence of some fact not mentioned, room to escape from the *prima facie* conclusion of guilt, the indictment is insufficient, which is the exact case before the court. 1 Bishop, Cr. Pro., 2d ed., sect. 325.

It is plain, says the same learned author, that if, after a full expression has been given to the statutory terms, any of the other rules relating to the indictment are left uncomplied with, the indictment is still insufficient. To it must be added what will conform also to the other rules. Consequently, the general doctrine, that the indictment is sufficient if it follows the words of the statute creating and defining the offence, is subject to exceptions, requiring the allegation to be expanded beyond the prohibiting terms. 1 id., sect. 623.

In general, says Marshall, C. J., it is sufficient in a libel (being a libel of information) to charge the offence in the very words which direct the forfeiture; but the proposition is not, we think, universally true. If the words which describe the subject of the law are general, . . . we think the charge in the libel ought to conform to the true sense and meaning of those words as used by the legislature. *The Mary Ann*, 8 Wheat. 389.

Similar views are expressed by this court in *United States* v.

Gooding, 12 Wheat. 474, in which the opinion was given by Mr. Justice Story. Having first stated the general rule, that it is sufficient certainty in an indictment to allege the offence in the very terms of the statute, he proceeds to remark, "We say, in general; for there are doubtless cases where more particularity is required, either *from the obvious intention of the legislature*, or from the application of *known principles of law*. Known principles of law require more particularity in this case, in order that all the ingredients of the offence may be accurately and clearly alleged; and it is equally clear that the intention of the legislature also requires the same thing, as it is obvious that the mere statement of the party that he offered to perform the prerequisite was never intended to be made equivalent to performance, unless such statement was accompanied by an offer to pay the tax, and under circumstances which show that he was ready and able to make the payment. Authorities are not necessary to prove that an indictment upon a statute must state all such facts and circumstances as constitute the statute offence, so as to bring the party indicted precisely within the provisions of the statute defining the offence.

Statutes are often framed, says Colby, to meet the relations of parties to each other, to prevent frauds by the one upon the other; and, in framing such statutes, the language used is often elliptical, leaving some of the circumstances expressive of the relation of the parties to each other to be supplied by intendment or construction. In all such cases, the facts and circumstances constituting such relation must be alleged in the indictment, though not expressed in the words of the statute. 2 Colby, Cr. Law, 114; *People* v. *Wilbur*, 4 Park, Cr. Cas. 21; *Com.* v. *Cook*, 18 B. Monr. 149; *Pearce* v. *The State*, 1 Sneed, 63; *People* v. *Stone*, 9 Wend. 191; *Whiting* v. *The State*, 14 Conn. 487; *Anthony* v. *The State*, 29 Ala. 27; 1 Am. Cr. Law, 6th rev. ed., sect. 364, note *d*, and cases cited.

Like the preceding counts, the preliminary allegations of the fourth count are without objection; and the jury proceed to present that the party offering to vote, having then and there all the qualifications, as to age, citizenship, and residence, required by the State law, did, *on the thirtieth day of January*, 1873, in order that he might become qualified to vote at said election,

offer to the collector at his office in said city to pay any capitation-tax due from him to said city, or any capitation-tax that had been theretofore assessed against him by said city, or which could be assessed against him by said city, or which said city or said collector claimed was due from him to said city; and that the said collector then and there wrongfully refused, on account of his race or color, to give the said party an opportunity to pay said capitation-tax for the preceding year, and then and there wrongfully refused to receive said tax from the said party in order that he might become qualified to vote at said election, the said collector having then and there given to citizens of the white race an opportunity to pay such taxes due from them to said city, in order that they might become qualified for that purpose.

All that is there alleged may be admitted, and yet it may be true that the complaining party never made any offer at the time and place mentioned to pay the capitation-tax of one dollar and fifty cents due to the city at the time and place mentioned, in such terms, and under such circumstances, that if the offer as made had been accepted by the person or officer to whom the offer was made, and that such person or officer had done every thing which it was his duty to do, or every thing which it was in his power to do, to carry it into effect, the offer would have constituted performance of the prerequisite act.

Actual payment of the capitation-tax on or before the 15th of January preceding the day of election is the prerequisite act to be performed to qualify the citizen, without distinction of race, color, or previous condition of servitude, to vote at said election. Such an offer, therefore, in order that it may be deemed and held as a performance in law of such prerequisite, must be an offer to pay the amount of the capitation-tax; and the party making the offer must then and there possess *the ability and means* to pay the amount to the person or officer to whom the offer is made; for, unless payment of the amount of tax is then and there made to the said person or officer, he would not be authorized to discharge the tax, and could not carry the offer into execution without violating his duty to the city.

5. Readiness to pay, therefore, is necessarily implied from

the language of the third section, as it is only in case the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance that the offer can be deemed and held as performance in law of such prerequisite act. Where the party making the offer is not ready to pay the tax to the person or officer to whom the offer is made, and has not then and there the means to make the payment, it cannot be held that the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer to whom the offer is made, as it would be a perversion of law and good sense to hold that it is the duty of such a person or officer to carry such an offer into execution by discharging the tax without receiving the amount of the tax from the party making the offer of performance.

Giving full effect to the several allegations of the count, nothing approximating to such a requirement is therein alleged, nor can any thing of the kind be implied from the word "offer" as used in any part of the indictment. Performance of that prerequisite, by citizens *otherwise* qualified, entitles all such, without distinction of race, color, or previous condition of servitude, to vote at such an election; and the offer to perform the same, if the offer is made in terms, and under such circumstances, that, if it be accepted and carried into execution, it will constitute performance, will also entitle such citizens to vote in the same manner and to the same extent as if they had performed such prerequisite, provided the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving and permitting such performance.

Judges, inspectors, and other officers of elections, must take notice of these provisions, as they constitute the most essential element or ingredient of the offence defined by the third section of the act. Officers of the elections, whether judges or inspectors, are required to carry those regulations into full effect; and the provision is, that any judge, inspector, or other officer of election, whose duty it is or shall be to receive, count, certify, register, report, or give effect to the vote of such citizens, who shall wrongfully refuse or omit to receive, count, cer-

tify, register, or give effect to the vote of any such citizen, upon the presentation by him of his affidavit stating such offer, and the time and place thereof, and the name of the officer or person whose duty it was to act on such offer, and that he, the citizen, was wrongfully prevented by such person or officer from performing such prerequisite act, shall for every such offence forfeit and pay the sum of $500 to the person aggrieved, and also be guilty of a misdemeanor, and be fined and imprisoned as therein provided.

6. Of course, it must be assumed that the terms of the affidavit were exactly the same as those set forth in the third count of the indictment; and, if so, it follows that the word "offer" used in the affidavit must receive the same construction as that already given to the same word in that part of the section which provides that the offer, if it fail to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance, shall be deemed and held as a performance in law of such prerequisite act. Decisive confirmation of that view is derived from the fact that the complaining party is only required to state in his affidavit the offer, the time, and the place thereof, the name of the person or officer whose duty it was to act thereon, and that he, the affiant, was wrongfully prevented by such person or officer from performing such prerequisite act.

None will deny, it is presumed, that the word "offer" in the affidavit means the same thing as the word "offer" used in the declaratory part of the same section; and, if so, it must be held that the offer described in the affidavit must have been one made in such terms, and under such circumstances, that, if the offer had been accepted, it might have been carried into execution by the person or officer to whom it was made; or, in other words, it must have been an offer to do whatever it was necessary to do to perform the prerequisite act; and it follows, that if the word "offer," as used in the act of Congress, necessarily includes readiness to pay the tax, it is equally clear that the affidavit should contain the same statement. Plainly it must be so; for unless the offer has that scope, if it failed to be carried into execution, it could not be held that the failure was by

the wrongful act or omission of the person or officer to whom the offer was made. Such a construction must be erroneous; for, if adopted, it would lead to consequences which would shock the public sense, as it would require the collector to discharge the tax without payment, which would be a manifest violation of his duty. Taken in any point of view, it is clear that the third count of the indictment is too vague, uncertain, and indefinite in its allegations to constitute the proper foundation for the conviction and sentence of the defendants. Even suppose that the signification of the word "offer" is sufficiently comprehensive to include readiness to perform, which is explicitly denied, still it is clear that the offer, as pleaded in the fourth count, was not in season to constitute a compliance with the prerequisite qualification, for the reason that the State statute requires that the capitation-tax shall be paid *on or before the fifteenth day of January preceding the day of the election.*

Having come to these conclusions, it is not necessary to examine the fourth section of the Enforcement Act, for the reason that it is obvious, without much examination, that no one of the counts of the indictment is sufficient to warrant the conviction and sentence of the defendants for the offence defined in that section.

MR. JUSTICE HUNT:—

I am compelled to dissent from the judgment of the court in this case.

The defendants were indicted in the Circuit Court of the United States for the District of Kentucky. Upon the trial, the defendants were, by the judgment of the court, discharged from the indictment on account of its alleged insufficiency.

The fourth count of the indictment contains the allegations concerning the election in the city of Lexington; that by the statute of Kentucky, to entitle one to vote at an election in that State, the voter must possess certain qualifications recited, and have paid a capitation-tax assessed by the city of Lexington; that James F. Robinson was the collector of said city, entitled to collect said tax; that Garner, in order that he might be entitled to vote, did offer to said Robinson, at his office, to pay any capitation-tax which had been or could be assessed against

him, or which was claimed against him; that Robinson refused to receive such tax on account of the race and color of Garner; that at the time of the election, having the other necessary qualifications, Garner offered his vote, and at the same time presented an affidavit to the inspector stating his offer aforesaid made to Robinson, with the particulars required by the statute, and the refusal of Robinson to receive the tax; that Farnaugh consented to receive his vote, but the defendants, constituting a majority of the inspectors, wrongfully refused to receive the same, which refusal was on account of the race and color of the said Garner.

This indictment is based upon the act of Congress of May 31, 1870. 16 Stat. 140.

The first four sections of the act are as follows: —

"SECTION 1. That all citizens of the United States, who are or shall be otherwise qualified by law to vote at any election by the people in any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

"SECT. 2. That if, by or under the authority of the constitution or laws of any State or the laws of any Territory, any act is or shall be required to be done as a prerequisite or qualification for voting, and, by such constitution or laws, persons or officers are or shall be charged with the performance of duties, in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote, without distinction of race, color, or previous condition of servitude; and, if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every such offence, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered by an action on the case with full costs, and such allowance for counsel-fees as the court shall deem just; and shall also, for every such offence, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five

hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

"SECT. 3. That whenever, by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to [be] done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance, or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had, in fact, performed such act; and any judge, inspector, or other officer of election, whose duty it is or shall be to receive, count, certify, register, report, or give effect to the vote of any such citizen who shall wrongfully refuse or omit to receive, count, certify, register, report, or give effect to the vote of such citizen, upon the presentation by him of his affidavit stating such offer, and the time and place thereof, and the name of the officer or person whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall, for every such offence, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel-fees as the court shall deem just; and shall also, for every such offence, be guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than $500, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

"SECT. 4. That if any person, by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent, or obstruct, or shall combine and confederate with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote or from voting at any election as aforesaid, such person shall, for every such offence, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered by an action on the case, with full costs and such allowance for counsel-fees as the court shall deem just; and shall also, for every such offence, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than $500, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court."

It is said, in opposition to this indictment and in hostility to the statute under which it is drawn, that while the second section makes it a penal offence for any officer to refuse an opportunity to perform the prerequisite therein referred to on account of the race and color of the party, and therefore an indictment against that officer may be good as in violation of the Fifteenth Amendment, the third section, which relates to the inspectors of elections, omits all reference to race and color, and therefore no indictment can be sustained against those officers. It is said that Congress has no power to punish for violation of the rights of an elector generally, but only where such violation is attributable to race, color, or condition. It is said, also, that the prohibition of an act by Congress in general language is not a prohibition of that act on account of race or color.

Hence it is insisted that both the statute and the indictment are insufficient. This I understand to be the basis of the opinion of the majority of the court.

On this I observe, —

1. That the intention of Congress on this subject is too plain to be discussed. The Fifteenth Amendment had just been adopted, the object of which was to secure to a lately enslaved population protection against violations of their right to vote on account of their color or previous condition. The act is entitled "An Act to enforce the right of citizens of the United States to vote in the several States of the Union, and for other purposes." The first section contains a general announcement that such right is not to be embarrassed by the fact of race, color, or previous condition. The second section requires that equal opportunity shall be given to the races in providing every prerequisite for voting, and that any officer who violates this provision shall be subject to civil damages to the extent of $500, and to fine and imprisonment. To suppose that Congress, in making these provisions, intended to impose no duty upon, and subject to no penalty, the very officers who were to perfect the exercise of the right to vote, — to wit, the inspectors who receive or reject the votes, — would be quite absurd.

2. Garner, a citizen of African descent, had offered to the collector of taxes to pay any capitation-tax existing or claimed

to exist against him as a prerequisite to voting at an election to be held in the city of Lexington on the thirtieth day of January, 1873. The collector illegally refused to allow Garner, on account of his race and color, to make the payment. This brought Garner and his case within the terms of the third section of the statute, that "the person so offering and failing as aforesaid" — that is, who had made the offer which had been illegally rejected on account of his race and color — shall be entitled to vote "as if he had, in fact, performed such act." He then made an affidavit setting forth these facts, stating, with the particularity required in the statute, that he was wrongfully prevented from paying the tax, and presented the same to the inspector, who wrongfully refused to receive the same, and to permit him to vote, on account of his race and color.

A wrongful refusal to receive a vote which was, in fact, incompetent only by reason of the act "aforesaid," — that is, on account of his race and color, — brings the inspector within the statutory provisions respecting race and color. By the words "as aforesaid," the provisions respecting race and color of the first and second sections of the statute are incorporated into and made a part of the third and fourth sections.

To illustrate: Sect. 4 enacts, that if any person by unlawful means shall hinder or prevent any citizen from voting at any election "as aforesaid," he shall be subject to fine and imprisonment. What do the words, "as aforesaid," mean? They mean, for the causes and pretences or upon the grounds in the first and second sections mentioned; that is, on account of the race or color of the person so prevented. All those necessary words are by this expression incorporated into the fourth section. The same is true of the words "the wrongful act or omission as aforesaid," and "the person so offering and failing as aforesaid," in the third section.

By this application of the words "as aforesaid," they become pertinent and pointed. Unless so construed, they are wholly and absolutely without meaning. No other meaning can possibly be given to them. "The person (Garner) so offering and failing as aforesaid shall be entitled to vote as if he had performed the act." He failed "as aforesaid" on account of his

race. The inspectors thereupon "wrongfully refused to receive his vote" because he had not paid his capitation-tax. His race and color had prevented that payment. The words "hindered and prevented his voting as aforesaid," in the fourth section, and in the third section the words "wrongfully refuse" and "as aforesaid," sufficiently accomplish this purpose of the statute. They amount to an enactment that the refusal to receive the vote on account of race or color shall be punished as in the third and fourth sections is declared.

I am the better satisfied with this construction of the statute, when, looking at the Senate debates at the time of its passage, I find, 1st, That attention was called to the point whether this act did make the offence dependent on race, color, or previous condition; 2d, That it was conceded by those having charge of the bill that its language must embrace that class of cases; 3d, That they were satisfied with the bill as it then stood, and as it now appears in the act we are considering.

The particularity required in an indictment or in the statutory description of offences has at times been extreme, the distinctions almost ridiculous. I cannot but think that in some cases good sense is sacrificed to technical nicety, and a sound principle carried to an extravagant extent. The object of an indictment is to apprise the court and the accused of what is charged against him, and the object of a statute is to declare or define the offence intended to be made punishable. It is laid down, that "when the charge is not the absolute perpetration of an offence, but its primary characteristic lies in the intent, instigation, or motives of the party towards its perpetration, the acts of the accused, important only as developing the *mala mens*, and not constituting of themselves the crime, need not be spread upon the record." *United States* v. *Almeida*, Whart. Prec. 1061, 1062, note; 1 Whart. C. L. § 285, note.

In the case before us, the acts constituting the offence are all spread out in the indictment, and the alleged defects are in the facts constituting the *mala mens*. The refusal to receive an affidavit as evidence that the tax had been paid by Garner, and the rejection of his vote, are the essential acts of the defendants which constitute their guilt. The rest is matter of motive or instigation only. As to these, the extreme particularity and

the strict construction expected in indictments, and penal statutes would seem not to be necessary. In *Sickles* v. *Sharp*, 13 Johns. 49, it is said, "The rule that penal statutes are to be strictly construed admits of some qualification. The plain and manifest intention of the legislature ought to be regarded." In *United States* v. *Hartwell*, 6 Wall. 385, it is said, "The object in construing penal as well as other statutes is to ascertain the legislative intent. The words must not be narrowed to the exclusion of what the legislature intended to embrace, but that intention must be gathered from the words. When the words are general, and embrace various classes of persons, there is no authority in the court to restrict them to one class, when the purpose is alike applicable to all." In *Ogden* v. *Strong*, 2 Paine, C. C. 584, it is said, "Statutes must be so construed as to make all parts harmonize, and give a sensible effect to each. It should not be presumed that the legislature meant that any part of the statute should be without meaning or effect."

In *United States* v. *Morris*, 14 Pet. 474, the statute made it unlawful for a person "voluntarily to serve on a vessel employed and made use of in the transportation of slaves from one foreign country to another." No slaves had been actually received or transported on board the defendant's vessel; but the court held that the words of the statute embraced the case of a vessel sailing with the intent to be so employed. The court say, "A penal statute will not be extended beyond the plain meaning of its words; . . . yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction."

In the case of *The Donna Mariana*, 1 Dods. 91, the vessel was condemned by Sir William Scott under the English statute condemning vessels in which slaves "shall be exported, transported, carried," &c., although she was on her outward voyage, and had never taken a slave on board. "The result is, that, where the general intent of a statute is to prevent certain acts, the subordinate proceedings necessarily connected with them, and coming within that intent, are embraced in its provisions." Id.

In *Hodgman* v. *People*, 4 Den. 235, 5 id. 116, an act subject-

ing an offender to "the penalties" of a prior act was held to subject him to an indictment, as well as to the pecuniary penalties in the prior statute provided for. Especially should this liberal rule of construction prevail, where, though in form the statute is penal, it is in fact to protect freedom.

An examination of the surrounding circumstances, a knowledge of the evil intended to be prevented, a clear statement in the statute of the acts prohibited and made punishable, a certain knowledge of the legislative intention, furnish a rule by which the language of the statute before us is to be construed. The motives instigating the acts forbidden, and by which those acts are brought within the jurisdiction of the Federal authority, need not be set forth with the technical minuteness to which reference has been made. The intent is fully set forth in the second section; and the court below ought to have held, that, by the references in the third and fourth sections to the motives and instigations declared in the second section, they were incorporated into and became a part of the third and fourth sections, and that a sufficient offence against the United States authority was therein stated.

I hold, therefore, that the third and fourth sections of the statute we are considering do provide for the punishment of inspectors of elections who refuse the votes of qualified electors on account of their race or color. The indictment is sufficient, and the statute sufficiently describes the offence.

The opinion of the majority of the court discusses no subjects except the sufficiency of the indictment and the validity of the act of May 31, 1870. Holding that there was no valid law upon which the crime charged could be predicated, it became unnecessary that the opinion should discuss other points. If it had been held by the court that the indictment was good, and that the statute created the offence charged, the question would have arisen, whether such statute was constitutional; and it was to this question that much the larger part of the argument of the counsel in the cause was directed. If the conclusions I have reached are correct, this question directly presents itself; and I trust it is not unbecoming that my views upon the constitutional points thus arising should be set forth. I have no warrant to say that those views are, or are not, entertained

by any or all of my associates. The opinions and the arguments are those of the writer only.

The question of the constitutionality of the act of May 31, 1870, arises mainly upon the Fifteenth Amendment to the Constitution of the United States. It is as follows: —

"1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"2. The Congress shall have power to enforce this article by appropriate legislation."

I observe, in the first place, that the right here protected is in behalf of a particular class of persons; to wit, citizens of the United States. The limitation is to the persons concerned, and not to the class of cases in which the question shall arise. The right of citizens of the United States to vote, and not the right to vote at an election for United States officers, is the subject of the provision. The person protected must be a citizen of the United States; and, whenever a right to vote exists in such person, the case is within the amendment. This is the literal and grammatical construction of the language; and that such was the intention of Congress will appear from many considerations. As originally introduced by Mr. Senator Henderson, it read, "No State shall deny or abridge the right of its citizens to vote and hold office on account of race, color, or previous condition." Globe, 1868–69, pt. i. p. 542, Jan. 23, 1869.

The Judiciary Committee reported back the resolution in this form: "The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude. The Congress, by appropriate legislation, may enforce the provisions of this article." Id. Omitting the words "and hold office," this is the form in which it was adopted. The class of persons indicated in the original resolution to be protected were described as citizens of a State; in the resolution when reported by the committee, as citizens of the United States. In neither resolution was there any limitations as to the character of the elections at which the vote was to be given. If there was a right to vote, and the person offer-

ing the vote was a citizen, the clause attached. It is both illiberal and illogical to say that this protection was intended to be limited to an election for particular officers; to wit, those to take part in the affairs of the Federal government.

Congress was now completing the third of a series of amendments intended to protect the rights of the newly emancipated freedmen of the South.

In the adoption of the Thirteenth Amendment, — that slavery or involuntary servitude should not exist within the United States, or any place subject to their jurisdiction, — it took the first and the great step for the protection and confirmation of the political rights of this class of persons.

In the adoption of the Fourteenth Amendment, — that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States in which they reside," and that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," — another strong measure in the same direction was taken.

A higher privilege was yet untouched; a security, vastly greater than any thus far given to the colored race, was not provided for, but, on the contrary, its exclusion was permitted. This was the elective franchise, — the right to vote at the elections of the country, and for the officers by whom the country should be governed.

By the second section of the Fourteenth Amendment, each State had the power to refuse the right of voting at its elections to any class of persons; the only consequence being a reduction of its representation in Congress, in the proportion which such excluded class should bear to the whole number of its male citizens of the age of twenty-one years. This was understood to mean, and did mean, that if one of the late slaveholding States should desire to exclude all its colored population from the right of voting, at the expense of reducing its representation in Congress, it could do so.

The existence of a large colored population in the Southern

States, lately slaves and necessarily ignorant, was a disturbing element in our affairs. It could not be overlooked. It confronted us always and everywhere. Congress determined to meet the emergency by creating a political equality, by conferring upon the freedmen all the political rights possessed by the white inhabitants of the State. It was believed that the newly enfranchised people could be most effectually secured in the protection of their rights of life, liberty, and the pursuit of happiness, by giving to them that greatest of rights among freemen, — the ballot. Hence the Fifteenth Amendment was passed by Congress, and adopted by the States. The power of any State to deprive a citizen of the right to vote on account of race, color, or previous condition of servitude, or to impede or to obstruct such right on that account, was expressly negatived. It was declared that this right of the citizen should not be thus denied or abridged.

The persons affected were citizens of the United States; the subject was the right of these persons to vote, not at specified elections or for specified officers, not for Federal officers or for State officers, but the right to vote in its broadest terms.

The citizen of this country, where nearly every thing is submitted to the popular test and where office is eagerly sought, who possesses the right to vote, holds a powerful instrument for his own advantage. The political and personal importance of the large bodies of emigrants among us, who are intrusted at an early period with the right to vote, is well known to every man of observation. Just so far as the ballot to them or to the freedman is abridged, in the same degree is their importance and their security diminished. State rights and municipal rights touch the numerous and the every-day affairs of life: those of the Federal government are less numerous, and, to most men, less important. That Congress, possessing, in making a constitutional amendment, unlimited power in what it should propose, intended to confine this great guaranty to a single class of elections, — to wit, elections for United States officers, — is scarcely to be credited.

I hold, therefore, that the Fifteenth Amendment embraces the case of elections held for state or municipal as well as for federal officers; and that the first section of the act of May

31, 1870, wherein the right to vote is freed from all restriction by reason of race, color, or condition, at all elections by the people, — state, county, town, municipal, or of other subdivision, — is justified by the Constitution.

It is contended, also, that, in the case before us, there has been no denial or abridgment by the State of Kentucky of the right of Garner to vote at the election in question. The State, it is said, by its statute authorized him to vote; and, if he has been illegally prevented from voting, it was by an unauthorized and illegal act of the inspectors.

The word "State" "describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government. It is not difficult to see, that, in all these senses, the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government or united by looser and less definite relations, constitute the State. . . . In the Constitution, the term 'State' most frequently expresses the combined idea just noticed, of people, territory, and government. A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such States under a common constitution which forms the distinct and greater political unit which that constitution designates as the United States, and makes of the people and States which compose it one people and one country." *Texas* v. *White*, 7 Wall. 720, 721.

That the word "State" is not confined in its meaning to the legislative power of a community is evident, not only from the authority just cited, but from a reference to the various places in which it is used in the Constitution of the United States. A few only of these will be referred to.

The power of Congress to "regulate commerce among the

several States" (sect. 8, subd. 3) refers to the commerce between the inhabitants of the different States, and not to transactions between the political organizations called "States." The people of a State are here intended by the word "State." The numerous cases in which this provision has been considered by this court were cases where the questions arose upon individual transactions between citizens of different States, or as to rights in, upon, or through the territory of different States.

"Vessels bound to or from one State shall not be obliged to enter, clear, or pay duties, in another." Sect. 9, subd. 5. This refers to region or locality only.

So "the electors (of President and Vice-President) shall meet in their respective States, and vote," &c. Art. 2, sect. 1, subd. 3.

Again: when it is ordained that the judicial power of the United States shall extend "to controversies between two or more States, between a State and the citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects" (art. 3, sect. 2, subd. 1), we find different meaning attached to the same word in different parts of the same sentence. The controversy "between two or more States" spoken of refers to the political organizations known as States; the controversy "between a State and the citizens of another State" refers to the political organization of the first-named party, and again to the persons living within the locality where the citizens composing the second party may reside; the controversy "between citizens of different States, between citizens of the same State claiming lands under grants of different States," refers to the local region or territory described in the first branch of the sentence, and to the political organization as to the grantor under the second branch.

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings, of every other State." Art. 4, sect. 1. Full faith shall be given in or throughout the territory of each State. By whom? By the sovereign State, by its agencies and authorities. To what is

faith and credit to be given? To the acts of the political organization known as the State. Not only this, but to all its agencies, to the acts of its executive, to the acts of its courts of record. The expression "State," in this connection, refers to and includes all these agencies; and it is to these agencies that the legislation of Congress under this authority has been directed, and it is to the question arising upon the agencies of the courts that the questions have been judicially presented. *Hampton* v. *McConnell*, 3 Wheat. 234; *Green* v. *Sacramento*, 3 W. C. C. 17; *Bank of Alabama* v. *Dalton*, 9 How. 528. The judicial proceedings of a State mean the proceedings of the courts of the State. It has never been doubted, that, under the constitutional authority to provide that credit should be given to the records of a "State," it was lawful to provide that credit should be given to the records of the courts of a State. For this purpose, the court is the State.

The provision, that "the United States shall guarantee to every State a republican form of government," is a guaranty to the people of the State, and may be exercised in their favor against the political power called the "State."

It seems plain that when the Constitution speaks of a State, and prescribes what it may do or what it may not do, it includes, in some cases, the agencies and instrumentalities by which the State acts. When it is intended that the prohibition shall be upon legislative action only, it is so expressed. Thus, in art. 1, sect. 10, subd. 1, it is provided that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The provision is, not that no State shall impair the obligation of contracts, but that no State shall pass a law impairing the obligation of contracts.

The word "State" in the Fifteenth Amendment is to be construed as in the paragraph heretofore quoted respecting commerce among the States, and in that which declares that acts of a State shall receive full faith and credit in every other State; that is, to include the acts of all those who proceed under the authority of the State. The political organization called the "State" can act only through its agents. It may act through a convention, through its legislature, its governor, or its magistrates and officers of lower degree. Whoever is authorized to

wield the power of the State is the State, and this whether he acts within his powers or exceeds them. If a convention of the State of Kentucky should ordain or its legislature enact that no person of African descent, or who had formerly been a slave, should be entitled to vote at its elections, such ordinance or law would be void. It would be in excess of the power of the body enacting it. It would possess no validity whatever. It cannot be doubted, however, that it would afford ground for the jurisdiction of the courts under the Fifteenth Amendment. It is the State that speaks and acts through its agents; although such agents exercise powers they do not possess, or that the State does not possess, and although their action is illegal. Inspectors of elections represent the State. They exercise the whole power of the State in creating its actual government by the reception of votes and the declaration of the results of the votes. If they wilfully and corruptly receive illegal votes, reject legal votes, make false certificates by which a usurper obtains an office, the act is in each case the act of the State, and the result must be abided by until corrected by the action of the courts. No matter how erroneous, how illegal or corrupt, may be their action, if it is upon the subject which they are appointed to manage, it binds all parties, as the action of the State, until legal measures are taken to annul it. They are authorized by the State to act in the premises; and, if their act is contrary to their instructions or their duty, they are nevertheless officers of the State, acting upon a subject committed to them by the State, and their acts are those of the State. The legislature speaks; its officers act. The voice and the act are equally those of the State.

I am of the opinion, therefore, that the refusal of the defendants, inspectors of elections, to receive the vote of Garner, was a refusal by the State of Kentucky, and was a denial by that State, within the meaning of the Fifteenth Amendment, of the right to vote.

It is contended, further, that Congress has no power to enforce the provisions of this amendment by the enactment of penal laws; that the power of enforcement provided for is limited to correcting erroneous decisions of the State court, when presented to the Federal courts by appeal or writ of error. "For

example (it is said), when it is declared that no State shall deprive any person of life, liberty, or property, without due process of law, this declaration is not intended as a guaranty against the commission of murder, false imprisonment, robbery, or other crimes committed by individual malefactors, so as to give Congress power to pass laws for the punishment of such crimes in the several States generally."

So far as the act of May, 1870, shall be held to include cases not dependent upon race, color, or previous condition, and so far as the power to impose pains and penalties for those offences may arise, I am not here called upon to discuss the subject.

So far as this argument is applied to legislation for offences committed on account of race or color, I hold it to be entirely unsound. If sound, it brings to an impotent conclusion the vigorous amendments on the subject of slavery. If there be no protection to the ignorant freedman against hostile legislation and personal prejudice other than a tedious, expensive, and uncertain course of litigation through State courts, thence by appeal or writ of error to the Federal courts, he has practically no remedy. It were as well that the amendments had not been passed. Of rights infringed, not one in a thousand could be remedied or protected by this process.

In adopting the Fifteenth Amendment, it was ordained as the second section thereof, "The Congress shall have power to enforce this article by appropriate legislation." This was done to remove doubts, if any existed, as to the former power; to add, at least, the weight of repetition to an existing power.

It was held in the *United States Bank Cases* and in the *Legal-Tender Cases* (*McCullough* v. *Maryland*, 4 Wheat. 316; *Gibbons* v. *Ogden*, 7 id. 204; *New York* v. *Miln*, 11 Pet. 102; *Knox* v. *Lee*, 12 Wall. 457; *Dooley* v. *Smith*, 13 id. 604) that it was for Congress to determine whether the necessity had arisen which called for its action. If Congress adjudges that the necessities of the country require the establishment of a bank, or the issue of legal-tender notes, that judgment is conclusive upon the court. It is not within their power to review it.

If Congress, being authorized to do so, desires to protect the freedman in his rights as a citizen and a voter, and as against

those who may be prejudiced and unscrupulous in their hostility to him and to his newly conferred rights, its manifest course would be to enact that they should possess that right; to provide facilities for its exercise by appointing proper superintendents and special officers to examine alleged abuses, giving jurisdiction to the Federal courts, and providing for the punishment of those who interfere with the right. The statute-books of all countries abound with laws for the punishment of those who violate the rights of others, either as to property or person, and this not so much that the trespassers may be punished as that the peaceable citizen may be protected. Punishment is the means; protection is the end. The arrest, conviction, and sentence to imprisonment, of one inspector, who refused the vote of a person of African descent on account of his race, would more effectually secure the right of the voter than would any number of civil suits in the State courts, prosecuted by timid, ignorant, and penniless parties against those possessing the wealth, the influence, and the sentiment of the community. It is certain that in fact the legislation taken by Congress, which we are considering, was not only the appropriate, but the most effectual, means of enforcing the amendment.

That the legislation in this respect is constitutional is also proved by the previous action of Congress and of this court.

Art. 4, sect. 5, subd. 3, of the Constitution provides as follows: "No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

At the time of the adoption of the Constitution containing this provision, slavery was recognized as legal in many States. The rights of the slaveholder in his slave were intended to be protected by this clause. To enforce this protection, Congress, from time to time, passed laws providing not only the means of restoring the escaped slave to his master, but inflicting punishment upon those who violated that master's rights. Thus, as early as 1793, Congress enacted not only that the master or his agent might seize and arrest such fugitive slave, and, upon obtaining a certificate from a judge or magistrate, carry him back

to the State from whence he escaped, and return him into slavery, but that every person who hindered or obstructed such master or agent, or who harbored or concealed such fugitive, after notice that he was such, should be subject to damages not only, but to a penalty of $500, to be recovered for the benefit of the claimant in any court proper to try the same. 1 Stat. 302. By the act of 1850 (9 Stat. 462), the circuit courts were ordered to enlarge the number of commissioners, "with a view to afford reasonable facilities to reclaim fugitives from labor."

The ninth section of the act provided that any person who should wilfully obstruct or hinder the removal of such fugitive, either with or without process, or should rescue or aid or abet an attempt to escape, or should harbor or conceal the fugitive, having notice, should for either of said offences be subject to a fine not exceeding $1,000, and imprisonment not exceeding six months, by indictment and conviction in the United States Court, "and shall pay and forfeit, by way of civil damages to the party injured by such illegal conduct, the sum of $1,000 for each fugitive so lost as aforesaid, to be recovered by action of debt," &c.

In *Prigg* v. *Pennsylvania*, 16 Pet. 539, the legislation of 1793 was held to be valid.

It was held in *Sims's Case*, 7 Cush. 285, that the act of 1850 was constitutional, and that the State tribunals cannot by writ of *habeas corpus* interfere with the Federal authorities when acting upon cases arising under that act.

In *Ableman* v. *Booth*, 21 How. 506, it was held by this court that the Fugitive-slave Act of 1850 was constitutional in all its provisions, and that a *habeas corpus* under the State laws must not be obeyed, but the authority of the United States must be executed.

The case of Prigg, decided under the act of 1793, and that of Booth, under the act of 1850, are pertinent to the present question.

In the former case, it was held that the act of 1793, so far as it authorized the owner to seize and recapture his slave in any State of the Union, was self-executing, requiring no aid from legislation, either State or National. The clause relating to fugitive slaves, it is there said, is found in the National and not

in the State Constitution. It was said to be a necessary conclusion, in the absence of all positive provision to the contrary, that the national government is bound through its own departments, legislative, judicial, or executive, to carry into effect all the rights and duties imposed upon it by the Constitution. This doctrine is useful at the present time, and is pertinent to the point we are considering. The clause protecting the freedmen, like that sustaining the rights of slaveholders, is found in the Federal Constitution only. Like the former, it provides the means of enforcing its authority, through fines and imprisonments, in the Federal courts; and here, as there, the national government is bound, through its own departments, to carry into effect all the rights and duties imposed upon it by the Constitution. In connection with the clause of the Constitution just quoted, there was not found, as here, an express authority in Congress to enforce it by appropriate legislation; and yet the court decide not only that Congress had power to enforce its provisions by fine and imprisonment, but that the right to legislate on the subject belongs to Congress exclusively. Courts should be ready, now and here, to apply these sound and just principles of the Constitution.

This provision of the Constitution and these decisions seem to furnish the rule of deciding the constitutionality of the law in question, rather than that which provides that life, liberty, or property, shall not be interfered with except by due process of law. It is not necessary to consider how far Congress may legislate upon individual crimes under that provision. If I am right in this view, the legislation we are considering — to wit, the enforcement of the Fifteenth Amendment by the means of penalties and indictments — is legal.

It is a well-settled principle, that, if an indictment contain both good counts and bad counts, a judgment of guilty upon the whole indictment will be sustained.

The record shows that the court below considered each and every count of the indictment as insufficient, and that judgment was entered discharging the defendants without day; *i.e.*, from the whole indictment. Upon the view I have taken of the validity of the fourth count, this judgment was erroneous. It should be reversed, and a trial ordered upon the indictment.

MONTGOMERY, ASSIGNEE, *v.* BUCYRUS MACHINE WORKS.

A., relying upon the representations of D., that the firm of B., C., and D., of which he was a member, was perfectly solvent, and that B. was wealthy, sold it goods. D. having, without the knowledge of A., retired from the firm, an arrangement was entered into whereby the proceeds of the sale of such goods remaining in the hands of the agents of the firm of B., C., and D., were applied to discharge the debt due to A., and the unsold portion of such goods returned to him. A., at the time, believed that B. and C. were insolvent; and they were within four months from such arrangement adjudged bankrupts. *Held*, that the representations of D. were a fraud upon A., on account of which he could have rescinded the contract of sale, and followed the goods wherever he could find them; and the goods not having lost their identity, nor become part of the permanent stock of B. and C., upon which they obtained credit, their assignee cannot, in the absence of actual fraud in the arrangement for the payment of such proceeds, recover them in a suit against A.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

Mr. James Baker for the plaintiff in error.

Mr. T. W. Bartley and *Mr. S. E. Jenner*, *contra.*

MR. JUSTICE DAVIS delivered the opinion of the court.

There can be no question, on the conceded facts of the case, that Stewart, Porter, and Wallace were copartners, under the firm name of Stewart, Porter, & Co.; and that they are bound by the duties and obligations arising out of that relation, so far as the transactions and contract with the defendant are concerned. The firm was formed at Sedalia, Mo., in January, 1870, by Stewart and Porter, to deal in agricultural implements, with a view to include Wallace, if he chose to join it; and the name of the partnership was taken for this purpose. Wallace was sent by them soon after this to Ohio, where the works of the defendant, a manufacturing corporation, were situated, to make contracts with it as their partner, if he elected to become such. This election was all that was required to render him a member of the firm: there was no necessity that he should sign any articles of copartnership.

Wallace, when he reached Ohio, elected to join the firm. Pursuant to the express authority conferred upon him by his associates in business, he entered into a contract of purchase

with the defendant, to whom he represented that the firm, consisting of Stewart, Porter, and himself, was solvent and doing a good business, and that Porter was wealthy. Previously to this the defendant knew nothing of the firm, but, relying on the truth of his statements, parted with its property to a firm composed of Stewart, Porter, and Wallace; nor did it learn of the retirement of Wallace from the firm until after proceedings in bankruptcy had been commenced against Stewart and Porter. It dealt throughout, as it had commenced, with a firm composed of the three persons, which, so far as it is concerned, was not changed.

It is true, before closing its dealings, it acted under the mistaken belief that this firm was insolvent. The firm owed no one else; and the firm composed of Stewart and Porter, which was insolvent, was not indebted to the defendant.

By the terms of the contract made by Wallace, on behalf of the firm, with the corporation, one car-load of machines was sold and delivered at the time; and there was a further agreement to fill all orders as soon as practicable. From time to time, orders were given, and machines forwarded. They were generally shipped direct to the different persons who had engaged to sell them for Stewart, Porter, & Co.; and the proceeds of these machines, when sold, were applied, with the consent of all parties, to discharge the debt due the corporation, and the unsold machines were returned to it.

The defendant had the right to rescind the contract on the ground of fraud, and follow the property or its proceeds wherever they could be found. This it did not do, because its agents and officers had no reason to believe that Wallace had actually misled them to its injury until after the machines were all forwarded. But equity and good conscience required that the proceeds of property obtained from it by fraud should be paid to it, or that the property itself, if unsold, be returned. This was recognized by Stewart, Porter, and Wallace; and the arrangement by which this was done is binding on them and the corporation. The machines did not lose their identity; nor can it be said that they formed a part of the permanent stock of goods of the bankrupts, Stewart and Porter, so that they can be considered as having thereby obtained credit.

Their creditors, therefore, have no right to complain, as the settlement was made in the absence of actual fraud; and the mere fact, that, when it was made, the corporation knew that Porter and Stewart were insolvent, does not render it fraudulent under the Bankrupt Law. The transaction by which it got part of the machines back, and received the proceeds of those which had been sold, was, under the circumstances, most equitable; and it cannot be defeated by the consideration that Wallace, after he had made the contract, was allowed to retire from the firm. It would be a great wrong to the corporation, who knew nothing of this, or of the untruthfulness of Wallace's representations, until after the property had all been delivered. It always dealt with the firm as composed of Stewart, Porter, and Wallace. Having no information to the contrary until after the bankruptcy of Stewart and Porter, and the receipt of the proceeds of its own property fraudulently procured from it, the corporation is not liable to the assignee of Stewart and Porter for such proceeds.

Judgment affirmed.

HENDERSON ET AL. *v.* MAYOR OF THE CITY OF NEW YORK ET AL.

COMMISSIONERS OF IMMIGRATION *v.* NORTH GERMAN LLOYD.

1. The case of the *City of New York* v. *Miln*, 11 Pet. 103, decided no more than that the requirement from the master of a vessel of a catalogue of his passengers landed in the city, rendered to the mayor on oath, with a correct description of their names, ages, occupations, places of birth, and of last legal settlement, was a police regulation within the power of the State to enact, and not inconsistent with the Constitution of the United States.
2. The result of the *Passenger Cases*, 7 How. 283, was to hold that a tax demanded of the master or owner of the vessel for every such passenger was a regulation of commerce by the State, in conflict with the Constitution and laws of the United States, and therefore void.
3. These cases criticised, and the weight due to them as authority considered.
4. In whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect.
5. Hence a statute which imposes a burdensome and almost impossible condition on the ship-master as a prerequisite to his landing his passengers, with

an alternative payment of a small sum of money for each one of them, is a tax on the ship-owner for the right to land such passengers, and, in effect, on the passenger himself, since the ship-master makes him pay it in advance as part of his fare.

6. Such a statute of a State is a regulation of commerce, and, when applied to passengers from foreign countries, is a regulation of commerce with foreign nations.
7. It is no answer to the charge, that such regulation of commerce by a State is forbidden by the Constitution, to say that it falls within the police power of the States; for, to whatever class of legislative powers it may belong, it is prohibited to the States if granted exclusively to Congress by that instrument.
8. Though it be conceded that there is a class of legislation which may affect commerce, both with foreign nations and between the States, in regard to which the laws of the States may be valid in the absence of action under the authority of Congress on the same subjects, this can have no reference to matters which are in their nature national, or which admit of a uniform system or plan of regulation.
9. The statutes of New York and Louisiana, here under consideration, are intended to regulate commercial matters which are not only of national, but of international concern, and which are also best regulated by one uniform rule, applicable alike to all the seaports of the United States. These statutes are therefore void, because legislation on the subjects which they cover is confided exclusively to Congress by the clause of the Constitution which gives to that body the "right to regulate commerce with foreign nations."
10. The constitutional objection to this tax on the passenger is not removed because the penalty for failure to pay does not accrue until twenty-four hours after he is landed. The penalty is incurred by the act of landing him without payment, and is, in fact, for the act of bringing him into the State.
11. This court does not, in this case, undertake to decide whether or not a State may, in the absence of all legislation by Congress on the same subject, pass a statute strictly limited to defending itself against paupers, convicted criminals, and others of that class, but is of opinion that to Congress rightfully and appropriately belongs the power of legislating on the whole subject.

THESE cases come here by appeal, — the former from the Circuit Court of the United States for the Southern District of New York, the latter from the Circuit Court of the United States for the District of Louisiana.

In the case from New York, which is a suit in equity against the mayor of the city of New York and the Commissioners of Emigration, the bill alleges that the complainants are subjects of Great Britain, and owners of the steamship "Ethiopia;" that their vessel arrived at the port of New York from Glasgow, Scotland, on the 24th of June, 1875, having on board a

number of emigrant passengers, and, among others, three persons whose names are specified, who came from a foreign country, intending to pass through the State of New York, and settle and reside in other States of the Union and in Canada; that, by the statutes of the State of New York, the master of every vessel arriving at the port of New York from a foreign port is required, within twenty-four hours after his arrival, to report in writing to the mayor of New York the name, birthplace, last residence, and occupation of every passenger who is not a citizen of the United States; that the statute then directs the mayor, by indorsement on this report, to require the owner or consignee of the vessel to give a bond for every passenger so reported, in a penalty of $300, with two sureties, each to be a resident and freeholder of the State, conditioned to indemnify the Commissioners of Emigration, and every county, city, and town in the State, against any expense for the relief or support of the person named in the bond for four years thereafter; but that the owner or consignee may commute such bond, and be relieved from giving it, by paying for each passenger, within twenty-four hours after his or her landing, the sum of one dollar and fifty cents, fifty cents whereof is to be paid to other counties in the State, and the residue to the Commissioners of Emigration for their general purposes, and particularly to be used in erecting wharves and buildings, and in paying salaries and clerk hire.

That if he does not, within twenty-four hours after landing such passengers, either give the bond or pay the commutation-tax for each passenger, he is liable to a penalty of $500 for every such passenger, which is made a lien on, and may be enforced against, the vessel, at the suit of the Commissioners of Emigration.

The master of the "Ethiopia" made the report required by the act: whereupon the complainants, in order to test the validity of the provisions of the acts requiring the bond or the commutation thereof, filed their bill, which the court, on the demurrer of the defendants, dismissed. The complainants thereupon appealed to this court.

Mr. James Emott for the appellants.

1. The acts of the legislature of the State of New York

under which the defendants demand the bond or the commutation-tax for every alien landing from a foreign port on his way to other states or countries, and which the complainants allege deprive them of rights to which they are entitled by the Constitution of the United States, consist of a series of acts passed in 1847, 1848, 1849, 1850, 1853, 1871, and 1873.

2. The extent of the decision in the case of the *City of New York* v. *Miln*, 11 Pet. 102, is simply that the State may lawfully require information of the character of the passengers who enter her ports from abroad, and to that end may, by law, require the master of a vessel to report an account of his passengers.

The Revised Statutes of New York, adopted in 1830, imposing for the first time a tax upon immigrants, were, in *Passenger Cases*, 7 How. 283, pronounced unconstitutional, so far as they attempted to subject vessels or their owners to a tax or imposition of head-money upon, or on account of, passengers from foreign countries.

The act of 1849, which requires the carrier of passengers to give a bond of indemnity in the sum of $300, with sureties and a continuing liability for four years, to the State of New York, for every passenger landed, whether he remains in the State or is to pass directly through it to other states or countries, whether rich or poor, old or young, well or sick, competent or disabled, to support himself, is, to that extent, unconstitutional. Its well-understood purpose was not, however, to obtain such bonds. It is disclosed by the succeeding provisions, which authorize the parties liable to be called on for these bonds to commute by the payment of a specific sum for every passenger.

3. The acts of the legislature under which bonds or a tax is demanded for passengers are in violation of the following provisions of the Constitution: —

Art. 1, sect. 8. "The Congress shall have power . . . to regulate commerce with foreign nations and among the several States."

Sect. 10, subd. 2. "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be actually necessary for executing its inspection laws.

No State shall, without the consent of the Congress, lay any duty of tonnage."

The laws in question are regulations of commerce which a State has no power to make; and the provisions exacting head-money for immigrants are an attempt to lay an impost or duty on imports.

4. Commerce includes navigation. It means intercourse. It includes all the subjects of such intercourse, and the transportation of persons as much as of property. *Gibbons* v. *Ogden*, 9 Wheat. 189; *Crandall* v. *Nevada*, 6 Wall. 35; *Railroad Co.* v. *Fuller*, 17 id. 560; *Railroad Co.* v. *Maryland*, 21 id. 456.

5. The power conferred upon Congress to regulate commerce is exclusive. *Gibbons* v. *Ogden*, *supra*; *Passenger Cases*, 7 How. 283; *Ex parte McNeil*, 13 Wall. 236; *The State Freight Tax Cases*, 15 id. 232; *Railroad Co.* v. *Fuller*, *supra*.

6. If the act of the legislature of New York had simply required a tax of one dollar and fifty cents for every passenger, and imposed, in case of failure to pay, a penalty, which should be a lien on the vessel, it would have been explicitly condemned by the decision in *Passenger Cases*, *supra*.

The alternative of a bond offered apparently to make the payment of a specific sum the election of the passenger or his carrier is a device to collect a tax on immigrants, and was manifestly intended to evade the decision which condemned, as unconstitutional, its direct imposition. That which cannot be done directly will not be permitted to be done indirectly. *Almy* v. *California*, 24 How. 169; *Brown* v. *Maryland*, 12 Wheat. 419.

The statutes in question are not an exercise of the police power, which, it might be claimed, belongs to the States respectively, to protect themselves against paupers or criminals. They violate the acts of Congress and our treaties with foreign powers.

Mr. Francis Kernan and *Mr. John E. Develin*, *contra*.

1. The question arising in this case was not adjudicated in *Passenger Cases*, 7 How. 283.

2. The act to be now passed upon does not impose a tax upon the passenger. It provides, that, "within twenty-four hours *after the landing of any passenger*," the master of the vessel "from which such passenger shall have been landed" shall

make to the mayor of the city of New York the report specified. It further provides, that it shall be lawful, within twenty-four hours after the landing of such passengers, to commute for the bonds required by paying one dollar and fifty cents for each passenger.

3. The act under consideration is not a regulation of commerce. It is a police regulation to protect the State from foreign paupers by appropriate legislation, the constitutional character of which seems to have been settled by this court. *City of New York* v. *Miln*, 11 Pet. 102; *Passenger Cases*, 7 How., per McLean, J., pp. 400, 406, 409, 410; *Holmes* v. *Jamison*, 14 Pet. 540; *Grove* v. *Slaughter*, 15 id. 449; *Prigg* v. *Pennsylvania*, 16 id. 539. It does not, as did the Massachusetts statute, which was held valid, prevent the landing of immigrants until after its provisions are complied with. It affects only persons who are upon the soil of the State and clearly subject to its jurisdiction, and imposes no tax upon the immigrant or the importer.

4. The act is not an attempt to evade the decision of the court in the *Passenger Cases:* on the contrary, it is in conformity with the law there declared. The majority and minority of the court declared that the States could rightfully protect themselves from pauper immigration from foreign countries.

The State of New York, in accordance with that decision, and in the only practical mode in which she can exercise her conceded right of self-protection against foreign paupers, exacts, by the statute under consideration, a bond to indemnify the State if the immigrant shall be a public charge within five years.

But it is objected that the law requires a bond for *all* the passengers who have been landed. We answer, that, if the State has rightful authority to exact such a bond for every passenger who in *the opinion* of its agent is incompetent to maintain himself, the law is not void because it exacts the bond as to all.

The right of the State to exact this indemnity cannot depend upon the manner in which it is exercised after the immigrant has been landed. There is no practical mode in which the State can correctly decide which of these alien strangers is self-supporting. Hence it may rightfully exact indemnity from all.

The right of the owner or consignee to commute by paying a small sum instead of giving a bond of indemnity for each does not render the law invalid. This is at the option of the owner or consignee. It cannot be tortured into an indirect mode of imposing a tax or duty upon the passenger as such. The option is allowed as a favor to the owner or consignee of the vessel. The commutation is by no means as perfect a protection to the State as a bond on behalf of each indigent person landed.

It cannot seriously be contended that this statute is void because it is in conflict with any statute of the United States, or treaty made by it.

In *Commissioners of Immigration* v. *North German Lloyd*, which was an action to prevent the appellants who were the respondents from requiring bonds or commutation thereof from all passengers, the court below granted the injunction.

Messrs. Samuel R. & C. L. Walker for the appellants.

Mr. W. S. Benedict, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

In the case of the *City of New York* v. *Miln*, reported in 11 Pet. 103, the question of the constitutionality of a statute of the State concerning passengers in vessels coming to the port of New York was considered by this court. It was an act passed Feb. 11, 1824, consisting of several sections. The first section, the only one passed upon by the court, required the master of every ship or vessel arriving in the port of New York from any country out of the United States, or from any other State of the United States, to make report in writing, and on oath, within twenty-four hours after his arrival, to the mayor of the city, of the name, place of birth, last legal settlement, age, and occupation of every person brought as a passenger from any country out of the United States, or from any of the United States into the port of New York, or into any of the United States, and of all persons landed from the ship, or put on board, or suffered to go on board, any other vessel during the voyage, with intent of proceeding to the city of New York. A penalty was prescribed of seventy-five dollars for each passenger not so reported, and for every person whose name, place of

birth, last legal settlement, age, and occupation should be falsely reported.

The other sections required him to give bond, on the demand of the mayor, to save harmless the city from all expense of support and maintenance of such passenger, or to return any passenger, deemed liable to become a charge, to his last place of settlement; and required each passenger, not a citizen of the United States, to make report of himself to the mayor, stating his age, occupation, the name of the vessel in which he arrived, the place where he landed, and name of the commander of the vessel. We gather from the report of the case that the defendant, Miln, was sued for the penalties claimed for refusing to make the report required in the first section. A division of opinion was certified by the judges of the Circuit Court on the question, whether the act assumes to regulate commerce between the port of New York and foreign ports, and is unconstitutional and void.

This court, expressly limiting its decision to the first section of the act, held that it fell within the police powers of the States, and was not in conflict with the Federal Constitution.

From this decision Mr. Justice Story dissented, and in his opinion stated that Chief Justice Marshall, who had died between the first and the second argument of the case, fully concurred with him in the view that the statute of New York was void, because it was a regulation of commerce forbidden to the States.

In the *Passenger Cases*, reported in 7 How. 283, the branch of the statute not passed upon in the preceding case came under consideration in this court. It was not the same statute, but was a law relating to the marine hospital on Staten Island. It authorized the health commissioner to demand, and, if not paid, to sue for and recover, from the master of every vessel arriving in the port of New York from a foreign port, one dollar and fifty cents for each cabin passenger, and one dollar for each steerage passenger, mate, sailor, or mariner, and from the master of each coasting vessel twenty-five cents for each person on board. These moneys were to be appropriated to the use of the hospital.

The defendant, Smith, who was sued for the sum of $295 for

refusing to pay for 295 steerage passengers on board the British ship "Henry Bliss," of which he was master, demurred to the declaration on the ground that the act was contrary to the Constitution of the United States, and void. From a judgment against him, affirmed in the Court of Errors of the State of New York, he sued out a writ of error, on which the question was brought to this court.

It was here held, at the January Term, 1849, that the statute was "repugnant to the constitution and laws of the United States, and therefore void." 7 How. 572.

Immediately after this decision, the State of New York modified her statute on that subject, with a view, no doubt, to avoid the constitutional objection; and amendments and alterations have continued to be made up to the present time.

As the law now stands, the master or owner of every vessel landing passengers from a foreign port is bound to make a report similar to the one recited in the statute held to be valid in the case of *New York* v. *Miln;* and on this report the mayor is to indorse a demand upon the master or owner that he give a bond for every passenger landed in the city, in the penal sum of $300, conditioned to indemnify the commissioners of emigration, and every county, city, and town in the State, against any expense for the relief or support of the person named in the bond for four years thereafter; but the owner or consignee may commute for such bond, and be released from giving it, by paying, within twenty-four hours after the landing of the passengers, the sum of one dollar and fifty cents for each one of them. If neither the bond be given nor the sum paid within the twenty-four hours, a penalty of $500 for each pauper is incurred, which is made a lien on the vessel, collectible by attachment at the suit of the Commissioner of Emigration.

Conceding the authority of the *Passenger Cases*, which will be more fully considered hereafter, it is argued that the change in the statute now relied upon requiring primarily a bond for each passenger landed, as an indemnity against his becoming a future charge to the state or county, leaving it optional with the ship-owner to avoid this by paying a fixed sum for each passenger, takes it out of the principle of the case of *Smith* v. *Turner*, — the *Passenger Case* from New York. It is said that

the statute in that case was a direct tax on the passenger, since the act authorized the shipmaster to collect it of him, and that on that ground alone was it held void; while in the present case the requirement of the bond is but a suitable regulation under the power of the State to protect its cities and towns from the expense of supporting persons who are paupers or diseased, or helpless women and children, coming from foreign countries.

In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger Cases*.

To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum. To suppose that a vessel, which once a month lands from three hundred to one thousand passengers, or from three thousand to twelve thousand per annum, will give that many bonds of $300 with good sureties, with a covenant for four years, against accident, disease, or poverty of the passenger named in such bond, is absurd, when this can be avoided by the payment of one dollar and fifty cents collected of the passenger before he embarks on the vessel.

Such bonds would amount in many instances, for every voyage, to more than the value of the vessel. The liability on the bond would be, through a long lapse of time, contingent on circumstances which the bondsman could neither foresee nor control. The cost of preparing the bond and approving sureties, with the trouble incident to it in each case, is greater than the sum required to be paid as commutation. It is inevitable, under such a law, that the money would be paid for each passenger, or the statute resisted or evaded. It is a law in its purpose and effect imposing a tax on the owner of the

vessel for the privilege of landing in New York passengers transported from foreign countries.

It is said that the purpose of the act is to protect the State against the consequences of the flood of pauperism immigrating from Europe, and first landing in that city.

But it is a strange mode of doing this to tax every passenger alike who comes from abroad.

The man who brings with him important additions to the wealth of the country, and the man who is perfectly free from disease, and brings to aid the industry of the country a stout heart and a strong arm, are as much the subject of the tax as the diseased pauper who may become the object of the charity of the city the day after he lands from the vessel.

No just rule can make the citizen of France landing from an English vessel on our shore liable for the support of an English or Irish pauper who lands at the same time from the same vessel.

So far as the authority of the cases of *New York* v. *Miln* and *Passenger Cases* can be received as conclusive, they decide that the requirement of a catalogue of passengers, with statements of their last residence, and other matters of that character, is a proper exercise of State authority and that the requirement of the bond, or the alternative payment of money for each passenger, is void, because forbidden by the constitution and laws of the United States. But the *Passenger Cases* (so called because a similar statute of the State of Massachusetts was the subject of consideration at the same term with that of New York) were decided by a bare majority of the court. Justices McLean, Wayne, Catron, McKinley, and Grier held both statutes void; while Chief Justice Taney, and Justices Daniel, Nelson, and Woodbury, held them valid. Each member of the court delivered a separate opinion, giving the reasons for his judgment, except Judge Nelson, none of them professing to be the authoritative opinion of the court. Nor is there to be found, in the reasons given by the judges who constituted the majority, such harmony of views as would give that weight to the decision which it lacks by reason of the divided judgments of the members of the court. Under these circumstances, with three cases before us arising under statutes of three different States

on the same subject, which have been discussed as though open in this court to all considerations bearing upon the question, we approach it with the hope of attaining a unanimity not found in the opinions of our predecessors.

As already indicated, the provisions of the Constitution of the United States, on which the principal reliance is placed to make void the statute of New York, is that which gives to Congress the power "to regulate commerce with foreign nations." As was said in *United States* v. *Holliday*, 3 Wall. 417, "commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments." It means trade, and it means intercourse. It means commercial intercourse between nations, and parts of nations, in all its branches. It includes navigation, as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted. "The mind," says the great Chief Justice, "can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of another;" and he might have added, with equal force, which prescribed no terms for the admission of their cargo or their passengers. *Gibbons* v. *Ogden*, 9 Wheat. 190.

Since the delivery of the opinion in that case, which has become the accepted canon of construction of this clause of the Constitution, as far as it extends, the transportation of passengers from European ports to those of the United States has attained a magnitude and importance far beyond its proportion at that time to other branches of commerce. It has become a part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come among us to find a welcome and a home within our borders. In addition to the wealth which some of them bring, they bring still more largely the labor which we need to till our soil, build our railroads, and develop the latent resources of the country in its minerals, its manufactures, and its agriculture. Is the regulation of this great system a regulation of commerce? Can it be doubted that a law which prescribes the terms on which vessels

shall engage in it is a law regulating this branch of commerce?

The transportation of a passenger from Liverpool to the city of New York is one voyage. It is not completed until the passenger is disembarked at the pier in the latter city. A law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations.

The accuracy of these definitions is scarcely denied by the advocates of the State statutes. But assuming, that, in the formation of our government, certain powers necessary to the administration of their internal affairs are reserved to the States, and that among these powers are those for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases, and other matters of legislation of like character, they insist that the power here exercised falls within this class, and belongs rightfully to the States.

This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.

Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may at the same time be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency and for the safety of the government which issues it.

It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable.

But, however difficult this may be, it is clear, from the nature of our complex form of government, that, whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States.

"It has been contended," says Marshall C. J., "that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy, not only of itself, but of the laws made in pursuance thereof. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is supreme." Where the Federal government has acted, he says, "In every such case the act of Congress or the treaty is supreme; and the laws of the State, though enacted in the exercise of powers not controverted, must yield to it." 9 Wheat. 210.

It is said, however, that, under the decisions of this court, there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the State, and its legislation be valid so long as it interferes with no act of Congress, or treaty of the United States. Such a proposition is supported by the opinions of several of the judges in the *Passenger Cases;* by the decisions of this court in *Cooly* v. *The Board of Wardens*, 12 How. 299; and by the cases of *Crandall* v. *Nevada*, 6 Wall. 35, and *Gilman* v. *Philadelphia*, 3 Wall. 713. But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree, that under the commerce clause of the Constitution, or within its compass, there are powers, which, from their nature, are exclusive in Congress; and, in the case of *Cooly* v. *The Board of Wardens*, it was said, that "whatever subjects of this power are in their nature

national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is more than this; for it may properly be called *international*. It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce the subject of a treaty, there could be no doubt that such a treaty would fall within the power conferred on the President and the Senate by the Constitution. It is in fact, in an eminent degree, a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected, whether the rule be established by treaty or by legislation.

It is equally clear that the matter of these statutes may be, and ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco. A striking evidence of the truth of this proposition is to be found in the similarity, we might almost say in the identity, of the statutes of New York, of Louisiana, and California, now before us for consideration in these three cases.

It is apparent, therefore, that, if there be a class of laws which may be valid when passed by the States until the same ground is occupied by a treaty or an act of Congress, this statute is not of that class.

The argument has been pressed with some earnestness, that inasmuch as this statute does not come into operation until twenty-four hours after the passenger has landed, and has mingled with, or has the right to mingle with, the mass of the population, he is withdrawn from the influence of any laws which Congress might pass on the subject, and remitted to the laws of the State as its own citizens are. It might be a sufficient answer to say that this is a mere evasion of the protection which the foreigner has a right to expect from the Federal government when he

lands here a stranger, owing allegiance to another government, and looking to it for such protection as grows out of his relation to that government.

But the branch of the statute which we are considering is directed to and operates directly on the ship-owner. It holds him responsible for what he has done before the twenty-four hours commence. He is to give the bond or pay the money because he *has* landed the passenger, and he is given twenty-four hours' time to do this before the penalty attaches. When he is sued for this penalty, it is not because the man has been here twenty-four hours, but because he brought him here, and failed to give the bond or pay one dollar and fifty cents.

The effective operation of this law commences at the other end of the voyage. The master requires of the passenger, before he is admitted on board, as a part of the passage-money, the sum which he knows he must pay for the privilege of landing him in New York. It is, as we have already said, in effect, a tax on the passenger, which he pays for the right to make the voyage, — a voyage only completed when he lands on the American shore. The case does not even require us to consider at what period after his arrival the passenger himself passes from the sole protection of the constitution, laws, and treaties of the United States, and becomes subject to such laws as the State may rightfully pass, as was the case in regard to importations of merchandise in *Brown* v. *Maryland*, 12 Wheat. 417, and in the *License Cases*, 5 How. 504.

It is too clear for argument that this demand of the owner of the vessel for a bond or money on account of every passenger landed by him from a foreign shore is, if valid, an obligation which he incurs by bringing the passenger here, and which is perfect the moment he leaves the vessel.

We are of opinion that this whole subject has been con fided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our law, state or national; that by providing a system of laws in these matters, applicable to all ports and to all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled.

Whether, in the absence of such action, the States can, or how far they can, by appropriate legislation, protect themselves against *actual* paupers, vagrants, criminals, and diseased persons, arriving in their territory from foreign countries, we do not decide. The portions of the New York statute which concern persons who, on inspection, are found to belong to these classes, are not properly before us, because the relief sought is to the part of the statute applicable to all passengers alike, and is the only relief which can be given on this bill.

The decree of the Circuit Court of New York, in the case of *Henderson et al.* v. *Mayor of the City of New York et al.*, is reversed, and the case remanded, with direction to enter a decree for an injunction in accordance with this opinion.

The statute of Louisiana, which is involved in the case of *Commissioners of Immigration* v. *North German Lloyd*, is so very similar to, if not an exact copy of, that of New York, as to need no separate consideration. In this case the relief sought was against exacting the bonds or paying the commutation-money as to all passengers, which relief the Circuit Court granted by an appropriate injunction; and the decree in that case is accordingly affirmed.

CHY LUNG *v.* FREEMAN ET AL.

1. The statute of California, which is the subject of consideration in this case, does not require a bond for every passenger, or commutation in money, as the statutes of New York and Louisiana do, but only for certain enumerated classes, among which are "lewd and debauched women."
2. But the features of the statute are such as to show very clearly that the purpose is to extort money from a large class of passengers, or to prevent their immigration to California altogether.
3. The statute also operates directly on the passenger; for, unless the master or owner of the vessel gives an onerous bond for the future protection of the State against the support of the passenger, or pays such sum as the Commissioner of Immigration chooses to exact, he is not permitted to land from the vessel.
4. The powers which the commissioner is authorized to exercise under this statute are such as to bring the United States into conflict with foreign nations, and they can only belong to the Federal government.
5. If the right of the States to pass statutes to protect themselves in regard to the criminal, the pauper, and the diseased foreigner, landing within their

borders, exists at all, it is limited to such laws as are absolutely necessary for that purpose; and this mere police regulation cannot extend so far as to prevent or obstruct other classes of persons from the right to hold personal and commercial intercourse with the people of the United States.

6. The statute of California, in this respect, extends far beyond the necessity in which the right, if it exists, is founded, and invades the right of Congress to regulate commerce with foreign nations, and is therefore void.

ERROR to the Supreme Court of the State of California.

Mr. Attorney-General Pierrepont for the plaintiff in error.

No opposing counsel.

MR. JUSTICE MILLER delivered the opinion of the court.

While this case presents for our consideration the same class of State statutes considered in *Henderson et al.* v. *Mayor of the City of New York et al.*, and *Commissioners of Immigration* v. *North German Lloyd*, *supra*, p. 259, it differs from them in two very important points.

These are, *First*, The plaintiff in error was a passenger on a vessel from China, being a subject of the Emperor of China, and is held a prisoner because the owner or master of the vessel who brought her over refused to give a bond in the sum of $500 in gold, conditioned to indemnify all the counties, towns, and cities of California against liability for her support or maintenance for two years.

Secondly, The statute of California, unlike those of New York and Louisiana, does not require a bond for *all* passengers landing from a foreign country, but only for classes of passengers specifically described, among which are "lewd and debauched women;" to which class it is alleged plaintiff belongs.

The plaintiff, with some twenty other women, on the arrival of the steamer "Japan" from China, was singled out by the Commissioner of Immigration, an officer of the State of California, as belonging to that class, and the master of the vessel required to give the bond prescribed by law before he permitted them to land. This he refused to do, and detained them on board. They sued out a writ of *habeas corpus*, which by regular proceedings resulted in their committal, by order of the Supreme Court of the State, to the custody of the sheriff of the county and city of San Francisco, to await the return of the "Japan," which had left the port pending the progress of

the case; the order being to remand them to that vessel on her return, to be removed from the State.

All of plaintiff's companions were released from the custody of the sheriff on a writ of *habeas corpus* issued by Mr. Justice Field of this court. But plaintiff by a writ of error brings the judgment of the Supreme Court of California to this court, for the purpose, as we suppose, of testing the constitutionality of the act under which she is held a prisoner. We regret very much, that, while the Attorney-General of the United States has deemed the matter of such importance as to argue it in person, there has been no argument in behalf of the State of California, the Commissioner of Immigration, or the Sheriff of San Francisco, in support of the authority by which plaintiff is held a prisoner; nor have we been furnished even with a brief in support of the statute of that State.

It is a most extraordinary statute. It provides that the Commissioner of Immigration is "to satisfy himself whether or not any passenger who shall arrive in the State by vessels from any foreign port or place (who is not a citizen of the United States) is lunatic, idiotic, deaf, dumb, blind, crippled, or infirm, and is not accompanied by relatives who are able and willing to support him, or is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease (existing either at the time of sailing from the port of departure or at the time of his arrival in the State) a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman;" and no such person shall be permitted to land from the vessel, unless the master or owner or consignee shall give a separate bond in each case, conditioned to save harmless every county, city, and town of the State against any expense incurred for the relief, support, or care of such person for two years thereafter.

The commissioner is authorized to charge the sum of seventy-five cents for every examination of a passenger made by him; which sum he may collect of the master, owner, or consignee, or of the vessel by attachment. The bonds are to be prepared by the commissioner, and two sureties are required to each bond; and, for preparing the bond, the commissioner is allowed to charge and collect a fee of three dollars; and for each oath ad-

ministered to a surety, concerning his sufficiency as such, he may charge one dollar. It is expressly provided that there shall be a separate bond for each passenger; that there shall be two sureties on each bond, and that the same sureties must not be on more than one bond; and they must in all cases be residents of the State.

If the ship-master or owner prefers, he may commute for these bonds by paying such a sum of money as the commissioner may in each case think proper to exact; and, after retaining twenty per cent of the commutation-money for his services, the commissioner is required once a month to deposit the balance with the Treasurer of the State. See c. 1, art. 7, of the Political Code of California, as modified by sect. 70 of the amendments of 1873, 1874.

It is hardly possible to conceive a statute more skilfully framed, to place in the hands of a single man the power to prevent entirely vessels engaged in a foreign trade, say with China, from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind.

The commissioner has but to go aboard a vessel filled with passengers ignorant of our language and our laws, and without trial or hearing or evidence, but from the external appearances of persons with whose former habits he is unfamiliar, to point with his finger to twenty, as in this case, or a hundred if he chooses, and say to the master, "These are idiots, these are paupers, these are convicted criminals, these are lewd women, and these others are debauched women. I have here a hundred blank forms of bonds, printed. I require you to fill me up and sign each of these for $500 in gold, and that you furnish me two hundred different men, residents of this State, and of sufficient means, as sureties on these bonds. I charge you five dollars in each case for preparing the bond and swearing your sureties; and I charge you seventy-five cents each for examining these passengers, and all others you have on board. If you don't do this, you are forbidden to land your passengers under a heavy penalty. But I have the power to commute with you for all this for any sum I may choose to take in cash. I am open to an offer; for you must remember that twenty per cent of all I can get out of you goes into my own pocket, and the remainder into the treasury of California."

If, as we have endeavored to show in the opinion in the preceding cases, we are at liberty to look to the effect of a statute for the test of its constitutionality, the argument need go no further.

But we have thus far only considered the effect of the statute on the owner of the vessel.

As regards the passengers, sect. 2963 declares that consuls, ministers, agents, or other public functionaries, of any foreign government, arriving in this State in their *official capacity*, are exempt from the provisions of this chapter.

All other passengers are subject to the order of the Commissioner of Immigration.

Individual foreigners, however distinguished at home for their social, their literary, or their political character, are helpless in the presence of this potent commissioner. Such a person may offer to furnish any amount of surety on his own bond, or deposit any sum of money; but the law of California takes no note of him. It is the master, owner, or consignee of the vessel alone whose bond can be accepted; and so a silly, an obstinate, or a wicked commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend.

While the occurrence of the hypothetical case just stated may be highly improbable, we venture the assertion, that, if citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress.

Or, if this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the

injury, would California pay it, or the Federal government? If that government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?

The Constitution of the United States is no such instrument. The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.

We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a State statute, limited to provisions necessary and appropriate to that object alone, shall, in a proper controversy, come before us, it will be time enough to decide that question. The statute of California goes so far beyond what is necessary, or even appropriate, for this purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified. Its manifest purpose, as we have already said, is, not to obtain indemnity, but money.

The amount to be taken is left in every case to the discretion of an officer, whose cupidity is stimulated by a reward of one-fifth of all he can obtain.

The money, when paid, does not go to any fund for the benefit of immigrants, but is paid into the general treasury of the State, and devoted to the use of all her indigent citizens.

The blind, or the deaf, or the dumb passenger is subject to contribution, whether he be a rich man or a pauper. The patriot, seeking our shores after an unsuccessful struggle against despotism in Europe or Asia, may be kept out because there his resistance has been adjudged a crime. The woman whose error has been repaired by a happy marriage and numerous children, and whose loving husband brings her with his wealth to a new home, may be told she must pay a round sum before she can land, because it is alleged that she was debauched by her husband before marriage. Whether a young woman's manners are such as to justify the commissioner in calling her lewd may be made to depend on the sum she will pay for the privilege of landing in San Francisco.

It is idle to pursue the criticism. In any view which we can take of this statute, it is in conflict with the Constitution of the United States, and therefore void.

Judgment reversed, and the case remanded, with directions to make an order discharging the prisoner from custody.

UNITED STATES *v.* ROSS.

1. It is incumbent upon a claimant, under the Captured or Abandoned Property Act, to establish by sufficient proof that the property captured or abandoned came into the hands of a treasury agent; that it was sold; that the proceeds of the sale were paid into the treasury of the United States; and that he was the owner of the property, and entitled to the proceeds thereof.
2. Because the claimant's property was captured and sent forward by a military officer, and there is an unclaimed fund in the treasury derived from sales of property of the same kind, a court is not authorized to conclude, as matter of law, that the property was delivered by that officer to a treasury agent, that it was sold by the latter, and that the proceeds were covered into the treasury.
3. The presumption that public officers have done their duty does not supply proof of independent and substantive facts.

APPEAL from the Court of Claims.

Mr. Assistant Attorney-General Edwin B. Smith for the United States.

Mr. George Taylor, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

It is incumbent upon a claimant under the Captured or Abandoned Property Act to establish by sufficient proof that the property captured or abandoned came into the hands of a treasury agent; that it was sold; that the proceeds of the sale were paid into the treasury of the United States; and that he was the owner of the property, and entitled to the proceeds thereof. All this is essential to show that the United States is a trustee for him, holding his money. That there is in the treasury a fund arisen out of the sales of property captured or abandoned, a fund held in trust for somebody, and that the claimant's property, after capture or abandonment, came into the hands of a quartermaster of the army or a treasury agent, is not sufficient. There must be evidence connecting the receipt of it by the treasury agent with the payment of the proceeds of sale of that identical property into the treasury. We do not say that the evidence must be direct. It must, however, be such as the law recognizes to be a legitimate medium of proof; and the burden of proof rests upon the claimant who asserts the connection.

In the present case, the Court of Claims has not found *as a fact* that the claimant's cotton came into the hands of a treasury agent, that it was sold, and that the proceeds of that cotton were paid into the treasury. No connection between the cotton captured and the fund now held by the United States has been established. Certain facts have been found, and from them it was inferred, as matter of law, that other facts existed; and upon the facts thus inferred the court gave judgment.

We think that in this there was error. The claimant owned, in May, 1864, thirty-one bales of cotton, then in a warehouse in Rome, Ga. On the 18th of that month, Rome was captured by the United States forces; and shortly afterwards the cotton was removed on government wagons to a warehouse adjoining the railroad leading from Rome to Kingston, and connecting there with a road leading thence to Chattanooga. Whether it was the only cotton in that warehouse is not found; but it is inferrible from the other facts found that it was not. Subsequently (but how long afterwards does not appear) all of the cotton in that warehouse was shipped on the railroad to

Kingston, the road being then in the possession of the military authorities. It is next shown that cotton (some cotton) arrived in Kingston from Rome before Aug. 19, 1864, and was forwarded to Chattanooga; that, on the 19th of August, forty-two bales were received at Chattanooga from the quartermaster at Kingston; that thence they were shipped to Nashville, where they were received as coming from Kingston, turned over to the treasury agent, and sold. The proceeds of sale were paid into the treasury, and no title to these forty-two bales has been asserted by third persons.

Such were the facts found; and from them the court deduced, not as a conclusion of fact, but as a presumption of law, that the thirty-one bales removed on government wagons to the warehouse immediately adjoining the railroad at Rome, shortly after May 18, 1864, were a part of the forty-two bales received at Nashville on the 24th of August, four months afterward, and there turned over to the treasury agent. It is obvious that this presumption could have been made only by piling inference upon inference, and presumption upon presumption. Because the thirty-one bales of the claimant were taken to the warehouse alongside of the railroad at Rome in May, 1864, and the cotton in that warehouse afterwards, at some unknown time (whether before or after Aug. 19 does not appear), was shipped on the road to Kingston, it is inferred that the claimant's cotton was part of the shipment. Because somebody's cotton (how much or how little is not shown) arrived at Kingston from Rome at some time not known, and was forwarded to Chattanooga before the 19th of August, 1864, it is inferred that the claimant's thirty-one bales, presumed to have reached Chattanooga, thus arrived, and were forwarded; and, because forty-two bales were received at Chattanooga on that day from the quartermaster at Kingston, it is inferred that the claimant's bales were among them. These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from

premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Evid., p. 80, lays down the rule thus: "In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by *direct* evidence, as if they were the very facts in issue." It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best on Evid., 95. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. *Douglas* v. *Mitchell*, 35 Penn. St. 440.

The Court of Claims thought the facts found by them entitled the claimant to the legal presumption said by this court to exist in *Crussell's Case*, 14 Wall. 1; and therefore determined, as a conclusion of law, that the cotton taken from the claimant was a part of that transmitted to Nashville, and turned over to the treasury agent and sold. We think *Crussell's Case* does not justify such a conclusion. Because property was captured by a military officer and sent forward by him, and because there is an unclaimed fund in the treasury derived from sales of property of the same kind as that captured, because *omnia presumuntur rite esse acta*, and officers are presumed to have done their duty, it is not the law that a court can conclude that the property was delivered by the military officer to a treasury agent, that it was sold by him, and that the proceeds were covered into the treasury. The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. Best, in his Treatise on Evid., sect. 300, says, "The true principle intended to be asserted by the rule seems to be, that there is a

general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view, where there is general evidence of facts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy." Nowhere is the presumption held to be a substitute for proof of an independent and material fact. The language of the opinion in *Crussell's Case* would perhaps mislead, were it not read in connection with the finding of facts. The question was, whether seventy-three bales of cotton of the plaintiff's had been forwarded, with a much larger amount, to the officer in charge of military transportation at Nashville, and by him turned over to the treasury agent. There was no direct proof that the plaintiff's cotton was included in the shipment; but there was proof that the treasury agent forwarded the cotton received by him to the supervising agent at Cincinnati, where a sale was soon after made, and some of the bales sold were marked with the plaintiff's mark. The question, therefore, whether the military officer who shipped the large quantity had shipped with it the cotton of the plaintiff, was not left to depend upon the presumption that he had done his duty. There was distinct and independent proof of it in the fact that some of the plaintiff's cotton had reached Cincinnati, and had been sold there. The presumption was only confirmatory of what had been proved by evidence, and in confirmation of that proof it might be invoked. This is all that can fairly be deduced from the opinion of the court as delivered by the Chief Justice.

No more need be said of the present case. It is not found as a fact that the identical cotton captured from the plaintiff ever came into the hands of a treasury agent, or that it was sold, and that the proceeds were paid into the treasury; and the presumption of law adopted by the court, that the cotton was a part of that transmitted and sold, was unwarranted.

Judgment reversed, and cause remanded for a new trial.

NEW YORK LIFE INSURANCE COMPANY *v.* HENDREN.

This court has no jurisdiction to re-examine the judgment of a State court in a case where the pleadings and the instructions asked for and refused present questions as to the effect, under the general public law, of a sectional civil war upon the contract which was the subject of the suit, and when it was not contended that that law, as applicable to the case, had been modified or suspended by the constitution, laws, treaties, or executive proclamations, of the United States.

ERROR to the Supreme Court of Appeals of the State of Virginia.

The plaintiff in error, a company incorporated under the laws of the State of New York, having its home office in New-York City, issued its policy of insurance, bearing date Aug. 25, 1856, to Mrs. Hendren, the defendant in error, on the life of her husband. The insurance was negotiated through an agent of the company at Norfolk, in Virginia, in which State Mrs. Hendren and her husband then, and until his death, resided. He died Aug. 15, 1862.

She brought this suit to recover the amount of the policy. Judgment was rendered in her favor in the Court of the Corporation of the City of Norfolk, which was affirmed by the Supreme Court of Appeals of the State. The company sued out this writ of error.

Mr. Edward O. Hinkley for the plaintiff in error.

Mr. Albert Ritchie, *contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This record does not show that any Federal question was decided or necessarily involved in the judgment rendered by the court below. The pleadings, as well as the instructions asked and refused, present questions of general law alone. The court was asked to decide as to the effect, under the general public law, of a state of sectional civil war upon the contract of life insurance, which was the subject of the action. It was not contended, so far as we can discover, that the general laws of war, as recognized by the law of nations applicable to this case, were in any respect modified or suspended by the constitution,

laws, treaties, or executive proclamations, of the United States. This distinguishes the present case from *Matthews* v. *McStea*, where jurisdiction was taken at the last term (20 Wall. 640), and the case decided at the present term. 91 U. S. 7. The question was there presented, whether the President's proclamation of April 19, 1861, did not suspend, for the time being, the operation of that principle in the law of war which prohibited commercial intercourse in time of war between the adherents of the two contending powers. Here there is nothing of the kind.

Our jurisdiction over the decisions of the State courts is limited. It is not derived from the citizenship of the parties, but from the questions involved and decided. It must appear in the record, or we cannot proceed. We act upon questions actually presented to the court below, not upon such as might have been presented or brought into the case, but were not.

The case, therefore, having been presented to the court below for decision upon principles of general law alone, and it nowhere appearing that the constitution, laws, treaties, or executive proclamations, of the United States were necessarily involved in the decision, we have no jurisdiction. We have often so decided. *Bethel* v. *Demaret*, 10 Wall. 537; *Delmas* v. *Insurance Co.*, 14 id. 666; *Tarver* v. *Keach*, 15 id. 67; *Rockhold* v. *Rockhold*, *supra*, p. 129.

Dismissed for want of jurisdiction.

Mr. Justice Bradley dissenting.

I dissent from the judgment of the court in this case. When a citizen of the United States claims exemption from the ordinary obligations of a contract by reason of the existence of a war between his government and that of the other parties to it, the claim is made under the laws of the United States by which trade and intercourse with the enemy are forbidden. It is not by virtue of the State law that such intercourse is forbidden; for a separate State cannot wage war: that is the prerogative of the general government. It is in accordance with international law, it is true; but international law has the force of law in our courts, because it is adopted and used by the United States. It could have no force but for that, and may

be modified as the government sees fit. Of course, the government would not attempt to modify it in matters affecting other nations, except by treaty stipulations with them: if it did, it would prepare itself to carry out its resolutions by military force. But, in many things that *prima facie* belong to international law, the government will adopt its own regulations: such as the extent to which intercourse shall be prohibited; how far property of enemies shall be confiscated; what shall be deemed contraband, &c. All this only shows that the laws which the citizens of the United States are to obey in regard to intercourse with a nation or people with which they are at war are laws of the United States. These laws will be the unwritten international law, if nothing be adopted or announced to the contrary; or the express regulations of the government, when it sees fit to make them. But in both cases it is the law of the United States for the time being, whether written or unwritten.

The case, then, of claiming dissolution or extinction of a contract on the ground of the existence of a war, is precisely a case within the meaning of the law which gives a writ of error to this court from the judgment of a State court where a right or immunity is claimed under the Constitution of the United States, or under an authority exercised under the United States. The power given by the Constitution to Congress to declare war, and the authority of the general government in carrying on the same, are the grounds on which the exemption or immunity is claimed. It is under the authority of the government of the United States that the party is not only shielded, but prevented, from the execution of his contracts. If he performed them, it would be a violation of his obligations to his government.

It is highly expedient that obligations and immunities of this sort, arising from public law and the public relations of the government, should be subject to uniform rules, and to the final adjudication of the judicial department of the general government.

TOWNSHIP OF ELMWOOD *v.* MARCY.

1. When the construction of the constitution or the statutes of a State has been fixed by an unbroken series of decisions of its highest court, the courts of the United States accept and apply it in cases before them.
2. Hence this court, conformably to the opinion of the Supreme Court of Illinois, holds that the bonds issued April 27, 1869, by the supervisor and town-clerk of the township of Elmwood, in that State, by way of payment for an additional subscription of $40,000 of stock of the Dixon, Peoria, and Hannibal Railroad Company, over and above the amount authorized by the original charter of said company, are not binding on the township.

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

The judges of the Circuit Court were divided in opinion, whether, under the facts of this case and the legislation of Illinois applicable to them, there existed power and lawful authority to issue the bonds and coupons in controversy, so as to render them valid and collectible in the hands of the plaintiff below, who is defendant here. Judgment was rendered in his favor, and the cause is brought here for review. From the certificate of division, it appears that the Dixon, Peoria, and Hannibal Railroad Company was incorported March 5, 1867; that prior to Feb. 11, 1869, the road of said company was located in the township of Elmwood; that, at the date last named, an election was called under the provisions of the charter of said company, to be held on March 16, 1869, to determine whether said township would subscribe to the stock of said company, and give its bonds for $35,000, the maximum amount permitted by law; that, five days afterwards, — to wit, on the 16th of February, 1869, — notice was given of another election, not purporting to be in pursuance of said charter, to be held at the same time and place with that aforesaid, to determine whether said township would subscribe to the stock of said company, and issue the bonds for a further sum, over and above the amount authorized by law as aforesaid; that said first-named election resulted in favor of subscribing said $35,000, and the second-named election resulted in favor of an additional subscription of $40,000; that after both said elections were notified, and seven days before they were held, —

viz., on the 9th of March, 1869, — the charter of said company was amended so as to authorize towns in which said road might be *thereafter* located to vote and subscribe $100,000 to its capital stock; also that, thirty-two days after said election, — viz., on the seventeenth day of April, 1869, — the legislature passed a validating act, and that ten days thereafter, on the 27th of that month, the supervisor and town-clerk issued the bonds and coupons contemplated by both elections. That act legalized and confirmed the subscription for $40,000 to the capital stock of the company over and above that for $35,000, which was confessedly made in accordance with the provisions of the original charter. The bonds in suit are part of those issued for the greater sum; and the question is, whether they are binding on the town.

Mr. H. B. Hopkins, *Mr. J. H. Morrow*, and *Mr. E. G. Johnson*, for the plaintiff in error.

The bonds and coupons in question are null and void. *First*, Because their issue was and is inhibited by the Constitution of Illinois, and the laws upon which they depend for their validity are unconstitutional and void. *Second*, Because they were issued in plain violation of the letter and spirit of the acts which purport to authorize their issue. *Wiley et al.* v. *Silliman et al.*, 62 Ill. 170; *Marshall et al.* v. *Silliman et al.*, 61 id. 218.

The act of the Legislature of Illinois of April 17, 1869, attempts to confer the power of municipal taxation upon persons who are not the corporate authorities of the district to be taxed, and is therefore unconstitutional and void. *Harward et al.* v. *The St. Clair and Monroe Levee and Drainage Company et al.*, 51 Ill. 130; *Same* v. *The State of Illinois*, id. 138; *The People ex rel., &c.* v. *Mayor, &c., of Chicago*, id. 17; *The People ex rel., &c.* v. *Soloman, Clerk of Cook County*, id. 37; *Hessler* v. *Drainage Commissioners*, 53 id. 105; *Marshall et al.* v. *Silliman et al.*, and *Wiley et al.* v. *Same*, *supra*.

It has become a prominent doctrine of this court, that the construction which prevails in the State courts at the time municipal bonds are issued, upon questions touching their validity, enters into and forms a part of them as the settled law of those contracts, although the State court may have adopted

a different ruling. *Gelpeck* v. *City of Dubuque*, 1 Wall. 175; *Olcott* v. *Supervisors*, &c., 16 id. 678; *Havemeyer* v. *Iowa County*, 3 id. 294; *Mitchell* v. *Burlington*, 4 id. 270; *Christy* v. *Pridgeon*, id. 196.

Mr. Isaac G. Wilson and *Mr. Sanford B. Perry* for the defendant in error.

It is apparent, from the phraseology of the act of April 17, 1869, that it does not compel the township to incur an obligation and tax itself without its consent. So far from conferring a new power, or imposing a debt, it simply cures and legalizes the defective and irregular exercise of an existing power. *The President and Trustees of the Town of Keithsburg* v. *Frick*, 34 Ill. 405.

It is competent for the legislature to give effect and validity to an election held for the purpose of determining as to the expediency of subscribing for stock, before the passage of a law providing therefor. *St. Joseph Township* v. *Rogers*, 16 Wall. 644; *McMillan et al.* v. *Lee Co.*, 3 Iowa, 317.

Wiley et al. v. *Silliman et al.*, 61 Ill. 218, is squarely in conflict with the decision of this court in *Township of Pine Grove* v. *Talcott*, 16 Wall. 666.

If the words, "and is hereby declared binding on said township, and said $40,000, when subscribed according to the conditions of said vote, may be collected from said township in the same manner as if the said subscription had been made under the provisions of said charter," create a debt, and so are obnoxious to the provisions of the Constitution, they must be disregarded. It is a familiar principle of construction, that a statute is void only so far as its provisions are repugnant to the Constitution; and that one provision may be void, and the others valid. Sedg. on Stat. and Const. Law, 2d ed., 413; *Fisher* v. *McGin*, 1 Gray, 22.

The township organization law of Illinois does not declare what officers of a town constitute its municipal officers.

The supervisor and town-clerk are, by the obvious intent of the law, the proper officers to execute all authorized town obligations, except those otherwise specially provided for. They are, *pro hac vice*, the municipal authorities. *Marcy* v. *Town of Ohio*, 5 Legal News, 551.

MR. JUSTICE DAVIS delivered the opinion of the court.

The questions arising upon this record were elaborately considered in *Marshall et al.* v. *Silliman et al.*, 61 Ill. 218; and the doctrines there announced were recognized and enforced in *Wiley et al.* v. *Silliman et al.*, 62 id. 170. The last case involved the validity of the identical bonds in question here; but both were, in all substantial particulars, alike. They were bills in equity to enjoin the collection of taxes for the payment of interest; and the court decided that the law of March 9 gave no power to issue the bonds. The opinion affirms, that, when the notice for the vote was posted, the charter of the company only authorized a subscription for $35,000; that the notice under which the vote for the $40,000 was taken was a mere call for a special town-meeting, signed only by twelve voters, which did not seek to follow the provisions of the charter, as, indeed, it could not, since the power under them was already exhausted; and that the proceeding was utterly void. That law is disposed of in these words: "It is true that on the 9th of March, 1869, the legislature passed another act authorizing towns to subscribe $100,000; but a new notice was not given. The charter required twenty days' notice, and only seven intervened between the passage of the act and the vote.

It was insisted, however, that the curative act of April 17, passed after the vote had been taken, gave validity to the bonds. On this ground counsel placed their chief reliance, and to it the court directed its principal attention.

The act was direct and positive, and left nothing to inference. It was intended, so far as the legislature could do it, to make the bonds binding on the township, and collectible in the same manner as if the subscription had been authorized by the charter, and voted for in accordance with its terms. The court held it to be a violation of the fifth section of the ninth article of the Constitution of 1848, which declares "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." The decision was placed on the

ground, that, this section having been intended as a limitation upon the law-making power, the legislature could not grant the right of corporate taxation to any but the corporate authorities, nor coerce a municipality to incur a debt by the issue of its bonds. In the opinion of the court, the act was an effort to do both these things, as it attempted to confer that right upon persons who were not by themselves the corporate authorities in the sense of the Constitution, and to compel the town to issue its bonds for railroad stock by declaring a void proceeding to be a valid subscription.

Counsel argued that the act might be treated as vesting an unconditional authority in the supervisors and town-clerk to issue the bonds, and cited *The President and Trustees of the Town of Keithsburg* v. *Frick*, 34 Ill. 405, which recognizes that the legislature can constitutionally bestow upon the trustees of a town the power, if they think proper to exercise it, to subscribe for stock in a railroad company, without requiring the subject to be submitted to a vote of the people. The court, adhering to the doctrines of that case, but distinguishing it from the one under consideration, and referring to *Lovingston* v. *Wilder*, 53 Ill. 302, as an authority in point, said "that the town supervisor and clerk who issued the bonds in controversy do not represent a township as the board of trustees represent an incorporated town, or the common council a city. The supervisor and town-clerk are but a part of the corporation. They have no power of taxation, nor power of themselves to bind the city in any way." But, even if these two officers could be recognized as the corporate authorities, the court observed "that they cannot be said to have voluntarily incurred this debt in behalf of the town. The act gave them no discretion. It declared the subscription shall be binding, and may be collected; and left to the town authorities only the ministerial function of executing the behest of the legislature."

The main doctrines of these cases were not new, but had been settled by the repeated adjudications of the Supreme Court; and that learned tribunal has given no decision at variance with them.

In *Harward* v. *The St. Clair Drainage Company*, 53 Ill. 130, the clause of the Constitution under consideration in *Marshall*

et al. v. *Silliman et al.*, and *Wiley et al.* v. *Silliman et al.*, was construed to be a limitation upon the power of the legislature to grant the right of corporate or local taxation to any other persons than the corporate or local authorities of the municipality or district to be taxed. To the same effect are *Hessler* v. *Drainage Company*, 53 id. 105, and *Lovingston* v. *Wilder*, id. 302. *The People ex rel., &c.* v. *The Mayor of Chicago*, 51 id. 17, decides that the legislature could not compel a municipal corporation, without its consent, to issue bonds or incur a debt for a merely corporate purpose.

So far as we can see, the only new point determined in the cases we have first cited is that it is not competent for the legislature to single out the supervisor and town-clerk, and confer on them powers which the Constitution limits to the corporate authorities as an aggregate body.

We are not called upon to vindicate the decisions of the Supreme Court of Illinois in these cases, or approve the reasoning by which it reached its conclusions. If the questions before us had never been passed upon by it, some of my brethren who agree to this opinion might take a different view of them. But are not these decisions binding upon us in the present controversy? They adjudge that the bonds are void, because the laws which authorized their issue were in violation of a peculiar provision of the Constitution of Illinois. We have always followed the highest court of the State in its construction of its own constitution and laws. It is only where they have been construed differently at different times, that, in cases like this, we have adopted as a rule of action the first decision, and rejected the last. This has been done on the ground that rights acquired on the strength of the former decision ought not to be lost by a change of opinion in the court; but, where the construction has been fixed by an unbroken series of decisions, the courts of the United States accept and apply it in cases before them. If a different rule were observed, it is not difficult to see that great mischief would ensue.

There has been no conflict of judicial opinion in Illinois on the controlling question in this suit, but, on the contrary, settled uniformity. As these concurring decisions of the court of last resort in that State are grounded on the construction of

its constitution and statutes, it is the duty of this court to conform to them. *Judgment reversed, and new trial ordered.*

MR. JUSTICE STRONG, with whom concurred MR. JUSTICE CLIFFORD and MR. JUSTICE SWAYNE, dissenting.

The material facts in this record are few. The two elections were held on the same day (March 16, 1869); one in pursuance of a regular call made Feb. 11, and the other pursuant to a call made Feb. 16, 1869. At the election held under these calls, a subscription for $35,000 was voted, and also an additional subscription of $40,000. The aggregate of the two was $75,000; and a subscription for so much stock having been made in accordance with the popular vote, and certificates therefor having been taken by the supervisor and town-clerk, bonds for the amount were issued. At the time these two subscriptions were voted, there was a provision in the original charter of the railroad company (passed March 5, 1867) authorizing the subscription for $35,000, and there was also in the amendment to the charter (passed March 9, 1869) a provision authorizing an additional subscription not exceeding $65,000. There was, therefore, full legislative authority for the entire subscription of $75,000, and for the issue of bonds for that amount, when the elections were held at which the subscriptions were voted.

But the call for the second vote to determine whether the town would subscribe for the additional $40,000 was irregular in two particulars. It was made before the act of March 9, 1869, was passed, — the act which authorized a subscription larger than $35,000, though the vote was taken afterwards; and the petition for the call was signed by the supervisor, town-clerk, and twelve freeholders (in the mode of calling special town-meetings), instead of being signed by twenty-five legal voters, — the mode pointed out by the act of March 5, 1867. The notice of the election, however, was given twenty days, — the full time prescribed by the act.

These variances from the directions of the statute were irregularities, mere non-compliance with form and mode; nothing more. Authority to subscribe the additional $40,000, if the subscription was approved by a popular vote, existed undenia-

bly *when the vote was cast in favor of the subscription*, though not when the call for the subscription was made. The authority emanated from the legislature. Whether it should be exercised or not was made to depend on the result of a popular vote. The popular vote was the substantial thing. The mode in which the election should be called, as well as the length of time during which notice of it should be given, were formalities required indeed, but they were not of the essence of the power. They were merely ancillary to the main object which the legislature had in view; which was to provide for an expression of the popular sentiment.

But if the departure from the mode of proceeding pointed out by the legislature was only an informality, as it plainly was, it was curable by the same power that prescribed the form; and I think it was cured, in the present case, before the subscription was made, and before the bonds were issued. On the seventeenth day of April, 1869, the legislature passed an act by which it was enacted as follows: —

"That a certain election held in the township of Elmwood, in Peoria County, on the sixteenth day of March, A.D. one thousand eight hundred and sixty-nine, at which a majority of the legal voters in said township, in special town-meeting, voted to subscribe for and take $40,000 of the capital stock of the Dixon, Peoria, and Hannibal Railroad Company, over and above the $35,000 which was on the same day subscribed for and taken in accordance with the provisions of the charter of said company, is hereby legalized and confirmed, and is declared to be binding upon said township; and the said $40,000, when subscribed according to the conditions of said vote, may be collected from said township in the same manner as if the said subscription had been made under the provisions of said charter."

Why this act did not cure all irregularities and all informalities of the election, and why, in connection with the prior acts of May 5, 1867, and March 9, 1869, it did not complete the authority to subscribe for the $40,000 of stock, and to issue the town-bonds therefor, I cannot discover. A retrospective statute curing defects in legal proceedings, and even in contracts, is of frequent occurrence, and, unless expressly forbidden by constitutional provisions, is effective. Irregular proceedings in courts,

or in the organization or elections of corporations, and irregularities in the votes or other action of municipal corporations, by means of which a statutory power has failed of due and regular execution, have often been cured by such legislation; and the power irregularly or informally executed has been declared well exercised. Such statutes are held to be constitutional. The principle asserted is, that if the thing wanting, or which failed to be done, and the want or failure of which constitutes the defect or irregularity in the proceedings, is something which the legislature might have dispensed with by prior statute, it is within the power of the legislature to dispense with it by subsequent enactment. Cooley, Const. Lim. 371, and cases there cited. Illustrations of this principle abound. Void contracts have thus been validated. So have void acknowledgments by married women, and, repeatedly, contracts by municipal corporations, which, when made, were in excess of their authority. Such retrospective laws are supported, when they impair no contract or disturb no vested right, but only vary remedies, or cure defects in proceedings otherwise fair. They have their foundation in equity and in justice. In *St. Joseph Township* v. *Rogers*, 16 Wall. 666, where it appeared that the election at which the subscription was approved was held before the passage of the law authorizing the subscription, and not after, as in the present case, this court said, "Argument to show that defective subscriptions of the kind may, in all cases, be ratified where the legislature could have originally conferred the power, is certainly unnecessary, as the question is authoritatively settled by the decisions of the Supreme Court of the State (Illinois) and of this court in repeated instances." And again: "Mistakes and irregularities are of frequent occurrence in municipal elections, and the State legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract or injuriously affect the rights of third persons, are never regarded as objectionable, and certainly are within the competency of legislative authority."

It is argued, however, that the validating act of April 17, 1869, is unconstitutional because it compels a municipal corporation to contract and pay a debt without its consent. It is said the election by which it was voted to subscribe was a

nullity, and, therefore, that there never was any consent to the subscription. The argument is founded upon a complete misconception of the facts and of the law. The statute was in no just sense an act to confer new power, or to impose a debt. It was what it purports to be, — an act to cure the defective execution of a power already granted. That such an act creates no rights, confers no authority, and imposes no new duty, is palpably plain. It might as well be argued that an act curing defective acknowledgments of a deed by a married woman compels her to make a conveyance. It cannot be said that there was no consent to the subscription. True, the consent was not according to the formalities required when it was given; but it was none the less a substantial assent to the proposition to subscribe. The validating statute, therefore, was not an overriding of the will of the voters: it was rather an act to give effect to an informally expressed consent.

The position here taken on behalf of the plaintiff in error is as novel as it is unsound. It is, in effect, to deny the power of a legislature to pass retrospective statutes in any case for the purpose of curing the irregular or defective execution of a power by municipalities, a power never before denied. In *The President and Trustees of the Town of Keithsburg* v. *Frick*, 34 Ill. 405 (decided in 1864), it was ruled, that if a town subscribes to the stock of a railroad company, and issues its bonds therefor, without legislative authority therefor, it is competent for the legislature to legalize and validate what the town has done. There the town, having no authority to take stock, had held an election irregularly, and had voted to subscribe for $20,000 and issue bonds. A subsequent act of the legislature validated the subscription, and the act was sustained by the Supreme Court of the State. It was not thought then that the confirming act compelled the town to contract a debt without its consent. This case of *Keithsburg* v. *Frick* was the declared law of the State when the bonds of the plaintiff in error were issued. It was in full accord with the decisions made in other States. *McMillan et al.* v. *Lee County*, 3 Iowa, 317.

It matters not, then, that the Supreme Court of Illinois changed its ruling in 1871, as in the cases of *Marshall et al.* v. *Silliman et al.*, 61 Ill. 218, and *Wiley et al.* v. *Silliman et al.*, 62 id. 170.

This was after the bonds had been issued. The purchaser had a right to rely upon the law as declared by the court when he purchased, or when the bonds were issued, especially as it was in accordance with the former decisions of the same court, and with what has been decided in every other State, so far as we know, and by this court. Then it had never been held that the legislature could not authorize the supervisor and town-clerk to execute township bonds. True, it had been decided that the power could not be conferred upon commissioners or persons who were not officers of the township, and for the reason that they were not the corporate authorities, but were persons having no interest in or control over the township affairs, — a reason inapplicable to the township surpervisor and clerk; and certainly it had never been decided that an act of the legislature validating an irregular election or an irregular exercise of power by the officers of a municipal corporation was unconstitutional and inoperative. The decisions made in 1871, after these bonds were issued, are, in my judgment, the assertion of new doctrine, which this court is not bound to follow, especially when it leads to such injustice as the present decision exhibits.

For these reasons, I dissent from the judgment of the court.

CHAMBERLAIN *v.* ST. PAUL AND SIOUX CITY RAILROAD COMPANY ET AL.

1. The act of Congress of March 3, 1857, granting certain lands to the Territory of Minnesota for the purpose of aiding in the construction of several lines of railroad between different points in the Territory, only authorized for each road, in advance of its construction, a sale of one hundred and twenty sections. No further disposition of the land along either road was allowed, except as the road was completed in divisions of twenty miles.
2. Where land is conveyed to the State by a corporation as indemnity against losses on her bonds loaned to it, the bondholders have no equity for the application of the land to the payment of the bonds which can be enforced against the State, and her grantees take the property discharged of any claim of the bondholders.

APPEAL from the Circuit Court of the United States for the District of Minnesota.

The plaintiff is the holder of bonds of the State of Minnesota, amounting to half a million of dollars, and seeks to charge certain lands in the possession of the defendant railroad companies with their payment. The bonds were issued in 1859 to the Southern Minnesota Railroad Company, under the authority of the constitutional amendment of April, 1858. That company was one of the four companies to which the Territory of Minnesota, on the 22d of May, 1857, granted the lands obtained by the act of Congress of March 3 of that year. The grant of the State was made in express terms, subject to the provisions of the act of Congress, and would have been thus subject without any declaration to that effect. The act of Congress only authorized a sale of one hundred and twenty sections for each road in advance of its construction. Any further disposition of the land along either road was allowed only as the road was completed in divisions of twenty miles.

The Southern Minnesota Railroad Company was authorized to construct two of the lines mentioned in the act of Congress, and took, therefore, under the grant of the State, a title to two hundred and forty sections. No title to any greater quantity passed from the State. In allowing one hundred and twenty sections for each line to be disposed of before the construction of any part of the road, Congress intended to furnish aid for such preliminary work as is required in all similar undertakings. We do not understand that the complainant contends that the company acquired an interest in any other lands than the one hundred and twenty sections for each of its roads.

In July of that year, the lines of the two roads were definitely surveyed and located to the extent of the grading subsequently made, and maps of the surveys were filed in the General Land-Office at Washington; but it does not appear that any other work for the construction of either of the roads was done during the year.

The Territory of Minnesota became a State in October, 1857; and was admitted into the Union in May, 1858. Its constitution prohibited the loan of the State credit in aid of any corporation; but the first legislature assembled under it, being desirous of expediting the construction of the lines of road in

aid of which the congressional grant was made, proposed, in March, 1858, an amendment to the constitution, removing this prohibition so far as the four companies named in the act of May 22, 1857, were concerned. The amendment was submitted to the people, and, on the 15th of April of the same year, was adopted. It provided, *first*, for the issue of bonds of the State to the railroad companies; *second*, for taking from them security for the payment of the interest, and against loss on the bonds thus issued; and, *third*, for a forfeiture of the lands and franchises of the companies in case certain portions of their respective roads were not completed within prescribed periods.

1st, The bonds were to be issued to each of the four companies, bearing interest at the rate of seven per cent per annum, payable semi-annually in the city of New York, to an amount not exceeding $1,250,000 in instalments of $100,000, as often as any ten miles of its road were ready for placing the superstructure thereon, and an additional instalment of the same amount as often as that number of miles of the road was fully completed, and the cars were running thereon, until the whole amount authorized was issued. The bonds were to be denominated Minnesota State Railroad Bonds; they were to be signed by the governor, countersigned and registered by the treasurer, and sealed with the seal of the State; they were to be issued in denominations not exceeding $1,000, payable to the order of the company to whom issued, transferable by indorsement of the president of the company, and redeemable at any time after ten and before the expiration of twenty-five years from their date; and for the payment of their interest, and the redemption of their principal, the faith and credit of the State were pledged.

2d, The security to be taken for the payment of the interest on the bonds received by each company was to consist of an instrument pledging the net profits of its road; and the security against loss on the bonds was to consist of a conveyance to the State of the first two hundred and forty sections of land, free from prior incumbrances, which the company was or might be authorized to sell, and a transfer to the treasurer of the State of an amount of first-mortgage bonds on the roads, lands, and franchises of the company, corresponding in amount to the State

bonds issued to it. The delivery of the first-mortgage bonds necessarily implied the execution of a mortgage or deed of trust for their payment. In case either company made default in the payment of the interest or principal of the bonds issued to it by the governor, no more State bonds were to be thereafter issued to that company; and the governor was to proceed to sell, in such manner as might be prescribed by law, its bonds, or the lands held in trust, or require a foreclosure of the mortgage executed by the company to secure its bonds.

3d, Each company which accepted the bonds of the State was required, as a condition thereof, to complete not less than fifty miles of its road on or before the expiration of the year 1861, and not less than one hundred miles before the year 1864, and four-fifths of the entire length of its road before the year 1866; the amendment declared that any failure on the part of the company to complete the number of miles of its road in the manner and within the several times thus prescribed should forfeit to the State all the rights, title, and interest of any kind whatsoever in and to any lands granted by the act of May 22, 1857, together with the franchises connected with the same, not pertaining to the portion of the road then constructed.

The Southern Minnesota Railroad Company accepted the amendment, and executed the pledge of net profits and the conveyance of the two hundred and forty sections required. It also executed a deed of trust upon its roads and all its lands and franchises to secure its first-mortgage bonds, to be transferred to the treasurer when State bonds were received. It then entered upon the construction of its roads, and contracted with the plaintiff to grade and prepare the road-beds for the superstructure. During that and the following year 1859, thirty-seven and a half miles of one of the roads and twenty miles of the other road were thus graded by the plaintiff. As often as any ten miles of either of the roads were ready for the superstructure, the governor issued to the company bonds of the State to the amount of $100,000. Nearly all of these bonds, amounting to half a million of dollars, were transferred to the plaintiff for his work in grading the roads, and are still held by him. They were indorsed by the president of the company with a waiver of presentment, demand, and notice.

An act of the legislature, passed on the 12th of August, 1858, required the first-mortgage bonds of the company to be transferred to the treasurer, to be drawn so that the interest and principal should mature sixty days before the maturity of the interest and principal of the State bonds; and, as the bonds of the company offered were accepted, we assume that they were so drawn. The act also provided for the foreclosure of the mortgage, or deed of trust, whenever default was made in the payment of either interest or principal.

The company never completed any part of either of its roads, and did nothing more than the grading mentioned; and it made default in the payment of the interest maturing upon the State bonds, and also in the payment of the interest accruing on its first-mortgage bonds. The governor thereupon proceeded under the above act, and an act passed on the 6th of March, 1860, and procured a foreclosure of the mortgage of the company; and the roads, lands, and franchises which it covered were sold pursuant to its provisions, and at the sale were purchased by the State. This purchase took place in October, 1860; and the necessary conveyances were made to the State. From that time until the 4th of March, 1864, the State held the property, lands, and franchises thus acquired. During this period, it made repeated efforts to induce other parties to undertake the enterprises and carry them to completion, but without success.

On the 4th of March, 1864, the legislature passed an act by which two new companies were organized, — one with the same name as the original company, the Southern Minnesota Railroad Company; and the other by the name of the Minnesota Valley Railroad Company. The name of this latter company was afterwards changed to that of the St. Paul and Sioux City Railroad Company.

To the companies thus organized the legislature granted, subject to certain conditions, all the property, rights, and franchises of the original company which the State had acquired, "free from all claims and liens:" those which appertained to one of the lines were granted to the new Southern Minnesota Railroad Company; those which appertained to the other line were granted to the Minnesota Valley Railroad Company, now the St. Paul and Sioux City Railroad Company. The condi-

tions annexed to the grants were complied with, and the grants accepted. These new companies soon afterwards commenced the construction of their respective roads, and had, at the commencement of this suit, nearly completed them. The Southern Minnesota Railroad Company had constructed and equipped one hundred and sixty-seven miles of its road, at an expenditure of $5,000,000; and the St. Paul and Sioux City Railroad Company had constructed and equipped one hundred and seventy miles of its road, at an expenditure of $3,000,000.

Upon the completion of ten miles of its road, each company received from the governor, pursuant to the provisions of the act, a deed in fee-simple of one hundred and twenty sections of land appertaining to its road, to which the State was entitled under the congressional grant, and the bonds of the original Minnesota company transferred to the treasurer of the State were cancelled.

Pending these proceedings, the bonds of the State in the hands of the complainant remained unpaid, and they are still unpaid. The faith of the State, solemnly pledged for the payment of both principal and interest, has never been kept. So far from keeping it, the State, as early as November, 1860, adopted an amendment to its constitution, prohibiting any law, which levied a tax or made other provision for such payment, from taking effect until the same had been submitted to a vote of the people and been adopted by them. This prohibition, if not a violation of the State's pledge, conflicts with its spirit. The bonds issued are legal obligations. The State is bound by every consideration of honor and good faith to pay them. Were she amenable to the tribunals of the country as private individuals are, no court of justice would withhold its judgment against her in an action for their enforcement.

The complainant, under these circumstances, finding no relief from the pledged faith of the State, and unable to pursue any remedies at law against her on the bonds, seeks to charge with their payment the two hundred and forty sections mortgaged by the company under the amendment of 1858 and purchased by the State under the foreclosure of the mortgage, and now held by the defendant railroad companies.

Mr. Gordon E. Cole and *Mr. W. M. Evarts* for the appellant.

The position of the State in relation to the bonds is that of an accommodation maker of negotiable paper. She is simply a surety. The original Southern Minnesota Railroad Company which indorsed the bonds is the principal debtor. Hence, upon the doctrine of subrogation, the conveyance by that company of any property to the State, to indemnify her, creates a trust in favor of the holder of the bonds, and appropriates the property so conveyed as a fund for the payment of them. 1 Lead. Cas. in Eq. 163, 164; 1 Story, Eq., sects. 502, 638.

The bonds are valid obligations, and the defendants are affected with notice of the facts on which the complainant bases his claim. He is not estopped by any act or laches from maintaining his suit.

Mr. E. C. Palmer and *Mr. James Gilfillan, contra.*

As between the State and the holder of the State bonds, the State is the principal debtor, and primarily liable; and there is no ground for the application of the doctrine of subrogation.

The defendant companies are purchasers in good faith without notice.

The complainant is estopped by his own actions from making his claim, and is not entitled to relief by reason of laches.

MR. JUSTICE FIELD, after making the foregoing statement of the case, delivered the opinion of the court.

The position of the complainant is, that, notwithstanding the form of the contract, the original company was, in fact, the principal debtor, and the State its surety; and that, as the creditor to be paid, he is entitled to have the securities taken by the State applied to the payment of the bonds held by him; that the one hundred and twenty sections for each road, which the company was authorized to construct, became its property by the act of May 22, 1857; that the subsequent interest of the State under the trust-deed and mortgage was only the right to hold them as security against loss upon its bonds; that this interest was not changed by the foreclosure of the mortgage and purchase of the State at the sale; and that the lands passed to the defendant railroad companies with notice that they were thus held by the State.

The general doctrine, that a creditor has a right to claim the benefit of a security given by his debtor to a surety for the latter's indemnity, and which may be used if necessary for the payment of the debt, is not questioned. The security in such case is in the nature of trust-property, and the right of the creditor arises from the natural justice of allowing him to have applied to the discharge of his demand the property deposited with the surety for that purpose if required by the default of the principal. In this case, the deed and mortgage to the State were not intended to create a trust in favor of the holders of her own bonds. The State was primarily liable to the bondholders; and it was only as between her and the company that the relation of principal and surety existed. It may be doubted whether the bondholders could call upon the company in any event. The indorsement made by the president simply transferred the bonds: it was not the act of the company. Be that as it may, whatever right the plaintiff had to compel the application of the lands received by the State to the payment of the bonds held by him, it was one resting in equity only. It was not a legal right arising out of any positive law or any agreement of the parties. It did not create any lien which attached to and followed the property. It was a right to be enforced, if at all, only by a court of chancery against the surety. But, the State being the surety here, it could not be enforced at all, and, not being a specific lien upon the property, cannot be enforced against the State's grantees.

Where property passes to the State, subject to a specific lien or trust created by law or contract, such lien or trust may be enforced by the courts whenever the property comes under their jurisdiction and control. Thus, if property held by the government, covered by a mortgage of the original owner, should be transferred to an individual, the jurisdiction of the court to enforce the mortgage would attach, as it existed previous to the acquisition of the government. *The Siren*, 7 Wall. 158, 159. But, where the property is not affected by any specific lien or trust in the hands of the State, her transfer will pass an unincumbered estate.

But aside from this consideration, which of itself is a suffi-

cient answer to the present suit, the long delay of the complainant in asserting any claim to the lands in controversy, whilst the defendants were constructing, at a vast expenditure of labor and money, their railroads, deprives his suit of favorable consideration. It does not appear that for twelve years after the abandonment of work by the original Minnesota Company on the roads, the grading of which it commenced, he set up any claim such as is advanced in this suit: on the contrary, it is abundantly established that in various ways he urged upon members of the legislature the adoption of measures for the construction of the roads, which involved an appropriation by the State for that purpose of the lands in controversy; and that after the new companies were organized, and the lands were granted to them, he urged them to proceed with the enterprises, knowing that upon those lands they relied to carry on the works. Under these circumstances, it would be manifestly inequitable and unjust to grant his prayer.

The conclusion we have reached renders it unnecessary to consider the effect of the alleged forfeiture, declared by the State, upon the interest of the company in the lands.

Decree affirmed.

MR. JUSTICE STRONG dissented.

COMMISSIONERS OF LARAMIE COUNTY *v.* COMMISSIONERS OF ALBANY COUNTY ET AL.

1. Unless the constitution of a State or the organic law of a Territory otherwise prescribes, the legislature has the power to diminish or enlarge the area of a county, whenever the public convenience or necessity requires.
2. Where the legislature of Wyoming Territory organized two new counties, and included within their limits a part of the territory of an existing county, but made no provision for apportioning debts or liabilities, — *Held*, that the old county, being solely responsible for the debts and liabilities it had previously incurred, had, on discharging them, no claim upon the new counties for contribution.

APPEAL from the Supreme Court of the Territory of Wyoming.

Mr. W. R. Steele for the appellants.

Mr. A. H. Jackson, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Counties, cities, and towns are municipal corporations, created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the constitution of the State otherwise provides. Beyond doubt, they are, in general, made bodies politic and corporate; and are usually invested with certain subordinate legislative powers, to facilitate the due administration of their own internal affairs, and to promote the general welfare of the municipality. They have no inherent jurisdiction to make laws, or to adopt governmental regulations; nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the State.

Trusts of great moment, it must be admitted, are confided to such municipalities; and, in turn, they are required to perform many important duties, as evidenced by the terms of their respective charters. Authority to effect such objects is conferred by the legislature; but it is settled law, that the legislature, in granting it, does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted. Unless the Constitution otherwise provides, the legislature still has authority to amend the charter of such a corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic, or unjust, and even abolish the municipality altogether, in the legislative discretion. Cooley on Const., 2d ed., 192.

Sufficient appears to show that the complainant county was first organized under the act of the 3d of January, 1868, passed by the legislature of the Territory of Dacotah, which repealed the prior act to create and establish that county. When organized, the county was still a part of the Territory, and embraced within its territorial limits all the territory now comprising the counties of Laramie, Albany, and Carbon, in the Territory of Wyoming, — an area of three and one-half degrees from east to west, and four degrees from north to south. Very heavy expenses, it seems, were incurred by the

county during that year and prior thereto, greatly in excess of their current means, as more fully explained in the bill of complaint, which increased the indebtedness to the sum of $28,000. Other liabilities, it is alleged, were also incurred by the authorities of the county during that period, which augmented their indebtedness to the sum of $40,000 in the aggregate.

Pending these embarrassments, the charge is, that the legislature of the Territory passed two acts on the same day, — to wit, Dec. 16, 1868, — creating the counties of Albany and Carbon out of the western portion of the territory of the complainant county, reducing the area of that county more than two-thirds; that, by the said acts creating said new counties, fully two-thirds of the wealth and taxable property previously existing in the old county were withdrawn from its jurisdiction, and its limits were reduced to less than one-third of its former size, without any provision being made in either of said acts that the new counties, or either of them, should assume any proportion of the debt and liabilities which had been incurred for the welfare of the whole before these acts were passed.

Payment of the outstanding debt having been made by the complainant county, the present suit was instituted in her behalf to compel the new counties to contribute their just proportion towards such indebtedness. Attempt is made to show that an equitable cause of action exists in the case by referring to the several improvements made in that part of the Territory included in the new counties before they were incorporated, and by referring to the great value of the property withdrawn from taxation in the old county, and included within the limits of the newly-created counties.

Process was served, and the respondents appeared and filed separate demurrers to the bill of complaint. Hearing was had in the District Court of the Territory, where the suit was commenced; and the court entered a decree sustaining the demurrers, and dismissing the bill of complaint. Immediate appeal was taken by the complainant to the Supreme Court of the Territory, where, the parties having been again heard, the Supreme Court entered a decree affirming the decree of the District Court, and the present appeal is prosecuted by the complainant.

Two errors are assigned, as follows: (1.) That the Supreme Court erred in affirming the decree of the District Court sustaining the demurrers of the respondents to the bill of complaint. (2.) That the Supreme Court erred in rendering judgment for the respondents.

Corporations of the kind are properly denominated public corporations, for the reason that they are but parts of the machinery employed in carrying on the affairs of the State; and it is well-settled law, that the charters under which such corporations are created may be changed, modified, or repealed, as the exigencies of the public service or the public welfare may demand. 2 Kent, Com., 12th ed., 305; Angell & Ames on Corp., 10th ed., sect. 31; *McKim* v. *Odom*, 3 Bland, 407; *St. Louis* v. *Allen*, 13 Mo. 400; *The Schools* v. *Tatman*, 13 Ill. 27; *Yarmouth* v. *Skillings*, 45 Me. 141.

Such corporations are composed of all the inhabitants of the Territory included in the political organization; and the attribute of individuality is conferred on the entire mass of such residents, and it may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic. 1 Greenl. Ev., 12th ed., sect. 331.

Corporate rights and privileges are usually possessed by such corporations; and it is equally true that they are subject to legal obligations and duties, and that they are under the entire control of the legislature, from which all their powers are derived. Sixty-five years before the decree under review was rendered, a case was presented to the Supreme Court of Massachusetts, sitting in Maine, which involved the same principle as that which arises in the case before the court. Learned counsel were employed on both sides, and Parsons was Chief Justice of the court, and delivered the opinion. First he adverted to the rights and privileges, obligations and duties, of a town, and then proceeded to say, "If a part of its territory and inhabitants are separated from it by annexation to another, or by the erection of a new corporation, the former corporation still retains all its property, powers, rights, and privileges, and remains subject to all its obligations and duties, unless some

new provision should be made by the act authorizing the separation." *Windham* v. *Portland*, 4 Mass. 389.

Decisions to the same effect have been made since that time in nearly all the States of the Union where such municipal subdivisions are known, until the reported cases have become quite too numerous for citation. Nor are such citations necessary, as they are all one way, showing that the principle in this country is one of universal application. Concede its correctness, and it follows that the old town, unless the legislature otherwise provides, continues to be seized of all its lands held in a proprietary right, continues to be the sole owner of all its personal property, is entitled to all its rights of action, is bound by all its contracts, and is subject to all the duties and obligations it owed before the act was passed effecting the separation.

Suppose that is so as applied to towns: still it is suggested that the same rule ought not to be applied to counties; but it is so obvious that the suggestion is without merit, that it seems unnecessary to give it any extended examination. *County of Richland* v. *County of Lawrence*, 12 Ill. 8.

Public duties are required of counties as well as of towns, as a part of the machinery of the State; and, in order that they may be able to perform those duties, they are vested with certain corporate powers; but their functions are wholly of a public nature, and they are at all times as much subject to the will of the legislature as incorporated towns, as appears by the best text-writers upon the subject and the great weight of judicial authority.

Institutions of the kind, whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon any thing like a contract between them and the legislature of the State, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with every thing of the nature of compact. Instead of that, the constant practice is to divide large counties and towns, and to consolidate small ones, to meet the wishes of the residents, or to promote the public interests, as understood by those who control

the action of the legislature. Opposition is sometimes manifested; but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable. *School Society* v. *School Society*, 14 Conn. 469; *Bridge Co.* v. *East Hartford*, 16 id. 172; *Hampshire* v. *Franklin*, 16 Mass. 76; *North Hemstead* v. *Hemstead*, 2 Wend. 109; *Montpelier* v. *East Montpelier*, 29 Vt. 20; *Sill* v. *Corning*, 15 N. Y. 197; *People* v. *Draper*, id. 549; *Waring* v. *Mayor*, 24 Ala. 701; *Mayor* v. *The State*, 15 Md. 376; *Ashby* v. *Wellington*, 8 Pick. 524; *Baptist So.* v. *Candia*, 2 N. H. 20; *Denton* v. *Jackson*, 2 Johns. Ch. 320.

Political subdivisions of the kind are always subject to the general laws of the State; and the Supreme Court of Connecticut decided that the legislature of that State have immemorially exercised the power of dividing towns at their pleasure, and upon such division to apportion the common property and the common burdens as to them shall seem reasonable and equitable. *Granby* v. *Thurston*, 23 Conn. 419; *Yarmouth* v. *Skillings*, 45 Me. 142; *Langworthy* v. *Dubuque*, 16 Iowa, 273; *Justices' Opinion*, 6 Cush. 577.

Such corporations are the mere creatures of the legislative will; and, inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified, or diminished at any time, without their consent, or even without notice. They are but subdivisions of the State, deriving even their existence from the legislature. Their officers are nothing more than local agents of the State; and their powers may be revoked or enlarged and their acts may be set aside or confirmed at the pleasure of the paramount authority, so long as private rights are not thereby violated. *Russel* v. *Reed*, 27 Penn. St. 170.

Civil and geographical divisions of the State into counties, townships, and cities, said Thompson, C. J., had its origin in the necessities and convenience of the people; but this does not withdraw these municipal divisions from the supervision and control by the State in matters of internal government. Proof of that is found in the fact that the legislature often exercises

the power to exempt property liable to taxation, and in many other instances imposes taxes on what was before exempt, or increases the antecedent burdens in that behalf. It changes county sites, and orders new roads to be opened and new bridges to be built at the expense of the counties; and no one, it is supposed, disputes the exercise of such powers by the legislature. *Burns* v. *Clarion County*, 62 Penn. St. 425; *People* v. *Pinkney*, 32 N. Y. 393; *St. Louis* v. *Russell*, 9 Mo. 507.

Old towns may be divided, or a new town may be formed from parts of two or more existing towns; and the legislature, if they see fit, may apportion the common property and the common burdens, even to the extent of providing that a certain portion of the property of the old town shall be transferred to the new corporation. *Bristol* v. *New Chester*, 3 N. H. 521.

In dividing towns, the legislature may settle the terms and conditions on which the division shall be made. It may enlarge or diminish their territorial liabilities, may extend or abridge their privileges, and may impose new liabilities. Towns, says Richardson, C. J., are public corporations, created for purposes purely public, empowered to hold property, and invested with many functions and faculties to enable them to answer the purposes of their creation.

There must, in the nature of things, be reserved, by necessary implication, in the creation of such corporations, a power to modify them in such manner as to meet the public exigencies. Alterations of the kind are often required by public convenience and necessity; and we have the authority of that learned judge for saying that it has been the constant usage, in all that section of the Union, to enlarge or curtail the power of towns, divide their territory, and make new towns, whenever the convenience of the public requires that such a change should be made.

Half a century ago, when that decision was made, the authority of the legislature to make such a division of a municipal corporation was deemed to be without doubt; and the same court decided that the power to divide the property of a municipal corporation is necessarily incident to the power to divide its territory and to create the new corporation. *Darlington* v.

Mayor, 31 N. Y. 195; *Clinton* v. *Railroad*, 24 Iowa, 475; *Layton* v. *New Orleans*, 12 La. Ann. 516.

Cases doubtless arise where injustice is done by annexing part of one municipal corporation to another, or by the division of such a corporation and the creation of a new one, or by the consolidation of two or more such corporations into one of larger size. Examples illustrative of these suggestions may easily be imagined. (1.) Consolidation will work injustice where one of the corporations is largely in debt and the other owes nothing, as the residents in the non-indebted municipality must necessarily submit to increased burdens in consequence of the indebtedness of their associates. (2.) Like consequences follow where the change consists in annexing a part of one municipal corporation to another, in case the corporation to which those set off are annexed is greatly more in debt than the corporation from which they were set off.

Hardships may also be suffered by the corporation from which a portion of its inhabitants, with their estates, may be set off, in case the corporation is largely in debt, as the taxes of those who remain must necessarily be increased in proportion as the polls and estates within the municipality are diminished. Even greater injustice may arise in cases where the legislature finds it necessary to circumscribe the jurisdiction of a county or town by dividing their territory, and creating new counties or towns out of the territory withdrawn from their former boundaries.

Legislative acts of the kind operate differently under different circumstances. Instances may be given where the hardship is much the greatest towards the new municipality, as where the great body of the property and improvements are left within the new boundaries of the old corporation. Other cases are well known where the hardship is much greater towards the old corporation, as where the newly-created subdivision embraces within its boundaries all the public buildings and most of the public improvements and the most valuable lands. Circumstances of the kind, with many others not mentioned, show beyond doubt that such changes in the subdivisions of a State often present matters for adjustment involving questions of great delicacy and difficulty.

Allusion was made to this subject by the Supreme Court of New Hampshire in the case to which reference has already been made. 3 N. H. 534. Speaking of the power to divide towns, the court in that case say that the power in that regard is strictly legislative; and that the power to prescribe the rule by which a division of the property of the old town shall be divided is incident to the power to divide the territory, and is *in its nature purely legislative.* No general rule can be prescribed by which an equal and just decision in such cases can be made. Such a division, say the court in that case, must be founded upon the circumstances of each particular case; and in that view the court here entirely concurs. *Powers* v. *Commissioners of Wood County*, 8 Ohio St. 290; *Shelby County* v. *Railroad*, 5 Bush, 228; *Olney* v. *Harvey*, 50 Ill. 455.

Regulation upon the subject may be prescribed by the legislature; but, if they omit to make any provision in that regard, the presumption must be that they did not consider that any legislation in the particular case was necessary. Where the legislature does not prescribe any such regulations, the rule is that the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed. Old debts she must pay, without any claim for contribution; and the new subdivision has no claim to any portion of the public property except what falls within her boundaries, and to all that the old corporation has no claim. *North Hemstead* v. *Hemstead*, 2 Wend. 134; Dil. on Mun. Corp., sect. 128; *Wade* v. *Richmond*, 18 Gratt. 583; *Higginbotham* v. *Com.*, 25 id. 633.

Tested by these considerations, it is clear that there is no error in the record. *Decree affirmed.*

Republican River Bridge Company *v.* Kansas Pacific Railroad Company.

1. The decision of the highest State court in which such decision could be had, adverse to a right under an act of Congress set up in a chancery suit or in any other case, where all the evidence becomes a part of the record in that court, the same record being brought here, can be re-examined upon the law and the facts, as far as may be necessary to determine the validity of

that right. In a common-law action, where the facts are passed upon by a jury, or by a State court, or by a referee, to whom they have been submitted by waiving a jury, where the finding is by the State law conclusive, this court has the same inability to review those facts as it has in a case coming from a circuit court of the United States.

2. Congress, by joint resolution, granted to the defendant, subject to the approval of the President, "fractional section one" on the west side of a military reservation, provided the usefulness of the latter would not, in his opinion, be impaired for military purposes. The President, by an executive order, set aside to the defendant said fractional section as designated on a map of survey accompanying the letter of the Secretary of the Interior. The court which tried the facts having found that the fractional section was inside of the reservation, was in the possession of the defendant, and was the land claimed in this action, held that the title thereto was vested in the defendant. *Held*, 1. That the finding being upon a mixed question of law and fact, and largely depending for its correctness on surveys not produced here, and there being no plat in the record, was not open to inquiry. 2. That looking to the manifest intent of the joint resolution, and to the fact that the grant was not to be consummated until the President had determined that the usefulness of the reservation would not be thereby impaired, the description in the joint resolution meant such a fractional section *within* the reservation on its west side. 3. That the title of the defendant became absolute on the issue of the President's order, and had relation back to the date of the passage of the joint resolution.

ERROR to the Supreme Court of the State of Kansas.

Mr. Robert McBratney for the plaintiff in error; and *Mr. William T. Otto, contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Kansas. The contest in the State court concerned the title to real estate, both parties claiming under grants from Congress made at different times. In the District Court for the County of Shawnee, where the suit was originally brought, the parties submitted the case to the court without the intervention of a jury; and that court found a series of facts, fourteen in number, on which it declared the law to be for the defendant. This judgment was affirmed on error in the Supreme Court of the State, which decision the present writ of error brings before us.

The finding by the District Court was received by the Supreme Court of the State as conclusive as to all facts in issue, and it is equally conclusive upon us. Where a right is set up under an act of Congress in a State court, any matter of law found in the record, decided by the highest court of the

State, bearing on the right so set up under the act of Congress, can be re-examined here.

In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of the State, the same record being brought here, this court can review the decision of that court on both the law and the fact, so far as may be necessary to determine the validity of the right to set up under the act of Congress; but in cases where the facts are submitted to a jury, and are passed upon by the verdict, in a common-law action, this court has the same inability to review those facts in a case coming from a State court that it has in a case coming from a circuit court of the United States.

This conclusiveness of the facts found extends to the finding by a State court to whom they have been submitted by waiving a jury, or to a referee, where they are so held by State laws, as well as to the verdict of a jury. *Boggs* v. *The Merced Mining Co.*, 3 Wall. 304.

Two propositions of law ruled by the State court were excepted to by plaintiff, the first of which gives construction to the grant under which defendant claims the land, and the other to the grant under which the plaintiff claims. The first is in the following language: —

"That the joint resolution passed by Congress, approved July 26, 1866, was and must be construed as a grant by Congress to the defendant of the land in controversy; and that upon the issuance of the executive order of the President, dated July 19, 1867, the legal title to said land vested in defendant, and relates back to the date of the passage of said joint resolution of July 26, 1866."

The joint resolution here referred to is as follows: —

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That, subject to approval by the President, the right of way one hundred feet in width is hereby granted to the Union Pacific Railroad Company, and the companies constructing the branch roads connecting therewith, for the construction and operation of their roads over and upon all military reserves through which the same may pass; and the President is hereby authorized to set apart to the Union Pacific Railroad Company, eastern division, twenty acres of the Fort Riley

Military Reservation for dépôt and other purposes in the bottom opposite 'Riley City;' also fractional section 'one,' on the west side of said reservation, near Junction City, for the same purposes; and also to restore from time to time to the public domain any portion of said military reserve over which the Union Pacific Railroad or any of its branches may pass, and which shall not be required for military purposes; provided that the President shall not permit the location of any such railroad or the diminution of any such reserve in any manner so as to impair its usefulness for military purposes, so long as it shall be required therefor."

On the nineteenth day of July, 1867, the President, by an executive order, declared that, by virtue of said resolution, there is set apart to the Union Pacific Railroad Company, eastern division (which was then the corporate name of the defendant), the twenty acres of the Fort Riley military reservation, and fractional section one, on west side of said reservation, near Junction City, for a dépôt and other purposes, as designated on a map or survey accompanying the letter from the Secretary of the Interior of Feb. 15, 1867.

The first objection made here to the conclusion of law by the court, that the resolution and order confer title to the land in controversy, is that the land of which defendant is in possession as fractional section one is a part of the reservation; whereas the true construction of the joint resolution is, that it has reference to a fractional section one lying outside of the reservation, and adjoining it on the west side.

No plat or survey, official or otherwise, accompanies this record to enable us to understand or decide this question in a satisfactory manner; nor is this map or letter of the secretary in evidence. The circuit judge, among his findings of fact, states distinctly that the fractional section one referred to in the joint resolution is *inside* of the reservation, and is the piece of land now in possession of the defendant, and claimed by plaintiff in this action. So far as the correctness of this finding depends, as it must largely depend, on surveys not produced to us, it is not open here to inquiry; and as it must from its very nature be a mixed question of law and fact, which would be concluded by the verdict of a jury, it must be equally conclusive here; the law question being the construction of the

words of the grant, and the fact being the manner in which the existing government surveys were made and numbered in reference to the fractional parts of section one.

Looking, however, to the manifest intent of the joint resolution, to the fact that neither the grant of the twenty acres confessedly a part of the reservation, nor of the fractional section one, was to be consummated until the President had determined that both could be given up without impairing the usefulness of the reservation for military purposes, we are of opinion that fractional section one on the west side of said reservation meant such a section to be found in the reservation on its west side.

The next objection is, that the grant does not purport to carry the fee; and, as it was only a use or equitable right, Congress had the power to grant the fee, as it did by the joint resolution of March 2, 1867, to plaintiff.

It is certainly true that the joint resolution of March 2, and the patent issued under it to plaintiff, cover geographically the land in controversy; and *Frisbie* v. *Whitney*, 9 Wall. 187, and the *Yosemite Valley Case*, 15 id. 77, are relied on to show that Congress could grant the land to other parties while the title of defendant was thus inchoate.

But there are two answers to this: 1st, The title of the defendant, whatever it was, became absolute on the issuing of the President's order, and had relation back to the date of the joint resolution under which it was made. It is, therefore, whatever its nature, an older title than that of plaintiff. It is not necessary here to decide whether it is a grant of the legal title, or only the grant of a use or easement; for, in either case, it vests the possession, of which the defendant cannot be deprived by an action of ejectment. 2d, The joint resolution under which plaintiff claims contains a proviso that nothing therein contained shall be construed to interfere with any grant of any part of said land heretofore made by the United States. As no other grant has been shown of any part of this land except the one under which the defendant claims, this proviso was no doubt intended to exempt it from plaintiff's grant; and, if there had been half a dozen other previous grants, it would have excepted them all as well as this from the operation of the joint resolution in which it is found.

In the first conclusion of law, finding the title under the joint resolution of 1866, and the order of the President, to be in defendant, we find no error.

The other proposition to which plaintiff excepted declares that plaintiff had title to all the land covered by the joint resolution of March 2, 1867, and by the patent, except that claimed by defendant under the joint resolution of July 26, 1866.

As this conclusion follows necessarily from what we have already said, it is unnecessary to notice it further.

Judgment affirmed.

WILSON v. BOYCE.

1. Where the Cairo and Fulton Railroad Company accepted certain bonds issued under an act of the General Assembly of the State of Missouri, which declared that they should "constitute a first lien and mortgage upon the road and property" of the company, — *Held*, that the word "property" included all the lands of the said company, and that a valid lien on them was created by the act.
2. The title of a subsequent purchaser from the company of its lands is destroyed by the sale of them under the mortgage.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This was an action of ejectment. The controversy turned upon the effect of an act of the General Assembly of the State of Missouri, under which bonds were issued to and accepted by the Cairo and Fulton Railroad Company. The act declared that the bonds should constitute a first lien and mortgage upon the road and *property* of that company.

Subsequently to the receipt of the bonds, the company executed a deed of trust upon her lands which had been granted by Congress to aid in the construction of the road. The plaintiff claimed under this deed.

The company failed to pay the interest on the bonds; and its lands were sold by the State, pursuant to the power contained in the act. The defendant became the purchaser of the demanded premises.

The court below held that the purchaser under the foreclosure

of the statutory mortgage held the better title, and that the word "property" embraced the lands owned by the company.

Mr. Isaac W. Scudder and *Mr. H. A. Clover* for the plaintiff in error.

A construction which would extend the lien of the State over the lands not in any way connected with the operation of the railroad, so as to divest the title of the plaintiff in error, a *bona fide* purchaser for value, is against the purpose and design of the grants made by Congress to Missouri, and also against the clear intention of the legislature of that State when it transferred the lands to the Cairo and Fulton Railroad Company.

These grants were made that the lands embraced by them should be sold, and the proceeds applied to the construction of a work of internal improvement.

Such plans have frequently been developed by the legislation of Congress, and also of those Western States where large tracts of public lands there situated have been granted for railroads and other highways. 9 Stat. 466; Poor's Manual of Railroads for 1871, 1872, 306, 413; 10 Stat. 8; id. 35, 155.

Every act of Congress granting not merely a right of way, but lands, provides that they shall be applied to the construction of the railroad, and to no other purpose. Most of the acts prescribe a particular manner for the sale of the lands as the work progresses, and all of them provide in some way to that effect. The grants were made, not to the companies, but to the States, out of deference to them, and because they would create the railroad corporations; but there is not a line in any act of Congress on this subject which contemplates that the States, by creating liens in their own favor, would divest the title to the lands granted.

Reference is made to the following acts of Congress. An examination of them will show that the construction we contend for is the proper one: March 2, 1827, 4 Stat. 234; March 2, 1827, id. 236; March 3, 1827, id. 242. See id. 290, 305, 393, 416, 662; 5 id. 731; 9 id. 83.

The principal land-grants to States to aid in the construction of railroads were made after the year 1850 by acts of Congress which vary but little in their general character. 11 Stat. 9, 15, 17, 21, 30, 195; 12 id. 624, 772; 13 id. 64, 66,

72, 95, 119, 356, 364, 365, 520, 526; 14 id. 236, 240; 15 id. 252; 16 id. 94.

The acts of the legislature of Missouri, relative to the Cairo and Fulton Railroad Company, clearly show that it was not the intention to create State liens extending over the alternate sections of land, but to grant them to the company, so that it might with the proceeds of the sales construct the road. There being a road in existence, the State lien would operate on that: the trust-deed and the State lien would not conflict.

The words, "a first *lien* or mortgage upon the *road and property* of the several companies so receiving them in the *same manner* as provided by the act approved Feb. 22, 1851, to expedite the construction of the Pacific Railroad and of the Hannibal and St. Joseph Railroad, and the act approved Dec. 10, 1855, of which this is amendatory," which are contained in the act of March 3, 1857, do not enlarge the mortgage so as to extend it over the alternate sections of land. The act of the 22d February, 1851, prescribes the *manner*, — "A mortgage of *the road of the company executing and filing their acceptance* as aforesaid, *and every part and section thereof, and its appurtenances*," &c. The act of the 10th December, 1855, says, "Upon the condition of a first lien or mortgage as contained or reserved in the act of Feb. 22, 1851."

Two words are joined, — *road* and *property*.

A road is property. The road and property, as defined by the statute, mean "the road of the company," "and every part and section thereof, and its appurtenances."

The first loan of State credit was made under the act of 11th December, 1855, when the word "property" was not used. The acceptance of $250,000 was under that act.

The second loan was made under the act of March 3, 1857, without any expression by the legislature that two different kinds of liens were intended to be created; and then, when we turn to the act of 22d of February, 1851, we find the intention to be clear, that the liens should be on the same property, the "*road and every part and section thereof, and its appurtenances.*"

The equitable rule would be that the lien should be on the road and its appendages, as they were the property to the con-

struction of which the fund was applied. *Canal Co.* v. *Gordon*, 6 Wall. 561.

To make lands subject to an equitable lien, the land must be described or identified. "A covenant to settle lands, without mentioning any certain lands, is no specific lien." *Seymour* v. *Canandaigua & Niagara Falls R.R. Co.*, 25 Barb. 286.

The distinction between lands which are used for the purpose of the franchise and other lands is stated in 3 Zabr. (N. J.) 511; *Dinsmore* v. *Racine & Mississippi R.R. Co.*, 12 Wis. 649; *Shamokin Valley R.R. Co.* v. *Livermore*, 47 Penn. 465; *Inhabitants of Worcester* v. *Wilson R.R. Co.*, 4 Met. 564; *Whitehead* v. *Vinyard*, 50 Mo. 30.

The contemporaneous construction of the State lien by the Cairo and Fulton Railroad Company, as to the effect of the deed to trustees of the 23d of May, 1857, is entitled to great consideration. *Attorney-General* v. *Parker*, 3 Atk. 576; *King* v. *Bellinger*, 4 T. R. 819; *Stuart* v. *Laird*, 1 Cranch, 309; *Doe* d. *Pearson* v. *Ries*, 8 Bing. 181; *Loring* v. *Gurney*, 5 Pick. 15; *Bridgeport Bank* v. *Dyer*, 19 Conn. 139; *Contemporana Expositio est optima et fortissima in Lege*, Broom's Legal Maxims, 654.

Mr. John D. S. Dryden, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

This is an action of ejectment brought by Blakeley Wilson, a citizen of the State of New Jersey, against Peter Boyce, to recover the possession of lands situated in the county of Scott, and State of Missouri, being a part of eleven thousand eight hundred and ninety-six acres and sixteen-hundredths of an acre purchased by Wilson on the 23d of November, 1860.

The Cairo and Fulton Railroad Company is by stipulation admitted to be the common source of title.

The title of Boyce, the defendant, is founded upon two several acts of the legislature of the State of Missouri; the first of the date of Dec. 11, 1855, the second of the date of March 3, 1857. By the first act, the bonds of the State to the amount of $250,000 were issued to the Cairo and Fulton Railroad Company of Missouri; which bonds, it was enacted, should become and be "a mortgage of the road, and every part and section

thereof, and its appurtenances," for securing the payment of the said bonds.

By the second act, the bonds of the State to the amount of $400,000 were authorized to be issued to the same company, and also bonds to other companies; which bonds, it was enacted, "shall constitute a first lien and mortgage upon the road and property of the several companies so receiving them, in the same manner as provided by the act of Feb. 22, 1851, to expedite the construction of the Pacific Railroad and of the Hannibal and St. Joseph Railroad, and the act approved Dec. 10, 1855, of which this is amendatory." The provisions of the acts of Feb. 22, 1851, and Dec. 10, 1855, in this paragraph mentioned, have no significance in the present case.

The Cairo and Fulton Railroad Company failing to pay the interest due to the State upon these bonds, a sale was made of the lands in question, under the powers contained in the two statutes; and they were bought in by the State according to the terms of the statutes. Conveyances were afterwards made by the State to purchasers from them, under whom and whose grantees the defendant, Boyce, holds possession.

The plaintiff's title arises in this manner: The lands, in pursuance of authority given by the statute of Missouri, were conveyed by the Cairo and Fulton Railroad Company to trustees, to be sold to raise money for the construction of their road. This conveyance was of the date of the 23d of May, 1857. On the 25th of November, 1859, the trustees conveyed the land in question to Hiram S. Hamilton, from whom Wilson, the plaintiff, derives title. The question is, Which of these is the better title?

All of the State bonds had been issued to the railroad company, and the terms of the acts above referred to had been formally accepted by the company, before it authorized the execution of the trust-deed of May 23, 1857; and the trust-deed refers to the acts of Dec. 11, 1855, and March 3, 1857, above mentioned.

The mortgage lien secured to the State by the act of 1855, when the first series of bonds was issued by the State, was expressed to be upon "the road, every part and section thereof, and its appurtenances." The lands in question do not consti-

tute the road, or any part thereof. The track of the road is not laid upon them, nor are they used in connection with the road. The terms of the second mortgage are broader; and, if the defendant's construction of its terms are correct, it is not necessary to decide whether the lands in question would pass under the expression "appurtenances."

The second mortgage to the State, made when $400,000 of bonds were issued to the company, covers "the road and property of the several companies so receiving them." These lands were the property of the company, held by it when this statutory mortgage took effect. The question is, Does the word "property" in the statute create a valid lien on these lands?

1. The generality of its language forms no objection to the validity of the mortgage. A deed "of all my estate" is sufficient. So a deed "of all my lands wherever situated" is good to pass title. *Johnson* v. *De Lancy*, 4 Cow. 427; *Pond* v. *Berg*, 10 Paige, 140; 1 Atk. on Conv., 2. A mortgage "of all my property," like the one we are considering, is sufficient to transfer title.

2. It was quite within the competency of the railroad company to mortgage its lands not used for its track or appurtenances. It might be deemed prudent and judicious to raise money upon its collateral property rather than upon its road. It might lose its foreign lands, and still be successful as a railroad company. If it should lose its track, it must at once cease to exist.

3. In the first mortgage, the State took its security upon the road and its appurtenances. In its second mortgage, it authorized and obtained security not only upon the road of the company and every part thereof, but also upon its property, meaning its other property, and all of its other property. It is difficult to conceive any reason for this extension of language in the statute except an intended extension of security. Time had passed without a completion of the road. A large additional loan was now made; and a desire to receive additional security gives a natural and logical explanation of the additional words inserted in the mortgage.

Such was the construction given to this language by the Supreme Court of the State of Missouri, in *Whitehead* v.

Vinyard, 50 Mo. 30. The court there held that these words were intended to cover all the corporate property of the railroad company, including lands situated like those in controversy. It is said, however, that the language of the court referred to was *obiter* merely, and that the point before us did not actually arise in that case. This is an error. The action in that case was ejectment for land purchased by Thomas Allen, in a foreclosure proceeding of a statutory mortgage upon the lands of the Iron Mountain Railroad Company, under the statute of 1857, now before us. If the word "property" did not cover the outside lands of the company, the plaintiff could not recover. But he did recover, the court saying that the intention of the legislature to include them was unequivocal; that there was not the shadow of a doubt upon the question. The point we are considering was the precise point before the court.

The title of the plaintiff was and is good, so far as the railroad company is concerned. That company held the title in fee, subject only to the statutory mortgage. He took title subject to that mortgage, which was a lien of a date prior to his title. That prior mortgage became forfeited by the non-payment by the company of the moneys due; the lands therein described were sold by reason of such forfeiture, and were purchased by the grantor of the defendant's landlord. The foreclosure of the prior statutory mortgage has destroyed the plaintiff's title. This is the only point that need be considered in the case.

The plaintiff, his grantors, and all who had any interest in knowing the fact, had ready means of learning that the lands they purchased were subject to the statutory mortgage. The deed of trust under which they claim referred to the statutes which created it, and in law they bought with knowledge of it.

Judgment affirmed.

NOTE. — In the case of *Wilson* v. *McCrellis*, which depended upon the same principles as that of *Wilson* v. *Boyce*, *supra*, MR. JUSTICE HUNT delivered the opinion of the court, affirming the judgment of the Circuit Court.

BROWN *v.* ATWELL, ADMINISTRATOR.

To give this court jurisdiction over the judgment of a State court, it must appear that the decision of a Federal question presented to that court was necessary to the determination of the cause, and that it was actually decided, or that, without deciding it, the judgment as rendered could not have been given.

MOTION to dismiss a writ of error to the Supreme Court of the State of New York.

Mr. James Flynn, for the defendant in error, in support of the motion.

Mr. John B. Gale, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Scott brought this action against Brown & Stone, in the Supreme Court of Rensselaer County, New York, alleging in his complaint that one Neer was the owner of a patent for a certain improvement in fire-places and stoves; that Neer had transferred the patent to Scott, who was the owner thereof; that Brown & Stone, being partners engaged in the sale of patent-rights, and having made sales of this patent while it belonged to Neer, continued to do so after its transfer to him, for which they had never accounted. He asked for an account, and judgment for such an amount as should be found due.

Brown & Stone answered, denying generally all the allegations in the complaint.

Stone having died, his death was suggested on the record; and, the cause proceeding against Brown, the issues were referred by stipulation of the parties to a referee for trial. The referee, having heard the case, reported that Scott was the owner of the patent; that Brown & Stone had made sales of the patent in different localities; and that Brown, as survivor, was bound to account to Scott for the proceeds of the sales. After the testimony on the part of the plaintiff was all in before the referee, Brown moved for a nonsuit, assigning for cause, among others, "that under the acts of Congress of the United States concerning letters-patent, and especially the Patent Act of 1836, and especially sect. 11 of that act, Scott's

title, interest, and rights were unaffected by the sales made by Neer and by Stone as his attorney, and therefore that plaintiff has no claim herein based on any such sale." The referee denied the motion. Brown excepted, and then proceeded with his own testimony. No other question was made before the referee as to the effect of the patent laws upon the rights of the parties. Numerous exceptions were taken to the report; but not one of them presented directly any question under these laws. The ruling of the referee on the motion for the nonsuit was not mentioned as one of the exceptions. A judgment was entered against Brown at the special term upon the report, from which an appeal was taken to the general term, where it was affirmed. The record does not show that any question under the patent laws was presented or decided in that court. From the judgment at the general term an appeal was taken to the Court of Appeals, where that judgment was affirmed.

After the judgment was rendered in the Court of Appeals, the following entry was made as part of the record of that court; to wit:—

"On the argument of the appeal herein before this court, it was claimed by said appellant Brown that the act of Congress of the United States, commonly called the Patent Act of 1836, and especially sect. 11 of said act, governed and determined the effect of the several transfers appearing in this case relative to the letters-patent issued to Neer, and determined the right in said patent of all concerned therewith; and that by said act and sect. 11, and the application thereof to the facts shown by the record herein, Scott, at the times of the sales and deeds for proceeds whereof judgment was recovered herein, owned only an undivided half of said patent, and Morrison owned the other half, and that Morrison owned and retained an equal interest with Scott in such proceeds; and that the decision herein that Scott was owner of said patent at the times of said sales and deeds, and his recovery herein as such owner, were therefore erroneous; and further it was claimed by said appellant, that, under said Patent Act, and sect. 11 thereof, said sales and deeds did not *per se*, or in connection with any facts shown by the record, affect Scott, or his interest in said patent, and that said recovery was therefore erroneous, and the decision of this court was against the said claims, and each thereof, thus made by said appellant; and for the particulars and grounds of such decision refer-

ence is hereby made to the opinion of this court, per Justice Folger, which is hereby, for the purposes hereof, made a part of the said record."

In the opinion to which reference is made, and which is therefore to be read as part of and in connection with this certificate, it is said, "Whether, by this permission or agreement given by Morrison to Neer, the latter and his assigns could make a good title for the whole of the patent-right to a vendee thereof, is not the question just here, but whether Scott got by the paper from Morrison to Neer, and by that from Neer to him, the right to claim an account of the whole proceeds of a sale." The court then decides, that, upon the facts as found, Scott had the equitable if not the legal title to the whole patent; and that, although Brown & Stone conveyed in the name of Neer, Scott was by his acts estopped from asserting title as against the several grantees. For this reason it was held that he was entitled to an account by Brown for the proceeds of the sales.

Until the certificate of the Court of Appeals, it nowhere appears in the record that any question was raised as to the effect of the patent laws upon the original title of Scott or his ownership. The only question presented under these laws was when Brown moved for a nonsuit; and that was for the reason, that, upon the proof as made, Scott's interest had never been sold. Whatever title he had he retained, as was claimed; and consequently he had no interest in the moneys received as the consideration for the sales actually made. This presented a principle of general law, and not of patent law alone. This question the Court of Appeals disposed of by the application of the doctrine of estoppel.

We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for the record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. *Commercial Bank of Cincinnati* v. *Buckingham's Executors*, 5 How. 341; *Lawler et al.* v. *Walker et al.*, 14 id. 154; *R.R. Co.* v. *Rock*, 4 Wall. 180; *Parmelee* v. *Lawrence*, 11 id. 38.

The same cases also establish the further rule, that "the office of the certificate, as it respects the Federal question, is to make more specific and certain that which is too general and indefinite in the record, but is incompetent to originate the question."

These principles dispose of this case. Brown & Stone confessedly sold as agents. The money they received was not their own. They were accountable for it to some one. Upon the record proper, they do not appear to have claimed that the title of Scott was defective under the patent laws: on the contrary, they in effect conceded his title, and sought to escape accountability to him because they had not conveyed it away. The decision of the Court of Appeals went no further than to dispose of this defence. That did not present a Federal question, and it ended the case.

Writ dismissed for want of jurisdiction.

ANGLE *v.* NORTH-WESTERN MUTUAL LIFE INSURANCE COMPANY.

1. Where a party to a negotiable instrument intrusts it to another for use as such with blanks not filled, it carries on its face an implied authority to complete it by filling them, but not to vary or alter its material terms by erasing what is written or printed as a part thereof, nor to pervert its scope or meaning by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument.
2. It is a principle of universal application, that the material alteration of a written instrument renders it void.

APPEAL from the Circuit Court of the United States for the District of Iowa.

Mr. George G. Wright for the appellant.

Mr. C. C. Nourse, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Persons dealing with an agent are entitled to the same protection as if dealing with the principal, to the extent that the agent acts within the scope of his authority.

Pursuant to that rule, it is settled law, that where a party to

a negotiable instrument intrusts it to another for use as such, with blanks not filled up, such instrument so delivered carries on its face an implied authority to complete the same by filling up the blanks; but the authority implied from the existence of the blanks would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument by erasing what is written or printed as part of the same, nor to pervert the scope and meaning of the same by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before it was so delivered.

By virtue of the implied authority, such a depositary may perfect, in his discretion, what is incomplete, by filling the blanks; but he may not make a new instrument by erasing what is written or printed, nor by filling the blanks with stipulations repugnant to the plainly expressed intention of the same as shown by its written or printed terms. *Goodman* v. *Simonds*, 20 How. 361; *Bank* v. *Neal*, 22 id. 108.

Much reference to the pleadings will be unnecessary, as the questions presented for decision arise chiefly out of the facts deducible from the proofs exhibited in the record. Suffice it to say, in that regard, that the suit was instituted by the complainant to procure a decree that the bond and mortgage and the two fire-insurance policies described in the bill of complaint were delivered and assigned to the respondents without consideration, and to obtain a decree setting aside said bond and mortgage, and for a return of said policies, the same having been delivered to the respondents as additional security for a loan of ten thousand dollars, the proceeds of which never came to the hands of the complainant; and he charges that the proceeds of the loan were never forwarded to him by his authority; that if the insurance company ever paid the same in current funds to the person through whom the loan was negotiated upon any order signed by him, as pretended by the respondents, the order was forged by the party who presented it, or by some person interested, to cheat and defraud the complainant out of the money.

Service was made, and the corporation respondents appeared and filed an answer, in which they allege that the bond, mort-

gage, and fire policies were duly delivered to the company by the agent of the complainant; and they deny that the order for the payment of the proceeds of the loan was forged, and aver that they made the payment to the person who presented it, in good faith. Proofs were taken; and the court, having heard the parties, entered a decree dismissing the bill of complaint, and the complainant appealed to this court.

Sufficient appears to show that the respondents are a corporation created by the laws of Wisconsin, and that they were doing a life-insurance business throughout the North-western States; and it also appeared that they were accustomed to loan money on real-estate securities. Agents were appointed by the respondents, in the different States, whose duty it was to solicit applications for policies, and to transact other matters connected with their insurance business.

State agents were appointed by the company; but it is conceded that they in turn appointed sub-agents to perform the same duties, and it appears that the commissions for all such services were paid by the company to the State agents.

Applications for loans of money were frequently made to the company through the State agents; and it appears that such agents of the company were furnished with blank forms for such applications, and for the appraisement of real estate intended as security for such loans. When an application for a loan was made, the blank forms were filled up by the agent. It was the business of the borrower to furnish abstracts of the title of the real estate offered as security, all of which were transmitted by the agent to the home office for examination; and, if they were approved, the course of business was that the bond and mortgage were prepared and forwarded to the agent, to be delivered to the applicant for execution and return.

Of course, the applicant might still refuse to execute the bond and mortgage; but if he was satisfied with the terms of the instruments, and completed the same, they were given back to the agent, and were by him returned to the company. It seems that the money loaned was usually transmitted to the applicant by means of a draft payable to the order of the borrower; or, in certain cases, the money was paid by the company at the home office, pursuant to the written order of the borrower,

evidenced by a receipt on the back of the order by the person in whose favor it was drawn. Such papers from the home office to the borrower and from the borrower to the company, it is conceded, are usually mailed to the State agent, and that they pass through his office; but it is insisted by the respondents that he has no interest in the business, and that he receives no compensation from the company for his services.

Sub-agents, it is conceded, were employed by the agents appointed by the company; and it appears that I. T. Martin, during the winter and spring of 1871, was a regular agent of the company, appointed for the State of Iowa; that he employed one C. W. Copeland, as sub-agent, to solicit applications for life insurance; that Copeland claimed to be the agent of the company to effect loans in their behalf on security of real estate; and that he represented to the complainant that he, the sub-agent, could procure for the complainant a loan from the company of $10,000 on such security.

Both the complainant and Copeland then resided at Cedar Rapids, and it was at that place and about that time that the former was introduced to the latter; and it appears that Copeland was at that time canvassing for the company, to procure customers to take policies in the company, and to induce persons to take loans from the company on security of real estate. About the same time, Copeland published a card in one or more of the local newspapers, representing that he was the agent of the company; and it appears that he exhibited to the complainant pamphlets, circulars, and other documents, of the kind prepared and distributed by the State agents, as the means of extending the business of the company, and that notice was published by the same party in one or more of the local journals, in which he is described as the agent of the insurance company.

Evidence entirely satisfactory was introduced, showing that it was during that period that the complainant commenced negotiations with Copeland to obtain for him a loan from the company for the sum of $10,000, to be secured by bond, and mortgage of real estate. Conversation ensued between them; and the evidence shows that Copeland told the complainant that he was going to quit preaching, and that he had made arrangements to act as attorney for the said insurance com-

pany; that he had already secured a loan for one person; and that, being an intimate friend of the general agent, he could get the money whenever he recommended a loan.

Blank forms were requisite; and it appears that Copeland furnished the complainant with a printed blank form of an application for a loan, and that he requested the complainant merely to insert the description of the property to be offered as security and his valuation of the same, stating that he, the agent, would fill the other blanks, and send the application forward. Accordingly, the complainant inserted the description of the property, giving his valuation of the same in figures, and also gave the name of his wife and the date of the instrument, and his own name, and place of residence. Incomplete though the instrument was, yet the witness states that he delivered it to Copeland, and that he, the witness, never saw it afterwards until he gave his deposition in the case, and that the indorsements on the back of the instrument were not there when it left his possession.

Due notice was received by the complainant, from the president of the company, that his application for the loan was accepted; and he was also informed, in the same communication, that abstracts of the title of the property and certain certificates were required to show that the property was free of incumbrances and liens, and that when the same were received, if found to be correct, their attorney would prepare the bond and mortgage, and forward the same to him for execution.

Such abstracts and certificates were procured by the complainant, at the instance of Copeland, and they were delivered by the complainant to him at his request; and it appears that Copeland presented to the complainant the bond and mortgage, ready for his signature, he having procured the signature of the complainant's wife to the mortgage before the instruments were exhibited to the complainant for execution. They were signed by the complainant at his house, no one being present except his wife and Copeland; and the complainant testifies that he then and there delivered the same to Copeland, together with two fire policies of insurance, in order that the fire policies might be indorsed by the agent of the companies

issuing the same, in a way to make the loss, if any, payable to the corporation respondents. Decisive proof that Copeland received the bond and mortgage for record and transmission is also exhibited by the receipt which he gave in behalf of the company, and which he signed as agent.

Throughout the whole transaction, the negotiations with the complainant were conducted by Copeland; and the evidence shows beyond doubt that all the instruments and documents which were delivered by the complainant to Copeland were by him delivered or transmitted to the State agent of the company, and that they were all forwarded by the latter to the company at their home office, where the officers of the company transact all their business.

Such applications for loans are usually made direct to the executive committee, and are required to be signed by the party desiring the loan; and, when the loan papers have been perfected, the company pay to the owner directly, either in checks or drafts *to his order*, unless the borrower, by written request or order, may have otherwise directed: but the president, in his testimony, admits that the State agent sometimes forwards applications to the executive committee for parties residing in the State, and that the home office does advise such parties, through him, of the action of the company in respect to such applications. Cases of the kind, therefore, it may be assumed, had occurred before, where the business was transacted through the State agent; but, if not, still it is proved beyond all doubt that all the negotiations with the complainant were conducted by the sub-agent, and that all the propositions to and from the company, in respect to the loan in question, were transmitted to the company through the same State agent.

Satisfactory abstracts and certificates having been forwarded, and the due execution and delivery of the bond and mortgage having been procured, nothing remained to be done to enable Copeland to carry his fraudulent scheme into effect, except to get an order for the money in such a form that he could convert the fund to his own use, without danger of immediate exposure and detection. Antecedent conversations between the parties made it known to him that the complainant expected to receive

the proceeds in drafts payable to his own order; it appearing that the complainant had told him that he wanted the amount in two drafts, one for $6,000 and the other for $4,000, each payable to his own order. Apprised of what the complainant desired, he doubtless thought it prudent to seem to conform to his expressed wish. Circumstances occasioned some delay: but Copeland finally informed the complainant that the papers had gone forward, and stated that notice that the papers were satisfactory might come any day, and suggested that the complainant might as well sign the blank order for the money, adding that he "would fill it out;" and the witness testifies that he looked at the blank, and, seeing that it contained the words "in drafts to the order of," put his signature to it, placed it in the drawer of Copeland, and went home.

Taken as a whole, the evidence satisfies the court, beyond all doubt, that the blank form which the complainant signed was without date, except the year, which was in printed figures; that it contained no direction except the printed word "to," followed by a blank; that it did not contain the name of any payee, nor any thing upon the subject, except the printed words "pay to," followed by a blank; that it did not specify any amount, nor contain any thing upon the subject, except the printed word "dollars," preceded by a blank; that it did not specify for what the payment was to be made, nor did it contain any thing upon the subject, except the printed words "on account of," followed by a blank; and that it contained nothing in respect to the medium of payment, except the printed words "in drafts to the order of," the word "of" immediately preceding the name of the plaintiff, H. G. Angle, and so close to the first initial of the signature as to leave no blank between the erased sentence and the name of the complainant.

Subsequent to the time when the blank form was signed by the complainant, and was left in the drawer of Copeland, the printed words "drafts to the order of," just preceding the signature of the complainant, were erased, evidently with pen and ink, and the words "current funds" were inserted in writing between the printed word "in" and the word "drafts," which is the first word of the sentence "drafts to the order of," the effect of which was to authorize the company to pay

the proceeds of the loan "in current funds," instead of "drafts to the order of" the signer of the blank form.

Armed with that instrument, the blanks having been filled, and the words "current funds" having been inserted, in lieu of the words "drafts to the order of," which were erased, Copeland went to the home office and obtained the whole proceeds of the loan, and absconded with the whole amount.

Full power to receive the proceeds of the loan would have been conferred upon the person who presented it, even if the holder of the blank form had done nothing more than to fill the blanks contained in the incomplete instrument; but it is quite obvious, that, if he had merely filled the blanks of the instrument, the company would have been obliged to make the payment "in drafts to the order of" the complainant, which, it is easy to see, would have defeated the fraudulent intent of the party who presented it for payment, as the drafts, if payable to the order of the complainant, could not be by that party converted into current funds. Had he merely filled the blanks, the body of the completed instrument would have read as follows; to wit: "Pay to [the person named] ten thousand dollars, on account of bond and mortgage, in drafts to the order of H. G. Angle." Evidently such an instrument would not have answered the purpose of the holder of the blank form, if he intended to betray his trust, and to convert the proceeds of the loan to his own use, without the consent of the lawful owner of the fund.

Blanks necessary to complete the instrument and render it operative, it may be admitted, might be filled by the holder of the instrument; but it is clear that it was not possible, within the meaning of that rule, to give the instrument such a form as would make it answer the supposed fraudulent intent, without doing violence to the scope and design of the blank form, as evidenced by the printed terms it contained, which, as outlines, plainly indicate that the signer required that the payment of the proceeds of the loan should be made in drafts to his own order. Manifest as that indication was, and as it would be, even to the casual reader, it became necessary, in order to make the completed instrument answer the fraudulent intent of the holder, to change the scope and design of the same,

which he effectually accomplished by erasing the printed words "drafts to the order of," which immediately preceded the name of the signer, as before explained, and by inserting the words "current funds" between the erased word "drafts" and the word "in," between which and the erased word "drafts" there was a short blank, scarcely sufficient to admit the written words "current funds," as will be seen by reference to the instrument actually presented to the company, which was sent up with the transcript as an original paper.

Compare the altered instrument with what it would have been if nothing had been done to it except to fill the blanks, and the criminal character of the act is manifest. By the erasure and insertion of the words "current funds," it was made to read as follows: "Pay to [the person named] ten thousand dollars, on account of bond and mortgage, in current funds."

Such an alteration, it is insisted by the complainant, is not and cannot be justified by any implication which arises from the existence of blanks in the instrument, inasmuch as the alteration consists both of the erasure of material words and the insertion of other material words in lieu of those erased, which change the scope and legal effect of the instrument from what it would have been if the blanks had been filled without any such erasure and insertion.

Complainant concedes that blanks in such an instrument may be filled by the person to whom it is intrusted for use; but he contends that the said alterations made in the instrument in this case were a forgery, which renders the completed instrument void; and the court here concurs in that proposition.

Negotiable instruments are frequently delivered for use, with blanks not filled; and, in respect to such instruments, it is held, that where a party to such an instrument intrusts it to the custody of another for use, with blanks not filled up, whether it be to accommodate the person to whom it was intrusted or to be used for the benefit of the signer of the same, such negotiable instrument carries on its face an implied authority to fill up the blanks necessary to perfect the same; and the rule is, that, as between such party and innocent third parties, the person to whom the instrument was so intrusted must be

deemed the agent of the party who committed the instrument to his custody, in filling the blanks necessary to perfect the instrument. *Violet* v. *Patton*, 5 Cranch, 142; *Russell* v. *Langstaffe*, 2 Doug. 514; *Collis* v. *Emmet*, 1 H. Black. 313; *Montague* v. *Perkins*, 22 Eng. L. & Eq. 516.

Questions of the kind most frequently arise in respect to negotiable instruments; but the court here is of the opinion that the same rule is properly applicable to the case before the court. Authority to act for another may be express, or it may, in certain cases, be implied; but an implied authority has its limitations as well as that which is express. Examples to prove that proposition exist everywhere; but it would be difficult to give one more apposite and striking than the one presented by the case in decision, where the authority to fill blanks is implied from their existence in an instrument intrusted to another for use. 1 Greenl. Ev. (12th ed.), sect. 567.

Beyond all doubt, such a party may fill every blank which it is necessary should be filled to perfect the instrument and render it operative, within its scope and design, if the terms or words of the instrument sufficiently indicate what that scope and design are. Cases arise, it must be conceded, where a party signs his name to a blank paper, and intrusts the paper containing his signature to another for use; but it is sufficient to say upon the subject, that the case before the court is not of that character. Instead of that, the blank form signed by the complainant contained terms clearly indicating that the money was to be paid on account of "the bond and mortgage," and that the signer of the blank form required the payment to be made "in drafts to the order of" the signer of the same; and it was no more competent for the person to whom it was intrusted, in that state of the case, to erase the words "drafts to the order of," and to insert in the short blank preceding that sentence the words "current funds," than it would have been for that person to have prepared and executed a new instrument in the name of the signer, requesting the company to pay the proceeds to the order of the holder of the blank form.

Argument is scarcely necessary to support that proposition, as it is self-evident that the erasure of the words "drafts to the order of" changed the manifest scope and design of the incom-

plete instrument; and it is equally clear that the words "current funds," which were inserted, are utterly repugnant to the printed terms "drafts to the order of," which were erased by black lines. *Bank* v. *Douglas*, 31 Conn. 180.

Properly applied, that case is decisive of the present case. It appears that the defendant in that case put his name upon an inchoate bill of exchange, drawn and signed by the maker, on a certain firm, blanks being left for the date, amount, time of payment, and the name of the payee; and that the defendant delivered the paper, thus indorsed, to the maker of the same, who struck out the name of the place where it was made, and the name of the firm on which it was drawn, and filled out the instrument, so as to make it a promissory note for $3,500, payable to the order of another party. Upon these facts the court held that an inference arose, — which, in favor of a *bona fide* holder of the paper, was irresistible, — that the person to whom the paper was intrusted was authorized, by filling the existing blanks, to complete the instrument and to fill the blanks so as to bind the defendant as indorser of a bill of exchange, drawn by him on the firm therein named, for any sum, payable at any time and place. But, say the court, no inference, or presumption of authority, can arise that he might turn the bill drawn on one firm into a bill drawn on another, or to turn it into a promissory note. Neither *dictum* nor decision, say the court, has been cited to warrant such a claim; and they add, that they suppose that none such can be found. Suit in that case was brought by the bank, claiming to be an innocent holder; but the court held, that, notwithstanding the erasures, unmistakable evidence of the original character of the instrument remained, and that the evidence was amply sufficient to excite distrust, and make it the duty of any one to whom the paper was offered to inquire when and by what authority such erasures and alterations had been made. *Gardner* v. *Walsh*, 32 Eng. L. & Eq. 162.

Where blanks exist in negotiable securities, delivered to another for use, the custody of the paper, under such circumstances, gives the custodian the right to fill the blanks; but it does not confer authority to make any addition to the terms of the note; and if any such of a material character are made by such a party, without the consent of the party from whom the

paper was received, it will avoid the note, even in the hands of an innocent holder. *Ivory* v. *Michael*, 33 Mo. 400.

Proof was given in that case that the parties had for many years been in the habit of indorsing for each other; that the defendant indorsed the note, which was in blank, as to the time of payment, and was payable without defalcation or discount. Before using it, the other party filled the blank with thirty days, and added, after the word "discount," "bearing ten per cent after maturity." Attempt was made in argument to sustain the right to make the addition to the note, because it was delivered before the blank was filled; but the court held that the insertion of the words, "bearing ten per cent after maturity," was not the filling of a blank, and that it rendered the note invalid. *Wood* v. *Steele*, 6 Wall. 80.

Persons intrusted with negotiable securities for use by the parties to it may, if it contains blanks, fill the same: but Mr. Parsons, though he admits that rule to its fullest extent, adds, that, if one materially changes words which are printed or written, the note by such change would be rendered invalid; and certainly it must be so if the change substantially varies the scope of the instrument, to the prejudice of the party from whom it was obtained. 2 Pars. on Bills & Notes, 566.

Suppose that is so: still it is insisted by the respondents that the rule is not applicable in this case, because they had not notice of the defect in the blank order. But the court here is entirely of a different opinion. Even the holders of negotiable securities, taken in the usual course of business, before the securities fall due, are held chargeable with notice, where the marks on the instrument are of a character to apprise one to whom the same is offered of the alleged defect. *Goodman* v. *Simonds*, 20 How. 365.

When it is proposed to impeach the title of a holder, for value, by proof of any facts and circumstances outside of the written instrument itself, it is a very different matter. He is then to be affected, if at all, by what has occurred between other parties; and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had *knowledge* of such facts and circumstances at the time the transfer was made. These principles are of universal application; but where a person takes a negotiable security, which,

upon the face of it, is dishonored, he cannot, says Taney, C. J., be allowed to claim the privileges which belong to a *bona fide* holder. *Andrews* v. *Pond*, 13 Pet. 65.

If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it. The same doctrine was enforced and applied in a subsequent case, where, in speaking of a promissory note, so marked as to show for whose benefit it was to be discounted, the court held that all those dealing in paper "with such marks on its face must be presumed to have *knowledge* of what it imported." *Fowler* v. *Brently*, 14 Pet. 318; *Brown* v. *Davis*, 3 Term, 80.

Actual notice in such a case is not required, even in suits founded upon negotiable securities, where the evidence of its infirmity consists of matters apparent on its face; nor is any different or stricter rule applicable in cases like the present, it appearing that the printed words, though erased so as to be inoperative, were still entirely legible, even to the casual reader; and that the words "current funds," inserted before the erased word "drafts," were plainly repugnant to the erased words, "drafts to the order of," which followed them in the same connection.

Constructive notice in such cases is held sufficient, upon the ground, that, when a party is about to perform an act which he has reason to believe may affect the rights of third persons, an inquiry as to the facts is a moral duty, and diligence an act of justice. Whatever fairly puts a party upon inquiry in such a case is sufficient notice in equity, where the means of knowledge are at hand; and if the party, under such circumstances, omits to inquire, and proceeds to do the act, he does so at his peril, as he is then chargeable with all the facts which by a proper inquiry he might have ascertained. *Hawley* v. *Cramer*, 4 Cow. 712; *Hill* v. *Simpson*, 7 Ves. Jr. 170; *Kennedy* v. *Green*, 3 Myl. & K. 722; *Booth* v. *Barnum*, 9 Conn. 286; *Pitney* v. *Leonard*, 1 Paige, 461; *Pringle* v. *Phillips*, 5 Sand. 157.

Authorities to show that the material alteration of a written instrument renders it void is unnecessary, as it is a principle of universal application.

Decree reversed, and the cause remanded, with direction to enter a decree in favor of the complainant.

OAKSMITH'S LESSEE *v.* JOHNSTON.

1. In this country there can seldom be occasion to invoke the presumption of a grant from the government, except in cases of very ancient possessions running back to colonial days, as, since the commencement of the present century, a record has been preserved of all such grants, and of the various preliminary steps up to their issue; and provision is made by law for the introduction of copies of the record when the originals are lost.
2. In ejectment for a lot in Washington City, both parties admitted that the original title was in the United States. The plaintiff relied principally upon evidence of title arising from uninterrupted and exclusive possession by his lessor, and the parties through whom he claims from 1828 to 1867. During the latter year the defendant entered. He traced title through a conveyance of the mayor of Washington, executed in October, 1866, in completion of a sale made under the act of Congress of May 7, 1822 (3 Stat. 691), and an ordinance of the city of the same year, creating a board of commissioners to carry the act into effect, and direct the sales of lots. The act required the deeds executed to the purchasers by the mayor to be recorded among the land-records of the county of Washington within the time prescribed for the recording of conveyances of real estate. The ordinance provided that the board should keep regular minutes of their acts and proceedings, and lay the same before the board of aldermen and common council at the commencement of every session of the council. The records and minutes were not produced, nor proof of their contents offered by the plaintiff. *Held*, that no presumption can legitimately arise that any other deed of the demanded premises was executed by the mayor than the one put in evidence, and that the possession created no title upon which the plaintiff can recover.

ERROR to the Supreme Court of the District of Columbia.

Mr. Edward Lander and *Mr. William A. Meloy* for plaintiff in error.

Mr. A. G. Riddle, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action of ejectment to recover a parcel of land situated in the city of Washington, consisting of the south half of lot fourteen in reservation B, and a portion of the adjoining lot thirteen. For this latter portion the plaintiff obtained judgment; and no question with respect to it is here raised. The only contention in this court relates to the other portion of the demanded premises, — the south half of lot fourteen. To recover this portion, the plaintiff relied principally upon evidence of title arising from the possession of the premises by

the lessor of the plaintiff, and parties through whom he claims, for a period of nearly forty years. It was shown, that, as early as 1828, one Thomas Hughes occupied and used the premises, and that he continued from that time to occupy and use them exclusively, either in person or by tenants, until his death in 1837; that by his will he devised his interest and estate in them to his daughter Anna, who, upon his death, continued in like manner in their occupation and use until the entry of the defendant in 1867, having erected in the mean time a brick building thereon. The lessor of the plaintiff, Oaksmith, is the trustee of Anna's estate.

The defendant traced title to the premises from the United States through a conveyance of the mayor of Washington, executed in October, 1866, in completion of a sale made by commissioners under the act of Congress of May 7, 1822, 3 Stat. 691, and an ordinance of the city of the same year passed to carry that act into effect. It is conceded, that, previous to the sale, the title was in the United States.

It appeared in evidence that the sale was made in September, 1822, to one Henry Weightman, to whom a bond was given for a conveyance upon payment of the purchase-money; that in June, 1830, the purchase-money was paid, and that, in 1832 or 1833, the purchaser permitted Hughes to occupy the premises as his tenant; that in 1853 the purchaser died, leaving Roger Weightman his only surviving heir; and that to him the mayor of the city, in October, 1866, executed the conveyance, and that during the same year he conveyed to the defendant.

It also appeared in evidence that the purchase of the premises by Henry Weightman in 1822 was made in trust for Roger Weightman, who, as early as 1830, became the assignee of the bond, and paid the purchase-money; and that the conveyance of the mayor to him, in October, 1866, was obtained upon a representation that the bond had been lost; that Roger Weightman had also purchased the adjoining lot thirteen, and in June, 1830, had received a conveyance of the same from the mayor of Washington, and in March, 1837, had conveyed to Hughes that portion of the lot which the plaintiff recovered in this action.

Upon this evidence, assuming it to have established all that

it tended to prove, the plaintiff asked of the court several instructions to the jury, amounting, when divested of some repetitions, substantially to these: —

1st, That the jury might presume that Roger Weightman assigned the bond for a conveyance to Thomas Hughes during his life; and that the mayor of the city executed a conveyance of the premises either to Hughes, or, after his death, to his devisee and daughter; and,

2d, That the exclusive and uninterrupted possession of the premises by the devisee of Hughes for more than twenty years prior to the entry of the defendant created a title upon which the plaintiff could recover.

The court refused the instructions; and, for their refusal, error is alleged.

The objection to the first of these instructions arises from that part which relates to the presumption of a conveyance from the mayor of the city. The title of the property, as already stated, was originally in the United States, and the mayor acted only as their agent in transferring it to the purchaser. It was, therefore, a grant from the government which the court was requested to instruct the jury to presume.

It is undoubtedly true, as stated by counsel, that, under some circumstances, grants may be presumed from the government, as well as from individuals, in support of a long-continued possession. The presumption in such cases arises not merely from the possibilities of the loss of documents by the common accidents of time, but from the general experience of men that property is not usually suffered to remain for long periods in the quiet possession of any one but the true owner, and that no other person will deliberately add to the value of the property by permanent improvements.

But in this country, at the present day, there can seldom be occasion to invoke the presumption of a grant from the government, except in cases of very ancient possessions running back to colonial days, as, since the commencement of the present century, a record has been preserved of all grants of the government, and of the various preliminary steps up to their issue; and provision is made by law for the introduction of copies of the record when the originals are lost.

The act of Congress of May 7, 1822, which authorized the sale of the public reservations, embracing the property in controversy, required the deeds executed to the purchasers by the mayor of the city to be recorded among the land-records of the county of Washington within the time prescribed for the recording of conveyances of real estate; and the ordinance of the city creating a board of commissioners to carry the act of Congress into effect, and direct the sales of the property, provided that the board should keep regular minutes of its acts and proceedings, and lay the same before the board of aldermen and common council at the commencement of every session of the council. If any deed was made by the mayor of the city to Hughes or to his devisee, as the court was requested to instruct the jury to presume, the records of the county and the minutes of the commissioners would no doubt have shown the fact. But these records and minutes were not produced; and no evidence was offered that they made mention of any deed of the premises, either to Hughes or to his devisee. The absence of any evidence on this point was of itself a circumstance sufficient to justify the conclusion that the records and minutes disclosed nothing impairing, or tending to impair, the validity of the conveyance through which the defendant claims. In the absence of such evidence, no presumption could legitimately arise that any other deed was executed by the mayor than the one produced. The court, therefore, properly refused the instruction asked.

The long uninterrupted possession of the premises by the devisee, and the valuable improvements made by her, might have justified the presumption of a transfer of the bond from Roger Weightman. But such transfer, if established, would not have availed the plaintiff: it would only have disclosed the possession of an equitable right to a conveyance, which a court of chancery might enforce by compelling a transfer of the legal title from the defendant, if he purchased with notice of the plaintiff's equity, or by decreeing compensation from Roger Weightman, if he conveyed the title to a *bona fide* purchaser without notice. But in the action of ejectment, in the Federal courts, the legal title must control, and to another forum the plaintiff must look for the enforcement of any equitable rights he may possess.

The legal title being in the United States, the Statute of Limitations raises no bar to the action. Mere possession of the land, though open, exclusive, and uninterrupted for twenty years, creates no impediment to a recovery by the government, and of course none to a recovery by one who within that period receives its conveyance. In *Burgess* v. *Gray*, 16 How. 48, the plaintiff and those through whom he claimed had been in possession of the land, for which the action was brought, for more than half a century; and, among other grounds, he relied upon this long-continued possession to recover against defendants, who had entered under title derived from the United States. But the court said, "The mere possession of public land without title will not enable the party to maintain a suit against any one who enters on it; and, more especially, he cannot maintain it against persons holding possession under title derived from the proper officers of the government. He must first show a right in himself before he can call into question the validity of theirs." The second instruction was, therefore, properly refused. *Judgment affirmed.*

RECKENDORFER *v.* FABER.

1. The decision of the Commissioner of Patents in the allowance and issue of a patent creates a *prima facie* right only; and, upon all the questions involved therein, the validity of the patent is subject to examination by the courts.
2. A combination, to be patentable, must produce a different force, effect, or result in the combined forces or processes from that given by their separate parts. There must be a new result produced by their union; otherwise it is only an aggregation of separate elements.
3. A combination, therefore, which consists only of the application of a piece of rubber to one end of the same piece of wood which makes a lead-pencil is not patentable.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Mr. Charles F. Blake and *Mr. Edmund Wetmore* for the appellant.

Mr. John S. Washburn and *Mr. George Gifford* for the appellee.

MR. JUSTICE HUNT delivered the opinion of the court.

This is an appeal from a decree of the United States Circuit Court for the Southern District of New York, dismissing the bill of complaint, which was filed to restrain the infringement by the respondent of certain letters-patent, and for an accounting and damages.

These patents relate to the manufacture of combined pencils and erasers.

1. The first was granted to Hymen L. Lipman, March 30, 1858; and was extended for a farther term of seven years from the 30th of March, 1872.

The material parts of the specification are as follows: —

"I make a lead-pencil in the usual manner, reserving about one-fourth of the length, in which I make a groove of suitable size, *A*, and insert in this groove a piece of prepared india-rubber (or other erasive substance), secured to said pencil by being glued at one edge. The pencil is then finished in the usual manner; so that, on cutting one end thereof, you have the lead, *B*, and on cutting at the other end you expose a small piece of india-rubber, *C*, ready for use, and particularly valuable for removing or erasing lines, figures, &c., and not subject to be soiled, or mislaid on the table or desk.

"In making mathemathical, architectural, and many other kinds of drawings, in which the lines are very near each other, the eraser is particularly useful, as it may be sharpened to a point to erase any marks between the lines; and, should the point of the rubber become soiled or inoperative from any cause, such cause is easily removed by a renewed sharpening, as in the ordinary lead-pencil."

The claim is as follows: —

"I do not claim the use of a lead-pencil with a piece of india-rubber, or other erasing material, attached at one end for the purpose of erasing marks; but what I do claim as my invention, and desire to secure by letters-patent, is the combination of the lead and india-rubber, or other erasing substance, in the holder of a drawing-pencil, the whole being constructed and arranged substantially in the manner and for the purposes set forth."

The drawings forming part of the specification exhibit a continuous sheath of uniform size, with interior grooves of different sizes, the eraser groove being larger than the lead groove.

2. The second patent is for an improvement upon the invention of Lipman, and was granted to Joseph Reckendorfer, the complainant, the 4th of November, 1862, and reissued on the 1st of March, 1872.

The material parts of the specification are as follows: —

"My invention is intended to provide a means whereby articles of greater size or diameter than the lead may be securely held in the head of a pencil of otherwise ordinary or suitable construction, without making the body of the pencil cumbrous or inconvenient. To this end, my invention consists, —

"*First*, Of a pencil composed of a wooden sheath and lead core, having one end of the sheath enlarged and recessed to constitute a receptacle for an eraser or other similar article, as hereinafter stated.

"*Second*, Of a pencil, the wooden case of which gradually tapers from the enlarged and recessed head towards its opposite end for the whole or a portion of the length, as hereinafter set forth.

"The receptacle for the eraser or other article is formed in the head, without too much weakening the wood, owing to the form of the sheath; while, for the same reason, the end of the pencil which contains the ordinary lead is not cumbrous nor clumsy, but can be readily held between the fingers, just as an ordinary pencil is."

Having thus described his invention, Reckendorfer claims, —

"1st, A pencil composed of a wooden sheath and lead core, having one end of the sheath enlarged and recessed to constitute a receptacle for an eraser, or other similar article, as shown and set forth.

"2d, A pencil, the wooden case of which gradually tapers from its enlarged and recessed head towards its opposite end for the whole or a portion of its length, substantially as shown and described."

The points we propose here to discuss are two: —

First, Is the article patented by the plaintiff and his assignor, and for the infringement of which patents this action is brought, a patentable invention within the laws of the United States?

Second, Is it within the power of the courts to examine and determine this question? or is the decision of the Commissioner of Patents, when, by issuing a patent, he decides that the invention is patentable, final and conclusive on the point?

The plaintiff contends that the decision of the commissioner is conclusive upon the point of invention; and that the question, as distinct from that of want of novelty, is one not open to the judgment of the court. In the natural order of things, this question is the first one to be examined; for, if it shall appear that the contention of the plaintiff is correct in this respect, the question in regard to the patentability of the instrument now before us will not arise. The point will have been decided for us, and by a controlling authority.

The "act to revise, consolidate, and amend the statutes relating to patents and copyrights," passed July 4, 1836 (5 U. S. Stat. 118), is the act regulating this case.

By the sixth section thereof it is enacted, "that any person having invented or devised any new and useful art, machine, manufacture, or composition of matter, not known or used by others before his invention or discovery thereof, and not at the time of his application for a patent in public use, or on sale with his consent or allowance as the inventor or discoverer, and shall desire to obtain an exclusive property therein, may make application in writing to the commissioner, expressing such desire; and the commissioner, on due proceedings had, may grant a patent therefor. . . . He shall make oath that he believes himself to be the first inventor or discoverer thereof, and that he does not know or believe that the same has ever before been used."

Looking at this section alone, it may be safely said no one is entitled to a patent unless (1) he has discovered or invented an art, machine, or manufacture; (2) which art, machine, or manufacture, is new; (3) which is also useful; (4) which is not known or patented as therein mentioned. It is not sufficient that it is alleged or supposed, or even adjudged, by some officer, to possess these requisites. It must, in fact, possess them; and that it does possess them the claimant must be prepared to establish in the mode in which all other claims are established; to wit, before the judicial tribunals of the country.

The seventh section of the act (p. 120) provides, that on the filing of any such application, &c., and the payment of the duty required by law, the commissioner shall make, or cause to be made, an examination of the alleged new invention or

discovery; and if, on such examination, it shall not appear to the commissioner that the same has been invented or discovered by any other person in this country prior to the alleged discovery, or patented or described in any foreign publication, or been in public use or on sale with the consent of the applicant, and if he shall be of the opinion that the same is sufficiently useful and important, the commissioner shall issue a patent therefor.

Before the commissioner is authorized to issue a patent, it must appear to him that the claimant is justly entitled to a patent; *i.e.*, that his art, machine, or manufacture, possesses all the qualities before mentioned. The commissioner must also be satisfied, that, if it possesses these qualities, it is sufficiently useful and sufficiently important to justify him in investing it with the *prima facie* respect arising from the governmental approval. These restrictions are wise and prudent; are intended to secure at least a probable advantage to those who deal with the favorites of the government; for they may justly be so termed who receive the exclusive right of making or using or vending particular arts or improvements.

It is nowhere declared in the statute that the decision of the commissioner, as to the extent of the utility or importance of the improvement, shall be conclusive upon that point; but, in the section just quoted, it is placed in the same category with the want of novelty and the other requisites of the statute; and it is expressly conceded by the appellant that the judgment of the commissioner on the question of novelty is not conclusive, but that that point is open to examination. On that subject the practice of the courts is uniform in holding it to be subject to inquiry.

The plaintiff's counsel, in his brief, put his argument in this form: "The commissioner, then, passes on these questions: (1.) Did the applicant himself make the invention? This question is settled by his oath." This is true to the extent and for the purpose of issuing a patent, and to this extent only. When the patentee seeks to enforce his patent, he is liable to be defeated by proof that he did not make the invention. The judgment of the commissioner does not protect him against the effect of such evidence. (2.) The counsel says, "Was the invention

new? This question is solved by the examination required by the act." To the same extent only. The defence of want of novelty is set up every day in the courts, and is determined by the court or the jury as a question of fact upon the evidence adduced, and not upon the certificate of the commissioner. (3.) The counsel says again, "Is the invention sufficiently useful and important? This the commissioner settles for himself by the use of his own judgment. It is a question of official judgment." These questions are all questions of official judgment, and are all settled by the judgment of the commissioner. His judgment goes to the same extent upon each question. He determines and decides for the purpose of issuing or refusing a patent. When the patent is sought to be enforced, the questions, and each of them, are open to judicial examination. We see many reasons why all the questions of invention, novelty, and prior use, should be open to examination in each case; and such we believe to be the course of the authorities, and practice of the courts.

A reference to some of the most recent cases, and to those decided by this court, will be sufficient. A review of all the cases in this court, and the various circuit courts where this question has been alluded to, will not be profitable.

In *Hotchkiss* v. *Greenwood*, 11 How. 248, a patent had been granted for a "new and useful improvement in making door and other knobs, of all kinds of clay used in pottery and of porcelain," by having the cavity in which the screw, or shank, is inserted, by which they are fastened, largest at the bottom of its depth, in form of a dovetail, and a screw formed therein by pouring in metal in a fused state. The precise question argued in this court and decided was of the patentability of this invention, and it was held not to be patentable. The only thing claimed as new was the substitution of a knob made of clay or porcelain for one made of wood. This, it was said, might be cheaper or better; but it was not the subject of a patent. The counsel for the defendants, in their points, there say, "The court now is called upon to decide whether this patent can be sustained for applying a well-known material to a use to which it had not before been applied, without any new mode of using the material, or any new mode of manufacturing the article

sought to be covered by the patent." Mr. Justice Nelson delivered the opinion of the court to the effect already stated. Mr. Justice Woodbury dissented, not upon the question of the power of the court to pass upon the validity of the patent, but rather in regard to the manner in which the facts were submitted to the jury.

In *Stimpson* v. *Hardman*, 10 Wall. 117, it was decided that the engraving or stamping of the figure upon the surface of a roller for pebbling leather by pressure, where the use previously had been of a smooth roller, required no invention; that it was a change involving mechanical skill merely, and not patentable. Mr. Justice Clifford dissented from the majority of the court, but expressly says that the question of patentability is for the decision of the jury, and not for the court, upon a bill of exceptions. The majority of the court held that the question could be considered upon a bill of exceptions; and no one claimed that the decision of the commissioner concluded the question.

In *Hailes* v. *Van Wormer*, 20 Wall. 353, the question of the patentability of certain improvements in stoves was largely discussed in this court upon appeal from the Circuit Court for the Northern District of New York. It was held, that, if a new combination produces new and useful results, it is patentable, though all the constituents of the combination were known and in use previous to the combination; but the results must be the product of the combination, not a mere aggregate of several results, each the complete product of one of the combined elements. It was held that the facts there present did not create a compliance with this principle; and the judgment, that the plaintiff's bill be dismissed, was affirmed.

In *Rubber Tip Pencil Co.* v. *Howard*, 20 Wall. 498, the same principle was affirmed. In delivering the opinion, the Chief Justice says, "The question which naturally presents itself for consideration at the outset of this inquiry is, whether the new article of manufacture claimed as an invention was patentable as such: if not, there is an end of the case, and we need not go farther." He makes a careful examination of the claim, and concludes that there is nothing patentable in the character of the invention. The decree of the court below dismissing the bill was unanimously affirmed upon that ground.

In *Smith* v. *Nichols*, 21 Wall. 115, an elaborate opinion to this same effect was delivered by Mr. Justice Swayne, and concurred in unanimously by the court. The only question discussed is the patentability of the invention.

Hicks v. *Kelsey*, 18 Wall. 670, is a similar case. To this rule, the case of *Lyman* v. *Osborne*, 11 Wall. 516, cited by the defendant, is no exception. The remarks there made are chiefly upon the subject of reissues, and are in accordance with the principles above set forth. Even as to reissues, their conclusiveness is limited to questions of fact, and is accompanied by the statement that they are re-examinable in court, when it is apparent upon the face of the patent that the commissioner has exceeded his authority, or there is such a repugnance between the old and the new patent that it must be held as a matter of legal construction that the new patent is not for the same invention as that embraced and secured in the original patent. Pp. 543, 544.

We do not attach much significance to the fact that the fifteenth section of the act of 1836 allows the defendant to plead the general issue, and to give in evidence, upon thirty days' notice, special matter tending to prove the various matters therein referred to. The statute in that respect was intended to create an easy system of pleading, and to relieve from any doubt the admissibility in that form of the defences specified. The argument, that because permission is given to prove under the general issue, that the specification does not contain the whole truth, or that it intentionally and deceitfully contains too much, or that the patentee was not the first discoverer, or that it had been in prior use, it follows that proof that there is no invention or discovery at all, or that the invention has no importance, cannot be made, is quite unsound. Proof that there is no invention or discovery strikes at the root of the whole claim. The patent is based on an affirmative fact, of which this is the direct negative. It needed no statute to aid or justify this defence. It is provable when it exists under any general denial, like the fact of not guilty or *non-assumpsit* in cases where guilt or a promise is first to be established.

Upon the proposition that the decision of the commissioner on the question of invention, its utility and importance, is con-

clusive, and that the same is not open to examination in the courts, we are unanimously of the opinion that the proposition is unsound. His decision in the allowance and issue of a patent creates a *prima facie* right only; and, upon all the questions involved therein, the validity of the patent is subject to an examination by the courts.

We come, then, to the questions, Does the article patented by Lipman, and improved by Reckendorfer, involve an invention? or is it a product of mechanical skill or a construction of convenience only?

The article presented is for the performance of mechanical operations, to produce mechanical results, and is a mechanical instrument as much as a brush, a pen, a stamp, a knife, a file, or a screw. Whether it is styled a manufacture, a tool, or a machine, it is an instrument intended to produce a useful mechanical result; and the question presents itself, Does it embody any new device, or any combination of devices producing a new result?

In the first place, what is not claimed by the specification of Lipman is to be observed. "I do not claim," he says, "the use of a lead-pencil with a piece of rubber attached at one end." Of course he does not claim a lead-pencil as his invention, nor the use of a strip of india-rubber for erasure. Each of these articles had been in long and general use. But he claims as his invention "the combination of the lead and india-rubber in the holder of a drawing-pencil," in the manner set forth. There is nothing peculiar in the manner set forth. The claim is simply of the combination of the lead and india-rubber in the holder of a drawing-pencil; in other words, the use of an ordinary lead-pencil, in one end of which, and for about one-fourth of its length, is inserted a strip of india-rubber, glued to one side of the pencil. The pencil is to be made in the "usual manner:" *i.e.*, he takes an ordinary lead-pencil, and in this he makes "a groove of suitable size," giving no idea of what he deems a suitable size; and in this groove he inserts a piece of prepared india-rubber, which is glued to one edge of the pencil. "The pencil is then finished in the usual manner; so that, in cutting one end thereof, you have the lead, *B*, and on cutting the other end you expose a small piece of india-rubber,

C, ready for use." It is evident that this manner of making or applying the instrument gives no aid to the patent. It must rest where the patentee claims to place it; that is, on the combination.

This combination consists only of the application of a piece of rubber to one end of the same piece of wood which makes a lead-pencil. It is as if a patent should be granted for an article, or a manufacture as the patentee prefers to term it, consisting of a stick twelve inches long, on one end of which is an ordinary hammer, and on the other end is a screw-driver or a tack-drawer, or, what you will see in use in every retail shop, a lead-pencil, on one end of which is a steel pen. It is the case of a garden rake, on the handle end of which should be placed a hoe, or on the other side of the same end of which should be placed a hoe. In all these cases there might be the advantage of carrying about one instrument instead of two, or of avoiding the liability to loss or misplacing of separate tools. The instruments placed upon the same rod might be more convenient for use than when used separately. Each, however, continues to perform its own duty, and nothing else. No effect is produced, no result follows, from the joint use of the two.

A handle in common, a joint handle, does not create a new or combined operation. The handle for the pencil does not create or aid the handle for the eraser. The handle for the eraser does not create or aid the handle for the pencil. Each has and each requires a handle the same as it had and required, without reference to what is at the other end of the instrument; and the operation of the handle of and for each is precisely the same, whether the new article is or is not at the other end of it. In this and the cases supposed you have but a rake, a hoe, a hammer, a pencil, or an eraser, when you are done. The law requires more than a change of form, or juxtaposition of parts, or of the external arrangement of things, or of the order in which they are used, to give patentability. Curtis on Pat., sect. 50; *Hailes* v. *Van Wormer*, 20 Wall. 353. A double use is not patentable, nor does its cheapness make it so. Curtis, sects. 56, 73. An instrument or manufacture which is the result of mechanical skill merely is not patentable. Mechanical skill is one thing: invention is a different thing. Per-

fection of workmanship, however much it may increase the convenience, extend the use, or diminish expense, is not patentable. The distinction between mechanical skill, with its conveniences and advantages and inventive genius, is recognized in all the cases. *Rubber Tip Pencil Co.* v. *Howard*, and other cases, *supra;* Curtis, sect. 72 *b*.

The combination, to be patentable, must produce a different force or effect, or result in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union: if not so, it is only an aggregation of separate elements. An instance and an illustration are found in the discovery, that, by the use of sulphur mixed with india-rubber, the rubber could be vulcanized, and that without this agent the rubber could not be vulcanized. The combination of the two produced a result or an article entirely different from that before in use. Another illustration may be found in the frame in a saw-mill which advances the log regularly to meet the saw, and the saw which saws the log; the two co-operate and are simultaneous in their joint action of sawing through the whole log: or in the sewing-machine, where one part advances the cloth, and another part forms the stitches, the action being simultaneous in carrying on a continuous sewing. A stem-winding watch-key is another instance. The office of the stem is to hold the watch, or hang the chain to the watch: the office of the key is to wind it. When the stem is made the key, the joint duty of holding the chain and winding the watch is performed by the same instrument. A double effect is produced or a double duty performed by the combined result. In these and numerous like cases the parts co-operate in producing the final effect, sometimes simultaneously, sometimes successively. The result comes from the combined effect of the several parts, not simply from the separate action of each, and is, therefore, patentable.

In the case we are considering, the parts claimed to make a combination are distinct and disconnected. Not only is there no new result, but no joint operation. When the lead is used, it performs the same operation and in the same manner as it would do if there were no rubber at the other end of the pencil: when the rubber is used, it is in the same manner

and performs the same duty as if the lead were not in the same pencil. A pencil is laid down and a rubber is taken up, the one to write, the other to erase: a pencil is turned over to erase with, or an eraser is turned over to write with. The principle is the same in both instances. It may be more convenient to have the two instruments on one rod than on two. There may be a security against the absence of the tools of an artist or mechanic from the fact, that, the greater the number, the greater the danger of loss. It may be more convenient to turn over the different ends of the same stick than to lay down one stick and take up another. This, however, is not invention within the patent law, as the authorities cited fully show. There is no relation between the instruments in the performance of their several functions, and no reciprocal action, no parts used in common.

We are of the opinion, that, for the reasons given, neither the patent of Lipman nor the improvement of Reckendorfer can be sustained, and that the judgment of the Circuit Court dismissing the bill must be affirmed.

MR. JUSTICE STRONG dissenting.

I dissent from so much of the opinion of the majority of the court as holds that the instrument or manufacture described in the patents exhibits no sufficient invention to warrant the grant of a patent for it.

MR. JUSTICE DAVIS and MR. JUSTICE BRADLEY also dissented.

POTTS ET AL. *v.* CHUMASERO ET AL.

Writs of error and appeals lie to this court from the Supreme court of the Territory of Montana only in cases where the value of the property or the amount in controversy exceeds the sum of one thousand dollars, and from decisions upon writs of *habeas corpus* involving the question of personal freedom. Rev. Stat., sect. 1909.

ERROR to the Supreme Court of the Territory of Montana.

Sect. 1 of an act of the legislature of the Territory of Montana, approved Feb. 11, 1874 (Laws of Montana, 8th sess., 1874, p. 43), provides,—

"That the seat of government of the Territory of Montana be, and the same is hereby, changed from the city of Virginia, in the county of Madison, to the town of Helena, in the county of Lewis and Clark, upon the approval hereof as hereinafter provided."

Sect. 2 provides that the question of removal shall be submitted to the qualified electors of the Territory at the general election to be held in 1874.

Sect. 3 prescribes the method of voting on the question, and provides, that, if a greater number of votes are cast for the removal than against it, "it shall be taken, deemed, and held that this law has been duly approved, and that the seat of government of the Territory of Montana has been in due form of law removed to the said town of Helena, and the governor shall make public proclamation thereof."

Sect. 5 provides that the votes cast for the approval of this law shall be counted, returned, and canvassed in the same manner and by the same persons and officers as votes for delegate in Congress.

Sect. 20 of the codified statutes of Montana (c. 23, p. 466) makes it "the duty of the secretary of the Territory, with a marshal of the Territory or his deputy, in presence of the governor, to proceed within thirty days after the election, and sooner if the returns be received, to canvass the votes given for delegate for Congress; and the governor shall grant a certificate of election to the person having the highest number of votes, and shall issue a proclamation declaring the election of such person."

At the general election held in the Territory on the 3d of August, 1874, the electors voted on the approval or disapproval of the law above referred to.

On the 2d September, 1874, thirty days after the election, the secretary and marshal of the Territory, in the presence of the governor, opened and canvassed the votes returned from the several counties of the Territory, recorded and signed the certificate of the count, and adjourned *sine die*. The canvass thus made showed a majority of the votes against removal.

On the 11th December, 1874, the defendants in error filed a petition in the Supreme Court of the Territory, setting forth

that they are resident citizens of Helena, in Montana Territory, and are attorneys and counsellors-at-law; that in the course of their practice, in order to attend the sessions of the Supreme Court, "they are required and compelled to make frequent journeys to the seat of government of said Territory; that heretofore they have been required and compelled to make frequent journeys to the city of Virginia," where the seat of government was located, and where it has hitherto remained, and where the records of said court, and clerk thereof, continue to remain; that, in order to attend to their professional duties, they are obliged to expend large sums of money in and about defraying their expenses for fare in stage-coaches thereto and therefrom, and for board and lodging at hotels along the route and at said city; and that they are therefore beneficially interested in having the seat of government and the Supreme Court of said Territory removed to Helena, which is about one hundred miles distant from said city.

The petition then sets forth in substance that the votes of two counties, although duly returned, had been improperly excluded, and that, had they been counted, the result would have been different; and it concludes by praying that a writ of mandate be issued to the plaintiffs in error, — viz., the governor, secretary, and marshal of the Territory, — commanding them again to canvass the votes in accordance with the findings and judgment of the court.

A demurrer to the petition having been overruled, the plaintiffs in error answered, denying its allegations, and setting up that the removal of the seat of government would involve an expense to the United States of $3,000.

The court found the facts for the petitioners, and issued the writ of mandate as prayed for: whereupon the case was brought here.

Mr. Richard T. Merrick, for the defendants in error, in support of a motion to dismiss for want of jurisdiction.

Mr. James A. Garfield, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We have no jurisdiction in this case. Writs of error and

appeals lie to this court from the Supreme Court of the Territory of Montana only in cases where the value of the property or the amount in controversy exceeds the sum of $1,000, and from decisions upon writs of *habeas corpus* involving the question of personal freedom. Rev. Stat., sect. 1909.

In *Barry* v. *Mercien*, 5 How. 120, it was held, Chief Justice Taney speaking for the court, that, in order to give us jurisdiction in a case dependent upon the amount in controversy, "the matter in dispute must be money, or some right, the value of which in money can be calculated and ascertained." This rule has been followed in many cases. *Pratt* v. *Fitzhugh*, 1 Black, 273; *De Krafft* v. *Barry*, 2 id. 714.

In the present case, the contest is not for money, or any right the value of which can be measured by money. The petitioners, to show that they have such a special interest in the question presented for adjudication as entitles them to commence and maintain the action, allege that they are attorneys and counsellors-at-law, and that, by the removal of the seat of government from Helena to Virginia City, their expenses will be increased while in attendance upon the courts pursuant to their professional engagements. But this is not the matter in controversy. The contest is as to the validity of certain proceedings for the removal of the seat of government for the Territory. The interest which the petitioners have in that contest is not in any sense property. Besides, they do not complain.

The defendants, who are the plaintiffs in error here, do not claim to be personally interested pecuniarily in the litigation. They only state in their answer, that, if a removal is had, the United States will be put to an expense of $3,000. But in this proceeding they do not represent the United States. They are government officials; but they do not appear here in their official capacity. By a law of the Territory, it has been made their duty to canvass the votes cast at a Territorial election. In this they act for the people of the Territory, and not for the United States. They derive all their authority for this purpose from a law of the Territory, and not from a law of Congress. If a judgment is given against them, they will not lose any money; neither will the petitioners gain any from them.

Writ dismissed for want of jurisdiction.

SCAMMON v. KIMBALL, ASSIGNEE.

1. A banker, who was a director of an insurance company, can set off against its demand for money it deposited with him, bearing interest and payable on call, the amount due on its policies issued to and held by him.
2. The company having been adjudicated a bankrupt, his right to such a set-off is equally available against its assignee.

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

The complainant, a private banker in Chicago, held several policies of insurance issued to him by the Mutual Security Insurance Company, of which he was a director.

The company was duly adjudicated a bankrupt. At the time of such adjudication, it had money deposited with him on call, drawing interest, and held his notes for unpaid subscriptions to its capital stock.

The question arising in the case and determined by the court below was, whether the amount due from the company on said policies of insurance on account of losses he had sustained by fire could be set off against said notes, and the money deposited.

In view of the decision in *Sawyer* v. *Hoag, Assignee*, 17 Wall. 610, by this court, the complainant's right to set off his claim against the company, so far as the notes in question are concerned, was abandoned in the argument.

Mr. Matt. H. Carpenter for the appellant.

1. The complainant is clearly entitled to the set-off. The Bankrupt Act, sect. 20; *Tucker* v. *Oxley*, 5 Cranch, 34; *Holbrook* v. *Receivers of the American Fire Ins. Co.*, 6 Paige, 220; *Ex parte Globe Fire Ins. Co.*, 2 Edw. Ch. 625; *Gray* v. *Rollo*, 18 Wall. 629; *Drake* v. *Rollo*, 3 Biss. 274; *Olive* v. *Smith*, 5 Taunt. 56; *Young* v. *Bank of Bengal*, 1 Deac. 622; *Jones* v. *Robinson*, 26 Barb. 310; *Berry* v. *Brett*, 6 Bosw. 627; *Bize* v. *Dickason*, 1 T. R. 285; *Ginn* v. *Dubois*, id. 112; *Osgood* v. *De Groot*, 36 N. Y. 348.

2. The deposit of the money with him as banker constituted a loan, and no trust attached to it in his hands. Hill on Trustees, 173; *Patt* v. *Clegg*, 16 M. & W. 321; *Sims* v. *Bond*, 5 B.

& Ad. 389; *Carr* v. *Carr*, 1 Meriv. 541; *Devoyneo* v. *Noble*, id. 568.

Mr. John L. Thompson, *contra*.

The debts are not of the same character, and cannot be set off. *Lawrence* v. *Nelson*, 21 N. Y. 158; *Duncan* v. *Lyon*, 3 Johns. Ch. 358; Waterman on Set-off, 209.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Jurisdiction is vested in the circuit courts, under the Bankrupt Act, concurrent with the District Court for the same district, of all suits, at law or in equity, which may or shall be brought by any person against the assignee of the bankrupt's estate, touching any property, or rights of property, of the bankrupt transferable to, or vested in, such assignee.

Pursuant to that authority, the appellant, on the 3d of May, 1872, filed the present bill of complaint in the Circuit Court against the appellee as assignee of the bankrupt company described in the title of the case. Prior to that, — to wit, on the 27th of January in the same year, — the insurance company was duly adjudged bankrupt; and the record shows that the present appellee was appointed the assignee of the estate of the bankrupt company.

Satisfactory evidence is exhibited in the record to show that the company was duly organized with a nominal capital of $300,000, of which ten per cent had been paid, and that the residue was secured by the notes of the subscribers. Provision is made by the charter that the stock and affairs of the corporation shall be managed and conducted by any number of directors, not more than twenty-five nor less than nine, to be chosen by ballot from among and by the stockholders. Directors, it is also provided, shall choose out of their number a president and vice-president; and the directors have the power to appoint, for the time being, "such officers, secretaries, agents, and servants as they shall judge necessary."

Shares in the stock of the company, to a large amount, were owned by the complainant; and he admits that the company held notes against him to the amount of $10,147.50, given to secure unpaid balances of subscriptions, for which he was liable either as principal guarantor or surety. Throughout

the lifetime of the company, the complainant insured many and valuable properties in the company, and paid to the proper officers of the same large sums of money as premiums for such policies of insurance. Antecedent to the event which caused the failure of the company, the proper officers of the same transacted a large, and, for the greater portion of the time, a prosperous insurance business.

Much reference to those details will not be made, as they are no longer material in this investigation. Suffice it to say, in that connection, that the complainant was, as he alleges, during the whole of that period, a large owner of real and other property, and was possessed of sufficient means to render secure any moneyed obligation into which he might enter, and to enable him to perform any promise or contract for the payment of money he might make; and he also alleges that it was necessary that the means of the company should be kept where the same could be promptly commanded, if required to pay losses; and in order that the company might accomplish that object, and still realize interest on the same, he came to an agreement with the proper authorities of the company that the funds thereof, or such portion of the same as they might choose, should thereafter, from time to time, be deposited with him, he being then a private banker, and that the moneys so deposited should be paid out or drawn at the pleasure of the company, without notice or limitation; and he avers that he agreed with the company to account with the proper officers for such moneys when and as often as thereto required, and to pay to the company interest thereon, at the rate of ten per centum annually during the continuance of such deposit, until a further or other agreement should be made.

Funds of the kind contemplated were, in accordance with the agreement, deposited with the complainant at the pleasure of the company; and the complainant avers that he paid interest on the average amount of the same, at the agreed rate, for the period and to the amount specified in the exhibit annexed to the bill of complaint.

Ten per centum per annum was paid during the period specified in the annexed exhibit; but it appears that the rate at the close of that period was reduced to eight per cent per annum,

and the complainant admits that no part of the interest since the rate was reduced has been paid.

Both parties, it seems, were solvent until the 9th of October, 1871, when a large part of the property of the complainant and others, which was insured by the company, was destroyed by fire, the immediate effect of which was to cause the failure of the insurance company. Losses of the complainant by the fire, for which the company is responsible, as claimed by the complainant, amount to the sum of $55,800, as appears by the second exhibit annexed to the bill of complaint; and he admits that he held on deposit at the time the company failed the sum of $39,188.03, received under the agreement already fully described, which is due to the company, with eight per cent interest from July 1, 1871, to the 18th of December in the same year.

Process was accordingly issued. The complainant prays that the respondent may be decreed to deliver to him the notes referred to; that he, the respondent, shall acquit and discharge the complainant from the admitted indebtedness to the company; that he, the complainant, be allowed to prove the balance of his demand against the estate of the bankrupt company; and that the respondent be enjoined and restrained from selling or assigning the said notes, and from instituting any suit against the complainant to recover the notes or his indebtedness to the company.

Service was made, and the respondent appeared and filed an answer. He admits that the complainant was one of the original corporators of the company, and subscribers to its capital stock; that only ten per cent of the subscriptions for the capital stock was paid in cash, and that ninety per cent of the same was secured in the promissory notes of the subscribers; that the company at the time of the great fire became insolvent, and that the company on the day named in the bill was adjudged bankrupt; that the company, as alleged, issued several policies of insurance to the complainant, and that he sustained large losses by the great fire; that he is indebted to the company as set forth in the third schedule exhibited in the record, and that he was and is the holder of the funds of the company to the amount specified in the bill of complaint:

but the respondent avers that the company never came to any such agreement, in respect to such funds, as that alleged, and that the complainant held the same solely in his official character as treasurer of the company.

Most of the allegations of the answer were also embodied in a cross-bill filed by the respondent at the same time, in which he denied all the equity of the original bill, and prayed for a decree in his own favor, and that the complainant in the original bill be decreed to pay over to him as assignee the whole amount he owed to the company, including the notes given for subscriptions for stock and the amount he held on deposit.

Proofs were taken; and, the parties having been fully heard, the court dismissed the original bill of complaint, and entered a decree for the respondent in the sum of $9,532, being the amount of the promissory notes given for capital stock, and $39,188.03, being the amount of the funds of the company held by the respondent in the cross-bill, with ten per cent interest on both amounts. Immediate appeal was taken by the complainant in the original bill and respondent in the cross-bill, and he now seeks to reverse that decree.

Complainant's losses by the great fire, it is admitted, amount to $45,015.33, and that the company is liable to him in that amount for such losses under the policies of insurance issued to the complainant prior to the fire.

Since the bill of complaint was filed in this case, this court has decided that the debt due to a stockholder in such a case, for losses sustained by the stockholder, of properties insured by the company, cannot be set off against his indebtedness to the company for unpaid shares in the capital stock of the company, for the reason that moneys arising from that source constitute a trust-fund for the payment of the debts of the company, which, in the due administration of the Bankrupt Law, must be equally divided among all the creditors of the bankrupt. *Sawyer* v. *Hoag*, 17 Wall. 610.

Such an indebtedness constitutes an exception to the rule, that, where there are mutual debts, "one debt may be set against the other," as originally provided by act of Parliament; or perhaps it would be more accurate to say that the rule does not

apply where it appears that the debts are not in the same right as well as mutual. *United States* v. *Eckford*, 6 Wall. 488.

Whether the suit be one at law or in equity, set-off must be understood as that right which exists between two parties, each of whom, under an independent contract, owes an ascertained amount to the other to set off their respective debts by way of mutual deduction, so that, in any action brought for the larger debt, the residue only, after such deduction, shall be recovered. Adams's Eq., 6th Am. ed., 447.

Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt; nor will such courts allow a set-off of debts accruing in different rights, except under very special circumstances, and where the proofs are clear and the equity is very strong. 2 Story's Eq., 6th ed., sect. 1437.

Equity regards the capital stock and property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue such properties into whosesoever possession the same may be transferred, unless the stock or property has passed into the hands of a *bona fide* purchaser; and the rule is well settled, that stockholders are not entitled to any share of the capital stock nor to any dividend of the profits until all the debts of the corporation are paid. *Railroad Co* v. *Howard*, 7 Wall. 416.

Moneys derived from the sale and transfer of the franchises and capital stock of an incorporated company are the assets of the corporation, and, as such, constitute a fund for the payment of its debts; and if held by the corporation itself, and so invested as to be subject to legal process, the fund may be seized by a creditor on such process, and subjected to the payment of the indebtedness of the company. Where the fund has been improperly distributed among the stockholders, or passed into the hands of third persons not *bona fide* creditors or purchasers, the established rule in equity is, if the debts of the company remain unpaid, that such holders take the fund charged with the trust in favor of the creditors, which a court of equity will enforce, and compel the application of the same to the satis-

faction of the debts of the corporation. 2 Story's Eq., 9th ed., sect. 1252; *Mumma* v. *Potomac*, 8 Pet. 286; *Wood* v. *Dummer*, 3 Mas. 308; *Vose* v. *Grant*, 15 Mass. 522; *Spear* v. *Grant*, 16 id. 14; *Curran* v. *Arkansas*, 15 How. 307.

Tested by these considerations, it is clear that the prayer of the bill of complaint, that the respondent may be directed to deliver to the complainant the notes referred to, must be denied.

Claim for losses due from the company cannot be set off against the notes given for capital stock. Suppose that is so: still the complainant insists that such claims for losses may be set off against the amount due from him to the company for the moneys of the company deposited with him under the agreement set forth in the bill of complaint.

Matters alleged in the bill of complaint, and denied in the answer, must be proved before such matters can be assumed as true by the court. Concede that, and it follows that the important question remains to be considered, whether there was such an agreement between the complainant and the company, in respect to the moneys deposited with the complainant, as that set forth in the bill of complaint.

Moneys to a large amount were deposited with the complainant; and it is not denied that he paid interest on the same to the amount of $11,799.96, as shown by the first schedule annexed to the original bill: but the respondent in the original bill, and complainant in the cross-bill, alleges that the complainant in the original bill received and held all such sums as treasurer of the company, and that the balance in his hands is a trust-fund belonging to all creditors, and consequently that his claim for losses under the policies issued to him by the company cannot be set off against his indebtedness to the company for the balance of that fund in his hands. He admits that he was elected to the office of treasurer by the directors in the month of July, 1870, and that he was reappointed thereto during the following year; but he denies that he ever accepted the office, or that he ever qualified as such, or that he held in his custody any money whatever as treasurer of the company. Subsequently he was examined as a witness in the case, and testified that he never qualified as treasurer or gave bond, and

never had any other or different relations with the company in respect to its funds than such as existed before he was elected.

What he states in respect to the alleged agreement is substantially as follows: That he agreed, at the first meeting of the directors, to receive all moneys paid to the company, and to allow the company ten per cent interest upon it, payable annually, until he should notify the company to the contrary, or a different arrangement should be made between the parties; the purpose of the directors being to have the money at all times available, as far as possible, and at the same time to get interest on it; and he says that he made the offer, not because it was of advantage to him, but to encourage the company.

Sufficient appears to show that the complainant was at that time a private banker in good standing, and of great reputed wealth; and he testifies that the arrangement was continued as long as the company transacted business, except that the rate of interest which he was to allow was reduced from ten to eight per cent per annum. Blank checks to draw the money in his hands were prepared by the officers of the company, and were drawn on him, not as treasurer, but as a private banker; and he testifies that it was never understood at any meeting of the company that there were any funds of the company in his hands as treasurer, and that the funds on hand were always reported as funds in bank, and were so described in the published reports of the company.

Decided confirmation of the material parts of these statements comes from several witnesses; and it appears to the entire satisfaction of the court that the arrangement set forth in the bill of complaint was known to and approved by the stockholders as well as the directors, and by the executive committee and the committee of finance and investment. Deposits undoubtedly may be made with a banker under circumstances where the legal conclusion would be, that the title to the fund deposited remained in the depositor; and in that case the banker would become the bailee of the depositor, and the latter might rightfully demand the identical money deposited as his property: but where the deposit is general, and there is no special agreement proved inconsistent with such a theory, the title to

the money deposited, whatever it may be, passes to the banker, and he becomes liable for the amount as a debt which can only be discharged by a legal payment of the amount. *Thompson* v. *Riggs*, 5 Wall. 678; *Bank* v. *Wister*, 2 Pet. 325.

All deposits made with bankers, said Mr. Justice Miller, may be divided into two classes: namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money, peculiar to banking business, in which the depositor for his own convenience parts with the title of his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. *Marine Bank* v. *Fulton Bank*, 2 Wall. 256.

Such an agreement to refund may be express or implied; and, if it is express, it may be to refund with or without interest, according to the terms of the agreement. Where the agreement is to pay interest, the agreement is obligatory; but the fact that the depositary agreed to pay interest affords very strong evidence that the title to the money deposited passed out of the depositor by the act of making the deposit.

Money deposited with a banker, says Hill, creates a legal debt between the parties, which, under proper circumstances, may be recovered in an action at law. Hill on Trustees, 4th Am. ed., 173.

Authorities to the same effect are numerous and decisive; as, for example, it was expressly decided by the Master of the Rolls that money paid to a banker becomes immediately a part of his general assets, and he is merely a debtor for the amount. *Devaynes* v. *Noble*, 1 Meriv. 561.

Sums which are paid, said Lord Denman, to the credit of a customer with a banker, though usually called deposits, are, in truth, loans by the customer to the banker; and the party who seeks to recover the balance of such an account must prove that the loan was in reality intended to be his, and that it was received as such. *Sims* v. *Bond*, 2 Barn. & Ad. 392.

Exactly the same rule was laid down in the Court of Exchequer, where it was held that money deposited with a banker by his customer, in the ordinary way, is money lent to the

banker, with a superadded obligation that it is to be paid when demanded by a check. *Pott* v. *Clegg*, 16 Mee. & Wels. 327.

Viewed in the light of these suggestions, it is clear that the amount deposited by the company with the complainant, and which he still owes to the company, or to the respondent as assignee, was and is held by him as a private banker, and not as treasurer of the company; and that any losses sustained by the complainant, at the time and in the manner alleged, for which the bankrupt corporation were and are liable as insurers, may be set off against that claim of the bankrupt corporation, as described in the pleadings in the original suit and cross-bill filed by the respondent.

Nothing remains to be done in this investigation except to recapitulate the elements for a decree, and to direct in general terms what the new decree in the case shall be in the court below. Enough is already remarked to show that the complainant is entitled to the relief prayed, so far as respects the claim of the respondent for the balance due to the bankrupt corporation for the moneys deposited with him as a private banker, amounting to the sum of $39,188.03, as appears in the record; and that he should be allowed to prove the balance due to him for the said losses, to the extent that the company is liable therefor, against the estate of the bankrupt corporation; that the complainant is not entitled to the relief prayed, so far as respects the notes referred to in the bill of complaint, for the reason that the notes were given for shares in the capital stock, and constitute a trust-fund which belongs to all the creditors of the company, for which the complainant in the cross-bill is entitled to a decree.

Should further investigation become necessary in order to ascertain the exact amount of the respective claims, that investigation will be made by the Circuit Court.

Decree reversed, and cause remanded for such further proceedings as may be necessary, and for decree in conformity to the opinion of this court.

MR. JUSTICE STRONG did not sit during the argument, nor take any part in the decision, of this case.

PACE *v.* BURGESS, COLLECTOR.

1. The acts of Congress of July 20, 1868 (15 Stat. 157), and June 6, 1872 (17 id. 254), so far as they relate to snuff and tobacco intended for exportation, do not impose a tax or duty on exports within the meaning of that clause of the Constitution which declares that "no tax or duty shall be laid on articles exported from any State."
2. The stamp thereby required was a means devised for the prevention of fraud by separating and identifying the tobacco intended for exportation; thus relieving it from the taxation to which other tobacco was subjected.
3. The proper fees accruing in the due administration of the laws and regulations necessary for the protection of the government against imposition and frauds likely to be committed under the pretext of exportation, are, in no sense, a duty on exports. They are simply the compensation given for services properly rendered.

ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

The question raised in this case was, whether the charge for the stamps required to be placed on packages of manufactured tobacco intended for exportation was a tax or duty on exports within the meaning of the constitutional prohibition.

Mr. William P. Burwell and *Mr. C. S. Stringfellow* for the plaintiff in error.

The constitutional provision that "no tax or duty shall be laid on articles exported from any State" absolutely prohibits Congress from imposing a pecuniary charge on them, whether it consists of a tax or duty, or is laid in the form of excises or imposts; and it is immaterial whether or not the professed object be to identify and separate the articles which are intended for export or to prevent fraud.

It has been insisted, however, that these charges are only for the regulation of trade, and are not a tax or duty for the purpose of revenue. This is entirely immaterial. In the constitutional convention, an amendment proposing to insert, after "duty" in the existing provision, the words "for the purpose of revenue," was rejected by a vote of eight States to three. Madison Debates, p. 456.

The asserted fact, that it was not the intention of Congress to give the character of an export tax to the money exacted by the laws in question, is entitled to no weight. Their constitu-

tionality cannot be determined by such intention. In *Brown* v. *Maryland*, 12 Wheat. 49, the articles imported were not taxed, but the importer was required to pay for a license to sell them. No one intimated that the legislature of Maryland designed to regulate the foreign commerce in which her citizens were engaged. It was contended, however, that the State had an undoubted right to tax the occupation of all persons within her limits; but this court held that this "was but varying the form without varying the substance of the thing prohibited." So, in this case, the purchase of the required revenue-stamps by the plaintiff in error at the time the officer made the entry is but the purchase of the privilege of exporting, and is equivalent to taking out a license and paying the United States therefor. The practical result is the same as if a tax or duty was specifically laid upon each exported package of manufactured tobacco.

Almy v. *State of California*, 24 How. 169, is another case bearing fully on the case at bar. This court held that the California statute was clearly within the terms of the prohibition on the States in regard to the subject of exports. If, therefore, it was an unconstitutional exercise of power in a State to levy a tax on a bill of lading, which the court regarded as an *inseparable incident* to a shipment abroad, how much more would it have regarded a stamp-tax laid directly on the article about to be exported! Chief Justice Taney stated, that, if the stamp had been required to be placed on the packages of gold dust, every one would see at a glance that such a tax would be repugnant to the prohibition. Yet that is exactly what the acts of Congress in question have required in regard to the exportation of this tobacco, although a much more stringent prohibition is imposed on that body than on the States.

The amount required to be paid for the stamp is wholly unimportant in determining the question submitted. It is one of constitutional power.

Mr. Assistant Attorney-General Edwin B. Smith, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The plaintiff in error brought this suit to recover from the

defendant (who was collector of internal revenue) the amount paid by plaintiff to defendant for stamps to be affixed, and which were affixed, pursuant to law, to packages of manufactured tobacco intended for exportation. The plaintiff was a manufacturer of tobacco in Richmond, Va.; and the payments were made from the years 1869 to 1873, inclusive, first under the act of July 20, 1868 (15 Stat. 157), and afterward under the act of June 6, 1872 (17 Stat. 254). By the act of 1868, an excise tax of thirty-two cents per pound was imposed on all manufactured tobacco, except smoking tobacco, on which the tax was sixteen cents per pound; and penalties and forfeitures were imposed for removing the manufactured article from the factory without being put up in proper packages, or without having the proper stamps affixed thereon and cancelled, to indicate the payment of the tax, and compliance with the law. From these provisions, tobacco intended for export was excepted; it being provided that such tobacco might be removed without payment of the tax, and without restriction as to the size of the packages: but it was enacted that "all tobacco and snuff intended for export, before being removed from the manufactory, shall have affixed to each package an engraved stamp indicative of such intention, to be provided and furnished to the several collectors as in the case of other stamps, and to be charged to them, and accounted for in the same manner; and, for the expense attending the providing and affixing such stamps, twenty-five cents for each package so stamped should be paid to the collector on making the entry for such transportation." To facilitate the disposal of tobacco intended for exportation, the Commissioner of Internal Revenue was authorized to designate and establish, at any ports of entry in the United States, export bonded warehouses for the storage of such tobacco in bond, to be used exclusively for that purpose, and to be in charge of an internal-revenue storekeeper; in which warehouses, tobacco intended for exportation might be kept in bond until actually exported. The act of 1872 reduced the charge for the stamps to ten cents, and provided for a drawback of the excise-tax, if, after being paid, the owner should wish to export the article.

The plaintiff contends that the charge for the stamps required

to be placed on packages of manufactured tobacco intended for exportation was and is a duty on exports, within the meaning of that clause in the Constitution of the United States which declares that "no tax or duty shall be laid on articles exported from any State." But it is manifest that such was not its character or object. The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or of ten cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. It bore no proportion whatever to the quantity or value of the package on which it was affixed. These were unlimited, except by the discretion of the exporter or the convenience of handling. The large amount paid for such stamps by the plaintiff only shows that he was carrying on an immense business.

The evidence given to show that the original cost of the stamps was never less than the amount paid for them by the manufacturers is entitled to very slight consideration. The cost of the paper, ink, and printing, formed but a small part of the expense of those arrangements which were necessary in order to give to the exporter the benefit of exemption from taxation, and at the same time to secure the necessary precautions against the perpetration of fraud. We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned; and the pretext of intending to export such an article as manufactured tobacco would open the widest door to such practices, if the greatest strictness and precaution were not observed. The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under pretence of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. The rule by which they are estimated may be an arbitrary one; but an arbitrary

rule may be more convenient and less onerous than any other which can be adopted. The point to guard against is, the imposition of a duty under the pretext of fixing a fee. In the case under consideration, having due regard to that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive, or that it amounts to an infringement of the constitutional provision referred to. We cannot say that it is a tax or duty instead of what it purports to be, a fee or charge, for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the government.

One cause of difficulty in the case arises from the use of stamps as one of the means of segregating and identifying the property intended to be exported. It is the form in which many taxes and duties are imposed and liquidated; stamps being seldom used, except for the purpose of levying a duty or tax. But we must regard things rather than names. A stamp may be used, and, in the case before us, we think it is used, for quite a different purpose from that of imposing a tax or duty: indeed, it is used for the very contrary purpose, — that of securing exemption from a tax or duty. The stamps required by recent laws to be affixed to all agreements, documents, and papers, and to different articles of manufacture, were really and in truth taxes and duties, or evidences of the payment of taxes and duties, and were intended as such. The stamp required to be placed on gold-dust exported from California by a law of that State was clearly an export tax, as this court decided in the case of *Almy* v. *The State of California*, 24 How. 169. In all such cases, no one could entertain a reasonable doubt on the subject. The present case is different, and must be judged by its own circumstances. The sense and reason of the thing will generally determine the character of every case that can arise.

The court being of opinion that the charge for the stamps in this case was not a tax or duty within the meaning of the clause of the Constitution referred to, it is unnecessary to examine the other questions that were discussed in the argument of the cause.

Judgment affirmed.

PIEDMONT AND ARLINGTON LIFE-INSURANCE COMPANY *v.* EWING, ADMINISTRATOR.

1. Where, in an action against a life-insurance company brought by an administrator on a policy purporting to insure the life of the intestate, one of the defences set up was that the answers of the latter to certain questions propounded to him at the time of his application touching his habits of life, &c., were untrue, the burden of proving the truth of such answers does not rest on the plaintiff.
2. While negotiations were still pending between an agent of the company and the applicant, touching the precise terms of a contract of insurance, the amount of premium, and the mode of payment, a friend paid the premium, but concealed from the agent the condition of the applicant, who was then *in extremis*, and died in a few hours. The agent, in ignorance of the facts, delivered the policy. *Held*, that no valid contract arose from the transaction.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

The case was argued by *Mr. E. C. Carrington* for the plaintiff in error, and submitted on printed argument by *Mr. Britton A. Hill* for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

This was an action on a policy of life-insurance issued by plaintiff in error.

The defence is, that though plaintiff below, as administrator of Mr. Howes, whose life it purported to insure, had received the policy, it was, in reality, not delivered by the agent until after the death of the assured, and in ignorance of that event. This is not disputed. But plaintiff below insisted that a contract of insurance had been made between Howes and the insurance company before his death, which bound the company; and whether this was so or not is the principal question in the case.

Another defence, however, was, that the assured had in his application, in answer to the questions propounded to him, stated, among many other things, that his habits of life were correct and temperate, and had ever been so, and that he had never habitually used ardent spirits to the extent of intemperance; and in reply to the question, "Are you subject to, or have you

had, dyspepsia, diarrhœa, dysentery, disease of the heart, stomach, bowels, or any of the vital organs?" answered "No." The defendant alleges in his answer to the declaration that these answers were untrue.

On this branch of the case the argument of plaintiff in error is, that the burden of proving the truth of these answers was on plaintiff below; and that, if he failed to introduce satisfactory evidence on that subject, he could not recover. It is true that this court holds that all these answers are warranties, if so declared by the terms of the policy; and if any of them, however immaterial to the risk, is shown to be untrue, the policy is void.

The number of questions in this application which require an answer are from thirty to fifty in every case. They relate to matters occurring in childhood, or which concern the health or habits of the ancestors of the assured, and to other matters rather of opinion than fact, which it would be almost impossible to prove. To establish the truth of the answer would, in many cases, require the party to prove a negative. Take the points raised in the case. How can a man who has lived forty or fifty years prove that he never had dyspepsia or a diarrhœa, or any disease of the heart or bowels? and how can he prove that his habits of life have always been correct, and that he never drank ardent spirits to the extent of intemperance?

While it may be easy enough to prove the affirmative of one of these questions, it is next to impossible to prove the negative.

The number of the questions now asked of the assured in every application for a policy, and the variety of subjects, and length of time which they cover, are such, that it may be safely said that no sane man would ever take a policy if proof to the satisfaction of a jury of the truth of every answer were made known to him to be an indispensable prerequisite to payment of the sum secured, that proof to be made only after he was dead, and could render no assistance in furnishing it. On the other hand, it is no hardship, that, if the insurer knows or believes any of these statements to be false, he shall furnish the evidence on which that knowledge or belief rests. He can thus single out the answer whose truth he proposes to contest;

and, if he has any reasonable grounds to make such an issue, he can show the facts on which it is founded.

The judge of the Circuit Court was, therefore, right in refusing to instruct the jury, that the burden of proving the truth of these answers rested with the plaintiff below.

The court submitted to the jury the question, whether, notwithstanding the policy was delivered to a friend of the deceased after his death, by the agent of the company, in ignorance of the fact of his death, there had been a contract for insurance before his death, which made this delivery a duty, and therefore valid; and, in doing this, the court placed before the jury hypothetically the principal facts proved on that subject, and said, if they found them as thus stated to be true, they were sufficient to justify a verdict for the plaintiff. This charge is the main error relied on to reverse the judgment.

All the evidence on this subject is in the record, and was parol. It appears that Howes was publisher of a newspaper; and that, the special agent of the company (Huff) desiring to advertise in the paper, an agreement was made that Howes should take a policy on his life for $5,000, and the cost of a year's advertisement should go towards paying the first annual premium. The advertisement was to cost $70, and its publication in the paper commenced at once. This was about the 28th August, 1871. Howes made his formal application; and the company sent its policy to the local agent, Bell, with instructions to deliver the policy on the payment of the balance of the first annual premium, — to wit, $17.70, the whole premium being $87.70.

"It further appeared in evidence," says the bill of exceptions, "that said policy was executed by the officers of the company, and forwarded to said Bell, and received by him at Jefferson City, Mo., about the sixth day of September, 1871, to be countersigned and delivered; that he tendered the same to said Howes, and demanded the cash part of said advance premium, — to wit, $17.70; but that said Howes did not pay the same, saying that the printing was to pay the first semi-annual premium on the policy; that he would write to Huff, the special agent of the company, with whom he had made the contract at Kansas City, about it; that, after giving said Howes time to

hear from said special agent, said Bell called again upon said Howes for the $17.70, but he did not pay said sum; and that afterwards — to wit, on the twelfth day of October, 1871 — said Bell, being about to remove to the neighborhood of Brazeto, fifteen miles from Jefferson City, called again upon said Howes, and found him sick. Howes told him that he would look up the accounts as soon as he was able to get to his office, and would settle the matter."

This evidence seems to be uncontradicted. On the fourteenth day of October, on or about six o'clock in the evening, Howes died, and Bell was at that time not in the city; but, on that day, Howes's friend and partner, Ragan (at what hour is not stated), paid to a man using the same office with Bell the $17.70, and gave a receipt for the bill for printing of $70, and took from the same person a receipt in full for the $87.70 paid on the policy, describing it by number. This receipt was signed "R. A. Hufford, for J. F. Bell, agent," &c.

Neither Hufford nor Bell knew of Howes's condition at this time. Hufford wrote to Bell what he had done, and requested him to send the policy by mail; which he did. There is some question raised as to Hufford's power to accept and receipt for the money; and if he had none, then as to Bell's ratification of his act.

But, in the view which we take of this case, this is immaterial; for we think, that, if Bell himself had done all that Hufford and himself both did, — that is, if Bell had received the money, given the receipt, and delivered the policy in the manner they were done, — there was still no valid contract.

It will, perhaps, be admitted, that if there had been no agreement before Howes was at the point of death, between himself and the insurance company as to the terms of the contract, Howes alone could not at that moment by any act of his perfect the agreement. It cannot for a moment be contended, that, while parties are still in negotiation as to the terms of a contract, one of them, learning of a total change in the condition of the subject-matter of the contract of which the other is ignorant, can at that moment accept terms which he has refused before, and by doing so bind the party who had offered those terms when the condition of affairs was wholly different.

The case before us is a striking instance of the attempt to do this.

There is no evidence to show that Howes and Huff, the first agent, ever came to any terms as to the amount of the premium, and but little to show that they agreed on the price of the advertisement. It is quite plain that when the policy was presented to Howes by Bell, and the balance of $17.70 demanded, that the parties had not then come to an understanding of the precise terms of the contract. It amounted to no more than this, — that the company should advertise in Howes's paper, that he should take a policy of the company for $5,000, and that the advertisement should go as payment on the first premium.

But Mr. Howes insisted that the advertisement should pay the first premium in full, and he refused to accept the policy on any other terms. It is not shown, nor is there any fair inference to be drawn from the testimony, that he ever changed his mind on the point. Time was given him to write to Huff, with whom he had negotiated; but it is not shown that he ever did so. After a reasonable time for this, he was again called on for the money, and did not pay; and, two days before his death, he was again called on by the agent, who was about to leave the town. His answer was, that he would look up the accounts as soon as he was able to get to his office, and would settle the matter. There is in all this no relinquishment of his claim that the printing was to pay all the first annual premium, and at no time a promise to pay the $17.70 in cash.

It seems impossible to conclude that up to this time there had been any thing more than negotiations; that there had been any meeting of minds on the necessary terms of the contract. The amount and the mode of payment were still under consideration.

To hold that when he was *in extremis*, an hour or two before he breathed his last, a friend could pay this small sum to an agent of the company, without the agent or the company having any idea of the condition of the dying man, and thus secure an obligation to pay his administrator $5,000 within sixty or ninety days, is to affirm that one party to a negotiation can delay his assent to the terms of the contract until the

changes of fortune enable him to reap all the benefits, and throw all the losses on the other side, and then, for the first time, do what was necessary on his part to make the contract obligatory.

This case differs very widely from those cited, in which a delay in payment has been treated by the court as waived. All such cases proceed on the ground that a valid agreement as to the terms of the contract has been made. In most of them one or two premiums have been paid, and the delay in paying subsequently has been waived or accounted for; or, the amount of the first payment having been agreed on, the agent or some one for the company has so acted with the assured in the matter as to show a consent to delay.

But in this case no delay was asked for. That was not the point in controversy. The amount due or to be paid was the open question; and we can see no evidence that on this point Mr. Howes ever in his lifetime agreed with the company on that subject; and if we could suppose that in the very presence of the event, in which his family was to get $5,000 for the payment of $17.70, he did then agree, it was certainly too late to bind the other party, whose first news of his danger was that he was dead.

For these reasons, notwithstanding the cautious manner in which the judge recited his view of what had been given in evidence, and left the jury to believe it or not, we think there was no such evidence of the existence of a valid contract as to sustain the verdict.

Judgment reversed, and case remanded with directions to set aside the verdict, and grant a new trial.

SAVAGE, EXECUTRIX, *v.* UNITED STATES.

1. The holder of treasury-notes, payable three years after date, which were issued under the authority of an act of July 17, 1861 (12 Stat. 259), demanded payment in gold of the principal and interest due thereon. The Secretary of the Treasury refused payment in that medium, but offered it in legal-tender notes. The holder, under protest, received the offered

payment in full discharge of the notes, surrendered them to be cancelled, and brought an action against the United States to recover the difference in the market-value of gold and of legal-tender notes at the date of such payment. *Held*, that by accepting the medium offered, and surrendering the treasury-notes, the holder waived all claim, independently of the question whether or not that medium was a legal tender in payment of them.

2. The protest, being unauthorized by law, had no efficacy to qualify the voluntary surrender of the treasury-notes.

APPEAL from the Court of Claims.

The case was argued by *Mr. Conway Robinson* for the appellant. The court declined to hear *Mr. Assistant Attorney-General Edwin B. Smith* for the appellee.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Power was conferred upon the Secretary of the Treasury, by the act of the 17th of July, 1861, to borrow $250,000,000, for which he was authorized to issue bonds or treasury-notes; the treasury-notes to be of any denomination fixed by the secretary, not less than $50, and to be payable three years after date, with interest at the rate of seven and three-tenths per centum per annum, payable semi-annually. Sect. 3 provides that the secretary shall cause books to be opened for subscription to the treasury-notes, for $50 and upwards, at such places as he may designate, and under such rules and regulations as he may prescribe, to be superintended by the assistant treasurers at their respective localities, and at other places by such depositaries, postmasters, and other persons as he may designate, giving notice thereof as therein directed. 12 Stat. 259.

Pursuant to the authority conferred, the secretary appointed Jay Cooke, one of the special agents, to open a book for subscription to the treasury-notes; and it appears that the secretary addressed to him, as such special agent, a circular-letter of instructions, in which, among other things, he stated that "all payments must be made in the lawful coin of the United States, and that, whenever the amount subscribed shall not be paid within the period prescribed, the first payment shall be forfeited to the United States."

Sufficient appears in the finding of the court to show that the special agent opened a book for subscriptions, and that he published an advertisement, describing what the denominations

of the notes would be, and giving the date when they would be issued; and that he stated that the notes would be "payable in gold in three years, or be convertible into a twenty-year six-per-cent loan, at the option of the holder; that each note would have interest-coupons attached, which could be cut off and collected in gold at the Mint every six months, and at the rate of interest therein prescribed."

Subsequent to the publication of that advertisement, the testator of the plaintiff, then in full life, became the purchaser of treasury-notes to the amount of $15,000, of the description named in the act of Congress and the advertisement, dated as described in the finding of the court; and it appears that all of the notes were in the following form: "Three years after date, the United States promise to pay to the order of —— dollars, with interest at $7\frac{3}{10}$ per cent, payable semi-annually."

On the 10th of December, 1864, the secretary gave notice that the department was ready to redeem the notes on presentation, and that he would pay the same in lawful money, or by converting the same into bonds as authorized by law, and that interest would cease on all such notes not so presented after three months from that date, at which time the right of conversion would also cease.

Throughout, the testator of the plaintiff insisted that it was his right to have the notes paid in gold; and on the 3d of March, 1866, he caused the notes to be transmitted here to certain bankers, with instructions to present the same at the Treasury and ask for the payment of the same, with interest, in gold, and with directions, that, if the payment in gold were refused, to accept the currency under protest. Payment in gold was subsequently refused; and the agents accepted the principal and interest after maturity in legal-tender notes, under protest, as directed by their employer.

Gold, at the time the notes were presented, was worth in the market a premium of thirty-two cents on the dollar over the legal-tender notes accepted in payment by the agents acting for the testator of the plaintiff. He demanded payment in gold; but his agents accepted the currency under protest, by his directions, the payment in gold having been refused.

Based on these facts, the executrix of the decedent instituted

the present suit in the Court of Claims to recover the difference in the market value of gold and legal-tender notes at the date of the payment made by the United States to the testator of the plaintiff. Judgment was rendered for the defendants in the court below, and the plaintiff appealed to this court. Appended to the finding of facts are the conclusions of law reported by the court, which, in the view taken of the case, it will not be necessary to reproduce for separate examination.

Four errors are assigned by the present plaintiff: (1.) That the court below erred in holding that the subscription agent had no lawful authority to make the statement contained in the advertisement, that the treasury-notes were payable in gold. (2.) That the same court erred in holding that the statement, and what appears in the record in connection therewith, did not in law bind the defendants to pay the notes in gold. (3.) That the court erred in holding that the notes were lawfully paid by the defendants in the legal-tender notes. (4.) That the court erred in holding that the plaintiff, as executrix of the decedent, had no right of action, as against the defendants, to recover the difference in value at that time between the legal-tender notes and gold.

Questions not necessarily involved in the matters of fact found by the court below will not be re-examined, even though they are presented in the assignment of errors. Controversies between parties usually depend, in the first instance, upon the matters of fact out of which the controversy in the particular case arises; and it often happens, even when it is suggested that the decision depends upon the legal questions presented, that it is, nevertheless, important to examine the facts with care, in order to ascertain whether the supposed legal questions do actually arise in the case.

Payment of the treasury-notes was accepted by the testator of the plaintiff; and it appears that he, at the time the payment was made, then being in full life, surrendered the notes to the secretary for cancellation. Neither deception, mistake, nor undue advantage, is suggested; but the whole record shows that it was an honest difference of opinion between the secretary and the decedent as to the rights of the parties, and that it terminated by the voluntary acceptance of the legal-tender

notes, on the part of the agents of the decedent, in lieu of gold, as offered by the secretary, and by the surrender of the treasury-notes to him for the United States. Such an acceptance of payment was a waiver of the claim antecedently made, and amounted to a full discharge of the same, independently of the question, whether the notes accepted in payment are or are not a legal tender, as insisted by the counsel for the defendants.

Had not the treasury-notes held by the decedent been surrendered to the United States, the effect of the acceptance of the currency-notes in payment might possibly have been different; but it is clear that a protest under such circumstances is utterly insufficient to qualify the effect of the waiver evidenced by the acceptance of what was offered in payment of the treasury-notes in lieu of gold. Gold was claimed; but the secretary refused to pay in that medium: and the agents of the decedent, acting in pursuance of his instructions, accepted the medium offered by the secretary, knowing full well that it was offered in full discharge of the treasury-notes; and it appears that they not only accepted the medium of payment offered by the secretary, but surrendered the treasury-notes to the secretary, as the well-known financial agent of the United States.

Actual surrender of the treasury-notes to the secretary was a condition precedent to the right of the secretary to redeem the same, and that fact was as well known to the agents of the decedent as to the secretary; and it must be that they knew full well that the payment of the treasury-notes could not be made unless the surrender was absolute and unconditional.

Viewed in the light of these suggestions, it must be held that the protest, being unauthorized by law, was a mere *ex parte* act, without any legal efficacy to qualify the voluntary surrender of the treasury-notes, which both parties understood to be absolute and unconditional.

Due protest at the time of paying custom duties has the effect to give the merchant the right to sue the collector to recover back duties illegally exacted, because the act of Congress provides that the protest in such a case shall have that effect. 5 Stat. 727. Congress might doubtless give a corresponding effect to such a protest in a case like the one before the court: but it is scarcely necessary to remark, that

there is no such statutory provision; and, in the absence of it, the ruling must be, that the protest is wholly insufficient to qualify the absolute and unconditional surrender of the treasury-notes.

Enough appears to show that the surrender was made with a full knowledge of all the circumstances, and without the least compulsion; that the secretary gave public notice that the department was ready to redeem the notes, on presentation, by paying the amount in lawful money, or by converting the same into bonds, as authorized by law. Treasury-notes of the kind, to a large amount, were over-due; and the holders of the same were given the option to accept payment in legal-tender notes, or in the bonds authorized by law; and they were informed that interest on all such as should not be presented within the next three months would cease from the expiration of the period allowed for their presentation.

Fifteen thousand dollars of the treasury-notes were held by the decedent, then in full life, and he claimed that he should be paid in gold; and it appears that the secretary refused to make the payment in that medium, and insisted that the United States had the right to redeem the same, or make the payment in the manner proposed in the published notice. Payment in gold being refused, the decedent transmitted the over-due notes to their agents here, with instructions to accept payment, under protest, in accordance with the terms proposed by the secretary; and the finding of the court shows that his agents obeyed his instructions, and that the whole amount of the notes presented, including the interest thereon after maturity, was paid in the medium proposed by the secretary.

Prompt payment, no doubt, was desired; but the decedent was under no legal compulsion to accept any other medium of payment than that which he demanded. Both he and his agents were doubtless convinced that the secretary would not recede from the position he had taken; but he was at perfect liberty to reject the terms proposed, and to refuse to surrender the over-due securities which he held.

Duress, if proved, would rebut the assumption of assent, and would doubtless be sufficient to relieve a party in such a case from the effect of a compromise procured by such means: but

the burden of proof to establish such a charge, in every such case, is upon the party making it; and, if he fails to introduce any such evidence to support it, the presumption is that the charge is without any foundation.

Unconditional acceptance of a medium of payment different from that promised by the United States, or absolute acceptance of a smaller sum from the Secretary of the Treasury than the one claimed from the United States, even in a case where the amount relinquished is large, does not leave the United States open to further claim on the ground of duress, if the acceptance of the different medium or the smaller sum is voluntary, and without intimidation, and with a full knowledge of all the circumstances; nor is the case changed if it appears that the claimant was induced to accept the different medium or the smaller sum in full as a means to secure an earlier payment of the claim than he could otherwise hope to procure. *Mason* v. *United States*, 17 Wall. 74.

Parties having claims against the United States, which are disputed by the officers authorized to adjust the same, may compromise the claim, and may accept payment in a different medium from that promised, or may accept a smaller sum than that claimed; and where it appears that the claimant voluntarily entered into a compromise, and accepted payment in full in a different medium from that promised, or accepted a smaller sum than that claimed, and executed a discharge in full for the whole claim, or voluntarily surrendered to the proper officer the evidences of the claim for cancellation, he cannot subsequently sue the United States, and recover in the Court of Claims for any part of the claim voluntarily relinquished in the compromise. *Sweeny* v. *United States*, 17 Wall. 77; *United States* v. *Child*, 12 id. 244; *United States* v. *Justice*, 14 id. 549.

Decisions of the kind by this court are quite numerous, and they show beyond all doubt that parties may adjust their own controversies in their own way, and that when they do so voluntarily, and with a full knowledge of their rights and all the circumstances, no appeal lies to the courts to review their mutual decision. Courts cannot make contracts for parties; and if parties understandingly contract to adjust a controversy

between them in a particular way, and actally execute the contract, they are both bound to regard the controversy as at an end.

Taken as a whole, the findings of the court below show beyond all doubt that the decedent, voluntarily and with a full knowledge of all the circumstances, elected to accept payment of the treasury-notes in the manner proposed by the secretary, and that the surrender of the same to the United States was absolute and unconditional. Nothing less can be inferred from the communication of his agents enclosing the securities when the same were transmitted for redemption, in which his agents say that they "present the notes for payment in accordance with the terms proposed" by the department. Such an acceptance, if intended to waive every variation from the terms antecedently demanded, could hardly be more complete or explicit; nor is its real character changed in any respect by the fact that the agents asked leave in the same communication "to enter protest, under their instructions, against payment otherwise than in gold."

They surrendered the securities, and asked leave to enter the protest in the same communication, which was, in effect, saying, "Our principal still thinks he ought to be paid in gold; but, inasmuch as the department declines to pay in that medium, he has decided to accept payment in the medium which you propose."

Suppose the controversy had respect to the sale and purchase of an article of personal property, instead of the redemption of treasury-notes, and that it appeared that the price asked by the owner was $100, and that a person desiring to purchase the same had offered the owner $90 for it, which the owner at the time declined to accept: of course the bargain, in that state of the case, would not be complete. But suppose the owner of the article should subsequently forward the same to the person who made the offer, informing him that he would accept the offer: no one, it is presumed, would hesitate to decide that the voluntary acceptance of the offer concluded the bargain, if the person who made the offer elected to pay the money, even though the seller might have written in the same communication that he ought to have ten dollars more, and should

protest that the article was worth the whole amount he asked for it in the prior negotiations. Remarks of the kind would not have the effect to qualify the acceptance of the offer and the unconditional delivery of the article.

Apply that rule to the case before the court, and it is clear that the protest of the agents did not have the effect to quality the voluntary acceptance of the terms proposed by the secretary, and the absolute and unqualified surrender of the securities to the United States, and that there is no error in the record. *Judgment affirmed.*

SMELTZER *v.* WHITE.

1. Warrants issued on the county treasurer subsequently to the year 1860 by order of the board of supervisors of a county in Iowa, and duly signed by their clerk, were not, unless sealed with the county seal, genuine and regularly issued, and the treasurer was not authorized to pay them.
2. Where such warrants were sold by a citizen of Iowa to a citizen of another State, with a guaranty that they were "genuine and regularly issued,"— *Held*, that the former thereby undertook that the warrants were not, in a suit brought against the county, subject to any defence founded upon a want of legal form in the signatures or seals; and that, the absence of the county seals being a breach of the warranty, the vendee, without returning or tendering the warrants, was entitled to recover of the vendor the damages which he had sustained by such breach.

ERROR to the Circuit Court of the United States for the District of Iowa.

The plaintiff in error, who is a citizen of Iowa, having sold to the defendant in error, a citizen of Maryland, certain warrants purporting to be issued by the counties of O'Brien, Buena Vista, and Clay, in the State of Iowa, guaranteed in writing that they were "genuine and regularly issued."

Payment of said warrants having been demanded and refused, suit was brought against the several counties. They demurred, upon the ground that the warrants were not issued under the proper seal of the county; and judgment was rendered in their favor: whereupon this suit was instituted.

The Circuit Court rendered a judgment in favor of the plaintiff below: whereupon Smeltzer sued out this writ of error.

Mr. Galusha Parsons for the plaintiff in error.

Mr. J. Hubley Ashton and *Mr. Nathaniel Wilson*, *contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

All the assignments of error, but one, are founded upon exceptions taken to the charge of the circuit judge. They are numerous; and many of them do not conform to the rules of this court, or to the exceptions which were actually taken. Without examining them separately, we shall consider the legal questions they present, so far as they have any bearing upon the case.

The suit was founded upon express guaranties of the genuineness and regularity of issue of county warrants, — guaranties which, the plaintiff alleged, had been broken. He had sued the county to recover the amount of the warrants, and had been defeated, for the general reasons that the seal of the county had not been attached to the warrants, and that under the laws of Iowa, as held by the court, the warrants were invalid unless they bore the impress of the county seal. In the present suit against the guarantor, the circuit judge instructed the jury that the guaranties covered the defect of the want of the county seal upon the warrants; and that, inasmuch as they did not bear the seal (the fact having been decided in the suit against the county), the guaranty was broken, and the defendant was liable. To this instruction several objections are now urged. It is said, first, that the warrants were genuine and regularly issued, even though they did not bear the impress of the county seal; that the statutes of the State did not require that county warrants should be sealed with the county seal. This, we think, is clearly a mistake. Prior to 1860, the county judge had the management of the business of the county, with the usual powers and jurisdiction of county commissioners; and the county funds could be paid out by the treasurer only upon warrants issued by him. Rev. Stat. of Iowa, 241, 243, 360. It was made his duty "to audit all claims against the county; to draw and seal with the county seal all warrants on the treasurer for money to be paid out of the county treasury." Code, 106. The treasurer was authorized to pay only warrants thus drawn and sealed. The language of the statute was, and it still is, "The treasurer shall disburse the same (the county money) on warrants drawn and signed by the county judge, and sealed with the county seal, and not otherwise." In 1860

the powers and duties of the county judge in this respect were transferred to a county board of supervisors (act of March 22, 1860, Rev., sect. 312 *et seq.*), and the clerk of the District Court was constituted their clerk, and required to sign all orders issued by the board. Now, as the treasurer can pay no orders or warrants unless they are sealed with the county seal, and as all warrants were required to be sealed by the county judge until 1860, when the board of supervisors was charged with his duties (except that their warrants are required to be signed by their clerk), it is very evident that no warrant is a genuine county warrant which is unsealed with the county seal. The statute expressly requires the board of supervisors, in all cases where the powers conferred by the act upon the board had been before exercised by the county judges, to conduct their proceedings under said powers in the same way and manner as had been provided by law in such cases for the proceedings of the county judge. Rev., sect. 325. It is too clear, therefore, for debate, that the genuineness and regularity of issue of county warrants can exist only in cases when the warrants are sealed with the county seal; and so it has been decided by the Supreme Court of Iowa substantially, both in *Prescott* v. *Gouser*, 34 Iowa, 178, and in *Springer* v. *The County of Clay*, 35 id. 243.

It is next contended that the Circuit Court mistook the extent of the guaranty. The contention is, that a guaranty that the warrants were "genuine and regularly issued" meant only that they were not forgeries, that they were not issued without consideration, and that they were ordered by the proper officers. To this we cannot assent. It is true, even of a technical guaranty, that its words are to be construed as strongly against the guarantor as the sense will admit. *Drummond* v. *Prestman*, 12 Wheat. 515. Such, also, is the English rule. *Wood* v. *Prestner*, Law Rep. 2 Ex. 66; *Mason* v. *Pritchard*, 12 East, 227. So it has been held, that, in construing a guaranty, it is proper to look at the surrounding circumstances in order to discover the subject-matter the parties had in view, and thus to ascertain the scope and object of the guaranty. *Sheffield* v. *Meadows*, L. R. 4 C. P. 595. Now, if this principle be applied to the present case, it is easy to see what the parties intended. The plaintiff was a citizen of Mary-

land. He purchased the alleged warrants from the defendant, a citizen of Iowa. He may be presumed to have had no actual knowledge of what constituted genuineness and regularity of issue of Iowa County warrants. What was necessary for him to be assured of was that the instruments he proposed to purchase were valid and legal claims against the county, — claims which might be enforced by law. In view of this, the construction contended for by the defendant is utterly inadmissible; and, even without this, the language of the guaranties admits of no other construction than that which the court below gave to it. Under the law of the State, there could be no genuine county warrants regularly issued, imposing a liability upon the county, which were not duly sealed. The treasurer was bound to pay those only that were genuine, and issued according to the requirements of the law.

Again: it is urged on behalf of the defendant that the plaintiff was bound to know, or must be presumed to have known, that the law required county warrants to be sealed with the county seal; and that, as the defect was apparent on the face of the instruments sold and guaranteed, the guaranties must be construed as not covering a patent defect. It is said it cannot be admitted the defendant intended to guarantee any thing more than the existence of facts of which the guaranty had no knowledge. To this it may be answered, that the absence of a proper seal upon the instruments guaranteed was not a patent defect equally within the knowledge of the plaintiff and defendant. Whether the instruments required a seal or not, and what the seal should be in order to constitute them genuine county warrants, regularly issued, depended upon the statute laws of Iowa, of which it may be presumed the plaintiff had no actual knowledge, and that for this reason he desired a warranty. Having exacted one, it is a necessary deduction from it that it was taken as a protection against his own ignorance of Iowa law. It was well said on the argument, that the only warranty that would protect him against loss, in case it should turn out that the county officers neglected to comply with the law prescribing the mode in which county warrants should be executed and issued, would be a warranty coextensive with the defences to which such instruments were subject in suits against the

counties, founded upon non-compliance with the State law on the part of the county officers. We can have no doubt that the true meaning of the guaranties is that the guarantor undertook that the paper was not subject to any defence in suits against the county founded upon any want of legal form, either in the signatures or seals; and we think the absence of the proper seal was a breach of the warranty, rendering the defendant liable for the loss which the plaintiff sustained thereby.

It is next urged by the defendant that the Circuit Court erred in holding him estopped by the judgments rendered in the plaintiff's suits against the county. This assignment rests upon a mistake of fact. The court did not so rule; and, had such ruling been made, it would have been harmless. The warrants were in evidence, and they exhibited the fact, not contradicted, that they were not sealed as the law required. They were, therefore, not genuine county warrants regularly issued; and it was the duty of the court so to declare them. The defendant's contract was broken as soon as it was made; and the plaintiff was entitled to a verdict, no matter whether the judgments in the suits against the county were conclusive or not. It would, therefore, be idle to discuss the question, whether the court below would have fallen into error had the jury been instructed that the former judgments were conclusive. The question is impertinent to this case. We may, however, simply refer to some decisions which tend strongly to show that those judgments were in law conclusive upon the defendant, especially as he had seasonable notice of the defences set up by the county in the plaintiff's suit on the warrants, and was required to assist in the prosecution of the claims. *Carpenter* v. *Pier*, 30 Vt. 81; *Lovejoy* v. *Murray*, 3 Wall. 18; *Walker* v. *Ferrin*, 4 Vt. 529; *Chicago* v. *Robbins*, 4 Wall. 658; *Clarke* v. *Carrington*, 7 Cranch, 322; *Drummond* v. *Preston*, 12 Wheat. 515.

The fifth assignment is, that the court erred in overruling the defendant's offer to show that the warrants were regularly issued for legal claims against the county. The offer, we think, was correctly overruled. The evidence proposed had no relevancy to the issue in the case. That the warrants were issued for debts due by the county was of no importance if they were

not genuine, and in the form that the law required, to enable the holder to set them up as legitimate claims against the county. What availed it to the plaintiff that the county owed the sums of money mentioned in the warrants, if the warrants were nullities? His only means of recovering the money was through the warrants.

The instruction given respecting the measure of damages is not open to any just exception. It was as follows: —

"The amount which the plaintiff paid the defendant for the warrants is *prima facie* evidence of their value at the time; and there is also the evidence of the defendant that they were sold by him to the plaintiff for their market value, based on the assumption that they were valid; and there is no other or different evidence on the subject of value. I therefore instruct you the plaintiff is entitled to recover . . . the amount of the consideration which he paid and the defendant received therefor (for the warrants), with six per cent interest per annum on such amount."

No other rule for the measure of damages could have been given to the jury. *Eaton* v. *Mellus*, 7 Gray, 573.

It is contended, however, that the court erred in refusing to charge as requested, that there could be no recovery without a return of the warrants, and in charging as follows: —

"It is not necessary thus to recover that the plaintiff should, before suit was brought, have tendered back the warrants mentioned in said written guaranties. It is enough that they are in court at the trial; and the court can order them to be retained, and, on payment of the judgment rendered herein, to be delivered to the defendant."

This instruction was in strict accordance with all the well-considered decisions. In case of a breach of warranty, the person to whom the warranty has been given may sue without a return of the goods. He is not obliged to rescind the sale. Thus the law is stated by Kent, 4 Com. 480. In *Man. Co.* v. *Gardner*, 10 Cush. 83, the Supreme Court of Massachusetts ruled that a vendee may sue for a breach of warranty, without returning the goods; and such is the rule in England. *Fielder* v. *Starkin*, 1 H. Bl. 17; *Pateshall* v. *Tranter*, 3 Ad. & Ell. 103. It is true, that, when a vendee seeks to rescind

the contract of sale, he must return the property, or tender it; but when he relies upon an express warranty, and sues upon it, he may recover the damages sustained by its breach without returning or tendering the property. This we understand to be the universal rule. There is, then, no just ground of complaint that the circuit judge charged as he did upon this subject, and much less that he added it was enough that the warrants were in court, and could be impounded for delivery to the defendant. If any one could complain of this last declaration, it was the plaintiff, and not the defendant.

What we have said sufficiently disposes of all the assignments of error, except the eleventh and twelfth. The eleventh is to the refusal of the court to charge as requested by the defendant's third prayer; which was, that "if the jury should find from the evidence that the warrants were regularly issued by order of the several boards of supervisors directing the same, for a valid and subsisting indebtedness by said counties respectively, for the several amounts thereof, and that the plaintiff has not at any time offered to return them, he could only recover the difference between their value without the county seal and their value with said seal at the time of the several sales, and interest." The fourth instruction asked for, but refused, was, "that the several assignments of the warrants carried with them the right to sue and recover the several demands for which they were issued; that if the plaintiff has retained the warrants, without any offer to return them, until the right of action upon the original indebtedness is barred by the Statute of Limitations, and the right of the holder to affix the county seal to the warrant is also barred by the statute, the jury should find for the defendants."

Of these it may be remarked, in addition to what we have said of the supposed obligation of the plaintiff to return the warrants before bringing his suit on the warranties, that there was no evidence whatever that the unsealed warrants had any value. The fair presumption is, that they had none, since they were not drawn as the law required, and since the county treasurer had no authority to pay them. It would, therefore, have been error had the court submitted to the jury to find that they had a value, and to deduct it from what their value would have been had they been genuine warrants regularly issued.

The plaintiff, as we have seen, was a citizen of Maryland. Buying, as he supposed, Iowa County warrants, and ignorant of their necessary form, he took from the seller an engagement that the subjects of his purchase were such warrants, genuine and regularly issued. He had a right to rest upon that engagement. It was not his duty to inquire farther. Assuming that it was possible, when he took the warrants, to procure the impress of the county seal upon them, he was under no obligation to procure it; and there is no evidence that he discovered that the instruments were not what the defendant warranted them to be until May 14, 1870, when, in his suit against the counties, they were adjudged void. Then it was too late to obtain, if they ever could have been obtained, regular warrants, or to obtain the impress of the county seal upon those he held. The right to require the affixing of the seal ceased, under the statutes of Iowa, at the expiration of three years from the issue of the warrants. That period had expired before 1870. The right of action on the original claims against the counties was barred at the end of five years from the time it accrued, and all the warrants were dated more than five years before they were adjudged void. The right of action on the original claims against the counties, even if it did pass to the plaintiff by the assignments of the unsealed warrants, was gone, therefore, when he discovered that the defendant's guaranty was broken; and consequently the defendant suffered no loss by not being remitted to the possession of the warrants then or subsequently. Before that time, there can be no pretence that the plaintiff should have returned them. From this it follows very plainly, that the third and fourth requests to the Circuit Court could not have been properly granted.

Judgment affirmed.

HOBSON ET AL. *v.* LORD.

A vessel bound to the United States, having loaded at one of the guano islands where clearances were not granted, was on her way to Callao for one, when she was badly injured by a collision with another vessel. Proceeding in distress to that, the nearest port, she came to anchor at the anchorage of vessels calling at that port for clearances. A survey revealed the fact

that her damaged condition was such as to require her to be unladen and extensively repaired before prosecuting her voyage. She was, therefore, removed to a hulk nearer the pier, where most of her cargo was discharged, and thence to a dock for repairs. After they were finished, she was, with reasonable despatch, reloaded, and completed her voyage. Before the delivery of her cargo, the consignees gave an average bond, whereby they agreed to pay the owner of the ship their respective proportions of the expenses and charges incurred by him in consequence of such collision, as soon as the average should be adjusted conformably to law and the usages of the port of New York. *Held*, that as the services of her crew were necessary for her preservation and safety in hauling her to and from the hulk for unloading and reloading, and in moving her while in dock undergoing repairs, their wages and provisions, during the time they were so employed, were properly allowed in general average. *Held further*, that an adjustment of the amount paid for the services, board, travelling and incidental expenses of an agent sent by the owner of the ship, in good faith, to Callao to advise and assist the master, for the benefit of the ship and cargo, having been made in conformity with the usage of the port of New York, the charge was properly allowed.

ERROR to the Circuit Court of the United States for the Southern District of New York.

The facts and the assignment of errors are stated in the opinion of the court.

Mr. William G. Choate for the plaintiffs in error.

The law of general average obviously and confessedly had its origin in jettisons. 3 Kent's Com., 12th ed., p. 233; Lowndes on Average, 2d ed., App. A, pp. 305–309, 316, 317.

In England, the wages and provisions of the crew during a detention for the repair of the ship, even when she is compelled for the common safety to bear away to a port of refuge, are not general average. *Plummer* v. *Wildman*, 3 M. & S. 482; *Power* v. *Whitmore*, 4 id. 141; *Hallett* v. *Wigram*, 9 C. B. 580.

According to the American decisions, wages and provisions during a detention to repair (unless the cause of the injury be itself a general average loss) are not general average, except when the vessel, in a proper case of imminent peril to ship and cargo, or to the voyage, voluntarily, and to escape the peril, leaves the proper course of her voyage, and bears away to a port of refuge; because, except in that case, the wages and provisions during the detention are not given or sacrificed for the common benefit, but are bought and paid for by the stipu-

lated freight for the voyage, and the ship, in her delay for repairs, has only complied with her contract with the shipper. *Jones* v. *Ins. Co. of N. America*, 4 Dall. 246; *Kingston* v. *Girard*, id. 274; *Leavenworth* v. *Delafield*, 1 Caines's Cas. 574; *Walden* v. *Le Roy*, 2 id. 263; *Henshaw* v. *Marine Ins. Co.*, id. 274; *Penny* v. *N. Y. Ins. Co.*, 3 id. 155; *Padelford* v. *Boardman*, 4 Mass. 548; *Wightman* v. *Macadam*, 2 Brev. 230; *Ross* v. *Ship Active*, 2 Wash. C. C. 226; *McBride* v. *Marine Ins. Co.*, 7 Johns. 431; *Barker* v. *Phœnix Ins. Co.*, 8 id. 307; *Dunham* v. *Commercial Ins. Co.*, 11 id. 315; *Spafford* v. *Dodge*, 14 Mass. 66; *Thornton* v. *Ins. Co.*, 12 Me. 150; *Hause* v. *N. O. Ins. Co.*, 10 La. o. s. 1; *Potter* v. *Ocean Ins. Co.*, 3 Sumn. 27; *Bixby* v. *Franklin Ins. Co.*, id. 46, note; *Giles* v. *Eagle Ins. Co.*, 2 Met. 40; *The Brig Mary*, 1 Sprag. Dec. 17; *The Star of Hope*, 9 Wall. 203; *Peters* v. *Warren Ins. Co.*, 3 Sumn. 400.

It was no departure from the course of the voyage to haul the vessel to the storeship for the discharge of her cargo, or from there to the dry dock to be repaired, or back again to the hulk to receive her cargo.

The custom proved is not sufficient to justify the allowance of the expenses of the special agent sent out by the owner of the ship.

Mr. Edwin B. Smith, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Sacrifices, voluntarily made in the course of a voyage, of part of the ship, or part of the cargo, to save the whole adventure from an impending sea peril, or extraordinary expenses incurred for the joint benefit of both ship and cargo, and which became necessary in consequence of a common peril of the kind, are regarded as the proper objects of general average.

Average of the kind mentioned denotes that contribution which is required to be made by all the parties to the same sea adventure towards a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, by some of the parties, for the common benefit, to save the ship and cargo from an impending peril.

Property not in peril requires no such sacrifice, nor that any

extraordinary expense should be incurred; and property not saved from the impending peril is not required to pay any portion of such a loss or expenditure, nor do *ordinary* losses or expenditures entitle a party to claim any such contribution from the associated interests of the adventure: from which it follows that the ship and cargo must have been in peril, and that the sacrifice must have been of a part of the ship or cargo to save the residue of the adventure, or that the extraordinary expenses must have been incurred for the joint benefit of the ship and cargo, and which became necessary in consequence of a common peril.

Where there is no peril, such a sacrifice presents no claim for such a contribution; but, the greater and more imminent the peril, the more meritorious the claim against the other interests, if the sacrifice was voluntary, and contributed to save the adventure from the impending danger to which all the interests were exposed. *Star of Hope*, 9 Wall. 229; *Fowler* v. *Rathbone*, 12 id. 114; *McAndrews* v. *Thatcher*, 3 id. 370.

Expenses to a large amount were incurred by the plaintiff in repairing the ship "Lincoln," of which he was the owner, during her voyage from one of the guano islands to Hampton Roads for orders. Her outward destination was to that island for a cargo; and she went there and received on board one thousand one hundred and ninety-two registered tons of guano, and sailed from the island on her return voyage.

Vessels loading there, if bound to the United States, are required to touch at Callao for a clearance in the homeward voyage. Clearances are not granted at the island; and she accordingly sailed for her return destination without one, intending to call at Callao for that purpose: but on the way she was badly injured by a collision with another vessel; and being in distress, and unable to prosecute her voyage by reason of such injuries, she proceeded to the port of Callao, which was her nearest port, and there came to anchor in the anchorage where vessels usually anchor when they call at that port for a clearance.

Surveys of the ship were had; and it was found that she was so damaged by the collision, that it was necessary to remove her cargo and repair the vessel before the voyage could be prose-

cuted; and it appears that it was necessary, in order to accomplish those objects, to remove the vessel from the place where she was anchored to another, a mile and a half nearer the mole or pier, to be repaired.

Heavily laden as the ship was, the repairs could not be conveniently made without first unloading the larger portion of the cargo; and with that view the ship proceeded first to a hulk at anchor a mile nearer the mole, and there discharged all of her cargo, except two hundred and fifty tons, before she went to the dock to be repaired. All the repairs ordered by the surveys were made; and it appears that all the steps taken to place the ship in the dock were judicious, and necessary and proper to execute the required repairs. Extensive repairs were made; and the finding of the court shows that the repairs, though they were of a permanent character, were necessary to enable the ship to prosecute her voyage to its termination, and that the ship, when the repairs were completed, was removed from the dock, proceeded back to the hulk, was reloaded with the cargo previously discharged, except forty-five to fifty tons, and that she successfully completed her voyage to her port of destination, where the cargo was discharged, and delivered to the defendants, who were the consignees of the cargo.

Service was made; and, the defendants having appeared, the parties waived a jury, and submitted the case to the circuit judge without a jury. Hearing was had; and the court rendered judgment for the plaintiff in the sum of $18,430.43. Immediate measures were adopted by the defendants to remove the cause into this court for re-examination.

Errors are assigned as follows: (1.) That the Circuit Court improperly allowed the wages and provisions of the crew as general average during the period the ship was delayed for repairs. (2.) That the Circuit Court improperly allowed as general average the sum paid by the plaintiff for the services and expenses of the special agent sent to assist the vessel in the port of distress.

Matters of fact need not be discussed, as they are all agreed or are embraced in the special findings of the court. Safe arrival and delivery of the cargo are admitted; and it appears that the defendants, before the delivery of the cargo,

gave to the plaintiff an average bond, in which they promised and agreed to pay to the plaintiff their respective proportions of the expenses, charges, and sacrifices made or incurred by the plaintiff during the detention of the vessel for repairs, in consequence of damage received by a collision with another vessel while proceeding towards Callao for a clearance, payment to be made whenever and so soon as the average should be adjusted conformably to law and the usages of the port of New York.

Most of the material matters of fact are embraced in the special findings of the court as follows: That the ship, on her voyage to Callao for clearance and orders, was seriously damaged in consequence of the collision; that she reached the port where she was to touch in the damaged condition described in the surveys exhibited in the record; that she was in distress, and unable to prosecute her voyage; that, in consequence of the peril, it was necessary that she should be unladen, and be extensively repaired; that the repairs were necessary in order to enable her to prosecute her voyage, and that by means thereof the voyage was prosecuted; that the repairs were made and that the vessel was reloaded with reasonable despatch; that, by reason of her damaged condition, she was compelled to leave her first anchorage ground, discharge her cargo at the hulk, about one mile from the place of her anchorage, and then to proceed to the dock for repairs, a half-mile more distant from the anchorage than the hulk; that the services of the seamen employed during the repairs of the vessel were necessary for her preservation and safety and the prosecution of the voyage; and that the amount expended for their wages and provisions was a reasonable amount; and that the expenses and salary of the special agent sent to assist the ship at the port of distress are the subject of general average, according to the customs of the port of New York.

Expenses incurred of the character mentioned, or sacrifices made on account of all the associated interests by the owners of either, to save the adventure from a common peril, constitute the proper objects of general average; and the owners of the other interests are bound to make contribution for the same, in the proportion of the value of their several interests, if it

appears that the expenses or sacrifices were induced or occasioned by an impending peril, apparently imminent; that the expenses or sacrifices were of an extraordinary character; that they were voluntarily incurred or made, with a view to the general safety of the adventure; and that they accomplished, or aided, at least, in the accomplishment of, that purpose.

Claims of the kind have their foundation in equity, and rest upon the doctrine, that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril, and which were saved from the common danger by the sacrifice.

Suppose that is so: still it is contended by the defendants that the expenses incurred for the wages and provisions of the crew, and the amount paid for the salary and expenses of the agent sent by the plaintiff to assist the ship in the port of distress, were improperly included in the adjustment. They object to the charge for wages and provisions for the crew, and insist that such a charge is never general average, except when the ship, in a proper case of imminent peril to vessel and cargo or to the voyage, voluntarily, and to escape the peril, leaves the regular course of her voyage, and bears away to a port of refuge for repairs; and they advance the theory, that wages and provisions during any other detention, though the ship may be disabled by perils of the sea, are not general average, because the expenses incurred, as they insist, are not given or sacrificed for the common benefit, but that they are bought and paid for by the freight stipulated for the voyage, and that the ship, in her delay for repairs, only complies with her contract made with the shipper.

Admit the proposition of the defendants, and it follows that a claim for general average can never be maintained in any case, nor for any sacrifice or expenditure, unless the injured ship bears away, and goes to a port of refuge not in the course of her voyage. Ships going out, or returning from an outward voyage, are sometimes disabled by collision or storms in the outer harbor of the port of departure, or of the return destination; and they are sometimes disabled in the course of the voyage in the outer harbor of the port where they are accustomed to call for funds or advice, or for wood, coal, provisions,

or water: but, if the rule of decision set up by the defendants should be adopted, no party in such a case can ever be entitled to maintain a suit for general average unless the ship bears away and goes to some other port, as a port of refuge for repairs, — not even if she was voluntarily stranded to escape a much greater peril, and thereby became unable to move in any direction whatever.

Such a rule of decision is wholly inadmissible, as in many cases it would divest the claim of much or all of its equity, and make it depend upon an act entirely unimportant, and wholly unnecessary. Navigators whose ship is injured by collision or perils of the sea should bear away to a port of refuge for repairs whenever the circumstances require it; but it would be a mere act of folly to do so in a case where the disaster to the ship happened in the harbor of a port where the necessary repairs could be as conveniently and economically executed as in a more distant port, out of the regular course of the voyage.

Both commercial usage and law allow compensation for such a voluntary sacrifice or extraordinary expenditure, not because the ship at the time bore away to a port of refuge outside of the course of her voyage, but because she was *interrupted* in the course of her voyage by the disaster, and because common justice dictates, that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the imminent danger, or incurs extraordinary expenses to promote the general safety of the associated interests, the sacrifice or expenses so made or incurred shall be assessed upon all in proportion to the share of each in the adventure.

Property at sea, as all experience shows, is often exposed to imminent perils arising from collision and fire, as well as from the violence of the wind and waves. Navigation, at best, is a perilous pursuit; and all those who follow it know full well that the owners of ships and cargoes frequently suffer disastrous losses, in spite of every safeguard and precaution which they can adopt. Equitable rules and regulations designed to avert the consequences likely to ensue from such perils, or to ameliorate the loss in case of disaster, have long been known in the jurisprudence of commercial countries, which, being founded in

the principles of equity, are entitled to be administered in the same spirit in which they had their origin.

Marine insurance is a system of that sort, and it had its origin as a measure to afford partial indemnity to the unfortunate for losses by such disasters. Allowances for salvage service are of a similar character; and the rule of proportionate contribution for sacrifices made to escape from an imminent sea peril, or extraordinary expenses incurred for that purpose, is one of equal merit and importance.

Where the disaster occurs in the course of the voyage, and the ship is disabled, the necessary expenses to refit her to go forward create an equity to support such a claim, just as strong as a sacrifice made to escape such a peril, if it appears that the cargo was saved, and that the expenses incurred enabled the master to prosecute the voyage to a successful termination. Contribution is enforced in such a case, not because the ship when injured bore away to a port outside of the regular course of the voyage, but because the principles of equity, common justice, and the usages of commerce, require that what is given by one of the associated interests "for the benefit of all shall be made good by the proportionate contribution of all." *McAndrews* v. *Thatcher*, 3 Wall. 367; *Barnard* v. *Adams*, 10 How. 270; 2 Arnould on Ins., 784.

Equity requires, that, in such a case, those whose effects have been preserved by the sacrifice or extraordinary expenditure of the others shall contribute to such voluntary sacrifice or expenditure; and commercial policy, as well as equity, favors the principle of proportionate contribution, as it encourages the owner, if present, to consent that his property, or some portion of it, may be cast away or exposed to peculiar and special danger to save the adventure and the lives of those on board from impending destruction. Such an owner, under such circumstances, has a lien upon the property saved from the imminent peril, to enforce the payment of the proportionate contribution for the sacrifice made or the extraordinary expenses incurred.

Proper repairs were made in this case; and the ship, having been refitted and reloaded, prosecuted her voyage to its termination. Safe arrival, with the cargo on board, is admitted;

and it appears that the owner of the ship demanded the payment of the proportionate contribution before delivering the cargo, and that the defendants, in order to obtain such delivery, gave the plaintiff the average bond exhibited in the record. Enough appears in the terms of the bond to show that the defendants did not controvert the right of the plaintiff to claim a proportionate contribution. Instead of that, the recital admits the collision; that the ship sustained damages which made it necessary to discharge the cargo, and refit; that sundry expenses and charges were incurred; and that various sacrifices were made which are the subject of a general average, and which should be borne by the property at risk as a common charge in contribution.

Nothing could be more explicit than the language of that recital; and the defendants promise and agree to pay to the plaintiff whatever sums may be found due from them for their proportion of such expenses, charges, and sacrifices as have arisen in consequence of the disaster, whenever and so soon as the average shall be adjusted conformably to law and the usages of the port of New York.

They admit the disaster, that sacrifices and expenses were made and incurred, that the sacrifices and expenses are the subject of general average, and promise and agree to pay the proportionate contribution so soon as the same shall be adjusted conformably to law and the usages of the port where the voyage ended. Plainly they admit that there is no merit in the present defence; for if it be true that such a claim cannot arise unless the vessel bears away to a port of refuge outside of the regular course of her voyage, then it follows that the plaintiff is not entitled to recover any thing. Inconsistencies of the kind cannot be overlooked in such an investigation, as they tend very strongly to show that the defence is unsound both in law and in fact.

Judgment was rendered in this case for the plaintiff, and it is now admitted that the judgment is correct, for the sum of $14,075.77, including interest; whereas, if the defence set up to the two sums in controversy is a valid defence, the plaintiff is not entitled to any contribution whatever. Expenses during the interruption of the voyage, incurred by the master for the

wages of the officers and crew to the amount of $3,917.18, were also allowed by the Circuit Court, and were included in the judgment; and those expenses, in the judgment of the court, are just as proper as the charge for the expenses of unloading and reloading the cargo, which, it is admitted, is a proper charge.

Temporary repairs of damages arising from extraordinary perils of the sea, made at some intermediate port, for the purpose of prosecuting the voyage, if the damage to the ship was of a character to disable her and to interrupt the voyage, are the proper object of general average. Phillips on Ins., 5th ed., sect. 1300.

Repairs in such cases, if necessary to remove the disability of the ship to proceed on her voyage, are now everywhere regarded as the proper object of proportionate contribution; but expenses incurred for repairs, beyond what is reasonably necessary for that purpose, are not so regarded, because it is the duty of the owners, except in case of disaster, to keep the ship in a seaworthy condition. *Fowler* v. *Rathbone*, 12 Wall. 117; *Star of Hope*, 9 id. 236.

Sea perils which result in damage to the ship to such an extent as to interrupt the voyage, and disable her from pursuing it, necessarily involve delay and extraordinary expenses; and this court held, in the case last cited, that the wages and provisions of the officers and crew in such a case are general average, from the time the disaster occurs until the ship resumes her voyage, unless it appears that proper diligence was not used in making the repairs.

Necessary repairs to the ship, except to the extent that such repairs are required to replace such parts of the ship as were sacrificed to save the associated interests, or to refit the ship to enable her safely to resume the voyage, are not to be included as general average by the adjuster; but the wages and provisions of the officers and crew during the consequent and necessary *interruption* of the voyage, occasioned by the disaster, are a proper charge for such proportionate contribution, wholly irrespective of the question, whether the ship bore away for repairs to a port of refuge outside of the regular course of the voyage, or whether the necessary repairs were executed in the

port where the disaster occurred. Masters may well consult convenience and economy in selecting the port for making repairs; and if, in the particular case, the master exercises good judgment in making the selection, no interested party will have any right to complain.

Argument to show that the services of the crew were necessary, during the period the voyage was interrupted, is quite unnecessary, as the findings of the court dispose of that question in the affirmative; from which finding it appears that as many men as were employed on board were actually necessary for the safety of the ship, in hauling her to and from the hulk on surf-days, and in moving the ship while in dock during the repairs. Apart from that, the court also finds that it was necessary that the men employed should be sailors, able to haul the ship out at any moment when there was surf; and that the services of the sailors employed during the repairs of the vessel were necessary for her preservation and safety, and to refit her for the prosecution of the voyage.

Where the disaster occurs in the open ocean, away from any port where repairs can conveniently be made, it often becomes necessary that the ship shall bear away to a port of refuge more or less distant from the usual course of her voyage; and it is unquestionably correct to say that the deviation in such a case is justifiable. Reported cases of the kind are quite numerous; and courts of justice, in disposing of such controversies, not infrequently refer to the bearing away of the ship as *marking the time* from which to compute the extraordinary expenses incurred in refitting the ship to prosecute the voyage. Examples of the kind are found in the decisions of this court, of which one of a striking character may be mentioned, where the court say that the wages and provisions of the master, officers, and crew, are general average from the time of putting away for the port of succor, and every expense necessarily incurred for the benefit of all concerned during the detention. *Star of Hope*, 9 Wall. 236.

Reference to the bearing away of the ship is there made solely to *mark the time* when the expenses commenced to be general average, as is obvious from the fact that the court proceed to decide, in the same opinion, that wages and provisions

in such a case "are general average from the time the disaster occurs until the ship resumes her voyage;" which is the true rule upon the subject, if proper diligence is employed in making the repairs. Numerous examples of the kind might be given, but it is unnecessary, as there is no well-considered case where it is held that sacrifices made by one of the associated interests for the benefit of ship, cargo, and freight, to escape an imminent sea peril, or that extraordinary expenses incurred by one of the interests in such a case for the benefit of all, to refit the ship if disabled to prosecute the voyage, are not the proper objects of general average, unless the ship bore away to a port of refuge outside the usual course of her voyage.

Decided cases are referred to by the defendants, which they insist support that proposition; but the court here, after having examined each one of the cases, is entirely of a different opinion. Even the case of *Potter* v. *Ocean Insurance Co.*, 3 Sumn. 27, does not sustain the theory of the defendants. In that case, the voyage was from New Orleans to Tampico; and, it appearing that the repairs could not be made at the port of destination if the vessel should proceed there, the ship put back to the port of departure: but the case warrants the conclusion that the result would have been the same if the vessel had gone forward, and been repaired in the port of destination.

Average contribution in such cases is allowed to the party making such sacrifice or incurring such extraordinary expenses, as a measure of justice for a meritorious service, to distribute among all who were benefited by it a due proportion of what was sacrificed or expended; the principle being, that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril, and which were saved from the common danger by the sacrifice.

Peculiar remedies, equitable in their nature, are given to persons engaged in navigation and marine adventures, for the reason that such pursuits are exposed to extreme dangers, and stand in need of such peculiar and equitable remedies. Contracts of marine insurance are enforced to indemnify the owner of such an adventure from a portion of his loss. Services of salvors are liberally rewarded to encourage the hardy mariners

to encounter such risks to save the property invested in such an adventure from complete destruction.

Proportionate contribution is enforced by courts of justice in cases like the present, not because the ship bore away from the course of her voyage, but because common justice requires that sacrifices made and expenses incurred by one of the associated interests for the benefit of all should be borne by all, in due proportion to the interests saved by the sacrifice or expenditure.

Contributions of the kind for expenses incurred to pay for wages and provisions of the crew, except in a very limited class of cases, are not enforced in the courts of the parent country. Their decisions in that regard, therefore, are not applicable to the present question; but, in all other respects, the rule of decision in the two countries is substantially the same. Such a condition to the right of recovery as that set up by the defendants finds no support in any reported decision in the tribunals of that country. *Moran* v. *Jones*, 7 Ell. & Bl. 532.

It appears in that case that the voyage was from Liverpool to Callao for a cargo of guano, and that the ship was driven on a bank by a storm, near the port of departure; that her cargo was discharged, and transported back whence it came; that the ship was subsequently got off and taken back to the port from which she departed, and there repaired, when she was reloaded with her cargo, and proceeded on her voyage. Attempt was made in that case to maintain that the cargo was not liable to contribute in general average, because it was separated from the ship before she was got off; but the whole court, Campbell, C. J., giving the opinion, held that the saving of the ship and the cargo was one continued transaction, and that the expenses incurred were general average, to which the ship, freight, and cargo must contribute.

Most of the expenses in that case were incurred in getting the ship off the bank, and the rest were incurred in the port of departure; and it never occurred to court or counsel that the plaintiff could not recover because the ship did not bear away to a port of refuge. *Insurance Company* v. *Parker*, 2 Pick. 8; *Merithew* v. *Sampson*, 4 Allen, 194; *Patten* v. *Darling*, 1 Cliff. 262.

Exactly the same rule was laid down in the Court of Appeals of the State of New York. *Nelson* v. *Belmont*, 21 N. Y. 38. Various questions were considered in that case; but the court laid down the rule, that where the expenses are incurred or the sacrifices voluntarily made for the safety of the ship, freight, and cargo, a general average will take place, provided the purpose of the sacrifice or expense is accomplished.

Such a cause of action, says Kent, "grows out of the incidents of a mercantile voyage;" and he adds that the duties which it creates apply equally to the owners of the ship and of the cargo; and he characterizes it as a contribution made by all parties concerned towards a loss sustained by some of the parties in interest, for the benefit of all; and he remarks, that it is called general average, because it falls upon the gross amount of ship, cargo, and freight.

Ship, cargo, and freight are undoubtedly required to contribute in such a case; and the same learned author holds that the wages and provisions of the crew, if the ship is obliged to go into port to refit, constitute the subject of general average during the detention; which, beyond all doubt, is the settled rule of the courts in this country, State and Federal. *Barnard* v. *Adams*, 10 How. 307; 3 Kent's Com., 12th ed., 235; *Barker* v. *Railroad*, 22 Ohio St. 62; *Lyon* v. *Alford*, 18 Conn. 75; *Nimick* v. *Holmes*, 25 Penn. St. 373; Emerigon, 482; *Hallet* v. *Wigram*, 6 C. B. 603; *Dilworth* v. *McKelvy*, 30 Mo. 155; Abbott on Ship., 497; *Hathaway* v. *Insurance Company*, 8 Bosw. 59.

Maritime usage everywhere is, that the port of destination, or delivery of the cargo, is the port where the average is to be adjusted. 4 Phil. Int. L., 641; *Simonds* v. *White*, 2 B. & C. 811; Pars. on Con., 6th ed., 332; *Dogleigh* v. *Davidson*, 5 Dowl. & R. 6; *McLoon* v. *Cummings*, 73 Penn. St. 108.

Universal usage designates the port of New York as the place where the adjustment should have been made; and, inasmuch as the parties so agreed in the average bond, further remarks upon the subject are quite unnecessary; and the court is of the opinion that expenses incurred for the wages and provisions of the crew were properly included in the average adjustment.

Discussion of the second objection to the adjustment is not

necessary, as the defendants are concluded by the finding of the Circuit Court. Among other things, the Circuit Court found, that when the owner of the ship sends out an agent to a foreign port, into which the ship has put in distress, to advise and assist the master, for the benefit of ship and cargo, the usage of the port of New York is, that the amount paid for the services of such agent and his board and travelling and incidental expenses are allowed in general average, without regard to the question, whether or not he reaches the port of distress in time actually to render service, provided he is sent out in good faith, with the intention that he shall render service for the general benefit. It appearing that the adjustment was made in conformity to the usage of the port in that regard, the court is of the opinion that the charge was properly allowed, and that there is no error in the record.

Judgment affirmed.

MR. JUSTICE BRADLEY dissenting.

I dissent from the judgment of the court in this case. It seems to me a dangerous precedent to allow contribution to the crew's wages when a ship does not deviate from her course, but is merely delayed for repairs on the route of her regular voyage. Such claims will too often be put forward, and a shipper will never know when he has done paying freight for the transportation of his property. I concede that the American rule is more liberal in this respect than the English; but I think it has never been carried so far as the present case.

BUTLER *v.* THOMSON ET AL.

The following memorandum of a contract of sale signed by the agents of the purchaser and the seller, to wit, —

"NEW YORK, July 10, 1867.

"Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (705) packs first quality Russia sheet-iron, to arrive at New York, at twelve and three quarters (12¾) cents per pound, gold, cash, actual tare.

"Iron due about Sept. 1, '67.

"WHITE & HAZARD, *Brokers.*"

— binds both parties thereto.

ERROR to the Circuit Court of the United States for the Southern District of New York.

Mr. William M. Evarts for the plaintiff in error.

Mr. E. H. Owen, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

The plaintiff alleged that on the eleventh day of July, 1867, he bargained and sold to the defendants a quantity of iron thereafter to arrive, at prices named, and that the defendants agreed to accept the same, and pay the purchase-money therefor; that the iron arrived in due time, and was tendered to the defendants, who refused to receive and pay for the same; and that the plaintiff afterwards sold the same at a loss of $6,581, which sum he requires the defendants to make good to him. The defendants interposed a general denial.

Upon the trial, the case came down to this: The plaintiff employed certain brokers of the city of New York to make sale for him of the expected iron. The brokers made sale of the same to the defendants at $12\frac{3}{4}$ cents per pound in gold, cash.

The following memorandum of sale was made by the brokers; viz.: —

"NEW YORK, July 10, 1867.

"Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (705) packs first-quality Russia sheet-iron, to arrive at New York, at twelve and three-quarters ($12\frac{3}{4}$) cents per pound, gold, cash, actual tare.

"Iron due about Sept. 1, '67.

"WHITE & HAZZARD, *Brokers.*"

The defendants contend, that, under the Statute of Frauds of the State of New York, this contract is not obligatory upon them. The judge before whom the cause was tried at the circuit concurred in this view, and ordered judgment for the defendants. It is from this judgment that the present review is taken.

The provision of the statute of New York upon which the question arises (2 R. S. 136, sect. 3) is in these words: —

"Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless (1) a note or memorandum of such contract be made in writing,

and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase-money."

The eighth section of the same title provides that "every instrument required by any of the provisions of this title to be subscribed by any party may be subscribed by the lawful agent of such party."

There is no pretence that any of the goods were accepted and received, or that any part of the purchase-money was paid. The question arises upon the first branch of the statute, that a memorandum of the contract shall be made in writing, and be subscribed by the parties to be charged thereby.

The defendants do not contend that there is not a sufficient subscription to the contract. White & Hazzard, who signed the instrument, are proved to have been the authorized agents of the plaintiff to sell, and of the defendants to buy; and their signature, it is conceded, is the signature both of the defendants and of the plaintiff.

The objection is to the sufficiency of the contract itself. The written memorandum recites that Butler & Co. had sold the iron to the defendants at a price named; but it is said there is no recital that the defendants had bought the iron. There is a contract of sale, it is argued, but not a contract of purchase.

As we understand the argument, it is an attack upon the contract, not only that it is not in compliance with the Statute of Frauds, but that it is void upon common-law principles. The evidence required by the statute to avoid frauds and perjuries — to wit, a written agreement — is present. Such as it is, the contract is sufficiently established, and possesses the evidence of its existence required by the Statute of Frauds.

The contention would be the same if the articles sold had not been of the price named in the statute; to wit, the sum of fifty dollars.

Let us examine the argument. Blackstone's definition of a sale is "a transmutation of property from one man to another in consideration of some price." 2 Bl. 446. Kent's is, "a contract for the transfer of property from one person to another." 2 Kent, 615. Bigelow, C. J., defines it in these words: "Competent

parties to enter into a contract, an agreement to sell, the mutual assent of the parties to the subject-matter of the sale, and the price to be paid therefor." *Gardner* v. *Lane*, 12 Allen, 39, 43. A learned author says, "If any one of the ingredients be wanting, there is no sale." Atkinson on Sales, 5. Benjamin on Sales, p. 1, note, and p. 2, says, "To constitute a valid sale, there must be (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; (4) a price in money, paid or promised."

How, then, can there be a sale of seven hundred and five packs of iron, unless there be a purchase of it? How can there be a seller, unless there be likewise a purchaser? These authorities require the existence of both. The essential idea of a sale is that of an agreement or meeting of minds by which a title passes from one, and vests in another. A man cannot sell his chattel by a perfected sale, and still remain its owner. There may be an offer to sell, subject to acceptance, which would bind the party offering, and not the other party until acceptance. The same may be said of an optional purchase upon a sufficient consideration. There is also a class of cases under the Statute of Frauds where it is held that the party who has signed the contract may be held chargeable upon it, and the other party, who has not furnished that evidence against himself, will not be thus chargeable. Unilateral contracts have been the subject of much discussion, which we do not propose here to repeat. In *Thornton* v. *Kempster*, 5 Taunt. 788, it is said, —

"Contracts may exist, which, by reason of the Statute of Frauds, could be enforced by one party, although they could not be enforced by the other party. The Statute of Frauds in that respect throws a difficulty in the way of the *evidence*. The objection does not interfere with the substance of the contract, and it is the negligence of the other party that he did not take care to obtain and preserve admissible evidence to enable himself also to enforce it."

The statute of 29 Car. II., c. 3, on which this decision is based, that "no contract for the sale of goods, wares, and merchandise, for the price of £10 sterling or upwards, shall be allowed to be good except the buyer," &c., is in legal effect the same

as that of the statute of New York already cited. See *Justice* v. *Lang*, 42 N. Y. 203, that such is the effect of the statute of New York.

The case before us does not fall within this class. There the contract is signed by one party only; here both have signed the paper; and, if a contract is created, it is a mutual one. Both are liable, or neither.

Under these authorities, it seems clear that there can be no sale unless there is a purchase, as there can be no purchase unless there be a sale. When, therefore, the parties mutually certify and declare in writing that Butler & Co. have sold a certain amount of iron to Thomson & Co. at a price named, there is included therein a certificate and declaration that Thomson & Co. have bought the iron at that price.

In *Radford* v. *Newell*, L. R. 3 C. P. 52, the memorandum was in these words: "Mr. H., 32 sacks culasses at 39*s*., 280 lbs., to wait orders;" signed, "John Williams." It was objected that it was impossible to tell from this memorandum which party was the buyer, and which was the seller. Parol proof of the situation of the parties was received, and that Williams was the defendant's agent, and made the entry in the plaintiff's books. In answer to the objection the court say, "The plaintiff was a baker, who would require the flour, and the defendant a person who was in the habit of selling it;" and the plaintiff recovered. It may be noticed, also, that the memorandum in that case was so formal as to contain no words either of purchase or sale ("Mr. H., 32 sacks culasses at 39*s*., 280 lbs., to wait orders"); but it was held to create a good contract upon the parol evidence mentioned.

The subject of bought and sold notes was elaborately discussed in the case of *Sievenright* v. *Archibald*, 6 Eng. L. & Eq. 286; s. c. 17 Q. B. 103; Benj. on Sales, p. 224, sect. 290. There was a discrepancy in that case between the bought and sold notes. The sold note was for a sale to the defendant of "500 tons Messrs. Dunlop, Wilson, & Co.'s pig-iron." The bought note was for "500 tons of Scotch pig-iron." The diversity between the bought and sold notes was held to avoid the contract. It was held that the subject of the contract was not agreed upon between the parties. It appeared

there, and the circumstance is commented on by Mr. Justice Patteson, that the practice is to deliver the bought note to the buyer, and the sold note to the seller. He says, "Each of them, in the language used, purports to be a representation by the broker to the person to whom it is delivered, of what he, the broker, has done as agent for that person. Surely the bought note delivered to the buyer cannot be said to be the memorandum of the contract signed by the buyer's agent, in order that he might be bound thereby; for then it would have been delivered to the seller, not to the buyer, and *vice versa* as to the sold note."

The argument on which the decision below, of the case we are considering, was based, is that the contract of sale is distinct from the contract of purchase; that, to charge the purchaser, the suit should be brought upon the bought note; and that the purchaser can only be held where his agent has signed and delivered to the other party a bought note, — that is, an instrument expressing that he has bought and will pay for the articles specified. Mr. Justice Patteson answers this by the statement that the bought note is always delivered to the buyer, and the sold note to the seller. The plaintiff here has the signature of both parties, and the counterpart delivered to him, and on which he brings his suit, is, according to Mr. Justice Patteson, the proper one for that purpose, — that is, the sold note.

We do not discover in *Justice* v. *Lang*, reported in 42 N. Y. 493, and again in 52 N. Y. 323, any thing that conflicts with the views we have expressed, or that gives material aid in deciding the points we have discussed.

The memorandum in question, expressing that the iron had been sold, imported necessarily that it had been bought. The contract was signed by the agent of both parties, the buyer and the seller, and in our opinion was a perfect contract, obligatory upon both the parties thereto.

Judgment reversed, and cause remanded for a new trial.

CLEMENTS v. MACHEBOEUF ET AL.

1. Where a party, holding a patent from the United States for certain lands, authorized, by a power of attorney, his agent "to act upon the application and demand of any person actually owning" town-lots in Denver City, within the limits of the lands, and to execute and deliver deeds to such persons who "may apply for the same within three months from" a certain date, — *Held*, that the "application and demand" must be made within that time; but the authority of the agent to adjudicate the claims was not so limited.
2. Where a party alleges that a deed executed by his attorney, under a power to convey, is invalid for matters not apparent on its face, the burden of proving them is on such party.

APPEAL from the Supreme Court of the Territory of Colorado.

The case was argued by *Mr. J. W. Denver* for the appellant, and by *Mr. R. T. Merrick* for the appellees.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Equity exercises jurisdiction in cases of accident, mistake, or fraud, where the party has not a plain, adequate, and complete remedy at law. Where the remedy at law is plain, equity will not interfere if the remedy is also adequate and complete; but, if the remedy at law is doubtful, the court of equity will retain the case, and, if the proofs are satisfactory, will grant relief.

Jurisdiction to a partial extent may exist at law; but, if the remedy there is not adequate, — that is, if the party cannot attain at law the full justice of the case, — he may, if he sees fit, pursue his remedy in equity. Nor is the court of equity closed to the party unless the remedy at law is complete, and will secure to the party the whole right involved, in a manner as just and perfect as would be attained in a suit in equity. 1 Story's Eq., sect. 33; *Insurance Co.* v. *Bailey*, 13 Wall. 621.

Fee-simple title to the lands described in the bill of complaint was vested in the complainant by virtue of a patent from the United States. Twelve or more persons are named in the bill of complaint as the principal respondents in the suit; and the complainant alleges that one James Hall, pretending to act in his behalf, as his attorney in fact, on the several days mentioned in the bill of complaint, without any authority what-

ever, conveyed by deeds of warranty certain portions of said lands, as therein described, to each of the several respondents named in the bill of complaint. The charge, in effect, is, that the several respondents, as such grantees, had full notice that the person pretending to be the agent of the complainant acted, in making the said several conveyances, without any authority whatever from the complainant; and that the respondents combined with the pretended agent to cheat, wrong, and defraud the complainant out of his title to said lands, and still refuse to restore him to his just rights. Wherefore the complainant prays that the several deeds executed by the said pretended agent to the said several respondents may be decreed to be cancelled, and that the lots may be returned to the complainant wholly discharged from all subsequent conveyances executed by such grantees, and for general relief.

Service was made; and the respondents appeared, and demurred to the bill of complainant. Hearing was had; and the court overruled the several demurrers, giving leave to the respondents to answer. Pursuant to that leave, the respondents filed several answers, setting up substantially the same defence. Suffice it to say, that they admit that the complainant was the owner of the lands in fee-simple, and that certain portions of the same were conveyed to them by the person professing to act as the agent of the complainant, as alleged in the bill of complaint, but deny that the person who executed the respective conveyances acted without authority from the complainant, or that they ever combined with that person to cheat, wrong, or defraud the complainant, as alleged in the bill of complaint. Instead of that, the respective respondents allege that the agent named, by virtue of the powers of attorney annexed to the answer, or by virtue of one or both of the same, conveyed to them respectively the certain lots or portions of said lands for a valuable consideration, as more particularly described in the bill filed by the complainant. Answers, differing in certain particulars, were filed by the respondents; but the propositions involved in the succinct analysis of the one given presents the main points of defence set up by all the respondents.

All of the conveyances were made by the alleged agent of the complainant; and it appears that they are all of record in

the office of the clerk and recorder of the county of Arapahoe, where the lands are situated. Annexed to the answers are the powers of attorney, under one or both of which it is claimed by the respondents that the respective described portions of the lands were conveyed to them in fee-simple. Exceptions filed to the answer of some of the respondents were sustained by the court; but it is unnecessary to examine any question involved in the exceptions, as the repondents acquiesced in the decision of the court, and filed amended answers, in conformity to the opinion of the court.

Leave was given by the court to the solicitors of certain of the respondents to withdraw their appearance for those respondents; and thereupon the bill of complaint as to those parties was dismissed on motion of the complainant. Default was made by one of the respondents served, and the bill of complaint as to him was taken as confessed; and the conveyance made to him by the agent was decreed to be cancelled and annulled, as prayed in the bill of complaint. Three others failed to file an amended answer, as required by the order of the court; and the bill of complaint as to those respondents was also taken as confessed.

Matters of the kind being all adjusted, the complainant filed a general replication, and proceeded to take proofs. Among other things, he introduced the patent from the United States, and the deposition of Caleb B. Clements, his father; and the master, appointed to take testimony, annexed to his report to the court the two exhibits attached to the answers of the respondents. No proofs were introduced by the respondents. They rested the case upon their deeds of conveyance, and on the powers of attorney annexed to the answers. Hearing was had; and the court of original jurisdiction entered a decree in favor of the complainant, cancelling the several conveyances executed to the respondents. Immediate appeal was taken to the Supreme Court of the Territory, where the parties were again heard; and the Supreme Court reversed the decree of the District Court for the county, and remanded the cause to that court, with directions to dismiss the bill of complaint, except as to the respondents, against whom decrees *pro confesso* had been entered. From that decree the complainant appealed to this court, and now seeks to reverse that decree.

Three errors are assigned in this court, as follows: (1.) That the Supreme Court of the Territory erred in reversing the decree of the District Court of the county. (2.) That the Supreme Court of the Territory erred in assuming, without evidence, that every thing had been done by the agent that was required by the power of attorney to give validity to the deeds of conveyance. (3.) That the said Supreme Court erred in holding that it was not incumbent upon the respondents to prove that the deeds to them were executed by the agent in good faith.

Before proceeding to the examination of the alleged errors of the court below, it should be remarked that the bill of complaint waived an answer under oath, and prayed that the several deeds of conveyance might be cancelled, and that the lands in controversy might be restored to the complainant, wholly discharged from the said conveyances. Separate admission was made by the respondents, in their amended answers, that each held certain described portions of the lands claimed under deeds of conveyance executed by the alleged agent; and they severally denied all combination, wrong, and fraud, and averred that the lands in question had been conveyed to them for a valuable consideration by the alleged agent, in virtue of the powers of attorney annexed to the original answers.

Four exceptions to the amended answers were sustained by the court; but any remarks upon that subject may well be omitted, as the amended answers supplied all the alleged defects. Enough appears to justify the conclusion that the complainant owned a certain bounty-land warrant, and that he desired to locate the same on the lands described in the bill of complaint; that certain equitable interests in certain portions of the lands were claimed by certain residents of the city of Denver; and that the complainant, in order to avoid the interposition of any objections from that quarter to the contemplated location of his land-warrant, stipulated with the mayor of the city, and gave to him a bond to the effect, that, if he was permitted to locate the warrant without opposition, he would convey to every such equitable claimant a good title to his equitable interest, provided he should give satisfactory evidence of such claim, and pay therefor the sum of forty cents for such lot.

Such an arrangement would not execute itself, and could not be carried into effect in a manner satisfactory to the parties, without some agency; and, to effect that object, the complainant, on the 14th of June, 1864, constituted and appointed one James Hall his true and lawful attorney, "to act upon the application and demand of any person or persons actually owning" town-lots situate in Denver City, within the lands described in the bill of complaint, and showing such ownership "by abstracts of title properly certified by the county clerk of the county," . . . and upon payment of forty cents for each and every lot, and the further expenses of every name and nature, "in accordance with the tenor and meaning of a certain bond executed '*by me*' to the mayor of Denver City, in trust for the citizens thereof;" and upon the fulfilment of the said requirements, and all others, as intended and mentioned in said bond, to make, execute, and deliver good and sufficient deed or deeds, with covenants of warranty, to any person or persons that may apply for the same within three months from the date of said bond, and in compliance with the same; giving and granting unto his said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as he might or could do if personally present, with full power of revocation, thereby ratifying and confirming all that his attorney or his substitute should lawfully do or cause to be done by virtue thereof.

Beyond doubt, the authority conferred was sufficient to warrant the agent to execute the deeds; and it appears by the recitals of the instruments that the deeds were executed the same month and year as the power of attorney.

By the terms of the power, the application and demand were required to be made within three months from the date of the bond; but no reason is perceived for limiting the authority of the agent to adjudicate the claims to so short a period. More time might be required for proofs and investigation; and there is nothing in the power of attorney which forbids the agent from taking such time for the purpose as was necessary in order to do justice between the parties.

None of the deeds were introduced in evidence, except the

one to the first-named respondent, which bears date Dec. 3, 1864, and which, it is conceded, may be regarded as a sample of the others. Nothing therein contained is inconsistent with the power of attorney given to the agent by the complainant; and the amended answers allege that the respective respondents, within three months from the date of the bond mentioned in the first power of attorney, made application to the attorney for a deed of the lots conveyed to them respectively, and that the several respondents complied with and fulfilled all the terms and conditions of the power of attorney and of the bond therein mentioned, and that the agent acted upon the application and demand, as therein required, and that he pronounced and decided in favor of the same, and conveyed the premises in question to the several respondents for a valuable consideration.

No proof of fraud was introduced by the complainant; and of course it is unnecessary to remark upon that question, except to say that the answers, though not under oath, are yet sufficient as a pleading to bring the complainant within the rule, that he who alleges fraud must prove the allegation, or fail to recover upon that ground.

Complainant denies that any such bond as that set up in favor of the respondents was ever given to the mayor of Denver City: but the deposition of his father proves that he, the father, gave it in behalf of the complainant; and the manner in which it was lost, and the recitals in the power of attorney, are sufficient to prove its existence, and to show that the complainant at that date recognized the covenants of the bond as valid and obligatory; that it was executed to the mayor in trust for the persons claiming equitable interests in the premises in question; and that the power of attorney was executed to the agent in order that he might act upon the application, and demand of those claiming such equitable interests.

Such action of the attorney was required to ascertain the extent of the respective claims; and the provision of the power was, that the attorney, when the extent of the interest was ascertained, should execute and deliver to the owner of such right a good and sufficient deed, with covenant of warranty, if the claimant made the required application for the same within

the time specified, and complied with all the other conditions of the power of attorney.

Two years after the power was given, — to wit, on the 9th of March, 1866, — the power of attorney was revoked by the complainant; and it appears that on the 17th of June, 1864, he gave another power to the same party, authorizing him to take possession of all land in which he, the principal, was interested in the county of Arapahoe, and to grant, bargain, and sell the same on such terms as he, the agent, should see fit, and to execute and deliver to the purchaser good and sufficient quitclaim-deeds of the same; which, it seems, continued in force until the 22d of April, 1867, when it was revoked by the complainant.

Registry of the first power of attorney was made in the office of the recorder for Arapahoe County on the 23d of June, 1864, and of the second in the same office on the 12th of March, 1869, as appears by the certificate of the recorder. Concede that all the other deeds were executed about the same time as the one given in evidence as an example, and it follows that they were executed more than a year before the first power of attorney was revoked; and, inasmuch as nothing appears to the contrary, the conclusion from the record must be that the power of attorney was in full force when the several conveyances were executed by the agent.

Grant that, and still it is insisted by the complainant that the defence is incomplete, because the respondents did not prove affirmatively that the agent, in executing the power, complied with the directions contained in the instrument under which he acted.

Sufficient has already appeared to show that the limitation of time in the power of attorney applies only to the period in which the parties claiming such equitable interests in the lands should make the required application to the attorney of the principal, and not to the period within which the attorney should execute the deeds. His authority to make the conveyances is without limit as to time, provided the application was made within three months from the date of the bond: from which it follows that the deeds of conveyance show on their face that they were executed within the limitations of the

power of attorney; and in such case the presumption is, that the trust reposed in the attorney was executed in good faith. Where the deed in such case is apparently valid, courts of justice will not infer any thing against its validity. *Very* v. *Very*, 13 How. 360.

Authority to make the conveyances was clearly conferred, if the agent complied with the directions given in the power; and the rule is, that, if the deed is apparently within the scope of the power, the presumption is that the agent performed his duty to his principal. *Morrill* v. *Cone*, 22 How. 82; *Doe* v. *Martin*, 4 Term, 39; *Rail* v. *McKernan*, 21 Ind. 421; *Wilburn* v. *Spofford*, 4 Sneed, 704; *Marr* v. *Given*, 23 Me. 55.

Subject to certain exceptions, not applicable in this case, the general rule is, that the presumption in favor of the conveyance will be allowed to prevail in all cases where it was executed as matter of duty, either by an agent or trustee, if the instrument is regular on its face. 1 Taylor on Ev., sect. 116.

Facts will not be presumed against a deed of conveyance which on its face has all the legal requisites to make it a valid instrument. *Burr* v. *Galloway*, 1 McLean, 496.

Instead of that, the rule is, that he who would invalidate such a deed must impeach it by affirmative proof. *Polk* v. *Wendell*, 9 Cranch, 87; *Bagnal* v. *Broderick*, 13 How. 450; *Minter* v. *Crommelin*, 18 id. 87; *Bank* v. *Dandridge*, 12 Wheat. 70.

Matters not assigned for error will not be examined, as no such matters are open for argument under the rules of this court.

Considerable effort is expended to show that the deeds of conveyance were executed under the first power of attorney; in which proposition the court here is inclined to concur, as the clear inference is that they all contain covenants of warranty: but the court does not concur with the complainant that the attorney was not authorized to execute the same under the first power, nor that there is any evidence, in any view of the case, that he acted in bad faith. Charges of bad faith are easily made; but they are of no avail to the party making the same, unless he introduces competent evidence to support the accusation.

Even the complainant admits that equitable interests did exist, and that the parties, if they established such rights by abstracts of title, properly certified by the county clerk of

Arapahoe County, and made the required application to the attorney for a deed, within three months, was to have such a deed with covenants of warranty, on the payment of a merely nominal consideration; but he insists that the attorney exceeded the power conferred, because the deeds do not bear date within three months from the date of the bond. Our views upon that subject have already been expressed; and we have only to repeat, that the limitation applies to the time of making the application and demand, and not to the time in which the deed was to be executed and delivered, if it was executed within a reasonable time after the adjudication by the attorney.

Examined in the light of the pleadings, and the facts and circumstances exhibited in the record, it is clear that the charge of fraud is not sustained, and that the burden of proof is upon the complainant to prove the allegation that the deeds of conveyance are invalid for any reason not apparent on their face; and if so, then it is equally clear that there is no error in the record. *Decree affirmed.*

IVES ET AL. *v.* HAMILTON, EXECUTOR.

1. Where an improvement in sawmills, for which letters-patent were issued, consists of the combination of the saw with a pair of curved guides at the upper end of the saw, and a lever, connecting-rod or pitman, straight guides, pivoted cross-head, and slides or blocks and crank-pin, or their equivalents, at the opposite end, whereby the toothed edge of the saw is caused to move unequally forward and backward at its two ends while cutting. The claim is, "giving to the saw in its downward movement a rocking or rolling motion by means of the combination of the cross-head working in the curved guides at the upper end of the saw, the lower end of which is attached to a cross-head, working in straight guides and pivoted to the pitman below the saw, with the crank-pin substantially as described," the use by another party of guides consisting of two straight lines representing two consecutive cords of the curve of the guides of the patentee, and arranged in other respects in the same manner as this curve, is clearly the employment of a mechanical equivalent, and is an infringement of the patent.
2. It is not a change in principle to pivot the lower end of the saw to the pitman *below* the cross-head, and, by a reverse motion of the crank or driving-wheel, produce the same motion of the saw as when the pitman is pivoted above the cross-head.
3. The description in a patent for an improvement is sufficient if a practical mechanic, acquainted with the construction of the old machine in which the

improvement is made, can, with the patent and diagram before him, adopt such improvement.

4. The essence of the improvement does not consist in the precise position in which any part is placed, but in a combination of mechanical means for producing a certain result.

ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

The facts are stated in the opinion of the court.

Mr. Charles J. Hunt for the plaintiffs in error.

It is the duty of the court to construe the claim of a patent, and to decide as to its ambiguity; to render it certain, and to point out what it is. *Emerson* v. *Hogg*, 2 Blatchf. 1; *Hogg* v. *Emerson*, 11 How. 587; *Washburn* v. *Gould*, 3 Story, 123.

When the claim is for a result in terms, produced by a combination *substantially as described*, it is a claim of the described means, or rather of the particular organization and devices described, by means of which the specified result is produced. *Seymour* v. *Osborne*, 3 Fish. 555; *Seymour* v. *Osborne*, 11 Wall. 516; *Burden* v. *Corning*, 2 Fish. 474 (489); *Leroy* v. *Tatham*, 14 How. 156; *O'Reilly* v. *Morse*, 15 id. 62; *Corning et al.* v. *Burden*, id. 252; *Mitchell* v. *Tilghman*, 19 Wall. 287, 391.

In the construction of a patent, the whole instrument, embracing the specification and drawings, is to be taken together; and if from this the exact nature and extent of the claim, made by the inventor, can be perceived, the court is bound to give it full effect. *Parker* v. *Styles*, 5 McL. 44; *Hogg* v. *Emerson*, *supra*; *Union Sugar Refinery* v. *Mathieson*, 2 Fish. 600.

The patentee cannot be allowed to prove that any part of the combination is immaterial or useless. *Vance* v. *Campbell*, 1 Black, 428; *Gill* v. *Wells*, 6 Pat. Off. Gaz. 881 (885).

The combination is an entirety. If one of the ingredients be given up, the thing claimed disappears. *Vance* v. *Campbell*, *supra*; *Gill* v. *Wells*, *supra*.

If an ingredient substituted for one of the ingredients in a combination is new, or performs substantially a different function, it is no infringement. *Roberts* v. *Harden*, 2 Cliff. 504; *Gill* v. *Wells*, *supra*; *Turrell* v. *Illinois Central R.R. Co.*, 3 Fish. 330.

The inventor of a combination, in improving old machines,

cannot invoke the doctrine of equivalents to suppress other improvements which are not merely colorable invasions of the first. *McCormick* v. *Talcott*, 20 How. 402, 405; *Burden* v. *Corning*, 2 Fish. *supra*.

Mr. H. H. Wells and *Mr. John H. B. Latrobe* for the defendant in error.

The true distinction under the patent law between a mere process or effect and a certain mechanical combination, or an improvement on an old machine by which a process or effect is produced, is well settled. *Blanchard* v. *Sprague*, 3 Sumn. 535; *Corning et al.* v. *Burden*, 15 How. 252; *Seymour* v. *Osborne*, 11 Wall. 516.

The patentee is only required to describe his invention with such certainty and particularity as to distinguish it from all others, and to enable one, skilled in the art of which it is a branch, to construct and use it. *Teese* v. *Phelps*, McAll. 48; *Allen* v. *Hunter*, 6 McL. 303; *Judson* v. *Moore*, 1 Fish. Pat. Cas. 544; *Gray* v. *James*, 1 Pet. C. C. 394; *Brookes* v. *Bicknall*, 3 McL. 250; *Treadwell* v. *Parott*, 5 Blatchf. C. C. 369; *Singer* v. *Walmsley*, 1 Fish. Pat. Cas. 558; *Mowry* v. *Whitney*, 14 Wall. 620.

There is no pretence whatever that Hamilton did not conform to this requirement in his specifications; and they are to be construed in the sense in which the common knowledge of persons skilled in the art would understand them. *Winans* v. *Denmead*, 15 How. 341; *Klein* v. *Russel*, 19 Wall. 433; *Carver* v. *Braintree Manuf. Co.*, 2 Story, 432–440; *Seymour* v. *Osborne*, 11 Wall. 516.

To constitute an infringement, it is not necessary that the two inventions should be identical. The question is, Were the means used substantially the same? *Alden* v. *Dewey*, 1 Story, 336; *Root* v. *Ball & Davis*, 4 McL. 180; *Parker* v. *Haworth*, id. 374; *Burr* v. *Duryea*, 1 Wall. 573.

The introduction of a mechanical equivalent does not relieve from the charge of infringement. *Tompkins* v. *Gage*, 5 Blatchf. C. C. 268; *Taylor* v. *Garretson*, 9 id. 156; *Conover* v. *Roach*, 4 Fish. Pat. Cas. 12; *Carter* v. *Baker*, id. 404; *Gould* v. *Rees*, 15 Wall. 187.

One machine is the same in substance as another if the principle be the same in effect, though the form of the machine be

different. *Brooke* v. *Hermance*, 1 Blatchf. C. C. 398; *Parkhurst* v. *Kinsman*, id. 497; *Blanchard* v. *Beers*, 2 id. 418.

The rule in regard to what constitutes an infringement is laid down in Curt. on Pat., sect. 32, and is quoted by this court in *Burr* v. *Duryea*, 1 Wall. 531–573.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an action brought to recover damages for the infringement of certain letters-patent granted to Hamilton, the plaintiff below, for an improvement in sawmills. The defendants pleaded the general issue, with notice of special matter, setting up several prior inventions, amongst others that of one Isaac Straub. The plaintiff's patent was dated the fifth day of December, 1865. His improvement, as described therein, consisted of the combination of the saw with a pair of curved guides at the upper end of the saw, and a lever, connecting-rod or pitman, straight guides, pivoted cross-head, and slides or blocks and crank-pin, or their equivalents, at the opposite end, whereby the toothed edge of the saw is caused to move unequally forward and backward at its two ends while cutting. His claim is, "giving to the saw in its downward movement a rocking or rolling motion, by means of the combination of the cross-head working in the curved guides at the upper end of the saw, the lower end of which is attached to a cross-head, working in straight guides and pivoted to the pitman below the saw, with the crank-pin, substantially as described."

The old method of guiding a saw in its upward and downward movement was to cause the two ends of the cross-head, to which the upper end was attached, to slide in straight grooves, or guides. The lower end of the saw was guided in the same manner, and to the lower cross-head was attached by a pivot the lever, or pitman, worked by the crank of the driving-wheel. This arrangement gave the saw a straight and uniform motion, up and down, between the guide-posts of the frame in which it worked, either perpendicular or at a slight inclination, according to the position of the guide-posts.

In Hamilton's improvement the guiding grooves for the upper end of the saw are curved, with the concave part of the curve turned towards the approaching log, so that, as the saw descends,

the top part at first retreats before the log, and afterwards moves up towards it at the same time that the bottom part is moved back and forth in just the opposite directions by being attached to the pitman above the cross-head; the combined motions thus giving to the whole saw a kind of rocking or vibratory movement, by which the teeth take the most advantageous bite into the log, and all of them perform their proportional part of the work. The result is something like that produced by two men working a saw in a saw-pit.

The defendant is using a saw in which the guides are not curved, it is true; but they each consist of two straight lines that represent two consecutive cords of the curve in Hamilton's guides, and are arranged in other respects in the same manner as this curve; namely, having the interior angle, like the concave side of the curve, turned towards the approaching log, the effect being exactly the same. He also connects the lower end of his saw to the pitman below the cross-head, instead of above it; but by reversing the motion of his crank, or driving-wheel, he produces exactly the same combination of movements as those produced by Hamilton, the one being the exact equivalent of the other; and, if Hamilton's patent was for the result, the infringement would be so perfect as to amount to a mere copy of the invention. But Hamilton does not claim the result. He could not do it; for, as he says, the same result was effected by two men when sawing in a pit. His claim is, "giving to the saw in its downward movement a rocking or rolling motion *by means* of the combination," &c.; that is, not the rocking motion itself, but the *means* devised by him for producing it.

The question in the case, therefore, is, whether the defendants use the same or equivalent means; that is, the same, or substantially the same, combination of mechanical devices.

The substitution of guides at the top, made crooked by a broken line instead of a curved line, is too transparent an imitation to need a moment's consideration. A curve itself is often treated, even in mathematical science, as consisting of a succession of very short straight lines, or as one broken line, constantly changing its direction; and many beautiful theorems were evolved by the early mathematicians on this hypothesis. At all events, in mechanics, when, as in this case, a broken

line is used instead of a regular curve, being deflected at one or more points by a very slight angle, and performing precisely the same office as a curve similarly situated, the one is clearly the equivalent of the other.

The attaching of the lower end of the saw to the pitman below the cross-head instead of above it, and thereby getting the same movement as before by reversing the motion of the crank, is no change in principle. This is too obvious for discussion.

The combination of the two things in the defendants' mill — namely, the crooked guides above, and the connection of the saw with the pitman below at a point removed from its centre of motion (both being calculated to give to the saw the precise rocking or vibratory motion desired) — is a close copy of the plaintiff's invention; quite as close as is usually made by those who attempt to evade a patent whilst they seek to use the substance of the invention.

The defendants insist, however, that Hamilton's patent is defective for not clearly describing the position, perpendicular or otherwise, in which the curved guides should be placed; and that, if any required position can be inferred from the patent, it is a perpendicular one, whilst the guides of the defendants' saw are inclined at a slight angle to the perpendicular. As to the alleged defect of the patent, there is nothing in the objection. The invention claimed is an improvement on an old machine, and it is properly taken for granted that the practical mechanic is acquainted with the construction of the machine in which the improvement is made; and nothing appears in the case to show that any peculiar position different from that of sawmills constructed in the ordinary way is necessary to render it effective and useful. The essence of the improvement has nothing to do with the precise position of the guides. It is a combination of mechanical means to produce a rocking motion of the saw; and this combination is just as applicable to guides that have a slight inclination as to guides that are perpendicular. We think that there is no ground for either branch of the objection. The description in the patent is sufficiently specific; and the inclination of the defendants' guides cannot exempt them from the charge of infringement.

The complaint made by the defendants, that the patent is defective in not stating the nature of the curve for the guides, whether that of a circle or of some other figure, in view of the subject-matter of the improvement and of the diagrams annexed to the patent, are not sufficient to affect its validity. Any good mechanic acquainted with the construction of saw-mills, and having the patent and diagram before him, would have no difficulty in adopting the improvement, and making suitable curves.

The conclusions to which we have come are decisive of the case. It is unnecessary to discuss in detail the different points made at the trial, or the several instructions asked. We have examined them all, and find nothing on which to base a judgment of reversal. If Straub's patent would have revealed any thing to affect the validity of Hamilton's, the parties did not see fit to spread it on the record; and therefore we have no means of deciding that question. *Judgment affirmed.*

THE "AMERICA."

1. Where two vessels under steam, meeting end on, or nearly end on, neglect, until it is too late to avoid a collision, to comply with the rule requiring each to port her helm, it is no defence for either to prove that she ported her helm before the collision actually occurred. The act of compliance must be seasonable; otherwise it is without substantial merit.
2. In this case, as both vessels were in fault, the damages, and the costs in the courts below, should be apportioned between them.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Mr. B. D. Silliman for the appellants.

Mr. W. R. Beebe, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Sailing rules were ordained to prevent collisions between ships employed in navigation, and to preserve life and property embarked in that perilous pursuit, and not to enable those whose duty it is to adopt, if possible, the necessary precautions to avoid such a disaster, to determine how little they can do

in that direction without becoming responsible for its consequences, in case it occurs.

Except in special cases, the sailing ship is required to keep her course where a steamship is approaching in such a direction as to involve risk of collision: but the rule is widely different if the two ships are under steam, and they are meeting end on, or nearly end on, so as to involve risk of collision; the requirement in that event being that the helms of both shall be put to port, *so that each may pass on the port side of the other.* 13 Stat. 60.

Steamships meeting end on, or nearly end on, should seasonably adopt the required precaution; and neither can be excused from responsibility, in case of omission, merely upon the ground that it was the duty of the other to have adopted the corresponding precaution at the same time, if it appears that the party setting up that excuse enjoyed equal facility to obey the requirement with the other party, and might have prevented the disaster. Imperative obligation is imposed upon each to comply with the rule of navigation; nor will the neglect of one excuse the other in a case where each might have prevented the disaster, as the law requires both to adopt every necessary precaution, if practicable, to prevent the collision, and will not tolerate any attempt of either, in such an emergency, to apportion the required precaution to avoid the impending danger, in case where both or either might secure perfect safety to both ships and all intrusted with their control and management.

Two steamboats, — to wit, the steam-tug "Fairfield" and the ferry-boat "America," — on the 13th of December, 1866, collided in East River, in the harbor of New York; and it appears by the transcript that the owners of the former instituted the present suit in the District Court of the United States against the ferry-boat to recover damages for the injuries sustained by the steam-tug on the occasion, whereby it is alleged that she was damaged to such an extent, that she soon sank and became a total loss. Service was made; and the owners of the ferry-boat appeared, and filed an answer. Testimony was taken on both sides; and the District Court, having heard the parties, entered a decree, dismissing the libel; and the libellants appealed to the Circuit Court. Hearing was again had in the Circuit Court; and the Circuit Court reversed the decree of the

District Court, and entered a decretal order in favor of the libellants, and referred the cause to a master to estimate the damages. Subsequently the master made a report, to which the respondents filed exceptions; but the Circuit Court overruled the exceptions, and entered a final decree in favor of the libellants for the sum of $17,723.75, with the costs of both courts; from which decree the respondents appealed to this court.

Sufficient appears to show that the steam-tug was proceeding down East River, having come from the Navy-Yard, and that she was bound on a trip round the Battery into the North River; that the other steamer was a ferry-boat, belonging to the Fulton Ferry, and was making one of her regular trips from her slip at the foot of Fulton Street, New York, to her slip at the foot of Fulton Street, in the city of Brooklyn. Theories widely different, and irreconcilably inconsistent, are maintained by the respective parties; but it may afford some aid in reaching the true solution of the controversy to reproduce those theories before adverting to the evidence by which each of the parties attempts to show that the other is responsible for the disaster.

Both parties agree that the tide was ebb; and the libellants allege that the steam-tug, in proceeding on her intended trip, was heading down the river, nearly in the middle of the same, when the ferry-boat left her slip on the New-York side for the purpose of transporting her passengers to her slip on the Brooklyn side; that, as the two vessels advanced towards each other, she, the steam-tug, blew one whistle to indicate that she intended to go to the right, and that she ported her helm at the same time, as evidencing that intention; that the ferry-boat paid no attention to the signal given by the steam-tug, but continued her course up the river, and towards the vessel of the libellants; and that the steam-tug, finding that the ferry-boat was rapidly approaching without changing her course, and that a collision would probably ensue if she, the steam-tug, pursued her course, rang her bell to slow, stop, and back; and the libellants aver that the orders were promptly obeyed, and that the headway of their vessel was nearly or quite stopped; and they charge that it was not until their vessel was in that condition that the ferry-boat blew two whistles to indicate that it was her intention to go to the left; and they also aver to the

effect that it was then too late to avoid a collision, for two reasons, — first, because the vessels were too close together; and secondly, because the power of the steam-tug to move forward was stopped; that the steam-tug, under the circumstances, could not do any thing except to continue to back her engine; and the allegation is, that the ferry-boat kept on at full speed, striking the steam-tug on her port bow, crushing in her planks and timbers to such an extent that she sank in a few minutes.

Suppose those allegations were all founded in fact: the conclusion of the libellants, that the collision happened through the carelessness, negligence, and want of skill and proper management, in those navigating the ferry-boat, might perhaps be adopted as correct: but the whole theory of fact involved in those allegations is denied by the respondents; and they allege, that, when the pilot of the ferry-boat discovered the steam-tug, the former was not more than two hundred yards from the Brooklyn shore, and about the same distance from her slip on that side of the river; and that she was heading up the river, against a strong ebb tide, for the purpose of getting room to swing into her slip, and that the ferry-boat was under full speed, heading down the river and towards the Brooklyn shore, on a course which, if continued, would carry her in front of the steam-tug on the Brooklyn side of the river; that the ferry-boat thereupon kept steadily on her course up the river, in order that the steam-tug might pass in front of her, as she easily might have done, without any danger of collision; and the respondents allege that the steam-tug continued that course under full headway until she was within a short distance of the ferry-boat, when it was impossible for the two boats to prevent a collision; and the respondents aver that it was at that moment, and under those circumstances, that the steam-tug blew one whistle, to indicate that she intended to go to the right, and that the ferry-boat answered the signal with one whistle, and put her helm hard a-port, and reversed her engine, and backed, which was all she could do in the emergency to avoid the impending peril. Hence they aver that the collision was caused by the carelessness, negligence, and want of skill and proper management, of those in charge of the steam-tug.

Evidence giving some support to each of the conflicting

theories is exhibited in the record, and the District Court decided in favor of that assumed by the respondents; but the Circuit Court was of the opinion that the libellants ought to recover, and entered a final decree in their favor.

Mutual accusations are made, each against the other, that the respective steamers were without lookouts: but the court here does not find it necessary to give such accusations, in this case, much examination, as the proofs are clear and satisfactory that each vessel was seen by the other in ample season to have adopted every necessary precaution to have prevented the collision; and it also appears to the entire satisfaction of the court that the want of a lookout on the one side or the other did not contribute in any degree to the disaster; which is all that need be remarked in respect to those accusations. *The Farragut*, 10 Wall. 338; *The City of Washington*, *supra*, p. 31.

Viewed in the light of these suggestions, it is quite clear that the decision must turn upon the merits of the controversy. Inevitable accident is not set up by either party; nor could it be with any hope of success, as it appears beyond all doubt that each steamer was seasonably seen by the other, as they were approaching nearly end on, and that they collided, the ferry-boat striking the steam-tug on the port bow, just aft the stem, in the open channel of the river, where each might have passed the other on either side in perfect safety, if proper measures for that purpose had been seasonably adopted to carry such an intention into effect.

Decided support to the material facts of that proposition is found in the libel and in the answer, as well as in the statements of the principal witnesses on both sides. Nothing different could have been intended by the libellants, as they allege that the steam-tug "headed down the East River, and about the middle thereof;" and the respondents allege that the ferry-boat "was heading up the East River, against a strong ebb-tide, for the purpose of getting room to swing into her slip."

Confirmation of that view is also derived from the charts exhibited by the parties, which show that the two steamers were approaching each other nearly end on, without any substantial change of course, until they were so close together that no efforts of those in charge of their navigation could possibly have avoided the impending danger.

Argument to show that nothing could have been done at that moment to avoid the collision is quite unnecessary, as the proposition is self-evident; but the fault consists in getting the two vessels into that dangerous situation. Precautions in such cases must be seasonable in order to be effectual; and if they are not so, and a collision ensues in consequence of such delay, it is no defence to allege and prove that nothing more could be done at the moment to prevent it, nor to allege and prove that the necessity for precautionary measures was not perceived until it was too late to render them availing.

Inability to do any thing effectual to prevent a collision, at the moment it occurs, usually exists; but it seldom happens that there is much difficulty in tracing the cause which produced it to some antecedent neglect, carelessness, or unskilfulness, in those having the command of one or both of the vessels.

Two ships under steam, if they are meeting end on, or nearly end on, so as to involve risk of collision, are required to put their helms to port, so that each may pass on the port side of the other: but, if they neglect to comply with that requirement until it is so late that the object to be accomplished cannot be effected, it is no defence to allege or prove that one or both ported their helms before the collision occurred; for, unless a party seasonably complies with the requirement, the act of compliance is without substantial merit.

Both parties allege in this case that they ported their helms; and the court here is of the opinion, that, if either had put the helm hard a-port in season, the loss of property would not have taken place. Beyond all doubt, it was the duty of each to have complied with that rule; but inasmuch as the circumstances convince the court, that, if either had properly complied with the rule, the collision would have been avoided, the conclusion must be that both were in fault.

Seasonable compliance with the rule is not alleged by the respondents, nor is there any proof exhibited in the transcript to warrant such a conclusion. Instead of that, the answer admits, in effect, that the collision was inevitable before the ferry-boat put her helm to port. Nor have the respondents attempted to place their defence entirely upon that ground. Merit to some extent is claimed by the libellants because those

in charge of the steam-tug did at some time blow one whistle to indicate that the steam-tug would go to the right, and that she ported her helm; but the evidence convinces the court that the signal was not seasonable, and that the porting of the helm was by no means sufficient to constitute a compliance with the rule of navigation.

Grant that, and still the libellants suggest that the ferry-boat paid no attention to the signal; and it may be that the charge is correct; but, if so, it would not follow that the steam-tug might run down the ferry-boat, as rules of navigation are ordained to preserve life and property, and not to promote or authorize collision. Even flagrant fault committed by one of two vessels approaching each other from opposite directions will not excuse the other from adopting every proper precaution to prevent a collision. *The Maria Martin*, 12 Wall. 47.

Admit that proposition, and still the libellants suggest that they also rang to slow, stop, and back; and they aver that the signals to that effect were properly obeyed: but the court is convinced from the evidence that these last-mentioned signals immediately followed the whistle to go to the right, and that the signals, one and all, were too late to be effectual.

Indefinite as the allegations of the libel are, it may well be urged that the libel contains nothing inconsistent with that conclusion; and the answer expressly alleges, that, as soon as the steam-tug blew her whistle, it was obvious that she would strike the ferry-boat on the starboard side, unless the ferry-boat changed her course "to ease the blow."

Tested by these several considerations, the court here is of the opinion that both vessels were in fault, and that the damages and the costs in both of the courts below should be equally apportioned between the two vessels, as prescribed by the decisions of this court. *The Catharine*, 17 How. 173; *The St. Charles*, 19 id. 109; *The Maria Martin*, 12 Wall. 43; *The Morning Light*, 2 id. 557.

Decree reversed, with costs in this court, and the cause remanded with directions to apportion the damages and the costs in both courts below equally between the respective vessels, in conformity with the opinion of the court.

THE "GALATEA."

Where, in order to avoid a collision between two vessels propelled by steam, one going with and the other against the tide, it is conceded that one should stop, it is the duty of the vessel proceeding against the tide to do so, as her movements can be controlled with less difficulty than those of the other vessel.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Mr. R. D. Benedict for the appellants.

Mr. William M. Evarts, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Owners of ships appoint the master and employ the crew, and consequently are, as a general rule, held responsible for the conduct of both in the navigation of the vessel.

Exceptions exist to that rule in certain cases; as where the craft is one without sails or steam apparatus, or where the difficulties of the navigation make it necessary to employ a steam-tug, and to turn over the control and navigation of the ship to the master and crew of the latter vessel.

Steam-tugs are usually employed in such cases; but the owners of the ship or other craft do not necessarily, in that event, constitute the master and crew of the accessory motive power their agents in performing the service, as they neither appoint the master of the steam-tug or ship the crew, nor can they displace either the one or the other. *Sturgis* v. *Boyer*, 24 How. 122.

Beyond doubt, they are under obligations to employ a seaworthy steam-tug, as the accessory motive-power to their own ship or craft; and they continue to be responsible for the negligence, omission of duty, or unskilfulness, of the master and crew of their own vessel.

Much discussion of those questions, however, is unnecessary, as it is not pretended, in the case before the court, that the barges in tow were guilty of negligence, or that any act or omission of duty by those in the immediate charge of their navigation contributed in any degree to the collision. Instead of that, it appears that the suit was promoted by the owners of

the steam-tug, the three barges, and the owners of the cargo of the two barges loaded with coal.

Two of the barges — to wit, the "Pottsville" and the "Reading" — belonged to the owners of the steam-tug; and it appears that they were all taken in tow by the steam-tug, to be transported from Jersey City to New Haven; and it also appears that the tow was arranged with the "Reading" on the starboard side of the steam-tug, and that the "Pottsville" was on the port side, the "Hoffman" being on the port side of the "Pottsville." Arranged as described, they were lashed together in the usual way by what are called spring-lines, stern-lines, head-lines, and breast-lines; and the master testifies that the lines were all good, and that the fastenings were sufficient.

Nothing occurred during the voyage, material to the present investigation, until half-past five o'clock in the morning of the day of the collision, when the steam-tug with the three barges in tow was passing through Hell Gate, on her way to the place of her destination. Sufficient appears to show that the sky was clear, and that the full moon was shining brightly above the horizon, and that the propeller "Galatea" was on her regular return trip from Providence to New York. Both the propeller and the steam-tug were well manned and equipped, and the evidence shows that they both displayed proper signal-lights; nor is there any reason to doubt that each was seen by the other in season to have prevented a collision, notwithstanding the tide was half-flood, running at the rate of seven knots an hour.

Bound out as the steam-tug with her tow was, she was running with the tide; and the propeller, being bound to New York, was of course heading against the tide, and it appears that she was running at her usual speed of twelve knots an hour. Though running with the tide, the evidence shows that the steam-tug was making two knots an hour less speed than the propeller; and the libellants allege that the propeller saw the lights of the steam-tug when the latter was opposite Astoria, and while the propeller was on the east side of Ward's Island, and before she arrived at Negro Point; that the steam-tug, when the two vessels were in those positions, blew a long signal-whistle to signify that both vessels should put their helms to port, and that each should go to the port side of the other;

and they allege that the propeller gave one long signal-whistle in reply, by which those engaged in navigating the steam-tug understood that their signal had been heard and was assented to and approved by those in charge of the propeller.

Satisfactory evidence is exhibited that the signal given by the steam-tug was heard, and that the lights of the steam-tug were seasonably seen by the propeller; and it is equally certain that those in charge of the respective vessels understood that each should port their helm, and pass the other on the port side. Testimony was introduced by the libellants to show that the signal to go to the right was given and answered a second time; but the point is not material, as it is proved beyond all doubt that there was no misunderstanding as to the course which each vessel was expected to pursue. Enough appears also to warrant the conclusion, that those in charge of each vessel understood sufficiently the character of the other. They were then a mile apart; but it is not doubted that the libellants knew that the lights ahead were the signal-lights of a large steamer, and it is equally certain that the propeller knew that it was a steam-tug with a tow that was approaching from the opposite direction.

It appears that the "Galatea" was a propeller of fifteen hundred and sixty-six tons; that she was two hundred and forty-five feet long, and fifty-four feet in width over all. On the other hand, the steam-tug was seventy feet long and seventeen feet wide, with three barges in tow, varying in length from one hundred and ten feet to one hundred and fifteen feet; and it appears that each was about the same width as the steam-tug.

Explanations as to the manner in which the tow was arranged have already been given; to which it may be added, that the barges projected some twenty feet forward of the stem of the steam-tug, and about the same distance aft the stern of the tug by which they were propelled.

Prior to and at the time of the collision, the master and pilot of the steam-tug was in the pilot-house, at the wheel; and it is proved that she had one man forward on deck, outside of the pilot-house, and that the master of each of the three barges in tow was at the helm of his respective barge.

None of these matters are much controverted, and it is admitted that the collision occurred at the time alleged in the libel; but the parties differ very widely as to the place where the disaster took place. Differences more antagonistic and irreconcilable are seldom encountered, even in collision cases, than are exhibited in the present transcript, in respect to that question; but still the parties concur in some things, which will afford some aid in the solution of the matters of fact in controversy: as, for example, they both admit that the collision took place while the two vessels were passing through what is called "Hell Gate;" that the steam-tug, with her tow, was on her way from Jersey City to New Haven, and that the propeller was making her return trip from Providence to New York; that it was a moonlight morning, and that the proper signal-lights of each vessel were seasonably seen by the other, showing conclusively that one or the other, or both, must have been in fault.

Neither party sets up inevitable accident; and they substantially concur that the question which was in fault must depend upon the answer to be given to the inquiry, whether the collision occurred on the north or the south side of the channel, defined by the witnesses, in that state of the navigation, as *the true tide;* that the steam-tug was in fault if the collision occurred on the north side, and that the propeller was in fault if it occurred on the south side, as alleged by the libellants.

Service was made; and the respondents appeared, and filed an answer. Proofs were taken on both sides; and the District Court, after having heard the parties, entered a decretal order in favor of the libellants, and referred the cause to a master to estimate the damages. Both parties were heard before the master, and he made a report to the District Court. Exceptions were filed to his report by both parties; but the District Court overruled all the exceptions, and entered a final decree in favor of the libellants for the sum of $13,123.21, and the respondents appealed to the Circuit Court. Hearing was again had in the Circuit Court; and the Circuit Court reversed the decree of the District Court, and entered a decree dismissing the libel: whereupon the libellants appealed to this court.

Matters of fact only are in controversy between the parties;

and it must be admitted that some of the questions presented are involved in some obscurity and doubt. Most of the questions discussed are comparatively unimportant, except as they bear upon the principal issue of fact between the parties as to the place where the collision occurred, — whether it was on the north or south side of the true tide, or channel of navigation, in that state of the tide.

Tested by the pleadings or evidence, it is plain that each vessel was bound to go to the port side of the other; and that, if they had both obeyed that regulation, they would not have collided. Both substantially admit that proposition in their pleadings, proof of which is found both in the libel and in the answer.

Pot Rock is the place designated in the libel as the place where the collision occurred; and it is clear, that, if it occurred in that vicinity, the libellants were not in fault. They allege that the collision occurred while the steam-tug was heading east by south; and that the propeller, while the steam-tug, with her tow, was in the prosecution of her trip, ran into and came into collision with the three barges; that her cutwater struck the "Hoffman," and, passing through the barge, struck the bow of the "Pottsville" and cut her entirely off, and then came in contact with the port bow of the "Reading," forward of her midships; and it appears that the result was that the "Hoffman" and the "Pottsville" with her cargo of coal sank immediately; and that the "Reading," with her cargo, sank in about ten minutes, all in very deep water; and that the barges and the two cargoes of coal became a total loss.

Directly opposed to that are the averments of the answer, in which the respondents deny that the propeller ran into the barges, or either of them, and allege that the barges drifted down and upon the propeller, and that they struck against and upon their vessel when she was not moving forward or towards the barges, but that she had stopped, and was backing her engines, with a view to avoid the barges, after having perceived that they were drifting down the tide and were in danger of running against the propeller; and that the collision occurred, not at Pot Rock, as alleged by the libellants, but abreast of Negro Point, which is very near the northern shore.

These references to the pleadings are sufficient, without more, to exhibit the real issue between the parties, and to show the proper application of the several propositions of fact maintained on the one side and the other in the argument at the bar. Such of those propositions as appear to be material will be considered. They are as follows, first giving the views of the libellants, and then those advanced by the respondents: —

Throughout, the libellants maintain that the collision occurred on the south side of the true tide, close to Pot Rock, which is emphatically denied by the respondents; and they insist that it took place on the north side of the channel, close to the opposite shore. Attempt is made by the libellants to support the main theory of the libel by another proposition of fact; which is, that the steam-tug and the barges, when the signals were exchanged between the steam-tug and the propeller, ported their helms, and kept as close to the edge of the true tide on the starboard side as they conveniently could, without getting into the eddy, which is just south of the Pot Rock, and which, as they claim, might have sent the craft ashore if they had drifted into it.

Suppose the steam-tug with her tow did port: still it is insisted by the respondents that the whole craft crossed the channel nearly to Hog's Back on the chart, on the northern edge of the true tide, and continued on that course until the collision occurred. Of course the libellants deny that proposition; and they insist that the propeller came across the channel from the northern to the southern edge of the same, and there struck the tow in charge of the steam-tug.

Diametrically opposite views are entertained by the respondents, and they insist that the propeller came down against the tide in the middle of the channel; and their theory is, that the steam-tug floated across the tide from the northern side of the channel, and that the port barge struck the stem of the propeller, and that it was by those means that the barges in tow were injured and sunk, as alleged in the libel.

Improbable as that proposition is, it needs more support to give it credence than is found in the evidence; and the libellants contend that the propeller was running at her usual speed

of twelve miles an hour when she cut through the two barges on the port side of the steam-tug.

Support to that view is certainly exhibited in the testimony introduced by the libellants; and the extent of the injuries inflicted by the concussion adds very decided confirmation to the statement of the witnesses.

Conclusions of fact are all that can properly be expected in such a case, without any attempt to give the details of the evidence. All of the evidence has been examined; and the court, after having duly considered the arguments of counsel, is of the opinion that the steam-tug, with the barges in tow, was as far towards the southerly edge of the true tide as she could reasonably be required to go in passing through that dangerous and narrow channel of navigation. Usage gave her the right to go through at half-flood tide; and the evidence is convincing that her tow was not greater than she was accustomed to transport through that channel on such occasions, nor is the theory of the propeller sustained that the steam-tug was at any time on the northern side of the true tide subsequent to the exchange of signals between the two vessels.

Properly weighed, the evidence is satisfactory that the two vessels came to a distinct and clear understanding by those signals, that each should port their helms, and pass on the port side of the other; and the court here is of the opinion that the steam-tug took every necessary step to carry that understanding into effect, and that she was as near to Pot Rock as the character of the navigation would safely allow.

Ample width was left to the northward of the line of her course for the propeller to have passed in safety, if she had conformed to the arrangement properly to be inferred from the signals. Those in charge of the navigation of the propeller testify that she ported her helm as she came round Negro Point: and it may be that she did; but it is scarcely to be believed that the helm was put *hard a-port*, as the most rational mode of accounting for the collision is, that her bow was struck by the tide just as she came round that point, which gave her a more southern direction across the true tide than she otherwise would have pursued.

Judging from the whole evidence, the better opinion is, that,

if her helm had been put *hard a-port*, the collision might have been avoided, as in that event she would have gone pretty close to the northern edge of the true tide, instead of crossing the same in the direction of the place where the collision actually took place.

Beyond doubt, the navigation through that gate is quite dangerous; and yet the evidence tends pretty strongly to show that both vessels, if proper precautions had been used, might have passed each other in safety, and without danger of collision. Nor is it necessary to decide that question; for, if it be conceded that one or the other should have stopped, it is clear that it was the duty of the propeller to adopt that precaution, as she was proceeding against the tide, and could control her movements with much less difficulty than the steam-tug, as the latter was running with the tide.

Apart from this, the evidence shows that the usages of navigation authorized the steam-tug to proceed on her voyage in that state of the tide; and it is obvious that she could not stop, as she was going with the tide at the rate of ten miles an hour, with the aid of her engine. Without doubt, she might have stopped her engine; but it is very doubtful whether the stopping the engine at that moment would have had any tendency to prevent the collision, as it appears that the propeller struck the tow on the port side nearly at right angles.

Viewed in the light of the whole evidence, the court is clearly of the opinion that the propeller was wholly in fault, and that the collision was occasioned by the negligence, and want of due care, on the part of those in charge of her navigation.

Certain exceptions were taken in the District Court to the report of the master; but inasmuch as the respondents did not appeal, and the libellants have not pressed their objections, it is not deemed necessary to give the exceptions any consideration.

Decree reversed, and the cause remanded with directions to affirm the decree of the District Court.

OTIS ET AL. *v.* CULLUM, RECEIVER.

1. Under authority of acts of the legislature of Kansas, the city of Topeka issued certain bonds payable to a party named, or bearer. They became the property of a bank, which put them upon the market, and disposed of them. This court having decided that the legislature had no power to pass the acts, and that the bonds were void, the purchasers brought suit on the ground of failure of consideration to recover the amount paid for them. *Held*, that, as the bank gave no warranty, it cannot be charged with a liability it did not assume.
2. The vendor of such securities is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him, and are not forgeries. Where there is no express stipulation, there is no liability beyond this.

ERROR to the Circuit Court of the United States for the District of Kansas.

Mr. Alfred Ennis for the plaintiff in error.

Mr. George R. Peck, *contra*.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This case presents but a single point for consideration. In the court below, the defendant demurred to the plaintiffs' petition. The court sustained the demurrer. The plaintiffs elected to stand by it. The court thereupon gave judgment for the defendant.

It is not alleged that there was any fraud on the part of the bank or its agent in selling the bonds in question: on the contrary, their good faith is expressly admitted. The plaintiffs' declaration, or petition as it is called, is not framed upon the theory of bad faith, and a recovery is not sought upon that ground.

The representations made by the agent of the bank to the plaintiffs when they bought the bonds are largely set out; but while it is alleged they were made in good faith, and believed by both parties to be true, it is not averred that they were intended to be, or were understood by either party to be, a warranty. The points of fraud and warranty may, therefore, be laid out of view. They are in no sense elements in the case. This simplifies the character of the controversy. With these

considerations eliminated, what is left of the case may be stated in a few words.

The legislature of Kansas passed two acts, under which the city of Topeka was authorized to issue bonds for certain specified purposes, the amount in each case to be within the limit prescribed. A hundred coupon bonds of one thousand dollars each, payable to a party named or bearer, were executed, and delivered to that party. They became the property of the First National Bank of Topeka. That bank put them upon the market, and disposed of them. Eighteen of them were sold to the plaintiffs in error for the sum of $12,852, and the residue to another party. There was default in the payment of interest. The other party brought suit. This court held that the legislature had no power to pass the acts, and that the bonds were, therefore, void. *Loan Association* v. *Topeka*, 20 Wall. 655. This suit was brought by the plaintiffs in error to recover from the receiver the amount paid to the bank for the eighteen bonds, with interest upon that sum. The ground relied upon is failure of consideration. The question presented for our determination is, whether, upon this state of facts, they have a valid cause of action.

In *Lambert* v. *Heath*, 15 Mees. & Wels. 486, the defendant bought for the plaintiff certain "certificates of Kentish-coast railway-scrip," and received from him the money for them. Subsequently the directors repudiated the scrip upon the ground that it had been issued by the secretary without authority. The enterprise to which it related was abandoned. The action, which was for money had and received, was thereupon brought to recover back what had been paid for the scrip. The court put it to the jury to say whether the scrip bought was "real Kentish railway-scrip." A verdict was found for the plaintiff upon this issue. A new trial was moved for, the defendant insisting that the court had misdirected the jury. After hearing the argument, the court said, "The question is simply this: Was what the parties bought in the market Kentish-coast railway-scrip? It appears that it was signed by the secretary of the company; and if this was the only Kentish-coast railway-scrip in the market, as appears to have been the case, and one person chooses to sell, and another to buy, that then the latter

has got all that he contracted to buy. That was the question for the jury; but it was not so left to them. The rule must, therefore, be absolute for a new trial."

The judges were unanimous.

Here, also, the plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume.

Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank-notes. The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage-ground upon which it would have placed him.

It would be unreasonably harsh to hold all those through whose hands such instruments may have passed liable according to the principles which the plaintiffs in error insist shall be applied in this case. *Judgment affirmed.*

BARNEY, COLLECTOR, *v.* WATSON ET AL.

The act of Feb. 26, 1845 (5 Stat. 727), prescribing the time and manner of making protest to a collector of customs in cases therein mentioned, continued in force until the passage of the act of June 30, 1864 (13 id. 202).

ERROR to the Circuit Court of the United States for the Southern District of New York.

Mr. Assistant Attorney-General Edwin B. Smith for the plaintiff in error.

Mr. J. Hubley Ashton, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was a suit brought by the defendants in error against the collector of customs at New York to recover certain duties alleged to have been overcharged upon certain goods imported in December, 1863. The plaintiffs claimed that they were "flannels," dutiable at only thirty-five per cent *ad valorem:* the collector held them to belong to a particular class of goods which were subject to an additional specific duty of eighteen cents per pound. As the quantity of goods was seven thousand nine hundred and eighty-four pounds, the difference was $1,437.12. For this amount, with interest, the plaintiffs brought the suit.

The goods in question were part of a large invoice entered on the 24th of December, 1863; on which day the sum of $8,840.93 was paid on account. The entry was not liquidated until the early part of March, 1864, when an additional sum of $1,182.71 was demanded. To this the plaintiffs demurred, as it was based on the aforesaid charge of eighteen cents per pound, in addition to the *ad valorem* duty on the goods in question.

The questions arising at the trial as to the character and dutiability of the goods referred to, and the evidence proper to decide the same, are not of sufficient importance to demand special consideration. The principal question below, and that which has been most discussed in this court, is, whether the plaintiffs gave timely and sufficient notice of protest and dissatisfaction with the decision of the collector.

No objection was made until the additional amount was demanded in March, 1864. The import entry was indorsed with the following memorandum: "Liquidated, and notified importer, March 11, 1864." The additional duty was paid, and a formal protest in writing was served by the plaintiffs on the 24th of March, 1864. In the mean time the importers had appealed to the Secretary of the Treasury, and had obtained his decision, dated the 21st of March, affirming that of the collector.

The defendant insisted that this protest was too late; that it should have been made within ten days from the entry of the liquidation on the import entry: but the court allowed

the plaintiffs to prove that the liquidation was really completed before the 11th of March; and that, within ten days after its completion, a written notice of dissatisfaction, different from the formal protest, was given to the collector. To this the defendant excepted. The jury rendered a verdict for $2,235.72, being the whole amount demanded, with interest.

It is assumed in the argument, and seems to have been assumed at the trial, that the case was governed by the act of March 3, 1857 (11 Stat. 195), by the fifth section of which it was provided, —

"That on the entry of any goods, wares, and merchandise imported on and after the first day of July aforesaid, the decision of the collector of the customs at the port of importation and entry, as to their liability to duty or exemption therefrom, shall be final and conclusive against the owner, importer, consignee, or agent of any such goods, wares, and merchandise, unless the owner, importer, consignee, or agent, shall, within *ten days* after such entry, give notice to the collector, in writing, of his dissatisfaction with such decision, setting forth therein, distinctly and specifically, his grounds of objection thereto, and shall within *thirty days* after the date of such decision appeal therefrom to the Secretary of the Treasury, whose decision on such appeal shall be final and conclusive; and the said goods, wares, and merchandise shall be liable to duty or exempted therefrom accordingly, any act of Congress to the contrary notwithstanding, unless suit shall be brought within thirty days after such decision for any duties that may have been paid, or may thereafter be paid, on said goods, or within thirty days after the duties shall have been paid in cases where such goods shall be in bond."

On examination of the various acts of Congress relating to claims for overcharge of duties on imported goods, we are satisfied that the act of 1857, above quoted, had no application to this case, but that the case was governed by an act passed on the 26th of February, 1845 (5 Stat. 727).

To make this more apparent, it will be necessary briefly to advert to the history of the laws on this subject.

The case of *Elliot* v. *Swartwout*, 10 Pet. 137, decided in 1836, affirmed the principle which had been established by previous authorities, — that money paid to a collector for duties illegally demanded, if paid under compulsion, in order to get possession

of the party's goods, or to prevent their being seized for the duties, may be recovered against the officer in an action at common law, provided the payment be made under protest and with full notice of the intent to sue, so that the officer may protect himself by retaining the money in his possession; but that a payment voluntarily made without such protest cannot be recovered back. The embarrassments which ensued in consequence of the large amount of duties withheld from the public treasury by Mr. Swartwout, the defendant in that case, induced the passage of an act in 1839 (5 Stat. 348, sect. 2), which required all duties collected to be paid into the treasury without regard to claims for overcharge, and deprived the party of an action at law by giving him the specific remedy of an appeal to the Secretary of the Treasury. This was held to be the effect of the act, although not its express terms, as may be seen by a reference to the case of *Cary* v. *Curtis*, reported in 3 How. 236. In 1845, the right of action was restored by an act passed to explain the act of 1839. It declared that nothing contained in this act should be construed to take away the right of any person who should pay money for duties under protest in order to obtain goods imported by him, which duties were not authorized or payable, in part or in whole, by law, to maintain an action at law to ascertain and try the validity of such demand and payment, and to have a right to a trial by jury according to the due course of law; but it required the protest to be made in writing, and signed by the claimant at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof. Act of Feb. 26, 1845 (5 Stat. 727). This act was never repealed until the passage of the act to increase duties on imports, approved June 30, 1864, by the fourteenth section of which (13 Stat. 214) it was enacted, that on the entry of any vessel, or of any goods, the decision of the collector as to the rate and amount of the duties, both on the tonnage of the vessel and on the goods, should be final and conclusive, unless the owner or consignee should, within ten days after the ascertainment and liquidation of the duties, give notice in writing to the collector, on each entry, if dissatisfied with his decision, setting forth distinctly and specifically the grounds of objec-

tion, and should appeal to the Secretary of the Treasury within thirty days after such ascertainment and liquidation, and unless suit should be brought within ninety days after the Secretary's decision. This act supplied the act of 1845, and repealed it by implication. But it was not in force when the goods in question in this case were imported: therefore the proceedings in this case were subject to the regulations of the act of 1845, which required the protest to be made at or before the payment of the duties alleged to be illegal.

The act of 1857, which was erroneously supposed to govern the case, did not relate to a decision upon the rate and amount of the duties to be charged, but to the decision of the collector whether the goods were on the free list or not. This act was passed for the purpose of reducing duties on imports still lower than the rates imposed by the tariff act of 1846, and it made a large addition to the list of articles entirely exempt from duty. The list of additional articles exempted is extended at large in the act, and occupies the greater part of it. The last section then enacts, that, on the entry of any goods imported after the first of July then next, the decision of the collector *as to their liability to duty or exemption therefrom* shall be final and conclusive, &c., unless the importer or consignee, &c., shall, within ten days after such entry, give notice to the collector, in writing, of his dissatisfaction, &c. Now, the question, whether goods imported were or were not on the free list, and exempt from any duty at all, could and necessarily would be decided on their entry, and need not await any ascertainment or liquidation of the amount. Hence it was required that the notice of dissatisfaction should be made within ten days after such entry; and the requirement, on this view of the act, was a reasonable one. The act does not in terms, nor by implication, repeal the act of 1845. That act still furnished the rule to be observed, if the importer, admitting that the goods were dutiable, questioned the rate and amount of duties to be paid. In most cases, the amount, and in many cases the rate, could not be ascertained until after examination and appraisement; and hence a limitation to ten days from the time of entry would often, perhaps generally, deprive the party of any remedy at all.

The question in the case, therefore, really was, whether the importers made their protest in accordance with the act of 1845; namely, at or before paying the duties complained of. It is not denied that they did this so far as relates to the additional charge of $1,182.72: but they claim a return of more than this; and, under the charge of the court, they obtained a verdict for nearly double this amount, which would include some portion of the money paid by them without protest when the goods were first entered. This was erroneous.

Judgment reversed, and cause remanded with directions to award a venire de novo.

TERRY v. COMMERCIAL BANK OF ALABAMA.

1. The holder of the notes of an insolvent bank, the stockholders whereof are liable for so much of the just claims of creditors as remain unpaid after the assets of the bank shall be exhausted, filed a bill in equity to wind up the affairs of the institution under the provisions of its charter. The stockholders were not made parties, nor served with process; nor was any motion, petition, or prayer, filed to subject them to liability. *Held*, that so much of the final decree as discharged them from all liability for and on account of any debt or demand against them or the bank was erroneous.
2. Where, after a final decree on the merits had been rendered upon the report of the receiver and upon the reports of the master to whom it had been referred, all of which had been confirmed without exception, the complainant filed a petition supported by his affidavit asserting that his solicitor had deserted his interests, failed to except to the reports, and improperly consented to the decree, — *Held*, that this court cannot consider the alleged errors in the reports of the master, or review the action of the court below in refusing to set aside the decree upon an application addressed mainly to its discretion.
3. If the complainant desired to place the case in a position where the action of the court below could be reviewed here, he should have filed his bill of review, and supported it by depositions. Such a bill is also the appropriate remedy where a decree has been obtained by fraud.

APPEAL from the Circuit Court of the United States for the Southern District of Alabama.

Mr. Harvey Terry for the appellant.

No opposing counsel.

MR. JUSTICE MILLER delivered the opinion of the court.

The defendant, the Commercial Bank of Alabama, was a

banking corporation organized under the laws of that State, and had become insolvent. The appellant, a citizen of the State of South Carolina, brought a suit in the District Court for the Middle District of Alabama, at that time exercising circuit-court powers, to wind up the bank under the provisions of the twenty-first section of its charter. Plaintiff alleged and proved that he was the owner of about $3,000 of the notes of the bank, on which he had demanded payment, and been refused. The bank admitted its insolvency; and a receiver was appointed by consent to wind up its affairs, and publication made for all creditors to come in and prove their claims. The receiver made his report, which was referred to a master, who also reported.

These reports, and several supplemental reports, were all confirmed without exceptions, and a final order of distribution made among those who had proved their claims, allowing first the costs of the proceeding, including attorney's fees and other costs of suit. All of these were referred to a master, who reported, and to whose report no exceptions were taken.

After all this was done, the appellant here and plaintiff below appeared in person, and filed numerous petitions and affidavits signed by himself, excepting to the decree, asking to set it aside, excepting to the reports, and suggesting many other matters and things in which he sought to modify or correct the decree.

The foundation of all this seems to be the charge that his counsel deserted his interest, failed to except to the reports, and consented to the decree because they received what he called an exorbitant allowance for their services out of the fund which should have gone to the creditors of the bank, thereby diminishing the amount of his dividend.

As to all this, it is sufficient to say that these motions cannot be considered here. They are mainly addressed to the discretion of the court, coming as they do after a final decree on the merits. If appellant desired to place the case in a position where this court could review the action of the court on that class of questions, he should have filed his bill of review and made the proper issues, and supported it by depositions. As it now stands, his motions are unsupported by any thing but his own affidavit.

So as to the errors alleged in the master's reports. There were no exceptions filed to these reports until after they were confirmed and a final order of distribution made. This court cannot review those reports on exceptions taken after that, and urged upon us now on appeal. If, as appellant alleges, he has been defrauded by his counsel, he must sue *them* for what he has lost by the fraud.

If he desire to set aside the decree because it was obtained by fraud, his remedy is by bill of review.

But he complains of one error in the decree which is shown on the face of the proceedings, and as to which he is, we think, entitled to have it reversed.

It appears that the creditors of the bank have not been paid the full amount of their claims, as allowed by the master, and confirmed by the court. By the law of the charter, the stockholders are liable to be called on for contribution to make up this deficit. They have not been made parties to this proceeding. No rule or process has been served on them, nor any motion or petition or prayer filed to subject them to liability. The decree, however, orders "that the said Commercial Bank of Alabama, its officers and *stockholders*, be, and they are hereby, for ever discharged from any and all liability for or on account of any debt or demand of whatsoever nature, now or hereafter, subsisting against the bank and officers or stockholders of the same."

We see nothing in the proceedings to authorize the part of the decree which relates to the stockholders. Their liability has not been put in issue by any pleading, notice, or paper in the cause; and while, under these circumstances, this part of the decree may be void for that reason, we still think appellant has the right to have it removed out of the way of his proceeding against these shareholders, if he should desire to do so.

The decree of the District Court is affirmed as to all but this part of it, and the case is remanded to the Circuit Court for the Southern District of Alabama, to which, by law, it has been transferred, with directions to modify the decree in that respect, as indicated in this opinion; and, when so modified,

The decree is affirmed, appellant to recover costs of appeal.

WILLIAMS ET AL. *v.* UNITED STATES.

The Board of Land Commissioners, under the act of March 3, 1851 (9 Stat. 631), passed in 1855 a decree confirming a grant for all the land asked for in the petition, which was acquiesced in until 1872, when a petition praying that the estimate of quantity in the original petition be stricken out, and that the land as now claimed be confirmed, was presented to the District Court, — *Held*, that the claimants are without remedy under any act of Congress.

APPEAL from the District Court of the United States for the District of California.

Mr. E. L. Goold for the appellants.

Mr. Solicitor-General Phillips, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Concessions or grants of land by Mexican governors were of three kinds, described as follows: (1.) Grants or concessions of land by specific boundaries, where the donee is entitled to the entire tract within the given boundaries. (2.) Grants or concessions by quantity, as of one or more leagues of land situate at some designated place, or within a larger tract described by what are known as out-boundaries, where the donee is entitled to the quantity specified and no more; it being settled law that boundaries given in such a case apply to the place where the land granted is situated, and not to the grant or concession to the donee. (3.) Grants or concessions of a certain place or rancho by some particular name, either with or without specific boundaries being given, where the donee is entitled to the tract within the boundaries, if given in the grant or concession; and if not, then he is entitled to the tract to be located and bounded as shown by the proofs of settlement and possession. *Higueras* v. *United States*, 5 Wall. 834.

Claimants to land in California by virtue of any right or title derived from the former governments might present their claims to the land commissioners; and it was made the duty of the commissioners, when the case was ready for hearing, to proceed to examine the same, and to decide upon its merits. 9 Stat. 632.

Pursuant to that act, the claimants in this case, on the 17th of February, 1852, presented their petition to the commissioners appointed under that act, asking, in effect, for confirmation

of the grant of land made to the original donee under whom they claim, describing the same as "the tract of land known as the Arroyo de la Laguna, situated on the coast of the designated county," and alleging that "the quantity of the land in said grant is one league." Three years later, the claimants, by leave of the commissioners, filed an amended petition in the case, in which they describe the claim as a certain piece of land known as the Rancho Arroyo de la Laguna, containing one square league, and situate in the county of Santa Cruz, in said State, and being bounded as follows: On the south by the Pacific Ocean, east by a stake about twenty yards from the mouth of a stream known as the Arroyo de la Laguna, northerly along the said stream to the mountains, westerly by the Arroyo de San Vicente, and containing in the said boundaries one league of land, as aforesaid.

Evidence, both oral and documentary, was subsequently introduced by the claimants in support of the claim of the petitioners, among which documents was the *espediente*, which embraced the petition of the original donee, the *diseño*, the order of reference, the *informé*, the *vista la petition*, the concession, the approval of the departmental assembly, and the decree of the governor confirming the proceedings. These several documents are given in the original language, with what purports to be a correct translation.

Concede that these several documents are genuine, and it follows beyond doubt that the claim is valid, and one of merit. All these evidences of title were submitted to the commissioners; and they, on the 10th of July, 1855, confirmed the grant, describing the same as "the land known by the name of Arroyo de la Laguna, situated in the county of Santa Cruz, of the extent of one league, provided the boundaries named contain that quantity; but if not, then the confirmation is for so much as may be embraced within the boundaries described as follows: On the east by the Arroyo de la Laguna, on the south by the sea, on the west by the Arroyo de San Vicente, and on the north by the sierra, reference being had to the concession and the *diseño* contained in the *espediente*."

On the 11th of February, 1856, notice of appeal was given by the Attorney-General; but on the 6th of October, in the

same year, the Attorney-General gave notice that the appeal would not be prosecuted by the United States; and, on the 24th of December in the same year, a stipulation, signed by the district-attorney, was filed in the case, dismissing the appeal, and withdrawing the notice previously filed by the Attorney-General, and granting leave to the claimants to proceed under the decree in their favor as under a final decree. Pursuant to that stipulation, the District Court, on the same day, entered a decree that the appeal in the case be dismissed, and that the claimants have leave to proceed under the decree in their favor as under a final decree. Whether they ever did proceed under that decree to secure a patent does not appear, unless the affirmative may be inferred from the long acquiescence of the claimants in that decree, and the order of the District Court made at the same time. Evidently the appeal on the part of the United States was abandoned, and none was ever taken by the claimants.

Fifteen years later — to wit, on the 27th of May, 1872 — the claimants filed a petition in the District Court, representing that the land granted to the original donee was granted by its name as a place, and that, in consequence of an error in translating one of the title papers in the case, the land described in the petition to the commissioners was estimated as one league in extent; and they pray that the estimate of quantity in that petition may be stricken out, and that the land as now claimed may be confirmed to the petitioners, — to wit, the land known as the Arroyo de la Laguna, — according to the boundaries given in the decree of the commissioners.

Affidavits were filed in support of the representations contained in the petition; and the petitioners also submitted a motion that the claim as made in the new petition be confirmed according to the original papers, and upon that motion the parties were heard; and the record shows that the District Court denied the motion, and that the claimants appealed to this court.

Beyond all doubt, the tract or parcel of land solicited by the donee in his petition to the governor was described in the petition as *el terreno conocido, de la costa de Santa Cruz, con el nombre del Arroyo de la Laguna segun el diseño que adjunto;* which,

when properly translated, means "the land, on the coast of Santa Cruz, known by the name of the Arroyo de la Laguna, according to the map, or *diseño* annexed" to the petition. Due reference of the petition was made to the proper authorities to report whether the land solicited was grantable to the applicant; and, an affirmative report having been made, the governor entered a decree ordaining that the petitioner is the *dueño en propriedad del terreno conocido con el nombre del Arroyo de la Laguna, tomando por linderos desde el Arroyo de San Vicente hasta el de la Laguna, como se manifiesta en el diseño que corre agregado al espediente;* which, properly translated, means that the petitioner is declared to be the owner in fee of the land known by the name of the Arroyo de la Laguna, taking for its boundaries, from the Arroyo de San Vicente, as far as that of the Laguna, as is shown in the *diseño* attached to the record of the proceedings.

None of the documents constituting the *espediente*, except one embraced in what is called the *informé*, describe the land solicited by the word *sitio*, and that only in an incidental way. All the other documents constituting the original title papers describe the tract solicited as *el terreno*, the land known, &c. Nor would it change the original right of the claimants even if the word *sitio* had been used in all the documents, as the true meaning of the word *sitio*, as used in that connection, is "place," and not league, as translated in the original petition of the claimants.

Suppose that is so: still the error of translation was made by the claimants, and the decree of confirmation gave them all the land they claimed in their petition. Plainly the petitioners could have nothing more, as the commissioners were not authorized to adjudicate such claims, unless they were presented for confirmation. Complaint cannot be made that the District Court committed any error, as the transcript from the commissioners was never presented to the District Court.

Three commissioners were appointed to adjudicate such claims; and the act authorizing their appointment provided that the commission should continue for three years from the date of the act, unless sooner discontinued by the President. 9 Stat. 631.

By a subsequent act, it was made the duty of the commissioners to have two certified transcripts prepared of their proceedings and decision, and of the papers and evidence on which the same are founded, — one to be filed with the clerk of the proper District Court, and the other to be transmitted to the Attorney-General; and the provision was that the filing the transcript with the clerk of the District Court should *ipso facto* operate as an appeal for the party *against whom* the decision was rendered, and either party might prosecute the appeal by filing within six months a notice with the clerk of the District Court that such was the intention of the party filing such notice. 10 Stat. 99.

Prior to the expiration of the original act, the same was extended for one year longer from the date of its passage; and by a subsequent act the original act was continued another year from the 3d of March, 1855, and no longer. 10 id. 265, 603.

Examined in the light of these acts of Congress, it is clear that the power of the board of commissioners appointed under the act to ascertain and settle such claims had expired and ceased to exist more than fifteen years before the petition under consideration was filed in the District Court. In the mean time, the petitioners never gave any notice of appeal from the decree of the commissioners to the District Court, and none was ever taken or perfected in their behalf. Instead of that, the notice given by the Attorney-General of his intention to prosecute an appeal in the case had been withdrawn, and the appeal abandoned; and it appears that all the parties, from the date of the decree to the 27th of May, 1872, acquiesced in the decision of the commissioners; and in that view the court here is of the opinion that it is too late to make the proposed correction in the petition to the commissioners, or to enlarge the boundaries of the land confirmed by the decree.

Several reasons may be given for that conclusion: (1.) That the jurisdiction of the board of commissioners to adjudicate such claims ceased more than fifteen years before the petition in question was filed in the District Court. (2.) That the decree of the commissioners was never legally transferred to the District Court, so as to give that court any jurisdiction in the case.

(3.) That the claimants, having acquiesced for fifteen years in the decree of confirmation, are without legal remedy. (4.) That they are not entitled to the redress claimed under any act of Congress now in force.

Tested by these considerations, it is clear that there is no error. *Decree affirmed.*

CITY OF ST. LOUIS *v.* UNITED STATES.

The deed of conveyance executed to the United States on the twenty-fifth day of October, 1854, by the city of Carondelet, of a part of the commons of Carondelet upon which Jefferson Barracks are situate, having been based upon an equitable compromise of a long-pending and doubtful question of title, is valid.

APPEAL from the Court of Claims.

Mr. Montgomery Blair for the appellants.

Mr. Solicitor-General Phillips, *contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

The subject of this controversy is the title to the land known as Jefferson Barracks, consisting of about seventeen hundred acres, five miles below the city of St. Louis. It lies within the lines of a survey of the commons of Carondelet, containing a much larger quantity, — nearly ten thousand acres.

The present suit was instituted in the Court of Claims, in 1859, by the city of Carondelet. As the jurisdiction of that court was doubted, Congress, by the act of 1873 (17 U. S. Stat. 621), specially authorized it to entertain jurisdiction of the controversy. The city of Carondelet having become merged in the city of St. Louis by an act of the legislature of Missouri, the latter city was substituted as plaintiff.

A deed conveying the land in controversy to the United States was made by the city of Carondelet on the twenty-fifth day of October, 1854; and it is not controverted that the authority under which this was done was sufficient. If this deed be held to be otherwise valid, it decides the controversy in favor of the United States. Its validity is denied, however, on the part of plaintiff, on the ground that it was

without consideration, and that it was improperly coerced from the authorities of Carondelet by the officers of the government who had charge of the department of public lands by an unjust and illegal exercise of authority in refusing to confirm and threatening to set aside the survey, which we have already mentioned, of the Carondelet commons, and exacting this deed as the condition of their acquiescence in that survey. On the other side, the deed is supported as a just and equitable compromise of a long-existing controversy, both as to the correctness of that survey and the right of the government to the ground known as Jefferson Barracks.

The origin of the claim of Carondelet was a concession of six thousand arpents of land adjoining the village, made in 1796 by Zenon Trudeau, lieutenant-governor of Upper Louisiana. An attempt to give locality to this concession was made by Soulard (who describes himself as a surveyor commissioned by the government) in December, 1797; but the first actual survey was made in 1818 by Elias Rector, who was deputy under his father, William Rector, surveyor of public lands for the Territories of Illinois and Missouri.

The Court of Claims finds, that, though the field-notes of this survey were filed in the surveyor's office, it was never approved by him.

But, in the year 1834, Elias T. Langham, surveyor-general at St. Louis, caused J. C. Brown, one of his deputies, to retrace and re-establish the lines of Rector's survey; and, when the result of the work was returned to his office, he approved the survey, and the same was duly filed in the office of recorder of land-titles in Missouri, who thereupon certifies that the title was by him duly confirmed of the village to their claim as commons of six thousand arpents of land, as shown by that survey. Six thousand arpents are equivalent to five thousand one hundred and four acres. The survey contained nine thousand nine hundred and five acres; and the Court of Claims finds, that, after deducting from that quantity the Jefferson-Barracks claim and all private claims, there still remained nearly one thousand acres more than the six thousand arpents. There is no evidence that this survey was ever brought to the attention of the Land Department in Washington until June, 1839.

In that year, the surveyor-general at St. Louis seems to have called the attention of the district-attorney of the United States for Missouri to the survey in connection with the location of Jefferson Barracks; and, the letter having been transmitted to the Secretary of War, an investigation of the whole matter was instituted by the commissioner of public lands.

This resulted in an order, made in 1841 by Commissioner Whitcomb to Surveyor-General Milburn, directing a new survey of these commons, on the principle of reserving one thousand seven hundred and two acres for military purposes at Jefferson Barracks, allowing six thousand arpents to Carondelet for her commons, and restoring the balance, not covered by private claims, to sale as public lands.

It may as well be here stated that this order was never carried out.

In the year 1826, the military authorities of the United States, desiring to establish at that point a military post, procured from twelve inhabitants of the village of Carondelet a deed conveying to the United States a described portion of the land which they claimed as part of the commons of the village, with a reversion to the village whenever the United States should cease to use it for military purposes. From that time the government has been in continued possession of the property.

It appears by the findings of the court that certain persons who had purchased lots of the city of Carondelet, not conflicting with the barracks claim, and other citizens of Carondelet, becoming uneasy about the condition in which the title to all the commons was left by the order of Commissioner Whitcomb, employed agents to procure a confirmation of the Brown-Rector survey. They appeared at Washington, and a negotiation, remonstrance, and correspondence was carried on for several years; and divers opinions and decisions were had from Commissioners of the Land-Office, and Secretaries of the Treasury and Interior, none of which confirmed the survey as valid.

Finally, without any suggestions shown to come from the United States or its officers, the parties interested in the settlement of the title of Carondelet to the remainder of the com-

mons, and the authorities of that city, conceiving that, if the title of the United States to that reservation was made good, the main difficulty in the way of this settlement would be removed, the authorities of the city made the deed we have already mentioned, of October, 1854.

And accordingly, on the 8th October, 1855, another survey on the basis of Brown's, but marking the barracks property as reserved, and giving its boundaries, was made and confirmed by the Commissioner of the Land-Office as the true survey of the Carondelet commons.

It is obvious enough from this imperfect sketch of the history of the controversy that the deed of the city to the United States and the subsequent confirmation of the survey were the result of a compromise of a long-pending contest between the parties to it. No fraud is found or suggested. The action of the city of Carondelet cannot be impeached on the ground of duress within any legal or equitable definition of that term as applied to contracts. It was a suggestion originating with Carondelet, designed to secure action, which she desired. The officers of the Land Department were doing nothing in the matter. The order for the new survey, made in 1841, had never been executed; and in 1845 Commissioner Shields had declared that there was no intention to carry that order into effect until further action by Congress, and this was repeated by Commissioner Young in 1846.

If, as is now argued, Carondelet had a perfect title to the land in controversy, she had nothing to do but remain quiet, or assert her title in the courts of law which were open to her; for no officer of the government from 1841 to the date of this deed — a period of thirteen years — did any thing to affect that title, or to deprive her of her rights.

But the opinion of all the officers of the Land Department was against the validity of that survey, and of course against her title to any commons at all as being perfect. The Supreme Court of the State of Missouri had so decided in 1844 in the case of *Dent* v. *Bingham*, 8 Mo. 579. It was known that the survey included nearly twice as much land as was originally claimed under the grant of Trudeau.

The Land-Office, while it declined to exercise it, had asserted

the right to set aside that survey and order another, and was apparently only awaiting some action of Congress.

How can it be said under these circumstances, after a contest of thirteen years, that Carondelet, in proposing to release her claim to the one thousand seven hundred acres of the barracks reservation in exchange for the quieting and perfecting of her title to the remainder of the commons, acted under duress? or acted unwisely? or that the compromise was, as to her, inequitable?

It is said to be inequitable, because it is now the settled law, that under the act of 1812, confirming the titles of the villages to their common lands, the title became perfect on the completion of the survey.

We are not disposed to deny the doctrine, that when such a survey was made by the proper officers in 1839, and approved by the Surveyor-General, that it constituted a title to the land.

But this doctrine was not so completely and fully settled at the date of this compromise as to be free from doubt; and, if it were, there still remained the question of the power of the Commissioner of the General Land-Office to set aside a survey so made, and order another, — a power which undoubtedly exists as to all surveys made for many years past, however it may have been in 1841.

But it is important to consider that the Land Department then asserted such a power, and no decision had then settled the law to the contrary. It was, therefore, a proper element of doubt in considering the question of a compromise.

If, however, the commissioner had no such power, and conceding that the approval of that survey by the Surveyor-General completed the *legal title* to the land it included, there can be no doubt of the right of the United States, treating the same as if it were a patent, to file a bill in chancery to set it aside as improvidently made; and, on the trial of this issue, the excessive quantity of the survey, the reservation and long possession of the barracks, and perhaps other circumstances, would have made the result doubtful enough to justify the authorities of Carondelet in compromising the matter in advance of such a suit.

In short, we are of opinion that the deed of Carondelet is

valid, as based upon an equitable compromise of a long-pending and doubtful question of title, and that it excludes the plaintiff in this suit from any relief. *Judgment affirmed.*

TYNG *v.* GRINNELL, COLLECTOR.

1. A special finding by the court upon issues of fact, where the parties or their attorneys have duly filed a stipulation, waiving a jury, has the same effect as a verdict, and is not subject to review by this court except as to the sufficiency of the facts found to support the judgment.
2. The question, whether an imported article is or is not known in commerce by the word or terms used in the act imposing the duty, is one of fact for the jury.

ERROR to the Circuit Court of the United States for the Southern District of New York.

Mr. C. Donohue for the plaintiff in error.

Mr. Assistant Attorney-General Edwin B. Smith, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Import duties of two cents and a half per pound were, by the act of the 30th of June, 1864, levied on steam, gas, and water tubes and flues; and it appears that the second section of the act of 3d March, 1865, levied one cent per pound on wrought-iron tubes, *in addition to the* duties heretofore imposed by law. 13 Stat. 204, 493.

Certain wrought-iron articles of tubular form, intended to be so used as to allow the passage through the same of the products of combustion, were imported into the port of New York by the plaintiffs; and the record shows that the importers, on the 21st of January, 1870, made due entry of the importation, and that they claimed that the articles imported and described in the entry were flues, and that they were subject *only* to the import duty of two cents and a half per pound; and it appears that the defendant, as the collector of the port, decided that the articles described in the entry were wrought-iron tubes, and that they were dutiable as such at three cents and a half per pound, under the second section of the last-named act of Congress.

Pursuant to the decision of the collector, the duties on the importation were, on the 12th of February following, ascertained and liquidated by the proper officers of the customs; and it also appears that the plaintiffs, within ten days thereafter, gave notice in writing to the collector that they were dissatisfied with his decision fixing the rate of duty to which the articles imported were subject. In the absence of any objection to the form of the notice, it may be assumed that it was correct.

Seasonable appeal was also taken by the plaintiffs to the Secretary of the Treasury; and the transcript shows that the secretary, on the 9th of April in the same year, affirmed the decision of the collector and the liquidation of the duties.

Apart from that, it also appears that the duties paid under protest amount to the sum of $173.36, and that the plaintiffs instituted the present suit in the Superior Court of the State to recover back the amount. Service was made; and, the defendant having appeared, the action was, on his motion, removed into the Circuit Court of the United States. Both parties appeared in the Circuit Court, and, having waived a jury, proceeded to trial before the circuit judge, without a jury. Judgment was rendered for the defendant, and the circuit judge made a special finding of facts. Certain exceptions were filed by the plaintiffs, and they sued out the present writ of error.

Two errors were assigned by the plaintiffs, as follows: (1.) That the court below erred in finding and deciding that the articles described in the entry were wrought-iron tubes, within the meaning of the amendatory tariff act, and that they were subject to the duty imposed of three and a half cents per pound. (2.) That the court below erred in refusing to find and decide that the articles imported were wrought-iron flues as claimed by the plaintiffs, and that they were only subject to a duty of two cents and a half per pound.

Whether the articles are wrought-iron tubes, as insisted by the United States, or are wrought-iron flues, as contended by the plaintiffs, was certainly a question of fact dependent upon the evidence; and, if so, it must be that it was a question to be decided by the court, inasmuch as the parties had waived a jury. Issues of fact pending in the circuit courts may be tried and determined by the court, without the intervention of a

jury, whenever the parties or their attorneys file a stipulation in writing with the clerk of the court waiving a jury. Such a submission necessarily implies that the facts shall be found by the court; and the act of Congress provides that the finding may be general or special, and that it shall have the same effect as the verdict of a jury in a case where no such waiver is made.

Exceptions may be taken to the rulings of the court *made in the progress of the trial*, and, if duly taken at the time, the rulings may be reviewed here, provided the questions are properly presented by a bill of exceptions. Where a jury is waived, and the issues of fact are submitted to the court, the finding of the court may be either general or special, as in cases where the issues of fact are tried by a jury; but, where the finding is general, the parties are concluded by the determination of the court, subject to the right to bring error to review any rulings of the court to which due exception was taken during the trial.

Whether the finding is general or special, the rulings of the court during the progress of the trial, if duly excepted to at the time and presented by a bill of exceptions, may be reviewed in this court; and, in a case where the finding is special, the review, even without a bill of exceptions, may extend to the question, whether the facts found are sufficient to support the judgment. *Miller* v. *Ins. Co.*, 12 Wall. 295.

Tested by the preceding rules of decision, which are undeniably correct, it is clear that there are but two questions open to review in the case before the court: *first*, whether the court ruled correctly in admitting evidence as to the name by which the article in question had been imported and sold in this country; *second*, whether the facts found by the court are sufficient to support the judgment.

1. Expert witnesses were examined on both sides, and the defendant inquired of a manufacturer and an experienced iron merchant as follows: "By what name has this article been imported, and sold in this country?" to which the plaintiffs objected. But the court overruled the objection, and the witness answered: "It has always been imported and sold as an iron boiler-tube by every importer in the country;" and the transcript shows that the exception of the plaintiffs was duly noted at the time.

Authorities which support the ruling of the court are very numerous, and quite as decisive as they are numerous. Tariff laws are passed to raise revenue; and, for that purpose, substances are classed according to the general usage and known denominations of trade. Whether a particular article is designated by one name or another in the country of its origin, or whether it is a simple or mixed substance, is a matter of very little importance in the adjustment of our revenue laws, as those who frame such laws are chiefly governed by the appellations which the articles bear in our own markets and in our domestic and foreign trade. *United States* v. *Smith*, 9 Wheat. 438.

Laws regulating the payment of duties are for practical application to commercial operations, and are to be understood in a commercial sense; and this court, sixty years ago, decided that Congress intended that they should be so administered and understood. *United States* v. *Goodale*, 8 Pet. 279. Such laws, say this court, are intended for practical use and application by men engaged in commerce; and hence it has become a settled rule, in the interpretation of statutes of the description, to construe the language adopted by the legislature, and particularly in the denomination of articles, according to the commercial understanding of the terms used. *Elliott* v. *Swartwout*, 10 Pet. 151.

Congress must be understood, says Taney, C. J., as describing the article upon which the duty is imposed, according to the commercial understanding of the terms used in the law, in our own markets; and the court held in that case that Congress, in imposing the duty, must be considered as describing the article according to the commercial understanding of the terms used in the act of Congress when the law was passed imposing the duty. *Curtis* v. *Martin*, 3 How. 109.

Suffice it to say, without multiplying authorities, that the rule of law is settled, that the question, whether an imported article is or is not known in commerce by the word or terms used in the act imposing the duty, is a question of fact for the jury, and not a question of construction; and of course it must, in a case like the present, be determined by the court as a question of fact, the issues of fact, as well as of law, being submitted to the court. *Lawrence* v. *Allen*, 7 How. 797.

Special findings under such a submission are no more subject to review here than general findings, as the provision in respect to both is that the finding of the court shall have the same effect as the verdict of a jury. Appellate courts have no more power to review the verdict of a jury where it is special than if it be general; but they may inquire and determine whether the special verdict is the proper basis of a judgment; and the act of Congress provides that the review, if the finding is special, may extend to the determination of the sufficiency of the facts found to support the judgment.

Matters of fact in such cases are not reviewable here under any circumstances, as appears by all the cases decided by this court, since the act was passed allowing parties to waive a jury, and to submit the law and fact to the determination of the Circuit Court. Consequently, it is irregular to report the evidence in the transcript, except so far as it may be necessary to explain the legal questions reserved, as to the rulings of the court in the progress of the trial; nor is either party entitled to a bill of exceptions as to any special finding of the court, for the plain reason that the special findings of the Circuit Court in such a case are not the proper subject of exceptions nor of review in this court.

2. Suppose that is so: then it follows that nothing remains to be considered in the case except the question, whether the facts are sufficient to support the judgment.

Facts found by the Circuit Court not being reviewable here, it will be sufficient to refer to a few brief sentences in the findings of the court, exhibited in the transcript, as follows: That the goods imported were, at the time of the passage of the tariff act, "known in commerce, and to dealers therein, as and by the name of wrought-iron tubes," and that the same were, and had been, at all times, imported by that name; and that "the same continued to be so known, designated, imported, and dealt in, to and including the time" of the enactment of the amendatory tariff act, and a long time thereafter. . . . "That wrought-iron tubes are constructed for various purposes, and are sometimes welded by joining the edges of the sheet-iron curved for that purpose, and sometimes by lapping the edges and welding them thus lapped."

Tubes joined in the former mode are called "but-welded wrought-iron tubes." When joined in the latter mode, "they are called lap-welded wrought-iron tubes;" and it appears that for uses as flues lap-welded tubes are *alone* suitable, and are understood to be "intended whenever wrought-iron tubes are designated as wrought-iron flues;" that wrought-iron flues is a subordinate designation used to indicate the purpose for which the tubes are to be employed, when ordered for such specific purpose; but that "they are included in the general designation of wrought-iron tubes," by which name *alone*, whether but-welded or lap-welded, they were known until after the passage of the amendatory tariff act.

Tubes lap-welded, it seems, when wanted for the described special purpose, are sometimes designated as flues; but the court finds that "the goods imported were wrought-iron tubes, within the true intent and meaning of the tariff act" in operation at the time of their importation; that the goods were properly classified and designated as such by the collector; and that they were subject to the duty of three cents and a half per pound, as adjudged by the proper officers of the customs.

Exceptions were filed by the plaintiffs to the finding, upon the ground that it is not warranted by the evidence; but sufficient has already been remarked to show that the findings of the Circuit Court, under such a submission, are not the subject of exceptions nor of review in this court, when the cause is removed here by a writ of error.

Findings of the kind required may be general or special; but, if special, the finding must not be a mere report of the evidence, leaving the conclusions of fact to be adjudged by the appellate tribunal, as that course is forbidden by the repeated decisions of this court. Instead of that, the requirement is that the Circuit Court shall state the ultimate facts, or the propositions of fact, which the evidence establishes, and not the evidence from which those ultimate facts, or propositions of fact, are derived. Such findings are intended by Congress as a proper substitute for the special verdict of a jury; and it is settled law, that it is of the very essence of a special verdict that the jury shall find the facts on which the court is to pronounce the judgment, according to law; that, in order to enable

the Appellate Court to act upon a special verdict, the jury must find the facts, and not merely state the evidence of facts; and the rule is, that when the jury states the evidence merely, without stating the conclusions of the jury, a court of error cannot act upon matters so found. *Norris* v. *Jackson*, 9 Wall. 127; *Suydam* v. *Williamson*, 20 How. 432.

Apply these principles to the case, and it is clear that the findings are sufficient and conclusive, and that there is nothing in the bill of exceptions or the reported evidence which can benefit the plaintiffs. *Judgment affirmed.*

MILLER ET AL. *v.* DALE ET AL.

1. In an action of ejectment for land in California, where both parties assert title to the premises, — the plaintiff under a concession of the former government, confirmed by the tribunals of the United States, and an approved survey under the act of Congress of June 14, 1860, and the defendant under a patent of the United States issued upon a similar confirmed concession, — the inquiry of the court must extend to the character of the original concessions to ascertain which of the two titles gave the better right to the premises; and, if these do not furnish the means for settling the controversy, reference must be had to the proceedings before the tribunals and officers of the United States by which the claims of the parties were determined.
2. Where the original concessions in such cases were without specific boundaries, being floating grants for quantity, the one first located by an approved survey appropriated the land embraced by the survey.
3. The object of the proceeding before the tribunals of the United States for the approval of a survey of a confirmed claim to land in California under a Mexican or Spanish grant, pursuant to the act of Congress of June 14, 1860 (12 Stat. 34), was to insure conformity of the survey with the decree of confirmation, and not to settle any question of title against other claimants. The approval of the court established the fact, that the survey was in conformity with the decree of confirmation; or, if the decree was for quantity only, that the survey was authorized by it, and is conclusive as to the location of the land against all floating grants not previously located.

ERROR to the Supreme Court of the State of California.

Mr. S. O. Houghton for the plaintiffs in error.

Mr. Jeremiah S. Black, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

This is an action of ejectment for the possession of certain

real property situated in the county of Santa Clara, in the State of California. The plaintiffs assert title to the premises under a concession of the former government, confirmed by the tribunals of the United States, and an approved survey under the act of Congress of June 14, 1860 (12 Stat. 34, sect. 5). That act gives to an approved survey upon a confirmed claim the effect and validity of a patent. Some question is made, whether this effect can be given to a survey approved, like the one here, since the repeal of the act, notwithstanding the reservation of jurisdiction in pending cases by the repealing clause. We do not deem it material to determine the question, and, for the purposes of this case, shall consider that the plaintiffs stand before the court upon a title as fully established as if supported by a patent. The confirmation under which they claim was made by the District Court of the United States in January, 1859; and the survey was approved by that court in June, 1865, and, on appeal, by the Circuit Court in September, 1866.

The defendants assert title to the premises under a patent issued upon a concession of the Mexican government, confirmed by the tribunals of the United States; the confirmation dating in March, 1857, and the patent being issued in January, 1859. The approved survey of the plaintiffs and the patent of the defendants both include the land in controversy. The question, therefore, for consideration, is, which of the two titles gave the better right to the premises. To answer this question, we must look into the character of the original concessions; and, if they furnish no guide to a just conclusion, we must seek a solution in the proceedings had before our tribunals and officers by which the claims of the parties were determined.

Looking at the original concessions, we find that they were mere licenses to settle upon and occupy vacant lands of the former government, without designation as to locality, except in the most vague and general way. It appears that one Mariano Castro, through whom the plaintiffs trace their title, had, as early as 1802, obtained permission from the Viceroy of Mexico to settle upon a tract of land within the jurisdiction of Monterey, known as La Brea; but, objection to his settlement there being made by the priests of the adjoining mission, he was directed to select another tract. He accordingly solicited of the

military commander of the district the tract called El Carneadero, alleged to be the same tract since known as Las Animas: but whether any action was ever taken by the public authorities upon his petition, further than to hear objections also made by the priests to his settlement there, we are not informed; and the archives of the department, searched by direction of the governor, disclose nothing on the subject. After Castro's death, his widow, in 1833, in a petition to the governor, represented that her husband had taken possession of the tract, Las Animas, in 1806, under a concession from the governor, but that she had not the title-papers, and asked that a title be issued to her. In 1835 her attorney renewed the application, affirming that the land had been granted to her husband, but that the title-papers had been destroyed by fire. Upon receipt of this petition, the governor ordered a search among the archives of the department for a record of the alleged concession; but, as already stated, none was found. In consideration, however, of the evidence which they afforded of the right to the tract under the name of La Brea, obtained by the deceased from the vice-royal government in 1802, the governor directed that a certificate or testimonial of the record in the case (*expediente*) be issued for the protection of the parties interested; and, as the boundaries had not been expressly defined within which they must confine themselves, he added that those set forth in the plat accompanying the petition of the attorney should in future be regarded as such, with a reservation, however, of the rights of any third party who might feel aggrieved by the proceeding. This certificate or testimonial, issued in 1835, with the documents upon which it was founded, constituted the record evidence of the concession upon which the confirmation and survey were had under which the plaintiffs claim.

Previous to the issue of this document, and in 1831, another person by the same name, Mariano Castro, under whom the defendants claim, had obtained from the governor of California a license to occupy for cultivation a tract of land called El Solis. Under this license he went into possession of vacant land, and remained in possession until the cession of the country to the United States. His widow and children obtained the decree of confirmation and patent.

Neither of the concessions transferred the title, or conferred upon the grantees any interest in the land occupied by them other than a right of possession during the pleasure of the government. Their possession under these licenses did not raise even an equity in their favor against the United States. *Serrano* v. *United States*, 5 Wall. 461. In this condition of the property, the party who first obtained a confirmation of his claim, and its definite location by an approved survey, took the title to the land embraced by the survey.

But, independent of this position, if we could regard the original concessions — the one issued to the first Castro in 1802, and the one issued to the second Castro in 1831 — as ordinary grants of the governor of the department, and, as such, passing a title, though of an imperfect character, to the grantees, the same result would follow; for they could then be treated only as floating grants. Neither of them gave any definite boundaries to the tract referred to by the general designation of place, and neither specified any quantity: that was only a matter of inference from subsequent documents. And equal vagueness as to the location and extent of the land solicited characterized the petitions of the parties. That of the first Castro only stated that La Brea was situated within the jurisdiction of Monterey, and distant three or four leagues from any mission or *pueblo*. The term appears to have been applied to a large region of country in that district. The petition of the second Castro only described El Solis, the tract which he desired, as a place within the jurisdiction of the same military post. Under these circumstances, the concessions being without specific boundaries by which the quantity embraced, when ascertained, could be identified, the only rule which the court can follow in actions at law is to consider the one first located by an approved survey as having appropriated the land covered by the survey. This rule was substantially recognized in one of the earliest cases which came before this court for consideration, — the *Fremont Case*, reported in the 17th of Howard. The grant to Alvarado, under which Fremont claimed, was for ten leagues within exterior boundaries embracing a much greater quantity; and while the court held, that, as between the government and the grantee, the grant passed to him a right to the quantity of land men-

tioned, to be laid off by official authority in the territory described, it said, that, if any other person within those limits had afterwards obtained a grant from the government by specific boundaries before Alvarado had made his survey, the title of the latter grantee could not be impaired by any subsequent survey of Alvarado. "As between the individual claimants from the government," the court added, "the title of the party who had obtained a grant for the specific land would be the superior and better one; for, by the general grant to Alvarado, the government did not bind itself to make no other grant within the territory described until after he had made his survey." Referring to this language in the recent case of *Henshaw* v. *Bissell*, 18 Wall. 267, we observed that "a second floating grant, the claim under which is first surveyed and patented, and thus severed from the public domain, would seem to stand, with reference to an earlier floating grant within the same general limits, in the position which the subsequent grant with specific boundaries mentioned in the citation would have stood to the general grant to Alvarado."

Upon this rule the land department of our government constantly acts with reference to floating warrants issued under the legislation of Congress to soldiers and others. The warrant first located takes the land, though it bear date only of yesterday. The date of the warrant is of no moment. So with Mexican floating grants, except that they are usually confined within certain general limits: the one first located takes the land. Here the survey of the defendants was made and approved in 1858, several years before the approval of the survey under which the plaintiffs claim.

It is contended with much earnestness, that the fact that the survey of the plaintiffs received the approval of the district and circuit courts of the United States gave it conclusive efficacy upon the title, and determined that it was superior to that of the defendants. This position is based upon a misconception of the object of subjecting surveys of confirmed claims under Mexican concessions to the consideration of the court. It was not to settle the question of title: so important a matter affecting the rights of parties as that would hardly have been left to proceedings of a summary character. The object of the proceeding was to insure conformity of the survey with the

decree upon which it was made. If the decree gave specific boundaries, the court was to see that the survey followed them: if the decree was for quantity, the court was to see that the survey did not embrace a greater quantity; that the land was taken in a compact form, or if the grantee had himself exercised a right of selection, and had settled upon and improved particular parcels, or sold parcels to others, that the survey, if practicable, included such parcels, and also that it was made with proper regard to the rights of others who had settled upon the land, especially when they had been induced to make improvements by the grantee himself. Originally surveys were left entirely to the action of the local surveyor and the land department. Great complaints were sometimes made that surveys thus established were unjustly extended in directions so as to include the settlements and improvements of others; and contests over them were, in consequence, often prolonged for years. To prevent possible abuses in this way, the act of Congress of June 14, 1860, was passed, allowing surveys, when objection was made to their correctness, to be brought before the court and subjected to examination, and requiring them to be corrected if found to vary from the specific directions of the decrees upon which they were founded; or, if the decrees contained no specific directions, from the general rules governing in such cases. The approval of the court established the fact, that the survey was in conformity with the decree of confirmation; or, if the decree was for quantity only, that the survey was authorized by it; and in either case the approval rendered the survey conclusive as to the location of the land against all floating grants not previously located. The questions then left for controversy before the courts related to the title of the property, the parties proceeding upon the established conformity of their respective surveys with the decrees upon which they were founded.

The case of *Henshaw* v. *Bissell*, upon which counsel seem to rely, does not militate against the views here stated. The question there was not as to which of two floating grants carried the premises. Only one of the grants there under consideration was floating. The other grant had specific boundaries, or such descriptive features as to render its limits easily ascertainable; and the court held that the right of the grantee to

the land thus designated could not be interfered with by the donee of the floating grant. A grant of that specific description necessarily carried the land described, unless appropriated by an earlier grant; and no subsequent location of a floating grant upon the premises could impair the title.

It is urged that the testimonial issued in 1835, although intended primarily as evidence of the proceedings taken in 1802, and of the license granted by the Viceroy of Mexico, established the boundaries of the settlement of the first Castro; so that, from that time, the license ceased to be a general and floating one, and became a license to occupy a specific tract. Admitting this view of the effect of the testimonial to be correct, the answer is obvious, — the title of the grantee or licensee was not changed by a limitation of his right of occupation to a specific tract; and the designation of the boundaries reserved the rights of any third party, which were to be left uninjured, that is, not encroached upon. The second Castro was then in possession of a portion of the tract within those boundaries; his right being of the same character, — that of occupancy by permission of the government. The decree confirming his claim, and the survey following it, approved by the land department, are conclusive as to the extent of his possession. The plaintiff shows no better claim to the premises thus possessed by producing a testimonial establishing the boundaries of his settlement, which at the same time provided that existing rights of others should remain unaffected by the proceeding.

It was suggested on the argument that the decree confirming the concession of the El Solis rancho was obtained upon an erroneous and fraudulent translation of certain documents introduced into the case, which, if correctly translated, would have defeated the claim by showing that the concession was denied instead of being made by the Mexican government. If this be so, the plaintiffs can proceed in equity, where the land has not passed to *bona fide* purchasers without notice, to remove the obstacle to the operation of their title arising from the defendants' patent, or to compel the patentees to hold the land in trust for their benefit, or in some other appropriate way. But, in this action of ejectment, the plaintiffs must rely upon their legal title; and that arising subsequent to the title of the defendants they cannot recover. *Judgment affirmed.*

KENNARD *v.* LOUISIANA EX REL. MORGAN.

The State of Louisiana passed an act entitled "An Act to regulate proceedings in contestations between persons claiming a judicial office."

Sect. 1 provided that "in any case in which a person may have been appointed to the office of judge of any court of this State, and shall have been confirmed by the senate, and commissioned thereto, . . . such commission shall be *prima facie* proof of the right of such person to immediately hold and exercise such office."

Sect. 2 provides "that if any person, being an incumbent of such office, shall refuse to vacate the same, and turn the same over to the person so commissioned, such person so commissioned shall have the right to proceed by *rule* before the court of competent jurisdiction, to have himself declared to be entitled to such office, and to be inducted therein. Such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately without jury, and by preference over all matter or causes depending in such court; . . . and the judgment thereon shall be signed the same day of rendition."

The next section provides that an appeal, if taken, shall be applied for within one day after the rendition of the judgment, and be made returnable to the Supreme Court within two days. The appeal has preference over all other business in that court, and the judgment thereon is final after the expiration of one day. *Held*, that the State, by proceedings under this act, which resulted in a judgment adverse to the title of the plaintiff in error to a certain judicial office, did not, through her judiciary, violate that clause of the Fourteenth Amendment to the Constitution of the United States which declares, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

ERROR to the Supreme Court of the State of Louisiana.

On the 3d of December, 1872, John H. Kennard was, during a recess of the senate of Louisiana, appointed by the governor associate justice of the Supreme Court of Louisiana, in place of W. W. Howe, resigned.

On the 4th of January, 1873, the acting governor commissioned P. H. Morgan associate justice of the Supreme Court, in place of W. W. Howe, resigned. Kennard claimed to hold until the expiration of the next regular session of the legislature.

To settle the disputed title to the office, suit was brought. The courts of Louisiana, proceeding under an act of the legislature of Jan. 15, 1873, determined in favor of Morgan.

The case was then brought here upon the ground that the State of Louisiana acting under this law, through her judiciary, had deprived Kennard of his office without due process of law, in violation of that provision of the Fourteenth Amendment of

the Constitution of the United States which prohibits any State from depriving any person of life, liberty, or property, "without due process of law." The provisions of the law are set forth in the opinion of the court.

Mr. Thomas J. Semmes, *Mr. Robert Mott*, and *Mr. N. P. Chipman*, for the plaintiff in error.

Mr. Thomas J. Durant, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The sole question presented for our consideration in this case, as stated by the counsel for the plaintiff in error, is, whether the State of Louisiana, acting under the statute of Jan. 15, 1873, through her judiciary, has deprived Kennard of his office without due process of law. It is substantially admitted by counsel in the argument that such is not the case, if it has been done "in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." We accept this as a sufficient definition of the term "due process of law," for the purposes of the present case. The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all.

This makes it necessary for us to examine the law under which the proceedings were had, and determine its effect.

It was entitled "An Act to regulate proceedings in contestations between persons claiming a judicial office." Sect. 1 provided, that "in any case in which a person may have been appointed to the office of judge of any court in this State, and shall have been confirmed by the senate and commissioned thereto, . . . such commission shall be *prima facie* proof of the right of such person to immediately hold and exercise such office."

It will thus be seen that the act relates specially to the

judges of the courts of the State, and to the internal regulations of a State in respect to its own officers.

The second section then provides, "that if any person, being an incumbent of such office, shall refuse to vacate the same, and turn the same over to the person so commissioned, such person so commissioned shall have the right to proceed by *rule* before the court of competent jurisdiction, to have himself declared to be entitled to such office, and to be inducted therein. Such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately without jury, and by preference over all matter or causes depending in such court; . . . and the judgment thereon shall be signed the same day of rendition."

There is here no provision for a technical "citation," so called; but there is, in effect, provision for a rule upon the incumbent to show cause why he refuses to surrender his office, and for service of this rule upon him. The incumbent was, therefore, to be formally called upon by a court of competent jurisdiction to give information to it, in an adversary proceeding against him, of the authority by which he assumed to perform the duties of one of the important offices of the State. He was to be told when and where he must make his answer. The law made it the duty of the court to require this return to be made within twenty-four hours, and it placed the burden of proof upon him. But it required that he should be called upon to present his case before the court could proceed to judgment. He had an opportunity to be heard before he could be condemned. This was "process;" and, when served, it was sufficient to bring the incumbent into court, and to place him within its jurisdiction. In this case, it is evident from the record that the rule was made, and that it was in some form brought to the attention of Kennard; for on the return day he appeared. At first, instead of showing cause why he refused to vacate his office, he objected that he had not been properly cited to appear; but the court adjudged otherwise. He then made known his title to the office; in other words, he showed cause why he refused to vacate. This was, in effect, that he had been commissioned to hold the office till the end of the next session of the Senate, and that time had not arrived.

Upon this he asked a trial by jury. This the court refused, and properly, because the law under which the proceedings were had provided in terms that there should be no such trial. He then went to trial. No delays were asked except such as were granted. Judgment was speedily rendered; but ample time and opportunity were given for deliberation. Due process of law does not necessarily imply delay; and it is certainly no improper interference with the rights of the parties to give such cases as this precedence over the other business in the courts.

The next section provides for an appeal. True, it must be taken within one day after the rendition of the judgment, and is made returnable to the Supreme Court within two days. The proceeding on appeal was given preference over all other business in the Appellate Court, and the judgment upon the appeal was made final after the expiration of one day. Kennard availed himself of this right. He took his appeal, and was heard. The court considered the case, and gave its judgment.

From this it appears that ample provision has been made for the trial of the contestation before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defence; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the State, and for hearing and judgment there. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the act. The remedy provided was certainly speedy; but it could only be enforced by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. In this particular case, the party complaining not only had the right to be heard, but he was in fact heard, both in the court in which the proceedings were originally instituted, and, upon his appeal, in the highest court of the State.

Judgment affirmed.

TOWN OF COLOMA *v.* EAVES.

Where, by legislative enactment, authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the enactment that the officers of the municipality were invested with power to decide whether that condition has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.

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

Assumpsit brought by the plaintiff below to recover the amount due on the coupons attached to certain bonds, purporting to have been issued by the town of Coloma, through its proper officers, to the Chicago and Rock River Railroad Company, in payment of a subscription of $50,000 by the town to said company. The form of the bond is as follows: —

"UNITED STATES OF AMERICA. [$1,000.

"COUNTY OF WHITESIDE,

"*State of Illinois, Town of Coloma:* —

"Know all men by these presents, That the township of Coloma, in the county of Whiteside, and State of Illinois, acknowledges itself to owe and be indebted to the Chicago and Rock River Railroad Company, or bearer, in the sum of $1,000, lawful money of the United States; which sum the said town of Coloma promises to pay to the Chicago and Rock River Railroad Company, or the bearer hereof, on the first day of July, 1881, at the office of the treasurer of the county of Whiteside aforesaid, in the State of Illinois, on the presentation of this bond, with interest thereon from the first day of January, 1872, at the rate of ten per centum per annum, payable annually at the office of the treasurer of the county of Whiteside aforesaid, on the presentation and surrender of the annexed coupons.

"[U. S. $5 revenue-stamp.]

"This bond is issued under and by virtue of a law of the State of Illinois entitled 'An Act to incorporate the Chicago and Rock River Railroad Company,' approved March 24, 1869, and in accordance with a vote of the electors of said township of Coloma,

at a regular election held July 28, 1869, in accordance with said law, and under a law of the State of Illinois entitled 'An Act to fund and provide for the paying of the railroad debts of counties, townships, cities, and towns,' in force April 16, 1869; and, when this bond is registered in the State auditor's office of the State of Illinois, the principal and interest will be paid by the State treasurer, as provided by said last-mentioned law.

"In witness whereof, the supervisor and town-clerk of said town have hereunto set their hands and seals this first day of January, A.D. 1872.

"(Signed)	M. R. ADAMS, *Supervisor.*	[SEAL.]
"(Signed)	J. D. DAVIS, *Town-Clerk.*	[SEAL.]"

Recovery was resisted by the town, mainly upon the alleged ground of a want of power in the officers of the town to issue the bonds, because the legal voters of the town had not been notified to vote upon the question of the town's making the subscription in question.

On the trial of the case, judgment was rendered for the plaintiff for the amount of the coupons, and interest after they were due.

Mr. C. M. Osborn for plaintiff.

Mr. J. Grant, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

It appears by the record that the plaintiff is a *bona fide* holder and owner of the coupons upon which the suit is founded, having obtained them before they were due, and for a valuable consideration paid. The bonds to which the coupons were attached were given in payment of a subscription of $50,000 to the capital stock of the Chicago and Rock River Railroad Company, for which the town received in return certificates of five hundred shares, of $100 each, in the stock of the company. That stock the town retains, but it resists the payment of the bonds, and of the coupons attached to them, alleging that they were issued without lawful authority.

Saying nothing at present of the dishonesty of such a defence while the consideration for which the bonds were given is retained, we come at once to the question, whether authority was shown for the stock subscription, and for the

consequent issue of the bonds. At the outset, it is to be observed that the question is not between the town and its own agents: it is rather between the town and a person claiming through the action of its agents. The rights of the town as against its agents may be very different from its rights as against parties who have honestly dealt with its agents as such, on the faith of their apparent authority.

By an act of the legislature of Illinois, the Chicago and Rock River Railroad Company was incorporated with power to build and operate a railroad from Rock Falls on Rock River to Chicago, a distance of about one hundred and thirty miles. The tenth section of the act enacted, that, "to aid in the construction of said road, any incorporated city, town, or township, organized under the township organization laws of the State, along or near the route of said road, might subscribe to the capital stock of said company." That the town of Coloma was one of the municipal divisions empowered by this section to subscribe fully appears, and also that the railroad was built into the town before the bonds were issued. But it is upon the eleventh section of the act that the defendant relies. That section is as follows: —

"No such subscription shall be made until the question has been submitted to the legal voters of said city, town, or township, in which the subscription is proposed to be made. And the clerk of such city, town, or township, is hereby required, upon presentation of a petition signed by at least ten citizens who are legal voters and tax-payers in such city, town, or township, stating the amount proposed to be subscribed, to post up notices in three public places in each town or township; which notices shall be posted not less than thirty days prior to holding such election, notifying the legal voters of such town or township to meet at the usual places of holding elections in such town or township, for the purpose of voting for or against such subscriptions. If it shall appear that a majority of all the legal voters of such city, town, or township, voting at such election, have voted 'for subscription,' it shall be the duty of the president of the board of trustees, or other executive officer of such town, and of the supervisor in townships, to subscribe to the capital stock of said railroad company, in the name of such city, town, or township, the amount so voted to be subscribed, and to receive from such company the proper

certificates therefor. He shall also execute to said company, in the name of such city, town, or township, bonds bearing interest at ten per cent per annum, which bonds shall run for a term of not more than twenty years, and the interest on the same shall be made payable annually; and which said bonds shall be signed by such president or supervisor or other executive officer, and be attested by the clerk of the city, town, or township, in whose name the bonds are issued."

Sect. 12 provides, "It shall be the duty of the clerk of any such city, town, or township, in which a vote shall be given in favor of subscriptions, within ten days thereafter, to transmit to the county-clerk of their counties a transcript or statement of the vote given, and the amount so voted to be subscribed, and the rate of interest to be paid."

Most of these provisions are merely directory. But conceding, as we do, that the authority to make the subscription was, by the eleventh section of the act, made dependent upon the result of the submission of the question, whether the town would subscribe, to a popular vote of the township, and upon the approval of the subscription by a majority of the legal voters of the town voting at the election, a preliminary inquiry must be, How is it to be ascertained whether the directions have been followed? whether there has been any popular vote, or whether a majority of the legal voters present at the election did, in fact, vote in favor of a subscription? Is the ascertainment of these things to be before the subscription is made, and before the bonds are issued? or must it be after the bonds have been sold, and be renewed every time a claim is made for the payment of a bond or a coupon? The latter appears to us inconsistent with any reasonable construction of the statute. Its avowed purpose was to aid the building of the railroad by placing in the hands of the railroad company the bonds of assenting municipalities. These bonds were intended for sale; and it was rationally to be expected that they would be put upon distant markets. It must have been considered, that, the higher the price obtained for them, the more advantageous would it be for the company, and for the cities and towns which gave the bonds in exchange for capital stock. Every thing that tended to depress the market-value was adverse to

the object the legislature had in view. It could not have been overlooked that their market-value would be disastrously affected if the distant purchasers were under obligation to inquire before their purchase, or whenever they demanded payment of principal or interest, whether certain contingencies of fact had happened before the bonds were issued, — contingencies the happening of which it would be almost impossible for them in many cases to ascertain with certainty. Imposing such an obligation upon the purchasers would tend to defeat the primary purpose the legislature had in view; namely, aid in the construction of the road. Such an interpretation ought not to be given to the statute, if it can reasonably be avoided; and we think it may be avoided.

At some time or other, it is to be ascertained whether the directions of the act have been followed; whether there was any popular vote; or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for all; and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town-clerk and the supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended that those officers, or one of them at least, should determine whether the requirements of the act prior to a subscription to the stock of a railroad company had been met. This presumption is strengthened by the provisions of the twelfth section, which make it the duty of the clerk to transmit to the county-clerk a transcript or statement, verified by his oath, of the vote given, with other particulars, in case a subscription has been voted. How is he to perform this duty if he is not to conduct the election, and to determine what the voters have decided? If, therefore, there could be any obligation resting on persons proposing to purchase the bonds purporting to be issued under such legislative authority, and in accordance with a popular vote, to inquire whether the provisions of the statute had been followed, or whether the conditions precedent to their lawful issue had been complied with, the inquiry must be addressed to the town-clerk or executive officer of the munici-

pality, — to the very person whose duty it was to ascertain and decide what were the facts. The more the statute is examined, the more evident does this become. The eleventh section (quoted above) declared, that if it should appear that a majority of the legal voters of the city, town, or township, voting, had voted "for subscription," the executive officer and clerk should subscribe and execute bonds. "If it should appear," said the act. Appear when? Why, plainly, before the subscription was made and the bonds were executed; not afterwards. Appear to whom? In regard to this, there can be no doubt. Manifestly not to a court, after the bonds have been put on the market and sold, and when payment is called for, but if it shall appear to the persons whose province it was made to ascertain what had been done preparatory to their own action, and whose duty it was to issue the bonds if the vote appeared to them to justify such action under the law. These persons were the supervisor and town-clerk. Their right to issue the bonds was made dependent upon the appearance to them of the performance of the conditions precedent. It certainly devolved upon some person or persons to decide this preliminary question; and there can be no doubt who was intended by the law to be the arbiter. In *Commissioners* v. *Nichols*, 14 Ohio St. 260, it was said that "a statute, in providing that county bonds should not be delivered by the commissioners until a sufficient sum had been provided by stock-subscriptions, or otherwise, to complete a certain railroad, and imposing upon them the duty of delivering the bonds when such provision had been made, without indicating any person or tribunal to determine that fact, necessarily delegates that power to the commissioners; and, if delivered improvidently, the bonds will not be invalidated."

In the present case, the person or persons whose duty it was to determine whether the statutory requisites to a subscription and to an authorized issue of the bonds had been performed were those whose duty it was also to issue the bonds in the event of such performance. The statute required the supervisor or other executive officer not only to subscribe for the stock, but also, in conjunction with the clerk, to execute bonds to the railroad company in the name of the town for the amount of the subscription. The bonds were required to be signed by

the supervisor or other executive officer, and to be attested by the clerk. They were so executed. The supervisor and the clerk signed them; and they were registered in the office of the auditor of the State, in accordance with an act, requiring that, precedent to their registration, the supervisor must certify under oath to the auditor that all the preliminary conditions to their issue required by the law had been complied with. On each bond the auditor certified the registry. It was only after this that they were issued. And the bonds themselves recite that they "are issued under and by virtue of the act incorporating the railroad company," approved March 24, 1869, "and in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law." After all this, it is not an open question, as between a *bona fide* holder of the bonds and the township, whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township-officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision; and beyond those a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by the law confided to others, — to those most competent to decide it, — and which the purchaser is, in general, in no condition to decide for himself.

This we understand to be the settled doctrine of this court. Indeed, some of our decisions have gone farther. In the leading case of *Knox* v. *Aspinwall*, 21 How. 544, the decision was rested upon two grounds. One of them was that the mere issue of the bonds, containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for an assumption by the purchaser that the conditions

on which the county (in that case) was authorized to issue them had been complied with; and it was said that the purchaser was not bound to look farther for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to *The Royal British Bank* v. *Torquand*, 6 Ell. & Bl. 327, a case in the Exchequer Chamber, which fully sustains it, and the decision in which was concurred in by all the judges. This position taken in *Knox* v. *Aspinwall* has been more than once reaffirmed in this court. It was in *Moran* v. *Miami County*, 2 Black, 732; in *Mercer County* v. *Hackett*, 1 Wall. 83; in *Supervisors* v. *Schenk*, 5 id. 784; and in *Mayor* v. *Muscatine*, 1 id. 384. It has never been overruled; and, whatever doubts may have been suggested respecting its correctness to the full extent to which it has sometimes been announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox* v. *Aspinwall*. That, we think, has been so firmly seated in reason and authority, that it cannot be shaken. What it is has been well stated in sect. 419 of Dillon on Munic. Corp. After a review of the decisions of this court, the author remarks, "If, upon a true construction of the legislative enactment conferring the authority (viz., to issue municipal bonds upon certain conditions), the corporation, or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their determination of a matter *in pais*, which they are authorized to decide, will, in favor of the bondholder for value, bind the corporation." This is a very cautious statement of the doctrine. It may be restated in a slightly different form. Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact

by the appointed tribunal. In *Bissell* v. *Jeffersonville*, 24 How. 287, it appeared that the common council of the city were authorized by the legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the petition of three-fourths of the legal voters of the city. The council adopted a resolution to subscribe, reciting in the preamble that more than three-fourths of the legal voters had petitioned for it, and authorized the mayor and city-clerk to sign and deliver bonds for the sum subscribed. The bonds recited that they were issued by authority of the common council, and that three-fourths of the legal voters had petitioned for the same, as required by the charter. In a suit subsequently brought by an innocent holder for value to recover the amount of unpaid coupons for interest, it was held inadmissible for the defendants to show that three-fourths of the legal voters of the city had not signed the petition for the stock subscription. A similar ruling was made in *Van Hostrop* v. *Madison City*, 1 Wall. 291, and in *Mercer County* v. *Hackett*, id. 83.

The same principle has recently been asserted in this court after very grave consideration, and it must be considered as settled. In *St. Joseph's Township* v. *Rogers*, 16 Wall. 644, it is stated thus: —

"Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions, or qualifications; but if it appears by their recitals that the bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all of these recitals were incorrect will not constitute a defence for the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification, which it is alleged was not fulfilled."

There is nothing in the case of *Marsh* v. *Fulton*, 10 Wall. 675, to which we have been referred, at all inconsistent with the rule thus asserted. In that case, there were no recitals in the bonds; and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed. The question was, therefore, open.

What we have said disposes of the present case without the necessity of particular consideration of the matters urged in the argument of the defendant below. It was inadmissible to show what was attempted to be shown; and, even if it had been admissible, the effort to assimilate the case to *Marsh* v. *Fulton* would fail. There the subscription was for the stock of a different corporation from that for which the people had voted: here it was not. *Judgment affirmed.*

MR. JUSTICE BRADLEY delivered the following concurring opinion: —

I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of *Knox County* v. *Aspinwall;* to wit, that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed is conclusive proof of its performance. If, when the law requires a vote of tax-payers, before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute, and who does execute, the bonds, and if the bonds themselves contain a statement or recital that such vote has been given, then the *bona fide* purchaser of the bonds need go back no farther. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital is not, in my judgment, conclusive. It may be *prima facie* sufficient; but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject; and I do not think that the contrary has ever been decided by this court. There have been various *dicta* to the contrary; but the cases, when carefully examined, will be found to have had all the prerequisites necessary to sustain the bonds, according to my view of the case. This view was distinctly announced by this court in the case of *Lynde* v. *The County of Winnebago*, 16 Wall. 13. In the case now under consideration, there is a sufficient recital in the bond to show that the proper election was held and the proper vote given; and the bond was executed by the officers whose duty it

was to ascertain these facts. On this ground, and this alone, I concur in the judgment of the court.

MR. JUSTICE MILLER, MR. JUSTICE DAVIS, and MR. JUSTICE FIELD, dissented.

TOWN OF VENICE *v.* MURDOCK.

1. An act of the legislature of New York authorized the supervisor of any town in the county of Cayuga, and the assessors of such town, who were thereby appointed to act with the supervisor as commissioners, to borrow money to the amount of twenty-five thousand dollars to aid in the construction of a railroad passing through the town, and execute the bonds of the town therefor. The act, however, provided that the supervisor and commissioners should have no power to issue the bonds until the written assent of two-thirds of the resident tax-payers, as appearing on the assessment-roll of such town next previous to the time when such money may be borrowed, should have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of said county, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed comprise two-thirds of all the resident tax-payers of said town on the assessment-roll of such town next previous thereto. Subsequently a written assent to the effect required was filed in that office, the persons who signed it representing themselves to be such resident tax-payers. Upon this instrument was indorsed the affidavit of the supervisor and one of the commissioners, that the persons whose names were subscribed to the assent composed two-thirds of all the resident tax-payers of said town. The bonds were issued, signed by the supervisor and commissioners, reciting that, in pursuance of said act of the legislature, "and the written assent of two-thirds of the resident tax-payers of said town obtained and filed in the office of the clerk of the county of Cayuga," said town promised to pay the sum of money therein named to bearer. *Held*, 1. That it was the appointed province of the supervisor and commissioners to decide the question, whether the condition precedent to the exercise of their authority had been fulfilled; that they did decide it by issuing the bonds; and that the recital in the bonds was a declaration of their decision. 2. That the supervisor and commissioners, who procured what purported to be the written assent of the tax-payers, had means of knowledge touching the genuineness of the signatures to the paper, which, from the nature of the case, the purchaser could not have; and that, in a suit by a *bona fide* holder of the bonds, the town was estopped from disputing their validity, and that he was not bound to prove the genuineness of the signatures to the written assent.
2. The decisions of the Court of Appeals of the State of New York on cases arising upon the same statute, and a similar state of facts, are not conclusive on this court, as such decisions do not present a case of statutory construction.

ERROR to the Circuit Court of the United States for the Northern District of New York.

This suit was brought upon certain bonds, each of which is as follows: —

"STATE OF NEW YORK, *County of Cayuga:* —

"Seven per cent loan, not exceeding $25,000.

"Be it known that the town of Venice, in the county of Cayuga, and State of New York, in pursuance of an act of the legislature of the said State, entitled 'An Act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehanna Railroad,' passed April 16, 1852, and for the purpose of aiding the construction of the Lake Ontario, Auburn, and New York Railroad, owes, and promises to pay, to —— ——, or bearer, $1,000, with interest at the rate of seven per cent, payable semi-annually, on the first days of January and July in each year, on surrender of the coupons hereto attached, at the Bank of the State of New York, in the city of New York; the principal to be reimbursable at the same place at the expiration of twenty years from the first day of January, 1853.

"In testimony whereof, the supervisor and commissioners of the town of Venice have, pursuant to the provisions of the act aforesaid, and the written assent of two-thirds of the resident tax-payers of said town, obtained and filed in the office of the clerk of the county of Cayuga, hereunto subscribed their names, this second day of March, A. D. 1853.

"CALVIN KING, *Supervisor.*
JONAS WOOD, }
ISAAC SMITH, } *Commissioners.*"

The following certificate was indorsed thereon: —

"CAYUGA COUNTY CLERK'S OFFICE.

"I, Edwin B. Marvine, clerk of the county of Cayuga, hereby certify that a paper purporting to be the written assent of two-thirds of the resident tax-payers of the town of Venice, with the affidavit required by sect. 1 of the act referred to by its title in the foregoing bond, has been filed in this office.

"Dated Auburn, May 16, 1853.

"(Signed) "E. B. MARVINE,
"*Clerk of Cayuga County.*"

Mr. Warren T. Worden for the plaintiff in error.

Mr. David Wright, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

It would be worse than useless for us to discuss separately each of the twenty-two assignments of error filed in this case; for the questions involved that are of any importance are very few in number. The leading one is, whether sufficient authority was shown at the trial for the issue of the town-bonds. The act of the legislature empowered the supervisor and the railroad commissioners of the town to borrow money, and to execute bonds therefor to an amount not exceeding $25,000. It directed that all moneys borrowed under its authority should be paid over to the president and directors of such railroad company (then organized, or that might thereafter be organized, under the provisions of the general railroad law), as might be expressed by the written assent of two-thirds of the resident tax-payers of the town, to be expended by said president and directors in grading, constructing, and maintaining a railroad or railroads passing through the city of Auburn, and connecting Lake Ontario with the Susquehanna and Cayuga Railroad, or the New York and Erie Railroad.

The act provided, however, that said supervisor and commissioners should have no power to do any of the acts authorized by the statute until a railroad company had been duly organized according to the requirements of the general railroad law, for the purpose of constructing a railroad between the termini above mentioned and through the town, and until the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town made next previous to the time such money might be borrowed, should have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprised two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

This act was passed on the sixteenth day of April, 1852; and, on the 23d of August next following, a railroad company was organized to construct a railroad through the town between the

termini mentioned in the act. On the 3d of November, 1852, there was filed in the office of the county-clerk of Cayuga County a written assent that the supervisor and assessors of the town (the assessors being railroad commissioners) might borrow such sum of money as they might deem necessary, not exceeding $25,000, giving town-bonds therefor; and that the money might be paid to the railroad company organized to construct the railroad. Two hundred and fifty-nine names were signed to the assent, the persons signing representing themselves to be resident tax-payers of the town of Venice. Upon this instrument was indorsed the affidavit of the supervisor and one of the commissioners that the persons whose names were subscribed to the assent comprised two-thirds of all the resident tax-payers of the said town of Venice on its assessment-roll next previous to the date of the affidavits, — namely, next previous to Oct. 30, 1852; and, on the 2d of March next following, the supervisor and the commissioners executed the bonds now in suit. Evidence of these facts was given at the trial; but the defendant objected to the admission in evidence of this assent, and of the bonds, on the ground that the plaintiff must first prove that the signatures to the assents were the genuine signatures of those persons whose names purported to be signed. The Circuit Court overruled this objection; and whether rightfully or not, is the primary and almost the only material question in the case.

It is very obvious that if the act of the legislature which authorized an issue of bonds in aid of the construction of the railroad, on the written assent of two-thirds of the resident tax-payers of the town, intended that the holder of the bonds should be under obligation to prove by parol evidence that each of the two hundred and fifty-nine names signed to the written assent was a genuine signature of the person who bore the name, the proffered aid to the railroad company was a delusion. No sane person would have bought a bond with such an obligation resting upon him whenever he called for payment of principal or interest. If such was the duty of the holder, it was always his duty. It could not be performed once for all. The bonds retained in the hands of the company would have been no help in the construction of the road. It was only

because they could be sold that they were valuable. Only thus could they be applied to the construction. Yet it is not to be doubted that the legislature had in view, and intended to give, substantial aid to the railroad company, if a sufficient number of the tax-payers assented. They must have contemplated that the bonds would be offered for sale; and it is not to be believed that they intended to impose such a clog upon their salableness as would rest upon it if every person proposing to purchase was required to inquire of each one whose name appeared to the assent whether he had in fact signed it.

The act of the legislature manifests a contrary intent. It created a tribunal to determine whether two-thirds of the resident tax-payers had assented. That tribunal was the supervisor and the commissioners, empowered also to execute the bonds in case such an assent were given. They were the appointed agents to obtain the assent; and, when acquired, they, or any two of them, were to make an affidavit that the persons whose written assents were attached to the statement comprised two-thirds of the resident tax-payers. That statement, with the affidavits, was required to be filed in the county-clerk's office. All this indicates unmistakably that it was their appointed province to decide whether the condition precedent to the exercise of their authority to issue the bonds had been complied with. *Commissioners* v. *Nichols*, 14 Ohio, N. S. 260. They did decide the question before they issued the bonds. Their statement, verified by their affidavit, filed in the county-clerk's office, was a decision, and the recital in the bonds was a declaration of the decision. That such a decision concludes the town against denying that the condition precedent had been performed, that it relieves the holder of the bonds from the obligation to look beyond it, is too firmly settled in this court to admit of question. In Dillon on Municipal Corporations, sect. 418, the author, after reviewing the decisions, states this conclusion: "If, upon a true construction of the legislative enactment conferring the authority, the corporation, or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their recital of their determination of a matter *in pais*, which they are

authorized to decide, will, in favor of the bondholder for value, bind the corporation." Here there was more than a recital. There was, in addition, proof of an actual decision, verified by oath. Without citing the numerous decisions which sustain this statement of the law, we refer only to *St. Joseph Township* v. *Rogers*, 16 Wall. 644, and *Town of Coloma* v. *Eaves*, *supra*, p. 484, decided at this term, which unequivocally assert it. And the rule has additional reason in its favor, where, as in the present case, the authority of the municipal officers to bind the municipality is made dependent upon a precedent condition of fact; and the fact is not of a nature to be ascertained by purchasers in the market, to whom it was contemplated the bonds might be sold. Dillon, in sect. 419, states this as another exception to the rule that an unauthorized representation by a municipal officer that he has power is not binding on the corporation. His language is, "The only exception to this rule (the rule above stated), — to wit, where it is the sole province of the officers who issued the bonds to decide whether conditions precedent have been complied with, — is where both parties have not equal means of knowledge as to the extent and scope of their powers, and where the particular character of their commission and authority is, from its nature and circumstances, peculiarly known to the officer or agent; in which case the principal will, or may be, bound by the false representations of the agent respecting its authority and its extent and scope." The present is exactly such a case. The town-officers had means of knowledge which the purchaser had not. They procured the signatures to the assent, and they knew whether or not they were genuine. They had knowledge, which, from the nature of the case, the purchaser could not have.

We are aware that in the State of New York it has been held adversely to the opinions we have expressed. It was so held in *Starin* v. *The Town of Genoa*, and in *Gould* v. *The Town of Sterling*, 23 N. Y. 439, 456. In the former case the court ruled, that under the act of April 16, 1852 (the same act which conferred powers conditionally upon the supervisors and commissioners of the town of Venice), the *onus* was on the bondholder to show, in a suit against the town, that two-thirds of

the resident taxables had given their written assent to the creation of the bonds. In the latter case a similar decision was given when bonds had been issued under another act, much like the act of 1852, though differing in some material particulars. These decisions are in conflict with the rulings of this court in *Bissell* v. *Jeffersonville*, 24 How. 287; *Knox County* v. *Aspinwall*, 21 id. 539; *Mercer County* v. *Hackett*, 1 Wall. 83, and other cases which we have cited. They are in conflict also with decisions in other State courts. *Society for Savings* v. *New London*, 29 Conn. 174; *Railroad Company* v. *Evansville*, 15 Ind. 395; *Comm'rs* v. *Nichols*, 14 Ohio, N. S. 260. We have carefully considered the reasons given for the judgments in the New-York cases, without being convinced by them. They ignore the paramount purpose for which the bonds were authorized by the legislature, and they treat the written assent of the taxables as the authority to the township-officers, when, in fact, the power was given by the legislature, and it was only left to the town to determine by the action of two-thirds of the resident taxables whether the supervisors and commissioners might act under the power. In *Gould* v. *Sterling*, the legislative act required no affidavit to be filed with a statement of the assenting tax-payers; and, in *Starin* v. *Genoa*, the affidavit filed was regarded as merely verifying that the persons whose names appeared on the assents comprised two-thirds of all the resident tax-payers. But it is obvious, that, if no more than this was meant by the required affidavit, it was wholly useless; for the assessment-rolls of the township would have shown as much.

The authority of *Starin* v. *Genoa* has not been increased by the subsequent action of the New-York courts. In *The People* v. *Mead*, 24 N. Y. 114, the ruling was followed; but Judge Denio, who only gave an opinion, claimed that the decision in *Starin* v. *Genoa* had been made on the ground that the bonds were not issued upon a loan, and that the plaintiff was not a *bona fide* holder. *The People* v. *Mead* came again before the Court of Appeals in 36 N. Y., p. 224, when Davis, J., said, "We do not think it seemly to review and reverse the former judgment of this court in this action upon the same facts;" and Grover, J., said, "But for the previous adjudication of

this court, I should have held that the affidavit filed with the clerk of Cayuga County, pursuant to the second section of chap. 375 of the laws of 1852, was conclusive evidence of the assents of the tax-payers of the town, required by the act in favor of a *bona fide* holder of the bonds issued under its provisions." But assuming that what was ruled in *Gould* v. *Sterling*, and in *Starin* v. *Genoa*, is still the doctrine of the New-York courts, we find ourselves unable to yield to it our assent. It is against the whole current of our decisions, as well as against the decisions made in other States; and we think it is not supported by the soundest reasons.

It is argued, however, that the New-York decisions are judicial constructions of a statute of that State; and, therefore, that they furnish a rule by which we must be guided. The argument would have force if the decisions, in fact, presented a clear case of statutory construction; but they do not. They are not attempts at interpretation. They would apply as well to the execution of powers or authorities granted by private persons as they do to the issue of bonds under the statute of April 16, 1852. They assert general principles, — to wit, that persons empowered to borrow money and give bonds therefor, for the purpose of paying it to an improvement company, are not authorized to deliver the bonds directly to the company; a doctrine denied in this court, in the Supreme Court of Pennsylvania, and even in the Court of Appeals of New York. *People* v. *Mead*, 24 N. Y. 124; *The Town of Venice* v. *Woodruff et al.*, 62 id. 462. They assert, also, that, where an authority is given to an officer to execute and issue bonds (on the assent of two-thirds of the voters of a town, the assent to be obtained by the officer and filed in a public office, with an affidavit verifying the assent), the verification amounts to nothing, subserves no purpose, and that a *bona fide* holder of the bonds is bound to prove that the requisite number of voters did actually assent. They assert this as a general proposition. They do not assert that the statute so declares, or that such is even its implied requisition. There is, therefore, before us, no such case of the construction of a State statute by State courts as requires us to yield our own convictions of the right, and blindly follow the lead of others, eminent as we freely concede they are.

We have treated the case thus far on the assumption that the plaintiff below was a *bona fide* holder of the bonds which he put in suit. That he was such abundantly appears, and nothing that was offered at the trial tended in the slightest degree to show the contrary. Even the railroad company itself, when it took some of the bonds and gave its stock therefor, could have had no reason to suppose that every condition precedent to their issue had not been performed; and a subsequent purchaser, at any time prior to the time fixed for their final payment, must be regarded as a *bona fide* purchaser.

We have thus considered all the assignments of error that deserve particular notice, and all that were much pressed at the argument. The others are without the least merit. In our opinion, the law and the plainest dictates of justice demand an affirmance of this judgment. *Judgment affirmed.*

MR. JUSTICE MILLER, MR. JUSTICE DAVIS, and MR. JUSTICE FIELD, dissented.

NOTE. — The cases of *Town of Venice* v. *Woodruff et al.*, *Same* v. *Watson*, *Same* v. *Edson*, error to the Circuit Court of the United States for the Northern District of New York, were argued at the same time, by the same counsel, as *Town of Venice* v. *Murdock*.

MR. JUSTICE STRONG delivered the opinion of the court.

These cases are, in all essential particulars, like the case of *Town of Venice* v. *Murdock*, *supra*, p. 494; and the judgments are affirmed for the reason given in that case. *Judgment in each case affirmed.*

MR. JUSTICE MILLER, MR. JUSTICE DAVIS, and MR. JUSTICE FIELD, dissented.

TOWN OF GENOA *v.* WOODRUFF ET AL.

1. The judgment in this case was affirmed upon the authority of *Town of Venice* v. *Murdock*, *supra*, p. 494.
2. The holder of a coupon is entitled to recover interest thereon from the time it fell due.

ERROR to the Circuit Court of the United States for the Northern District of New York.

Mr. H. L. Comstock for the plaintiff in error.

Mr. David Wright, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

Twenty-six errors have been assigned in this case, not one of which can be sustained. All which have the least plausibility have been considered and declared unfounded in *Town of Venice* v. *Murdock*, *supra*, p. 494; and the others might well be dismissed without special notice. The thirteenth complains that the circuit judge decided that the plaintiffs could recover interest upon the coupons from the time they fell due. That the ruling was correct is perfectly plain. It was in entire accordance with the decisions generally of the State courts and also of this court.

The other assignments have either been answered in *Town of Venice* v. *Murdock*, or they are totally without merit.

Judgment affirmed.

MR. JUSTICE MILLER, MR. JUSTICE DAVIS, and MR. JUSTICE FIELD, dissented.

CONVERSE *v.* CITY OF FORT SCOTT.

Pursuant to the authority conferred by the act of the legislature of the State of Kansas, and by virtue of a popular election thereby authorized, the mayor and council of the "City of Fort Scott" were empowered to issue $25,000 of bonds of the city for the purpose of procuring the right of way for the Missouri, Kansas, and Texas Railway Company through that city, and also procuring grounds for dépôts, engine-houses, machine-shops, and yard-room, and donating the same to the company, provided that the company, in the judgment of the mayor and council, had first given evidence of their intention to comply with certain specified conditions. The company did comply with the conditions. The mayor and council did then, upon an understanding with the company, agree to deliver to it the $25,000 of bonds in lieu of said grounds and right of way, and in full satisfaction of all the obligations resting on the city in relation thereto. Thereupon the bonds were duly issued, and registered in the office of the State auditor, who certified upon each bond that it had been regularly and legally issued, that the signature to it was genuine, and that it had been duly registered in accordance with the State law. The bonds were thereupon delivered to the railroad company. *Held*, that the bonds were binding on the city.

ERROR to the Circuit Court of the United States for the Northern District of Kansas.

This was an action to recover the interest on certain bonds

issued by the city of Fort Scott, Kan. One of the bonds (all of which were similar) is as follows: —

"No. 1. UNITED STATES OF AMERICA. $1,000.

"STATE OF KANSAS,

"*City of Fort Scott, in the county of Bourbon:* —

"Issued under the laws of Kansas, and in pursuance of an ordinance of the city of Fort Scott, approved Dec. 22, 1870. $25,000 subscription to the Missouri, Kansas, and Texas Railway Company.

"Know all men by these presents, That the city of Fort Scott, county of Bourbon, in the State of Kansas, hereby, for value received, acknowledges itself indebted and firmly bound to pay to the Missouri, Kansas, and Texas Railway Company, or bearer, the sum of $1,000, lawful money of the United States of America, which sum of money the said city promises to pay on the first day of July, A.D. 1890, at the Fourth National Bank, in the city of New York, with interest thereon at the rate of seven per centum per annum, payable semi-annually at the office of said Fourth National Bank, in said city of New York, on the first day of January and July in each year, on presentation and surrender of the annexed coupons as they severally become due.

$1,000. $1,000.

"The city, the maker hereof, reserves the right to pay this bond at its option at any time before maturity.

"In witness whereof, the said city of Fort Scott has caused this bond to be signed, sealed, and delivered on its behalf and for its benefit by its mayor, and countersigned by its clerk, duly and legally appointed and authorized in this respect.

"FORT SCOTT, KAN., July 1, 1870.

"B. P. MCDONALD, *Mayor.* [SEAL.]

"T. A. CORBETT, *City-Clerk.*"

(Across the face in red ink) $1,000.

Each of said bonds, in order to distinguish it from others of like character, was numbered, and, pursuant to law, was duly registered in the office of the auditor of the State of Kansas. Attached to each bond was the following certificate of such auditing; to wit: —

"I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signa-

tures thereto are genuine; and that such bond has been duly registered in my office in accordance with an act of the legislature, entitled "An Act to authorize counties, incorporated cities, and municipal townships, to issue bonds for the purpose of building bridges, aiding in the construction of railroads or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2, 1872.

"Witness my hand and official seal, this seventh day of January, 1873.

"A. THOMAN, *Auditor of State.*"

Attached to each bond were coupons falling due on the first days of January and July, one of which is as follows: —

"$35.00. STATE OF KANSAS.

"City of Fort Scott, in the county of Bourbon, will pay the bearer hereof thirty-five dollars, at the Fourth National Bank, in the city of New York, on the first day of July, 1872; being six months' interest on bond No. 1.

"T. A. CORBETT, *City-Clerk.*"

Mr. G. C. Yeaton for the plaintiff in error.
Mr. A. L. Williams, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

The general legislation of Kansas confers unusual power upon municipal corporations in that State. Not only are they authorized to subscribe for and take stock in any railroad company duly organized under any law of the State or Territory, and to loan their credit to such corporations upon such conditions as they may prescribe (Acts of 1869, c. 29), but the act of Feb. 28, 1868 (Gen. Stat. c. 19), confers upon some of them much more extended powers. It enlarges the range of municipal authority and duty far beyond the limits within which such corporations are commonly understood to be confined. That was an act providing for the incorporation of cities of the second class, of which the city of Fort Scott is one. By the twenty-ninth section, the mayor and council of each such city governed by the act are empowered to enact, ordain, alter, modify, or repeal such ordinances as it shall deem expedient "for the benefit of trade and commerce" among

others. Sect. 30, sub-sect. 32, grants power "to take all needful steps to protect the interest of the city, present or prospective, in any railroad leading from or towards the same, but not to take stock in any railroad without a vote of a majority of the legal voters." Sub-sect. 33 of sect. 30 authorizes all such ordinances as may be expedient, and not inconsistent with the laws of the State, maintaining *inter alia* "the trade, commerce, and manufactories" of the city; and the thirty-seventh subsection (which has a very direct bearing upon the case now before us) empowers the mayor and council "to take private property for public use, *or for the purpose of giving the right of way or other privilege to any railroad company*, or for the purpose of erecting or establishing market-houses and market-places, or for any other necessary public purpose. Provided, however, that in all cases the city shall make the person or persons whose property shall be taken or injured thereby adequate compensation therefor, to be determined by the assessment of five disinterested householders of the city," &c.

Sub-sect. 39 authorizes the mayor and council to borrow money on the credit of the city, with no other limitation than that no money shall be borrowed on any contract thereafter made exceeding $2,000, without the instruction of a majority of all the votes cast at an election held in the city for that purpose; and sub-sect. 40 authorizes the issue of bonds to fund any and all indebtedness existing, or subsequently created, due or to become due.

By these sections, the legislature manifestly contemplated a lawful acquisition by the city of interests in railroads leading from or towards it, and authorized municipal legislation in their favor for the promotion of trade and commerce. The thirty-seventh section expressly conferred the power to give to a railroad company a right of way into or through the city; authorized the expenditure of money to enable the city thus to aid the company; and, for the purpose of such aid, empowered the city to make use of the State's right of eminent domain. Nothing can be clearer, it appears to us, than that the power to make a donation of a right of way, or of a site for station-houses, machine-shops, and other like conveniences, was thus vested in the mayor and city council.

If we are correct, therefore, it remains only to inquire whether the issue of the bonds held by the plaintiff was within the authority thus conferred on the city. On the twenty-fifth day of July, 1870, a city ordinance was passed, by which it was ordained, among other things, that a special election should be held in the several wards of the city on the 30th of August next following, for the purpose of submitting to the qualified electors the question of authorizing the mayor and city council to issue bonds in a sum not exceeding $25,000 for the purpose of procuring the right of way for the road of the Missouri, Kansas, and Texas Railway Company, through the corporate limits of the city, and also procuring grounds for dépôts, engine-houses, machine-shops and yard-room, and donating the same to the company. By the eighth section of the ordinance, it was declared to be the duty of the mayor and council, in case the election should result in favor of the donation, to confer forthwith with the officers of the railroad company, and ascertain at the earliest possible moment the route selected by the company for the line of their road through the corporate limits of the city, and also the ground chosen by them for dépôts and other purposes, and to proceed in such manner as might be deemed most conducive to the interests of the city; to purchase so much land as might be necessary for the right of way, and also twenty-five acres exclusive of the right of way, at such convenient point within the city as the officers of the railroad company might select, for dépôts, engine-houses, machine-shops and yard-room, and to issue the bonds of the city to an amount not exceeding $25,000 to pay for the same. The tenth section ordained, that, as the mayor and city councils purchased or procured the right of way and grounds above specified, they should donate or convey the same for a nominal consideration, or cause the same to be donated or conveyed for a nominal consideration, by an indefeasible title in fee-simple to said company; provided, however, that in their judgment the company had first given evidence of their determination to comply with certain conditions specified in the fourth section of the ordinance.

At the election thus ordered, the proposition submitted was approved by a large majority of the legal voters; and the case

finds that the railroad company did comply with the conditions mentioned in the ordinance.

Why this action of the city councils and the donation proposed to be made under it were not authorized by the act of the State legislature of Feb. 28, 1868, we are unable to perceive, and the argument submitted to us on behalf of the defendant in error has made no serious attempt to show. Indeed, it may be doubted whether the act of 1868 was called to the attention of the Circuit Court. It has been contended here that another act, passed in 1869, gave no such authority to the mayor and city council; but the argument quite overlooks the grant of powers expressly made by the act of 1868. The act of 1869 authorized the council of any city to subscribe for stock for the city in any railroad company organized under the laws of the State or Territory of Kansas, or to loan the credit of the city to such company upon such conditions as might be prescribed by the city authorities, provided such subscription was previously assented to by a majority of the qualified electors voting at a general or special election; and, in case such an assent was given, the act made it the duty of the city authorities to make the subscription. This act speaks only of subscriptions, and loans of credit; but the act of 1868 contemplated donations.

If, then, the mayor and city council were authorized to make donations of land for the right of way and other privileges to a railroad company, and to expend money for the purpose of acquiring land to be given, and if they were authorized to borrow money to an unlimited extent when instructed so to do by a popular vote, and further to issue bonds to fund any indebtedness of the city, existing or to be created, it is clear they had the power to agree to give upon conditions. We have noticed, that by the ordinance of July 25, 1868, conditions were attached to the proposed gift, — conditions to be performed by the railroad company. It was after this, after the submission of the proposition to the people, and its approval, and after a compliance with its conditions by the company, that the ordinance of Dec. 22, 1870, was passed. Its preamble recites the submission of the proposition to issue the bonds for the purposes mentioned to a popular vote; its approval by a large majority; that the railway company had so far complied with the conditions on

their part to be done and performed as to enable them to demand from the city the right of way and grounds; that in the exercise of this right they had made a proposition to the city to accept the $25,000 of bonds so voted, in lieu of said grounds and right of way, and in full satisfaction and discharge of all the obligation resting on the city in relation thereto; and that, after full and careful consideration, it was deemed advisable to accept the proposition, and issue to the company the bonds.

With such a preamble, the ordinance directed the mayor and city-clerk to execute and deliver to the railroad company bonds to the amount of $25,000 for the avowed purpose of discharging the city's obligation.

The bonds were accordingly issued, and registered in the office of the auditor of the State, who certified upon each that it had been regularly and legally issued, that the signature to it was genuine, and that it had been duly registered in accordance with a statute of the State. The plaintiff then purchased the bonds and coupons before their maturity, without any actual knowledge of the defences set up against them. Indeed, no defence is set up except an alleged want of authority for their issue, — a defence which, in view of the legislation of the State and of the city ordinances, has, in our opinion, no foundation. Certainly it has none, unless a power conferred upon a municipality is different from what the same power would be when possessed by another holder; a doctrine which no one will venture to assert. It follows, that, on the facts found by the Circuit Court, the judgment should have been given for the plaintiff.

Judgment reversed, and cause remanded for a new trial.

CARROL ET AL. *v.* GREEN ET AL.

The Exchange Bank of Columbia, S. C., failed in February, 1865. In June, 1872, its creditors filed a bill in equity to enforce their claims against the stockholders under a clause of the charter, which, "upon the failure of the bank," rendered them individually liable for any sum not exceeding double the value of their respective shares. The defence set up the Statute of

Limitations of 1712, which requires actions upon the case, and actions of debt, grounded upon any contract without specialty, to be brought within four years. *Held*, that as the liability of the stockholders arose from their acceptance of the act creating the corporation, and their implied promises to fulfil its requirements, the proper remedy was an action upon the case; and that, as the statute barred such an action at law, it was also a good defence in equity.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

Mr. James Lowndes for the appellant.

Mr. D. T. Corbin, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

A number of important questions arising in this case have been fully argued, which we shall pass by without remark. We have not examined any of them exhaustively, and have not found it necessary to do so. Our judgment will be placed upon the defence of the Statute of Limitations, and our opinion will be confined to that subject.

The appellees filed this bill, and the subpœnas were issued in the court below, on the 18th of June, 1872. The bill seeks to make the appellants individually liable as stockholders of the Exchange Bank of Columbia, which was incorporated by an act of the legislature of South Carolina of the 16th of December, 1852. It is alleged in the bill, that, by this act, the Exchange Bank "was endowed with the same rights and privileges, and was made subject to the same duties, liabilities, obligations, and restrictions, provided for the said Planters' and Mechanics' Bank;" and that, by the fourth section of the act incorporating the last-named bank, it was declared, "that, in case of the failure of said bank, each stockholder, copartnership, or body politic, having a share in such bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound, individually, for any sum not exceeding twice the amount of his, her, or their share or shares."

It is conceded for the purposes of this opinion that the provision, quoted from the act of 1852, applies to the stockholders of the Exchange Bank as well as to the bank itself.

The master found, and the court below affirmed the finding

as correct, that the Exchange Bank failed in the month of February, 1865, and never resumed business after that time.

The defendants severally set forth in their answers "that the cause of action stated in the bill did not accrue within four years before the exhibiting of said bill." The complainants replied, and took issue. It appears that the bank suspended specie payment several years before its failure at the time specified by the master; and some stress is laid upon this fact by the counsel for the appellants in discussing the case in this aspect. We have preferred to adopt the finding of the master, because it is the view most favorable to the appellees, and because the proof as to that period brings the case clearly within the terms of the statute; while the proof is further that the bank paid specie until its suspension was legalized, and that, if it had been put in liquidation on the 1st of February, 1865, it could then have met all its liabilities, and redeemed its outstanding bills in specie or its equivalent. Its subsequent losses arose from the war. According to the statute, the liability of "each stockholder" arose upon "the failure of the bank." The liability gave at once the right to sue; and, by necessary consequence, the period of limitation began at the same time. From the last of February, 1865, four years expired on the 1st of March, 1869. But there are certain interruptions of the running of the statute to be taken into account. An act of the legislature of the State, of the 21st December, 1861, suspended the Statute of Limitations until the close of the first session of the next general assembly. This suspension was continued by successive acts. The last one was passed on the 22d of December, 1865, and prolonged the suspension "until the adjournment of the next regular session of the general assembly." The Supreme Court of the State held that these acts arrested the effect of the Statute of Limitations from Dec. 21, 1861, until December, 1866. *Wardlow* v. *Buzzard*, 15 Rich. 158.

It does not appear in the case at what time in December, 1866, the general assembly adjourned. From December, 1866, the statute was in full force. Four years from that time expired in December, 1870. The war in South Carolina ended on the 2d of April, 1866. *The Protector*, 12 Wall. 701.

The Circuit Court of the United States for South Carolina was open for business on and after the 12th of June, 1866.

In any view of the facts that can be taken, more than four years elapsed after the statute began to run before this suit was instituted.

The Statute of Limitations of South Carolina in force when this cause of action accrued, and under which the case must be decided, was that of 1712. Angel on Lim., App. p. 98.

The sixth section declares, among other things, "that . . . all actions of account *and upon the case* (other than such accounts as concern the trade of merchandise), . . . all actions of debt *grounded upon any* lending *or contract without specialty*, all actions for arrearages of rent reserved by indenture, all actions of covenant . . . which shall be brought at any time after the ratification of this act, shall be commenced and sued within the time of limitation hereafter expressed, and not after; that is to say, *the said actions upon the case* other than for slanders, and the said actions for accounts, . . . *and the said actions for* . . . *debt*, . . . within three years next after the ratification of this act, or within four years next after the cause of such actions or suits, and not after." The statute contains no exception as to actions on the case, save that for slander. All others are expressly barred at the expiration of the time named.

The section of the act of 1852 above quoted, which is said to create the individual liability here in question, is silent as to who shall sue. The suit was, therefore, necessarily to be brought by and for the benefit of the parties injured. 2 Inst. 650; Com. Dig. Debt, A, 1.

Individual liability is repugnant to the law of corporations, and qualifies in this case an exemption which would otherwise exist. Stockholders in such cases are liable according to the plain meaning of the terms employed by the legislature, and not otherwise. The section is silent as to a preference to any class of creditors. All, therefore, in this case, stood upon a footing of equality, and were entitled to share alike in the proceeds of the litigation. The remedy against the stockholders was necessarily in equity. *Pollard* v. *Bailey*, 20 Wall. 521.

They were severally compellable to contribute according to the amount of the stock they respectively held, and the liabili-

ties of the bank to be met, after exhausting its means, the maximum of the liability of each stockholder not to exceed in any event twice the amount of his stock. *Iglehart* v. *The Bank of Circleville & Others*, 6 McLean, 568.

It is obvious from this statement, that, if there had been a suit at law against the stockholders, debt could not have been maintained.

The action of debt lies on a statute where it is brought for a sum certain, or where the sum is capable of being readily reduced to a certainty. It is not sustainable for unliquidated damages. 1 Ch. Pl. 108, 113; *Stockwell* v. *United States*, 13 Wall. 542.

"The action of debt is in legal contemplation for the recovery of a debt *eo nomine* and *in numero*." "Case, now usually called assumpsit," is founded on a contract express or implied. 1 Ch. 99; *Metcalf* v. *Robinson*, 2 McLean, 364.

Let us apply these tests to the case in hand. Certainly the amount sought to be recovered was not certain, and could not readily be reduced to certainty; and there was clearly an implied promise on the part of the stockholders.

The legislature created the corporation, and prescribed certain terms to which the stockholders should be subjected. This was an offer on the part of the State. It could be accepted or declined. There was no constraint. By taking the stock, the terms were acceded to, the contract became complete, and the stockholders were bound accordingly. The same result followed which would have ensued under the like circumstances between individuals. The assent thus given and the promise implied are of the essence of the liability sought to be enforced in this proceeding. If a remedy at law were necessary, clearly it must have been case.

Case is a generic term, which embraces many different species of actions. "There are two, however, of more frequent use than any other form of action whatever: these are assumpsit and trover." Steph. Plead. 18.

"The more legal denomination of the action of assumpsit is trespass on the case upon promises." 3 Woodison's Lect. 168. This form of action originated, like many others, under the Stat. of Westm. 2, 13 Edw. I., c. 24, sect. 2. Its estab-

lishment was strenuously resisted through several reigns. 2 Reeves's Hist., 394, 507, 608. It was sustained, upon full consideration, in *Slade's Case*, 4 Coke, 92, which was decided in 44 Elizabeth. When the statute of South Carolina of 1712, here in question, was enacted, the term *case* was as well understood to embrace assumpsit as any thing else in the law of procedure to which it is now held to apply.

Blackstone thought that one of the most important amendments of the law during the century in which he lived was effected "by extending the equitable writ of *trespass on the case*, according to its primitive institution by King Edward the First, to almost every instance of injustice not remedied by any other process." 4 Com. 442.

But if debt were the proper form of action if this were a suit at law, the result must be the same. The act bars "all actions of debt" grounded upon any lending *or contract without specialty;* also "after the lapse of four years." The contract here was of the class last designated. The statute was only inducement. The implied promise of the stockholders to fulfil its requirements was the agreement on their part, and it was without specialty.

Where a deed-poll was executed by a lessor, and the lessee entered and enjoyed the premises, it was held that he was liable according to the terms of the lease, but that he was suable only in assumpsit. *Goodwin* v. *Gilbert*, 9 Mass. 484; *Newell* v. *Hill*, 2 Met. 180.

So where one conveys land by deed, pursuant to a parol agreement, the law implies a promise by the grantee to pay the purchase-money, and it may be recovered; but the action must be in case, and not debt on the specialty. *Butler* v. *Lee*, 11 Ala. 885; *Bowen* v. *Bell*, 20 Johns. 338; *Wilkinson* v. *Scott*, 17 Mass. 249.

In *Lindsay* v. *Hyatt*, 4 Ed. Ch. 104, the act of incorporation declared that the directors and stockholders might be sued for the debts of the corporation, either at law or in equity, as if they were joint debtors or copartners. The Vice-Chancellor said, "It appears to me that the six years within which actions on simple contract indebtedness must be brought does apply."

Speaking of a suit at law, he said, "In such an action, the

declaration must be in case founded on the statute. . . . The form of the action and the nature of the liability to be enforced fall within the provisions of the statute which takes away the right to sue after six years."

Corning v. *Horner & McCullough*, 1 Comst. 58, was a suit at law against stockholders upon a similar statute, and involving the same statute of limitations. It was said that the action must "necessarily be an action on the case at common law upon the liability of the stockholders for the debt of the company." The same conclusion was reached, as to the time when such actions were barred, as in *Lindsay* v. *Hyatt*.

Baker v. *The Atlas Bank*, 9 Met. 182, was a bill in equity founded upon a statute making the stockholders liable in the cases specified. The defendants relied upon a statute of limitations which declared that "all actions founded upon any contract or liability not under seal shall be commenced within six years next after the cause of action shall accrue, and not afterwards." It was held that the statute applied in equity as well as at law, and that, after the lapse of six years, the bar was complete.

The Commonwealth v. *The Cochituate Bank*, 3 Allen, 42, was also a case in equity involving a statute creating a liability on the part of the stockholders of the bank, and the same Statute of Limitations. The same conclusions were reached by the court as in the preceding case.

It is insisted by the learned counsel for the appellees that while the Limitation Act of 1712 provided that "actions of debt upon any lending or contract, without specialty," should be brought within four years, it did not limit actions of debt upon specialties; and that the liability here in question, being created by a statute, is to be regarded as falling within the latter class.

It is said that an obligation to pay money, arising under a statute, is a debt by specialty. In support of this point, *Bullard* v. *Bell*, 1 Mas. 243, has been pressed upon our attention. Fully to examine that case would unnecessarily extend this opinion. It was cited in *Baker* v. *The Atlas Bank* and in *Corning* v. *McCullough* without effect. We think it is distinguishable from the case in hand in several material points. If

it be in conflict with the cases to which we have referred in this connection, we think the results in the latter were controlled by the better reason.

If a claim like that of the appellees sued at law would have been barred at law, their claim is barred in equity. This proposition is too clear to require argument or authorities to support it.

Decree reversed, with directions to dismiss the bill.

FRANKLIN FIRE INSURANCE COMPANY *v.* VAUGHAN.

A. having bought goods at an auction-store, and made part payment therefor, and having the disposal of them, permitted them to remain there for sale by and under his direction. He agreed that the first proceeds of the sale, to the amount of $3,150, should be paid to the vendor; and that the auctioneers, if they advanced money upon the goods, should retain the possession and control thereof as security. No advance was made. A. procured an insurance upon the goods for $2,500, representing that no other person was interested therein; that they were unincumbered; and that he estimated their value to be $12,000. Part of the goods were sold; and, the remainder having been destroyed by fire, A. brought suit against the company for the amount of the policy. The company set up by way of defence, that his statement as to the freedom of the goods from incumbrance was untrue; that he, knowing of its rule not to insure goods at more than three-fourths of their value, had overvalued them; and that they were, in fact, worth but $6,000. The jury found that the value of the goods destroyed was $7,204. *Held*, that the facts of the case do not justify the claim that the property was incumbered, or that the title of the insured therein was not absolute. *Held further*, that, as nothing appeared at the trial to show that the estimate of the value of the goods by A. was not an honest one, the charge of the court below, that such valuation, if made in good faith, and without intention to mislead or defraud the company, would not defeat a recovery, was without error.

ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. U. M. Rose for the plaintiff in error.

Mr. Albert Pike, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

In seeking to recover the amount insured upon his goods

destroyed by fire, the insured was bound to prove only his policy, his loss, and the service of preliminary proofs. This proof he made.

The insurance was for $2,500. The jury found the value of the goods destroyed by fire to be $7,204.

Defence is made on the ground of a violation of that condition of the policy which provides, that, "if the interest of the assured in the property is not absolute, it must be so expressed in the policy, otherwise the insurance shall be void," and of a misstatement in answering that there was no incumbrance on the property insured.

The insured had bought the goods of one Flowers. They were in the store of Harris & Co., auctioneers, at the time of the purchase, and were left there for sale by and under the direction of Vaughan, the purchaser. It was agreed by him that the first proceeds of the sale should be paid to the vendor to the amount of $3,150; and, if the auctioneers advanced money upon the stock, they were authorized to retain the possession and control of the goods as their security. There is no evidence or claim that any such advance was made.

We see nothing in the writing produced to justify the claim that the property insured was incumbered, or that any person other than the vendee had any interest in it, or that the title of the insured was not absolute. The property was sold to the insured in April, 1873; and the evidence showed, that, when so sold, it was in the auction store of Harris & Co. for sale. The goods remaining there, the purchaser took possession and proceeded to make sale of them, as was also proved on the trial. The writing produced contains no limitation of Vaughan's title, and expresses no right of possession or control in any person other than himself, except in the event that Harris & Co. should make advances. The paper stipulated that Harris & Co. might hold the possession and control of the goods as security for their advances. There was no such stipulation in favor of the vendor. He did not profess to retain any right in the goods, or any control over their possession. So far as he was concerned, Vaughan had the full power of disposition. His claim was upon the money realized from the sales. To bring his claim into enjoyment, it was necessary that sales should

first be made, and Vaughan, and Harris & Co. as the agents of Vaughan, were intrusted with this duty. The goods were, and the proceeds of the goods when sold would be, the property of Vaughan. His agreement as to the proceeds did not affect his title or estate. While it is possible, that, in the event of a fraudulent combination to defraud him, Flowers might have invoked the aid of a court of equity in securing the proceeds of the sales, there is nothing to affect the present title of his vendee. It may be likened to the familiar case of an insurance upon a house in the name of the mortgagor, which he promises to hold for the benefit of the mortgagee. While, under certain circumstances, equity would interfere in behalf of the mortgagee, it can scarcely be doubted, that, until the occurrence of such circumstances, the mortgagor is the owner of the policy and its fruits.

A defence was also sought to be made on the ground of the over-valuation of the goods by Vaughan when he obtained the insurance. The policy was preceded by an application in this form: —

"Application of James L. Vaughan for insurance, &c., in the sum of $6,000, on the property specified; the value of the property being estimated by the applicant.

Valuation.	Sum to be insured.	Rate.
On stock, &c., $12,000.	$6,000.	3-10 of 2 per cent."

Which statement was signed by Vaughan, and agreed to be true, so far as it was known to him, and so far as it was material to the risk. This was on the 23d of March, 1873. The fire occurred on the fifth day of May, 1873.

The sale of goods after the purchase, and before the fire, amounted to the sum of $653. The jury found the goods which were actually destroyed to have been worth $7,204. These two sums show the value of the goods; to wit, $7,857.

The value of the goods was to be estimated by the applicant. He gave this estimate at $12,000; and there is not the slightest evidence that such was not his honest estimate of their value. Insurance agents, as well as other persons, know with what partiality most men estimate their property, and how much more valuable they esteem it when their own than when it is

their neighbor's. They do not object to this principle when the premiums are received for issuing policies. It is only when losses occur that they seek to apply the more rigid test of actual value.

The value of a stock of goods is not always, nor usually, indicated by its purchase price. Such goods are often bought in the country to sell at retail and at a profit. What may be expected to be obtained for them under such circumstances may reasonably be considered their value; and that the owner and purchaser should estimate them at much more than he gave for them, and should hope and expect to make large gains and profits upon their sale, was, no doubt, understood by the agent making the insurance.

The counsel for the plaintiff in error, in his brief, concedes that it is not every over-valuation which will avoid a policy; but he objects to the charge of the judge, that, to produce this result, the over-valuation must be "grossly enormously" in excess of the truth. It is hardly just to the judge holding the circuit, or to the claimant, that the charge should rest upon this statement. The judge undoubtedly said, "If the valuation was grossly enormously in excess of the value of the goods, then the burden is cast on the plaintiff of showing that he acted honestly and in good faith in making the valuation, and that it was not made for any fraudulent purpose or with any fraudulent intention, but was an honest and unintentional error." He did not, however, say that nothing less than this would have that effect. He said also, "The law exacts the utmost good faith in contracts of insurance, both on the part of the insured and the insurer; and a knowing and wilful over-valuation of property by the insured, with a view and purpose of obtaining insurance thereon for a greater sum than could otherwise be obtained, is a fraud upon the insurance company that avoids the policy. . . . It is a question of good faith and honest intention on the part of the insured; and though he may have put a value on his property greatly in excess of its cash value in the market, yet if he did so in the honest belief that the property was worth the valuation put upon it, and the excessive valuation was made in good faith, and not intended to mislead or defraud the insurance company, then such over-valuation is not a fraudulent over-valuation that will defeat a recovery."

Looking at the whole charge, as we must do, we think the jury were correctly instructed, and that there was nothing said to which the company can properly except.

Judgment affirmed.

UNITED STATES *v.* DIEKELMAN.

1. Unless treaty stipulations provide otherwise, a merchant vessel of one country visiting the ports of another for the purpose of trade, is, so long as she remains, subject to the laws which govern them.
2. Where, in time of war, a foreign vessel, availing herself of a proclamation of the President of May 12, 1862, entered the port of New Orleans, the blockade of which was not removed, but only relaxed in the interests of commerce, she thereby assented to the conditions imposed by such proclamation that she should not take out goods contraband of war, nor depart until cleared by the collector of customs according to law.
3. As New Orleans was then governed by martial law, a subject of a foreign power entering that port with his vessel under the special license of the proclamation became entitled to the same rights and privileges accorded under the same circumstances to loyal citizens of the United States. Restrictions placed upon them operated equally upon him.
4. Money, silver-plate, and bullion, when destined for hostile use or for the purchase of hostile supplies, are contraband of war. In this case, the determination of the question whether such articles, part of the outward-bound cargo of the vessel, were contraband, devolved upon the commanding general at New Orleans. Believing them to be so, he, in discharge of his duty, ordered them to be removed from her, and her clearance to be withheld until his order should be complied with.
5. Where the detention of the vessel in port was caused by her resistance to the orders of the properly constituted authorities whom she was bound to obey, she preferring such detention to a clearance upon the conditions imposed, — *Held*, that her owner, a subject of Prussia, is not "entitled to any damages" against the United States, under the law of nations or the treaty with that power. 8 Stat. 384.

APPEAL from the Court of Claims.

Mr. Assistant Attorney-General Edwin B. Smith for the appellant.

Mr. J. D. McPherson, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This suit was brought in the Court of Claims under the au-

thority of a joint resolution of both Houses of Congress, passed May 4, 1870, as follows: —

"That the claim of E. Diekelman, a subject of the King of Prussia, for damages for an alleged detention of the ship "Essex" by the military authorities of the United States at New Orleans, in the month of September, 1862, be and is hereby referred to the Court of Claims for its decision in accordance with law, and to award such damages as may be just in the premises, if he may be found to be entitled to any damages."

Before this resolution was passed, the matter of the claim had been the subject of diplomatic correspondence between the governments of the United States and Prussia.

The following article, originally adopted in the treaty of peace between the United States and Prussia, concluded July 11, 1799 (8 Stat. 168), and revived by the treaty concluded May 1, 1828 (8 Stat. 384), was in force when the acts complained of occurred, to wit: —

"Art. XIII. And in the same case, if one of the contracting parties, being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation, and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding; paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not, in that case, be carried into any port, nor further detained, but shall be allowed to proceed on her voyage."

When the "Essex" visited New Orleans, the United States were engaged in the war of the rebellion. The port of that city was, at the very commencement of the war, placed under blockade, and closed against trade and commercial intercourse; but, on the 12th of May, 1862, the President, having become satisfied that the blockade might "be safely relaxed with advantage to the interests of commerce," issued his proclamation, to the effect that from and after June 1 "commercial intercourse, . . . except as to persons, things, and information contraband of war," might "be carried on subject to the laws of the United States, and to the limitations, and in pursuance of the regulations . . . prescribed by the Secretary of the Treasury," and appended to the proclamation. These regulations, so far as they are applicable to the present case, are as follows: —

"1. To vessels clearing from foreign ports and destined to . . . New Orleans, . . . licenses will be granted by consuls of the United States upon satisfactory evidence that the vessels so licensed will convey no persons, property, or information contraband of war either to or from the said ports; which licenses shall be exhibited to the collector of the port to which said vessels may be respectively bound, immediately on arrival, and, if required, to any officer in charge of the blockade; and on leaving either of said ports every vessel will be required to have a clearance from the collector of the customs according to law, showing no violation of the conditions of the license." 12 Stat. 1264.

The "Essex" sailed from Liverpool for New Orleans June 19, 1862, and arrived Aug. 24. New Orleans was then in possession of the military forces of the United States, with General Butler in command. The city was practically in a state of siege by land, but open by sea, and was under martial law.

The commanding general was expressly enjoined by the government of the United States to take measures that no supplies went out of the port which could afford aid to the rebellion; and, pursuant to this injunction, he issued orders in respect to the exportation of money, goods, or property, on account of any person known to be friendly to the Confederacy, and directed the custom-house officers to inform him whenever an attempt was made to send any thing out which might be the subject of investigation in that behalf.

In the early part of September, 1862, General Butler, being still in command, was informed that a large quantity of clothing had been bought in Belgium on account of the Confederate government, and was lying at Matamoras awaiting delivery, because that government had failed to get the means they expected from New Orleans to pay for it; and that another shipment, amounting to a half million more, was delayed in Belgium from coming forward, because of the non-payment of the first shipment. He was also informed that it was expected the first payment would go forward through the agency of some foreign consuls; and this information afterwards proved to be correct.

He was also informed early in September by the custom-house officers, that large quantities of silver-plate and bullion were being shipped on the "Essex," then loading for a foreign port, by persons, one of whom had declared himself an enemy of the United States, and none of whom would enroll themselves as friends; and he thereupon gave directions that the specified articles should be detained, and their exportation not allowed until further orders.

On the 15th September, the loading of the vessel having been completed, the master applied to the collector of the port for his clearance, which was refused in consequence of the orders of General Butler, but without any reasons being assigned by the collector. The next day, he was informed, however, that his ship would not be cleared unless certain specified articles which she had on board were taken out and landed. Much correspondence ensued between General Butler and the Prussian consul at New Orleans in reference to the clearance, in which it was distinctly stated by General Butler that the clearance would not be granted until the specified goods were landed, and that it would be granted as soon as this should be done. Almost daily interviews took place between the master of the vessel and the collector, in which the same statements were made by the collector. The master refused to land the cargo, except upon the return of his bills of lading. Some of these bills were returned, and the property surrendered to the shipper. In another case, the shipper gave an order upon the master for his goods, and they were taken away by force. At a very early stage in the proceeding, the master and the Prussian con-

sul were informed that the objection to the shipment of the articles complained of was that they were contraband.

A part only of the goods having been taken out of the vessel, a clearance was granted her on the 6th of October, and she was permitted to leave the port and commence her voyage.

Upon this state of facts, the Court of Claims gave judgment for Diekelman, from which the United States took an appeal.

One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself.

In this case, Diekelman, claiming to have been injured by the alleged wrongful conduct of the military forces of the United States, made his claim known to his government. It was taken into consideration, and became the subject of diplomatic correspondence between the two nations. Subsequently, Congress, by joint resolution, referred the matter to the Court of Claims "for its decision according to law." The courts of the United States were thus opened to Diekelman for this proceeding. In this way the United States have submitted to the Court of Claims, and through that court upon appeal to us, the determination of the question of their legal liability under all the circumstances of this case for the payment of damages to a citizen of Prussia upon a claim originally presented by his sovereign in his behalf. This requires us, as we think, to consider

the rights of the claimant under the treaty between the two governments, as well as under the general law of nations. For all the purposes of its decision, the case is to be treated as one in which the government of Prussia is seeking to enforce the rights of one of its citizens against the United States in a suit at law, which the two governments have agreed might be instituted for that purpose. We shall proceed upon that hypothesis.

1. As to the general law of nations.

The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain; and this as well in war as in peace, unless it is otherwise provided by treaty. *The Exchange* v. *McFadon*, 7 Cranch, 316. When the "Essex" sailed from Liverpool, the United States were engaged in war. The proclamation under which she was permitted to visit New Orleans made it a condition of her entry that she should not take out goods contraband of war, and that she should not leave until cleared by the collector of customs according to law. Previous to June 1 she was excluded altogether from the port by the blockade. At that date the blockade was not removed, but relaxed only in the interests of commerce. The war still remained paramount, and commercial intercourse subordinate only. When the "Essex" availed herself of the proclamation and entered the port, she assented to the conditions imposed, and cannot complain if she was detained on account of the necessity of enforcing her obligations thus assumed.

The law by which the city and port were governed was martial law. This ought to have been expected by Diekelman when he despatched his vessel from Liverpool. The place had been wrested from the possession of the enemy only a few days before the issue of the proclamation, after a long and desperate struggle. It was, in fact, a garrisoned city, held as an outpost of the Union army, and closely besieged by land. So long as it remained in the possession of the insurgents, it was to them an important blockade-running point, and after its capture the inhabitants were largely in sympathy with the rebellion. The situation was, therefore, one requiring the most active vigil-

ance on the part of the general in command. He was especially required to see that the relaxation of the blockade was not taken advantage of by the hostile inhabitants to promote the interests of the enemy. All this was matter of public notoriety; and Diekelman ought to have known, if he did not in fact know, that although the United States had to some extent opened the port in the interests of commerce, they kept it closed to the extent that was necessary for the vigorous prosecution of the war. When he entered the port, therefore, with his vessel, under the special license of the proclamation, he became entitled to all the rights and privileges that would have been accorded to a loyal citizen of the United States under the same circumstances, but no more. Such restrictions as were placed upon citizens, operated equally upon him. Citizens were governed by martial law. It was his duty to submit to the same authority.

Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed. New Orleans was at this time the theatre of the most active and important military operations. The civil authority was overthrown. General Butler, in command, was the military ruler. His will was law, and necessarily so. His first great duty was to maintain on land the blockade which had theretofore been kept up by sea. The partial opening of the port toward the sea, made it all the more important that he should bind close the military lines on the shore which he held.

To this law and this government the "Essex" subjected herself when she came into port. She went there for gain, and voluntarily assumed all the chances of the war into whose presence she came. By availing herself of the privileges granted by the proclamation, she, in effect, covenanted not to take out of the port "persons, things, or information contraband of war." What is contraband depends upon circumstances. Money and bullion do not necessarily partake of that character; but, when destined for hostile use or to procure hostile supplies, they do. Whether they are so or not, under the circumstances of a particular case, must be determined by some

one when a necessity for action occurs. At New Orleans, when this transaction took place, this duty fell upon the general in command. Military commanders must act to a great extent upon appearances. As a rule, they have but little time to take and consider testimony before deciding. Vigilance is the law of their duty. The success of their operations depends to a great extent upon their watchfulness.

General Butler found on board this vessel articles which he had reasonable cause to believe, and did believe, were contraband, because intended for use to promote the rebellion. It was his duty, therefore, under his express instructions, to see that the vessel was not cleared with these articles on board; and he gave orders accordingly. It matters not now whether the property suspected was in fact contraband or not. It is sufficient for us that he had reason to believe, and in fact did believe, it to be contraband. No attempt has been made to show that he was not acting in good faith. On the contrary, it is apparent, from the finding of the court below, that the existing facts brought to his knowledge were such as to require his prompt and vigorous action in the presence of the imminent danger with which he was surrounded. Certainly enough is shown to make it necessary for this plaintiff to prove the innocent character of the property before he can call upon the United States to respond to him in damages for the conduct of their military commander, upon whose vigilance they relied for safety.

Believing, then, as General Butler did, that the property was contraband, it was his duty to order it out of the ship, and to withhold her clearance until his order was complied with. He was under no obligation to return the bills of lading. The vessel was bound not to take out any contraband cargo. She took all the risks of this obligation when she assumed it, and should have protected herself in her contracts with shippers against the contingency of being required to unload after the goods were on board. If she failed in this, the consequences are upon her, and not the United States. She was operating in the face of war, the chances of which might involve her and her cargo in new complications. She voluntarily assumed the risks of her hazardous enterprise, and must sustain the losses that follow.

Neither does it affect the case adversely to the United States that the property had gone on board without objection from the custom-house officers or the military authorities. It is not shown that its character was known to General Butler or the officers of the custom-house before it was loaded. The engagement of the vessel was not to leave until she had been cleared according to law, and that her clearance might be withheld until with reasonable diligence it could be ascertained that she had no contraband property on board. This is the legitimate effect of the provisions of the treasury regulations, entitling her to a license "upon satisfactory evidence" that she would "convey no persons, property, or information contraband of war, either to or from" the port; and requiring her not to leave until she had "a clearance from the collector of customs, according to law, showing no violation of the license." Her entry into the port was granted as a favor, not as a right, except upon the condition of assent to the terms imposed. If the collector of customs was to certify that the license she held had not been violated, it was his duty to inquire as to the facts before he made the certificate. Every opportunity for the prosecution of this inquiry must be given. Under the circumstances, the closest scrutiny was necessary. If, upon the examination preliminary to the clearance, prohibited articles were found on board, there could be no certificate such as was required, until their removal. It would then be for the vessel to determine whether she would remove the goods and take the clearance, or hold the goods and wait for some relaxation of the rules which detained her in port as long as she had them on board. General Butler only insisted upon her remaining until she removed the property. She elected to remain. There was no time when her clearance would not have been granted if the suspected articles were unloaded.

We are clearly of the opinion that there is no liability to this plaintiff resting upon the United States under the general law of nations.

2. As to the treaty.

The vessel was in port when the detention occurred. She had not broken ground, and had not commenced her voyage. She came into the waters of the United States while an im-

pending war was flagrant, under an agreement not to depart with contraband goods on board. The question is not whether she could have been stopped and detained after her voyage had been actually commenced, without compensation for the loss, but whether she could be kept from entering upon the voyage and detained by the United States within their own waters, held by force against a powerful rebellion, until she had complied with regulations adopted as a means of safety, and to the enforcement of which she had assented, in order to get there. In our opinion, no provision of the treaties in force between the two governments interferes with the right of the United States, under the general law of nations, to withhold a custom-house clearance as a means of enforcing port regulations.

Art. XIII. of the treaty of 1828 contemplates the establishment of blockades, and makes special provision for the government of the respective parties in case they exist. The vessels of one nation are bound to respect the blockades of the other. Clearly the United States had the right to exclude Prussian vessels, in common with those of all other nations, from their ports altogether, by establishing and maintaining a blockade while subduing a domestic insurrection. The right to exclude altogether necessarily carries with it the right of admitting through an existing blockade upon conditions, and of enforcing in an appropriate manner the performance of the conditions after admission has been obtained. It will not be contended that a condition which prohibits the taking out of contraband goods is unreasonable, or that its performance may not be enforced by refusing a clearance until it has been complied with. Neither, in the absence of treaty stipulations to the contrary, can it be considered unreasonable to require goods to be unloaded, if their contraband character is discovered after they have gone on board. In the existing treaties between the two governments there is no such stipulation to the contrary. In the treaty of 1799, Art. VI. is as follows: "That the vessels of either party, loading within the ports or jurisdiction of the other, may not be uselessly harassed or detained, it is agreed that all examinations of goods required by the laws shall be made before they are laden on board the vessel, and that there shall be no examination after." While other articles in the

treaty of 1799 were revived and kept in force by that of 1828, this was not. The conclusion is irresistible, that the high contracting parties were unwilling to continue bound by such a stipulation, and, therefore, omitted it from their new arrangement. It would seem to follow, that, under the existing treaty, the power of search and detention for improper practices continued, in time of peace even, until the clearance had been actually perfected and the vessel had entered on her voyage. If this be the rule in peace, how much more important is it in war for the prevention of the use of friendly vessels to aid the enemy.

Art. XIII. of the treaty of 1799, revived by that of 1828, evidently has reference to captures and detentions after a voyage has commenced, and not to detentions in port, to enforce port regulations. The vessel must be "stopped" in her voyage, not detained in port alone. There must be "captors;" and the vessel must be in a condition to be "carried into port" or detained from "proceeding" after she has been "stopped," before this article can become operative. Under its provisions the vessel "stopped" might "deliver out the goods supposed to be contraband of war," and avoid further "detention." In this case there was no detention upon a voyage, but a refusal to grant a clearance from the port that the voyage might be commenced. The vessel was required to "deliver out the goods supposed to be contraband" before she could move out of the port. Her detention was not under the authority of the treaty, but in consequence of her resistance of the orders of the properly constituted port authorities, whom she was bound to obey. She preferred detention in port to a clearance on the conditions imposed. Clearly her case is not within the treaty. The United States, in detaining, used the right they had under the law of nations and their contract with the vessel, not one which, to use the language of the majority of the Court of Claims, they held under the treaty "by purchase" at a stipulated price.

As we view the case, the claimant is not "entitled to any damages" as against the United States, either under the treaty with Prussia or by the general law of nations.

The judgment of the Court of Claims is, therefore, reversed, and the cause remanded with directions to dismiss the petition.

BOARD OF LIQUIDATION ET AL. *v.* MCCOMB.

1. On the 24th of January, 1874, the legislature of Louisiana passed "the Funding Act," which created a board of liquidation, consisting of the governor and other State officers. Its principal stipulations, aside from that which provided that, prior to the year 1914, the entire State debt should never be increased beyond the sum of fifteen million dollars, are: *First*, that the "consolidated bonds," the issue of which is thereby authorized, shall not exceed in amount fifteen million dollars, or so much thereof as may be necessary for the purpose of consolidating and reducing the floating and bonded debt of the State, amounting to twenty-five million dollars, and consisting of valid outstanding bonds, and valid warrants of the auditor theretofore issued; *secondly*, that they shall only be used for exchange for said debt at the rate of sixty cents in consolidated bonds for one dollar in such bonds and warrants; *thirdly*, that a tax of five and a half mills on the dollar of the assessed value of all the real and personal property of the State shall be annually levied and collected for paying the interest and principal of the bonds, and is set apart and appropriated for that purpose, and no other, any surplus beyond paying interest to be used for the purchase and retirement of the bonds; *fourthly*, that the power of the judiciary, by means of *mandamus*, injunction, and criminal procedure, shall be exerted to carry out the provisions of the act. An amendment of the Constitution was subsequently adopted, which declared that the issue of the consolidated bonds should create a valid contract between each holder thereof and the State, which the latter should not impair; and directed that the tax should be levied and collected without further legislation. Thereafter, on the 2d of March, 1875, the legislature passed an act authorizing the board of liquidation to issue a portion of such consolidated bonds to the Louisiana Levee Company, in liquidation of a debt claimed to be due it under a contract made in 1871. This debt was not one of those to fund which the consolidated bonds had been issued; but the act, under which that contract was made, provided and set apart certain taxes, to be levied and collected throughout the State, to meet the payments which would accrue to the company. The Circuit Court, upon a bill filed for that purpose by a citizen of Delaware, who had surrendered his old bonds, and taken sixty per cent of the amount in consolidated bonds, two millions of which had then been issued, granted an injunction restraining the board from using the consolidated bonds, and from issuing any other State bonds in payment of said pretended debt. *Held*, that as the proposed funding of the levee debt at par in the consolidated bonds destroys all benefits anticipated from the funding, on which benefits those who accepted its terms had a right to rely, and makes an unjust discrimination between one class of creditors and another, the injunction, so far as it restrained the funding of said debt in consolidated bonds issued, or to be issued, under the act of Jan. 24, 1874, was properly granted.

2. Although a State, without its consent, cannot be sued by an individual, nor can a court substitute its own discretion for that of executive officers, in matters belonging to their proper jurisdiction, yet, when a plain official

duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

Mr. J. A. Campbell and *Mr. J. Q. A. Fellows* for the appellants.

Mr. Thomas J. Semmes and *Mr. Robert Mott*, *contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

The decree appealed from in this case was for a perpetual injunction to restrain the Board of Liquidation of the State of Louisiana from using the bonds known as the consolidated bonds of the State, for the liquidation of a certain debt claimed to be due from the State to the Louisiana Levee Company, and from issuing any other State bonds in payment of said pretended debt.

The decree was made upon a bill filed by the appellee, McComb, a citizen of Delaware, in which he alleges that he is a holder of some of these consolidated bonds, and that the employment of the bonds for the purpose proposed, namely, the payment of the claim of the Levee Company, will be a violation of the pledges given by the act creating the bonds, and will greatly depreciate their value. The bill sets out the circumstances of the case, and prays for an injunction. The defendants demurred; and, the demurrer being overruled, they declined to answer, and stood upon the supposed defects of the plaintiff's case. Thereupon the decree appealed from was rendered; and the question is, whether the injunction ought to have been decreed upon the statements made by the bill.

It appears that, by an act of the legislature of Louisiana, passed the 24th of January, 1874, called the Funding Act, the governor of the State, and other State officers, were created a

board of liquidation, with power to issue bonds of the State to an amount not to exceed $15,000,000, or so much thereof as might be necessary for the purpose of consolidating and reducing the floating and bonded debt of the State, and to be called "consolidated bonds of the State of Louisiana;" which bonds were to bear date the 1st of January, 1874, and to be payable in the year 1914, with interest at seven per cent per annum. The act provided that these bonds should be exchanged by the board for valid outstanding bonds of the State and valid warrants of the auditor issued prior to the passage of the act (except warrants issued in payment of constitutional officers of the State), at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and warrants; and that they should be used for no other purpose. An annual tax of five and a half mills on the dollar of the assessed value of all the property of the State was levied, and directed to be collected, to pay the interest on these bonds, and to purchase and retire them. Other provisions were added, making it penal for the officers to divert the funds thus provided, or to obstruct the execution of the act, or to fail in the performance of any of the official duties required by it; and it was declared that no court or judge should have power to enjoin the payment of the bonds or the collection of the tax provided therefor. The eleventh section further declared, that each provision of the act should be a contract between the State and each and every holder of the bonds issued under the act: and section thirteen provided that the entire State debt, prior to the year 1914, should never be increased beyond the sum of $15,000,000 authorized by the act; it being declared to be the intent and object thereof, and of the exchanges to be effected under it, to reduce and restrict the whole indebtedness of the State to a sum not exceeding $15,000,000, and to agree with the holders of the consolidated bonds that said indebtedness should not be increased beyond that sum during said period. On the day of passing this act, the general assembly passed another act, proposing to the people of the State an amendment to the constitution of the State, which was adopted at the ensuing election; and provided that the issue of the consolidated bonds authorized by the funding act should create a valid contract between the State and each

holder thereof, which the State should not impair; prohibited the issue of any injunction against the payment of the bonds or levy of the tax; directed that the latter should be levied and collected without further legislation; and declared that, whenever the debt of the State should be reduced below $25,000,000, the constitutional limit should remain at the lowest point reached, until it was reduced to $15,000,000, beyond which it should not be increased.

The language of this clause is explained by the fact that, in 1870, a constitutional provision had been adopted limiting the State debt to $25,000,000; and the further fact, stated in the bill, that in 1874, when the funding act was passed, the outstanding bonds and valid warrants fundable under the act equalled this amount; so that, at sixty cents on the dollar, the debt to be funded would require the issue of the whole $15,000,000 of consolidated bonds. Besides these classes of debts, others to a considerable amount were then outstanding, as will appear further on.

The board of liquidation created by the funding act entered upon the performance of their duties, and, up to the commencement of proceedings in this case, they had issued a little over $2,000,000 under the act.

On the 2d of March, 1875, the general assembly passed an act authorizing the board to issue a portion of the above-mentioned consolidated bonds to the Louisiana Levee Company, in liquidation of a debt claimed to be due it under a contract made with the State in 1871, by which that company was to reconstruct and keep in repair the levees on the Mississippi River and its branches and outlets. The act of 1871, in and by which this contract was made, had provided and set apart certain taxes to be levied and collected throughout the State, to meet the payments which would accrue to the company. But it seems that these taxes had failed to reach their destination, as a committee appointed by the act of 1875, to investigate the subject, reported that there was $1,700,000 still due the company, which had accrued prior to October, 1873, and which the act authorized the board of liquidation to pay in the said consolidated bonds. This debt was not one of the debts to fund which the consolidated bonds had been created. It was not

represented by outstanding bonds of the State, nor by valid warrants of the State auditor; and the complainant in this case, in his bill, insists that it is not a debt of the State at all, being provided for by the special taxes appropriated for its payment. Another objection made to the proposal to fund it is, that it is to be paid in full, whilst the funding act authorized the payment of only sixty cents on the dollar of the debts to be replaced by the issue of the consolidated bonds, — the great object of the act being to effect a reduction of the State debt within manageable limits. It is insisted that the act of 1875, authorizing the appropriation of consolidated bonds to the payment of the levee debt, defeats this scheme, and impairs the validity of the contract made with those who have accepted the bonds according to the terms of the Funding Act, and is therefore void. The plaintiff, being a holder of these bonds, filed his bill for an injunction to prevent the consummation of the wrong which he alleges will be committed by carrying out the act of 1875.

The decree of the court below is sought to be sustained on several grounds. In the first place, the appellee contends, that, in consequence of the provisions of the Funding Act, and the constitutional amendment adopted in confirmation of it, the State debt cannot be increased, whereas the assumption of the levee debt (which, it is contended, is not a debt of the State) will directly increase it. As a part of the same proposition, it is contended that the State has deprived itself of the right to issue any bonds at all, except the consolidated bonds created by the Funding Act, to be exchanged for outstanding debts already existing.

We are not prepared to say that the legislature of a State can bind itself, without the aid of a constitutional provision, not to create a further debt, or not to issue any more bonds. Such an engagement could hardly be enforced against an individual; and, when made on the part of a State, it involves, if binding, a surrender of a prerogative which might seriously affect the public safety. The right to procure the necessary means of carrying on the government by taxation and loans is essential to the political independence of every commonwealth. By the internal constitution of a government, it is true its legis-

lature may be temporarily restricted in this respect, as we have seen is the case in Louisiana. But how, or at whose instance, such restriction can be enforced, may sometimes be a question of some difficulty. In a clear case, of course, an unconstitutional enactment will be treated as void, as against the rights of an individual. But there are many constitutional provisions mandatory upon the legislature which cannot be directly enforced, — the duty, for example, when creating a debt, to provide adequate ways and means for its payment. It affects the public generally, but no individual in particular, in such manner as to give him a legal remedy. So the State debt may be increased beyond the prescribed limit, without admitting of judicial redress. It may arise indirectly in the accomplishment of public works necessary to the general safety and welfare, in such a manner as to make it difficult to tell when the line is over-passed, or whose claims arose after it had been over-passed. Executory contracts for the preservation of the public levees may be greatly swollen by work rendered necessary by the occurrence of unprecedented floods. Many such cases, and analogous ones, might be readily supposed, in which it would be utterly impossible to observe the prescribed limits of State indebtedness. And as the amount of State debt is a matter of eminently public concern, and the enactment of laws on the subject cannot be controlled by the judiciary, it may admit of doubt, whether, in any case, the courts, at the instance of an individual citizen, even a tax-payer (who would be most directly interested), would undertake to restrain the State officers in the execution of such laws. At all events, the case should be a very clear one, to induce them to interpose by injunction or *mandamus*. But where a person is neither a citizen nor a tax-payer, but is a citizen of another State, and presents himself simply in the character of a creditor of the State, the courts would hardly be justified in interfering on his behalf to prevent a supposed violation of the State constitution by an increase of the State debt. His interest is too remote to give him a standing in court for any such purpose.

But in the case before us, the assumption on which this part of the case is based does not appear to be well founded. It is not the creation of a new indebtedness which the board of

liquidation propose. The amount payable to the levee company for its services is none the less a debt, because it is already provided for by a special tax; and, so far as the State is concerned, it is no more of a public burden when chargeable upon one fund than it is when chargeable upon another. If the general assembly, with the company's assent, sees fit to alter the mode of payment, it is difficult to see who else has a right to complain, unless specially injured by the change. The tax formerly appropriated to it will be liberated and made available for other State purposes. The other creditors of the State cannot possibly be injured, if nothing is appropriated to the payment of the claim which has been pledged to them.

The plea of increase of State indebtedness, therefore, cannot avail in this case; and so much of the decree as prohibits the levee company from receiving any State bonds whatever in liquidation of its claim, is untenable, and must be reversed. The claim itself, for any thing that appears in the record to the contrary, is a perfectly valid one against the State. It is not even alleged to have arisen after the State indebtedness had arrived to the constitutional limit of $25,000,000; nor is it denied that it was founded on a good consideration.

The question, however, remains, whether, even supposing the levee debt to be a valid one, it can be lawfully funded in the consolidated bonds, in view of the other stipulations of the Funding Act.

The principal stipulations of this act, aside from that respecting the increase of the State debt, are: *First*, that the consolidated bonds shall not exceed in amount $15,000,000, or so much thereof as may be necessary, — that is, necessary for the purpose of consolidating and reducing the floating and bonded debt of the State at sixty cents on the dollar; *secondly*, that they shall only be used for exchange for said floating and bonded debt, as designated in the act, which does not embrace the levee debt in question; and that such exchange shall be at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and warrants; *thirdly*, that a tax of five and a half mills on the dollar of the assessed value of all the real and personal property of the State shall be annually levied and collected for paying the interest and principal of the bonds, and

is set apart and appropriated for that purpose, and no other, any surplus beyond paying interest to be used for the purchase and retirement of the bonds; *fourthly*, that the power of the judiciary, by means of *mandamus*, injunction, and criminal procedure, shall be exerted to carry out the provisions of the act.

The precise manner in which these stipulations will be violated by the proposed funding of $1,700,000 of the levee debt at par, as insisted by the plaintiff, is this: *First*, that the entire issue of bonds will be increased by that amount, thereby diminishing the relative security provided for each bond. *Secondly*, that the levee company will receive the full amount of its debt, whilst the complainant, and others in like case with him, have accepted sixty cents on the dollar for their old bonds, on the faith that no one should receive any more. *Thirdly*, that the benefits of the scheme propounded by the Funding Act will be lost by such a violation of it, and all the advantages anticipated by the complainant and others in surrendering their original debts will fail.

In answer to the first of these supposed violations, — namely, that the issue of consolidated bonds will be increased by the amount of the levee debt, — it may be said, that the amount of the consolidated bonds is expressly limited to $15,000,000; and there is no pretence that the board of liquidation intend to issue more. The proposed appropriation might have the effect of excluding from the benefit of the Funding Act some of the outstanding obligations of the State originally intended to be embraced within its provisions. But it will not increase the total amount of the consolidated bonds. The complainant can hardly contend that he has a right to prevent the State from using the bonds for funding its other debts, if those for which they were intended should not be surrendered. It is a question of power. The Funding Act gives the board of liquidation power to issue $15,000,000 of these bonds, or so much thereof as may be necessary to fund the outstanding floating and bonded debt; and it is admitted that the amount of that debt is sufficient to absorb the whole $15,000,000. He cannot say, "I am entitled to the chances of some of the designated creditors not coming in." He cannot be injured, so far as this objection goes, if the amount of bonds ultimately

issued does not exceed the limit of $15,000,000. It may very well be that some of the creditors whose debts were intended to be funded will refuse to come in and accept the terms of the Funding Act. If that should be so, it might greatly embarrass the financial affairs of the State to have to appropriate the entire tax of five and a half mills to a mere fraction of the debt it was intended to provide for, which was $15,000,000. To tie the hands of the State under such circumstances would be to give the complainant the advantage of a technicality, to the great injury of the State. It would be adhering to form rather than to substance. The complainant consented, when he took his bonds, that there might be $15,000,000 of them issued. He cannot justly complain if that amount is not exceeded, even though the debts funded thereby are not precisely those specified in the act, provided the material terms of the act are complied with. In any case, those that are not funded must be provided for in some other way; and, unless some special reason exists why one debt should be funded instead of another, the complainant cannot be injured. He has failed to show any such reason in his bill.

If, therefore, the substitution of one debt for another, in the participation of the benefits of the Funding Act, were all that is proposed to be done by the defendants, the complainant would have great difficulty in maintaining a bill in equity for the purpose of enjoining the officers of the State from carrying out the law passed in 1875. But this is not all that they propose to do. The proposed funding of the levee debt in the manner provided by that act would break up the whole scheme of the Funding Act, and destroy all the benefits anticipated from it, — benefits on which those who accepted its terms had a right to rely.

It was the special object of that scheme, by providing extraordinary security and sanctions for the payment of the consolidated bonds, to induce the public creditors to reduce their claims forty per cent, and exchange them for these new securities, and thus diminish the aggregate indebtedness of the State $10,000,000. This result would enhance the general credit of the State, and enable it to meet all its obligations and engagements with more certainty and less liability to failure.

The complainant and others who have surrendered their old bonds, and taken sixty per cent of the amount in the new bonds in full satisfaction, did so on the faith that the scheme should be carried into effect as a whole, and that all others taking the benefit of the act should be subject to the same condition that they were. It cannot be supposed that they would have made the sacrifice they did, without relying, as they had a right to do, on this essential feature of the scheme being rigidly carried out. The proposal to fund the levee debt at par entirely interferes with its accomplishment, and makes an unjust discrimination between one class of creditors and another.

It is this aspect of the act of 1875, and the proposed proceedings under it, of which the petitioner has special reason to complain, and which furnishes substantial ground for giving him relief.

True, it may be objected even to this view, as to the former one, that the bondholders of the State may refuse to come in and make the sacrifice required by the act; and, in such case, the State ought not to be for ever precluded from making such other disposition of the unissued consolidated bonds as may be beneficial to it, without being injurious to those who have accepted such bonds. If such a state of things should arise, after due time and opportunity shall have been given to test the practicability of carrying out the scheme, it will, undoubtedly, furnish proper ground for modified legislation, having due regard to the rights already vested. But the act in question was passed within three months after the adoption of the constitutional amendment confirmatory of the Funding Act, and before its practicability could possibly have been ascertained; and no attempt was made by the act to reinstate the bondholders who had come in, to their former position, or to return to them the forty per cent of their claims which they had surrendered, or in any manner to obviate the inequality and injustice to which they would be subjected by the change of plan.

In our judgment, therefore, the court below was right in granting the injunction as to the consolidated bonds, if the defendants, occupying the official position they do, are amenable to such a process.

On this branch of the subject the numerous and well-considered cases heretofore decided by this court leave little to be said. The objections to proceeding against State officers by *mandamus* or injunction are: first, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void. *Osborn* v. *Bank of the United States*, 9 Wheat. 859; *Davis* v. *Gray*, 16 Wall. 220.

Decree affirmed, so far as it prohibits the funding of the debt due to the Louisiana Levee Company in the consolidated bonds issued or to be issued under the Funding Act of Jan. 24, 1874; *and reversed as to so much thereof as prohibits the issue of any other bonds to said Louisiana Levee Company in liquidation of said debt.*

MR. JUSTICE FIELD did not sit in this case, and took no part in the decision.

UNITED STATES *v.* CRUIKSHANK ET AL.

1. Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. The duty of a government to afford protection is limited always by the power it possesses for that purpose.
2. There is in our political system a government of each of the several States, and a government of the United States. Each is distinct from the others, and has citizens of its own, who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State; but his rights of citizenship under one of these governments will be different from those he has under the other.
3. The government of the United States, although it is, within the scope of its powers, supreme and beyond the States, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the States.
4. The right of the people peaceably to assemble for lawful purposes, with the obligation on the part of the States to afford it protection, existed long before the adoption of the Constitution. The first amendment to the Constitution, prohibiting Congress from abridging the right to assemble and petition, was not intended to limit the action of the State governments in respect to their own citizens, but to operate upon the national government alone. It left the authority of the States unimpaired, added nothing to the already existing powers of the United States, and guaranteed the continuance of the right only against Congressional interference. The people, for their protection in the enjoyment of it, must, therefore, look to the States, where the power for that purpose was originally placed.
5. The right of the people peaceably to assemble, for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or duties of the national government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed by the United States. The very idea of a government republican in form implies that right, and an invasion of it presents a case within the sovereignty of the United States.
6. The right to bear arms is not granted by the Constitution; neither is it in any manner dependent upon that instrument for its existence. The second amendment means no more than that it shall not be infringed by Congress, and has no other effect than to restrict the powers of the national government.
7. Sovereignty, for the protection of the rights of life and personal liberty within the respective States, rests alone with the States.
8. The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law, and from denying to

any person within its jurisdiction the equal protection of the laws; but it adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

9. In *Minor* v. *Happersett*, 21 Wall. 178, this court decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In *United States* v. *Reese et al.*, *supra*, p. 214, it held that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been.

10. The counts of an indictment which charge the defendants with having banded and conspired to injure, oppress, threaten, and intimidate citizens of the United States, of African descent, therein named; and which in substance respectively allege that the defendants intended thereby to hinder and prevent such citizens in the free exercise and enjoyment of rights and privileges granted and secured to them in common with other good citizens by the constitution and laws of the United States; to hinder and prevent them in the free exercise of their right peacefully to assemble for lawful purposes; prevent and hinder them from bearing arms for lawful purposes; deprive them of their respective several lives and liberty of person without due process of law; prevent and hinder them in the free exercise and enjoyment of their several right to the full and equal benefit of the law; prevent and hinder them in the free exercise and enjoyment of their several and respective right to vote at any election to be thereafter by law had and held by the people in and of the State of Louisiana, or to put them in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted at an election theretofore had and held according to law by the people of said State, — do not present a case within the sixth section of the Enforcement Act of May 31, 1870 (16 Stat. 141). To bring a case within the operation of that statute, it must appear that the right the enjoyment of which the conspirators intended to hinder or prevent was one granted or secured by the constitution or laws of the United States. If it does not so appear, the alleged offence is not indictable under any act of Congress.

11. The counts of an indictment which, in general language, charge the defendants with an intent to hinder and prevent citizens of the United States, of African descent, therein named, in the free exercise and enjoyment of the rights, privileges, immunities, and protection, granted and secured to them

respectively as citizens of the United States, and of the State of Louisiana, because they were persons of African descent, and with the intent to hinder and prevent them in the several and free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States, do not specify any particular right the enjoyment of which the conspirators intended to hinder or prevent, are too vague and general, lack the certainty and precision required by the established rules of criminal pleading, and are therefore not good and sufficient in law.

12. In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." The indictment must set forth the offence with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged; and every ingredient of which the offence is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading, that, where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it must state the species, — it must descend to particulars. The object of the indictment is, — first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

13. By the act under which this indictment was found, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court. The indictment should, therefore, state the particulars, to inform the court as well as the accused. It must appear from the indictment that the acts charged will, if proved, support a conviction for the offence alleged.

ERROR to the Circuit Court of the United States for the District of Louisiana.

This was an indictment for conspiracy under the sixth section of the act of May 30, 1870, known as the Enforcement Act (16 Stat. 140), and consisted of thirty-two counts.

The *first* count was for banding together, with intent "unlawfully and feloniously to injure, oppress, threaten, and intimidate" two citizens of the United States, "of African descent and persons of color," "with the unlawful and felonious intent thereby" them "to hinder and prevent in their respective free

exercise and enjoyment of their lawful right and privilege to peaceably assemble together with each other and with other citizens of the said United States for a peaceable and lawful purpose."

The *second* avers an intent to hinder and prevent the exercise by the same persons of the "right to keep and bear arms for a lawful purpose."

The *third* avers an intent to deprive the same persons "of their respective several lives and liberty of person, without due process of law."

The *fourth* avers an intent to deprive the same persons of the "free exercise and enjoyment of the right and privilege to the full and equal benefit of all laws and proceedings for the security of persons and property" enjoyed by white citizens.

The *fifth* avers an intent to hinder and prevent the same persons "in the exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the said United States, and as citizens of the said State of Louisiana, by reason of and for and on account of the race and color" of the said persons.

The *sixth* avers an intent to hinder and prevent the same persons in "the free exercise and enjoyment of the several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana."

The *seventh* avers an intent "to put in great fear of bodily harm, injure, and oppress" the same persons, "because and for the reason" that, having the right to vote, they had voted.

The *eighth* avers an intent "to prevent and hinder" the same persons "in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured" to them "by the constitution and laws of the United States."

The next eight counts are a repetition of the first eight, except that, instead of the words "band together," the words "combine, conspire, and confederate together" are used. Three of the defendants were found guilty under the first sixteen counts, and not guilty under the remaining counts.

The parties thus convicted moved in arrest of judgment on the following grounds: —

1. Because the matters and things set forth and charged in the several counts, one to sixteen inclusive, do not constitute offences against the laws of the United States, and do not come within the purview, true intent, and meaning of the act of Congress, approved 31st May, 1870, entitled "*An Act to enforce the right of citizens of the United States*," &c.

2. Because the matters and things in the said indictment set forth and charged do not constitute offences cognizable in the Circuit Court, and do not come within its power and jurisdiction.

3. Because the offences created by the sixth section of the act of Congress referred to, and upon which section the aforesaid sixteen counts are based, are not constitutionally within the jurisdiction of the courts of the United States, and because the matters and things therein referred to are judicially cognizable by State tribunals only, and legislative action thereon is among the constitutionally reserved rights of the several States.

4. Because the said act, in so far as it creates offences and imposes penalties, is in violation of the Constitution of the United States, and an infringement of the rights of the several States and the people.

5. Because the eighth and sixteenth counts of the indictment are too vague, general, insufficient, and uncertain, to afford the accused proper notice to plead and prepare their defence, and set forth no specific offence under the law.

6. Because the verdict of the jury against the defendants is not warranted or supported by law.

On this motion the opinions of the judges were divided, that of the presiding judge being that the several counts in question are not sufficient in law, and do not contain charges of criminal matter indictable under the laws of the United States; and that the motion in arrest of judgment should be granted. The case comes up at the instance of the United States, on certificate of this division of opinion.

Sect. 1 of the Enforcement Act declares, that all citizens of the United States, otherwise qualified, shall be allowed to vote at all elections, without distinction of race, color, or previous servitude.

Sect. 2 provides, that, if by the law of any State or Territory a prerequisite to voting is necessary, equal opportunity for it shall be given to all, without distinction, &c.; and any person charged with the duty of furnishing the prerequisite, who refuses or knowingly omits to give full effect to this section, shall be guilty of misdemeanor.

Sect. 3 provides, that an offer of performance, in respect to the prerequisite, when proved by affidavit of the claimant, shall be equivalent to performance; and any judge or inspector of election who refuses to accept it shall be guilty, &c.

Sect. 4 provides, that any person who, by force, bribery, threats, intimidation, or other unlawful means, hinders, delays, prevents, or obstructs any citizen from qualifying himself to vote, or combines with others to do so, shall be guilty, &c.

Sect. 5 provides, that any person who prevents, hinders, controls, or intimidates any person from exercising the right of suffrage, to whom it is secured by the fifteenth amendment, or attempts to do so, by bribery or threats of violence, or deprivation of property or employment, shall be guilty, &c.

The sixth section is as follows: —

"That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provisions of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court, — the fine not to exceed $5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the constitution or laws of the United States."

This case was argued at the October Term, 1874, by *Mr. Attorney-General Williams* and *Mr. Solicitor-General Phillips* for the plaintiff in error; and by *Mr. Reverdy Johnson*, *Mr. David Dudley Field*, *Mr. Philip Phillips*, and *Mr. R. H. Marr* for the defendants in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case comes here with a certificate by the judges of the Circuit Court for the District of Louisiana that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon sect. 6 of the Enforcement Act of May 31, 1870. That section is as follows: —

"That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court, — the fine not to exceed $5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the constitution or laws of the United States." 16 Stat. 141.

The question certified arose upon a motion in arrest of judgment after a verdict of guilty generally upon the whole sixteen counts, and is stated to be, whether "the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States."

The general charge in the first eight counts is that of "banding," and in the second eight, that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the constitution and laws of the United States."

The offences provided for by the statute in question do not consist in the mere "banding" or "conspiring" of two or

more persons together, but in their banding or conspiring with the intent, or for any of the purposes, specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress.

We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. *Slaughter-House Cases*, 16 Wall. 74.

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate States, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated States. For this reason, the people of the United States, "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for

the common defence, promote the general welfare, and secure the blessings of liberty" to themselves and their posterity (Const. Preamble), ordained and established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law, and made its rule of action.

The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States; but beyond, it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.

The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace, in the assault. So, too, if one passes counterfeited coin of the United States within a State, it may be an offence against the United States and the State: the United States, because it discredits the coin; and the State, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship

which owes allegiance to two sovereignties, and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction.

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the constitution or laws of the United States.

The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 211, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in *Gibbons* v. *Ogden*, id. 203, subject to State jurisdic-

tion. Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government.

The first amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone. *Barron* v. *The City of Baltimore*, 7 Pet. 250; *Lessee of Livingston* v. *Moore*, id. 551; *Fox* v. *Ohio*, 5 How. 434; *Smith* v. *Maryland*, 18 id. 76; *Withers* v. *Buckley*, 20 id. 90; *Pervear* v. *The Commonwealth*, 5 Wall. 479; *Twitchell* v. *The Commonwealth*, 7 id. 321; *Edwards* v. *Elliott*, 21 id. 557. It is now too late to question the correctness of this construction. As was said by the late Chief Justice, in *Twitchell* v. *The Commonwealth*, 7 Wall. 325, "the scope and application of these amendments are no longer subjects of discussion here." They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in

these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York* v. *Miln*, 11 Pet. 139, the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.

The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, "of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy

to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bank of Columbia* v. *Okely*, 4 Wheat. 244, it secures "the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in "the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States; and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens." There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add any thing

to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

No question arises under the Civil Rights Act of April 9, 1866 (14 Stat. 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, because, as has already been stated, it is nowhere alleged in these counts that the wrong contemplated against the rights of these citizens was on account of their race or color.

Another objection is made to these counts, that they are too vague and uncertain. This will be considered hereafter, in connection with the same objection to other counts.

The sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent, and colored, "in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana, or by the people of and in the parish of Grant aforesaid." In *Minor* v. *Happersett*, 21 Wall. 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In *United States* v. *Reese et al.*, *supra*, p. 214, we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on

account of race, &c., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.

Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the constitution or laws of the United States. We may suspect that race was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offence, and cannot be supplied by implication. Every thing essential must be charged positively, and not inferentially. The defect here is not in form, but in substance.

The seventh and fifteenth counts are no better than the sixth and fourteenth. The intent here charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted "at an election before that time had and held according to law by the people of the said State of Louisiana, in said State, to wit, on the fourth day of November, A.D. 1872, and at divers other elections by the people of the State, also before that time had and held according to law." There is nothing to show that the elections voted at were any other than State elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a State. Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States. If a State cannot protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution (art. 4, sect. 4); but it applies to no case like this.

We are, therefore, of the opinion that the first, second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fourteenth,

and fifteenth counts do not contain charges of a criminal nature made indictable under the laws of the United States, and that consequently they are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution.

We come now to consider the fifth and thirteenth and the eighth and sixteenth counts, which may be brought together for that purpose. The intent charged in the fifth and thirteenth is "to hinder and prevent the parties in their respective free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States, and as citizens of said State of Louisiana," "for the reason that they, . . . being then and there citizens of said State and of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof;" and in the eighth and sixteenth, to hinder and prevent them "in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States." The same general statement of the rights to be interfered with is found in the fifth and thirteenth counts.

According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offence in the language of the statute, but whether the offence has here been described at all. The statute provides for the punishment of those who conspire "to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States." These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all, and singular" the rights granted them by the Constitution, &c. There is no specification of any particular right. The language is broad enough to cover all.

In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be in-

formed of the nature and cause of the accusation." Amend. VI. In *United States* v. *Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offence "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in *United States* v. *Cook*, 17 Wall. 174, that "every ingredient of which the offence is composed must be accurately and clearly alleged." It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, — it must descend to particulars. 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offence must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court

may see that they are in fact illegal. *State* v. *Parker*, 43 N. H. 83; *State* v. *Keach*, 40 Vt. 118; *Alderman* v. *The People*, 4 Mich. 414; *State* v. *Roberts*, 34 Me. 32. In Maine, it is an offence for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the State prison (*State* v. *Roberts*); but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been "unlawfully and wickedly to commit each, every, all, and singular the crimes punishable by imprisonment in the State prison." All crimes are not so punishable. Whether a particular crime be such a one or not, is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear — that is to say, appear from the indictment, without going further — that the acts charged will, if proved, support a conviction for the offence alleged.

But it is needless to pursue the argument further. The conclusion is irresistible, that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them.

The order of the Circuit Court arresting the judgment upon the verdict is, therefore, affirmed; and the cause remanded, with instructions to discharge the defendants.

MR. JUSTICE CLIFFORD dissenting.

I concur that the judgment in this case should be arrested, but for reasons quite different from those given by the court.

Power is vested in Congress to enforce by appropriate legislation the prohibition contained in the fourteenth amendment of the Constitution; and the fifth section of the Enforcement Act provides to the effect, that persons who prevent, hinder, control, or intimidate, or who attempt to prevent, hinder, control, or intimidate, any person to whom the right of suffrage is secured or guaranteed by that amendment, from exercising, or in exercising such right, by means of bribery or threats; of depriving such person of employment or occupation; or of ejecting such person from rented house, lands, or other property; or by threats of refusing to renew leases or contracts for labor; or by threats of violence to himself or family, — such person so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined or imprisoned, or both, as therein provided. 16 Stat. 141.

Provision is also made, by sect. 6 of the same act, that, if two or more persons shall band or conspire together, or go in disguise, upon the public highway, or upon the premises of another, with intent to violate any provision of that act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution and laws of the United States, or because of his having exercised the same, such persons shall be deemed guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, and be further punished as therein provided.

More than one hundred persons were jointly indicted at the April Term, 1873, of the Circuit Court of the United States for the District of Louisiana, charged with offences in violation of the provisions of the Enforcement Act. By the record, it appears that the indictment contained thirty-two counts, in two series of sixteen counts each: that the first series were drawn under the fifth and sixth sections of the act; and that the second series were drawn under the seventh section of the same act; and that the latter series charged that the prisoners are guilty of murder committed by them in the act of violating some of the provisions of the two preceding sections of that act.

Eight of the persons named in the indictment appeared on

the 10th of June, 1874, and went to trial under the plea of not guilty, previously entered at the time of their arraignment. Three of those who went to trial — to wit, the three defendants named in the transcript — were found guilty by the jury on the first series of the counts of the indictment, and not guilty on the second series of the counts in the same indictment.

Subsequently the convicted defendants filed a motion for a new trial, which motion being overruled they filed a motion in arrest of judgment. Hearing was had upon that motion; and the opinions of the judges of the Circuit Court being opposed, the matter in difference was duly certified to this court, the question being whether the motion in arrest of judgment ought to be granted or denied.

Two only of the causes of arrest assigned in the motion will be considered in answering the questions certified: (1.) Because the matters and things set forth and charged in the several counts in question do not constitute offences against the laws of the United States, and do not come within the purview, true intent, and meaning of the Enforcement Act. (2.) Because the several counts of the indictment in question are too vague, insufficient, and uncertain to afford the accused proper notice to plead and prepare their defence, and do not set forth any offence defined by the Enforcement Act.

Four other causes of arrest were assigned; but, in the view taken of the case, it will be sufficient to examine the two causes above set forth.

Since the questions were certified into this court, the parties have been fully heard in respect to all the questions presented for decision in the transcript. Questions not pressed at the argument will not be considered; and, inasmuch as the counsel in behalf of the United States confined their arguments entirely to the thirteenth, fourteenth, and sixteenth counts of the first series in the indictment, the answers may well be limited to these counts, the others being virtually abandoned. Mere introductory allegations will be omitted as unimportant, for the reason that the questions to be answered relate to the allegations of the respective counts describing the offence.

As described in the thirteenth count, the charge is, that the

defendants did, at the time and place mentioned, combine, conspire, and confederate together, between and among themselves, for and with the unlawful and felonious intent and purpose one Levi Nelson and one Alexander Tillman, each of whom being then and there a citizen of the United States, of African descent, and a person of color, unlawfully and feloniously to injure, oppress, threaten, and intimidate, with the unlawful and felonious intent thereby the said persons of color, respectively, then and there to hinder and prevent in their respective and several free exercise and enjoyment of the rights, privileges, and immunities, and protection, granted and secured to them respectively as citizens of the United States and citizens of the State, by reason of their race and color; and because that they, the said persons of color, being then and there citizens of the State and of the United States, were then and there persons of African descent and race, and persons of color, and not white citizens thereof; the same being a right or privilege granted or secured to the said persons of color respectively, in common with all other good citizens of the United States, by the Federal Constitution and the laws of Congress.

Matters of law conceded, in the opinion of the court, may be assumed to be correct without argument; and, if so, then discussion is not necessary to show that every ingredient of which an offence is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested before sentence, or be reversed on a writ of error. *United States* v. *Cook*, 17 Wall. 174.

Offences created by statute, as well as offences at common law, must be accurately and clearly described in an indictment; and, if the offence cannot be so described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the indictment must be expanded to that extent, as it is universally true that no indictment is sufficient which does not accurately and clearly allege all the ingredients of which the offence is composed, so as to bring the accused within the true intent and meaning of the statute defining the offence. Authorities of great weight, besides those referred to by me, in the dissenting opinion just read,

may be found in support of that proposition. 2 East, P. C. 1124; *Dord* v. *People*, 9 Barb. 675; *Ike* v. *State*, 23 Miss. 525; *State* v. *Eldridge*, 7 Eng. 608.

Every offence consists of certain acts done or omitted under certain circumstances; and, in the indictment for the offence, it is not sufficient to charge the accused generally with having committed the offence, but all the circumstances constituting the offence must be specially set forth. Arch. Cr. Pl., 15th ed., 43.

Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens thereof; and the fourteenth amendment also provides, that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Congress may, doubtless, prohibit any violation of that provision, and may provide that any person convicted of violating the same shall be guilty of an offence, and be subject to such reasonable punishment as Congress may prescribe.

Conspiracies of the kind described in the introductory clause of the sixth section of the Enforcement Act are explicitly forbidden by the subsequent clauses of the same section; and it may be that if the indictment was for a conspiracy at common law, and was pending in a tribunal having jurisdiction of common-law offences, the indictment in its present form might be sufficient, even though it contains no definite allegation whatever of any particular overt act committed by the defendants in pursuance of the alleged conspiracy.

Decided cases may doubtless be found in which it is held that an indictment for a conspiracy, at common law, may be sustained where there is an unlawful agreement between two or more persons to do an unlawful act, or to do a lawful act by unlawful means; and authorities may be referred to which support the proposition, that the indictment, if the conspiracy is well pleaded, is sufficient, even though it be not alleged that any overt act had been done in pursuance of the unlawful combination.

Suffice it to say, however, that the authorities to that effect are opposed by another class of authorities equally respectable, and even more numerous, which decide that the indictment is

bad unless it is alleged that some overt act was committed in pursuance of the intent and purpose of the alleged conspiracy; and in all the latter class of cases it is held, that the overt act, as well as the unlawful combination, must be clearly and accurately alleged.

Two reasons of a conclusive nature, however, may be assigned which show, beyond all doubt, that it is not necessary to enter into the inquiry which class of those decisions is correct.

1. Because the common law *is not a source of jurisdiction* in the circuit courts, nor in any other Federal court.

Circuit courts have no common-law jurisdiction of offences of any grade or description; and it is equally clear that the appellate jurisdiction of the Supreme Court does not extend to any case or any question, in a case not within the jurisdiction of the subordinate Federal courts. *State* v. *Wheeling Bridge Co.*, 13 How. 563; *United States* v. *Hudson et al.*, 7 Cranch, 32.

2. Because it is conceded that the offence described in the indictment is an offence created and defined by an act of Congress.

Indictments for offences created and defined by statute must in all cases follow the words of the statute: and, where there is no departure from that rule, the indictment is in general sufficient, except in cases where the statute is elliptical, or where, by necessary implication, other constituents are component parts of the offence; as where the words of the statute defining the offence have a compound signification, or are enlarged by what immediately precedes or follows the words describing the offence, and in the same connection. Cases of the kind do arise, as where, in the dissenting opinion in *United States* v. *Reese et al.*, *supra*, p. 222, it was held, that the words *offer to pay a capitation tax* were so expanded by a succeeding clause of the same sentence that the word "offer" necessarily included readiness to perform what was offered, the provision being that the offer should be equivalent to actual performance if the offer failed to be carried into execution by the wrongful act or omission of the party to whom the offer was made.

Two offences are in fact created and defined by the sixth section of the Enforcement Act, both of which consist of a

conspiracy with an intent to perpetrate a forbidden act. They are alike in respect to the conspiracy; but differ very widely in respect to the act embraced in the prohibition.

1. Persons, two or more, are forbidden to band or conspire together, or go in disguise upon the public highway, or on the premises of another, *with intent to violate* any provision of the Enforcement Act, which is an act of twenty-three sections.

Much discussion of that clause is certainly unnecessary, as no one of the counts under consideration is founded on it, or contains any allegations describing such an offence. Such a conspiracy with intent to injure, oppress, threaten, or intimidate any person, is also forbidden by the succeeding clause of that section, if it be done with intent to prevent or hinder his free exercise and enjoyment of *any right or privilege* granted or secured to him by the constitution or laws of the United States, or because of having exercised the same. Sufficient appears in the thirteenth count to warrant the conclusion, that the grand jury intended to charge the defendants with the second offence created and defined in the sixth section of the Enforcement Act.

Indefinite and vague as the description of the offence there defined is, it is obvious that it is greatly more so as described in the allegations of the thirteenth count. By the act of Congress, the prohibition is extended to any *right or privilege* granted or secured by the constitution or laws of Congress; leaving it to the pleader to specify the particular right or privilege which had been invaded, in order to give the accusation that certainty which the rules of criminal pleading everywhere require in an indictment; but the pleader in this case, overlooking any necessity for any such specification, and making no attempt to comply with the rules of criminal pleading in that regard, describes the supposed offence in terms much more vague and indefinite than those employed in the act of Congress.

Instead of specifying the particular right or privilege which had been invaded, the pleader proceeds to allege that the defendants, with all the others named in the indictment, did combine, conspire, and confederate together, with the unlawful intent and purpose the said persons of African descent and

persons of color then and there to injure, oppress, threaten, and intimidate, and thereby then and there to hinder and prevent them in the free exercise and enjoyment of the *rights, privileges, and immunities and protection* granted and secured to them as citizens of the United States and citizens of the State, without any other specification of the rights, privileges, immunities, and protection which had been violated or invaded, or which were threatened, except what follows; to wit, the same being a right or privilege granted or secured in common with all other good citizens by the constitution and laws of the United States.

Vague and indefinite allegations of the kind are not sufficient to inform the accused in a criminal prosecution of the nature and cause of the accusation against him, within the meaning of the sixth amendment of the Constitution.

Valuable rights and privileges, almost without number, are granted and secured to citizens by the constitution and laws of Congress; none of which may be, with impunity, invaded in violation of the prohibition contained in that section. Congress intended by that provision to protect citizens in the enjoyment of all such rights and privileges; but in affording such protection in the mode there provided Congress never intended to open the door to the invasion of the rule requiring certainty in criminal pleading, which for ages has been regarded as one of the great safeguards of the citizen against oppressive and groundless prosecutions.

Judge Story says the indictment must charge the time and place and nature and circumstances of the offence with clearness and certainty, so that the party may have full notice of the charge, and be able to make his defence with all reasonable knowledge and ability. 2 Story, Const., sect. 1785.

Nothing need be added to show that the fourteenth count is founded upon the same clause in the sixth section of the Enforcement Act as the thirteenth count, which will supersede the necessity of any extended remarks to explain the nature and character of the offence there created and defined. Enough has already been remarked to show that that particular clause of the section was passed to protect citizens in the free exercise and enjoyment of every right or privilege granted

or secured to them by the constitution and laws of Congress, and to provide for the punishment of those who band or conspire together, in the manner described, to injure, oppress, or intimidate any citizen, to prevent or hinder him from the free exercise and enjoyment of all such rights or privileges, or because of his having exercised any such right or privilege so granted or secured.

What is charged in the fourteenth count is, that the defendants did combine, conspire, and confederate the said citizens of African descent and persons of color to injure, oppress, threaten, and intimidate, with intent the said citizens thereby to prevent and hinder in the free exercise and enjoyment of the right and privilege to vote *at any election to be thereafter had and held* according to law by the people of the State, or by the people of the parish; they, the defendants, well knowing that the said citizens were lawfully qualified to vote at any such election thereafter to be had and held.

Confessedly, some of the defects existing in the preceding count are avoided in the count in question; as, for example, the description of the particular right or privilege of the said citizens which it was the intent of the defendants to invade is clearly alleged: but the difficulty in the count is, that it does not allege for what purpose the election or elections were to be ordered, nor when or where the elections were to be had and held. All that is alleged upon the subject is, that it was the intent of the defendants to prevent and hinder the said citizens of African descent and persons of color in the free exercise and enjoyment of the right and privilege to vote *at any election thereafter to be had and held*, according to law, by the people of the State, or by the people of the parish, without any other allegation whatever as to the purpose of the election, or any allegation as to the time and place when and where the election was to be had and held.

Elections thereafter to be held must mean something different from pending elections; but whether the pleader means to charge that the intent and purpose of the alleged conspiracy extended *only* to the next succeeding elections to be held in the State or parish, or to all future elections to be held in the State or parish during the lifetime of the parties, may admit of

a serious question, which cannot be easily solved by any thing contained in the allegations of the count.

Reasonable certainty, all will agree, is required in criminal pleading; and if so it must be conceded, we think, that the allegation in question fails to comply with that requirement. Accused persons, as matter of common justice, ought to have the charge against them set forth in such terms that they may readily understand the nature and character of the accusation, in order that they, when arraigned, may know what answer to make to it, and that they may not be embarrassed in conducting their defence; and the charge ought also to be laid in such terms that, if the party accused is put to trial, the verdict and judgment may be pleaded in bar of a second accusation for the same offence.

Tested by these considerations, it is quite clear that the fourteenth count is not sufficient to warrant the conviction and sentence of the accused.

Defects and imperfections of the same kind as those pointed out in the thirteenth count also exist in the sixteenth count, and of a more decided character in the latter count than in the former; conclusive proof of which will appear by a brief examination of a few of the most material allegations of the charge against the defendants. Suffice it to say, without entering into details, that the introductory allegations of the count are in all respects the same as in the thirteenth and fourteenth counts. None of the introductory allegations allege that any overt act was perpetrated in pursuance of the alleged conspiracy; but the jurors proceed to present that the unlawful and felonious intent and purpose of the defendants were to prevent and hinder the said citizens of African descent and persons of color, by the means therein described, in the free exercise and enjoyment *of each, every, all, and singular the several rights and privileges* granted and secured to them by the constitution and laws of the United States in common with all other good citizens, without any attempt to describe or designate any particular right or privilege which it was the purpose and intent of the defendants to invade, abridge, or deny.

Descriptive allegations in criminal pleading are required to be reasonably definite and certain, as a necessary safeguard

to the accused against surprise, misconception, and error in conducting his defence, and in order that the judgment in the case may be a bar to a second accusation for the same charge. Considerations of the kind are entitled to respect; but it is obvious, that, if such a description of the ingredient of an offence created and defined by an act of Congress is held to be sufficient, the indictment must become a *snare* to the accused; as it is scarcely possible that an allegation can be framed which would be less certain, or more at variance with the universal rule that every ingredient of the offence must be clearly and accurately described so as to bring the defendant within the true intent and meaning of the provision defining the offence. Such a vague and indefinite description of a material ingredient of the offence is not a compliance with the rules of pleading in framing an indictment. On the contrary, such an indictment is insufficient, and must be held bad on demurrer or in arrest of judgment.

Certain other causes for arresting the judgment are assigned in the record, which deny the constitutionality of the Enforcement Act; but, having come to the conclusion that the indictment is insufficient, it is not necessary to consider that question.

HARSHMAN *v.* BATES COUNTY.

1. Sect. 14 of art. 11 of the Constitution of Missouri, adopted in 1865, declaring that "The general assembly shall not authorize any county, city, or town, to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto," extends as well to townships as to counties, cities, and towns.
2. Although a subscription for stock of a railroad company be duly authorized by the requisite number of the qualified voters of a township, if the company, before the subscription be actually made, becomes consolidated with another, thereby forming a third, the County Court is not empowered to subscribe, on behalf of the township, for stock of the new company, and issue bonds in payment therefor.
3. The holder of coupons attached to the bonds in question in this suit is not entitled to recover thereon, as sufficient notice of the objection to the validity of the bonds is contained in their recitals.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

This is an action against the county of Bates, upon a large number of coupons originally attached to bonds issued by the County Court of that county.

The following is a copy of one of the bonds and coupons: —

"[No. 90. UNITED STATES OF AMERICA. [$1,000.

"STATE OF MISSOURI, *County of Bates:* —

"Issued pursuant to articles of consolidation in payment of stock due the Lexington, Lake, and Gulf Railroad Company, consolidated Oct. 4, A.D. 1870.

"Know all men by these presents, that the county of Bates, in the State of Missouri, acknowledges itself indebted and firmly bound to the Lexington, Lake, and Gulf Railroad Company, in the sum of $1,000; which sum the said county of Bates, for and in behalf of Mount Pleasant Township, therein promises to pay to the said Lexington, Lake, and Gulf Railroad Company, or bearer, at the Bank of America, in the City and State of New York, on the eighteenth day of January, A.D. 1886, together with the interest thereon from the eighteenth day of January, 1871, at the rate of ten per centum per annum, which interest shall be payable annually on the presentation and delivery at said Bank of America of the coupons of interest hereto attached.

"This bond being issued under and pursuant to an order of the County Court of Bates County, by virtue of an act of the general assembly of the State of Missouri, approved March 23, 1868, entitled 'An Act to facilitate the construction of railroads in the State of Missouri,' and authorized by a vote of the people taken May 3, 1870, as required by law, upon the proposition to subscribe $90,000 to the capital stock of the Lexington, Chillicothe, and Gulf Railroad Company, and which said railroad company last aforesaid and the former Pleasant Hill Division of the Lexington, Chillicothe, and Gulf Railroad Company were, on the fourth day of October, 1870, consolidated, as required by law, into one company, under the name of the Lexington, Lake, and Gulf Railroad Company; and which said last-named railroad company, as provided by law, and under the terms of said consolidation thereof, possesses all the powers, rights, and privileges, and owns and controls all the assets, subscriptions, bonds, moneys, and properties whatever, of the two said several companies forming said consolidation, or either one of them.

"In testimony whereof, the said county of Bates has executed this bond, by the presiding justice of the County Court of said county, under the order thereof, signing his name hereto; and the clerk of said court, under the order thereof, attesting the same, and affixing the seal of said court.

"This done at the city of Butler, county of Bates, this eighteenth day of January, A.D. 1871.

{ COUNTY COURT OF [SEAL] BATES CO., MO. }

B. H. THORNTON,
Presiding Justice of the County Court of Bates County, Mo.

"Attest:—

"W. J. SMITH,
Clerk of the County Court of Bates County, Mo.

"$100.] *Coupon.* [$100.

"BUTLER, BATES COUNTY, MO.,
"Jan. 18, A.D. 1871.

"The County of Bates acknowledges to owe the sum of $100, payable to bearer on the eighteenth day of January, 1872, at the Bank of America, in the city of New York, for one year's interest on bond No. 90.

"W. J. SMITH,
"Clerk County Court Bates County, Mo."

The plaintiff alleges, that, on the eighteenth day of January, 1871, the defendant issued its several bonds, by which it bound itself to pay to the Lexington, Lake, and Gulf Railroad Company, and for and on behalf of Mount Pleasant Township, in said county, $1,000, payable to said company at the Bank of America, &c., and that he is the holder of certain coupons of said bonds.

That, prior to the fifth day of April, 1870, certain tax-payers of Mount Pleasant Township petitioned the County Court of Bates County, setting forth their desire to subscribe $90,000 to the stock of the Lexington, Chillicothe, and Gulf Railroad Company: and thereupon the court ordered an election in said township, for the 3d of May, 1870; which was held, and two-thirds of the qualified voters of said township voting thereat voted for it.

That, on the eighteenth day of July, 1870, another corporation was formed by the name of the Pleasant Hill Division of the

Lexington, Chillicothe, and Gulf Railroad Company; and that these two corporations, one being the Lexington, Chillicothe, and Gulf Railroad Company, and the other being the Pleasant Hill Division of the Lexington, Chillicothe, and Gulf Railroad Company, were, on the fourth day of October, 1870, consolidated under the name of the Lexington, Lake, and Gulf Railroad Company.

That, thereafter — to wit, on the 18th of January, 1871 — the County Court of Bates County, in pursuance of the authority conferred upon it by the vote of the people of said township, subscribed the said sum of $90,000, in behalf of said township to said Lexington, Lake, and Gulf Railroad Company (the consolidated company); and that said bonds (to which the coupons in suit were annexed) were, among others, issued by the said court in payment for said subscription.

The defendant demurred to the petition, on the ground that it shows that the County Court had no authority in law to make the subscription recited in the bonds, or to issue the bonds in payment therefor; and because it also shows that the question of making the subscription to the new or consolidated company was never submitted to a vote of the people of Mount Pleasant Township, nor assented to by them, as required by the constitution and laws of the State. The court sustained the demurrer, and gave judgment accordingly; whereupon the case was brought here.

Argued by *Mr. T. K. Skinker* for the plaintiff in error, and submitted on printed briefs by *Mr. John W. Ross* and *Messrs. Glover & Shepley* for the defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an action brought to recover the amount due on certain coupons attached to bonds of Bates County, Mo., issued at the request and on account of Mount Pleasant Township in said county, in payment of a subscription, on behalf of the township, to the capital stock of the Lexington, Lake, and Gulf Railroad Company. The subscription was made under a law of Missouri, called the "Township Aid Act," passed in 1868; by which, on the application of twenty-five tax-payers and residents of any township, for election purposes, in any

county, the County Court may order an election to be held in such township to determine whether and on what terms a subscription to any railroad to be built in or near the township shall be made; and if two-thirds of the qualified voters of the township, voting at such election, are in favor of the subscription, the County Court shall make it in behalf of the township, and, if bonds are proposed to pay the subscription, the court shall issue such bonds in the name of the county, but to be provided for by the township. It is contended that this law is repugnant to the fourteenth section of article 11 of the Constitution of Missouri, adopted in 1865; by which it is declared that "the general assembly shall not authorize any *county*, *city*, *or town* to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." Now, the law of 1868 only requires the assent of two-thirds of the qualified voters who vote at such election. This is certainly a broad difference; and if the constitutional restriction extends, by implication, to townships, as well as to counties, cities, and towns, an election not conforming to the requirements of the constitution would be invalid and confer no authority to make a subscription. The petition in this case only alleges that two-thirds of the qualified voters voting at the election voted in favor of the subscription; which does not satisfy the demands of the constitution. The question, therefore, arises, whether townships are within the restriction of the constitutional provision. A township is a different thing from a town in the organic law of Missouri; the latter being an incorporated municipality, the former only a geographical subdivision of a county. As said in the *State* v. *Linn County Court* (44 Mo. 510), "It has no power by itself to make independent contracts, or to become bound in its separate capacity. The law has not invested it with that power. It forms an integral part of the county, and the county to a certain extent controls and acts for it." That the framers of the constitution intended to require the assent of two-thirds of all the qualified voters of a "county, city, or town," as a prerequisite to a subscription to a railroad or other company, and did not intend the same thing with

regard to townships, seems almost absurd. It was undoubtedly supposed that every case was provided for. The thirteenth section of article 11 declared that the credit of the State should not be given or used in aid of corporations; the fourteenth section then imposes the restriction referred to with regard to counties, cities, and towns. This specification embraced every political organization which could be supposed capable of making a subscription. To contend that the mere subdivision of counties into townships enabled the legislature to defeat the constitutional provision, is to ignore the manifest intention and spirit of that instrument. It cannot be possible that it was intended to restrict the legislature as to counties, and not to restrict it as to mere sectional portions of counties. Had counties alone been mentioned, there might have been no restriction as to cities and towns; because they are separate and distinct organizations, corporate in character, and often clothed with legislative functions. But in Missouri, in 1865, when the constitution was adopted, a township had no corporate character; but, as before stated, was a mere geographical section of a county, partitioned off for purposes of local convenience in the matter of elections and a few other things. They had no power to act as corporate bodies. If the legislature could clothe these geographical portions of a county with power to subscribe to stock companies at all, it certainly could not set at nought the constitutional requirement of the people's consent thereto.

The court below did not decide the case on this ground, probably in consequence of certain decisions of the State courts which were deemed inconsistent with it. But we are not aware of any decisions of those courts which hold that the constitutional restriction in question could be ignored with regard to townships, any more than with regard to counties, cities, or towns.

Another objection to the validity of the subscription for which the bonds were given in this case is, that the township voted a subscription to one company and the County Court subscribed to another. This is sought to be justified on the ground that the former company became consolidated with another, thereby forming a third, to whose stock the subscription was made. This consolidation was effected under a law of Missouri

authorizing consolidations, and declaring that the company formed from two companies should be entitled to all the powers, rights, privileges, and immunities which belong to either; and it is contended that this provision of the law justified the County Court in making the subscription, without further authority from the people of the township. But did not the authority cease by the extinction of the company voted for? No subscription had been made. No vested right had accrued to the company. The case of the *State* v. *Linn County Court*, *supra*, only decides, that, if the County Court refuses to issue bonds after making a subscription, a *mandamus* will lie to compel it to issue them. There the authority had been executed, and a right had become vested. But, so long as it remains unexecuted, the occurrence of any event which creates a revocation in law will extinguish the power. The extinction of the company in whose favor the subscription was authorized worked such a revocation. The law authorizing the consolidation of railroad companies does not change the law of attorney and constituent. It may transfer the vested rights of one railroad company to another, upon a consolidation being effected; but it does not continue in existence powers to subscribe for stock given by one person to another, which, by the general law, are extinguished by such a change. It does not profess to do so, and we think that it does not do so by implication.

As sufficient notice of these objections is contained in the recitals of the bonds themselves to put the holder on inquiry, we think that there was no error in the judgment of the Circuit Court. *Judgment affirmed.*

STATE RAILROAD TAX CASES.

TAYLOR, COLLECTOR, ET AL., *v.* SECOR ET AL.

MILLER, COLLECTOR, ET AL., *v.* JESSUP ET AL.

MILLER, COLLECTOR, ET AL., *v.* KIDDER ET AL.

1. While this court does not lay down any absolute rule limiting the powers of a court of equity in restraining the collection of taxes, it declares that it is essential that every case be brought within some of the recognized rules of equity jurisdiction, and that neither illegality or irregularity in the proceed-

ings, nor error or excess in the valuation, nor the hardship or injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after the payment of the tax, will authorize an injunction against its collection.

2. This rule is founded on the principle that the levy of taxes is a legislative and not a judicial function, and the court can neither make nor cause to be made a new assessment if the one complained of be erroneous, and also in the necessity that the taxes, without which the State could not exist, should be regularly and promptly paid into its treasury.
3. *Quære:* Whether the same rigid rule against equitable relief would apply to taxes levied solely by municipal corporations for corporate purposes as that here applied to State taxes. Probably not.
4. No injunction, preliminary or final, can be granted to stay collection of taxes until it is shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, have been paid or tendered without demanding a receipt in full.
5. While the Constitution of Illinois requires taxation, in general, to be uniform and equal, it declares, in express terms, that a large class of persons engaged in special pursuits, among whom are persons or corporations owning franchises and privileges, may be taxed as the legislature shall determine, by a general law, *uniform as to the class upon which it operates;* and under this provision a statute is not unconstitutional which prescribes a different rule of taxation for railroad companies from that for individuals.
6. Nor does it violate any provision of the Constitution of the United States.
7. The capital stock, franchises, and all the real and personal property of corporations, are justly liable to taxation; and a rule which ascertains the value of all this, by ascertaining the cash value of the funded debt and of the shares of the capital stock as the basis of assessment, is probably as fair as any other.
8. Deducting from this the assessed value of all the tangible real and personal property, which is also taxed, leaves the real value of the capital stock and franchise subject to taxation as justly as any other mode, all modes being more or less imperfect.
9. It is neither in conflict with the Constitution of Illinois, nor inequitable, that the entire taxable property of the railroad company should be ascertained by the State board of equalization, and that the state, county, and city taxes should be collected within each municipality on this assessment, in the proportion which the length of the road within such municipality bears to the whole length of the road within the State.
10. The action of the board of equalization, in increasing the assessed value of the property of a railroad company or an individual above the return made to the board, does not require a notice to the party to make it valid; and the courts cannot substitute their judgment as to such valuation for that of the board.
11. The Supreme Court of the State of Illinois having decided that the law complained of in these cases is valid under her constitution, and having construed the statute, this court adopts the decision of that court as a rule to be followed in the Federal courts.

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

These were bills of injunction to restrain the collection of taxes assessed on certain railroads in the State of Illinois, and, as they raised the same questions of law, were heard together. The complainants in the first-mentioned case are trustees and mortgagees of the Toledo, Peoria, and Warsaw Railroad Company; in the second, stockholders in the Chicago and Alton Railroad Company; and in the third, stockholders in the Chicago, Burlington, and Quincy Railroad Company.

To a proper understanding of the questions raised, reference is necessary to the following provisions of the constitution and statutes of the State of Illinois.

Sects. 1, 6, 9, and 10 of art. 9, and sect. 10 of art. 11, of the constitution, declare: —

"ART. 9, SECT. 1. The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its 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; but the general assembly shall have power to tax pedlers, auctioneers, brokers, hawkers, merchants, commission-merchants, showmen, jugglers, innkeepers, grocery-keepers, liquor-dealers, toll-bridges, ferries, insurance, telegraph, and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates."

"SECT. 6. The general assembly shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or the property therein, from their or its proportionate share of taxes to be levied for State purposes; nor shall commutation for such taxes be authorized in any form whatever."

"SECT. 9. The general assembly may vest the corporate authorities of cities, towns, and villages, with power to make local improvements by special assessment or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

"SECT. 10. The general assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

"ART. 11, SECT. 10. The rolling-stock and all other movable property belonging to any railroad company or corporation in this State shall be considered personal property."

"An Act for the assessment of property and for the collection of taxes," approved March 30, 1872, in force July 1, 1872, among other provisions contains the following: —

"SECT. 3. Personal property shall be valued as follows: —

"*First*, All personal property, except as herein otherwise directed, shall be valued at its fair cash value.

"*Second*, Every credit, for a sum certain, payable either in money or labor, shall be valued at a fair cash value for the sum so payable; if for any article of property, or for labor, or services of any kind, it shall be valued at the current price of such property, labor, or service.

"*Third*, Annuities and royalties shall be valued at their then present total value.

"*Fourth*, The capital stock of all companies and associations, now or hereafter created under the laws of this State, shall be so valued by the State board of equalization as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association. Said board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock as to it may seem equitable and just; and such rules and principles, when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act, subject, however, to such change, alteration, or amendment as may be found, from time to time, to be necessary by said board: *Provided*, that, in all cases where the tangible property or capital stock of any company or association is assessed under this act, the shares of capital stock of any such company or association shall not be assessed or taxed in this State. This clause shall not apply to the capital stock, or shares of capital stock, of banks organized under the general banking laws of this State."

"SECT. 6. Personal property shall be listed in the manner following:—

. . . . . .

"*Eighth*, The property of a body politic or corporate, by the president, or proper agent or officer thereof."

"SECT. 7. Personal property, except such as is required in this act to be listed and assessed otherwise, shall be listed and assessed in the county, town, city, village, or district where the owner resides. The capital stock and franchises of corporations and persons, except as may be otherwise provided, shall be listed and taxed in the county, town, district, city, or village where the principal office or place of business of such corporation or person is located in this State."

"SECT. 26. Whenever the assessor shall be of opinion that the person listing property for himself, or for any other person, company, or corporation, has not made a full, fair, and complete schedule of such property, he may examine such person under oath in regard to the amount of property he is required to schedule; and for that purpose he is authorized to administer oaths: and if such person shall refuse to answer under oath, and a full discovery make, the assessor may list the property of such person, or his principal, according to his best judgment and information."

"SECT. 40. Every person, company, or corporation, owning, operating, or constructing a railroad in this State, shall return sworn lists or schedules of the taxable property of such railroad, as hereinafter provided. Such property shall be listed and assessed with reference to the amount, kind, and value on the first day of May of the year in which it is listed."

"SECT. 41. They shall, in the month of May of the year eighteen hundred and seventy-three, and at the same time in each year thereafter, when required, make out and file with the county-clerks of the respective counties in which the railroad may be located, a statement or schedule showing the property held for right of way, and the length of the main and all side and second tracks and turnouts in such county, and in each city, town, and village in the county, through or into which the road may run, and describing each tract of land, other than a city, town, or village lot, through which the road may run, in accordance with the United States surveys, giving the width and length of the strip of land held in each tract, and the number of acres thereof. They shall also state the value of improvements and stations located on the right of way. New companies shall make such statement in May next after the

location of their roads. When such statement shall have been once made, it shall not be necessary to report the description as hereinbefore required, unless directed so to do by the county board; but the company shall, during the month of May, annually, report the value of such property by the description set forth in the next section of this act, and note all additions or changes in such right of way as shall have occurred.

"SECT. 42. Such right of way, including the superstructures of main, side, or second tracks and turnouts, and the stations and improvements of the railroad company on such right of way, shall be held to be real estate for the purposes of taxation, and denominated 'railroad track,' and shall be so listed and valued; and shall be described in the assessment thereof as a strip of land extending on each side of such railroad track, and embracing the same, together with all the stations and improvements thereon, commencing at a point where such railroad track crosses the boundary line in entering the county, city, town, or village, and extending to the point where such track crosses the boundary line leaving such county, city, town, or village, or to the point of termination in the same, as the case may be, containing —— acres, more or less (inserting name of county, township, city, town, or village, boundary line of same, and number of acres, and length in feet); and, when advertised or sold for taxes, no other description shall be necessary.

"SECT. 43. The value of the 'railroad track' shall be listed and taxed in the several counties, towns, villages, districts, and cities in the proportion that the length of the main track in such county, town, village, district, or city bears to the whole length of the road in this State, except the value of the side or second track, and all turnouts, and all station-houses, dépôts, machine-shops, or other buildings belonging to the road, which shall be taxed in the county, town, village, district, or city in which the same are located.

"SECT. 44. The movable property belonging to a railroad company shall be held to be personal property, and denominated, for the purpose of taxation, 'rolling-stock.' Every person, company, or corporation, owning, constructing, or operating a railroad in this State, shall, in the month of May, annually, return a list or schedule, which shall contain a correct detailed inventory of all the rolling-stock belonging to such company, and which shall distinctly set forth the number of locomotives of all classes, passenger cars of all classes, sleeping and dining cars, express cars,

baggage cars, house cars, cattle cars, coal cars, platform cars, wrecking cars, pay cars, hand cars, and all other kinds of cars.

"SECT. 45. The rolling-stock shall be listed and taxed in the several counties, towns, villages, districts, and cities, in the proportion that the length of the main track, used or operated in such county, town, village, district, or city, bears to the whole length of the road used or operated by such person, company, or corporation, whether owned or leased by him or them, in whole or in part. Said list or schedule shall set forth the number of miles of main track on which said rolling-stock is used in the State of Illinois, and the number of miles of main track on which said rolling-stock is used elsewhere.

"SECT. 46. The tools and materials for repairs, and all other personal property of any railroad, except 'rolling-stock,' shall be listed and assessed in the county, town, village, district, or city wherever the same may be on the first day of May. All real estate, including the stations and other buildings and structures thereon, other than that denominated 'railroad track,' belonging to any railroad, shall be listed as lands, or lots, as the case may be, in the county, town, village, district, or city where the same are located.

"SECT. 47. The county-clerk shall return to the assessor of the town or district, as the case may require, a copy of the schedule or list of the real estate (other than 'railroad track'), and of the personal property (except 'rolling-stock'), pertaining to the railroad; and such real and personal property shall be assessed by the assessor. Such property shall be treated in all respects, in regard to assessment and equalization, the same as other similar property belonging to individuals; except that it shall be treated as property belonging to railroads, under the terms 'lands,' 'lots,' and 'personal property.'

"SECT. 48. At the same time that the lists or schedules are hereinbefore required to be returned to the county-clerks, the person, company, or corporation, running, operating, or constructing any railroad in this State, shall return to the auditor of public accounts sworn statements or schedules, as follows: —

"*First*, Of the property denominated 'railroad track,' giving the length of the main and side or second tracks and turnouts, and showing the proportions in each county, and the total in the State.

"*Second*, The 'rolling-stock,' giving the length of the main track in each county, the total in this State, and the entire length of the road.

"*Third*, Showing the number of ties in track per mile, the

weight of iron or steel per yard, used in main and side tracks; what joints or chairs are used in track; the ballasting of road, whether gravelled or dirt; the number and quality of buildings or other structures on 'railroad track;' the length of time iron in track has been used, and the length of time the road has been built.

"*Fourth*, A statement or schedule showing, —

"1. The amount of capital stock authorized, and the number of shares into which such capital stock is divided.

"2. The amount of capital stock paid up.

"3. The market value, or, if no market value, then the actual value, of the shares of stock.

"4. The total amount of all indebtedness, except for current expenses for operating the road.

"5. The total listed valuation of all its tangible property in this State.

"Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the auditor of public accounts.

"SECT. 49. If any person, company, or corporation, owning, operating, or constructing any railroad, shall neglect to return to the county-clerks the statements or schedules required to be returned to them, the property so to be returned and assessed by the assessor shall be listed and assessed as other property. In case of failure to make returns to the auditor, as hereinbefore provided, the auditor, with the assistance of the county-clerks and assessors, when he shall require such assistance, shall ascertain the necessary facts, and lay the same before the State board of equalization. In case of failure to make said statements, either to the county-clerk or auditor, such corporation, company, or person shall forfeit, as a penalty, not less than one thousand nor more than ten thousand dollars for each offence, to be recovered in any proper form of action, in the name of the 'People of the State of Illinois,' and paid into the State treasury.

"SECT. 50. The auditor shall annually, on the meeting of the State board of equalization, lay before said board the statements and schedules herein required to be returned to him; and said board shall assess such property in the manner hereinafter provided.

"SECT. 51. The county-clerk shall procure, at the expense of the county, a record-book, properly ruled and headed, in which to enter the railroad property of all kinds, as listed for taxation, and shall enter the valuations as assessed, corrected, and equalized, in the manner provided by this act; and against such assessed, corrected, or equalized valuation, as the case may require, the county-clerk

shall extend all the taxes thereon, for which said property is liable; and, at the proper time fixed by this act for delivering tax-books to the county collector, the clerk shall attach a warrant, under his seal of office, and deliver said book to the county collector, upon which the said county collector is hereby required to collect the taxes therein charged against railroad property, and pay over and account for the same in the manner provided in other cases. Said book shall be returned by the collector, and be filed in the office of the county-clerk for future use."

"SECT. 78. The assessor or his deputy shall . . . call at the office, place of doing business, or residence of each person required by this act to list property, and list his name, and shall require such person to make a correct statement of his taxable property in accordance with the provisions of this act; and the person listing the property shall enter a true and correct statement of such property, in the form prescribed by this act, which shall be signed and sworn to, to the extent required by this act, by the person listing the property, and delivered to the assessor; and the assessor shall thereupon assess the value of such property, and enter the same in his books.

"SECT. 79. If any person required by this act to list property shall be sick or absent when the assessor calls for a list of his property, the assessor shall leave at the office, or usual place of residence or business of such person, a written or printed notice requiring such person to make out and leave at the place named therein the statement or schedule required by this act. The date of leaving such notice, and the name of the person required to list the property, shall be carefully noted by the assessor in a book to be kept for that purpose."

"SECT. 82. When the personal property of any person is assessable in several school districts, the amount in each shall be assessed separately, and the name of the owner placed opposite each amount."

"SECT. 86. In counties under township organization, the assessor, clerk, and supervisor of the town, shall meet on the fourth Monday of June, for the purpose of reviewing the assessment of property in such town. And on the application of any person considering himself aggrieved, or who shall complain that the property of another is assessed too low, they shall review the assessment, and correct the same as shall appear to them just. No complaint that another is assessed too low shall be acted upon until the person so assessed, or his agent, shall be notified of such complaint, if a resident of the county."

"SECT. 97. The county board, at a meeting to be held for the purpose contemplated in this section, on the second Monday in July, annually, after the return of the assessment-books, shall, —

. . . . . .

"2. On the application of any person considering himself aggrieved, or who shall complain that the property of another is assessed too low, they shall review the assessment and correct the same as shall appear to be just. No complaint that another is assessed too low shall be acted upon until the person so assessed, or his agent, shall be notified of such complaint, if a resident of the county.

. . . . . .

"4. . . . If the county board of any county shall find the aggregate assessment of the county is too high or too low, or is generally so unequal as to render it impracticable to equalize such assessment fairly, they may set aside the assessment of the whole county, or of any township or townships therein, and order a new assessment, with instructions to the assessors to increase or diminish the aggregate assessment of such county or township, as the case may be, by such an amount as said board may deem right and just in the premises, and consistent with this act."

"SECT. 100. The State board of equalization shall, at the expiration of the term of office of the members now forming said board, consist of one member from each congressional district in the State, elected as hereinafter provided, and the auditor of public accounts.

"SECT. 101. The qualified electors of each congressional district shall, at the general election in November, 1872, and every four years thereafter, elect one of their number to serve as a member of said board of equalization, who shall hold his office for four years, and until his successor is elected and qualified."

"SECT. 105. Said board shall assemble at the State capital on the second Tuesday in the month of August, annually, and examine the abstracts of property assessed for taxation in the several counties of this State, as returned to the auditor, and shall equalize the assessments as hereinafter provided; but said board shall not reduce the aggregate assessed valuation in the State; neither shall it increase said aggregate valuation, except in such an amount as may be reasonably necessary to a just equalization, and not exceeding one per cent on such aggregate assessed valuation; but this rule shall not apply to railroad property.

"SECT. 106. Said board, in equalizing the valuation of property as listed and assessed in the different counties, shall consider the

following classes of property separately: viz., personal property; railroad and telegraph property; lands, and town and city lots; and, upon such consideration, determine such rates of addition to or deduction from the listed or assessed valuation of each of said classes of property in each county, or to or from the aggregate assessed value of each of said classes in the State, as may be deemed by the board to be equitable and just, — such rates being in all cases even and not fractional; and such rates, as finally determined by said board, shall not be combined."

"SECT. 108. The State board of equalization shall assess the capital stock of each company or association, respectively, now or hereafter incorporated under the laws of this State, in the manner hereinbefore in this act provided. The respective assessments so made (other than of the capital stock of railroad and telegraph companies) shall be certified by the auditor, under direction of said board, to the county-clerk of the respective counties in which such companies or associations are located; and said clerk shall extend the taxes for all purposes on the respective amounts so certified the same as may be levied on the other property in such towns, districts, villages, or cities in which such companies or associations are located.

"SECT. 109. Said board shall also assess the railroad property denominated in this act as 'railroad track' and 'rolling-stock;' and said board is hereby given the power and authority, by committee or otherwise, to examine persons and papers. The amount so determined and assessed shall be certified by the auditor to the county-clerks of the proper counties. The county-clerk shall, in like manner, distribute the value, so certified to him by the auditor, to the county and to the several towns, districts, villages, and cities in his county entitled to a proportionate value of such 'railroad track' and 'rolling-stock.' And said clerk shall extend taxes against such values, the same as against other property in such towns, districts, villages, and cities.

"SECT. 110. The aggregate amount of capital stock of railroad or telegraph companies assessed by said board shall be distributed proportionately by said board to the several counties in like manner that the property of railroads denominated 'railroad track' is distributed. The amount so determined shall be certified by the auditor to the county-clerks of the proper counties. The county-clerk shall, in like manner, distribute the value, so certified to him by the auditor, to the county and to the several towns, districts, villages, and cities in his county entitled to proportionate value of such capital stock. And said clerk shall extend taxes

against such values the same as against other property in such towns, districts, villages, and cities."

"SECT. 114. When said board shall have completed its equalization of assessments for any year, the chairman and secretary shall certify to the auditor the rates finally determined by said board to be added to or deducted from the listed or assessed valuation of each class of property in the several counties, and also the amounts assessed by said board; and it shall be the duty of said auditor, under his seal of office, to report the action of the board to the several county-clerks, immediately after the adjournment of said board."

"SECT. 126. Said clerks shall extend the rates of addition or deduction ordered by the county board and State board of equalization, in the several columns provided for that purpose. The rate per cent ordered by the State board of equalization shall be extended on the assessed valuation of property, as corrected and equalized by the county board; except that, in the case of railroad property denominated 'railroad track' and 'rolling-stock,' said rates shall be extended on the listed valuations of such designated property." Rev. Stat. of Illinois, 1874, p. 857 *et seq.*

The State board of equalization, for the purpose of ascertaining the fair cash value of the capital stock and franchises of corporations in excess of the value of their tangible property, adopted the following rules: —

"WHEREAS, the fourth clause of sect. 3 of 'An Act for the assessment of property, and for the levy and collection of taxes,' approved March 30, 1872, in force July 1, 1872, provides as follows: —

"'SECT. 3. . . . *Fourth*, The capital stock of all companies and associations now or hereafter created under the laws of this State shall be so valued by the State board of equalization as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association. Said board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock as to it may seem equitable and just; and such rules and principles, when so adopted, if not inconsistent with this act, shall be as binding, and of the same effect, as if contained in this act, subject, however, to such change, alteration, or amendment as may be found, from time to time, to be necessary by said board: *Provided*, that in all cases where the tangible property or capital stock of any company or association is assessed under this act, the shares of capital stock of any such com-

pany or association shall not be assessed or taxed in this State. This clause shall not apply to the capital stock or shares of capital stock of banks organized under the general banking laws of this State'; therefore be it

"*Resolved*, That for the purpose of ascertaining the fair cash value of the capital stock, including the franchise, of all companies and associations now or hereafter created under the laws of this State, and for the assessment of the same, or so much thereof as may be found to be in excess of the assessed or equalized value of the tangible property of such companies and associations, respectively, we, the State board of equalization, hereby adopt the following rules and principles, viz.: —

"*First*, The market or fair cash value of the shares of capital stock, and the market or fair cash value of the debt (excluding from such debt the indebtedness for current expenses), shall be combined or added together; and the aggregate amount so ascertained shall be taken and held to be the fair cash value of the capital stock, including the franchise, respectively, of such companies and associations.

"*Second*, From the aggregate amount ascertained as aforesaid there shall be deducted the aggregate amount of the equalized or assessed valuation of all the tangible property, respectively, of such companies and associations (such equalized or assessed valuation being taken, in each case, as the same may be determined by the equalization or assessment of property by this board); and the amount remaining, in each case, if any, shall be taken and held to be the amount and fair cash value of the capital stock, including the franchise, which this board is required by law to assess, respectively, against companies and associations now or hereafter created under the laws of this State."

The bill, in the first-mentioned case, alleges that the Toledo, Peoria, and Warsaw Railroad Company returned to the clerks of the respective counties in which said railroad was located, and to the auditor, sworn lists or schedules of all its property, as required by law; that after said schedules were filed with the respective county-clerks, the town and county assessors, without authority of law and without notice to the company, made additions to the schedules of property returned by it. That the respective county boards of equalization made further additions, and caused equalized assessments, made by them, to

be returned to the respective county-clerks, who certified an abstract thereof to the auditor; that said returns were by the auditor laid before the State board of equalization; that said State board added to and deducted from the assessed valuations of personal property and lands, returned to said auditor, without making any re-assessment of said property; that the only reason for making said additions and deductions was to equalize the assessed value of said property with the assessed value of the same class of property in other counties, which valuation so made without regard to the value of such property separately from the class in which the same was placed is charged to be in violation of the State constitution; that the value of said "railroad track," as returned to the county clerks and auditor, was $648,436.41, which was distributed to the several counties in which said railroad track is located, according to the value of the same in each of said counties; that the State board of equalization assessed the value of said "railroad track" at $1,629,556, and pretended to distribute the same to the several counties, without regard to the actual value of said property in said several counties, but according to the length of the track in the same; but, in fact, distributed the said sum neither according to the actual value in the several counties, nor according to the length of the main track in the same; that the value per mile of the right of way, iron and steel rails, bridging, &c., is different in different counties, and that by reason of the distribution of the assessed value of said railroad track as made by the said State board, said railway company is liable to be taxed in one county on property owned in another; that the taxes in different counties, towns, &c., are widely different, and cannot be made on an assessment as made by the State board, so as to be uniform as to property within the jurisdiction imposing the same, as required by the State constitution; that the aggregate listed value of the rolling-stock as returned to the auditor was $388,039, and the aggregate value of same as assessed by State board of equalization was $1,000,110, distributed among the several counties on the mileage principle; that the bonded debt of said railway company on the 1st of May, 1873, was $7,184,719.37; that said board of equalization assessed said railway company the sum

of $2,003,415 as and for the value of its capital stock, including its franchise over and above the assessed value of its tangible property, and distributed the same to the several counties on the mileage principle; that said board of equalization, in ascertaining the value of said capital stock and franchise, included the debt of said railway company, in accordance with the rule adopted by said board; that all of said pretended equalizations of tangible property, and assessments by said State board of equalization, were made without notice to said railway company; that the general assembly of the State could not delegate its authority to prescribe a rule uniform in operation for the taxation of franchises to the State board of equalization in the manner provided by the statute, nor provide for the election of persons to ascertain the value of the property of one class of persons, and elect or appoint other persons to ascertain the value of the property of other classes of persons; that said act allowed the equalization to be made by vote of a minority of the members of said board, and in these respects is in violation of the State constitution; that said franchise was not assessed apart from the capital stock, but is so intermingled therewith that the same cannot be separated, which makes the entire assessment void; that the capital stock and capital of a corporation are distinct and different; that the capital stock belongs to the stockholders, and cannot be assessed against the corporation, but said act requires not only the capital of corporations to be assessed, but their capital stock to be assessed to the corporation in addition thereto, and that the distribution of the amount required to be assessed for capital stock, as required by said act, is in violation of the constitution requiring county, city, &c., taxes to be uniform within the jurisdiction of the body imposing the same. The bill further alleges that such proceedings have taken place; that the collectors of the various counties are threatening to collect the taxes assessed against said railway company as aforesaid; that the capital stock of said railway company on the first day of May, 1873, was worthless; that the complainants are willing to pay so much of said taxes as have been legally assessed against said company, but they are unable to ascertain such amount; that they are trustees for the holders of certain bonds

mentioned in a deed of trust or mortgage given by said Toledo, Peoria, and Warsaw Railway Company upon its property; that on the third day of February, 1874, in pursuance of the terms of said trust-deed, they took possession of said railway and its other property, and on the 14th of February, 1874, filed their bill to foreclose said mortgage, in this court, which suit is still pending. The bill alleges that other liens are also existing against said railway company; that its bonded debt, secured by mortgages, amounts to $6,450,000; that its entire franchises and property are not worth to exceed $1,088,749; that its net earnings have never been sufficient to pay the interest on its debt; that its capital stock is of no real value, and the assessment thereof at $2,013,415 is illegal and void; that the said board of equalization did not equalize the property of said railway company with all other personal property in the State of like character, nor its lands, lots, right of way, and other real estate, with all other lands, lots, and real estate of like character in the State, but pretended to equalize said personal property owned by like corporations, and said real estate owned by like corporations; that the rates of taxation are different in each and all of the counties, towns, and municipalities through which the said railway runs; and prays that the said railway company may be enjoined from paying, and the other defendants from collecting, any of said taxes.

The defendants, except the railway company which was defaulted, filed an answer denying that in the lists and schedules filed by the railway company its property was valued at its fair cash value; or that it was listed and scheduled in the manner required by law, in this, that certain real estate was listed and scheduled as railroad track, which was used for stations or other purposes than railroad track, which real estate was subsequently assessed by the local town and county assessors, as was their duty, as real estate other than railroad track; and said assessors in like manner assessed the tangible personal property of said railway company, and none other, in their respective localities, which did not form part of the rolling-stock of said company. Defendants deny that any portion of the property of said company was doubly assessed; admit the equalization by the county and State boards, but deny that

the State board, in the assessment of the right of way or railroad track and improvements thereon, took into consideration the increased value of such right of way, arising from the fact that the same had been graded, and bridges and culverts built thereon, as it was believed such increased value could be more fairly and equitably ascertained in the assessment of capital stock; deny that the State board distributed the assessed value of said railway track among the various counties, &c., in any other manner than as required by law. Defendants admit that the rate of taxation for local purposes is different in the different municipal corporations through which the road passes; that the State board of equalization adopted and acted on the rules set forth in the bill in the assessment of the capital stock, including the franchises of said railway company; and that said board did not attempt to make an assessment of the value of the franchises as separate from the assessment under the designation "capital stock," but that the same was included in said assessment under that designation; admit no other notice was given of the proceedings of said board, than such as the law gives; deny that said State board made an arbitrary addition or deduction to the assessed value of the property in the respective counties without any regard to the actual value, and allege that said board examined the abstracts of property assessed for taxation by the various local assessors of the State, as returned to the auditor, and ascertained as nearly as was practicable the necessary rates of addition and deduction to be made to the assessed value of the several classes of property as equalized by the various county boards, to make a just equalization of the assessed value of property between the respective counties throughout the State; deny that said State board distributed to any county any greater portion of the aggregate value of the railroad track of said company than the value of the portion of such track actually situated in such county, and deny that the action of said State board resulted in the assessment of property of said company for taxation in one county, which was in fact situate in another county; admit that such proceedings have taken place, that the taxes as alleged in said bill have been extended upon said equalized assessments, and that the collectors in the various counties threaten to collect

the same, except as to $\frac{7}{36}$ of the State tax levied and extended upon said assessment, under the act of April 16, 1869, entitled "An Act to fund and provide for the paying of the railroad debt of counties, townships, cities, and towns," which $\frac{7}{36}$ of the State tax was after the same was levied and extended in a case involving the validity of the act of April 16, 1869, held by the Supreme Court of the State to be unconstitutional and void, since when the defendants have disclaimed all right to collect said $\frac{7}{36}$ per cent of said State tax, and have made no effort to collect the same; and in cases where said $\frac{7}{36}$ of said tax had been collected, the same has been refunded in pursuance of an act of the general assembly in force March 26, 1875. A replication was filed, and the case was heard on bill, answers, replication, an agreed state of facts, and exhibits therein referred to, and the report of the examiner, and a decree entered perpetually enjoining the collection of the taxes, or any of them in the bill mentioned. The defendants, who are the collectors in the various counties through which the road runs, bring the case to this court.

It is not deemed necessary to make any special statement in regard to the two other cases, as the facts in them are substantially the same as those above given.

Mr. Lyman Trumbull and *Mr. James K. Edsall*, Attorney-General of Illinois, for the appellants in the first case.

Mr. Trumbull submitted, —

1. The objection that the local assessors assessed part of "the railroad track" as real estate, other than railroad track, is not sustained by the evidence.

2. The great point in the case is the alleged unconstitutionality of the act creating the State board of equalization, as it is not pretended that the action of the board was not according to the statute.

It is said that the constitution requires the property of every person and corporation, for the purpose of taxation, to be valued separately, and that the act requires the board of equalization to consider all property listed and assessed in different counties, by a classification of the same into the classes of personal property, railroad property, lands, &c.; and, upon such consid-

eration, to determine what addition to or deduction from the aggregate assessed value of each of said classes should be made in any county, or throughout the State; and requires the said board to make such addition or deduction by a rate per cent on the assessed value of each class. The answer to this objection is, that the property of every person and corporation is by the law valued separately in the first instance; and the only effect of the action of the State board of equalization is to so adjust the assessment that each person or corporation shall pay a tax in proportion to the value of his or its property.

Adsit v. *Lieb*, 76 Ill. 198, disposes of the question thus raised. In that case, it was decided that "the legislature is not prohibited by the constitution from creating a State board of equalization, and investing it with power to equalize the assessments of the different counties for the purpose of producing uniformity in the valuation."

It is next objected to the constitutionality of the act, that it provides that the railroad track, rolling-stock, capital stock, and franchise, shall be taxed in the several counties, cities, towns, &c., in proportion that the length of the main track in such county, city, town, &c., bears to the whole length of the road in the State, except the value of the side track, and all turnouts, and all station-houses, dépôts, machine-shops, or other buildings belonging to the road, shall be taxed in the county, city, town, &c., in which the same are located; that the county, city, town, &c., special taxes are different; and that such taxes, levied on an assessment so made and distributed, are not uniform within the jurisdiction imposing the same, and are therefore illegal.

This precise question has been decided in Missouri, under a similar constitutional provision, and the constitutionality of such legislation sustained. *State* v. *Severance*, 55 Mo. 388.

The case of *Missouri River, &c., R.R. Co.* v. *Morris*, 1 Amer. Ry. R. 365, 7 Kan. 210, is to the same effect.

So, also, it was decided by this court that the provision of the Constitution of Illinois, requiring taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same, did not prevent the taxation of the owners of the stock of a national bank in that State at the place

where the bank was located, without regard to their places of residence. *Tappan* v. *Merchants' National Bank*, 19 Wall. 501.

The ninth section of the ninth article of the constitution introduces no new rule as to the assessment of property; that was provided for by sect. 1 in the same article; and the general assembly, in strict obedience thereto, has provided for the election of persons to make the assessment of the railroad track, rolling-stock, and capital stock. All the ninth section does, is to provide that the tax shall be *uniform* in respect to persons and property. The bill fails to show wherein the tax in each county, city, &c., is not uniform within the jurisdiction of the body imposing the same. The fact that special taxes are different in different localities, and that the same species of property, and of the same value, is taxed more in one county, city, &c., than another, furnishes no constitutional objection to the tax in any of the localities. If it was unequal within the jurisdiction of the municipality imposing the tax, it would be objectionable; but this is not pretended. *Missouri River, &c., R.R. Co.* v. *Morris*, 7 Kan. 210; *Hines* v. *Leavenworth*, 3 id. 201.

The objection that the railroad track, rolling-stock, and capital-stock tax is apportioned to the several counties, cities, &c., according to the mileage principle, amounts to nothing more than a complaint that the railroad track, &c., has been assessed too much in some localities, and not enough in others. The right to assess in each county is not denied. When property is subject to taxation, and has been assessed for that purpose by the proper officers, as in this case, the fact that it is assessed too much or too little in any particular locality affords no ground for a court of equity to enjoin the collection of the tax. *Albany, &c., R.R.* v. *Town of Canaan*, 16 Barb. 244; *Clinton School District's Appeal*, 56 Penn. St. 317; *Stewart* v. *Maple*, 70 id. 221; *Dowds* v. *City of Chicago*, 11 Wall. 109.

All the objections stated under this head have been especially considered and passed upon by the Supreme Court of Illinois. *C., B., & Q. R.R. Co.* v. *Cole*, reported in pamphlet copy of Tax-Injunction Cases, p. 43; *Munson* v. *Wilder*, 66 Ill. 383; *Du Page Co.* v. *Jenks*, 65 id. 275.

3. The mode provided by the act and adopted by the board of equalization for the assessment of the capital stock of the

railroad company is not unconstitutional. It is authorized by the first section of art. 9 of the constitution of the State. This section gives authority to tax corporations, &c., owning or using franchises, in such manner as the legislature shall from time to time direct. There is nothing in the constitution which prohibits the legislature from appointing different persons to ascertain the value of the property of different classes of persons.

The objections which are being considered under this head have been overruled by the Supreme Court of the State. Tax-Injunction Cases, 23.

4. The objection that the board of equalization acted without notice has also been overruled by the Supreme Court. Tax-Injunction Cases, 34; *Adsit* v. *Leib*, 76 Ill. 201. See also *Missouri River, &c., R.R. Co.* v. *Morris*, 7 Kan. 210.

5. The objection to the assessment of the capital stock and franchise of the company by the State board of equalization, and to the manner in which it was done, is also overruled by the decisions of the Supreme Court of the State. *Porter* v. *Frankfort, &c., R.R. Co.*, 76 Ill. 561; *Republic Life Insurance Co.* v. *Pollock*, Tax-Injunction Cases, 35; *C., B., & Q. R.R. Co.* v. *Cole*, id. 43.

These are questions peculiarly within the province of the State tribunals, and their decisions are binding on this court. *Nesmith* v. *Sheldon*, 7 How. 818; *Carpenter* v. *Page*, 17 id. 462; *Wetherspoon* v. *Duncan*, 4 Wall. 217; *Delaware R.R. Tax Cases*, 18 id. 231; *Hamilton Co.* v. *Massachusetts*, 6 id. 633; *Lane Co.* v. *Oregon*, 7 id. 71; *Bailey* v. *R.R. Co.*, 22 id. 604.

Mr. R. G. Ingersoll, for the appellees, submitted the following points: —

First, The revenue law of 1872 provides only for taxation by valuation, and has nothing to do with an excise or license tax.

Second, The taxing power can only be exercised upon property within the jurisdiction of the body imposing the same.

Third, Real estate can only be taxed at its actual *situs*.

Fourth, The *situs* of the rolling-stock of a railway corporation is where the general office of such corporation is.

Fifth, Personal property cannot be changed into real estate, and real estate into personal property, for the purposes of taxation.

Sixth, Indebtedness cannot be taxed as against the debtors.

Seventh, The rules laid down by the board of equalization for the ascertainment of value cannot produce a correct valuation.

Eighth, The principle of uniformity has been violated.

Ninth, The Constitution of Illinois places the property of corporations and individuals upon an equality.

Tenth, By the law of 1872, corporations are denied privileges and rights accorded to individuals.

Eleventh, The board of equalization cannot disregard the sworn returns of the railway company, and cannot raise the valuation without evidence justifying it, nor then without notice to the company.

Twelfth, It is unlawful to classify property according to owners.

Thirteenth, The assessment by the board was fraudulent, and made not only without evidence, but contrary to evidence.

Fourteenth, The Supreme Court of the United States is not bound by the decision of the State court in this case, even if such decision stood unquestioned by the State court.

Fifteenth, In any event, where there are conflicting decisions by the State court, this court has the power to follow those decisions which are in accordance with the constitution of the State.

In the second case, *Mr. James K. Edsall*, Attorney-General of Illinois, appeared for appellants. See abstract of his brief, *infra*.

Mr. C. Beckwith and *Mr. Obadiah Jackson* for appellees, submitted, —

1. The decisions of the Supreme Court of Illinois are not conclusive.

The complainants insist that the assessments set forth in their bill are prohibited by that clause of the Fourteenth Amendment of the Federal Constitution which provides that "no State shall deprive any person of life, liberty, or property, without due process of law."

State laws and constitutions are construed by the Federal courts according to their own judgment in all cases where it is necessary to determine whether a right secured by the Federal Constitution has been violated. *Jefferson Bank* v. *Skelly*, 1 Black, 436; *The Hoboken Bridge*, 1 Wall. 116; *Ward* v. *Maryland*, 12 id. 418; *Delmas* v. *Ins. Co.*, 14 id. 661.

2. The mode of assessment adopted in this case is not warranted by the constitution and laws of the State.

3. The constitution of the State does not authorize an assessment of the franchise of a corporation by valuation.

An excise tax may be imposed under art. 9 of the State constitution upon a franchise, in the same manner as such a tax may be imposed upon jugglers, showmen, &c., having special privileges. The constitution did not intend to permit double taxation; that is, on a valuation and by an excise tax.

The rule of assessment adopted by the State board is unjust, as it compels the payment of taxes upon debts.

Mr. P. Phillips also for appellees.

The Federal courts have jurisdiction of the case, both on the ground of citizenship and to prevent a multiplicity of suits.

The restriction in the thirty-fourth section of the Judiciary Act of 1789 applies only to trials at common law: it does not apply to the decisions of the State courts upon questions of a general nature. *Nives* v. *Scott*, 13 How. 271; *Russell* v. *Southard*, 12 id. 144; *Watson* v. *Tarpley*, 18 id. 517.

The nature of taxation, what uses are public and what private, and the extent of unrestricted legislative power, are matters which no State court can conclusively determine for us. *Olcott* v. *Supervisors*, 16 Wall. 678; *Township* v. *Pine Grove*, 19 id. 671.

The question, then, for the determination of this court is, whether the "rules and principles" adopted by the board are "just and equitable."

The debt of the corporation is not part of the possessions of the corporation, but is property belonging to the creditor who holds it. *State* v. *Thomas*, 2 Dutch. 184; *State Tax*, 15 Wall. 320; *Bradley* v. *People*, 4 id. 459.

The rule, therefore, adopted by the board is based upon valuations, not of the property of the *corporations*, but of *property belonging to others*.

This is a departure from the authority conferred. A discretion so exercised cannot be substituted for legal requisition. *Bank of Chemung* v. *City of Elmira*, 53 N. Y. 52.

The rule adopted does not secure the uniformity demanded alike by just principles of taxation and constitutional guaranties.

The mode of distributing the assessed value of the property of the company, so as to subject it to taxation in the several counties and towns without regard to the real location of the property, is also illegal.

The State cannot *transfer property* from a county in which it is located into another, and thus subject it to a different rule of taxation than that which obtains at its *situs*. *Bank of Commerce*, 2 Black, 631; *St. Louis* v. *Terry Co.*, 11 Wall. 430.

In the third case, *Mr. James K. Edsall*, Attorney-General of the State of Illinois, and *Mr. Lyman Trumbull*, appeared for the appellants.

Mr. Edsall contended, —

I. Under the statutes of Illinois, railroad corporations may be assessed upon their capital stock and franchises.

II. The meaning of the terms "capital stock, including the franchise" (with all other questions involved in the present cases), has been determined by the Supreme Court of Illinois. These decisions, being unreported, are referred to as "Illinois Tax-Injunction Cases," printed in pamphlet form.

In these cases it is held, —

1. That the words "capital stock" mean the property of the corporation, and not the shares of stock owned by the shareholders.

2. That it was competent for the legislature to require the "capital stock" of corporations, as thus construed, to be assessed for the purpose of taxation against the corporation.

3. That the franchise of a corporation is property, and as such may be taxed, in proportion to its value, the same as other property. Illinois Tax Injunction Cases, pp. 3, 36.

III. The rule adopted by the board to ascertain the value of the "capital stock and franchise" of a corporation is at least theoretically correct.

This rule is, in substance, as follows: —

"*First*, The market or fair cash value of the shares of capital stock and the market or fair cash value of the debt (excluding from such debt the indebtedness for current expenses) shall be combined or added together; and the aggregate amount so ascertained shall be taken and held to be the fair cash value of the capital stock, including the franchise, respectively, of such companies and associations.

"*Second*, From the aggregate amount, ascertained as aforesaid, there shall be deducted the aggregate amount of the equalized or assessed valuation of all the tangible property, respectively, of such companies and associations."

This mode of taxing corporations upon their capital stock is upheld in other States. *Commonwealth* v. *Hamilton Manuf. Co.*, 12 Allen, 298; *Munroe Co. Savings Bank* v. *Rochester*, 37 N. Y. 366; *Osborn* v. *N. Y. & N. H. R.R. Co.*, 40 Conn. 491.

This mode of taxing corporations was recommended by the commissioners appointed in 1870 by the legislature of New York.

The board of equalization having jurisdiction, their action is conclusive, even though they may have erred in their judgment. *The People* v. *Halsey*, 53 Barb. 548.

IV. The assessment does not appear to be excessive.

V. The decisions of the Supreme Court of a State, as to the proper construction of its revenue laws, are conclusive on the Federal courts.

VI. The assessment in question being confided to the State board of equalization, its action cannot be collaterally impeached for mere error in judgment, but only for fraud, accident, or mistake.

Mr. O. H. Browning and *Mr. Wirt Dexter* for the appellees.

I. The assessment for capital stock is illegal and void under the first clause of sect. 1, art. 9, of the Constitution of Illinois.

First, Because the law under which the assessment was made is unconstitutional. *Solamons* v. *Laing*, 14 Jurist, for Dec., 1850; *Dodge* v. *Woolsey*, 18 How. 343; *Van Allen* v. *The Assessors*, 3 Wall. 583, 584; *Bradley* v. *The People*, 4 id. 459;

Bank v. *The Commonwealth*, 9 id. 359; *Austin* v. *Board of Aldermen of City of Boston*, 14 Allen, 362; Ang. & Ames on Corp., sect. 558, n. 1; *Brightwell* v. *Mallory*, 10 Yerg. 196; *State* v. *Franklin Bank*, 10 Ohio, 90, 97; Redf. Am. Railw. Cases, 500, 507, 510, 568; *State* v. *Thomas*, 2 Dutch. 184; Const. of Ill., sect. 1, art. 9, sect. 9, art. 11; *Railroad Co.* v. *Penn.*, 15 Wall. 300, 320; *The State* v. *Branin*, 3 Zab. 500; *Smith* v. *Burley*, 9 N. H. 428.

Second, Because, if the law shall be held to be constitutional, the assessment, as made, was not authorized by the law. *Porter* v. *R., R. I., & St. L. Railw. Co.*, Chic. Leg. News, June 27, 1874; *The C., B., & Q. R.R. Co.* v. *Cole et als.*, id. July 3, 1875; *Bank of Chemung* v. *City of Elmira*, 53 N. Y. 52.

II. The assessment cannot be sustained as a tax upon the franchise of the corporation under the second clause of sect. 1, art. 9, of the Constitution of Illinois.

First, Because the general assembly has passed no law, uniform as to the class upon which it operates, directing the manner in which persons and corporations shall be taxed for the ownership or use of franchises and privileges.

Second, Because the State board of equalization disregarded and violated the rule which it had adopted, and by which it had resolved to be governed, in making the assessment.

Third, It cannot be sustained as a franchise tax; because the assessment was not, in fact, for or on account of franchises and privileges.

Fourth, Because, in making it, the State board totally disregarded the uniformity and equality of assessment required by the constitution. Redf. Railw. Cases, 500; *United R.R. & Canal Co.* v. *Comm'r*, 8 Vroom, 247, 248; *Moore* v. *Chicago*, 60 Ill. 243; *The C., B., & Q. R.R. Co.* v. *Cole et als.*, Chic. Leg. News, July 3, 1875; *Knowlton* v. *Supervisors*, 9 Wis. 414; *Weeks* v. *Milwaukee*, 10 id. 242; *Hersey* v. *Board of Supervisors*, 16 id. 186; *Henry* v. *Chester*, 15 Vt. 460; *Brewer Brick Co.* v. *Inhabitants of Brewer*, 62 Me. 74, 75; *Portland Bank* v. *Apthorp*, 12 Mass. 252; *Commonwealth* v. *People's Savings Bank*, 5 Allen, 431; *Oliver* v. *Washington Mills*, 11 id. 268; *Bureau County* v. *C., B., & Q. R.R. Co.*, 44 Ill. 238.

Mr. Justice Miller delivered the opinion of the court.

The three cases whose titles stand at the head of this opinion are appeals from decrees of the Circuit Court for the Northern District of Illinois, enjoining the appellants from the collection of taxes assessed by the proper officers of the State of Illinois against three several railroad companies, organized under the laws of that State, and doing business in it. The plaintiffs in the first named of the above suits are mortgagees of the Toledo, Peoria, and Warsaw Railroad Company. In the other two cases the complainants are stockholders of the respective companies whose interests they represent; namely, the Chicago and Alton Railroad Company, and the Chicago, Burlington, and Quincy Railroad Company.

The act of the legislature of Illinois of March 30, 1872, under which the taxes complained of were assessed, makes special provisions for the taxation of railroads and other corporations, the main feature of which is the purpose of leaving to each county, city, and town the power of assessing for taxation what is properly local in the same manner that other similar property is taxed in that municipality, and at the same time to subject to like taxation on some fair basis that which is not in its nature so clearly local, but which, by reason of its being appurtenant or incident to the railroad, should pay its share to the State, and to all the counties, towns, and cities through which any part of the road runs. The theory of the system is manifestly to treat the railroad track, its rolling-stock, its franchise, and its capital, as a unit for taxation, and to distribute the assessed value of this unit according as the length of the road in each county, city, and town bears to the whole length of the road.

It provides, therefore, for three separate valuations, —

1. Of the real estate in each county, city, and town, which is not a part of the track and right of way, and of the personal property, such as tools, implements, &c., which remain permanently at that locality. These are valued by the local assessor and taxed by the local authorities in precisely the same manner that other real and personal property are assessed and taxed.

2. The railroad track, including the right of way, the grad-

ing and superstructure, and such dépôts, buildings, and other improvements as are on it, and all the rolling-stock and other personal property not local.

The entire value of this, owned by any company in the State, is ascertained by a report made by the proper officer of the railroad company, submitted to a State board of equalization, which fixes this value finally; and each county, city, and town taxes the company on so much of this assessment as the length of the track within that locality bears to the whole length of the track assessed by the board.

These two subjects of assessment are by the statute called the tangible property of the company.

It is obvious, however, that while a fair assessment under these two descriptions of property will include all the visible or tangible property of the corporation, it may or may not include all its wealth. There may be other property of a class not visible or tangible which ought to respond to taxation, and which the State has a right to subject to taxation. Thus it may occur, as in fact is claimed by one of these companies, that, being insolvent, and its earnings not being sufficient to pay any thing beyond its necessary expenses for operating the road and its repairs, this tangible property represents more than the real wealth of the company and its property. While, on the other hand, another one of these companies is so rich that, after paying its expenses and interest on a large amount of debt, it declares large dividends; and this interest and these dividends, when looked to in reference to what is called the tangible property, show that there is here another element of wealth which ought to pay its share of the taxes.

3. This element the State of Illinois calls the value of the franchise and capital stock of the corporation, — the value of the right to use this tangible property in a special manner for purposes of gain. This constitutes the third valuation, which is likewise to be made by the board of equalization; and, when thus ascertained, is subjected to the taxation of the State, counties, towns, and cities, by the same rule that the value of the road-bed is; namely, according to the length of the track in each taxing locality. The words "capital stock," as here used, do not mean the shares of the stock, but the aggre-

gate capital of the company. This is obvious from the proviso to the fourth paragraph of sect. 3 of the revenue law. As this paragraph lies at the basis of these controversies, it is here given *verbatim*: —

"The capital stock of all companies and associations now or hereafter created under the laws of this State shall be so valued by the State board of equalization as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association. Said board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock as to it may seem equitable and just; and such rules and principles, when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act, — subject, however, to such change, alteration, or amendment as may be found, from time to time, to be necessary by said board: *Provided*, that in all cases where the tangible property or capital stock of any company or association is assessed under this act, the shares of capital stock of any such company or association shall not be assessed or taxed in this State. This clause shall not apply to the capital stock, or shares of capital stock, of banks organized under the general banking laws of this State."

That the franchise, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business, and by the State which creates them, admits of no dispute at this day. "Nothing can be more certain in legal decisions," says this court in *Society for Savings* v. *Coite*, 6 Wall. 607, "than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of a State government." *State Freight Tax Case*, 15 Wall. 232; *State Tax on Gross Receipts*, 15 Wall. 284. But it has been a *desideratum*, perhaps not yet fully attained, to find a method of taxing this species of property which will be at the same time just to the owners of it, equal and fair in its relations to taxes on other property, and which will enforce the just contribution that such property should pay for the benefits which, more than property generally, it receives at the hands of government.

The tax on the deposits of savings-banks, in *Society for Savings* v. *Coite*, which was held to be of this class by the court; the tax on freight, in the *Freight Tax Cases;* and, in the other cases, the tax on gross receipts, by the State of Pennsylvania, — are all attempts at arriving at the desired result in the best mode.

The statute of Illinois, and the rule adopted by the board of equalization, under the power conferred by the clause we have just recited, may not be the wisest mode of doing complete justice in this difficult matter; but we confess we have, on the whole, seen no scheme which is better adapted to effect the purpose, so far as railroad corporations are concerned, of taxing at once all their property, and of making the tax just and equal in its relation to other taxable property of the State.

The rule adopted by the board is as follows: —

"*First*, The market or fair cash value of the shares of capital stock, and the market or fair cash value of the debt (excluding from such debt the indebtedness for current expenses), shall be combined or added together; and the aggregate amount so ascertained shall be taken and held to be the fair cash value of the capital stock, including the franchise, respectively, of such companies and associations.

"*Second*, From the aggregate amount ascertained as aforesaid, there shall be deducted the aggregate amount of the equalized or assessed valuation of all the tangible property, respectively, of such companies and associations (such equalized or assessed valuation being taken, in each case, as the same may be determined by the equalization or assessment of property by this board); and the amount remaining, in each case, if any, shall be taken and held to be the amount and fair cash value of the capital stock, including the franchise, which this board is required by law to assess, respectively, against companies and associations now or hereafter created under the laws of this State."

It may be assumed for all practical purposes, and it is perhaps absolutely true, that every railroad company in Illinois has a bonded indebtedness secured by one or more mortgages. The parties who deal in such bonds are generally keen and far-sighted men, and most careful in their investments. Hence the value which these securities hold in market is one of the

truest *criteria*, as far as it goes, of the value of the road as a security for the payment of those bonds.

These mortgages are, however, liens on the road, and, taking precedence of the shares of the stockholder, may or may not extinguish the value of his shares. They must in any event affect that value to the exact amount of the aggregate debts. For all that goes to pay that debt and its interest diminishes *pro tanto* the dividend of the shareholder and the value of his share.

It is therefore obvious, that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock.

This would of itself be, perhaps, the fairest basis of taxation for the State at large, if all railroads were solvent and paid the interest promptly on their funded debt. But this has never been the case in Illinois; and it is doubtful if this happy state of affairs is likely to prevail soon in that or any other State of the Union. If taxes were assessable alone on the value of the capital stock and franchises of the corporation, cases might be found where these were worth nothing, and such companies would pay no tax even for their real estate and personal property. And this is precisely the main argument of counsel for the Toledo, Peoria, and Warsaw Railroad Company, in opposition to the law and to the rule of the board of equalization. But individuals do not escape taxation on their real and personal property because they are insolvent. In several of the States many men in effect pay tax on their lots or lands, and on the mortgage which covers it and exceeds it in value, and on a large amount of personal property, while the mortgage debt exceeds in amount all that they are worth in the world. No State has ventured to establish the principle of permitting its visible, tangible property to escape taxation, relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts.

The system adopted by the statute of Illinois, and the rule

of the board of equalization, preserve this principle of taxing all the tangible property at its value, and taxing the capital stock and franchise at their value, if there be any, after deducting the value of the tangible property. The case of Toledo, Peoria, and Warsaw Company, as we have said, is used as an illustration of the inequality which this rule works, and which counsel say is forbidden by the constitution of the State, thus rendering the tax assessed against it void. That company is insolvent, and in the hands of a receiver. It is unable to pay any interest on its bonds. Its capital stock is of no value. But the board of equalization assessed the capital stock and franchise at $2,003,415, and its tangible property at $2,629,367, thus assessing a property which pays but little, if any thing, beyond its running expenses, at the sum of $4,632,782.

This sounds plausible; but it is nothing more. Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of the company has at present no market value, or is unsalable, — there remains what is valued as worth over $2,600,000 of real and personal property, which, like all other property of individuals or corporations, ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value, — that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the dépôts, the grounds, the rolling-stock, and other tangible property? Is it supposed by any one that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction as a man would sell town-lots and household furniture, and horses and carriages? The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when con-

sidered as so much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose.

It is this *franchise* which the legislature of Illinois intended to tax, which it had a right to tax; and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so utterly bankrupt that it must necessarily pass from it into other hands. In those hands, disembarrassed of its overweight of debt, who shall say that it is not worth $2,000,000? and who shall say that such is not the real value now of this franchise?

We shall presently consider the extent to which a court of justice can enter upon the consideration of this question; but we take occasion here to say, that, in the view we have taken of the matter, there is no sufficient evidence in these cases to show that if the rule adopted by the board be just, that it has been unfairly applied to any of these roads, except in the single case of a mistake in the amount of the bonds of the Chicago, Burlington, and Quincy Railroad Company, — a mistake induced by the report of that company's officer to the State auditor.

Another objection to the system of taxation by the State is, that the rolling-stock, capital stock, and franchise, are personal property, and that this, with all other personal property, has a local *situs* at the principal place of business of the corporation, and can be taxed by no other county, city, or town, but the one where it is so situated.

This objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicile of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the State which recognizes it; and when it is called into operation as to property located in one State, and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases. *Green* v. *Van Buskirk*, 5 Wall. 312. Like all other laws of a State, it is, therefore, subject to legislative repeal,

modification, or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation. Whether allowing the rule to stand as to taxation of individuals, and changing it as to railroads or other corporations, it violated any rule of uniformity prescribed by the constitution of the State, we will consider when we come to the constitutional objections to the statute.

It is further objected that the railroad track, capital stock, and franchise is not assessed in each county where it lies according to its value there, but according to an aggregate value of the whole, on which each county, city, and town collects taxes according to the length of the track within its limits.

This, it is said, works injustice both to the counties and to the companies. To the counties and cities, by depriving them of the benefit of this value as a basis of local taxation; to the company, by subjecting its track and franchises, on the basis of this general value, to the taxation of the counties and towns, varying, as they do, in rate, without the benefit of the rule of assessment which prevails in those counties in the valuation of other and similar property. But, as we have already said, a railroad must be regarded for many, indeed for most purposes, as a unit. The track of the road is but one track from one end of it to the other, and, except in its use as one track, is of little value. In this track as a whole each county through which it passes has an interest much more important than it has in the limited part of it lying within its boundary. Destroy by any means a few miles of this track within an interior county, so as to cut off the connection between the two parts thus separated, and, if it could not be repaired or replaced, its effect upon the value of the remainder of the road is out of all proportion to the mere local value of the part of it destroyed. A similar effect on the value of the interior of the road would follow the destruction of that end of the road lying in Chicago, or some other place where its largest traffic centres. It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole.

There are other objections urged by counsel against the equity and fairness of the Illinois mode of assessing and taxing railroad companies as a system. But we cannot notice them all. Those above commented on are the most important.

There is, however, an objection urged to the conduct of the board of equalization, resting on the action of the board in these particular cases, in which they are charged with a gross violation of the law to the prejudice of the corporations, which we will consider.

The statute requires the proper officers of the railroad companies to furnish to the State auditor a schedule of the various elements already mentioned as necessary in applying the statutory rule of valuation. It is charged that the board of equalization increased the estimates of value so reported to the auditor, without notice to the companies, and without sufficient evidence that it ought to be done; and it is strenuously urged upon us, that for want of this notice the whole assessment of the property and levy of taxes is void.

It is hard to believe that such a proposition can be seriously made. If the increased valuation of property by the board without notice is void as to the railroad companies, it must be equally void as to every other owner of property in the State, when the value assessed upon it by the local assessor has been increased by the board of equalization. How much tax would thus be rendered void it is impossible to say. The main function of this board is to equalize these assessments over the whole State. If they find that a county has had its property assessed too high in reference to the general standard, they may reduce its valuation; if it has been fixed too low, they raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual who owns any in that county. Must each one of these have notice and a separate hearing? If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet if this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. Nor is

there any hardship in the matter. This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked.

As we do not know on what evidence the board acted in regard to these railroads, or whether they did not act on knowledge which they possessed themselves, and as all valuation of property is more or less matter of opinion, we see no reason why the opinion of this court, or of the Circuit Court, should be better, or should be substituted for that of the board, whose opinion the law has declared to be the one to govern in the matter.

It is said that the statute of Illinois is void, because it violates the principle of uniformity, and taxes corporations in a manner different from that which governs taxation of individuals.

The sections of the constitution relied on in support of this proposition are sects. 1 and 10 of article 9, which are as follows: —

SECT. 1. "The general assembly shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its 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; but the general assembly shall have power to tax pedlers, auctioneers, brokers, hawkers, merchants, commission-merchants, showmen, jugglers, innkeepers, grocery-keepers, liquor-dealers, toll-bridges, ferries, insurance, telegraph, and express interests or business, venders of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates."

SECT. 10. "The general assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, — such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

As regards this latter section, there is no claim that *the rate* of taxation levied by any municipal corporation, on the assessed value of railroad property within its limits, is greater than on other property.

Nor is it asserted that the valuation of that part of the property which the statute regards as strictly local — namely, real estate not a part of the track, and tools and implements used exclusively within the locality — has been assessed on any other principle than that which is applied to the property of individuals.

But the contention is, that the rule of treating the road, its rolling-stock and franchises, as a unit, and assessing it as a whole, on which each municipality levies its taxes according to the length of the road within its limits, violates the principles of this section. We have already discussed this question, and are of opinion that taxes assessed by that rule on the railroad property by the municipality are uniform when the rate of taxation is the same on the assessment thus ascertained that it is on other property.

This court has expressly held in two cases, where the road of a corporation ran through different States, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each State, as the basis of taxation. *The Delaware Railroad Tax Case*, 18 Wall. 208; *Erie R.R. Co.* v. *Pennsylvania*, 21 Wall. 492.

As to sect. 1, we need not inquire very closely whether the mode adopted by the statute and the rules of the board of equalization produces a valuation for railroad companies different from that of individuals, though, as we have already said, it does not appear to us to produce any inequality to the prejudice of the companies. But we need not pursue that inquiry very closely, because the latter part of the section in express terms authorizes the legislature to "tax persons and corporations owning or using franchises in such manner as it shall from time to time direct, by general law;" and the only restriction on the power, as applied to this class, is, that it shall be "uniform as to the class upon which it operates."

There can be no doubt that all the classes named in this

clause, including pedlers, showmen, innkeepers, ferries, express, insurance, and telegraph companies, are taken out of the general rule of uniformity prescribed by the first clause, and the only limitation as to them is that of uniformity as to the class upon which the law shall operate; that is, innkeepers may be taxed by one, ferries by another, railroads by another, provided that the rule as to innkeepers be uniform as to all innkeepers, the rule as to ferries uniform as to all ferries, and the rule as to railroad companies be uniform as to all railroad companies. As we have seen no evidence that the rule by which railroad property is taxed is not uniform in its action on all the railroad companies of Illinois, we can perceive no opposition to the constitution of the State in that rule.

But suppose it were otherwise; perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised, must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large State like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature, and of the evidence on which human judgment is founded. *Tappan* v. *Merchants' National Bank*, 19 Wall. 504; *Weber* v. *Renhard*, 73 Penn. St. 373; *Commonwealth* v. *Savings Bank*, 5 Allen, 247; *Allen* v. *Drew*, 44 Vt. 174.

Let us suppose that the complaints made in these cases against the taxes were well founded; that the mode adopted by the board of equalization to ascertain the value of the franchise and capital stock is not the best mode; that it produces unequal and unjust results in some cases; that the same is true of the mode of ascertaining the basis of assessment for the taxation by municipalities; that the board of equalization increased the entire assessment on each company without sufficient evi-

dence; in short, let us suppose that in these and many other respects the proceedings were faulty and illegal, — does it follow that in every such case a court of equity will restrain the collection of the tax by injunction, or will enjoin the collection of the whole tax when it is obvious that in justice a large part of it should be paid, and if not paid, that the complainant escapes taxation altogether?

We propose to consider these questions for a moment, because the immense weight of taxation rendered necessary by the debts of the United States, of the several States, and of the counties, cities, and towns, has resulted very naturally in a resort to every possible expedient to evade its force.

It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a court of equity. *Mooers* v. *Smedley*, 6 Johns. Ch. 27; *Dodd* v. *Hartford*, 26 Conn. 239; *Green* v. *Munford*, 5 R. I. 478; *Messert* v. *Supervisors of Columbia*, 50 Barb. 190; *Dow* v. *Chicago*, 11 Wall. 108; *Hannewinkle* v. *Georgetown*, 15 Wall. 548.

The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.

That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Rev. Stat. sect. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived

from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice. See *Cheatham* v. *Norvell*, decided at this term; *Nickoll* v. *United States*, 7 Wall. 122; *Dow* v. *Chicago*, 11 Wall. 108.

In this latter case, this court, after commenting upon the necessary reliance of the State governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, says, "No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked." So, in the case of *Hannewinkle* v. *Georgetown*, the court says, "It has been the settled law of this country for a great many years, that an injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction." 15 Wall. 548. We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is, that it has no power to apportion the tax or to make a new assess-

ment, or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitutions of all the States, and by the theory of our English origin, is exclusively legislative. *Heine* v. *The Levee Commissioners*, 19 Wall. 660.

A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of, in whole or in part, without any power of doing complete justice by making, or causing to be made, a new assessment on any principle it may decide to be the right one. In this manner it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner.

These reasons, and the weight of authority by which they are supported, must always incline the court to require a clear case for equitable relief before it will sustain an injunction against the collection of a tax, which is part of the revenue of a State. Whether the same rigid rule should be applied to taxes levied by counties, towns, and cities, we need not here inquire; but there is both reason and authority for holding that the control of the courts, in the exercise of power over private property by these corporations, is more necessary, and is unaccompanied by many of the evils that belong to it when affecting the revenue of the State. High on Injunc., sect. 369, and cases there cited. The assessments in the cases before us, of which complaint is made, are all made by the State board of equalization; and though the taxes are collected by the county authorities, a large part of them go to make up the revenue of the State.

In the examination which we have made of these cases, we do not find any of the matters complained of to come within the rule which we have laid down as justifying the interposition of a court of equity. There is no fraud proved, if alleged. There is no violation of the constitution, either in the statute or in its administration, by the board of equalization. No property is taxed that is not legally liable to taxation, nor is the rule of uniformity prescribed by the constitution violated.

If there is an excessive estimate of the value of the franchise or capital stock, or both, it is by an error of judgment in the officers to whose judgment the law confided that matter; and it does not lie with the court to substitute its own judgment for that of the tribunal expressly created for that purpose.

But there is another principle of equitable jurisprudence which forbids in these cases the interference of a court of chancery in favor of complainants. It is that universal rule which requires that he who seeks equity at the hands of the court must first do equity.

The defendants in all these cases are the clerks and treasurers of the counties, — the clerk who makes out the tax-list, and the treasurer who collects the taxes. These taxes are both the State and county taxes. It is clear, from the statements of the bills and from what we have already said, that there must be in every county mentioned a considerable amount of real estate and personal property coming within the character of local tangible property, and subjected to taxation on precisely the same principles, and no other, that all other personal and real estate within the county is taxed. It is equally clear that the road-bed within each county is liable to be taxed at the same rate that other property is taxed. Why have not complainants paid this tax? In reference to the latter, it is said, that they resist the rule by which the value of their road-bed in each county is ascertained, and therefore resist the tax. But surely it should pay tax by some rule. If the rule adopted gives too large a valuation in some counties, it must be too small in others. What right have they to resist the tax in the latter case? And in the former, is the whole tax void because the assessment is too large? Should they pay nothing, and escape wholly because they have been assessed too high? These questions answer themselves. Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them.

It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the

tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill, that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The State is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed.

We are satisfied that an observance of this principle would prevent the larger part of the suits for restraining collection of taxes which now come into the courts. We lay it down with unanimity, as a rule to govern the courts of the United States in their action in such cases. Cooley on Tax. 537; *Palmer* v. *Napoleon*, 16 Mich. 176; *Hersey* v. *Supervisors*, 16 Wis. 185; *Roseberry* v. *Huff*, 27 Ind. 12; *Frazer* v. *Liebon*, 16 Ohio St. 614; *Parmely and Others* v. *The Railroad Companies*, 3 Dill. 19.

But, if for no other reason, we should reverse the decrees of the Circuit Court in these cases, because the same questions, involving the same considerations urged upon us here, have been decided by the Supreme Court of the State of Illinois in a manner which leads to the reversal of these. The cases referred to are *Samuel R. Porter, County Treasurer, and John W. Cook, County Clerk*, v. *Rockford, Rock Island, & St. Louis Railroad Co.*, decided at the January Term, 1874, and *The Chicago, Burlington, & Quincy R.R. Co.* v. *J. J. Cole and Another*, decided in June, 1875. In these two cases, all the points arising in the present cases were presented to the court, and decided adversely to the railroad companies. These questions all grew out of the validity and the construction of the tax-law involved in the present cases, and out of the same action of the board of equalization. The validity of the statute is not seriously questioned here on the ground of any conflict with the Constitution of the United States. If any such claim be set up, it is

sufficient to say it is without foundation. As the whole matter, then, concerns the validity of a State law as affected by the constitution of the State, that question, and the other one of the true construction of that statute, belong to the class of questions in regard to which this court still holds, with some few exceptions, that the decisions of the State courts are to be accepted as the rule of decision for the Federal courts.

It is, nevertheless, a satisfaction that our judgment concurs with that of the State court, and leads us to the same conclusions.

The decrees in all these cases are reversed. The cases are remanded to the Circuit Court, with directions to dissolve the injunction granted in each case, and to dismiss the bills.

It was said on the argument, and seems to be conceded, that, in the case of *The Chicago, Burlington, & Quincy R.R. Co.*, an agreement existed that the mistake of the board of equalization in assessing the company on bonds of its leased roads might be corrected in this suit. No such agreement is on file here, and we cannot act on it. But when the case is returned to the Circuit Court, of course such decree can be rendered in that regard as counsel may agree on. A similar remark applies to what the brief of the attorney-general of the State admits to be an error to the prejudice of the Chicago and Alton Company.

LEWIS, TRUSTEE, *v.* UNITED STATES.

1. The United States is entitled to priority of payment out of the effects of its bankrupt or insolvent debtor, whether he be principal or surety, or be solely, or only jointly with others, liable, and it is immaterial where the debt was contracted.
2. The United States was the creditor of a firm, A., B., & Co., doing business in London, and consisting of several persons, some of whom resided there. The others resided in this country, and, with another partner, constituted the firm of A. & Co. The members of the latter firm were duly declared bankrupt, and a trustee was appointed under the forty-third section of the Bankrupt Act of March 2, 1867. *Held*, that the relations of the bankrupt members of the firm of A., B., & Co. to the United States are the same as if they were severally liable to the United States; and that the United States

is entitled to the payment of its debt out of their separate property, in preference and priority to all other debts due by them or either of them, or by the firm of A. & Co.

3. The United States was under no obligation to prove its debt in the bankruptcy proceedings, or pursue the partnership effects of A., B., & Co. before filing this bill against the trustee; and the Circuit Court had original jurisdiction of the case thereby made, although the fund arose, and the trustee was appointed, under the Bankrupt Act.
4. A creditor holding collaterals is not bound to apply them before enforcing his direct remedy against his debtor.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. William M. Evarts, *Mr. R. L. Ashhurst*, and *Mr. W. P. Clough*, for the appellant.

Mr. Attorney-General Pierrepont and *Mr. R. C. McMurtrie*, *contra*.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This case turns upon legal propositions. There is no controversy about the facts. Jay Cooke, McCulloch, & Co., bankers, of London, were appointed by the United States disbursing agents for the Navy Department. On the 19th of October, 1873, they were indebted to the department for the balance of moneys placed in their hands for disbursement, in the sum of £131,610 9*s.* 8*d.* On or about the 20th of September, 1873, when the amount due to the department was considerably larger than that mentioned, the company placed in the hands of the United States or their agents a large amount of collaterals for the security of the debt. The United States claim the right to apply the proceeds of these collaterals to the payment of another and later debt arising in the same way. Irrespective of the collaterals, the amount first mentioned, with interest, is still due and unpaid.

The firm of Jay Cooke, McCulloch, & Co. consisted of Hugh McCulloch, J. H. Puleston, and Frank H. Evans, residents of Great Britain, and of Jay Cooke, William G. Moorehead, H. C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, Jr., residents of the United States. For a long period previous to the time first mentioned there was a banking-house in Philadelphia under the name of Jay Cooke & Co.

The members of that firm were the seven American partners in the house of Jay Cooke, McCulloch, & Co., and James A. Garland. On the 26th of November, 1873, all the persons composing the firm of Jay Cooke & Co. were adjudicated bankrupts; and this adjudication remains in full force. This included the seven American members in the house of Jay Cooke, McCulloch, & Co. The other three partners of this latter firm are not bankrupt. Under the proceedings in bankruptcy, the defendant, Lewis, has been appointed trustee of the estates of the bankrupts of the firm of Jay Cooke & Co., and as such received and holds their several separate individual estates and assets, and the estates and assets of the firm as well. The estates of these bankrupts are insufficient to pay all their indebtedness. The United States, under the statutes in such case provided, claim priority of payment of their debt before mentioned out of the separate estates of such members of the firm of Jay Cooke & Co. as were also members of the debtor firm of Jay Cooke, McCulloch, & Co. The trustee denies the validity of this demand. The United States have instituted this proceeding to enforce it.

On the 10th of April, 1875, there was already accumulated in the hands of the trustee of the funds so claimed by the United States the sum of $267,844.80.

The Bankrupt Act of March 2, 1867, declares, that, in the order for a dividend, "the following claims shall be entitled to priority or preference, and to be first paid in full in the following order: —

"*First*, Fees, costs, and expenses of suits and of the several proceedings under this act, and for the custody of property, as herein provided.

"*Second*, All debts due to the United States, and all taxes and assessment under the laws thereof."

The fifth section of the act of March 3, 1797 (1 Stat. 515), enacts, —

"That where any revenue officer or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor in the hands of executors or administrators shall be insufficient to pay all

the debts due from the deceased, the debt due to the United States shall be first satisfied, and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor shall be attached by process of law, as to the cases in which a legal act of bankruptcy shall be committed."

It may be well to pause here and carefully analyze this section, and consider the particulars of the category it defines, so far as its provisions apply to the case in hand.

Those affected are persons "indebted to the United States."

This language is general, and it is without qualification.

The form of the indebtedness is immaterial.

It may be by simple contract, specialty, judgment, decree, or otherwise by record. The debt may be legal or equitable, and have been incurred in this country or abroad. A valid indebtedness is as effectual in one form as another. No discrimination is made by the statute.

The debtors may be joint or several, and principals or sureties.

Here, again, no distinction is made by the statute. All are included. *Beaston* v. *The Bank of Delaware*, 12 Pet. 134; *United States* v. *Fisher*, 2 Cranch, 358.

There must be bankruptcy or else insolvency, as the latter is defined by the statute and the authorities upon the subject.

As bankruptcy exists here, we need not look beyond that point in this case. Congress had power to pass the act. 2 Cranch, 396.

Where the language of a statute is transparent, and its meaning clear, there is no room for the office of construction. There should be no construction where there is nothing to construe. *United States* v. *Wiltberger*, 5 Wheat. 95; *Cherokee Tobacco*, 11 Wall. 621.

That the facts disclosed in the record bring the case within the plain terms and meaning of the section in question, seems to us, viewing the subject from our stand-point, almost too clear to admit of serious controversy. Affirmative discussion, under such circumstances, is not unlike argument in support of

a self-evident truth. The logic may mislead or confuse. It cannot strengthen the pre-existing conviction. 11 Wall. 621.

The statute must prevail, unless its effect shall be overcome by the considerations to which our attention has been called by the learned counsel for the appellant. They have argued their contentions with a wealth of learning and ability commensurate with the importance of the case.

We shall respond to their propositions without restating them.

The United States are in no wise bound by the Bankrupt Act. The clause above quoted is *in pari materia* with the several acts giving priority of payment to the United States, and was doubtless put in to recognize and reaffirm the rights which those statutes give, and to exclude the possibility of a different conclusion. That the claim of the United States was not proved in the bankruptcy proceedings in question is, therefore, quite immaterial in this case. *United States* v. *Herron*, 20 Wall. 251; *Harrison* v. *Sterry*, 5 Cranch, 289.

The case presented is that of a trust fund, a trustee holding and a *cestui que trust* claiming it. This gave the Circuit Court original and plenary jurisdiction. That the fund arose and the trustee was appointed under the Bankrupt Act did not affect the right of the United States to pursue both by the exercise of the jurisdiction invoked. The same remedies are applicable as if the fund had arisen and the trustee had been appointed in any other way. 12 Pet. *supra*; *Thomson* v. *Smith*, 2 Wheat. 425.

The United States were under no obligation to pursue the partnership effects of Cooke, McCulloch, & Co. before filing this bill. The bankruptcy of the American partners dissolved the firm of Cooke, McCulloch, & Co., not only as to themselves, but also, *inter se*, as to the solvent partners. In analogy to the proceeding at law, where there are joint debtors and one is beyond the reach of the process of the court, and equity has jurisdiction, a decree may be taken against the other for the whole amount due. *Darwent* v. *Walton*, 2 Atk. 510. In *Nelson* v. *Hill*, 5 How. 127, this court held that the creditor of a partnership may proceed at law against the surviving partner, or go in the first instance into equity against the representatives of the deceased partner, and that it was not necessary for him

to exhaust his remedy at law against the surviving partner before proceeding in equity against the estate of the deceased. The solvency of the surviving partner is immaterial. To the same effect are *Thorpe* v. *Jackson*, 2 Y. & C. Ex. 553, *Wilkinson* v. *Henderson*, 1 M. & K. 582, *Ex parte Clegg*, 2 Cox's Cas. 372, and *Camp* v. *Grant*, 21 Conn. 41. A court of equity will not entertain the question of marshalling assets, unless both funds are within the jurisdiction and control of the court. Adams's Eq. 6 Am. ed., 548, note; *Denham* v. *Williams*, 39 Ga. 312; see also *Walker* v. *Covar*, 2 S. C., N. S., 16; *Dodds* v. *Snyder*, 34 Ill. 53; *Herriman* v. *Skillman*, 33 Barb. 378; *Shunk's Appeal*, 2 Barr, 304; *Coates's Appeal*, 7 Watts & S. 99; *Keyner* v. *Keyner*, 6 Watts, 221. If a judgment at law be recovered against a copartnership, the separate property of each partner is alike liable to execution with the property of the partnership; and equity will not interfere, unless there are cogent special circumstances, such as have no existence here. *Meech* v. *Allen*, 17 N. Y. 300. These authorities are conclusive on the point under consideration. If there could otherwise be a doubt upon the subject, it is removed by the two statutes. The Bankrupt Law declares that the United States shall be first paid; the fifth section of the statute of 1797 enacts, that, where there is a debt and bankruptcy, they shall have priority of payment. Neither statute contains any qualification, and we can interpolate none. Our duty is to execute the law as we find it; not to make it. It would be a singular equity which would drive the appellees "beyond sea" to carry through a litigation of uncertain duration, and results against parties there before they can be permitted to proceed against the parties and property here.

It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor. *Kellock's Case*, 3 Ch. App. 769; *Bonser* v. *Cox*, 6 Beav. 84; *Tuckley* v. *Thompson*, 1 Johns. & Hem. Ch. 126; *Lord* v. *The Ocean Bank*, 20 Penn. 384; *Neff's Appeal*, 9 id. 36. This is admitted; but it is insisted that there are special considerations here which ought to take the case out of the general rule. We think those considerations are all of the opposite tendency. One of them is found

in the character and circumstances of a large portion of the collateral assets. The facts are set forth in the answer of the United States to the cross-bill of the appellant, and need not be more particularly adverted to. Another of these considerations applies to all the collaterals, and is conclusive. There are parties entitled to be heard touching the application of the proceeds who were not, and could not be, brought before the Circuit Court. According to the best-considered adjudications, no burden touching these assets can be made to rest upon the United States, which they are not willing to assume. Doubtless questions will arise involving much delay before the administration of the fund is completed. In the mean time, the United States cannot be barred from enforcing any remedy to which they are entitled.

The court below committed no error in holding that the preference of the United States as a creditor of Cooke, McCulloch, & Co. applied to the separate and individual estates of the bankrupt partners, thus superseding the rule in equity recognized by the Bankrupt Act, — that partnership property is to be first applied in payment of the partnership debts, and individual property in payment of the individual debts. It is sufficient to say upon this subject that the learned and elaborate argument of the appellant's counsel in support of the opposite view overlooks the true meaning and effect of the statutes. The bankrupt parties in question were indebted to the United States, and they had separate estates. This entitled the United States to the preference claimed. One of the obvious purposes of the fifth section of the act of 1797 was to abrogate the rule insist d upon, and it has clearly done so. The provisions of the Bankrupt Act relied upon do not, as we have shown, affect the United States. The legal relations of those parties to the United States, in this controversy, are just what they would have been if those parties were individual debtors to the United States, and the firm of Cooke, McCulloch, & Co. had never existed.

The separate and individual interest of the several partners in the partnership property of Jay Cooke & Co. can be only the share of each one of what may be left after discharging all the liabilities of the copartnership. This will be nothing,

the firm being in bankruptcy and conceded to be hopelessly insolvent. The United States can, therefore, have no interest with respect to the administration of its affairs. Any rights as to the collaterals held by the United States, claimed by others, must be settled outside of the present proceeding. They cannot be adjudicated upon in this case. *Decree affirmed.*

TOWN OF CONCORD *v.* PORTSMOUTH SAVINGS BANK.

An act of the general assembly of the State of Illinois in force March 7, 1867, authorized towns acting under the Township Organization Law of the State — of which the town of Concord was one — to appropriate money to aid in the construction of a certain railroad, to be paid to said company as soon as its track should have been located and constructed through such towns. At a popular election held in the town of Concord, on the 20th of November, 1869, the proposition to make such appropriation was submitted to the legal voters thereof, as required by the act; and the town voted the appropriation, provided the company would run its road through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation; and on the 9th of October, 1871, town bonds representing such donation were issued by the supervisor and town-clerk. *Held*, 1. That under the statute the town could not make an appropriation or donation in aid of the company until its road was located and constructed through the town. 2. That the constitution of the State, which came into operation July 2, 1870, annulled the power of any city, town, or township, to make donations or loan its credit to a railroad company, and, after that date, rendered the act of 1867 ineffective. 3. As the town had no authority to make a contract to give, and the acceptance by the company was an undertaking to do nothing which it was not bound to do, before the authority of the town to make or to engage to make a donation came into existence, no valid contract arose from such offer and acceptance. 4. That the bonds so issued are void.

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

This was an action of assumpsit to recover the amount of the coupons attached to certain bonds issued by the supervisor and town-clerk of the town of Concord, in the State of Illinois.

The act of the general assembly of the State of Illinois, pursuant to which the bonds recite that they were issued, provides, —

"That all incorporated cities and towns acting under the township organization law, which lie wholly or partly within twenty

miles of the east line of this State, and also between the city of Chicago and the southern boundary of Lawrence County, be and the same are hereby severally authorized to appropriate such sum of money as they may deem proper to the Chicago, Danville, and Vincennes Railroad Company, to aid in the construction of the road of said company, to be paid to said company as soon as the track of said road shall have been located and constructed through said city, town, or township, respectively: *Provided, however*, that the proposition to appropriate moneys to said company shall be first submitted to a vote of the legal voters of said respective townships, towns, or cities, at a regular, annual, or special meeting, by giving at least ten days' notice thereof; and a vote shall be taken thereon by ballot at the usual place of election; and if the majority of the votes cast shall be in favor of the appropriation, then the same shall be made, otherwise not."

"SECT. 2. The authorities of said townships, towns, or cities, respectively, are hereby authorized and required to levy and collect a tax, and make such provisions as may be necessary for the prompt payment of the appropriation under the provisions of this law."

Pursuant to a notice for that purpose, an election was held on Nov. 20, 1869, and the legal voters of the town of Concord voted to levy a tax on the taxable property of said town, amounting in the aggregate in two years — to be levied and collected as other taxes — to the sum of $25,000, to be donated to said railroad company, provided said company run the said railroad through the village of Concord, or on its boundaries, and to and through the town of Sheldon, in Sheldon township.

On the twentieth day of June, 1870, the railroad company filed in the town-clerk's office a written notice of the acceptance of the donation, the same being addressed to the supervisor and town-clerk.

The Constitution of Illinois, which took effect July 2, 1870, ordains as follows: —

"No county, city, town, township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation: *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, where the same have been

authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

On the ninth day of October, 1871, the supervisor and town-clerk executed bonds of the following tenor: —

"United States of America, *State of Illinois:* —

"No. .] Concord Township Railroad Bond. [$1,000.

"Know all men by these presents, That the township of Concord, in the county of Iroquois and State of Illinois, acknowledges itself to owe and be indebted in the sum of $1,000, lawful money of the United States of America, which sum of money the said township of Concord promises to pay to the bearer at the Mechanics' National Bank, Chicago, on the first day of June, in the year 1881, with interest thereon at the rate of ten per centum per annum, which interest shall be payable yearly on the first day of June in each year, at the Mechanics' National Bank of the city of Chicago, upon presentation and delivery of the warrants or coupons severally hereto annexed, until the payment of the said principal sum.

"This bond is issued under and by virtue of a law of the State of Illinois, to authorize cities, towns, or townships lying within certain limits to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville, and Vincennes Railroad, and the faith of said township of Concord is hereby pledged for the payment of said principal sum and interest as aforesaid."

And they were delivered to the company Oct. 17, 1871.

The case was tried below without the intervention of a jury. The court found for the plaintiff, and gave judgment accordingly, whereupon the defendant brought the case here.

Argued by *Mr. George H. Williams* for the plaintiff in error, and submitted on printed briefs by *Mr. Isaac G. Wilson* and *Mr. Sanford B. Perry* for the defendant in error.

Mr. Justice Strong delivered the opinion of the court.

The bonds to which the coupons in suit were attached purport to have been made under legislative authority given to the town officers by the act of March 7, 1867. Their recitals make direct reference to that act by its title, which is set forth at length, with an averment that they were issued under and by virtue of it. The primary question, therefore, is, whether that statute did in reality give to the supervisor and clerk of

the town power to execute and deliver town bonds on the ninth day of October, 1871 (when the bonds were in fact issued), as an appropriation or donation to the railroad company. The first and second sections are the only ones to which reference need be made. By the first, it was enacted that certain incorporated towns and cities, and towns acting under the township organization law (among which it is conceded the town of Concord was one), should be and were severally authorized to appropriate such sum of money as they might deem proper, to the Chicago, Danville, and Vincennes Railroad Company, to aid in the construction of the road of said company; to be paid to the company as soon as the track of said road should have been located and constructed through said city, town, or township respectively. To this was attached the following proviso: —

"*Provided, however*, that the proposition to appropriate moneys to said company shall be first submitted to a vote of the legal voters of said respective townships, towns, or cities, at a regular annual or special meeting, by giving at least ten days' notice thereof; and a vote shall be taken thereon by ballot at the usual place of election; and if the majority of votes cast shall be in favor of the appropriation then the same shall be made, otherwise not."

The second section empowered and required the authorities of said municipalities to levy and collect a tax, and make such provisions as might be necessary for the prompt payment of the appropriation under the provisions of the law.

The authority given to the town of Concord by this statute was not to subscribe to the stock of the railroad company, but to make an appropriation or donation in aid of the construction of the road; and even that donation was not permitted to be made until after the completion of the location and construction of the road through the town. It has been strenuously insisted during the argument that the act conferred no power upon the town to make an appropriation or donation by the issuing of bonds or certificates of indebtedness. It is said that other provision was made for the donation, — provision by the levy and collection of a tax. We do not care, however, to discuss this matter, for in the view which we have of the case it is quite immaterial.

A popular election having been held, and a majority of votes cast at the election having been in favor of the appropriation, it may be conceded that payment of the appropriation could lawfully have been made in town bonds instead of money, if the donation itself was authorized. The real question is, whether the authority to make the donation existed when it was made. The act of the legislature of 1867 may have been authority for a donation at any time prior to July 2, 1870, and no authority at all afterwards. And such, we think, it was. The popular vote in favor of an appropriation was on the 20th of November, 1869; but it was not itself an appropriation or donation, and the town was not authorized to make it until the railroad was located and constructed through the town. Before that time, and before any attempt at a donation or appropriation was made, the authority to make it was withdrawn. If no effect be attributed to the rescinding vote of June 30, 1870, the new constitution of the State, which came into operation on the 2d of July, 1870, annulled, we think, the power of municipalities to make donations to railroad companies. It ordained that, —

"No city, town, township, or other municipality, shall ever become subscribers to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation: *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption."

This article, in our opinion, makes a clear distinction between subscriptions to the capital stock of a railroad company, or a private corporation, and donations or loans of credit to such corporations. The latter are prohibited under all circumstances. The former may still be made, if they have been authorized by a vote of the people prior to the adoption of the constitution. A very able and ingenious argument has been submitted to us, aiming to show that in fact the article makes no such distinction, and that donations and subscriptions are put upon the same footing; but we cannot yield to it our assent. No matter what may have been the intention of the mover of the proviso, the intent of the framers of the article, and of the people

adopting it, must be gathered from the article itself. There was reason for the distinction. For subscriptions to capital stock the municipality got something for which there was at least a possibility of return, more than was possible in the case of donation. In both cases public convenience may have been contemplated: but in the one, more than that may have been contemplated and expected; and this may have been the prevailing motive for assent to a subscription. It cannot be doubted that a subscription would have been voted in many cases where a donation, or a loan of credit, would not have been.

If, then, the State constitution prohibited donations to railroad companies, made after its adoption, the act of the legislature of 1867 became ineffective after July 2, 1870. After that date the power no longer existed in the municipality.

We do not say that the new constitution could annul or impair any contract that was made between the town and the railroad company, during the time in which the town had authority to make it. A constitution can no more impair the obligation of a contract than ordinary legislation can. But the record exhibits no contract made before July 2, 1870. The town voted on the twentieth day of November, 1869, that it would make a donation, provided the company would run its railroad through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation. But the town was not empowered to make the donation until the road was located and constructed through the town. It had no authority to make a contract to give. And the acceptance was an undertaking to do nothing which the company was not bound to do before the authority of the town to make a donation, or to engage to make a donation, came into existence. What is called the acceptance of the railroad company cannot be construed as an engagement to locate and build the railroad through the town. It amounted to no more than saying, "If we build our road through your town, we will receive your gift." There was, therefore, no consideration for the town's promise to give, even if the popular vote can be considered a promise. There was no contract to be impaired. A contract should be clearly proved before it invokes the protection of the Federal Constitution.

We conclude, then, that, at the time the donation was made, there was no authority in the municipality to make a donation to the railroad company, and consequently no authority to issue the bonds. It follows that the bonds and coupons are void.

Judgment reversed and new trial ordered.

County of Moultrie v. Rockingham Ten-Cent Savings-Bank.

1. An act of the general assembly of the State of Illinois, approved March 26, 1869, authorized the board of supervisors of Moultrie County to subscribe to the stock of the Decatur, Sullivan, and Mattoon Railroad Company, to an amount not exceeding $80,000, and to issue bonds therefor when the road should be opened for traffic between the city of Decatur and the town of Sullivan. In December, 1869, the board of supervisors ordered that a subscription to the stock of that company, in the sum of $80,000, be made by the county; and that, in payment therefor, bonds payable to said company should be issued and delivered to it, when the road should be so open for traffic. No subscription was actually made on the books of the company; but its president and clerk entered of record the resolution of the board of supervisors, and the company, by a contract made April 15, 1870, appropriated the bonds that would be received in payment of that subscription. The bonds were delivered to the company and the road was so open to traffic early in 1873. By the constitution of the State, which took effect July 2, 1870, counties were prohibited from subscribing to the capital stock of any railroad or private corporation, or from making donations to or loaning their credit in aid of such corporations. *Held*, that whether the action of the board in December, 1869, be in substance and legal effect a subscription, or only an undertaking to subscribe which was accepted by the company, a valid contract existed between the county and the company, which, when the new constitution took effect, authorized the subsequent delivery of the bonds.
2. The board of supervisors, acting under the authority of the act in question, could bind the county by a resolution, which, in favor of private persons interested therein, might, if so intended, operate as a contract; and the obligation thereby assumed would continue in force after July 2, 1870, although the power to *enter* into such a contract was, *after that date*, withdrawn.
3. The holder of the bonds purchased them before their maturity, and without notice of any defence. They recite that they are issued by the county in pursuance of the subscription of the capital stock of said company, made by the board of supervisors of the county, December, 1869, in conformity to the provisions of an act of the general assembly above mentioned. The purchaser was thus assured that the subscription was made when they had authority to make it; and it would be tolerating a fraud to permit the county, when called upon for payment, to set up that it was not made until after July 2, 1870, when their authority had expired.

4. The constitution of a State cannot impair the obligation of a contract; but the Constitution of Illinois declares that the contracts of bodies corporate shall continue to be as valid as if it had not been adopted. The power to subscribe carried with it authority to issue bonds for the sum subscribed, and, the subscription being valid, the bonds are equally so.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The facts are stated in the opinion of the court.

Mr. John R. Eden and *Mr. W. J. Henry* for the plaintiff in error.

Mr. S. M. Cullom, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

This case differs very materially from *Town of Concord* v. *Portsmouth Savings-Bank*, *supra*, p. 625. We there held that the bonds were void because the legislative authority to issue them as a donation to the railroad company had been annulled by the constitution of the State before the donation was made. In the present case the authority exercised was given to the county by the act of March 26, 1869, incorporating the railroad company. The tenth section of the act was as follows: —

"The board of supervisors of Moultrie County are hereby authorized to subscribe to the capital stock of said company, to an amount not exceeding $80,000, and to issue the bonds of the county therefor, bearing interest at a rate not exceeding ten per cent per annum, said bonds to be issued in such denominations and to mature at such times as the board of supervisors may determine: *Provided*, that the same shall not be issued until the said road shall be opened for traffic between the city of Decatur and the town of Sullivan aforesaid."

No approving popular vote was required.

It is not to be doubted that this section gave to the county complete authority to make a subscription to the capital stock of the company. The power was fettered by no conditions or limitations, except as to the amount which might be subscribed; but the payment of the subscription was directed to be postponed until the railroad should be opened. And, of course, as a greater power includes every constituent part of it, the legislative act empowered the board of supervisors to agree to sub-

scribe preparatory to an actual subscription. The power thus granted was never revoked, unless it was by the new constitution of the State, which did not take effect prior to July 2, 1870. Whatever was done in pursuance of the power before that time, if any thing was, could not be affected by the constitution, subsequently adopted. Subscriptions, or contracts to subscribe, made in pursuance of it before it was abrogated, remained binding; for a constitution can no more impair the obligation of a contract than ordinary legislation can. It must be conceded, that, had no subscription been made, or engagement to subscribe entered into, before the new constitution took effect, none could have been made after. But the special finding of facts shows that one was made in 1869. On the 16th of December of that year, the board of supervisors met and informally resolved to subscribe $80,000 to the capital stock of the railroad company; and the resolutions were referred to a lawyer, to be put in form before being recorded on the records of the board. They were accordingly prepared from minutes furnished by the chairman of the board, and entered by the clerk upon the records, as of the date of the December meeting of the board, and duly attested. This must have been done prior to the first Tuesday in March, 1870. The record, as it appears under date of Dec. 14, 1869, is as follows: —

"And it is further ordered by the board of supervisors of Moultrie County, that, under and by virtue of the authority conferred upon said board by an act approved March 26, A.D. 1869, entitled 'An Act to incorporate the Decatur, Sullivan, and Mattoon Railroad Company,' the county of Moultrie subscribed to the capital stock of the Decatur, Sullivan, and Mattoon Railroad Company the sum of $80,000 to aid in the construction of a railroad by said company, in pursuance of their charter.

"And be it further ordered by the board of supervisors aforesaid, that, when said railroad shall be 'open for traffic' between the city of Decatur and the town of Sullivan aforesaid, there be issued $80,000 of the bonds of said county, in denominations of not less than $500, payable to said company, drawing interest, to be paid annually, at the rate of eight per cent per annum; the principal to be due and payable ten years after date, or sooner, at the option of the county; and that said bonds be delivered to said railroad company in full payment of the subscription of said county so made as aforesaid."

It is true, there was no further order of this board to enter the resolutions of record, but it was the clerk's duty to make the entry. The substance of them had been adopted. They required no further action except to put them in form. No further action appears to have been contemplated. They remain of record still, and the board has never taken any action to correct the record. On the contrary, it has been recognized by subsequent action. At the December meeting of 1872, a special committee was appointed to examine the records of subscriptions of railroad donations, and report. The committee did report on the 25th of December, 1872, that the subscription of $80,000, under the act of the general assembly of March 26, 1869, to aid in the construction of the Decatur, Sullivan, and Mattoon Railroad, was in accordance with law. Under this action of the board, and the report of the committee, the bonds were delivered. It is impossible, therefore, to doubt that the resolutions adopted in December, 1869, as recorded, must be treated as the action of the board at that time. And, if so, they amounted to a subscription to the stock of the company, and created an obligation for the payment of the subscription in county bonds. It is true no subscription was made *on the books* of the railroad company until July, 1871, when one was made by Mr. Titus, chairman of the board, without any express authority, and then made for the purpose of enabling him to vote at an election. But a subscription on the books of the company was unnecessary, for that which amounted to a subscription had been made in December, 1869. The authorized body of a municipal corporation may bind it by an ordinance, which, in favor of private persons interested therein, may, if so intended, operate as a contract, or they may bind it by a resolution, or by vote clothe its officers with power to act for it. The former was the clear intention in this case. The board clothed no officer with power to act for it. The resolution to subscribe was its own act; its immediate subscription. *Western Saving-Fund Society* v. *The City of Philadelphia*, 31 Penn. St. 174; *Sacramento* v. *Kirk*, 7 Cal. 419; *Logansport* v. *Blakemore*, 17 Ind. 318. In *The Justices of Clarke County Court* v. *The Paris, Winchester, and Kentucky River Turnpike Company*, 11 B. Mon. 143, it was ruled that an order of the County

Court, by which it was said the court subscribed, on behalf of Clarke County, for fifty shares of stock in the turnpike company, if concurred in by a competent majority of the magistrates, was itself a subscription, and bound the county. There was no subscription on the books of the company, but the Court of Appeals said, "We cannot, therefore, regard this order as a mere offer or pledge to subscribe the fifty shares in this particular road, but as actually taking, and, in substance and legal effect subscribing for, that number of shares." So in *Nugent* v. *The Supervisors of Putnam County*, 19 Wall. 241, it was said, that to constitute a subscription by a county to stock in a railroad company, it is not necessary that there be an act of manual subscribing on the books of the company. These cases lead directly to the conclusion that the action of the board of supervisors in December, 1869, was in substance and in legal effect a subscription.

And if this conclusion could not be reached, it would make but little difference to the present case; for it could not be doubted that the action of the board was at least an undertaking to subscribe, and this was assented to or accepted by the railroad company. The resolutions were entered of record by the clerk and president of the railroad company; and the company made an appropriation of the bonds to be received in payment for the subscription, by a contract made on the 15th of April, 1870. In either aspect of the case, therefore, there was an authorized contract existing between the county and the railroad company when the new constitution came into operation. No matter whether the contract was a subscription or an agreement to subscribe, it was not annulled or impaired by the prohibitions of the constitution. The delivery of the bonds was no more than performance of the contract. For these reasons, it is in vain to appeal to the decisions made in *Aspinwall* v. *The County of Davies*, 22 How. 364, and *Town of Concord* v. *Portsmouth Savings-Bank*, *supra*, p. 625. In neither of those cases was there any contract made before the authority to make one was annulled. We do not assert that the constitutional provision did not abrogate the authority of the board of supervisors to make a subscription for railroad stock. On the contrary, we think it did. But we hold that contracts made under the

power while it was in existence were valid contracts, and that the obligations assumed by them continued after the power to enter into such contracts was withdrawn. The operation of the constitution was only prospective. Indeed, it is expressly ordained in its schedule that "all rights, actions, prosecutions, claims, and contracts of the State, individuals, or bodies corporate, shall continue to be as valid as if this constitution had not been adopted." It is hardly necessary to say, that, under the act of the general assembly, the authority to make a subscription was coupled with an authority and a duty to issue county bonds for the sum subscribed. No action of the board was needed after the subscription was made.

This disposes of the only material question in the case. There is, however, another consideration that is worthy of notice. The findings of the court are, that the plaintiff below is a purchaser of the bonds for a valuable consideration, having purchased them before their maturity, and without notice of any defence. They were executed by the president of the board of supervisors and the county-clerk. They recite that they are issued by the county of Moultrie, "in pursuance of the subscription of the sum of $80,000 to the capital stock of the Decatur, Sullivan, and Mattoon Railroad Company, made by the board of supervisors of said county of Moultrie, in December, A.D. 1869, in conformity to the provisions of an act of the general assembly of the State of Illinois, approved March 26, A.D. 1869."

Now, if it be supposed that the purchaser of bonds with such recitals was bound to look further and inquire what was the authority for the issue, where was he to look? Had he looked to the act of the general assembly of March 26, 1869, he would have found plenary authority for a stock subscription, and for the issue of bonds in payment thereof. If he was bound to know that the constitutional provision terminated that authority after July 2, 1870, he knew that any subscription made before that time continued binding, notwithstanding the constitution, and that bonds issued in payment of it were, therefore, lawful. If, then, he had inquired whether a subscription had been made before July 2, 1870, at the only place where inquiry should have been made, — namely, at the records of the

board, — he would have found an order to subscribe, equivalent to a subscription made, in December, 1869, corresponding with the assertions of the recitals, and declared by them to have been a subscription. He could have made inquiry nowhere else with any prospect of learning the truth. Every step he could have taken assured him that the recitals were true. How, then, can the county be permitted to set up against a *bona fide* holder of the bonds, that the authority to make a subscription with all its legitimate consequences had expired before the subscription was made, in the face of the recitals and of the county records? Whether it had expired was a matter of fact, not of law; and it was peculiarly, if not exclusively, within the knowledge of the board of supervisors. After having assured a purchaser that their subscription was made in December, 1869, when they had power to make it, it would be tolerating a fraud to permit the county to set up, when called upon for payment, that it was not made until after July 2, 1870, when their authority expired.

It is unnecessary to say more. Some matters which we have not noticed were assigned as errors, but they were not mentioned in the argument, and, in our opinion, they exhibit no error in the court below. *Judgment affirmed.*

MR. JUSTICE MILLER, MR. JUSTICE DAVIS, and MR. JUSTICE FIELD, dissented.

MARCY *v.* TOWNSHIP OF OSWEGO.

1. An act of the legislature of Kansas of Feb. 25, 1870, provides, that whenever fifty of the qualified voters, being freeholders of any municipal township in any county, shall petition the board of county commissioners of such county to submit to the qualified voters of the township a proposition to take stock in any railroad proposed to be constructed into or through such township, and shall designate in the petition the railroad company, and the amount of stock proposed to be taken, it shall be the duty of the board to cause an election to be held, to determine whether such subscription shall be made; provided, that the amount of bonds voted shall not be above such a sum as will require a levy of more than one per cent per annum on the taxable property of the township, to pay the yearly interest on the amount of bonds issued. In the event of the vote being favorable, the board of

county commissioners were to issue the bonds in the name of the township. The bonds in question here were regularly executed by the chairman of the board, and attested by the county-clerk and seal of the county. They recite that they are issued in accordance with said act, and in pursuance of the votes of three-fifths of the legal voters of the township at a special election duly held. *Held*, that, in a suit brought on some of the coupons by a *bona fide* holder for value, it cannot be shown as a defence to a recovery, that, at the time of voting and issuing the bonds, the value of the taxable property of the township was not in amount sufficient to authorize the voting and issuing of the whole series of them.

2. All prerequisite facts to the execution and issue of the bonds were, by the statute, referred to the board of county commissioners; and the plaintiff was not bound, when he purchased, to look beyond the legislative act and the recitals of the bonds.

ERROR to the Circuit Court of the United States for the District of Kansas.

The facts are stated in the opinion of the court.

Mr. Alfred Ennis and *Mr. A. L. Williams* for the plaintiff in error.

Mr. Henry G. Webb, *contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

At the trial in the Circuit Court, the plaintiff proved by competent evidence that the bonds, coupons of which were declared upon, were part of a series of bonds for $100,000 voted and issued by the township, and that they were so voted and issued in strict compliance with an act of the legislature of the State, approved Feb. 25, 1870, unless they were voted and issued in excess of the amount authorized by the act. It became, therefore, a question whether, in this suit, brought by a *bona fide* holder for value to recover the amount of some of the coupons, it could be shown, as a defence to a recovery, that at the time of voting and issuing the series of bonds the value of the taxable property of the township was not in amount sufficient to authorize the voting and issuing of the whole series, amounting to $100,000.

To solve this question, there are some facts appearing in the case which it is necessary to consider. The bonds to which the coupons were attached contained the following recital: —

"This bond is executed and issued by virtue of and in accordance with an act of the legislature of the said State of Kansas,

entitled 'An Act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved Feb. 25, 1870,' and in pursuance of and in accordance with the vote of three-fifths of the legal voters of said township of Oswego, at a special election duly held on the seventeenth day of May, A.D. 1870."

Each bond also declared that the board of county commissioners of the county of Labette (of which county the township of Oswego is a part) had caused it to be issued in the name and in behalf of said township, and to be signed by the chairman of the said board of county commissioners, and attested by the county-clerk of the said county, under its seal. Accordingly, each bond was thus signed, attested, and sealed. Nor is this all. The bonds were registered in the office of the State auditor, and certified by him in accordance with the provisions of an act of the legislature. His certificate on the back of each bond declared that it had been regularly and legally issued, that the signatures thereto were genuine, and that it had been duly registered in accordance with the act of the legislature.

In view of these facts, and of the decisions heretofore made by this court, the first question certified to us cannot be considered an open one. We have recently reviewed the subject in *Town of Coloma* v. *Eaves*, *supra*, p. 484, and reasserted what had been decided before; namely, that where legislative authority has been given to a municipality to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription, on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of the bonds, their decision is final in a suit by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with, is conclusive. And this is more emphatically true when the fact is one peculiarly within the knowledge of the persons to whom the power to issue the bonds has been conditionally granted.

Applying this settled rule to the present case, it is free from difficulty. The act of the legislature under which the bonds purport to have been issued was passed Feb. 25, 1870. Laws of Kansas, 1870, p. 189. The first section enacted that whenever fifty of the qualified voters, being freeholders, of any municipal township in any county should petition the board of county commissioners of such county to submit to the qualified voters of the township a proposition to take stock in the name of such township in any railroad proposed to be constructed into or through the township, designating in the petition, among other things, the amount of stock proposed to be taken, it should be the duty of the board to cause an election to be held in the township to determine whether such subscription should be made; provided, that the amount of bonds voted by any township should not be above such a sum as would require a levy of more than one per cent per annum on the taxable property of such township to pay the yearly interest.

The second section directed the board of county commissioners to make an order for holding the election contemplated in the preceding section, and to specify therein the amount of stock proposed to be subscribed, and also to prescribe the form of the ballots to be used.

The fifth section enacted that if three-fifths of the electors voting at such election should vote for the subscription, the board of county commissioners should order the county-clerk to make it in the name of the township, and should cause such bonds as might be required by the terms of the vote and subscription to be issued in the name of such township, to be signed by the chairman of the board and attested by the clerk, under the seal of the county.

These provisions of the legislative act make it evident not only that the county board was constituted the agent to execute the power granted, but that it was contemplated the board should determine whether the facts existed which, under the law, warranted the issue of the bonds. The board was to order the election, if certain facts existed, and only then. It was required to act, if fifty freeholders who were voters of the township petitioned for the election; if the petition set out the amount of stock proposed to be subscribed; if that amount

was not greater than the amount to which the township was limited by the act; if the petition designated the railroad company; if it pointed out the mode and terms of payment. Of course the board, and it only, was to decide whether these things precedent to the right to order an election were actual facts. No other tribunal could make the determination, and the members of the board had peculiar means of knowledge beyond what any other persons could have. Moreover, these decisions were to be made before they acted, not after the election and after the bonds had been issued.

The order for the election, then, involved a determination by the appointed authority that the petition for it was sufficiently signed by fifty freeholders who were voters; that the petition was such a one as was contemplated by the law; and that the amount proposed by it to be subscribed was not beyond the limit fixed by the legislature.

So, also, the subsequent issue of the bonds containing the recital above quoted, that they were issued "by virtue of and in accordance with" the legislative act, and in "pursuance of and in accordance with the vote of three-fifths of the legal voters of the township," was another determination not only of the result of the popular vote, but that all the facts existed which the statute required in order to justify the issue of the bonds.

It is to be observed that every prerequisite fact to the execution and issue of the bonds was of a nature that required examination and decision. The existence of sufficient taxable property to warrant the amount of the subscription and issue was no more essential to the exercise of the authority conferred upon the board of county commissioners than was the petition for the election, or the fact that fifty freeholders had signed, or that three-fifths of the legal voters had voted for, the subscription. These are all extrinsic facts, bearing not so much upon the authority vested in the board to issue the bonds, as upon the question whether that authority should be exercised. They are all, by the statute, referred to the inquiry and determination of the board, and they were all determined before the bonds and coupons came into the hands of the plaintiff. He was, therefore, not bound when he purchased to look beyond the act of the legislature and the recitals which the bonds contained. It

follows that the first question certified to us should be answered in the negative.

Such being our opinion respecting the first question certified, the second and third questions are immaterial, and they require no consideration.

Judgment reversed, and new trial ordered.

MR. JUSTICE MILLER, MR. JUSTICE DAVIS, and MR. JUSTICE FIELD, dissented.

HUMBOLDT TOWNSHIP *v.* LONG ET AL.

1. The bonds in question in this suit were issued under the authority of the same act of the legislature as those mentioned in the preceding case. The doctrines there held are reaffirmed.
2. A bond of the tenor following, —

> "Be it known that Humboldt Township, in the county of Allen and State of Kansas, is indebted to the Fort Scott and Allen County Railroad Company, or bearer, in the sum of $1,000, lawful money of the United States, with interest at the rate of seven per cent per annum, payable annually on the first days of January in each year, at the banking-house of Gilman, Son, & Co., in the city of New York, on the presentation and surrender of the respective interest-coupons hereto annexed. The principal of this bond shall be due and payable on the thirty-first day of December, A.D. 1901, at the banking-house of Gilman, Son, & Co., in the city of New York. This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through said township, in pursuance of and in accordance with an act of the legislature of the State of Kansas, entitled 'An Act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same,' approved Feb. 25, A.D. 1870; and for the payment of said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humboldt Township, as also its property, revenue, and resources, is pledged.
>
> 'In testimony whereof, this bond has been signed by the chairman of the board of county commissioners of Allen County, Kan., and attested by the county-clerk of said county, this twelfth day of October, 1871.
>
> "Z. WISNER,
> "*Chairman County Commissioners.*
>
> "Attest: W. E. WAGGONER, *County-Clerk.*"

— is negotiable, and a *bona fide* holder is entitled to the rights of a holder of negotiable paper taken in the ordinary course of business before maturity.

3. Although the election authorizing the issue of the bonds was held within less

than thirty days after the day of the order calling it, they are not thereby rendered invalid in the hands of a *bona fide* holder for value, who, without any knowledge of the process through which the legislative authority was exercised, relied upon the recitals in them that they had been issued in accordance with law. The recitals are conclusive in a suit brought by him against the township.

ERROR to the Circuit Court of the United States for the District of Kansas.

The facts are stated in the opinion of the court.

Submitted on printed briefs by *Mr. Wilson Shannon* for the plaintiff in error, and by *Mr. G. C. Clemens, contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

The first question certified from the court below, is, whether the bonds to which the coupons in suit were attached are negotiable bonds, such as to entitle the plaintiff to the rights of a *bona fide* holder of negotiable paper taken in the ordinary course of business before maturity.

They are certificates of indebtedness to the railroad company, or bearer, each for $1,000, lawful money of the United States, payable on a day certain, with interest at the rate of seven per cent, payable annually on the first days of January in each year, at a specified banking-house, on the presentation and surrender of the respective interest-coupons thereto annexed. If this were all, there could be no doubt of their complete negotiability. But, it is said, the subsequent language of the certificates controls the absolute promise, and shows that payment was to be made only on a contingency. This is argued from the recital contained in the instrument, and from what follows it. We quote: "This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through the said township, in pursuance of, and in accordance with, an act of the legislature of the State of Kansas, entitled, 'An Act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved Feb. 25, 1870;' and for the payment of the said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humboldt Township, as also its property, revenue,

and resources, is pledged." Relying upon this clause of the certificate, the township contends that the construction of the railroad through the township was a condition upon which the payment was agreed to be made. We think, however, this is not the true construction of the contract. The construction of the road, as well as the subscription for stock, were mentioned in the recital as the reasons why the township entered into the contract, not as conditions upon which its performance was made to depend. It was for the purpose of subscribing, and to aid in the construction of the road, that the bond was given. The words, "upon the performance of the said condition," cannot then refer to any thing mentioned in the recital, for there is no condition there. A much more reasonable construction is, that they refer to a former part of the bond, where the annual interest is stipulated to be payable at a banker's, "on the presentation and surrender of the respective interest-coupons." Such presentation and surrender is the only condition mentioned in the instrument. But that stipulation presents no such contingency as destroys the negotiability of the instrument. It is what is always implied in every promissory note or bill of exchange, — that it is to be presented and surrendered when paid. As well might it be said that a note payable on demand is payable upon a contingency, and therefore non-negotiable, as to affirm that one payable on its presentation and surrender is, for that reason, destitute of negotiability.

The next question certified is, whether the bonds are invalid because of the fact that the election was held within less than thirty days after the day of the order calling for it.

The act of the legislature under which the bonds purport to have been issued (passed in 1870) is the act under which the bonds considered in the case of *Marcy* v. *Township of Oswego*, *supra*, p. 637, were issued. We held in that case, that, by its provisions the board of county commissioners, who caused the bonds to be issued, were constituted the authority to determine whether the conditions of fact, made by the statute precedent to the exercise of the authority granted to execute and issue the bonds, had been performed, and that their recital in the bonds issued by them was conclusive in a suit against the

township brought by a *bona fide* holder. In so ruling, we but decided what had often before been decided, and what ought to be regarded as a fixed rule. Applying it to the solution of the question now before us, it is plain that the bonds are not invalid, because all the notice of the popular election was not given which the legislative act directed. The election was a step in the process of execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power. Whether that step had been taken or not, and whether the election had been regularly conducted with sufficient notice, and whether the requisite majority of votes had been cast in favor of a subscription, and consequent bond issue, were questions which the law submitted to the board of county commissioners, and which it was necessary for them to answer before they could act. In the present case, the board passed upon them and issued the bonds, asserting by the recitals that they were issued "in pursuance of and in accordance with the act of the legislature." Thus the plaintiff below took them, without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board, that the bonds had been issued in accordance with the law. In his hands, therefore, they are valid instruments.

The third question certified is answered by what was decided in the case of *Marcy* v. *Township of Oswego*, *supra*, p. 637, to which we have already referred. There is no essential difference between this case and that. The assessment-rolls of the township may have been proper evidence for the consideration of the board of county commissioners, when they were inquiring what the value of the taxable property of the township was; but the bonds are not invalid in the hands of a *bona fide* holder by reason of their having been voted and issued in excess of the statutory limit, as shown by the rolls. Whatever may be the right of the township as against those who issued the bonds, it cannot set up against a *bona fide* holder of the bonds that the amount issued was too large, in the face of the decision of the board, and their recital that the bonds were issued pursuant to and in accordance with the act of 1870.

Judgment affirmed.

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE DAVIS and MR. JUSTICE FIELD, dissenting.

We have had argued and submitted to us, during the present term, some ten or twelve cases involving the validity of bonds issued in aid of railroads by counties and towns in different States.

They were reserved for decision until a late day in the term; and the opinions having been delivered in all of them within the last few weeks, I have waited for what I have thought proper to say by way of dissent to some of them until the last of these judgments are announced, as they have been to day.

I understand these opinions to hold, that, when the constitution of the State, or an act of its legislature, imperatively forbids these municipalities to issue bonds in aid of railroads or other similar enterprises, all such bonds issued thereafter will be held void. But, if there exists any authority whatever to issue such bonds, no restrictions, limitations, or conditions imposed by the legislature in the exercise of that authority can be made effectual, if they be disregarded by the officers of those corporations.

That such is the necessary consequence of the decision just read, in the cases from the State of Kansas, is too obvious to need argument or illustration. That State had enacted a general law on the subject of subscriptions by counties and towns to aid in the construction of railroads, in which it was declared that no bonds should be issued on which the interest required an annual levy of a tax beyond one per cent of the value of the taxable property of the municipality which issued them.

In the cases under consideration this provision of the statute was wholly disregarded. I am not sure that the relative amount of the bonds, and of the taxable property of the towns, is given in these cases with exactness; but I do know that in some of the cases tried before me last summer in Kansas it was shown that the first and only issue of such bonds exceeded in amount the entire value of the taxable property of the town, as shown by the tax-list of the year preceding the issue.

This court holds that such a showing is no defence to the bonds, notwithstanding the express prohibition of the legislature.

It is therefore clear that, so long as this doctrine is upheld, it is not in the power of the legislature to authorize these corporations to issue bonds under any special circumstances, or with any limitation in the use of the power, which may not be disregarded with impunity.

It may be the wisest policy to prevent the issue of such bonds altogether. But it is not for this court to dictate a policy for the States on that subject.

The result of the decision is a most extraordinary one. It stands alone in the construction of powers specifically granted, whether the source of the power be a State constitution, an act of the legislature, a resolution of a corporate body, or a written authority given by an individual. It establishes that of all the class of agencies, public or private, whether acting as officers whose powers are created by statute or by other corporations or by individuals, and whether the subject-matter relates to duties imposed by the nation, or the State, or by private corporations, or by individuals, on this one class of agents, and in regard to the exercise of this one class of powers alone, must full, absolute, and uncontrollable authority be conferred on them, or none. In reference to municipal bonds alone, the law is, that no authority to issue them can be given which is capable of any effectual condition or limitation as to its exercise.

The power of taxation, which has repeatedly been stated by this court to be the most necessary of all legislative powers, and least capable of restriction, may by positive enactments be limited. If the constitution of a State should declare that no tax shall be levied exceeding a certain per cent of the value of the property taxed, any statute imposing a larger rate would be void as to the excess. If the legislature should say that no municipal corporation should assess a tax beyond a certain per cent, the courts would not hesitate to pronounce a levy in excess of that rate void.

But when the legislature undertakes to limit the power of creating a debt by these corporations, which will require a tax to pay it in excess of that rate of taxation, this court says there is no power to do this effectually. No such principle has ever been applied by this court, or by any other court, to a State, to

the United States, to private corporations, or to individuals. I challenge the production of a case in which it has been so applied.

In the *Floyd Acceptance Cases*, 7 Wall. 666, in which the Secretary of War had accepted time-drafts drawn on him by a contractor, which, being negotiable, came into the hands of *bona fide* purchasers before due, we held that they were void for want of authority to accept them. And this case has been cited by this court more than once without question. No one would think for a moment of holding that a power of attorney made by an individual cannot be so limited as to make any one dealing with the agent bound by the limitation, or that the agent's construction of his power bound the principal. Nor has it ever been contended that an officer of a private corporation can, by exceeding his authority, when that authority is express, is open and notorious, bind the corporation which he professes to represent.

The simplicity of the device by which this doctrine is upheld as to municipal bonds is worthy the admiration of all who wish to profit by the frauds of municipal officers.

It is, that wherever a condition or limitation is imposed upon the power of those officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the limitation upon the exercise of the power has been complied with; and especially and particularly if they make a *false recital* of the fact on which the power depends in the paper they issue, this false recital has the effect of creating a power which had no existence without it.

This remarkable result is always defended on the ground that the paper is negotiable, and the purchaser is ignorant of the falsehood. But in the *Floyd Acceptance Cases* this court held, and it was necessary to hold so there, that the inquiry into the authority by which negotiable paper was issued was just the same as if it were not negotiable, and that if no such authority existed it could not be aided by giving the paper that form. In *County Bond Cases* it seems to be otherwise.

In that case the court held that the party taking such paper

was bound to know the law as it affected the authority of the officer who issued it. In *County Bond Cases*, while this principle of law is not expressly contradicted, it is held that the paper, though issued without authority of law, and in opposition to its express provisions, is still valid.

There is no reason, in the nature of the condition on which the power depends in these cases, why any purchaser should not take notice of its existence before he buys. The bonds in each case were issued at one time, as one act, of one date, and in payment of one subscription. All this was a matter of record in the town where it was done.

So, also, the valuation of all the property of the town for the taxation of the year before the bonds were issued is of record both in that town and in the office of the clerk of the county in which the town is located. A purchaser had but to write to the township-clerk or the county-clerk to know precisely the amount of the issue of bonds and the value of the taxable property within the township. In the matter of a power depending on these facts, in any other class of cases, it would be held that, before buying these bonds, the purchaser must look to those matters on which their validity depended.

They are all public, all open, all accessible, — the statute, the ordinance for their issue, the latest assessment-roll. But in favor of a purchaser of municipal bonds all this is to be disregarded, and a debt contracted without authority, and in violation of express statute, is to be collected out of the property of the helpless man who owns any in that district.

I say helpless advisedly, because these are not *his* agents. They are the officers of the law, appointed or elected without his consent, acting contrary, perhaps, to his wishes.

Surely if the acts of any class of officers should be valid only when done in conformity to law, it is those who manage the affairs of towns, counties, and villages, in creating debts which not they, but the property-owners, must pay.

The original case on which this ruling is based is *Knox County* v. *Aspinwall*, 21 How. 539. It has, I admit, been frequently cited and followed in this court since then, but the reasoning on which it was founded has never been examined or defended until now: it has simply been followed. The case

of the *Town of Coloma* v. *Eaves*, *supra*, p. 484, is the first attempt to defend it on principle that has ever been made. How far it has been successful I will not undertake to say. Of one thing I feel very sure, that if the English judges who decided the case of *The Royal British Bank* v. *Tarquand*, on the authority of which *Knox County* v. *Aspinwall* was based, were here to-day, they would be filled with astonishment at this result of their decision.

The bank in that case was not a corporation. It was a joint-stock company in the nature of a partnership. The action was against the manager as such, and the question concerned his power to borrow money. This power depended in this particular case on a resolution of the company. The charter or deed of settlement gave the power, and, when it was exercised, the court held that the lender was not bound to examine the records of the company to see if the resolution had been legally sufficient.

That was a private partnership. Its papers and records were not open to public inspection. The manager and directors were not officers of the law, whose powers were defined by statute, nor was the existence of the condition on which the power depended to be ascertained by the inspection of public and official records made and kept by officers of the law for that very purpose.

In all these material circumstances that case differed widely from those now before us.

It is easy to say, and looks plausible when said, that if municipal corporations put bonds on the market, they must pay them when they become due.

But it is another thing to say that when an officer created by the law exceeds the authority conferred upon him, and in open violation of law issues these bonds, the owner of property lying within the corporation must pay them, though he had no part whatever in their issue, and no power to prevent it.

This latter is the true view of the matter. As the corporation could only exercise such power as the law conferred, the issuing of the bonds was not the act of the corporation. It is a false assumption to say that the corporation put them on the market.

If one of two innocent persons must suffer for the unauthor-

ized act of the township or county officers, it is clear that he who could, before parting with his money, have easily ascertained that they were unauthorized, should lose, rather than the property-holder, who might not know any thing of the matter, or, if he did, had no power to prevent the wrong.

INTERMINGLED COTTON CASES.

UNITED STATES *v.* RAYMOND, ASSIGNEE; SAME *v.* KIDD; SAME *v.* COWAN, ADMINISTRATOR; SAME *v.* BRABSTON; SAME *v.* SPEAR; SAME *v.* MCLEAN; SAME *v.* COOK; SAME *v.* BATCHELOR; SAME *v.* HAWKINS; SAME *v.* GARDNER, ASSIGNEE; SAME *v.* BODENHEIM, EXECUTRIX.

1. The Court of Claims found that cotton in large quantities captured from the respective owners thereof in Mississippi by the military forces of the United States was subsequently intermingled and stored in a common mass, and then sent forward and sold by the treasury agents in the same intermingled condition, and the proceeds thereof paid into the treasury as a common fund; that court further found as a fact that the cotton of each of the claimants in these suits contributed to and formed a part of the mass so intermingled and sold. Having ascertained the amount of that fund remaining in the treasury after deducting payments theretofore made to other claimants, the number of bales sold to create the fund for which payment had not already been made, and the number of bales contributed by each of the plaintiffs to the common mass, — the court thereupon gave judgment in favor of the plaintiff in each case for a sum which bore the same proportion to the whole fund still on hand that the number of his bales did to the whole number then represented by the fund. *Held*, that the judgment was proper.
2. While the Court of Claims cannot delegate its judicial powers, and must itself hear and determine all causes which come before it for adjudication, no reason exists why it may not use such machinery as courts of more general jurisdiction are accustomed to employ under similar circumstances to aid in their investigations.
3. Where that court in certain cases before it, in which complicated accounts and facts were to be passed upon, referred them to a special commissioner to state the accounts, marshal the assets, and adjust the losses, "so that equal and exact justice should be done to all;" and upon consideration of his report, and after due deliberation, approved it, — *Held*, that the judgments as rendered are the result of the deliberation of the court, and not that of the commissioner alone.

APPEALS from the Court of Claims.

Mr. Solicitor-General Phillips and *Mr. Assistant Attorney-General Edwin B. Smith* for the appellants.

Mr. Joseph Casey and *Mr. Henry S. Foot, contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The facts in these cases, as shown by the records and the findings of the Court of Claims, are as follows: —

During the years 1863, 1864, and 1865, large quantities of cotton were captured by the military forces of the United States and taken from the owners in the State of Mississippi. The identity of the several parcels so captured was destroyed, and the property of each owner could not be traced. A very large quantity was used by the army of the United States for defensive purposes in the vicinity of Vicksburg. Much of it was stolen, destroyed, or otherwise lost. After the surrender of Vicksburg, such as could be found and saved was collected at that place and at Natchez, and afterwards intermingled and stored in a common mass. Subsequently it was sent forward and sold by the treasury agents in the same intermingled condition. The proceeds were paid into the treasury as a common fund produced from the sale of this common mass of unidentified cotton, shipped and received under these circumstances.

The Court of Claims found as a fact that the cotton of each of these several plaintiffs contributed to and formed part of this mass so intermingled and sold. This finding was not based upon evidence specifically tracing the property of each claimant, but upon the assumption that, under the circumstances attending these collections, all cotton started from the place of capture, on the way to Vicksburg or Natchez, in a manner that would naturally carry it into the mass, must be presumed to have gone there, unless it was shown to have been lost or shipped to some other point.

The court, upon this finding, ascertained the amount of the fund remaining in the treasury, after deducting payments theretofore made to other claimants; the number of bales sold to create the fund for which payment had not already been made, and the number of bales contributed by each of these plaintiffs

to the common mass. It then gave judgment in favor of the plaintiff in each case for a sum which bore the same proportion to the whole fund still on hand that the number of his bales did to the whole number then represented by the fund.

From these judgments the United States have appealed.

It is difficult to see how the United States can complain of the judgments that have been rendered in these cases upon the facts as found. The aggregate of the whole is no more than the amount of money in the treasury to the credit of the fund, and which, as we have often decided, is a trust for the benefit of such as should establish their claim to it under the provisions of the Abandoned and Captured Property Act.

Each contributor to a common fund becomes interested in the fund in proportion to his contribution. Each owner of property intermingled with other property of the same kind and value, and stored in a common mass, becomes the owner as tenant in common of an interest in the mass proportionate to his contribution. If loss occurs while the common ownership continues, each owner must sustain his proportionate share.

Here the property of different owners was intermingled in a common mass. There was, therefore, an ownership in common. The Court of Claims, ascertaining that there was likely to be a deficiency in the fund, very properly brought all the several claimants together, and conducted the suits in such a manner as to compel them to litigate with each other. The judgments rendered represent the result of this litigation. The several claimants are satisfied. The time has elapsed within which new claims can be presented against the fund, and, so far as we can discover, substantial justice has been done. The United States have only been made liable for cotton the proceeds of which have been clearly traced into the treasury, and these judgments discharged them from further responsibility on that account.

A portion of the cotton was, after its capture, used for military purposes; but the United States are now charged only with that which was afterwards sold under the provisions of the Abandoned and Captured Property Act, the proceeds being in the treasury, and constituting the fund now under consideration.

The Court of Claims cannot delegate its judicial powers. It

must itself hear and determine all causes which come before it for adjudication; but we see no reason why it may not use such machinery as courts of more general jurisdiction are accustomed to employ under similar circumstances to aid in their investigations. In these cases, complicated accounts and complicated facts were to be passed upon. The court referred them to a special commissioner to state the accounts, marshal the assets, and adjust the losses, "so that equal and exact justice should be done to all." The report of the commissioner, when made, was considered by the court, and, after due deliberation, approved. The court determined the title of the several claimants, and their rights to the proceeds, upon evidence irrespective of the commissioner's report, whenever requested to do so by the claimant or the defendants. We see no error in this. The judgments rendered are the result of the deliberation of the court, and not that of the commissioner alone.

Judgment in each case affirmed.

NOTE. — In *United States* v. *Smith*, which was argued at the same time by *Mr. Solicitor-General Phillips* and *Mr. Assistant Attorney-General Edwin B. Smith* for the appellants, and by *Mr. Henry S. Foot* for the appellees, MR. CHIEF JUSTICE WAITE, delivering the opinion of the court, remarked, this case differs only from those just decided, in the fact that it seeks to reach a different fund produced in the same way. All the essential facts are the same.

Judgment affirmed upon the principles embraced in the opinion just read.

MORRISON ET AL. v. JACKSON.

In 1802 a concession of six thousand arpents of land was made to S. by the acting Spanish governor of Upper Louisiana. An official survey, made by the officer designated in the concession, and in part fulfilment thereof, gives the boundaries of a tract situate on the river Des Pères, about eight miles from St. Louis, containing four thousand and two arpents. Another survey was made by the same surveyor, under the same concession, of another tract, upon the river Meramac, about twenty miles south-west of St. Louis, supposed to contain fourteen hundred arpents. The claim of S. was rejected in 1811 by the board of commissioners, but was confirmed by the recorder of land-titles for the quantity contained in a league square (seven thousand and fifty-six arpents), situate on the river Des Peres, and the decision of that officer, embraced in his report of February, 1816, was confirmed by an act of Congress, April 29, 1816. The surveyor of the United States for the Territory of Missouri surveyed for S., on the sixth and seventh days of May, 1818, a tract

containing one league square, and including the four thousand and two arpents covered by the previous survey, and it was designated on the plat of the township as survey No. 1953. The recorder of land-titles made his certificate No. 1033, dated Sept. 13, 1825, setting forth that S. was entitled to receive a patent for the tract containing seven thousand and fifty-six arpents as contained in said survey No. 1953, and transmitted it to the Commissioner of the General Land-Office for a patent. The latter declined to issue it, as it varied from the original survey, and included land not therein embraced. S., by deed bearing date Aug. 29, 1818, conveyed to H. certain lands therein specifically described, which had been previously confirmed, and also the interest of said S. in all the land to which said S. was entitled by virtue of concessions under the Spanish government, ratified by act of Congress. S. died in 1824. Congress in 1842 directed a patent to issue to S., or his legal representatives, for seven thousand and fifty-six arpents, pursuant to patent certificate No. 1033, Sept. 13, 1825, and to the survey No. 1953. The patent was accordingly issued Feb. 1, 1869. *Held*, that by virtue of the deed of S. his grantee H. became his legal representative, and acquired as against the heirs-at-law of S. the title to all the tracts of land described in said patent.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

Mr. P. Phillips and *Mr. J. L. D. Morrison* for the plaintiffs in error.

Mr. John R. Shepley and *Mr. J. M. Koune*, *contra*.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Claimants holding incomplete titles to land in the territory ceded by France to the United States were required, by the act of the 2d of March, 1805, to deliver, before the day therein named, to the register of the land-office or the recorder of land-titles in the district where the land was situated, a notice in writing, stating the nature and extent of the claim, together with a plat of the same, and every grant, order of survey, and conveyance, or other written evidence of the claim, in order that the same might be recorded. 2 Stat. 326.

Prior to the passage of that act the province ceded by the treaty had been subdivided and organized into two territories, and the fifth section of the act before referred to made provision for the appointment of commissioners in each of the territories to ascertain and adjudicate the rights of persons claiming such incomplete titles. Power was conferred upon the commissioners to hear and decide, in a summary way, all matters respecting such claims, and the provision was, that their adjudications should be laid before Congress, and be subject to their determination.

Both parties in this case claim under the same original title, which is evidenced as follows: —

1. By the petition of Gregoire Sarpy, addressed to the acting governor, in which he asks for a concession of six thousand arpents of land, to be taken from along the river Des Peres, and in the woodland parts that belong to the domain of the king.

2. By the preliminary concession of the acting governor, dated Oct. 28, 1802, in which he concedes the land solicited, if it does not prejudice any person, and directs the local surveyor of the province to put the interested party in possession of the quantity of land which he asks in the indicated location. Direction is also given to the surveyor, in the same instrument, that he should make a plan of the land conceded and deposit the same at the military post, and furnish the party with a certificate which will serve to obtain the concession and the legal title from the intendant-general, to whom, by royal decree, belongs the granting of vacant land.

3. By the official survey made by the surveyor designated in the concession, which gives the courses, distances, corners, and monuments of the tract surveyed, supposed to contain four thousand and two arpents, together with a figurative plan of the same, showing that it was situated upon the river Des Peres, about eight miles from St. Louis, the river being the eastern boundary of the tract.

4. On the 15th of April, 1804, another survey was made, under the same concession, by the same surveyor, in favor of Gregoire Sarpy, situate upon the river Meramac, in the woodlands of the king, about twenty miles south-west of St. Louis; and it appears that the surveyor returned a figurative plan of the tract, supposed to contain fourteen hundred arpents.

5. Supported by these evidences, the claim for six thousand arpents was presented by Gregoire Sarpy to the board of commissioners, under the act of the 2d of March, 1805, and the subsequent acts supplementary thereto; and the claim was, on the 9th of December, 1811, rejected by the said commissioners.

6. Pending the examination of the same before the board, the sheriff of the county, by virtue of an execution, levied upon and sold the four thousand and two "arpents of land on the

river Des Peres, being the same, more or less," and "being a part of the quantity of six thousand arpents granted on the 28th of October, 1802, to said Sarpy;" and it appears that, on the 29th of June, the sheriff made a deed of the same to Pierre Chouteau.

7. Pierre Chouteau and wife, by deed dated June 30, 1808, conveyed, among other parcels of land, to Madame Pelagie Chouteau, Widow Labadie, the four thousand and two arpents, just as the tract was acquired from the sheriff, situated on the river Des Peres, and also "another land of fourteen hundred arpents," situated on the river Meramac, the last two lands forming a part of a concession of six thousand arpents granted on the 28th of October, 1802, to the said Gregoire Sarpy by the acting governor under the former government.

Among other things, it is agreed by the parties that Gregoire Sarpy died in the year 1824, leaving three sons as his heirs, — to wit, John B. Sarpy, Peter A. Sarpy, and Thomas Sarpy, — two of whom — to wit, John and Peter — were living on the 11th of August, 1842, but that they all, before the first day of February, 1869, departed this life, each having by last will and testament devised his estate, real and personal, to Virginia, John R., and Adele S. Sarpy, the only children of John B. Sarpy at the time of his death, and being the nephew and nieces of Peter A. Sarpy at the time of his decease; that John R. Sarpy died single and without issue, subsequent to the death of his father and uncle, having by last will and testament devised his entire estate to Virginia Berthold, since intermarried with Armand Penguet, and to Adele S. Morrison, wife of James L. D. Morrison; that Armand Penguet and Virginia S. Penguet conveyed all their interest and title in and to survey 1953 to James L. D. Morrison before the present suit was commenced; that his wife, sometimes described in the record as Adele S. Morrison, is the granddaughter of Gregoire Sarpy, and one of his three living heirs; and that the wife of Gregoire Sarpy departed this life before the commencement of the suit; and that Edward Abend is a trustee under a marriage settlement between the plaintiff and his wife, and that he claims no beneficial interest in the suit in his own right.

Certain portions of the premises, as more fully described in

the record, — to wit, two undivided third parts of the same, — are claimed by the plaintiffs; and it appearing that the defendant was in possession of the same, the plaintiffs brought ejectment in the Circuit Court to try the title; and service being made, the defendant appeared, and, for answer to the petition, filed a denial that the plaintiffs were entitled to the possession of the premises, and alleged that he and those under whom he claims and derives title have, for more than ten years prior to the commencement of the suit, been in the quiet, uninterrupted, and exclusive possession of the premises, adverse to the plaintiffs and all those under whom they derive their title.

Both parties appeared and waived a trial by jury, and stipulated to submit the issues to the court. Many matters of fact were agreed between the parties, and certain others are embraced in a special finding of the court. Hearing was had, and the Circuit Court entered judgment for the defendant; and the plaintiffs sued out the present writ of error.

Sufficient appears in the agreed statement to show that Gregoire Sarpy is the same person to whom the concession was made by the acting governor of the province under Spanish rule, and that the persons named in the agreed statement as the heirs of Madame Labadie — to wit, her son Sylvester and her four daughters — are the same parties who, together with their husbands, on the 29th of August, 1817, executed the deed to Wilson P. Hunt, through and under which the defendant makes claim to the land of which he is now possessed, as stated in his answer.

From the same source, it also appears that Wilson P. Hunt died in 1843; that his wife was duly appointed administratrix of his estate; and that the property described in the deed was duly ordered to be sold as part of the estate of the decedent; and that it was so sold by the administratrix for the payment of the debts due from the estate of the deceased: and it is also agreed, that the defendant has, for more than ten years next before the commencement of the suit, been in the quiet, uninterrupted, and continuous possession of the premises, under claim of title thereto, adverse to all the world.

Due sale of the premises, it must be admitted, was made by the administratrix; and the record shows that she conveyed the

same to the grantor of the defendant, which, together with the deed to him from his grantor, completes the title, so far as respects the conveyances under which the defendant attempts to justify his possession.

Before the heirs of Madame Labadie, including Gregoire Sarpy and wife, conveyed the premises to Wilson P. Hunt, certain other proceedings took place in the office of the recorder of land-titles, which it is important to notice.

Power to confirm incomplete titles derived from the former governments of the province, whether arising from grants, concessions, or warrants or orders of survey, was vested in the commissioners, appointed under the act before referred to, and the several supplements thereto, and it is matter of general knowledge that the larger portion of such claims were satisfactorily adjusted by virtue of those enactments. Others, however, remained when Congress, on the 12th of April, 1814, passed the act for the final adjustment of such incomplete titles. 3 Stat. 121.

By that act, claimants of the kind were, in certain cases and under certain conditions, confirmed in their claims; but it was expressly provided that no claim shall be confirmed by the first section of the act which shall have been adjudged by either of the boards of commissioners, or a register or receiver of public moneys, or a recorder acting as such, to be *antedated or otherwise fraudulent;* nor was it allowed that any one should claim a greater quantity of land than the number of acres contained in one league square, nor could the claim of any person, in his own right, be allowed who had previously received, in his own right, a donation grant from the United States in said State or Territory.

Pursuant to that act, the recorder of land-titles, on the 2d of February, 1816, made his report to the Commissioner of the General Land-Office, inclosing four tabular lists; and the record shows that the claim in question was included in the third list, and that it was reported as confirmed for the quantity contained in a league square, which is seven thousand and fifty-six arpents.

Comprised in the third list are confirmations of concessions, orders or warrants of survey, principally under the act of the

12th of April, 1814, and the claim in controversy is placed in the list, as follows: —

"Concessions," Ch. D. Delassus, Lt. Gov.; "survey," 18th March, 1803, and 2d January, 1804; "claimant," Gregoire Sarpy; "land claimed," six thousand arpents; "situation," river Des Peres. Opinion of the recorder, "confirmed, not exceeding a league square." 3 Am. State Papers, 337.

Official reports of claims not confirmed were required, under the act of the 3d of March, 1809, to be made by the commissioners to the Secretary of the Treasury, and they were directed to arrange such reports into three classes: (1.) Claims which, in the opinion of the commissioners, ought to be confirmed in conformity with existing laws. (2.) Claims which, though not embraced within the provisions of existing laws, ought, nevertheless, in the opinion of the commissioners, to be confirmed in conformity with the laws, usages, and customs of the former sovereign. (3.) Claims not embraced within the provisions of existing laws, and which, in the opinion of the commissioners, ought not to be confirmed. 2 Stat. 140.

Reports of the kind were made as required; and Congress, on the 29th of April, 1816, enacted that all claims embraced in the report of the recorder of land-titles, acting as commissioner, dated the 2d of February, 1816, where the decision of the commissioner is in favor of the claimant, shall be, and the same are hereby, confirmed. 3 Stat. 329.

All these proceedings took place before the heirs of Madame Labadie, including Gregoire Sarpy and wife, conveyed the whole tract of seven thousand and fifty-six arpents to Wilson P. Hunt, whose legal representative conveyed the same to the grantor of the defendant.

Attempt is made in argument to show that the words of the deed are not sufficient to convey the premises; but it is so manifest that the proposition is without merit, that it is unnecessary, in the judgment of the court, to pursue the argument, and the proposition is accordingly dismissed without further remark.

Subsequent proceedings also took place to secure the rights of the claimant, which deserve to be noticed. Enough appears to show that the surveyor of the United States for that Territory, on the 7th of May, 1818, surveyed the seven thousand

and fifty-six arpents on the river Des Peres for Gregoire Sarpy, who claimed the same in his own right, and that the surveyor designated the survey thereof on the township plats as survey No. 1953; and it appears that the survey made at that time embraced the whole of the original survey of four thousand and two arpents reported by the surveyor of the former government.

Due report of that survey was made, and the recorder of land-titles, on the 13th of September, 1825, issued a patent certificate, No. 1033, to Gregoire Sarpy or his legal representatives, for seven thousand and fifty-six arpents, as contained in the said survey No. 1953, and transmitted the same to the proper authorities here for a patent.

Evidence that the patent certificate was received here is convincing, as the Commissioner of the General Land-Office, under date of Dec. 14, 1825, writes to the surveyor at St. Louis that it is received, and states that the recorder, under the provisions of the act of April 12, 1814, confirmed the claim, "not exceeding a league square," and requests information as to the quantity of the land actually contained within the surveys, not exceeding a league square. Five days later, he stated, in another communication, that the patent on the resurvey is withheld, because it varies from the original survey, and includes a large body of land confessedly not included in either of the original surveys.

Appeal was made to Congress for redress, and Congress, on the 11th of August, 1842, passed the act entitled "An Act for the relief of Gregoire Sarpy or his legal representatives," which provides as follows: "That it shall be the duty of the proper officers of the United States to issue a patent to Gregoire Sarpy or his legal representatives for seven thousand and fifty-six arpents, containing six thousand and two acres and fifty-hundredths of an acre of land, pursuant to patent certificate No. 1033, dated Sept. 13, 1825, and to the survey thereof, numbered 1953, certified by the said survey on the 13th of September, 1825."

Complete redress followed, as the patent, dated Feb. 1, 1869, was duly issued, reciting therein the act of Congress commanding the officers to issue it, the patent certificate and survey

granting the land described in survey No. 1953 to Gregoire Sarpy or his legal representatives.

For more than twenty years prior to the commencement of the suit the defendant had been in possession of the land described in the petition, having acquired it from Pierre Chouteau, who acquired it from the legal representatives of Wilson P. Hunt. But it is conceded by the defendant that the tract possessed by him was outside of the premises described in the deed of the sheriff to Chouteau, and outside of the survey of the four thousand and two arpents, and that it was west of the portion of the concession so surveyed, and in the western part of the survey No. 1953, for which the patent certificate was issued.

Material conclusions of law were also adopted by the Circuit Court, which are entitled to be considered in connection with the facts agreed, and such as are embraced in the findings of the court. They are as follows: —

"1. That the deed of the sheriff to Pierre Chouteau, dated June 29, 1808, is inoperative as a conveyance, because it was not acknowledged as required by the laws then in force.

"2. That the said deed is admissible in evidence as explanatory of the subsequent conveyances which expressly refer thereto.

"3. That the deed from the heirs of Madame Labadie, including Gregoire Sarpy and wife, to Wilson P. Hunt, dated Aug. 29, 1817, is a confirmation by said Sarpy of the sale by the sheriff in 1808 to Pierre Chouteau.

"4. That the deed last mentioned conveyed to said Hunt all the tracts of land therein described which had been previously confirmed, and also the interest of said Sarpy in all other tracts of land described therein, to which the said Sarpy had a claim under concessions by the Spanish government.

"5. That by virtue of said conveyance last mentioned the grantees under said Hunt to said land and claims became the legal representatives of Gregoire Sarpy as to the premises in controversy, through survey No. 1953, the patent certificate No. 1033, the act of the 11th of August, 1842, and the patent dated Feb. 1, 1869, and that said legal representatives acquired the title to all the tracts of land described in the said patent.

"6. That the title to the premises in dispute, thus acquired from the United States by said legal representatives, passed by operative and valid conveyances to the defendant, and that the plaintiff is not

entitled to recover, and it appears that the Circuit Court rendered judgment for the defendant and for his costs."

Authority was vested in the recorder of land-titles, by the act of the 13th of June, 1812, to perform the same duties in relation to such claims, *not decided on* by the commissioners, as were possessed and exercised by the boards constituted for the purpose under former laws, except that all of the decisions of the recorder were to be subject to the revision of Congress. 2 Stat. 751.

Titles of the kind were, in numerous instances, adjudicated by the recorder; and many such claims were confirmed and patented. Doubt upon that subject cannot be entertained; but his jurisdiction did not extend to claims *decided on* by the commissioners. 3 Am. State Papers, 337.

Beyond all doubt, the claim in question was rejected; but the record furnishes no warrant for the suggestion that it was to be regarded as antedated or fraudulent. Instead of that, the clear inference is, that the *bona fides* of the claim was not drawn in question; and the proof that the claim was actually confirmed by the recorder is full and satisfactory, and it is equally so that the claim as confirmed was reported to Congress.

Confirmations of the kind, in excess of jurisdiction, certainly were not in any sense obligatory upon Congress; but it cannot be doubted but that power existed in the Congress to adopt and ratify such an adjudication, if for any reason the legislative branch of the government deemed it just and proper to make such a grant.

Documentary evidence of the most authentic character shows that the claim was confirmed by the recorder, and that it was reported to Congress: and the better opinion is, that it was confirmed by the second section of the act passed for the confirmation of such incomplete titles to lands in that territory; but the court here is not inclined to rest the decision entirely upon that ground. 3 Stat. 329.

Evidence to show that the claim was confirmed by the recorder, and that it was duly reported to the land-office, is ample; and, if more be needed, it is found in two communications from the land commissioner, to which reference has already been made. He, the commissioner, there admits the confirmation:

and the only excuse he offers for withholding the patents is, that the survey is too large; and in consequence of that suggestion the claimant is subjected to further delay. Justice being denied by the executive officers, application was made to Congress for redress: and Congress, in view of the whole case, directed the proper officers of the United States to issue the patent to the original claimant or his legal representatives; and we are all of the opinion that the defendant, to the extent specified in the patent, is the legal representative of the original claimant, and that the judgment rendered by the Circuit Court is correct. *Judgment affirmed.*

NOTE. — *Morrison et al.* v. *Benton*, error to the Circuit Court of the United States for the Eastern District of Missouri, involved the same questions as the preceding case, and was argued by the same counsel.

MR. JUSTICE CLIFFORD delivered the opinion of the court. Certain described parcels of lands, amounting in the aggregate to seven hundred and seventy-nine acres and one-fourth, are the subject-matter of the controversy in this case. Those parcels of land are claimed by the plaintiffs as part of six thousand arpents conceded under Spanish rule to Gregoire Sarpy, as more fully explained in the opinion given by the court in the case just decided.

Actual possession of the premises being held by the defendant, the plaintiffs brought ejectment to try the title to the land, claiming to be the legal representatives of the original donee for two undivided third parts of the said several parcels. Service was made; and the defendant appeared and filed an answer, in which he specifically describes the several parcels of land which are in his possession, and which he claims as his own property. Apart from that, he also denies that the plaintiffs are entitled to the possession of the land, and alleges that he and those under whom he claims have been in the actual, undisturbed, and continuous adverse possession of the land for ten years and more next before the suit was commenced.

Both parties appeared and waived a trial by jury, and they agreed to the following facts: that the lands in controversy are within the out-boundary lines of the survey under which the patent was granted to Gregoire Sarpy or his legal representatives; that the original donee died in the year 1824, leaving three sons — John, Peter, and Thomas — surviving the deceased; that the plaintiffs claim title under John and Peter Sarpy, both of whom were living at the date of the act passed for the relief of Gregoire Sarpy or his legal representatives. 6 Stat. 854.

They also stipulated that Gregoire Sarpy is the same party who, with the other heirs of Madame Labadie, conveyed the land in question to Wilson P. Hunt, under whom the defendant claims title, and that all the grantors in that deed died before the date of the patent.

Sufficient appears to show that the plaintiffs claim that they are the legal representatives of Gregoire Sarpy, and consequently are the rightful grantees of the land under the patent issued in obedience to the said act of Congress. 6 Stat. 854.

Pursuant to that theory, they gave in evidence all the muniments of title in-

troduced in the case just decided, together with the patent, and maintained the same propositions as those which they submitted in that case. Opposed to that theory, the defendant claimed, and still claims, that he is entitled, by purchase and conveyance, to be regarded as the legal representative of the original donee; and he refers to the same muniments of title, with others introduced by him, to show the justice and validity of his claim.

Hearing was had in the court below, and the court rendered judgment for the defendant. Appended to the agreed statement of facts are certain conclusions of law adopted by the Circuit Court; but it is not deemed necessary to reproduce those conclusions, as they are substantially the same as those exhibited in the case already decided.

Dissatisfied with the judgment, the plaintiffs removed the cause into this court. Since the cause was removed here, the parties have been fully heard; and, in the judgment of this court, there is no error in the record. Our reasons for the conclusion are stated in the other case, and will not be repeated, as the facts and legal questions presented for decision are substantially the same in both cases. *Judgment affirmed.*

CENTRAL RAILROAD AND BANKING COMPANY *v.* GEORGIA.

1. The consolidation of two companies does not necessarily work a dissolution of both, and the creation of a new corporation. Whether such be its effect, depends upon the legislative intent manifested in the statute under which the consolidation takes place.
2. An act of the legislature authorized two railroad companies (C. and M.) to unite and consolidate their stocks, and all their rights, privileges, immunities, property, and franchises under the name and charter of C., in such manner that each owner of shares of the stock of M. should be entitled to receive an equal number of the shares of the stock of the consolidated companies. The act also declared that all contracts of both companies should be assumed by and be binding upon C., that its capital should not exceed their aggregate capital, and that all their benefits and rights should accrue to it. It was further enacted, that, upon the union and consolidation, each stockholder of M. should be entitled to receive a certificate for a like number of shares of the stock of C., upon his surrender of his certificate of stock in M. *Held*, that consolidation under this act was not a surrender of the existing charters of the two companies, and that it did not work the extinction of C., nor the creation of a new company. *Held, further*, that the consolidated company continued to possess all the rights and immunities which were conferred upon each company by its original charter.
3. Exemption from liability to any greater tax than one-half of one per centum of its net annual income having been conferred upon C. by its charter, — *Held*, that it is not in the power of the legislature to impose an increased tax after the consolidation was effected. *Held, further*, that inasmuch as M. possessed no such immunity under its charter, the power of the legislature to tax its franchises, property, and income, remained unimpaired after its consolidation with C.

4. The purpose and effect of the consolidating act were to provide for a merger of M. into C., and to vest in the latter the rights and immunities of the former, not to enlarge them. Therefore, M. having held its franchises and property subject to taxation, C., succeeding to the ownership, held them alike subject.

ERROR to the Supreme Court of the State of Georgia.

The case was argued by *Mr. Jeremiah S. Black*, *Mr. David Dudley Field*, and *Mr. A. R. Lawton*, for the plaintiff in error, and by *Mr. N. J. Hammond*, Attorney-General of the State of Georgia, and *Mr. Robert Toombs*, for the defendant in error.

MR. JUSTICE STRONG delivered the opinion of the court.

By an act of the legislature of Georgia, enacted in 1833, a charter, unlimited in duration, was granted to "The Central Railroad and Canal Company of Georgia," with power to make, construct, and maintain a canal or railroad from the city of Savannah to the city of Macon. The seventh section was as follows: —

"The said canal or railway, and the appurtenances of the same, shall not be subjected to be taxed higher than a half per cent upon its annual net income."

In 1835, by an amendment to the charter, the name of the company was changed to "The Central Railroad and Banking Company of Georgia;" its capital stock was declared to consist of $3,000,000: and the eighteenth section of the amendment enacted that "the said railroad, and the appurtenances of the same, shall not be subjected to be taxed higher than one-half of one per centum upon its annual net income; and no municipal or other corporation shall have the power to tax said company, but may tax any property, real or personal, of the said company, within the jurisdiction of said corporation, in the ratio of taxation of like property." Under this latter act the company was organized in 1836, and proceeded to build the railroad. By subsequent enactments, the capital stock was increased to $5,000,000, and the company was authorized to build its road *into* Macon.

In 1847 the legislature of the State, by a statute approved Dec. 27, 1847, incorporated "The Macon and Western Railroad Company," with power to build a railroad from Macon to At-

lanta. The charter contained no exemption from taxation, and affixed no limits to it. An amendment, however, was made to the charter by an act approved Feb. 9, 1869, and assented to by the company, by which authority was given to increase the capital stock to $2,500,000; and the chartered rights of the company were continued during the term of thirty years from its passage. The amending act contained the following proviso: —

"*Provided, nevertheless*, that such additional stock as may be issued, as well as the present stock of said company, shall hereafter pay the same annual tax to the State as the other railroad companies of this State now do; viz., one-half of one per cent on the amount of the net income."

Under this charter the railroad was constructed to Atlanta. Thus the western terminus of the Central Railroad and Banking Company of Georgia, and the eastern terminus of the Macon and Western Railroad, were both fixed at Macon.

On the twenty-fourth day of August, 1872, the legislature passed an act authorizing the union and consolidation of the two railroad companies, under the name and charter of the first named, "The Central Railroad and Banking Company of Georgia." As the true meaning and effect of this act is the basis of all the questions presented by the case, we quote the first section entire: —

"Be it enacted by the general assembly of the State of Georgia, that the Macon and Western Railroad Company, and the Central Railroad and Banking Company of Georgia, be, and they are hereby, authorized and empowered to unite and consolidate the stocks of the said two companies, and all the rights, privileges, immunities, property, and franchises belonging or attaching to said companies, under the name and charter of the said 'The Central Railroad and Banking Company of Georgia,' in such manner that each and every owner and holder of shares of the capital stock of the Macon and Western Railroad Company shall be entitled to and receive an equal number of shares of the capital stock of the consolidated companies: *Provided*, that nothing herein contained shall relieve or discharge either of said companies from any contract heretofore entered into, but that all such contracts shall be assumed by, and be binding on, the Central Railroad and Banking Company of

Georgia, and all benefits and rights under the same shall accrue to, and vest in, the said last-mentioned company: *And provided further*, that, upon such union and consolidation, the capital stock of the Central Railroad and Banking Company of Georgia shall not exceed the amount of the authorized capital thereof, and the present authorized capital of the Macon and Western Railroad Company added thereto."

The second section enacted, that the union and consolidation provided for should not take place until at least two-thirds of the stockholders of each company assented thereto.

By the third section it was enacted, that when it should be ascertained, in the manner provided, that the assent required in the second section had been given, it should be the duty of the board of directors of each company to complete said union and consolidation, and to certify the same under the corporate seals of said companies, to the governor of the State, to be filed in the office of the Secretary of State.

The fourth section is as follows: —

"Be it further enacted, that upon the union and consolidation herein provided for, each stockholder in the Macon and Western Railroad Company shall be entitled to receive a certificate of stock as a shareholder in the Central Railroad and Banking Company of Georgia for a like number of shares, upon the surrender of his certificate of stock in the former company, which new certificate shall entitle the holder thereof to the same rights, privileges, and benefits as attach to the holders of stock now held by the shareholders in said companies, or either of them."

Under the provisions of this act, and in the manner prescribed, the two companies united, the stock of the Central Company being at the time $5,000,000, and that of the Macon and Western being $2,500,000.

Such was the legal *status* of the Central Railroad and Banking Company on the twenty-eighth day of February, 1874, when the legislature passed an act entitled "An Act to amend the tax-laws of the State so far as the same relate to railroad companies, and to define the liabilities of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this act." The act required from each company an annual return

to the comptroller-general of the value of its property, without deducting indebtedness, each class or species of property to be separately named and valued, to be taxed as other property of the people of the State. It also required the railroad companies to pay the taxes assessed upon them, and it repealed conflicting laws. Pursuant to this act of 1874, the comptroller-general assessed a tax of $46,034.87 against the Central Railroad and Banking Company, and issued an execution to collect it. The company then paid the tax of one-half of one per cent required by the prior law, and instituted proceedings in the mode provided by the statute to resist the exaction of the remainder of the tax assessed, on the ground that by its charter it was not subject to be taxed higher than one-half of one per centum of its annual net income, and that the tax-law of 1874 impaired the obligation of its contract with the State. Having failed in the State courts, the case has been brought here for review.

It is not denied that, by the provisions of the charter granted in 1833, amended in 1835, and accepted by the Central Railroad and Banking Company, a contract was made that the company should not be taxed higher than one-half of one per cent upon its net income. Nor is it denied that the protection thus promised was as perpetual as the existence of the company itself. But it is contended on behalf of the State that the charter granted in 1833, and amended in 1835, was surrendered by the union and consolidation of the company under the act of 1872 with the Macon and Western Railroad Company; that the company is now existing under a charter granted by the latter act, a charter which is subject to repeal or modification at the will of the legislature; and, therefore, that the act of 1874, which imposes a more onerous tax than one-half of one per cent on the net income, is a violation of no contract, but that it is a legitimate exercise of legislative authority.

If it could be admitted, as contended by the State, that the charter granted in 1835 is no longer in existence, if in fact and in law it was surrendered in 1872, and if the "Central Railroad and Banking Company of Georgia" is a new corporation, created when it united with the Macon and Western Railroad Company, the consequences claimed by the State might, and

probably would, follow. The Code of Georgia, which went into operation Jan. 1, 1863, has the following provisions: —

SECT. 1682. "In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter."

SECT. 1683. "Private corporations heretofore created, without the reservation of the right of dissolution, and where individual rights have become vested, are not subject to dissolution at the will of the State."

Chartered rights granted subsequent to the Code may, therefore, be withdrawn. It is equally certain that those granted before Jan. 1, 1863, cannot be impaired by any legislative act.

Hence, it is of vital importance to this case to examine the effect of the union of the two companies, under what is called "the consolidation act of the legislature," of Aug. 24, 1872. Did the act contemplate a surrender of its charter by the Central Railroad and Banking Company, and the grant to it of a new charter, or a re-grant of the old? It may be that the consolidation of two corporations, or amalgamation, as it is called in England, if full and complete, may work a dissolution of them both, and its effect may be the creation of a new corporation. Whether such be the effect or not must depend upon the statute under which the consolidation takes place, and of the intention therein manifested. If, in the statute, there be no words of grant of corporate powers, it is difficult to see how a new corporation is created. If it is, it must be by implication; and it is an unbending rule that a grant of corporate existence is never implied. In the construction of a statute, every presumption is against it. True it is that in *McMahan* v. *Morrison*, 16 Ind. 172, where three corporations had consolidated under an act of the legislature, authorizing them to merge and consolidate their stock "*and make one joint company*," it was said that the effect of the act and the terms of consolidation under it was a dissolution of the three corporations, and at the same instant the creation of a new corporation with property, liabilities, and stockholders derived from those then passing out of existence. And this language was quoted approvingly by this

court in *Clearwater* v. *Meredith*, 1 Wall. 40. But in neither case was an assertion of this doctrine necessary to the decision made. The first was a suit against the consolidated company on a claim against one of the old companies, and the other was a suit by a party who had consented that the stock of a railroad company should be merged and consolidated with that of another company, against one who had guaranteed that the stock should be worth a certain price at a fixed time. After having consented that the stock thus guaranteed should be consolidated with other stock, he was not permitted to recover. And, indeed, we find no case decided in this country where the question directly arose, or was necessarily determined. There are numerous cases where a consolidated company has been held liable for the debts of the old companies, and where it has been held to possess the rights of the old companies; but this does not necessarily imply a surrender of all the old charters. So there are cases where it has been held that a consolidation cannot be consummated against the consent of a stockholder in one of the companies unless his stock is purchased. This, however, may be doubted as applicable to all cases; but, if universally true, it leaves open the question, whether the consolidation is the creation of a new company. *Lanman* v. *The Lebanon Valley R. R. Co.*, 30 Penn. 46, was a bill by a stockholder for an injunction against consolidation; and all that was decided was, that his interest must be protected before consolidation could take place. We are not called upon, however, now to determine whether a consolidation, effected under a statute making no express grant of new corporate existence, may not, in some cases, work a dissolution of the existing corporations, and at the same time the creation of a new company; for, in the present case, we think the act of 1872 plainly contemplated no such thing. It is true, the act speaks of union and consolidation. It authorizes the two companies to unite and consolidate their stock, and all their rights, privileges, immunities, property, and franchises; but it prescribes the manner in which this may be done, and its effect. It is to be done under the name and charter of the Central Railroad and Banking Company; that is, the union is to be under that charter, not under a new charter of a company bearing that name. The union is also to be in such a

manner that every holder of the shares of the capital stock of the Macon and Western Railroad Company shall be entitled to, and shall, on the surrender of their certificates, receive, an equal number of shares of the capital stock, as a shareholder in the Central Railroad and Banking Company of Georgia, as declared in the fourth section. But there is no provision for a surrender of the certificates of stock of the shareholders of the Central, and none for the issue of other certificates to them. Their rights, whatever they may be after the union, are evidenced only by certificates of stock of the company chartered in 1835. If that charter has gone out of existence, they are stockholders in no company. Again: the act declared that all contracts of either of the companies should be assumed by and binding on the Central Railroad and Banking Company, and all benefits and rights under the same — that is, under the contracts — should vest in that company, not in a new corporation then springing into life. Nowhere in the act is there an intimation of any legislative purpose that the Central Railroad Company should cease to exist. The Macon and Western Railroad Company was undoubtedly intended to go out of existence: for provision was made for the surrender of all the shares of its capital stock; and without stockholders it could not exist. The existence of such a provision in regard to the one company, and its absence in regard to the other, is a strong argument in support of the conclusion that it was not intended the Central Railroad and Banking Company should surrender its charter, or dissolve. And still more, that company was authorized to increase its capital, plainly for the purpose of making room for the new shareholders entitled to come in by virtue of their ownership of shares of the dissolved company's stock. The language of this provision is significant. It is, that, upon the union and consolidation, the capital stock of the Central Railroad and Banking Company "shall not exceed the amount of the *authorized capital thereof*, and the present authorized capital of the Macon and Western Railroad Company added thereto." This refers plainly to the corporation which it was contemplated should exist after the union and consolidation of the two companies. What, then, was intended by the expression "authorized capital thereof;" that is, authorized capital of the Central Company?

Had this reference to a new company? Certainly not; for no new company had any authorized capital. It must have referred, therefore, to the old Central Railroad and Banking Company, in existence when the act was passed; and that was the company the amount of whose stock was to be limited after the union had taken place. That company was to continue in existence, and its capital was restricted to the amount of what had been previously authorized, augmented by a sum equal to the capital of the absorbed company. This view is confirmed by the language of a subsequent act of the legislature, enacted Feb. 20, 1873, the preamble of which is, "Whereas, the recent union and consolidation of the Macon and Western Railroad Company with the Central Railroad and Banking Company of Georgia, under the name and charter of the latter company, has largely *increased* the capital stock, and the number of stockholders of the said last-named company." What company was it whose stock had been increased by the union? Plainly, one that was in existence before the union, — the one under whose charter the companies had united. The stock of no new company had been increased. It is clear, therefore, that the legislature of 1873 did not understand that the old Central Company had gone out of existence.

If, then, this construction of the act of Aug. 24, 1872, be correct (and we cannot doubt that it is), that act contemplated and authorized no such union and consolidation of the two companies as should work a surrender of their charter by both of them, and the creation of a new company. At most, it intended a merger of the Macon and Western Railroad Company into the other, a mode of transfer of that company's franchise and property, and a payment therefor with stock of the Central Company. It is of no importance to the inquiry, whether a new corporation was created by the union and consolidation, that the Central acquired under the act new and enlarged powers as well as new stockholders. It was authorized to own and operate a railroad from Macon to Atlanta; to operate it as its own. It was also authorized to increase its capital stock. But the gift of new powers to a corporation has never been thought to destroy its identity, much less to change it into a new being. Such a gift is not a grant of corporate

existence. It assumes corporate life already existing. Nor is it a necessary inference from the provision of the act of Aug. 25, 1872, requiring the board of directors of each company to certify the union and consolidation to the governor of the State, that the union was intended to be a surrender of the charter of both companies, and the acceptance of a new charter. There were sufficient reasons for that requirement, without the large inference attempted to be drawn from it. They were, that it might appear in the office of the Secretary of State that the Macon and Western Railroad Company was no longer in existence, and that the capital stock of the Central Company had been increased.

Our opinion, therefore, is, that the charter granted to the Central Railroad and Banking Company of Georgia, by the act of 1835, was not surrendered by its action under the later act of 1872; that it still has all the rights that were originally conferred upon it, holding them under the charter originally granted to it; and, consequently, that it is not in the power of the legislature to impose upon it a greater tax than one-half of one per centum of its net annual income.

It is still to be determined, however, whether the exemption from a higher tax applies to that portion of the company's property which was the road and franchise of the Macon and Western Railroad Company before its merger into the Central Railroad and Banking Company. The Macon and Western never had any contract with the State limiting its liability to taxation. Its original charter said nothing upon the subject, and the amending act of Feb. 9, 1869, gave it no exemption. It simply provided that the company should thereafter pay the same annual tax to the State as the other railroad companies then did; to wit, one-half of one per cent on the amount of net income. It contained no negative words. It did not declare that higher taxation should not be imposed at any future time. At most, it raised only an implication that a higher tax would not be levied for the State. But it is a well-settled principle that a claim for exemption from taxation cannot be supported, unless the statute alleged to confer it is so plain as to leave no room for controversy. No presumption can be made in support of the exemption; and, if there be a reasonable doubt, it must

be resolved in favor of the State. *Bailey* v. *Maguire*, 22 Wall. 215; *Delaware Railroad Tax*, 18 id. 206. In the latter of these cases, it was ruled that a provision in a charter, requiring a company to pay annually into the treasury of the State a tax of one-quarter of one per cent upon its capital stock of $400,000, did not prevent a subsequent legislature from imposing a further or different tax upon the company. To the same effect is *The Commonwealth* v. *The Easton Bank*, 10 Penn. St. 451.

If, then, there was nothing in the charter of the Macon and Western Railroad Company by which its property was exempted from such taxation as the legislature might see fit to impose, did the union and consolidation with the Central Company bring it within the exemption which the Central enjoyed? We think it did not. Nothing within the act of Aug. 24, 1872, indicates that such was the intention of the legislature, and it is not a necessary result of the consolidation authorized. The obvious purpose of the act was to vest in the Central Company the rights, privileges, immunities, property, and franchises which had belonged to the Macon and Western Company; not to enlarge those rights, or to bestow new immunities. If, therefore, the Macon and Western held its franchises and property subject to taxation, the Central, succeeding to the franchises and property, holds them alike subject. It took them just as they were, acquiring no additional or enlarged rights as against the State. The case of *The Philadelphia & Wilmington Railroad Co.* v. *Maryland*, 10 How. 376, in its leading features is not unlike the one now before us. There, three railway companies were united and incorporated into one, in pursuance of statutory authority. One of the companies was by its charter partially exempted from taxation; and the law which authorized the union of the three companies declared that the new corporation should be entitled to all the powers and privileges and advantages belonging to the uniting companies. In construing this provision of the consolidating act, this court ruled, that as the constituent companies held their corporate privileges under different charters, the evident meaning of the provision was, that whatever privileges and advantages either of them possessed should in like manner be held and possessed by the new company, to the extent of the road they had respectively occupied before the union; that it should stand in

their place, and possess the powers, rights, and privileges they had severally enjoyed in the portions of the road which had previously belonged to them, and be subject to the liabilities that rested upon them during their separate existence. A similar decision was made in *The Delaware Railroad Tax Case*, 18 Wall. 206. So in *Tomlinson* v. *Branch*, 15 id. 460, the same doctrine was maintained. Two railroad companies, the one exempt from taxation and the other not exempt, were authorized to unite, so that the latter should merge into the former; and the statute declared that thereafter all the rights, privileges, and property of the latter should be vested in the former, and that the former should be liable for all the debts and contracts of the latter. Under the statute, the union was consummated: and the question arose, whether the railroad property and works which had belonged to the company not exempt from taxation were exempt under the charter of the other after the union; and this court held that they were not. The case is hardly to be distinguished from the present, and it leads directly to the conclusion that the property and franchises formerly belonging to the Macon and Western Railroad Company (now converted into $2,500,000 of the stock of the Central Railroad and Banking Company) has no well-founded claim to exemption from such taxation as it is now argued the legislature is forbidden by the Federal Constitution to impose. It is not protected by any contract with the State. That property, by the articles of union between the two companies, sanctioned by the legislature, amounts to one-third of the entire property of the company which survived the union, and to that extent, to that extent only, is it taxable at any greater rate than was stipulated in the charter of the Central Railroad and Banking Company granted in 1835.

The judgment of the Supreme Court must, therefore, be reversed, and the record be remitted, with instructions to reverse the order of the Superior Court, and direct further proceedings in accordance with this opinion.

NOTE. — *South-western Railroad Company* v. *Georgia*, error to the Supreme Court of the State of Georgia, was argued by the counsel who appeared in the preceding case.

MR. JUSTICE STRONG delivered the opinion of the court. What we have said in *Central Railroad & Banking Company* v. *Georgia*, is applicable, in its largest ex-

tent, to the present case. It appears from the record that the South-western Railroad Company, chartered in 1845, with an exemption from taxation beyond one-half of one per cent of its annual net income, was united with the Muscogee Railroad Company, a company entitled by its charter to a similar exemption. The union was effected under an act of the legislature, approved March 4, 1856, the effect of which was to extinguish the Muscogee Company by its merger in the South-western. No new corporation was created by the union of the two companies; but the powers of the South-western were enlarged, and all the rights, privileges, and property of the Muscogee Railroad Company became the rights and property of the South-western. The exemption from taxation, which both the companies enjoyed under their original charters, cannot, therefore, be withdrawn by the legislature, and it is unaffected by the tax-laws of 1874.

The judgment of the Supreme Court is reversed, and the record is remitted, with instructions to reverse the order of the Superior Court.

BRANCH ET AL. *v.* CITY OF CHARLESTON ET AL.

1. In *Tomlinson* v. *Branch*, 15 Wall. 460, and *City of Charleston* v. *Branch*, id. 470, this court held that the respective roads and property of the two companies, which had become consolidated in the hands of the South Carolina Railroad Company, retained their original *status* towards the public and the State the same as if the consolidation had not taken place; that the entire line of road between Branchville and Charleston was subject to taxation; and that "*prima facie* the railroad terminus and dépôt in Charleston and the property accessory thereto belong to the South Carolina Canal and Railroad Company portion of the joint property."
2. The holding, that, if it could be fairly shown that any of that company's property in Charleston was acquired by the South Carolina Railroad Company for the accommodation of the business belonging to its original roads, or for the joint accommodation of the entire system of roads under its control, such property would, *pro tanto* and in fair proportion, be exempt from taxation, was intended to meet the case of such property as the present company might have acquired in Charleston, either separately or in conjunction with the old company, had no consolidation taken place, and had the line between Branchville and Charleston used by both remained the property of the old company.
3. In carrying out that principle, any repairs or improvements made on the old line or the property of the old company would become a part thereof, and be subject to taxation. An item, therefore, for replacing tracks and sidetracks within the city limits, as it fairly belongs to the old road, should have been taxed *in toto* and not *pro tanto*.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

In *City of Charleston* v. *Branch*, 15 Wall, 470, the decree of the Circuit Court of the United States for the District of South

Carolina was reversed, and the record remitted with instructions to proceed in conformity with the opinion of this court.

The Circuit Court ordered a special master to report: —

1st, What property of the South Carolina Railroad Company was acquired by it for the accommodation of the business of its original roads, or for the joint accommodation of the entire system of roads under its control; and of such property, how much, and in fair proportion, should be exempt from taxation.

2d, What property of the South Carolina Railroad Company has been acquired by it directly under its own charter, and for purposes connected with its original road, that such property may be decreed exempt from taxation.

3d, What property, if any, besides that not directed to be apportioned, and that acquired by the South Carolina Railroad Company under its own charter, and belonging to the South Carolina Railroad Company, is exempt from taxation.

The master reported that: —

"The real estate within the present limits of the city of Charleston, now owned by the South Carolina Railroad Company, consists of two separate and well-defined parcels of land. The first is a long, narrow strip of land, lying between Meeting and King Streets, and extending from Hudson Street to the northern boundary of the city. Upon this, the dépôts, shops, yards, and railroad tracks of the company are located. This property embraces: —

"1st, Various lots, purchased by the South Carolina Canal and Railroad Company, prior to December, 1837, and vested in the South Carolina Railroad Company by the act of 1843. This property cost $25,205, and this was probably its value when acquired by the South Carolina Railroad Company. Its present assessed value is $99,600. This increased value of $74,395 is entirely owing to the workshops, dépôts, and other improvements which have been put upon the land by the South Carolina Railroad Company since 1843, the value of all other lands in the city having, in the mean time, greatly depreciated. According to the testimony of Mr. Magrath, the president of the road, all the dépôts and other buildings existing prior to that time have been entirely destroyed or removed, and replaced by others of a far more costly and substantial character.

"2d, Various lots, purchased by the Louisville, Cincinnati, and Charleston Railroad Company, between December, 1837, and February, 1843. The lots are now valued in the aggregate at $2,300.

"3d, Various lots, purchased by the South Carolina Railroad Company since 1814, and now valued at $177,400.

"Prior to 1849 all of this land was without the corporate limits of the city of Charleston. By the act passed on the nineteenth day of December, 1849, the city limits were extended, and then they took in, for the first time, the property of the South Carolina Railroad Company.

"The second parcel of land belonging to the company lies in the eastern portion of the city, on Cooper River. It consists of various lots, purchased by the South Carolina Railroad Company between the years 1853 and 1870. Its present value is $94,900. The history of this purchase is as follows: The South Carolina Canal and Railroad Company was not authorized to cross the limits of the city. It had only power to come to the boundary line of the city, and the city council were authorized to permit the extension of its road through the public streets and lands of the city. (A. A. 1832.) In 1840, the legislature authorized the South Carolina Railroad Company to extend their road to some one or more of the wharves in Charleston (A. A. 1840); and, in 1845, adopted a joint resolution, declaring that they regarded it as highly desirable that the company should forthwith lay down a track to connect the dépôt with the wharves of Charleston in such manner as might afford free access and competition to all.

"The evidence shows that the property in the eastern part of the city was purchased to carry out that purpose, and that it is the intention of the company to locate its dépôts at that point as soon as the means to make the connection can be raised. Though not in actual use, there is no doubt that this property has been acquired by the South Carolina Railroad Company for the joint accommodation of the entire system of roads under its control. This is also true of all the other property (with an inconsiderable exception) now owned by the South Carolina Railroad Company, whether purchased from the South Carolina Canal and Railroad Company or other parties. The whole property which can, with any propriety, be said to have been purchased by the South Carolina Railroad Company directly under its own charter, for purposes connected *exclusively* with its original road, is the property purchased by it under the name of the Louisville, Cincinnati, and Charleston Railroad Company before 1843, and when the union of that company and the South Carolina Canal and Railroad Company had not been thought of. And this property, even if it is properly to be regarded as having been purchased exclusively for the South Carolina

Railroad, ceased to be so used after 1843, and from that time to the present has been used for the joint accommodation of the entire system of roads.

"I am, therefore, of opinion that all the property set forth in the schedule as having been owned by the South Carolina Canal and Raiload Company, with the appendages and appurtenances thereof, as they existed at the time of the transfer to the South Carolina Railroad Company, are liable to taxation. I find that the value of this property at that time was $25,205, its cost price, and that the increased value given to it by the dépôts, workshops, railroad tracks, and other improvements since put upon it by the South Carolina Railroad Company, is $74,395. These improvements come under the category of property acquired by the South Carolina Railroad Company under its own charter, and must be taxed accordingly.

That of the company's property in Charleston, acquired by the South Carolina Railroad under its own charter, for the joint accommodation of the entire system of roads under its control, so much as is properly apportionable and applicable to that part of the line which extends from Branchville to Columbia and Camden, is exempt from taxation. This applies to all property purchased by the South Carolina Railroad Company since 1843. Its value, including the improvements put upon the land purchased from the South Carolina Canal and Railroad Company, is $346,695.

"What proportion of this property should be exempt from taxation? The length of the road is the only mode which has been suggested by either side of estimating this.

"The length of the road from Charleston to Hamburg is one hundred and thirty-six miles; from Branchville to Columbia, sixty-eight miles; and from Kingville to Camden, thirty-eight miles. If, therefore, I am right in supposing that it was the intention of the Supreme Court to exclude the South Carolina Railroad Company from exemption from taxation, in reference to that portion of the road acquired from the South Carolina Canal and Railroad Company, which extends from Charleston to Branchville, and which is now used jointly by the two roads, 106–242 of this property is exempt from taxation.

"The personal property owned by the company within the city limits is appraised at $45,750. It was all acquired by the South Carolina Railroad Company, under its own charter, for the joint accommodation of all the roads under its control; and the same rule must be applied to it as has been adopted in reference to the real estate similarly acquired."

Exceptions were filed to the report of the master by both the plaintiffs and defendants. A supplemental report was filed by the master, which embraced the testimony of the president of the South Carolina Railroad Company, which was to the effect that all the tracks below Mary Street must have been constructed by the South Carolina Railroad Company. All the rails now on the track between Line Street and Mary Street were laid by the South Carolina Railroad Company. The cross-ties now on the track were also put there by the South Carolina Railroad Company, as was every thing connected with the track.

The following decree was thereupon passed by the court: —

"This case came up on the report of the special master, and the exceptions thereto on the part of the plaintiffs and the defendants, and the report thereon.

"The master reports that the various lots of land purchased by the South Carolina Canal and Railroad Company, prior to December, 1837, and vested in the South Carolina Railroad Company by the act of 1843, are taxable *in toto* only in the condition in which they passed into the hands of the latter company, and that the improvements which have been put upon the land by the South Carolina Railroad Company since 1843 come under the category of property acquired by the South Carolina Railroad Company under its own charter, and so taxable only *pro tanto*. To this ruling the city council excepts, and claims that all the improvements on the land, in the shape of dépôts, workshops, railroad tracks, &c., before or since 1843, must be held taxable, inasmuch as said improvements are superstructures and fixtures upon the said lands, and not separable therefrom. I am of opinion that so much of this exception as refers to the dépôts, workshops, and other buildings, erected by the South Carolina Railroad Company, on the lands acquired from the South Carolina Canal and Railroad Company, is well taken, and so much of the master's report as holds that these improvements, valued in the report at $74,395, are taxable only *pro tanto*, is overruled. I am satisfied by the evidence that the tracks and sidetracks within the city limits have all been replaced by the South Carolina Railroad Company since 1843, and are used for the joint accommodation of the united system of roads under its control, and are, therefore, taxable only *pro tanto*, according to the standard reported by the master. The same rule is also to be applied to the stationary engines, tools, machinery, &c., reported by the master as of the value of $20,750.

"All other exceptions by plaintiffs and defendants are overruled, and the report of the master, except as herein above modified, is confirmed and made the decree of the court."

From which decree both parties appealed to this court.

Mr. A. G. Magrath and *Mr. James Conner* for Branch *et al.*

Mr. D. T. Corbin, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

These cases require but very little discussion, as they have already been before the court and substantially settled in *Tomlinson* v. *Branch* and *City of Charleston* v. *Branch*, reported in 15 Wall., pp. 460, 470. The result to which we came in those cases was substantially this: that the respective roads and the property of the two companies, which had become consolidated in the hands of the South Carolina Railroad Company, — namely, that of the Canal and Railroad Company, and that of the Louisville and Charleston Railroad Company, — respectively retained their original *status* towards the public and the State, the same as if they had not been consolidated under a single proprietorship. As one of these roads has become taxable, and the other has not, the rights of the State and the public growing out of this accidental diversity may sometimes raise questions of some embarrassment. This occasions the only difficulty remaining to be solved in these cases. From Branchville to Charleston there is but one road, and that is a part of the original road of the Canal and Railroad Company, used in common for the accommodation of both branches of the property. The Louisville and Charleston Railroad Company had a chartered right to extend their road to Charleston, but were met by the exclusive privileges of the elder company; and hence the purchase of its property and the ultimate consolidation. Now, the fact that the elder company had this exclusive privilege, shows that, even if the consolidation had not taken place, the old road would have continued to do the work of both companies between Branchville and Charleston, and this part of the line would have been now subject to taxation. It does not follow, therefore, that this part of the road, though used for the accommodation of both branches, should be regarded as divisible into proportional parts, one subject to taxa-

tion, and the other not. It is to be regarded as simply the road and property of the old company; in the hands of the new company it is true, but subject to all the liabilities of its original charter. Hence we held that the entire line of road between Branchville and Charleston is subject to taxation; and that *prima facie* the railroad terminus and dépôt in Charleston and the property accessory thereto belong to the elder portion of the joint property. But inasmuch as the charter right of the present company extended to Charleston, we further held, that if it could be fairly shown that any of the company's property there was acquired by the present company for the accommodation of the business belonging to its original roads, or for the joint accommodation of the entire system of roads under its control, such property would, *pro tanto* and in fair proportion, be exempt from taxation. This was intended to meet the case of such property as the present company might have acquired in Charleston, either separately or in conjunction with the old company, had no consolidation taken place, and had the line between Branchville and Charleston, used by both, remained the property of the old company. Of course, in carrying out this principle, any repairs or improvements made on the old line or the property of the old company would become a part thereof, and be subject to taxation. But newly acquired property might not be. This is the general principle. The method of carrying it out in detail admits of some latitude for the exercise of deliberation and judgment. We have examined the report of the special master to whom the matter was referred, and the review of that report by the court below, and we think that a result was reached corresponding in the main to the principle which we have endeavored to establish. There is but one item which we regard as calling for any interference with the decree appealed from; that is the item of $25,000 for replacing the tracks and side-tracks within the city limits, which we think fairly belongs to the old road, and should have been taxed *in toto*, and not *pro tanto*.

With this modification, decree affirmed.

GARSED v. BEALL ET AL.

This case involves only disputed questions of fact. It was heard here upon the pleadings, proofs, and the findings of the jury, in response to the issues sent down to be tried at law. *Held*, that issues of the kind are properly directed where such questions are involved in great doubt by conflicting or insufficient evidence. *Held further*, that such findings are regarded as influential in an appellate court, but they are not conclusive.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

The case was argued by *Mr. Robert Toombs* for the appellant, and by *Mr. Benjamin H. Hill* for the appellee.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Peculiar as the controversy is, it will be necessary to make some reference to the pleadings, in order to understand its origin, and the precise character of the questions presented here in the assignment of errors.

Two of the complainants — to wit, Jeremiah Beall and William A. Beall — claimed, in the original bill of complaint, filed in the Superior Court of the State, to be joint owners with the other appellee, in equal proportions, of eight thousand six hundred and ninety-four bales of cotton; and the second complainant claimed that he was a joint owner with the aforesaid appellee, of the other parcel of cotton, consisting of one thousand one hundred bales: making, in all, nine thousand seven hundred and ninety-four bales of cotton, of the alleged value of $2,000,000. They not only claimed to be the owners of the cotton, in the proportions described, but they claimed that John Garsed and George Schley, therein named as respondents, had, at that date, commenced to seize and remove the same, for their own benefit, under some pretended military orders, and that Thomas S. Metcalf, the other part owner, was deterred, by fear of bodily harm, from making any effort to prevent such seizure and removal, or to join with them in asserting the plain and undoubted right of the described parties to the joint ownership of the property.

Suffice it to say, without entering into details, that the bill of complaint exhibits a detailed description of all the alleged

pretences, and proceeds to allege that the same, one and all, are without any legal or equitable foundation whatever.

Two other parcels of cotton, it is admitted, were sold by said Metcalf to the first-named respondent; but the complainants allege that he never possessed any authority to sell any portion of the cotton in question, and they aver that he never did make any offer of the same to the respondent. Voluntary recognition of the pretended contract being refused, the respondent applied to the military authorities of the district to enforce the same; and it appears that the military authorities decided that the cotton had been sold to the respondent, as he claimed, and that they promulgated an order that the supposed contract of sale should be carried into effect.

Sufficient appears to warrant the conclusion that it was under that order that the respondents commenced to seize and remove the cotton; and it appears that the complainants contested the legality of that order, and prayed the court in which the bill of complaint was filed to restrain and enjoin the respondents from removing the cotton, and from all attempts to take possession of the same, and to abstain from all interference with the cotton until the final hearing of the cause.

Pursuant to the prayer of the bill of complaint, a temporary injunction was granted. Service was made, and the respondents appeared and filed separate answers.

Ownership of the cotton, as alleged in the bill of complaint, is admitted by the first-named respondent; but he sets up the defence that he purchased the same of the other respondent, and that the other respondent was authorized to sell the same by Thomas S. Metcalf, who was one of the joint owners. Detailed reply to every allegation of the bill of complaint is set forth in the answer, which need not be reproduced.

Apart from that, the respondent first named prayed that he may have the decree of the court in his favor, and alleged that it was evident that a recovery of damages in a suit at law, for and on account of the breach of the contract committed by the complainants, would not be an adequate compensation for the non-performance of the same; and he also prayed that the complainants may be ordered, by the decree of the court, to perform the contract, and if any thing prevents it, that they may

be ordered, directed, and adjudged to respond in damages to the respondent, to an amount which will compensate him as fully as if specific performance of the contract had been completely carried into effect, and that the issues presented in the pleadings may be, fully and fairly, and without multiplication of actions, adjudicated between him and the complainants. Most of the allegations in the answer of the other principal respondent, so far as respects the pretended sale of the cotton, correspond with the allegations in the answer of the first-named respondent. Metcalf was also made a party respondent, and he appeared and filed an answer, in which he admitted, in substance and effect, that the allegations of the bill of complaint were correct.

Proofs were taken on both sides, but the counsel of the complainants, in vacation, before the cause came to final hearing, filed a motion in the clerk's office, dismissing the suit, to which motion the first-named respondent objected. Hearing upon the objection was had, and the court finally decided that the bill of complaint was properly dismissed, but that the answer of the first-named respondent, being in the nature of a cross-bill, must, under the law of the State, be retained for the purpose of adjudicating the question of relief prayed therein by that respondent in the original bill of complaint, and that he, the respondent, by those allegations, made himself complainant, and that the complainants in the original bill thereby became and are made the respondents, as in a cross-bill. *Attaway* v. *Dyer*, 8 Ga. 189; Code (Ga.), sect. 4181.

Due application was subsequently made by the complainant in the cross-bill, that the cause be removed into the Circuit Court of the United States; and the record shows that the motion was granted, and that the order of removal was carried into effect, so far as respects the cross-bill, as constituted under the decision of the State court.

New pleadings, in such a case, should have been filed in the Circuit Court, and such, it would seem, were the views of the appellees, as they submitted a motion that the cause be not entertained in the Circuit Court; but the parties subsequently entered into stipulations, in respect to the conduct of the cause, which authorized the conclusion that all such objections are

waived by the parties. Enough appears to warrant that conclusion, in the fact that proofs taken in the original suit were in some instances brought forward by stipulation, and made a part of the record in the Circuit Court; and in the more important fact, that the parties made respondents in the cross-bill appeared in the Circuit Court, and filed separate answers.

Reference will first be made to the answer of William A. Beall. He alleges that all the cotton, except the one thousand one hundred bales, was bought by Jeremiah Beall in his own name, under an arrangement between the purchaser and the other two respondents, that he, Jeremiah, should buy, store, and control, and dispose of the cotton in his own name, as if sole owner; that William A. Beall should negotiate loans for all the money needed, except what the purchaser might advance; and that the other respondent should give credit to the paper of the party contracting to furnish the money, or discount the notes of his firm for that purpose.

Subsequently, sales of the cotton purchased were to be made by the designated purchaser, as he should see fit; and the alleged stipulation was, that the proceeds of the sale should be applied to the extinguishment of the loans, and that the profits should be divided equally between the parties. Sales sufficient to pay all the loans contracted for the purchase of the cotton had been made, before the present controversy arose, except the advances made by the purchaser, and a few small debts, amounting in all to about $200,000; and the same respondent avers that his interest in the cotton, and that of the last-named appellee, were only silent interests in the accounts to be rendered on final settlement, the other party having the sole right and power of purchasing, preserving, and disposing of the cotton in his own individual name, as the sole owner.

Other defences are also set up in the answer, as follows: (2.) That Schley was not the agent of Metcalf, nor of himself, nor of the purchaser of the cotton; nor was he himself or Metcalf authorized to sell the same or any part thereof, nor to employ or appoint a broker or agent to sell or dispose of the same. (3.) That the appellant never purchased the cotton of any one, and that he well knew that neither Schley nor Metcalf possessed any authority to sell the cotton upon any terms whatever.

Separate answer was also filed by Jeremiah Beall, to the effect following: That all the cotton, except the one thousand one hundred bales, was purchased by him in his own name, and that it was in his sole and exclusive possession and control, and that neither of the other respondents had any authority whatever to sell or dispose of the same.

Appearance was also entered by Thomas S. Metcalf, in the Circuit Court, and he also filed an answer, in which he denied all the material allegations of the appellant in respect to the pretended purchase of the cotton, and averred, in the most explicit and positive manner, that he never offered to sell the cotton either to Schley or the appellant, as alleged by the latter in his answers to the original bill of complaint.

Voluminous proofs were taken by both parties in the Circuit Court; and on the 14th of May, 1869, it was ordered that the commission for taking testimony be closed, and that the cause be set down for hearing. Such hearing was subsequently had before the district judge, sitting in the Circuit Court; and he delivered an elaborate opinion, in which he discussed most of the matters of law and fact involved in the case, without announcing any final conclusion as to the rights of the parties. Instead of that, he entered an order in the cause, to the effect that certain prescribed issues, formally set forth in the transcript, should be tried by a jury, and prescribed certain rules and regulations to be observed by the parties in conducting the trial.

Pursuant to that order, a jury was subsequently called; and the transcript shows that the parties appeared, and that all the issues framed by the court were duly submitted to their determination. These issues were framed by the district judge, sitting in the Circuit Court; but the transcript shows that the circuit judge presided at the trial of the same, and that the jury, by their verdict, made a response to each issue. All of the findings were in favor of the respondents; and it appears that both the circuit and the district judges concurred in the final decree, which is, that the case be dismissed with costs, including the cross-bill. Immediate appeal was taken by the complainant, in the cross-bill, to this court.

Five principal errors are assigned, as follows: (1.) That the

court below erred in dismissing the case, including the cross-bill. (2.) That the court erred in holding that there was no valid contract for the sale of the cotton. (3.) That the court erred in holding that the code of the State required that the authority of the alleged agent must be in writing. (4.) That the court erred in holding that the contract for the sale of the three parcels of cotton in this case was not an entire contract. (5.) That the court erred in not admitting the statement of the agent to prove that he received authority from Metcalf to sell the cotton in controversy.

Years of litigation have ensued since the original bill of complaint was filed in the State court, but the court here is unanimously of the opinion that the decision of the controversy must turn chiefly upon the issues of fact involved in the pleadings; and in that view of the case it becomes necessary to advert, with some more particularity, to the preliminary transactions out of which the controversy arose.

Cotton in bales to a very large amount was collected under the orders of a Confederate officer, and was piled in certain fields adjacent to the city of Augusta, to be burned in case our army should approach that city. Certain quantities of cotton belonging to the appellee Metcalf were collected for that purpose under those orders; but our army did not enter Augusta, and the cotton was left where it was deposited by the Confederate military forces. Of course it was much exposed; and Metcalf and Schley entered into an agreement by which the latter undertook to remove as much of the cotton belonging to the former as he could, to a place of safety, and in consideration of such service he was to be entitled to one-third of the quantity so removed and saved. Twenty-five hundred bales were, by that contract and one other of a like character, saved to the owner, he being entitled to two-thirds of the cotton saved by the other parties to the contract.

How much time was consumed in the operation does not appear; but it does appear that the appellant was in Augusta about that time to buy cotton, and that Metcalf and Schley agreed to sell to him the cotton belonging to them which was saved by that contract. Schley and the appellant were acquainted; and it appears that the former offered the cotton

to the latter, and that the latter desired to purchase it if he could have some indulgence, which was finally given him by Schley, in pursuance of an arrangement between the owners of the cotton.

Beyond controversy, that matter was amicably arranged; and it was during one of these interviews that Metcalf informed the appellant of the existence of another large lot of cotton, stored in the name of another party, in the south-western part of the State, in which he, the informant, as he represented, had an interest, and which, as the informant believed, could be bought in cash for the same price.

Evidence was also introduced which shows that Metcalf handed to Schley a memorandum in writing, touching that large lot, and that the lot therein described contained nine thousand seven hundred and ninety-four bales, and that the same was deposited or stored at the several places named in the memorandum exhibited in the transcript. Appended to the memorandum was the following: "Believed to be in very good order as a whole lot, and to average five hundred pounds to the bale." Speaking of the bales, he says, "They belong to, and were bought by, a large planter in the south-west part of the State, and can this day be bought for twenty cents a pound in greenbacks. They are mostly crop-lots entire, and, therefore, are desirable for spinners, as cottons in that section are long-staple. There is not much doubt but that they can be had at that price a short time hence, if a buyer should come out with cash and go down and see the owner and the cotton."

Authority to sell the large lot, it is manifest, is not there conferred; but Schley sets up in his answer that Metcalf, when he handed him the memorandum, gave him verbal authority to sell the large lot also to the appellant, and that he afterwards, on the same day, agreed that the terms of sale should be the same as the terms for the other lot. Written proof of that allegation is not exhibited; and Metcalf denies, both in his answer and in his testimony, that he ever gave Schley any such authority, and insists that he handed him the memorandum merely as information, which he might show to the appellant, to let him know where and from whom the large lot of cotton could be purchased; and he denies also that he himself had

any authority to sell it, and he avers that he so informed Schley when he handed him the memorandum.

Opposed to that is the testimony of Schley; and it appears that his offer to the appellant was reduced to writing, dividing the cotton into three classes, in substance and effect as follows, stating in respect to class No. 1, that he controlled two thousand and eighty-nine bales of selected cotton, previously shown to the appellant, and which he offered to sell to him, to be reweighed and delivered at the gin-house where it then was, at twenty-five cents per pound, payable there in greenbacks; adding, "you have the privilege to the 6th of July to close the trade by telegraph," and that he, the seller, would wait for the money until he, the buyer, could reach there with it. What he said in respect to class No. 2 was, that he had six hundred bales of his own, of the same lot, which "you can have for eighteen cents in gold, payable here as soon as you can return with it." Both of those parcels were, undoubtedly, sold to the appellant, and they are not now in controversy.

Class No. 3 is in controversy, and in respect to that the same party stated, in the same communication, that he also controlled, and would have authority to sell by the 3d of July, nine thousand seven hundred and seventy-eight bales of cotton, stored as therein specifically described, and that he would sell the same, delivered where stored, at twenty-three cents per pound, — the cotton to be reweighed, and payable in greenbacks; adding as follows: "This purchase secured after I telegraph you." Late in the same afternoon Schley sent, by his servant, the following note to the appellant: "Since you left town I saw the party controlling the large lot of cotton No. 3, and it is agreed that if you telegraph to take it they will ratify what I have agreed," &c.

Three days later Schley informed Metcalf of the substance of the note sent by the servant to the appellant, and it appears that Metcalf promptly replied that he was misunderstood: that he had given no such authority. Whereupon Schley immediately sent a telegraph to the appellant, that he had misunderstood the parties in respect to lot No. 3, and requested him, if he still wished to purchase that lot, to say so by telegraph, and that he would answer if they would sell.

Conflicting testimony is exhibited in the transcript as to the precise period of time when the preceding telegram was received by the appellant; but it appears that he, on the 6th of the same July, telegraphed to his correspondent that he accepted lots 1, 2, and 3, and that gold and greenbacks would be sent by Adams Express in the next vessel, and directing his correspondent to forward the cotton. Schley, immediately on the receipt of that telegram, showed it to Metcalf, who repudiated so much of it as related to lot No. 3, and dictated the following answer, which Schley, without delay, sent to the appellant: "Parties owning the nine-thousand-bale lot refuse to sell unless the funds are here." "If here to-day, the bargain could be closed, and probably can be on your arrival."

Neither the gold nor greenbacks were shipped to pay for the three lots, as stated in the prior telegram; but it does appear that the contracts for lots 1 and 2 were subsequently closed, and that the amount was paid partly in money and partly in drafts.

Metcalf refused to deliver lot No. 3, and the appellant applied to the military authorities for an order to compel the delivery. Orders of the kind were at one time given; but it is unnecessary to discuss that topic, as the court is unhesitatingly of the opinion that the military authorities were entirely without jurisdiction in the premises, and that all such orders and the proceedings therein are absolutely null and void, which is all that need be said upon the subject.

Pending those proceedings, the original bill of complaint was filed, and the complainants obtained the writ of injunction, to which reference has already been made. On the 20th of September following all the military orders touching the cotton in controversy were revoked, and, four days later, the complainants proposed to dismiss the bill of complaint. Counsel were heard; and the court decided that the bill of complaint might be dismissed, but that the answer of the appellant must be retained, for the purpose and under the conditions heretofore sufficiently explained.

Controversies seldom arise where the proofs are more conflicting and irreconcilable than in the case before the court; and that remark applies with all its force to the testimony of

the parties as well as to many of the other witnesses. Taken as a whole, the court here is of the opinion that the case is one where it was quite proper that the Circuit Court should invoke the aid of a jury in settling the controverted matters of fact.

Feigned issues were accordingly framed, and ten questions were submitted to the jury, all of which appertain to the material matters of fact in dispute between the parties, — the two great questions being as follows: (1.) Whether the appellant ever purchased lot No. 3, either of Schley or of the owners, or either of them. (2.) Whether Schley ever had any authority to sell that lot, either from Metcalf or the other owners.

Presented as those questions were in every proper form to the jury, it will be sufficient to reproduce the findings of the jury without repeating the questions, except in one or two instances. Considering the importance of the first question, it will be given in the form exhibited in the transcript: —

1. Whether there was a sale of lots 1, 2, and 3, by Schley to Garsed; and, if so, whether the contract of sale was intended by the parties to be one entire and indivisible contract.

Responsive to that question, the jury found that there was a sale of lots Nos. 1 and 2, but that there was no sale as to lot No. 3; and if there was a sale of lot No. 3, Schley had no authority from Metcalf to make the sale, and that it would have been a separate, unauthorized, and distinct sale.

They also responded to the second question, and found that the contract was not entire, and that as to lot No. 3, it was never confirmed or ratified by Metcalf.

Part of the third question is equally important, and in response to that the jury found that lot No. 3 was never sold; and if so, without authority from Metcalf. Consequently it was not sold at a stipulated price. In response to the fourth question, the jury found that there was no time fixed for the delivery of the cotton.

Much less importance is attached to the fifth question, as it presents the inquiry whether the cotton was to be weighed or otherwise prepared for delivery; and the jury found upon that subject that neither of the parties was to prepare or weigh the cotton for delivery. In response to the sixth question, that the cotton, so far as appeared, was never reweighed.

Inquiry was also made of the jury, in the seventh place, as to the market-price of cotton; and the jury found that a reasonable price at that time was eighteen or twenty cents per pound at the different localities.

Beyond all doubt, every one of the preceding findings of the jury tends more or less strongly to support the theory of the appellees; but the finding of the jury to the eighth question is even more conclusive that the claim of the appellant is without merit, as they find that Schley had no *verbal* authority from Metcalf to sell lot No. 3, and that it was not included in the sale of lots Nos. 1 and 2, and that the appellant, by virtue of his contract with Schley as to lots 1 and 2, neither accepted nor actually received any part of lot 3, or paid any part of the purchase-money.

Suppose the appellant never paid any part of the purchase-money for lot No. 3, still it was insisted that he offered to perform, and was ready to perform, his part of the contract; and, in order that that issue might be determined by the jury, the ninth question was framed, and it appears that the jury found, in response to that inquiry, that the appellant did not perform, or offer to perform, his part of the contract, and that he was never in a condition to perform it so as to entitle him to demand a delivery of the cotton; and they found, in response to the tenth inquiry, that he sustained no damages in relation to lot 3, upon the assumption that the findings are correct.

Costs were awarded to the respondents in the cross-bill; and the recital of the final decree shows that the parties were heard upon the pleadings and evidence in the case, and upon the findings of the jury rendered in response to the issues sent down to be tried at law, and which were duly returned to the Circuit Court sitting in equity. Error is not assigned in respect to that proceeding, and inasmuch as nothing is exhibited in the record to the contrary, the presumption must be that it is correct. Issues of the kind are properly directed, in a case where the questions of fact are involved in great doubt, by conflicting or insufficient evidence, and it is clear that the case before the subordinate court was one of that character. Adams's Eq., 6th Am. ed., 376; *Flagg* v. *Mann*, 2 Story, 387; *Field* v. *Holland*, 6 Cranch, 8.

Equity courts may decide both fact and law, but they may, if they see fit, refer doubtful questions of fact to a jury. Findings of the kind, however, are not conclusive, and, if not satisfactory, they may be set aside or overruled; but if the finding is satisfactory to the Chancellor, the practice is to regard it as the proper foundation for a decree. *Harding* v. *Handy*, 11 Wheat. 103. Such findings are regarded as influential in an appellate court, but they are not conclusive. *Goodyear* v. *Rubber Co.* 2 Cliff. 365; *Brockett* v. *Brockett*, 3 How. 691; 2 Dan. Chan. Prac., 4th Am. ed., 1072. Consequently counsel were allowed to review the whole evidence in the case, and the court has followed the course adopted by the counsel at the argument, and the result of the review of the evidence is, that the court is clearly of the opinion that the findings of the jury were correct in all material respects, and that there is no error in the record.

Decree affirmed.

THE "ALABAMA" AND THE "GAME-COCK."

Where a collision occurs at sea, each vessel being at fault, and damage is thereby done to an innocent party, a decree should be rendered, not against both vessels *in solido* for the entire damage, interest, and costs, but against each for a moiety thereof, so far as the stipulated value of each extends; and it should provide that any balance of such moiety, over and above such stipulated value of either vessel, or which the libellant shall be unable to collect or enforce, shall be paid by the other vessel, or her stipulators, to the extent of her stipulated value beyond the moiety due from her.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case was argued by *Mr. Edwards Pierrepont* for the "Alabama," by *Mr. W. R. Beebe* for the "Game-cock," and by *Mr. John E. Parsons* for the libellant.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Without entering upon a discussion of the evidence in this case, it is sufficient to say, that, having carefully examined the same, we see no reason to be dissatisfied with the conclusions of fact arrived at by the District and Circuit Courts. On the question of blame, the conclusion is, that both the "Alabama" and

the "Game-cock" were in fault, and contributed to the loss; and that the "Ninfa," which was in tow of the "Game-cock," and suffered the loss, was not in fault. On this finding arises the question of law which is of principal interest in the case; namely, against whom, and in what manner, should the damage be adjudged? The "Alabama" was a large steamer, and was bonded for $100,000; whilst the "Game-cock" was a small tug, bonded at the stipulated value of $10,000. The loss was found to be about $80,000. The District Court rendered a decree against both for the whole, regarding them as liable *in solido*. The Circuit Court, on appeal, reversed this decree, and divided the loss between them, rendering a decree against each for one-half the amount. The court adopted this division of liability in obedience to the supposed views of Dr. Lushington, in the case of *The Milan*, 1 Lush. 404, which was followed in the case of the steamboat "Atlas," both by the District and Circuit Courts of the Southern District of New York. 4 Ben. 27; 10 Blatch. 459. The theory which underlies this decision seems to be, that the "Game-cock" and her tow, the "Ninfa," being moved by one power, are to be regarded as one vessel, the same as a ship and her cargo; and that the two combined, whatever be their mutual relations to each other, are, as regards the "Alabama," affected by the fault of the tug; and that those vessels on the one side, and the "Alabama" on the other, according to the admiralty rule in collision cases, must each bear half of the damage. The rule has been thus applied when the ship and her cargo constituted one opposing force, and a single ship the other; the entire damage to ships and cargo being equally divided between the two ships. Where both ship and cargo on one side belong to the same owners, the case is no way different from that of the two ships alone being injured. And even so long as the ship having cargo is able to respond to half the loss, no difficulty arises; for the other ship is liable for the balance, so that the owner of the cargo injured will lose nothing. But, if the carrying ship is unable to respond to half the damage sustained by her cargo, the deficiency will be entirely lost if the other offending vessel can only be made liable for a single moiety. And yet it would seem to be just that the owner of the cargo, who is supposed to be free from

fault, should recover the damage done thereto from those who caused it; and if he cannot recover from either of them such party's due share, he ought to be able to recover it from the other. The same reason for a division of the damage does not apply to him which applies to the owners of the ships. The safety of navigation requires that if they are both in fault, they should bear the damage equally, to make them more careful. And this consideration may well require, or at least justify, a primary award against each of a moiety only of the damage sustained by the cargo, for as between themselves that would be just. But if either is unable to pay his moiety of damage, there is no good reason why the owner of the cargo should not have a remedy over against the other. He ought not to suffer loss by the desire of the court to do justice between the wrong-doers. In short, the moiety rule has been adopted for a better distribution of justice between mutual wrong-doers; and it ought not to be extended so far as to inflict positive loss on innocent parties.

In the cases which have been cited from Lushington and others, it does not appear that any difficulty arose from the inability of either of the condemned parties to pay their share of the loss. No such inability seems to have existed. And when it does not exist, the application of the moiety rule operates justly as between the parties in fault, and works no injury to others. It is only when such inability exists that a different result takes place. The cases quoted, therefore, may have been well decided, and yet furnish no precedent for the case under consideration.

Conceding, therefore, that a vessel in tow, and without fault, is to be regarded as sustaining the same relation to the collision which is sustained by cargo (and it seems fair thus to consider it), we think that the decree of the Circuit Court was erroneous, and that a decree ought to be made against the "Alabama" and the "Game-cock," and the irrespective stipulators, severally, each for one moiety of the entire damage, interest, and costs, so far as the stipulated value of said vessel shall extend; and any balance of such moiety, over and above such stipulated value of either vessel, or which the libellant shall be unable to collect or enforce, shall be paid by

the other vessel or her stipulators to the extent of the stipulated value thereof beyond the moiety due from said vessel.

This is substantially the form of decree sanctioned by this court in *The Washington and The Gregory*, 9 Wall. 516, a case involving similar principles, although the particular point was not fully discussed in that case.

Decree reversed, and record remanded with instructions to enter a decree in conformity with this opinion.

MR. JUSTICE CLIFFORD dissented.

HOT SPRINGS CASES.

RECTOR *v.* UNITED STATES; HALE *v.* UNITED STATES; GAINES ET AL. *v.* UNITED STATES; RUSSELL *v.* UNITED STATES.

1. The third section of an act of Congress, approved April 20, 1832 (4 Stat. 505), which is still in force, enacts that four sections of land, including the hot springs in Arkansas, shall be reserved for the future disposal of the United States, and shall not be entered, located, or appropriated for any other purpose whatever. The Indian title to them was not extinguished until Aug. 24, 1818, nor were the public surveys extended over them until 1838, nor has the sale of them ever been authorized by law. No part of said sections was, therefore, ever subject to pre-emption or to location; and no claim thereto has been validated or confirmed by any act of Congress.
2. The "Act for the relief of the inhabitants of the late county of New Madrid in Missouri Territory, who suffered by earthquakes," approved Feb. 17, 1815 (3 Stat. 211), required the following steps to be taken: Application to the recorder of land-titles, showing the party's claim, and praying a certificate of location — certificate of location issued by the recorder, setting forth the amount of land to which the applicant was entitled — application to the surveyor, presenting the certificate of location, and designating the lands which the party desired to appropriate — survey and plat made by the surveyor — return of the survey and plat to the recorder to be filed and recorded, with a notice designating the tract located and the name of the claimant — certificate of the recorder, stating the facts, and that the party was entitled to a patent — transmission of this certificate to the General Land-Office — the patent. In addition to these requisites, the land thus appropriated must have been a part of the public lands of the Territory, the sale of which was authorized by law. A survey, therefore, of part of said four sections made in 1820, if never returned to the recorder's office, did not within the meaning of said act, or of the act of April 26, 1822 (4 Stat. 668),

locate, or segregate from the public domain, the land thereby covered, and so appropriate it to the claimant as to give him a vested right thereto, and prevent the operation of the said act of April 20, 1832.

3. The asserted rights of the respective claimants to the land in controversy discussed and disallowed.

APPEALS from the Court of Claims.

These cases were argued by —

Mr. Matt. H. Carpenter and *Mr. Albert Pike* for Rector.

Mr. Frederick P. Stanton for Hale.

Mr. E. W. Munford for Gaines *et al.*

Mr. John A. Grow for Russell.

Mr. Attorney-General Pierrepont for the United States.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The title to a well-known watering-place in the State of Arkansas, called the Hot Springs, now located in Hot Springs County, has been contested by a number of claimants for nearly half a century. These springs are situated in a narrow valley or ravine between two rocky ridges in one of the lateral ranges of the Ozark Mountains, about sixty miles to the westward of Little Rock. Though not easily accessible, and in a district of country claimed by the Indians until after the treaty made with the Quapaws in 1818, they were considerably frequented by invalids and others as early as 1810 or 1812; but no permanent settlement was made at the place until a number of years afterwards. Temporary cabins were erected by visitors, and by those who resorted there to dispose of articles needed by visitors, but were only occupied during a portion of the year. The public surveys were not extended to that portion of the country until 1838.

In order to settle, if possible, the controversies which existed, and which seemed interminable, none of the parties having any regular government title, and it being doubtful whether any of them were entitled thereto, Congress, on the thirty-first day of May, 1870, passed the following act: —

"AN ACT in relation to the Hot Springs Reservation in Arkansas.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person claiming title, either legal or equitable, to the whole or any

part of the four sections of land constituting what is known as the Hot Springs Reservation, in Hot Springs County, in the State of Arkansas, may institute against the United States in the Court of Claims, and prosecute to final decision, any suit that may be necessary to settle the same: *Provided*, that no such suits shall be brought at any time after the expiration of ninety days from the passage of this act, and all claims to any part of said reservation upon which suit shall not be brought under the provisions of this act within that time shall be for ever barred.

"SECT. 2. *And be it further enacted*, That all such suits shall be by petition in the nature of a bill in equity, and shall be conducted and determined in all respects, except as herein otherwise provided, according to the rules and principles of equity practice and jurisprudence in the other courts of the United States; and for the purposes of this act, the Court of Claims is hereby invested with the jurisdiction and powers exercised by courts of equity, so far as may be necessary to give full relief in any suit which may be instituted under the provisions of this act.

"SECT. 3. *And be it further enacted*, That notice of every suit authorized by this act shall be executed by the delivery of a true copy thereof, with a copy of the petition, to the Attorney-General, whose duty it shall be, for and in behalf of the United States, to demur to or answer the petition therein, within thirty days after the service of such process upon him, unless the court shall, for good cause shown, grant further time for filing the same.

"SECT. 4. *And be it further enacted*, That if two or more parties claiming the same lands under different titles shall institute separate suits under the provisions of this act, such suits shall be consolidated and tried together, and the court shall determine the question of title and grant all proper relief as between the respective claimants, as well as between each of them and the United States.

"SECT. 5. *And be it further enacted*, That if, upon the final hearing of any cause provided for in this act, the court shall decide in favor of the United States, it shall order such lands into the possession of a receiver to be appointed by the court, who shall take charge of and rent out the same for the United States, until Congress shall by law direct how the same shall be disposed of, which said receiver shall execute a sufficient bond to be approved by the court, conditioned for the faithful performance of his duties as such, render a strict account of the manner in which he shall have discharged said duties, and of all moneys received by him as a receiver as aforesaid, which shall be by said court approved or rejected accordingly as it

may be found correct or not, and pay such moneys into the treasury of the United States; and he shall receive such reasonable compensation for his services as said court may allow; and in case of a failure of said receiver to discharge any duty devolving upon him as such, the court shall have power to enforce the performance of the same by rule and attachment. But if the court shall decide in favor of any claimant, both as against the United States and other claimants, it shall so decree, and proceed by proper process to put such successful claimant in possession of such portion thereof as he may be thus found to be entitled to; and upon the filing of a certified copy of such decree with the Secretary of the Interior, he shall cause a patent to be issued to the party in whose favor such decree shall be rendered for the lands therein adjudged to him: *Provided*, that either party may within ninety days after the rendition of any final judgment or decree in any suit authorized by this act, carry such suit by appeal to the Supreme Court of the United States, which court is hereby vested with full jurisdiction to hear and determine the same on such appeal, in the same manner and with the same effect as in cases of appeal in equity causes from the circuit courts of the United States: *And provided further*, that in case the judgment or decree of the Court of Claims in any such suit shall be adverse to the United States, the Attorney-General shall prosecute such appeal within the time above prescribed; and the taking of an appeal from any such judgment or decree shall operate as a *supersedeas* thereof until the final hearing and judgment of the Supreme Court thereon.

"J. G. BLAINE,

"*Speaker of the House of Representatives.*

"SCHUYLER COLFAX,

"*Vice-President of the United States and President of the Senate.*

"Received by the President May 31, 1870.

"[NOTE BY THE DEPARTMENT OF STATE. — The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.]"

The various parties setting up a claim to the property having, in pursuance of the act, filed their respective petitions in the Court of Claims; and the cases having been consolidated, the court, after a very full investigation, rendered a decree in

favor of the United States, and adverse to all the claimants. That decree is brought here by appeal.

Three different titles are set up against the United States; two of them under claims of pre-emption, and one under a New-Madrid location.

1. John C. Hale claims the south-west quarter of section 33, township 2 south, range 19 west, of the fifth principal meridian in Hot Springs County, Ark., embracing the hot springs, which are the object of contention. He claims as representative of John Percifull by right of pre-emption under the fifth section of the act of Congress, passed April 12, 1814, entitled "An Act for the final adjustment of land-titles in the State of Louisiana and Territory of Missouri." By this section it was provided, amongst other things, that every person, and the legal representatives of every person, who had actually inhabited and cultivated a tract of land lying in the Territory of Missouri, not rightfully claimed by any other person, and who should not have removed from the Territory, should be entitled to the right of pre-emption in the purchase thereof, under the same restrictions and regulations as directed in a similar act passed Feb. 5, 1813, in relation to Illinois. Those restrictions and regulations were, that the price should be the same as that of other public lands in the Territory; that only one quarter-section should be thus sold to one individual; that it should be bounded by the sectional and divisional lines of the public survey; and that the sale should not embrace lands reserved from sale by former acts, or directed to be sold in town-lots, &c. It was further required by the act of 1813, that every person claiming under the act must make known his claim by delivering a notice in writing to the register of the land-office for the district in which the land should lie, designating his claim, and to be filed in the office. If it appeared to the satisfaction of the register and receiver that he was duly entitled, he was allowed to enter the land on payment of one-twentieth of the price; but the entry must be made at least two weeks before the time of the commencement of public sales in the district, or the right would be forfeited.

Hale sets forth in his petition that, at the time when the said act was passed, — namely, April 12, 1814, — John Percifull

had actually inhabited and cultivated the tract of land embracing the hot springs, and forming a portion of the quarter-section claimed by him; that he had settled upon the same as early as 1809, and had continued to reside thereon and cultivate the same up to the time of the passage of the act; but that he could not comply with the act as to making entry, &c., because the land was not publicly surveyed until the year 1838. That as soon as practicable after the survey was made, — namely, on the 27th of September, 1838, — Sarah and David Percifull, the widow and heir-at-law of John Percifull (who was then deceased), gave notice of the said claim, verified by affidavits, to the register of the proper land-office at Washington, Ark., and applied to the register and receiver to enter the same; but that their application was rejected. That this decision of the register and receiver was subsequently confirmed by the Commissioner of the General Land-Office, on the ground that the hot springs, and four sections of land around the same, had been reserved for the future disposal of the United States by an act of Congress passed April 20, 1832.

The act of 1832, referred to, was an act authorizing the governor of Arkansas Territory to lease the salt springs therein. By the third section of the act, it was enacted that the hot springs in said Territory, together with four sections of land including said springs, as near the centre thereof as may be, shall be reserved for the future disposal of the United States, and shall not be entered, located, or appropriated for any other purpose whatever.

Besides this act which the claimant had to contend with, the Indian title to that portion of the country was not extinguished until Aug. 24, 1818, when it was ceded to the United States by the treaty made with the Quapaws. Attorney-General Butler, in 1836, being applied to for his opinion on the subject, held that none of the lands ceded by that treaty were, or ever had been, subject to pre-emption claims under the act of 1814; because no settlement or cultivation of the lands prior to that act could have been made consistently with the rightful claims of others, — namely, the Quapaw Indians. The land department always acted in conformity with this opinion. And it is difficult to see how a different result could have been

reached. It was the declared policy of the government at an early day to prohibit any settlement of lands belonging to the Indians. A proclamation to this effect was issued by the old Congress, Sept. 22, 1783. Journals, vol. iv. p. 275; Land Laws, 1828, p. 388. An enactment of the same purport was made by Congress in 1802, in the act to regulate trade and commerce with the Indians, sect. 5. 2 Stat. 141, 142. After the acquisition of Louisiana, it was repeated in reference to that Territory. Act March 26, 1804 (2 Stat. 289).

But it is contended that this difficulty has been obviated by the act of March 1, 1843 (5 Stat. 603), passed to perfect the titles of land south of the Arkansas River, held under New-Madrid locations and pre-emption rights, especially in reference to the Indian title. By the third section of this act it was enacted that every settler on the public lands south of the Arkansas River should be entitled to the same benefits accruing under the act of 1814 as though they had resided north of said river. What does this mean? We know the fact that the lands north of the Arkansas had been ceded to the United States by the Great and Little Osages by the treaty of 1808, and that the Indian title, therefore, was extinguished in 1814. Does the act mean that the settlers south of the river should have the same benefit as if the Indian title had been extinguished in and prior to 1814? If it meant this, why did it not say it? But supposing that the act had this effect, so that the objection arising from the Indian title was removed, the act still left unshaken the reservation made by the act of 1832. This act is absolute in its terms. It contains no saving clause. It declares that the hot springs shall be reserved for the future disposal of the United States, and that they shall not be entered, located, or appropriated for any other purpose whatever. This positive prohibition would have prevented the representatives of Percifull from availing themselves of any benefit which the removal of the obstacle arising from the Indian title gave them. Entry and location were still necessary to give them title.

The counsel for Hale, however, strenuously contends that the act of 1843 was intended to validate the pre-emption claim of Percifull to the property in question, and that it must be construed to effect a repeal of the act of 1832 by implication. In

favor of this view he alleges as a fact that this was the only case to which the act could apply. We cannot know this. There is nothing on the face of the act to indicate it. If it was intended to repeal the act of 1832, and to confirm Percifull's title, why was it not so expressed? A plain word or two would have done it. If such had been the legislative intent, we cannot believe that this intent would have been left in such deep obscurity, and dependent on so many implications. The act of 1832 expressed very clearly the intent of Congress to reserve the hot springs from private appropriation. If the act of 1843 was intended to revoke this reservation, it ought to have been expressed with like clearness.

But besides these legal obstacles in the way of this claim, it is not clear, from the evidence, that Percifull came within the description of the act of 1814. He resorted to the hot springs temporarily during the visiting season, to deal in such articles as the persons who frequented the place for their health needed. When they left he left. If he erected shanties or cabins, it was not for the purpose of permanent residence, but for temporary accommodation. His actual residence was several miles distant. There is no clear evidence of an intent on his part, at that time (1814), or previously, to make this retired spot in the Indian country his home.

We think this claim cannot be maintained either at law or in equity. Whatever hardship exists in the case must be submitted to the just consideration of the government.

2. William H. Gaines and wife and others, as heirs of one Ludovicus Belding, claim the same quarter-section as is claimed by Hale, by virtue of an alleged residence and settlement on the land in 1829 and 1830, under the pre-emption act of May 29, 1830 (4 Stat. 420). This was a general act, and declared that every settler or occupant of the public lands prior to its passage, who was then in possession, and cultivated any part thereof in the year 1829, might enter with the register of the land-office for the district in which such lands should lie, by legal subdivisions, any number of acres not more than one hundred and sixty, or a quarter-section, to include his improvements, upon paying to the United States the minimum price; with a proviso that no entry or sale of any land should be made under the act, which

should have been reserved for the use of the United States, or either of the States. Other provisions of the act as well as that here recited demonstrate that it was only intended to apply to lands which had been publicly surveyed. By its very language it could apply to no other. It evidently did not apply to the lands in question. They were not surveyed until 1838. The act contained the further provision, that it should remain in force for one year. It ceased to have effect, therefore, on the 29th of May, 1831. On the 20th of April, 1832, the act was passed reserving the hot springs. But the heirs of Belding rely on the act of July 14, 1832 (4 Stat. 603), by which it was declared, that all occupants and settlers upon the public lands of the United States, who were entitled to a pre-emption according to the act of 1830, and had not been able to make proof and enter the same within the time limited therein, in consequence of the public surveys not having been made and returned, or where the land was not attached to any land district, or where the same had been reserved from sale on account of a disputed boundary between any State and Territory, should be permitted to enter said lands on the same conditions, in every respect, as were prescribed in that act, within one year after the surveys were made, &c. It is difficult to see how this act can aid the claimants. The conditions of the act of 1830 are not only not waived, but they are expressly reimposed. One of those conditions, as seen above, was, that no entry or sale of any land should be made which should have been reserved for the use of the United States, or either of the States. This very thing had been done by the reservation of the hot springs by the act of 1832. No vested right had accrued to Belding before that reservation, for the pre-emption act of 1830 did not extend to the lands in question until the passage of the act of July, 1832, even if a vested right could be set up against the government before entry and location. The counsel for the claimants, however, bases an ingenious argument upon that phrase in the act reserving the hot springs, by which they are reserved "for the future disposal of the United States." He supposes that this differs from a reservation "to the United States." And as they are only reserved for future disposal, it may well be said that such disposal was made by the act of

July 14, 1832, in subjecting them to the right of pre-emption given by the act of 1830. But this argument is too far-fetched and circuitous. In the first place, we think that a reservation for the future disposal of the United States was a reservation to the United States. And, in the next place, that Congress could hardly have entertained an intent to dispose of the Hot Springs Reservation by any such general phraseology as that which was employed in the act of July 14, 1832. Certain reservations are expressly referred to in the act as no longer to be in the way of pre-emption; and the express mention of these makes the omission of others more emphatic. The argument of the counsel would have the effect of defeating all governmental reservations made between April, 1830, and July, 1832; for the United States had the power of disposing of all of them, whether expressly retained or not.

Without referring, therefore, to the character of Belding's occupation, his want of title, either legal or equitable, is manifest upon the face of the statutes under which he claims, taken in connection with the act of April 20, 1832, reserving the property to the government. If it were necessary to examine his mode of occupation, it would be open to some very just criticism, for which it is sufficient to refer to the opinion of the court below.

3. The remaining title is that claimed by Henry M. Rector (and, under him, Russell), under a New-Madrid location, in right of Francis Langlois. The earthquake, or succession of earthquakes, which occurred along the Mississippi below the mouth of the Ohio in 1811 and 1812, was particularly disastrous to the county and village of New Madrid, in Missouri Territory (then the District of Louisiana), leaving a large portion of the land now known as the "sunk country" under water. For the relief of the inhabitants, Congress, on the 17th of February, 1815, passed an act authorizing those whose lands had been materially injured by earthquakes to locate the like quantity of land on any of the public lands of the said Territory, the sale of which was authorized by law. It was provided, however, that no person should be permitted to locate a greater quantity than he had before, except where that was less than one hundred and sixty acres, and, in no case, a greater

quantity than six hundred and forty acres; and that, in every case where such location should be made according to the provisions of the act, the title of the person or persons to the land injured should revert to and become absolutely vested in the United States. By the second section of the act, proof of the applicant's title to the lands injured was required to be made to the recorder of land-titles for the Territory of Missouri, who thereupon was to issue a certificate of the party's right. A location being selected, and the certificate being presented to the principal deputy-surveyor of the Territory, it became his duty to cause a survey thereof to be made, and to return a plat of the location made to the recorder, together with a notice in writing designating the tract thus located, and the name of the claimant, on whose behalf it was made, which notice and plat the recorder was required to have recorded in his office. By the third section, it was made the duty of the recorder to transmit a report of the claims allowed, and locations made under the act, to the Commissioner of the General Land-Office, and to deliver to the party a certificate stating the circumstances of the case, and that he was entitled to a patent for the tract designated. This certificate being presented to the land-office, a patent was issued for the land.

These are the substantial provisions of the act. As apparent on its face, it required the following steps to be taken: —

1. Application to the recorder of land-titles, showing the party's claim, and praying a certificate of location.

2. Certificate of location issued by the recorder, showing the amount of land to which the applicant was entitled.

3. Application to the surveyor, presenting the certificate of location, and designating the lands which the party desired to appropriate.

4. Survey and plat made by the surveyor.

5. Return of the survey and plat to the recorder of land-titles to be filed and recorded, with a notice designating the tract located and the name of the claimant.

6. Certificate of the recorder, stating the facts, and that the party was entitled to a patent.

7. Transmission of this certificate to the General Land-Office.

8. The patent.

In addition to these requisites, the land thus appropriated must be located on the public lands of the Territory the sale of which was authorized by law.

It is shown by the claimant that Francis Langlois was the owner of a tract of two hundred arpents of land (about one hundred and seventy acres), in the county of New Madrid, which was materially injured by the earthquakes. It is also satisfactorily shown that application was made on his behalf on the 26th of November, 1818, to the recorder of land-titles at St. Louis, for a certificate of location of a like quantity of lands; and that the said recorder did, on that day, grant and issue to him a certificate accordingly (being certificate No. 467), stating that Langlois or his legal representatives were entitled to locate two hundred arpents of land on any of the public lands of the Territory of Missouri the sale of which was authorized by law. It also seems that Langlois, at the same time, by his attorney, executed a release to the United States of his said lands in New Madrid. As this, however, was not necessary, inasmuch as the New-Madrid land would revert to the United States on the completion of the substituted title to other lands of like amount, under the act, it could have no effect on the validity of Langlois's title to the lands which he sought in exchange therefor. The certificate of location thus procured from the recorder was subsequently assigned to other parties, and came to the hands of Samuel Hammond and Elias Rector, under whom the present claimant deraigns title. In January, 1819, Hammond and Rector made formal application to the surveyor-general (the officer who succeeded the principal deputy-surveyor) for the entry of two hundred arpents of land to satisfy certificate No. 467, to be surveyed in a square tract, with lines corresponding to the cardinal points of the compass so as to include the said hot springs, as near the centre of the square as circumstances would admit. This application was in writing, and was filed in the office of the surveyor-general, who directed James S. Conway, a deputy-surveyor, to make the survey. Thereupon Conway made the survey as requested, and on the 16th of July, 1820, made out a plat and descriptive statement of the same, which he numbered "Survey No. 2903, Certificate 467." This survey was deposited by the deputy in the office of the

surveyor-general at St. Louis; but it was not recognized or recorded by the surveyor-general, nor was it returned to the recorder of land-titles. Of course no patent was obtained upon it.

Subsequently, in 1838, when the public surveys were extended to that region, the then surveyor-general in his instructions to the deputy-surveyor who prosecuted the work, whether on Rector's application does not clearly appear, directed him to survey for Francis Langlois or his legal representatives a tract of two hundred arpents, having the main spring in the centre, according to the location of New-Madrid certificate No. 467, which would be furnished to him. The survey was made and returned accordingly, and duly returned to the office of the recorder of land-titles, who issued a patent certificate thereon. No patent, however, was ever issued on this location, as it was made subsequent to the act of April 20, 1832, reserving the hot springs and surrounding lands to the United States. This act clearly rendered void all subsequent appropriations of land, unless it was repealed by the act of 1843 before referred to. The first section of that act declared that the locations of warrants issued under the act of Feb. 17, 1815 (relating to sufferers at New Madrid), on the south side of the Arkansas River, if made in pursuance of the provisions of that act in other respects, should be perfected into grants in like manner as if the Indian title to the lands on the south side of said river had been completely extinguished at the time of the passage of said act.

Attorney-General Cushing, in an opinion on this title given in 1854, pertinently remarks that the only obstacle removed from the New-Madrid locations by this act was that of the existence of the Indian title at the time of the passage of the act of 1815. No such title existed when the survey was subsequently made; and if that were the only objection to the title in question, it would be entitled to recognition. But there stands the act of 1832 reserving the lands to the United States. Unless, therefore, the title of Rector, or those whose estate he represents, became fixed and vested, as against the government, before the passage of that act, so as to make the act obnoxious to the objection of taking private property without just compensation,

it cannot be maintained. Hence it is all important to ascertain the effect of the survey made for Hammond and Rector in 1820.

As before observed, that survey was not recognized nor recorded in the surveyor-general's office, nor returned to, nor recorded in, the office of the recorder of land-titles. It is proper to consider the reasons why this was not done.

The difficulty was this: The act for the relief of the sufferers of New Madrid required that the lands to be given to them in exchange for their injured lands should be located on public lands of the Territory "*the sale of which was authorized by law.*" Mr. Wirt, the then attorney-general, gave it as his opinion that no lands were authorized by law to be sold which had not been publicly surveyed, according to the general system of sections and townships; and as the region in which the hot springs were located was subject to the Indian title until 1818, and had never been publicly surveyed, no lands could be located there under a New-Madrid claim in 1820, when the attempt was made by Hammond and Rector as above stated. This opinion of the Attorney-General was followed by the General Land-Office, and patents were refused for any lands thus attempted to be located. Hence the surveyor-general did not recognize the survey of Conway, and never returned it to the recorder. *Vide* Wirt's Opinions, 1 Opin. 361, 372.

But on the 26th of April, 1822, Congress passed an act, entitled "An Act to perfect certain locations and sales of public lands in Missouri," by which it was enacted that *the locations* theretofore made of warrants issued under the act of Feb. 15, 1815 (the act for the relief of the New-Madrid sufferers), if made in pursuance of the provisions of that act in other respects, should 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 *theretofore* created by such locations should be as valid and binding on the United States as if such fractions had been made by rivers or other natural obstructions: and the second section of the act declared that thereafter the holders and locators of such warrants should be bound, in locating them, to conform to the sectional and quarter-sectional lines of the pub-

lic surveys; and that all such warrants should be located within one year after the passage of the act.

In delivering the opinion of this court in *Barry* v. *Gamble*, 3 How. 52, where the construction and effect of this act were brought under review, Mr. Justice Catron considered that the act only had reference to lands which had not been surveyed when the imperfect locations were made and had been surveyed prior to the passage of the act; for, in making provision for the fractions created by such irregular surveys, reference is only made to fractions "heretofore created." If this view of the act is correct, it decides the case; for the public surveys were not extended to these lands until long after 1822, — namely, 1838. As this was not the point involved in that case, however, it is proper to look further in reference to the effect of the Hammond and Rector survey of 1820.

The petitioner's counsel insist that the act of 1822 removed the objection that the location did not conform to the public surveys, without reference to the time when those surveys were or might be made, whether before or after the date of the act.

Conceding for the sake of the argument that this may be the true construction of the act, what is it that the act saves? It is "locations." "The *location* heretofore made, of warrants issued under the act, &c., if made in pursuance of the provisions of that act in other respects, shall be perfected into grants," &c. By the second section, locations thereafter to be made were to conform to the sectional and quarter-sectional lines. It becomes important, therefore, to know what is meant by a location in the act of 1815. It evidently meant a completed location. When the land became located, the title of the applicant to his New-Madrid lands at once reverted to the government. The words of the act are, —

> "In every case where such location shall be made according to the provisions of this act, the title of the person or persons to the land injured as aforesaid shall revert to, and become absolutely vested in, the United States."

Now, when did this take place? Certainly not on the mere application to the surveyor-general to survey the tract which the party desired to appropriate; nor when the surveyor had

planted his last stake or heap of stones on the ground; nor when he had returned home with his notes in his pocket; nor when he had made out his survey and plat. This survey and plat did not belong, the instant they were finished, to the applicant; neither did the land, until something more was done. What was that something more? The act tells us that the surveyor must return the survey and plat, and the notice as to the party for whom the survey was made, to the office of the recorder of land-titles, to be by him filed and recorded. Then, and not till then, the applicant was entitled to a patent. Then the land first became appropriated. It then first appeared on the records of the country as his. This point has been repeatedly adjudged by this court, and has become part of the established land-law of the country, and we should do a great wrong at this late day to shake it. *Bagnell* v. *Broderick*, 13 Pet. 436; *Stoddard* v. *Chambers*, 2 How. 284; *Barry* v. *Gamble*, 3 id. 32; *Lessieur* v. *Price*, 12 id. 60; *Hale* v. *Gaines*, 22 id. 144; *Rector* v. *Ashley*, 6 Wall. 142; *Mackay* v. *Easton*, 19 id. 633. In the last case, the court, Mr. Justice Field delivering the opinion, says as follows: —

"The act of Congress . . . 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 of 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."

A brief reference to the history of land-titles in the Louisiana country will show the ground and reason for the importance attached to a return of the survey to the office of the recorder

of land-titles. It is well known that the Territory purchased of the French government in 1803 was, in the following session of Congress, divided into two Territories: one called the Territory of Orleans, comprising West Florida and the present State of Louisiana; and the other, called the District of Louisiana, and comprising the whole region west of the Mississippi and north of that State. Act March 26, 1804 (2 Stat. 283). The treaty by which this Territory was acquired, guaranteed, on the part of the United States, to the inhabitants the free enjoyment of their liberty, property, and religion. The land-titles which had been perfected and located by surveys offered no difficulties; but there were many inchoate titles which had never been perfected, which by the laws of France and Spain the claimants had a right to perfect. In order that the government of the United States might know what claims it was bound in good faith to respect, measures were taken to have all outstanding claims brought in and recorded, and located by surveys where these should be necessary. By the act of March 2, 1805 (2 Stat. 324), the Territory of Orleans was divided into two land-districts, for each of which a register was appointed; but for the District of Louisiana an officer was created, called the Recorder of Land-Titles, who continued for many years to exercise important functions in regard to the public lands in the District, even after the appointment of a surveyor, and of registers and receivers, under the general land-laws. The act referred to required every person claiming lands, whether by complete or incomplete title, within a limited time, to deliver to the registers of Orleans, or to the recorder of land-titles of the District of Louisiana, a notice of his claim, with a plat of the tract claimed, and also his grant, order of survey, or other written evidence of his claim; which documents the said registers and recorder respectively were to record in proper books. Claims not so presented and recorded within the proper time were to be barred as against grants from the United States. The act further provided for the appointment of two additional persons in each district, to act with the register or recorder as a board of commissioners to examine and decide upon the claims which should be presented; whose duty it was, after deciding, to report their decisions to Congress, and

to deposit the same, with all the evidence and documents, in the offices of the register and recorder respectively within whose district the lands lay. At a later period the additional commissioners were dispensed with, and the powers of the board were vested in the register and recorder respectively. The reports of these commissioners, and the acts of Congress confirmatory thereof, formed the basis of the titles derived from the French and Spanish authorities. And this constitution of the office and duty of the recorder of land-titles in the District of Louisiana led to the importance subsequently attached to the return and registration of other surveys in the same office. It was there that the officers of the government looked, or were supposed to look, for all authentic claims to land in the District. No lands were supposed to be appropriated or segregated from the public domain, unless recorded or registered there.

Now the difficulty in this case is, that the survey of 1820 was never returned to the recorder's office, and, therefore, this land never became located within the meaning of the act of 1815, or the act of 1822. It never became segregated from the public domain. It never became so appropriated to the claimants as to give them a vested right, and prevent the operation of the act of April 20, 1832, by which it was reserved to the United States.

But the claimant insists that this was not the fault of Hammond and Rector; that they did all they could do; and that the surveyor-general could not, by neglecting his duty, — namely, that of recording the survey and returning it to the recorder of land-titles, — deprive them of their just rights. But, when the survey was made, the act of 1822 was not in existence: the laws then were, as the Attorney-General held them to be, that unsurveyed lands were not lands the sale of which were authorized by law; and as this doctrine was received and acted upon by the land department of the government, we should not feel authorized at this late day to reverse it. And it is not shown that any further efforts were made to have the location perfected until after the passage of the act of 1832. If at any subsequent time it became the duty of the surveyor-general to return the survey to the recorder's office, no application for that purpose seems to have been made. A clear duty on his part could have

been enforced by *mandamus*, had he refused to perform it. But it is unnecessary to speculate. Nothing further was done; and no vested right accrued under the claim.

In conclusion, we feel bound to decide that none of the claimants are entitled to the lands in question. The claims advanced all depend on one or other of the titles which we have considered; and all are equally untenable. Whatever hardship, if any, may ensue from this declaration of the law of the case, we have no doubt will be duly taken into consideration by the legislative department of the government in dealing with the subject of the future disposition of those lands.

It is just to say that we have been much aided in the investigation of this case by the able arguments of the counsel on both sides, and by the elaborate opinion of the Court of Claims, which supersedes the necessity of our going more into detail in the discussion of the various questions involved.

Decree affirmed.

BURDELL ET AL. *v.* DENIG ET AL.

1. In cases where profits are the proper measure of damages for the infringement of a patent, such profits as the infringer has made, or ought to have made, govern, and not those which the *plaintiff* can show that *he* might have made.
2. The above rule applies peculiarly and mainly to cases in equity, and is based upon the idea that as to such profits the infringer of the patent should be treated as a trustee for the owner thereof. On the other hand, in actions at law, it has been repeatedly held that the rate at which sales of licenses of machines were made, or the established royalty, constitutes the primary and true criterion of damages.
3. In the absence of satisfactory evidence of that class which is more appropriate in the forum where the case is pending, the other class may be resorted to, as furnishing one of the elements on which the damages, or the compensation, may be ascertained.
4. A certain instrument (*infra*, p. 717), held not to be a mere power of attorney, revocable at the pleasure of the maker, but a contract under which rights for a specified time were acquired.
5. As a receipt for the use of four of plaintiffs' machines, executed after the institution of the suit, was a valid acquittance of any claim for such use, it was properly admitted in evidence, under the general issue, to reduce the amount of damages.
6. Where the evidence merely tended to prove certain disputed facts in issue, it

was error for the court to assume in its charge that they had been proved, and thus withdraw from the jury the right to weigh the evidence bearing upon such facts.

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

Mr. William Lawrence for the plaintiffs in error.

Mr. George Gifford, contra.

The facts are stated in the opinion of the court. The paper therein referred to as having been introduced by the defendants is as follows: —

"Article of agreement made and entered into, this thirteenth day of March, 1860, between Sarah Burdell, of the county of Franklin, in the State of Ohio, and H. Crary, of the same county, witnesseth: —

"That said Sarah Burdell does hereby authorize and empower the said Crary, for the full term of four years and eight months, or from the date hereof until the twelfth day of November, 1864, as fully and completely as she might herself, had not this agreement been entered into, to sell and use, and grant to others the right to use, in the said county of Franklin, A. B. Wilson's sewing-machines, as known and denominated for sewing cloth and other fabrics, patented Nov. 12, 1850, and reissued Jan. 22 and Dec. 9, 1856, and also, the sewing-machine patented by J. M. Singer, together with all the improvements which have been made already, or shall hereafter be made in the same, without additional costs, and also all other sewing-machines of every name and description to which the said Sarah may have power to exercise any control whatever; and the said Sarah hereby covenants and agrees with the said Crary, that during the said term of four years and eight months she will not sell or use, or grant to others the right to sell or use, in the said county of Franklin, the sewing-machines above specified, or any other of any name or kind or description, without the consent of said Crary.

"2. That the said Crary agrees to make out and deliver to the said Sarah Burdell, or her authorized agent or attorney, on the first day of each and every month, a full and accurate report of all sales of sewing-machines of every name, kind, and quality made by him or his agents during the preceding month, stating the first cost of each such machine in the purchase of the same from the manufacturers or their agents until ready for shipping, exclusive of freight and other incidental charges; also, the price at which such

machine was sold by said Crary or his agents; and stating, also, the difference between the said first cost of the said machines and the price at which the same were sold, and which difference for the preceding month, on the first day of each month when the said report is delivered, as aforesaid, the said Crary agrees to pay the said Sarah Burdell, or her authorized agent or attorney, thirty-five per centum during the first six months from the date hereof, and forty per centum thereafter, or until the 12th of November, 1864: *Provided, however*, if the said percentage for any one month during the first four months from the date hereof should not amount to the sum of seventy-five dollars, the said Crary agrees to make it up to the full sum of seventy-five dollars, and the said Sarah agrees that for any such deficiency or difference between the said percentage and the sum of seventy-five dollars the said Crary may reimburse himself out of the first excess of said percentage over one hundred dollars after the expiration of the said four months from the date hereof.

"3. It is agreed by the said Sarah Burdell and the said Crary that in the prosecution of an injunction to restrain or prevent the sale or use of any sewing-machine in said county of Franklin, in violation of the right, power, and authority hereby vested in the said Crary to sell or use such machine in said county, and in the prosecution of any suit at law for the recovery of damages for the sale hereafter, or for the use of any such sewing-machine hereafter sold, the costs and expense of any such suit at law or in equity shall be equally borne by the said Sarah and the said Crary, each paying one-half of such costs and expenses, and each sharing equally, that is, each being entitled to one-half of the net amount received in any such proceedings, at law or in equity: *Provided*, that no such injunction shall be applied for, or any such suit at law instituted, without the consent of both parties to this agreement: *Provided also*, that for the purpose of prosecuting any such suit at law that may be agreed upon by the parties hereto, the power and authority herein vested in the said Crary shall remain and continue in full force and effect after the expiration of said term of four years and eight months: *Provided also*, that in any suits or proceedings at law or in equity which the said Sarah may see fit to institute on account of the use hereafter of any sewing-machines hereafter sold, the said Crary shall not be required to defray any portion of the costs and expenses, or be entitled to any share of the amount so recovered in any suit or proceedings so instituted, as last aforesaid, by said Sarah.

"4. It is agreed that the first report of sales herein provided for shall be made on the first day of May next, and shall include all sales of sewing-machines from this date until the said first day of May.

"Witness our hands and seals this thirteenth day of March, 1860.

(Signed) "SARAH BURDELL. [SEAL.]
"H. CRARY. [SEAL.]

"In presence of:
"FRANKLIN GALE."

MR. JUSTICE MILLER delivered the opinion of the court.

The plaintiffs in error were plaintiffs in the Circuit Court in an action for an infringement of the patent of A. B. Wilson, for a feeding device in sewing-machines. They recovered a judgment for one hundred and twenty-five dollars, but insist that they were entitled to a much larger judgment, of which they were deprived by the rulings of the court in the progress of the trial.

The objections to these rulings will be considered by us under three heads, to which all the assignments of error relate.

1. As to the measure of damages.

Evidence was given tending to prove that plaintiffs had advertised to sell their machines, and had actually sold a shop-right to use one of them for twelve dollars and fifty cents, and had given a verbal license to another person to use an old machine in his house for five dollars, but afterwards refused to sell or license for Franklin County, and told defendants they desired to retain the use of the machine as a close monopoly. Evidence had also been given as to profits made by defendants. On this testimony they asked the court to instruct the jury that "this testimony was not sufficient to change the rule of damages from the profits which plaintiffs would have made if they had not been embarrassed by the interference of the defendants, to a mere license-price, because they do not establish a customary charge for the right to use the invention in Franklin County," which the court refused.

There are two sufficient objections to this prayer: —

First, In cases where profits are the proper measure, it is the profits which the *infringer* makes, or ought to make, which

govern, and not the profits which *plaintiff* can show that *he* might have made.

Second, Profits are not the primary or true criterion of damages for infringement in an action at law. That rule applies eminently and mainly to cases in equity, and is based upon the idea that the infringer shall be converted into a trustee, as to those profits, for the owner of the patent which he infringes, — a principle which it is very difficult to apply in a trial before a jury, but quite appropriate on a reference to a master, who can examine defendant's books and papers, and examine him on oath, as well as all his clerks and employés.

On the other hand, we have repeatedly held that sales of licenses of machines, or of a royalty established, constitute the primary and true criterion of damages in the action at law.

No doubt, in the absence of satisfactory evidence of either class in the forum to which it is most appropriate, the other may be resorted to as one of the elements on which the damages or the compensation may be ascertained; but it cannot be admitted, as the prayer which was refused implies, that in an action at law the profits which the other party might have made is the primary or controlling measure of damages. *Packet Company* v. *Sickles*, 19 Wall. 617.

2. A paper was introduced in evidence by defendants, signed Sarah Burdell, authorizing H. Crary, for the full term of four years, to sell, use, and grant to others the right to use, in said county of Franklin, A. B. Wilson's sewing-machines. It was agreed that the paper should have the same effect as if signed by William Burdell and the other plaintiffs in whom the title was when it was executed. It is too long a paper to insert here, but will be given *verbatim* by the reporter;[1] and its true construction is the foundation of the alleged error of the court in admitting it, and also in admitting a receipt given to the defendants by said Crary for the use of four of the machines for which they were sued.

It is claimed that the instrument is but a power of attorney revocable at the pleasure of the maker, and that it was so revoked before the receipt given in evidence was executed by Crary.

But we are of a different opinion. We think the instru-

[1] See the paper, *supra*, p. 717.

ment is a contract. That Crary acquired rights under it for four years, which, whether he may have so acted or not as to enable plaintiffs to have it rescinded or set aside in a suit in chancery, could not be revoked at their mere volition; and that these rights were such that his receipt for the use of the four machines mentioned in it was a valid acquittance of any claim for the same thing by plaintiffs in this suit.

It is said that the court erred in admitting the receipt in bar of the action, because it was executed after the suit was brought, and could not be so used without a special plea setting it up.

The fallacy of this argument consists in assuming that it was introduced as a bar to the action. It was only used to reduce the amount of the recovery, and not as a complete bar; and as it excluded from the computation of damages only four machines out of a larger number, it was admissible under the general issue, or any other form of plea which left the amount of the recovery in dispute.

We see no error in this branch of the case.

3. The defendants introduced also the following paper, and gave evidence of an assignment by Lowe to Singer & Co., and of a license from Singer & Co. to defendants: —

"In consideration of the sum of eighty dollars, to me paid by J. Payne Lowe, the receipt whereof is acknowledged, I do hereby assign, transfer, and set over unto the said Lowe, his representatives and assigns, the exclusive right to use, and sell to others to be used, in the county of Franklin, in the State of Ohio, Singer's patent sewing-machines, as mentioned in the patent granted to Isaac M. Singer, dated Aug. 12, 1851, together with the right to have the said machines delivered to be used, or sold to be used, in the said county of Franklin, in the State of Ohio.

"And I hereby covenant that I have good right to make the assignment aforesaid.

"In witness whereof I have hereunto set my hand and seal, this fourth day of February, A.D. 1857.

"WM. BURDELL. [SEAL.]"

Evidence was also given tending to show that the machines called Singer machines, used by the defendants, were made as Singer machines had always been made.

And after all the testimony was closed, the plaintiff asked

the court to instruct the jury that the license of Burdell to J. Payne Lowe, of the 4th of February, 1857, did not authorize him, and those deriving rights under that license, to use, in the machine known and called Singer machine, in said county of Franklin, the feeding device patented to A. B. Wilson, which the court refused to give; but did charge the jury that the said license authorized the said Lowe, and all claiming title from him, to use in Franklin County the Singer machine, with a feeding device operating upon the principle and plan of that patented to Wilson: to which refusal of the court to charge as asked, and to the said charge as given, the plaintiffs then and there excepted.

In defence of this ruling, it is said that Burdell never had any interest in the Singer patent; that the instrument called the Singer machine, which was in use when Burdell made the above assignment to Lowe, was a Singer machine with the Wilson feeding device; and that, as Burdell did own the patent for this device, what he intended to assign was the right to use the Singer machine *with that* device. It is certainly true, that, in construing a written instrument, it is necessary and admissible to look to all the surrounding circumstances of the transaction which are necessary to discover its meaning. And it may be admitted, that, if the facts above stated were conceded to be true, it would follow that the reasonable construction of the contract would be such as the court held it to be. The refusal of the court to give the instruction asked by counsel for plaintiffs was, therefore, justifiable.

But these facts were not conceded by plaintiffs. Nor does the bill of exceptions say that they were proved. It says nothing at all about Burdell's interest or want of interest in the Singer patent; and in regard to use of the Wilson feeding device in the Singer machine, it says no more than that there was evidence *tending* to prove that it had always been so used in all these machines.

If these things were not proved, then there was no ground for the construction of the contract given by the court; and whether they were proved or not, was a matter for the jury and not for the court to decide. The jury may not have believed the witnesses; or, if believed, may not have found that their

testimony established what the bill of exceptions declares it tended to prove. The court, therefore, in telling the jury peremptorily, on this testimony, that the license to Lowe did authorize him to use the Singer machine with a feeding device operating upon the principle and plan of that patented by Wilson, took away from the jury the right to weigh that testimony. If the judge had said, that, *if they believed these facts to be established*, then the license to Lowe authorized the use of the Wilson device in the Singer machine, we would affirm the judgment; but because he, in this respect, assumed a function which belonged to the jury, and for that reason alone, the

Judgment must be reversed and a new trial awarded.

McStay et al. v. Friedman.

Where, in ejectment for a part of the lands confirmed to the city of San Francisco by an act of Congress, the validity and operative effect of which were not questioned, the judgment of the Supreme Court of the State of California was adverse to the defendant, who endeavored to make out such possession as would, under the operation of the city ordinance and the act of the legislature, transfer, as he claimed, the title of the city to him, — *Held*, that this court has no jurisdiction.

Motion to dismiss a writ of error to the Supreme Court of the State of California.

Mr. Aaron A. Sargent for the defendant in error, in support of the motion.

Mr. W. Irvine, contra.

Mr. Chief Justice Waite delivered the opinion of the court.

This was an action of ejectment brought by Friedman to recover the possession of a certain parcel of the Pueblo lands confirmed to the city of San Francisco by the act of Congress passed March 8, 1866 (14 Stat. 4). He did not attempt to connect himself with the city title, but relied entirely upon his alleged prior possession and that of his grantors.

The defendants, who are the plaintiffs in error, set up in their answer, as defences, (1) adverse possession, with specifi-

cations to bring themselves within the operation of the Statute of Limitations; and (2) the title of the city of San Francisco under the act of Congress, and an assignment of that title to themselves, pursuant to the provisions of an ordinance of the city and an act of the legislature of California.

At the trial no question was raised as to the validity or operative effect of the act of Congress. The effort on the part of the plaintiffs in error seems to have been (1) to establish their defence under the Statute of Limitations; and (2) to prove such possession as would, according to their claim, transfer the city title to them under the operation of the city ordinance and the act of the legislature.

No Federal question was involved in the decision of the Supreme Court. The city title was not drawn in question. The real controversy was as to the transfer of that title to the plaintiffs in error; and this did not depend upon the "Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States." The case is, therefore, in all essential particulars, like that of *Romie et al.* v. *Casanova*, 91 U. S. 379; and the writ must be

Dismissed for want of jurisdiction.

HAMMOND ET AL. *v.* MASON AND HAMLIN ORGAN COMPANY.

1. A contract concerning the use of a patented invention bound the "parties and their legal representatives to the covenants and agreements of the contract." A plea alleged that the defendants "are the legal representatives and successors and assignees in business and interest" of one of the parties. The question being on the sufficiency of this plea, *Held*, that the defendants were the legal representatives of that party within the meaning of the contract.
2. An allegation that L. refused to manufacture and furnish his invention as he had agreed to do, is equivalent to an allegation of a demand on him to do so, and a refusal.
3. Where an inventor signed several different agreements with the same party, on the same day, for the sale of his invention and for a license to use it, they must all be construed together; and if it is apparent that he intended to convey the right to use a new invention in connection with former patents, under any renewal or extension of the former, the grantee or assignee is protected, though the improvement was never patented, and though the

reissued patent was extended afterwards. It is a question of intention to be gathered from all the instruments of writing in the case.

4. The rights growing out of an invention may be sold, including the right to use it, though no patent ever issues for it.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

Mr. B. E. Valentine for the appellants.

Mr. Frederick H. Betts, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

On the eighteenth day of November, 1856, a patent issued to Lafayette Louis for an invention which produced a tremolo in the musical notes of melodeons or reed instruments, and which has since become known as the tremolo attachment. Louis surrendered and obtained reissues of this patent on the twenty-sixth day of February, 1867, and again on the twenty-sixth day of May, 1868; and after his death his wife, who was his administratrix, obtained in July, 1871, what appears to have been both a reissue and a renewal for seven years of the same patent, the whole right in which she assigned to plaintiffs May 30, 1872.

Whereupon the present suit, which is a bill in chancery, is brought against the defendants, as infringers, for an injunction and for an account of profits, and other relief.

The defendants, not denying the allegation of the use of the invention, interpose a plea; and on this plea the case was heard and a decree rendered dismissing the bill.

The plea sets up the right to use the invention described in the reissued patent of 1872, in defendants, as shown by five several written instruments, signed by Louis in his lifetime, which were made parts of the plea as exhibits A, B, C, D, and E.

The first of these is a contract between said Louis and Henry Mason and Emmons Hamlin, for the use by the latter in their melodeons, of the original invention of Louis, and is dated April 10, 1861. Exhibit B is a copy of an application by Louis for a patent for an improvement in his tremolo attachment, with the accompanying specifications, and is dated Sept. 25, 1868. Exhibits C, D, and E are all dated the same day as this appli-

cation, and are contracts between said Louis and the Mason and Hamlin Organ Company for the sale of this improvement, and its use in connection with the invention already patented in 1856, and reissued in 1867 and 1868.

Exhibit A is a contract by which Louis agrees to furnish to Mason and Hamlin his patent tremolo attachment in such numbers and as they may order them, at one dollar for each attachment; and if he fails to furnish them as ordered, Mason and Hamlin are licensed to make, use, and sell the same in connection with all musical instruments manufactured by them anywhere in the United States. The closing paragraph of this contract declares that "the said parties mutually bind themselves and their legal representatives to the covenants and agreements herein contained, to continue in force until the full expiration of the term for which said letters-patent have been granted, and during such period as the same may be hereafter *renewed or extended.*"

It is not alleged that any of the subsequent contracts abrogated this one. It cannot be denied that this contract extends to the renewal of the patent which was assigned to plaintiffs. The only question on this branch of the plea is, whether the Mason and Hamlin Organ Company are entitled to the rights of Mason and Hamlin.

As the case was decided on the sufficiency of the plea, its allegations must be taken as true; and all that can be reasonably inferred from those allegations, and from the various exhibits which it makes, must also be held to be true. The plea does allege that the defendants are "the legal representatives, and successors, and assignees in business and interest, of said Mason and Hamlin." This allegation seems to be full and specific; and the only doubt of its sufficiency arises as to whether the legal representatives spoken of in the agreement are or can be others than executors, administrators, or heirs. Whatever doubt might be entertained on this point, we think is solved by the fact that Louis, in the subsequent contracts of 1868, seems throughout to treat with the corporation as successors of Mason and Hamlin in the contract of 1861. For in exhibit E he sells and assigns to the company the exclusive right to use his supposed improvement under the patent of

1856 and all the subsequent reissues, and as this new improvement required the use of the old, he seems here to recognize the right of the company to control the license he had previously granted to Mason and Hamlin.

We are of opinion, therefore, that the defendant corporation is entitled to the benefit of the contract between Mason and Hamlin, covered by exhibit A, and that this gives them the right to use the attachment under the extension of the original patent now assigned to plaintiffs.

It is said that defendants never demanded these attachments, and, therefore, they had no right to make them.

But the allegation is full that Louis at all times *refused* to manufacture and furnish the attachment to defendants, and we think under the contract this authorized them to make them for themselves.

The court below, however, rested its decision on another ground, which we think equally conclusive.

As we have already said, Louis signed these contracts with the defendant company on the same day that he made his application for a patent for his improvement in the tremolo. The supposed improvement consisted in a different construction of the parts already patented by him. By the first contract (exhibit C) he *sold* to the defendant *this* invention wholly, and authorized the patent to issue to the company. By the second (exhibit D), he licensed them to use this new invention or improvement in connection with his former patents, and in connection with a patent of his of 1862 for an improvement in pianos with melodeon attachments; and the company agreed to pay him a royalty of one dollar each for his new tremolo attachment, at an average of forty attachments per month. The third contract (exhibit E) provides that if the company fail in securing a patent for the improvement sold to them, referring to his original patent and reissues, and to his sale of the later invention, and his claim to use it in connection with the old patents, he grants to the defendants the exclusive right, under the letters-patent already granted, and under *any* and all reissues thereof, to make, use, and sell the specific mechanism described and set forth in the application for the new patent.

Without elaborating this matter, we concur in the opinion

of the Circuit Court, that Louis, having *sold* this *invention*, and doubt existing whether the purchasers would obtain a patent for it, intended by this contract and by exhibit D to secure to them the benefit of the exclusive *use* of that invention, in connection with his first mechanism, so long as the latter was protected by any patent founded on his right as inventor. It was this use for which defendants are sued in this case.

While it is, perhaps, not necessary to decide whether in any case a sale of an invention which is never patented carries with it any thing of value, we are of opinion that the rights growing out of an *invention* may be sold, and that in the present case the sale, with the right to use it in connection with the existing patent and its reissues or renewals, protects defendants from liability as infringers. *Decree affirmed.*

HALL ET AL. *v.* WEARE.

1. In a suit upon acceptances amounting to $4,500, the defendants pleaded as a set-off the plaintiff's draft for a like sum, which had been indorsed to them by A., the payee thereof, and protested for non-payment. The plaintiff replied that his draft was given as a part of the proceeds of a discount by him of A.'s draft for $5,000, which had been procured by A. upon false and fraudulent representations, and that the consideration for it had wholly failed, of all which the defendants, when they received it, had notice. There was evidence at the trial that the plaintiff had, in a suit against A., recovered $4,000 on account of the $5,000 draft. The court instructed the jury that the issues were those tendered by the plaintiff, and that, if either was found in his favor, he was entitled to recover. *Held*, that while the instruction, so far as given, was correct, its general effect was misleading, as it tended to withdraw from the notice of the jury the evidence that the failure of consideration for the plaintiff's draft was only partial.
2. The decision of a court below, granting counsel the right to open and close arguments to a jury, will not be reviewed here; nor is a refusal to grant a new trial assignable in error.

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

The facts are stated in the opinion of the court.

Mr. Emery A. Storrs for the plaintiffs in error.

Mr. W. Penn Clarke, *contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

This record has been brought up in a shape of which we can

hardly speak in too strong terms of disapproval. The bill of exceptions spreads out at length the testimony of numerous witnesses, in regard to which no question arises that we can consider; and exception appears to have been taken to almost every paragraph in the charge. The whole is like a drag-net, bringing up in shapeless mass a portion of what occurred at the trial, apparently in the hope that something might somewhere be found that would justify a reversal of the judgment. The purpose in thus making up the record seems to have been to treat the case here both as a motion for a new trial and as a writ of error, and much of the argument has been directed to showing that the evidence did not justify the verdict that was rendered. Eighteen errors have been assigned, some of them to matters not reviewable in this court, as has often been decided, and others to matters that were quite immaterial, and that could have had no possible effect upon the judgment in the court below. We shall not consider in detail these assignments. It is not necessary to a correct decision of the case. Those that have any apparent soundness only will be noticed.

The plaintiff sued upon two acceptances, together amounting to $4,500, and the defendants pleaded as a set-off a draft for $4,500, drawn by the First National Bank of Cedar Rapids, of which the plaintiff was cashier, upon the First National Bank of Chicago, and protested for non-payment. The draft was dated March 16, 1869. It was drawn in favor of Charles H. Hall, and by him indorsed to the defendants. To these pleas the plaintiff replied that the draft offered to be set off had been obtained from the bank by false and fraudulent representations of Charles H. Hall, the payee, and that the consideration for it had wholly failed; and, further, that the defendants, when they received it, had knowledge of the fraud, and of the failure of consideration. Following the replications, there were rejoinders and surrejoinders; but the replications tendered the only material issues between the parties, and to the maintenance of one side or the other of these issues the evidence was directed. Thus the case was put to the jury by the Circuit Court. The learned judge instructed them as follows: —

"The issues under the pleadings are these: *First*, that the consideration for the said draft has wholly failed, of which the

defendants had notice at the time they received the same, and that it is not now a valid demand against the plaintiff in the hands of the defendants. *Second*, that the said draft was obtained from the said bank by certain fraudulent acts of the said Charles H. Hall, of which the defendants were cognizant at the time they took the same, and that the said draft is void in the defendants' hands, by reason of said fraud. If either of these issues is found for the plaintiff, he will be entitled to recover."

This instruction is the first error assigned to the charge. That the issues raised by the pleadings were correctly stated is perfectly plain. In our examination of the voluminous pleas, replications, rejoinders, and surrejoinders, we have been unable to find any other, either tendered or accepted. But it is said the court erred in the instruction, that, if either of the issues was found for the plaintiff, he was entitled to recover. The argument is, that, even if there was a failure of consideration for the $4,500 draft, if the bank did not get for it all it was agreed it should have, the evidence was that the bank subsequently obtained $4,000 as fruits of Charles H. Hall's draft for $5,000 of even date therewith, a part of the proceeds of the discount whereof was the draft attempted to be set off. To understand this, it is necessary to look at the evidence. The $4,500 draft was given as part of the proceeds of a discount of Charles H. Hall's draft for $5,000. Both were dated March 16, 1869. The evidence tended to show, that, when the $5,000 draft was offered for discount, Hall stated falsely that former drafts drawn by him upon the defendants, amounting to $12,000 or $13,000, had been accepted, and that collaterals had been put up to secure their payment; that he had grain in value equal to or exceeding $20,000, and that he engaged the $5,000 draft would be accepted and secured by collaterals; that such was his arrangement with the defendants. On the faith of these representations and assurances the $5,000 draft was discounted, and the bank's draft for $4,500 was given on account. The former drafts had in fact not been accepted. Collaterals for acceptance had not been put up. Charles H. Hall had the day previous sold his grain, much less in value than he had stated, and the $5,000 draft was dishonored. It was not accepted, and collaterals were not put up for it. Had these been

all the facts in evidence, the charge would have been strictly correct. What the bank gave its $4,500 draft for was not the draft it got, but that draft to be accepted and secured by collaterals; and when the defendants refused to accept the $5,000 draft, and put up collaterals, the consideration for the bank's draft failed. This would appear very plainly if Hall had himself sued the bank as drawer of the $4,500 bill. It cannot be pretended for a moment that he could maintain such a suit in the face of such a state of facts. And why not? Obviously for the reason that he failed to give the consideration for the bank's contract which he agreed to give. In other words, because, as between him and the bank, the consideration of the latter's contract had failed or been withheld. And if he could not enforce the bank's contract, certainly the defendants cannot, if at the time they took the draft they knew of the agreement between the drawer and the payee, and knew of the stipulated consideration, or knew of the fraud. And such was substantially the charge to the jury. But the judge overlooked, or did not notice, the subsequent recovery by the bank of $4,000, by suit upon the $5,000 draft, of which there was some evidence. It is true, no point was made of this in the court below. The circuit judge was not asked to instruct the jury as to the effect of a subsequent recovery of a part of the $5,000 draft, if there ever was such a recovery, and there was no averment in the pleadings that the bank or the plaintiff had ever obtained any thing in virtue of that draft. And even if the bank did obtain $4,000 by suit upon Hall's draft, some time after it was discounted, there was still a failure of consideration for the bank's draft to the extent of $1,000; and for this reason the plaintiff, if either of the issues was found in his favor, was entitled to a verdict, so far as the consideration had failed. The instruction complained of, therefore, so far as it was given, was correct. If the defendants desired further instruction respecting the extent of the recovery, it was their duty to ask it. We think, however, the general effect of the charge must have been misleading. It tended to withdraw from the notice of the jury the evidence that the failure of consideration for the bank's draft was only partial. Had the bank made no use of the $5,000 draft, had there been no suit upon it, and no

collection of any part of the sum mentioned in it, the jury would have been justified in finding a total failure of consideration for the instrument which the defendant sought to set off. But if Hall's draft has yielded $4,000 to the bank, though that was not the consideration stipulated for, it cannot be said that the consideration of the $4,500 draft has wholly failed. The bank cannot derive a benefit from Hall's draft, and at the same time insist that it got nothing for its own draft. This view of the case, we think, should have been presented to the jury, as bearing upon the amount which the plaintiff was entitled to recover, if the issues, or either of them, were found for him.

We find no other error in the charge. Nor was there any material error in the admission of evidence. There was evidence from which the jury might have inferred that Hall, the defendants, and McAfee were acting in concert, having a common purpose to obtain drafts from the bank, and to cover up Hall's property so that the bank could not reach it. If such was the fact, the acts and declarations of Hall and McAfee in furtherance of the common design were evidence against the defendants. And if that was not so, Hall's declarations and acts were evidence to show his fraud in obtaining the bank draft, and McAfee's declarations were evidence of his fraudulent concert with Hall. Proof of Hall's fraud was legitimate; for it was a protection to the plaintiff, if knowledge of it was brought home to the defendants. The objection to the proof of the contents of the letter from the defendants to Charles H. Hall would be serious, if the letter as proved by the witness could have had any injurious effect upon the defendants' case. But we do not perceive that it could have had any injurious bearing.

It has been assigned for error that the court gave to the plaintiff the opening and close of the argument to the jury. The assignment cannot be sustained. Under the pleadings, the affirmative of the issues framed was upon the plaintiff. He was therefore entitled to the conclusion. But if he was not, the decision of the court awarding it to him is not a subject that will be reviewed here.

The motion for an arrest of judgment was properly overruled. It rested upon no substantial basis, and the refusal to grant a

new trial is not assignable in error, as we have often said heretofore.

But, for the error in the charge which we have noticed, the judgment must be reversed.

Judgment reversed, and new trial ordered.

MR. JUSTICE DAVIS did not sit in this case.

LEAVENWORTH, LAWRENCE, AND GALVESTON RAILROAD COMPANY *v.* UNITED STATES.

1. Where rights claimed under the United States are set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.
2. The rule announced in the former decisions of this court, that a grant by the United States is strictly construed against the grantee, applies as well to grants to a State to aid in building railroads as to one granting special privileges to a private corporation.
3. The doctrine in *Wilcox* v. *Jackson*, 13 Pet. 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it, or to operate upon it, although no exception be made of it, reaffirmed and held to apply with more force to Indian, than to military, reservations, inasmuch as the latter are the absolute property of the government, whilst in the former other rights are vested.
4. Where Congress enacts "That there be and is hereby granted" to a State, to aid in the construction of a specified railroad, "every alternate section of land, designated by odd numbers," within certain limits of each side of the road, the State takes an immediate interest in land, so situate, whereto the complete title is in the United States at the date of the act, although a survey of the land and a location of the road are necessary to give precision to the title and attach it to any particular tract. Such a grant is applicable only to public land owned absolutely by the United States. No other is subject to survey and division into such sections.
5. Where the right of an Indian tribe to the possession and use of certain lands, as long as it may choose to occupy the same, is assured by treaty, a grant of them, absolutely or *cum onere*, by Congress, to aid in building a railroad, violates an express stipulation; and a grant in general terms of "land" cannot be construed to embrace them.
6. A proviso, that any and all lands heretofore reserved to the United States, for any purpose whatever, are reserved from the operation of the grant to which it is annexed, applies to lands set apart for the use of an Indian tribe under a treaty. They are reserved to the United States for that specific use; and, if so reserved at the date of the grant, are excluded

from its operation. It is immaterial whether they subsequently become a part of the public lands of the country.

7. The act of March 3, 1863 (12 Stat. 772), to aid in the construction of certain railroads in Kansas, embraces no part of the lands reserved to the Great and Little Osages by the treaty of June 2, 1825 (7 Stat. 240); and the treaty concluded Sept. 29, 1865, and proclaimed Jan. 21, 1867 (14 Stat. 687), neither makes nor recognizes a grant of such lands. The effect of the treaty is simply to provide that any rights of the companies designated by the State to build the roads should not be barred or impaired by reason of the general terms of the treaty, but not to declare that such rights existed.
8. The act of Congress of even date with said act (12 Stat. 793), authorizing treaties for the removal of the several tribes of Indians from the State of Kansas, and for the extinction of their title, and a subsequent act for relocating a portion of the road of the appellant (17 Stat. 5), neither recognize nor confer a right to the lands within the Osage country.

APPEAL from the Circuit Court of the United States for the District of Kansas.

This is a bill, filed by the United States against the Leavenworth, Lawrence, and Galveston Railroad Company, to establish its title to certain tracts of land lying within the Osage country in Kansas, which were certified to the Governor of Kansas as forming part of the grant made by Congress to that State, to aid in the construction of certain railroads. The court granted the prayer of the bill, and the company appealed.

The treaty with the Great and Little Osage tribes of Indians of June 2, 1825 (7 Stat. 240), contains the following provision: —

ARTICLE II. "Within the limits of the country above ceded and relinquished, there shall be reserved to and for the Great and Little Osage tribe or nation aforesaid, so long as they may choose to occupy the same, the following described tract of land."

The land embraces, with other tracts, that mentioned in the first article of a treaty with those Indians, which was concluded Sept. 29, 1865 (14 Stat. 687). That article is as follows: —

"The tribe of the Great and Little Osage Indians, having now more lands than are necessary for their occupation, and all payments from the government to them under former treaties having ceased, leaving them greatly impoverished, and being desirous of

improving their condition by disposing of their surplus lands, do hereby grant and sell to the United States the lands contained within the following boundaries. . . . And, in consideration of the grant and sale to them of the above-described lands, the United States agree to pay the sum of three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians in the treasury of the United States; and interest thereon at the rate of five per centum per annum shall be paid to said tribe semi-annually, in money, clothing, provisions, or such articles of utility as the Secretary of the Interior may from time to time direct. Said lands shall be surveyed and sold under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws [including any act granting lands to the State of Kansas, in aid of the construction of a railroad through said lands], but no pre-emption claim or homestead settlement shall be recognized; and, after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the treasury of the United States, to the credit of the "civilization fund," to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States."

The words in brackets are an amendment adopted by the senate, 26th June, 1866, which the Indians accepted Sept. 21 of that year. The treaty was proclaimed Jan. 21, 1867.

On the 3d of March, 1863, Congress passed "An Act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State" (12 Stat. 772); the first section of which is as follows: —

"That there be, and is hereby, granted to the State of Kansas, for the purpose of aiding in the construction: *First*, of a railroad and telegraph from the city of Leavenworth, by way of the town of Lawrence, and *viâ* the Ohio City crossing of the Osage River, to the southern line of the State in the direction of Galveston Bay, in Texas; with a branch from Lawrence by the valley of the Wakarusa River, to the point on the Atchison, Topeka, and Santa Fé Railroad where said road intersects the Neosho River. *Second*, of a railroad from the city of Atchison, *viâ* Topeka, the capital of

said State, to the western line of the State, in the direction of Fort Union and Santa Fé, New Mexico; with a branch from where this last-named road crosses the Neosho, down said Neosho Valley to the point where the said first-named road enters the said Neosho Valley; every alternate section of land, designated by odd numbers, for ten sections in width on each side of said road and each of its branches. But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purpose aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of pre-emption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers and selected by the direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid: *Provided*, that the land to be so selected shall in no case be located further than twenty miles from the lines of said road and branches: *Provided further*, that the lands hereby granted for and on account of said road and branches, severally, shall be exclusively applied in the construction of the same, and for no other purpose whatever; and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided: *Provided, also*, that no part of the land granted by this act shall be applied to aid in the construction of any railroad or part thereof, for the construction of which any previous grant of land or bonds may have been made by Congress: *And provided further*, that any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the President of the United States."

The legislature of Kansas, on the 9th of February, 1864, passed an act accepting the grant; and designated the appellant to build the road from Leavenworth to the southern line of the State, and to receive the grant of land upon the prescribed terms and conditions. Its authorized route passed through the Osage lands whereof mention is made in the first article of the treaty of 1865, and a map of the definite location of the road was filed in the General Land-Office, Jan. 2, 1868.

The Commissioner of the General Land-Office, by letter bearing date Jan. 21, 1868, directed the register and receiver of the proper office to withdraw from sale the odd-numbered sections within ten miles of the line of the road.

The fourth section of the law making appropriations for the Indian Department, approved March 3, 1863 (12 Stat. 793), is as follows: —

"That the President of the United States be, and is hereby, authorized to enter into treaties with the several tribes of Indians, respectively, now residing in the State of Kansas, for the extinction of their titles to lands held in common within said State, and for the removal of such Indians of said tribes as hold their lands in common to suitable localities elsewhere within the territorial limits of the United States, and outside the limits of any State."

On the 10th of April, 1869, Congress passed the following joint resolution (16 Stat. 55): —

"*Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled*, That any *bona fide* settler residing upon any portion of the lands sold to the United States by virtue of the first and second articles of the treaty concluded between the United States and the Great and Little Osage tribe of Indians, September twenty-ninth, eighteen hundred and sixty-five, and proclaimed January twenty-first, eighteen hundred and sixty-seven, who is a citizen of the United States, or shall have declared his intention to become a citizen of the United States, shall be, and hereby is, entitled to purchase the same, in quantity not exceeding one hundred and sixty acres, at the price of one dollar and twenty-five cents per acre, within two years from the passage of this act, under such rules and regulations as may be prescribed by the Secretary of the Interior: *Provided, however*, that both the odd and even numbered sections of said lands shall

be subject to settlement and sale as above provided: *And provided further*, that the sixteenth and thirty-sixth sections in each township of said lands shall be reserved for State school purposes, in accordance with the provisions of the act of admission of the State of Kansas: *Provided, however*, that nothing in this act shall be construed in any manner affecting any legal rights heretofore vested in any other party or parties."

Settlers made entries lying within the odd-numbered sections, which were set aside and vacated, Jan. 16, 1872, by the Secretary of the Interior, who decided that the appellant had a grant within those lands.

The appellant having constructed its road from its initial point to Thayer, within the ceded territory, and about twenty miles south of its northern boundary; and, desiring to change its previously located route south of that town, the legislature of Kansas, in January, 1871, asked Congress to allow a relocation of the road.

Congress passed an act, approved April 19, 1871, as follows (17 Stat. 5): —

"An Act to enable the Leavenworth, Lawrence, and Galveston Railroad Company to relocate a portion of its road.

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the Leavenworth, Lawrence, and Galveston Railroad Company, for the purpose of improving its route and accommodating the country, may relocate any portion of its road south of the town of Thayer, within the limits of its grant, as prescribed by the act of Congress entitled 'An Act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State,' approved March third, eighteen hundred and sixty-three; but not thereby to change, enlarge, or diminish said land grant."

Sept. 21, 1871, the Governor of Kansas certified to the Secretary of the Interior that the road of the appellant had been constructed and equipped as required by the act of Congress of March 3, 1863, and that a map of the road had been duly filed, whereupon certified lists of the odd-numbered sections of lands within the railroad limits were made by the proper authority at Washington, and the governor, April 8, 1872, and March 21,

1873, issued to the appellant patents for the lands mentioned in the bill of complaint.

The case was argued by *Mr. George F. Edmunds* and *Mr. P. Phillips* for the appellant, and by *Mr. Solicitor-General Phillips*, *Mr. Jeremiah S. Black*, and *Mr. William Lawrence*, for the appellee.

MR. JUSTICE DAVIS delivered the opinion of the court.

This bill was brought by the United States to confirm and establish its title to certain tracts of land, and to enjoin the appellant from setting up any right or claim thereto. These tracts, situate within the Osage ceded lands in Kansas, and specifically described in "certified lists" furnished by the Commissioner of the General Land-Office, with the approval of the Secretary of the Interior, to the governor of the State, were subsequently conveyed by the latter to the appellant. Having the force and effect of a patent (10 Stat. 346), the lists passed the title of the United States to the tracts in question, if they were embraced by the grant in aid of the construction of the appellant's road. But the appellee contends that they were not so embraced. If such be the fact, inasmuch as public officers cannot bind the government beyond the scope of their lawful authority, the decree of the Circuit Court granting the prayer of the bill must be affirmed.

The act of Congress of March 3, 1863 (12 Stat. 772), is the starting-point in this controversy. Upon it and the treaty with the Great and Little Osage Indians, proclaimed Jan. 21, 1867 (14 id. 687), the appellant rests its claim of title to the lands covered by the patents. It is, therefore, of primary importance to ascertain the scope and meaning of that act. The parties differ radically in their interpretation of it. The United States maintains that it did not dispose of the Osage lands, and that it was not intended to do so. On the contrary, the appellant insists that, although not operating upon any specific tracts until the road was located, it then took effect upon those in controversy, as they, by reason of the extinction of the Osage title in the mean while, had become, in the proper sense of the term, public lands. This difference would seem to imply obscurity in the act; but, be this as it may, the rules which govern in the interpretation of legislative grants are so well

settled by this court that they hardly need be reasserted. They apply as well to grants of lands to States, to aid in building railroads, as to grants of special privileges to private corporations. In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object the accomplishment of which it desires to promote, but declines directly to undertake.

The main question in *The Dubuque and Pacific Railroad Company* v. *Litchfield*, 23 How. 66, was, whether a grant to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines River, extended to lands above the Raccoon Fork, or was confined to those below it. The court, in deciding it, say, —

"All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language; and, as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and, if not thus expressed, they cannot be implied."

This grant, like that to Iowa, was made for the purpose of aiding a work of internal improvement, and does not extend beyond the intent it expresses. It should be neither enlarged by ingenious reasoning, nor diminished by strained construction. The interpretation must be reasonable, and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting them; but, if they admit of different meanings, — one of extension, and the other of limitation, — they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them. In other words, what is not given expressly, or by necessary implication, is withheld. *Dubuque and Pacific Railroad Company* v. *Litchfield*, *supra*; *Rice* v. *Railroad Company*, 1 Black, 380; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 120. Applying these rules to this controversy, there does not seem to be any difficulty in deciding it. Whatever is included in the

exception is excluded from the grant; and it therefore often becomes important to ascertain what is excepted, in order to determine what is granted. But, if the exception and the proviso were omitted, the language used in the body of this act cannot be construed to include the Osage lands.

It creates an immediate interest, and does not indicate a purpose to give in future. "There be and is hereby granted" are words of absolute donation, and import a grant *in præsenti*. This court has held that they can have no other meaning; and the land department, on this interpretation of them, has uniformly administered every previous similar grant. *Railroad Company* v. *Smith*, 9 Wall. 95; *Schulenberg* v. *Harriman*, 21 id. 60; 1 Lester, 513; 8 Opin. 257; 11 id. 47. They vest a present title in the State of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was a float until the line of the road should be definitely fixed. But did Congress intend that it should reach these lands? Its general terms neither include nor exclude them. Every alternate section designated by odd numbers, within certain defined limits, is granted; but only the public lands owned absolutely by the United States are subject to survey and division into sections, and to them alone this grant is applicable. It embraces such as could be sold and enjoyed, and not those which the Indians, pursuant to treaty stipulations, were left free to occupy. *Rice* v. *Railroad Co.*, *supra*. Since the land system was inaugurated, it has been the settled policy of the government to sell the public lands at a small cost to individuals, and for the last twenty-five years to grant them to States in large tracts to aid in works of internal improvement. But these grants have always been recognized as attaching only to so much of the public domain as was subject to sale or other disposal, although the roads of many subsidized companies pass through Indian reservations.

Such grants could not be otherwise construed; for Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of it

was not necessary; because the policy which dictated them confined them to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. The legislation which reserved it for any purpose excluded it from disposal as the public lands are usually disposed of; and this act discloses no intention to change the long-continued practice with respect to tracts set apart for the use of the government or of the Indians. As the transfer of any part of an Indian reservation secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it.

"A thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers." 1 Bac. Abr. 247. The treaty of June 2, 1825, secured to the Osages the possession and use of their lands "so long as they may choose to occupy the same;" and this treaty was only the substitute for one of an earlier date with equal guaranties.

As long ago as *The Cherokee Nation* v. *Georgia*, 5 Pet. 1, this court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy, until it shall be extinguished by a voluntary cession to the government; and, recently, in *United States* v. *Cook*, 19 Wall. 591, that right was declared to be as sacred as the title of the United States to the fee. Unless the Indians were deprived of the power of alienation, it is easy to see that they could not peaceably enjoy their possessions with a dominant race constantly pressing on their frontier. With the ultimate fee vested in the United States, coupled with the exclusive privilege of buying that right, the Indians were safe against intrusion, if the government discharged its duty to them. This it has indicated a willingness to do; for in 1834 an act was passed (4 Stat. 729, sect. 11) prohibiting, under heavy penalties, a settlement on the lands of an Indian tribe, or even an attempt to survey them. This perpetual right of occupancy, with the correlative obligation of the government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Osages, intended to grant their land to a railroad company, either absolutely or *cum onere*. For all practical purposes, they owned it; as the actual right of possession, the

only thing they deemed of value, was secured to them by treaty, until they should elect to surrender it to the United States. In the free exercise of their choice, they might hold it for ever; and whatever changed this condition, or interfered with it, violated the guaranties under which they had lived. The United States has frequently bought the Indian title, to make room for civilized men, — the pioneers of the wilderness; but it has never engaged in advance to do so, nor was constraint, in theory at least, placed upon the Indians to bring about their acts of cession. This grant, however, if it took effect on these lands, carried with it the obligation to extinguish the Indian right. This will be conceded, if a complete title to them were granted; but it is equally true if only the fee subject to that right passed. It would be idle to grant what could be of no practical benefit unless something be done which the grantee is forbidden, but which the grantor has power, to do. And this applies with peculiar force to a grant like this, intended to be immediately available to the grantee. The lands were expected to be used in the construction of the road as it progressed; but they could neither be sold nor mortgaged so long as a valid adverse right of occupancy attached to them. The grantee was prohibited from negotiating with the Indians at all; but the United States might, by treaty, put an end to that right. As Congress cannot be supposed to do a vain thing, the present grant of the fee would be an assurance to the grantee that the full title should be eventually enjoyed. This would be in effect a transfer of the possessory right of the Indians before acquiring it, — a poor way of observing a treaty stipulation. How could they treat on an equality with the United States under such circumstances? They would be constrained to sell, as the United States was obliged to buy. Although it might appear that the sale was voluntary, it would, in fact, be compulsory. Can the court, in the absence of words of unmistakable import, presume that an act so injurious to the Indians was intended? The grant is silent as to such a purpose; but if it was to take effect in the Osage country, on the surrender of the Indian title, it would have so declared. It is true the recognized route of the road passed through that country; but many other roads, aided by similar grants, ran through such reservations, and in no case before this has land included in them been considered

as falling within any grant, whether the Indian right was extinguished before or after the definite location of the road. And if Congress really meant that this grant should include any part of the reservation of the Osages, it would at least have secured an adequate indemnity to them, and sanctioned a delay in locating the road until the surrender of their right should be made. Instead of this, the act contains no provision for them, and contemplates that the road shall be finished as soon as practicable. This is inconsistent with a purpose to grant their land; for they had not proposed to relinquish it, nor had the President encouraged them to do so. In the face of this, it is hard to believe that Congress meant to hold out inducements to the company to postpone fixing the route of their road until a contingency should happen which the act did not contemplate. Besides, Congress was bound by every consideration affecting the condition of the Indians to retain their lands within its own control. But it is said that the Indian appropriation bill became a law the same day as the act under consideration, and that it authorized the President to enter into negotiations with the several tribes of Indians residing in Kansas, for the extinction of their title and for their removal. This is true; but it does not prove any purpose inconsistent with the policy of the act of 1837 (5 Stat. 135), which contemplates the sale of all Indian lands ceded to the government. If Congress had intended to extinguish the Osage title, for the benefit of the appellant, it would have spoken directly, as it did in the Pacific Railroad act, and not in an indirect way near the end of one of the general appropriation bills. The Congress that made this grant made one, eight months before, to aid in the construction of a railroad from the Missouri River to the Pacific Ocean, and of other roads connecting therewith; in which it agreed to extinguish as rapidly as possible the Indian title, for the benefit of the companies. This was necessary, although their roads ran through territory occupied by wild tribes; but this passed through a reservation secured by treaty, and occupied by Indians at least partially civilized. A transfer of any part of it would be wrong; and, as the act does not mention it, there is no reason to suppose that Congress, in making the grant, contemplated the extinction of the Indian title at all. Besides, the avowed object of the

provision in the appropriation act was to remove the Indians. If any ulterior hidden purpose was to be thereby subserved, Congress is not responsible for it, nor can it affect this case. The language used is to be taken as expressing the legislative intention, and the large inference attempted to be drawn from it is not authorized. It does not follow, because Congress sanctioned negotiations to effect the removal of the Indians from Kansas, as a disturbing element of her population, and to procure their land for settlement, that it also contemplated obtaining the title of any tribe in order to convey it by this grant. The policy of removal — a favorite one with the government, and always encouraged by it — looked to the extinguishment of the Indian title for the general good, and not for the special benefit of any particular interest. But the two acts have no necessary connection with each other, because they happened to be approved on the 3d of March. The laws signed by the President that day occupy one hundred pages of the twelfth volume of the statutes.

We are not without authority that the general words of this grant do not include an Indian reservation. In *Wilcox* v. *Jackson*, 13 Pet. 498, the President, by proclamation, had ordered the sale of certain lands, without excepting therefrom a military reservation included within their boundaries. The proclamation was based on an act of Congress supposed to authorize it; but this court held that the act did not apply, and then added, "We go further, and say, that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, proclamation, or sale would be construed to embrace or operate upon it, although no reservation were made of it." It may be urged that it was not necessary in deciding that case to pass upon the question; but, however this may be, the principle asserted is sound and reasonable, and we accept it as a rule of construction. The supreme courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved. *State* v. *Delesdenier*, 7 Tex. 76; *Spaulding* v. *Martin*, 11 Wis. 274. It applies with more force to Indian than to military reservations. The latter are the absolute property of the government; in the former, other rights are vested. Congress cannot be supposed to grant them by a subsequent law,

general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose.

But this case does not rest alone on the words of description in the grant; for the Osage lands are expressly excepted by force of the following proviso: —

"That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, *or for any other purpose whatsoever*, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands; in which case, the right of way only shall be granted, subject to the approval of the President of the United States."

In construing a public grant, as we have seen, the intention of the grantor, gathered from the whole and every part of it, must prevail. If, on examination, there are doubts about that intention or the extent of the grant, the government is to receive the benefit of them. This proviso has, in our opinion, no doubtful meaning. Attached in substantially the same form to all railroad land-grant acts passed since 1850, it was employed to make plainer the purpose of Congress to exclude from their operation lands which, by reason of prior appropriation, were not in a condition to be granted to a State to aid it in building railroads. It would be strange, indeed, if, by such an act, Congress meant to give away property which a just and wise policy had devoted to other purposes. That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the government, and saved from a possible grant, is a proposition which will command universal assent. What ought to be done, has been done. The proviso was not necessary to do it; but it serves to fix more definitely what is granted by what is excepted. All lands "heretofore reserved," that is, reserved before the passage of the act, "by competent authority, for any purpose whatsoever," are excepted by the proviso. This language is broad and comprehensive. It unquestionably covers these lands. They had been reserved by treaty before the act of 1863 was passed. It is said, however, that having been reserved,

not "to the United States," but to the Osages, they are, therefore, not within the terms of the proviso. This position is untenable. It would leave the proviso without effect; because all the reservations through which this road was to pass were Indian. This fact was recognized, and the right of way granted through them, subject to the approval of the President. Through his negotiations with the Indians, he secured it in season for the operations of the company. Besides, there were no other lands over which he could exercise any authority to obtain that right. And why grant it by words vesting its immediate enjoyment, unless it was contemplated that the roads would be constructed during the existence of those reservations? But the verbal criticism, that these lands were not, within the meaning of this proviso, reserved "to the United States," is unsound. The treaty reserved them as much to one as to the other of the contracting parties. Both were interested therein, and had title thereto. In one sense, they were reserved to the Indians; but, in another and broader sense, to the United States, for the use of the Indians.

Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference, in this respect, whether it be appropriated for Indian or for other purposes. There is an equal obligation resting on the government to require that neither class of reservations be diverted from the uses to which it was assigned. Out of a vast tract of land ceded by the Osages, a certain portion was retained for their exclusive enjoyment, as long as they chose to possess it. The government covenanted that they should not be disturbed, except with their voluntary consent first obtained; and a grant of their land would be such a manifest breach of this covenant, that Congress, in order to leave no possible room for doubt, specially excepted it by the proviso. A construction which would limit it to land set apart for military posts and the like, and deny its application to that appropriated for Indian occupation, is more subtle than sound. This proviso, or rather one couched in the same language, was the subject of consideration by this court, and received a liberal interpretation, instead of the technical and narrow one claimed for it by the appellant. *Wolcott* v. *Des Moines Navigation Co.*, 5 Wall. 681,

was a controversy concerning the title to certain lands, which, it was conceded, were covered by a grant, unless excluded by the proviso thereunto annexed. The court held that they were excluded, although they had not been reserved "to the United States." They had been, in fact, reserved by the executive officers of the government, upon a mistaken construction of a prior grant made by the United States to the State of Iowa. This decision was reaffirmed in *Williams* v. *Baker*, 17 id. 144.

The scope and effect of the act of 1863 cannot, in our opinion, be mistaken. The different parts harmonize with each other, and present in a clear light the scheme as an entirety. Kansas needed railroads to develop her resources, and Congress was willing to aid her to build them, by a grant of a part of the national domain, in a condition at the time to be disposed of. It was accordingly made of alternate sections of land within ten miles on each side of the contemplated roads. Formerly, lands which would probably be affected by a grant were, as soon as it was made, if not in advance of it, withdrawn from market. But experience proved that this practice retarded the settlement of the country, and at the date of this act the rule was not to withdraw them until the road should be actually located. In this way, the ordinary working of the land system was not disturbed. Private entries, pre-emption, and homestead settlements, and reservations for special uses, continued within the supposed limits of the grant, the same as if it had not been made. But they ceased when the routes of the roads were definitely fixed; and if it then appeared that a part of the lands within those limits had been either sold at private entry, taken up by pre-emptors, or reserved by the United States, an equivalent was provided. The companies were allowed to select, under the direction of the Secretary of the Interior, in lieu of the lands disposed of in either of these ways, an equal number of odd sections nearest to those granted, and within twenty miles of the line of the road. Having thus given lands in place and by way of indemnity, Congress expressly declared, what the act already implied, that lands otherwise appropriated when it was passed were not subject to it.

The indemnity clause has been insisted upon. We have before said that the grant itself was *in præsenti*, and covered

all the odd sections which should appear, on the location of the road, to have been within the grant when it was made. The right to them did not, however, depend on such location, but attached at once on the making of the grant. It is true they could not be identified until the line of the road was marked out on the ground; but, as soon as this was done, it was easy to find them. If the company did not obtain all of them within the original limit, by reason of the power of sale or reservation retained by the United States, it was to be compensated by an equal amount of substituted lands. The latter could not, on any contingency, be selected within that limit; and the attempt to give this effect to the clause receives no support, either in the scheme of the act or in any thing that has been urged by counsel. It would be strange, indeed, if the clause had been intended to perform the office of making a new grant within the ten-mile limit, or enlarging the one already made. Instead of this, the words employed show clearly that its only purpose is to give sections beyond that limit, for those lost within it by the action of the government between the date of the grant and the location of the road. This construction gives effect to the whole statute, and makes each part consistent with the other. But, even if the clause were susceptible of a more extended meaning, it is still subject to, and limited by, the proviso which excludes all lands reserved at the date of the grant, and not simply those found to be reserved when the line of the road shall be definitely fixed. The latter contingency had been provided for in the clause; and, if the proviso did not take effect until that time, it would be wholly unnecessary. And these lands being within the terms of the proviso, as we construe it, it follows that they are absolutely and unconditionally excepted from the grant; and it makes no difference whether or not they subsequently became a part of the public lands of the country.

But the appellant claims that these lands were subjected to this grant by virtue of the senate amendment to the Osage treaty, concluded Sept. 29, 1865, and proclaimed in 1867. If the amendment has this effect, it is entirely inconsistent with the purposes of the treaty. The United States had not made an absolute or a contingent grant of the lands. There was,

manifestly, no reason why the Osages should bestow a gratuity on the appellant; and the treaty itself, as originally framed, disclaims such an intention. Whatever they did give was limited to persons from whom they had received valuable services, and they so expressly stated. Their annuities had ceased. Confessed poverty, and the desire to improve their condition, induced them to negotiate. They had a surplus of land, but no money. The United States, in pursuance of a long-settled policy, desired to open that land to settlement. Induced by these considerations, the parties concluded a treaty, which was submitted to the senate for its constitutional action. By the first article the Osages ceded, on certain conditions, a large and valuable part of their possessions. The United States was required to survey and sell it on the most advantageous terms, for cash, in conformity with the system then in operation for surveying and selling the public lands, with the restriction that neither pre-emption claims nor homestead settlements were to be recognized. The proceeds, after deducting enough to repay advances and expenses, were to be placed in the treasury to the credit of the "civilization fund," for the benefit of the Indian tribes throughout the country.

The moneys arising from the sale of the lands ceded by the second article were for the exclusive benefit of the Osages; but the relation of the United States to the property in each case is the same. And it can make no difference that the trust in one is specifically set forth, and in the other is to be ascertained from the general scope of the language. It is an elementary principle, that no particular form of words is necessary to create a trust. In neither case is the government a beneficiary. In both, the fund is to be applied to promote the well-being of the Indians, which it has ever been the cherished policy of Congress to secure.

Neither party contemplated that a part of the lands was to be given to a corporation, to aid in building a railroad. And, if the appellant gets any of them, it is manifest that the treaty cannot be carried into effect, nor can the trusts therein limited and declared be executed. As neither the act of 1863 nor the treaty in its original shape grants the tracts in controversy, the inquiry presents itself as to the effect of the amendment.

The provision on this subject, with the amendment in brackets, reads as follows: —

"Said lands shall be surveyed and sold under the direction of the Secretary of the Interior, on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws [including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands]; but no pre-emption claim or homestead settlement shall be recognized."

Tested by its literal meaning and grammatical structure, this amendment relates solely to the survey and sale of the lands, and cannot be extended further. It was doubtless so explained to the Indians when they accepted it. But obscure as it is, and indefinite as is its purport, it was intended to do more than declare what laws should be observed in surveying and selling the lands. But whatever purpose it was meant to serve, it obviously does not, *proprio vigore*, make a grant. To do this, other words must be introduced; but treaties, like statutes, must rest on the words used, — "nothing adding thereto, nothing diminishing." In *Rex* v. *Barrell*, 12 Ad. & Ell. 468, Patteson, J., said, "I see the necessity of not importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty." Courts have always treated the subject in the same way, when asked to supply words in order to give a statute a particular meaning which it would not bear without them. *Rex* v. *Poor Law Comm'rs*, 6 Ad. & Ell. 7; *Everett* v. *Wells*, 2 Scott (N. C.), 531; *Green* v. *Wood*, 7 Q. B. 178.

It is urged that the amendment, if it does not make a grant, recognizes one already made. It does not say so; and we cannot suppose that the senate, when it advised and consented to the ratification of the treaty with that among other amendments, intended that the Indians, by assenting to them, should recognize a grant that had no existence. Information was, doubtless, communicated to that body, that there were grants of some of the ceded lands which might interfere with the absolute disposal of them required by the treaty. If there were such grants, it was obviously proper that the treaty should be so modified as not to conflict with rights vested under them. But the senate left that question to the proper tribunal; and

declared, in effect, that such grants, if made by existing laws, should be respected in the disposition of the lands. On this interpretation, the amendment in question is consistent with the treaty. But if that contended for by the appellant be correct, the treaty is practically defeated. If no such grant had been made, lands would be taken from the Osages without either their consent or that of Congress, and appropriated to building railroads; for no one can fail to see that interested outside parties, having access to these ignorant Indians, would explain the amendment as a harmless thing. In concluding the treaty, neither party thereto supposed that any grant attached to the lands; for, as we have seen, all were to be sold, and the fund invested. Did the senate intend to charge them with a grant, whether it had really been made or not? If so, the treaty would have been altered to conform to so radical a change in its essential provisions, by excepting the lands covered by the grant instead of directing them to be sold. Why sell *all*, if the *status* of a part was fixed absolutely by the amendment? In such a case, justice to the companies required that they should have the lands granted to them. The United States should, also, to this extent, be relieved of its trust. But, if the amendment was designed to operate only in the contingency that a grant had been made, there was no occasion to alter the treaty further than to say, as it now substantially does say, that the companies, if entitled to the lands, should get them. No objection could justly be made to such a provision. It preserved vested rights, but did not create new ones. Without solving the problem whether or not a grant had been made, it decided that the rights of the companies, if any they had, should not be barred or impaired by reason of the general terms of the treaty. It is argued that the Osages are not injured by taking a portion of their country, as an enhanced value would be given to the remainder by the construction of the appellant's road. This is taking for granted what may or may not be true. Besides, they cannot be despoiled of any part of their inheritance upon such a fallacious pretence, and they chose to have *all* their lands sold. To this the United States assented by positive stipulation. We do not think that it was the intent of the amendment to annul that stipulation,

or to construe statutes upon which the title of the appellant depends. Its office was to protect rights that might be asserted, independently of the treaty, but not to declare that any such rights existed.

The Thayer Act, as it is called, is invoked; but it can have no effect upon this case. It was passed for the sole purpose of enabling the company to relocate its road; and a false recital in it cannot turn the authority thereby given into a grant of lands or a recognition of one. Especially is this so, when it expressly leaves the rights of the appellant to be determined by previous legislation. Besides this, these lands were then selling under a joint resolution; and it cannot be presumed that the Congress of 1871 intended to change the disposition of them, directed by the Congress of 1869.

It is urged that parties have loaned money on the faith that the lands in question were covered by the grant.

This is a subject of regret, as is always the case when a title, on the strength of which money has been advanced, fails. It is to be hoped that the security taken upon the other property of the company will prove to be sufficient to satisfy the claims of the holders of its bonds. But whether this be so or not, we need hardly say that the title to lands is not strengthened by giving a mortgage upon them; nor can the fact that it has been given throw any light upon the prior estate of the mortgagor.

Upon the fullest consideration we have been able to bestow upon this case, we are clearly of opinion that there is no error in the record. *Decree affirmed.*

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE SWAYNE and MR. JUSTICE STRONG, dissenting.

I do not agree with the majority of the court in this case. In my judgment, the land in controversy passed by the grant of Congress to the State of Kansas, and by the patents of the State to the defendant. In reliance upon the title conferred, a large portion of the money was raised with which the road of the company was built. I cannot think that the legislation of Congress, and the subsequent action in conformity to it of the Department of the Interior and of the State of Kansas, deceived both company and creditors.

The act of Congress appears to me to be singularly plain and free from obscurity. "There be and is hereby granted to the State of Kansas," are the words used, for the purpose of aiding in the construction of a railroad and telegraph between certain places, alternate odd sections of land along each side of the road and its branches. These words were sufficiently comprehensive to pass whatever interest the United States possessed in the lands. If there were any limitation upon their operation, it lay either in the character of the property granted, as lands in the occupation of Indian tribes, or in the subsequent reservations of the act.

The road with which the present company is concerned was to be constructed through the tract situated in the southern part of the State, known as the Osage reservation. Upon this tract the Osage tribes of Indians resided under the treaty of June 2, 1825, by which the tract was reserved to them so long as they might choose to occupy it. 7 Stat. 240. The fee of the land was in the United States, with the right of occupation, under the treaty, in the Indians. Until this right was relinquished, the occupancy could not be disturbed by any power except that of the United States. The only right of Indian tribes to land anywhere within the United States is that of occupancy. Such has been the uniform ruling of this court; and upon its correctness the government has acted from its commencement. In *Fletcher* v. *Peck*, which was here as long ago as 1810, it was suggested by counsel on the argument that the power of the State of Georgia to grant did not extend to lands to which the Indian title had not been extinguished; but Mr. Chief Justice Marshall replied, that the majority of the court were of opinion that the nature of the Indian title, which was certainly to be respected until legitimately extinguished, was not such as to be absolutely repugnant to seisin in fee on the part of the State. 6 Cranch, 121, 142, 143.

In *Clark* v. *Smith*, 13 Pet. 200, decided many years afterwards, Mr. Justice Catron, speaking of grants made by North Carolina and Virginia of lands within Indian hunting-grounds, said that these States "to a great extent paid their officers and soldiers of the Revolutionary war by such grants, and extinguished the arrears due the army by similar means. It was one

of the great resources that sustained the war, not only by these States, but others. The ultimate fee encumbered with the Indian right of occupancy was in the crown, previous to the Revolution, and in the States of the Union afterwards, and subject to grant."

And in the recent case of the *United States* v. *Cook*, where replevin was brought for timber cut and sold by Indians on lands reserved to them, the court said that the fee of the land was in the United States, subject only to a right of occupancy in the Indians; that this right of occupancy was as sacred as that of the United States to the fee; but it was "only a right of occupancy," and "that the possession, when abandoned by the Indians, attaches itself to the fee without further grant." 19 Wall. 593.

It would seem, therefore, clear that there was nothing in the character of the land as an Indian reservation which could prevent the operation of the grant of Congress, subject to the right of occupancy retained by the Indians; so that, when this right should be relinquished, the possession would inure to the grantee.

It is true that the United States, acting in good faith, could only acquire the relinquishment of the Indian right of occupancy by treaty; and so the authors of the bill for the grant understood. The representative of Kansas in the Senate of the United States, by whom the bill was introduced, preceded its presentation with a notice of his intention to introduce at the same time a bill for extinguishing the Indian title in Kansas, and the removal of the Indians beyond her borders. The two bills were introduced within a few days of each other; and both became a law on the same day. The one for the extinguishment of the Indian title was incorporated into the appropriation bill, and authorized the President to enter into treaty for that purpose with the several tribes of Indians then residing in the State, and for their own removal beyond its limits. Pursuant to this authority, a treaty was subsequently made with the Osage Indian tribes; and, before the line of the road of the defendant company was definitely fixed, their right of occupancy to the lands in controversy was extinguished.

I proceed to the next inquiry: Was there any thing in the

reservations of the act which limited the operation of the general words of grant? There were two reservations in the act, — one general and the other special, the latter being in the proviso. The general reservation only excepted from the operation of the grant lands which, at the time the line of the road and its branches was definitely fixed, were sold or reserved, or to which the right of pre-emption or homestead settlement had then attached.

The sections granted could only be ascertained when the route of the road was established; but, as this might take years, the government did not in the mean time withhold the lands from settlement and sale upon any notion that the route might possibly pass through or near them. It kept the lands generally open to the settler or pre-emptor, and subject at all times to appropriation for public uses; and the object of the general reservation mentioned was to provide for the possible acquisition of interests in this way to lands falling within the limits of the grant. When they did so fall, other lands in their place were to be selected. It was only when the route was definitely fixed that the right of sale or settlement or reservation ended, and the title previously floating attached to the land subject to the grant. This was the construction adopted by the land department, and was the one which most fully fitted in with the general policy of the government in other cases in the disposition of the public lands.

In 1856 the question arose before the Department of the Interior as to the construction of a similar provision in the act of Congress of May 15 of that year, granting lands to the State of Iowa, and was submitted to the then attorney-general, Cushing; and he replied that the act contemplated that the United States should retain power to convey within all the possible limits of the grant, either by ordinary sale or on pre-emption, up to the time when the lines or routes of the road were definitely fixed. 8 Op. Att'y-Gen. 246.

Whilst the operation of the grant may, on the one hand, be thus limited by what occurs subsequent to the act, it may, on the other hand, be enlarged by subsequent removal of existing impediments; such as reservations, contracts of sale, and initiatory steps for acquiring rights of pre-emption and homestead

settlement. The question in either case respects the condition of the land at the time the line or route of the road is definitely fixed. If a previous reservation, whether existing before the act or made afterwards, be then relinquished, or a previous contract of sale or right of pre-emption or homestead settlement be then abandoned, the grant will, in my judgment, take the land. Such I understand to be the ruling of the land department; and it is difficult to perceive any reasons of public policy which should prevent the land in such cases from passing under the grant.

The special reservation contained in the proviso to the act in terms applies only to lands reserved *to* the United States. There have been, from the outset of the government, reservations of lands for public uses of various kinds, through which a right of way for a public highway or railroad might well be granted, subject to the approval of the President, who would see that the property was not injured. To protect lands thus situated, or lands reserved to the government for similar public purposes, the proviso applied. The lands now in controversy, occupied by the Osage Indians, were set apart to them: they were not reserved *to* the United States in any sense in which those terms can be properly used.

The treaty of 1825, under which the lands were held, distinguishes between reservations *to* the Indians and reservations *to* the United States, and speaks of both in the same article (art. 2).

The argument of the majority of the court on this head appears to me to defeat itself. The proviso, it is contended, excluded from the operation of the grant any of the lands occupied by the Indians: it would have been a great breach of faith, it is said, to apply the grant to any of those lands. But at the same time, it is admitted that the act contemplated a right of way through those lands for the road. It is difficult to perceive how taking the lesser quantity of the land for a right of way, if done without treaty, could have been any less a breach of faith; and, if done by treaty, the taking might as well have extended to the whole lands. As the Congress which made the grant also authorized the President to obtain an extinguishment of the right of occupancy from the Indians, it would seem that there ought not to be any greater reproach

in providing for the acquisition of the lands, than in providing for the acquisition of the right of way.

But, aside from this consideration, if the conclusion were at all doubtful, which I do not think it is, there is a rule applicable to the construction of provisos in a grant, which should determine the question here; and that is, that they must be strictly construed. In *United States* v. *Dixon*, Mr. Justice Story stated, that it was "the general rule of law, which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof." 15 Pet. 165. I submit confidently that the proviso here thus construed would not take the lands in controversy out of the enacting clause of the act.

The proviso itself is a formula used in nearly all land-grants; and is inserted out of abundant caution, even where there are no special reservations on which it can operate. But in this case there was the military reservation at Fort Gibson, which would have passed under the grant but for the proviso.

There is, then, in my judgment, nothing in the reservations contained in the act which should prevent the operation of the granting words upon the lands within the Osage reservation. But, were there any doubt whether the act was intended to cover these Indian lands, that doubt would be removed by the recognition of the grant in the treaty with the Indians and the subsequent legislation of Congress. The treaty was adopted on the 29th of September, 1865. Stat. 687, 692. It provided that, in consideration of the sale of the lands, the United States should pay $300,000, to be placed to the credit of the Indians in the treasury of the United States; and should pay interest thereon in money, clothing, provisions, and such articles of utility as the Secretary of the Interior might from time to time direct. And it declared, as originally drawn, that the lands should be surveyed and sold as public lands are surveyed and sold under existing

laws. But, when the treaty was under consideration by the Senate, it was amended in this particular, so as to conform to the act granting the lands to Kansas. That act provided that the alternate sections reserved from the grant, within ten miles of the road or its branches, should be sold at double the minimum price of the public lands. The amendment inserted in the treaty added, immediately after the provision for the survey and sale under existing laws, the words "including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands;" so that the provision required that the sale of the lands of the Osage Indians should be made in accordance with existing laws, including among them the one granting lands to Kansas. Here is a clear recognition that that act was intended to cover the Indian lands. This recognition was not limited merely to the senate; for the attention of both houses of Congress was called to the subject by the appropriation which the treaty required and Congress made.

Again: in January, 1871, Congress passed an act authorizing the company, for the purpose of improving its route and accommodating the country, to relocate any portion of its road south of the town of Thayer, within the limits of its grant as prescribed by the act of Congress. The town of Thayer was situated within the boundaries of the Osage lands. The act also declared, that the company should not thereby — that is, by the relocation — change, enlarge, or diminish the land-grant; and this declaration is held by the majority of the court to destroy the effect of the act as a recognition of the grant of the Indian lands. How it does so I am unable to see. When it declares that the company may alter its road south of a particular point within the limits of its grant, the act does admit that the company has a grant, and that the grant lies south of that point; and this admission is not affected by the further declaration that the company shall not thereby change, enlarge, or diminish the grant.

But I will not pursue the subject further. The conclusion reached by the court appears to me to work great injustice. The government of the United States, through one set of its officers, after mature deliberation and argument of counsel, has issued its certificates or lists, that the lands in controversy were

covered by the grant, and has thus encouraged the expenditure of millions of money in the construction of a public highway, by which the wilderness has been opened to civilization and settlement; and then, on the other hand, after the work has been done and the money expended, has, with another set of officers and all the machinery of the judiciary, attempted to render and has succeeded in rendering utterly worthless the titles it aided to create and put forth upon the world. Such proceedings are not calculated, in my judgment, to enhance our ideas of the wisdom with which the law is administered, or of the justice of the government.

I am of opinion that the decree should be reversed.

NOTE. — *Missouri, Kansas, and Texas Railway Company* v. *United States*, appeal from the Circuit Court of the United States for the District of Kansas, is, in its essential features, the same as the preceding case, and was argued by the same counsel.

MR. JUSTICE DAVIS delivered the opinion of the court. The decision in *Leavenworth, Lawrence, and Galveston Railroad Company* v. *United States, supra*, p. 733, controls this case. Each company claims a grant of land within the Osage reservation. This case involves substantially the same questions as the other; with this difference, that the act of July 25, 1866 (14 Stat. 289), under which the appellant claims, was passed after the amendment had been advised by the senate, and the treaty was beyond its control.

In any aspect of this case, the appellant cannot recover. The amendment refers only to existing laws, and does not apply to the act of 1866, as it was not then in force. It is true that the bill, which subsequently became a law, was pending at the same time as the treaty; but if the senate intended the amendment to apply not only to existing but to contemplated grants, language appropriate to such a purpose would have been used. This remark applies to Congress also; for if it meant, notwithstanding the provisions of the treaty, to grant these lands, words would have been employed to include them, or at least take them out of the proviso. But the result is the same, whether the act is to be treated as taking effect before or after the treaty became operative by the proclamation of the President on the 21st of January, 1867. If it was in force for all purposes on the day it passed, then the Indian title even was not extinguished, as the treaty had not been ratified. But if it be considered as in any sense taking effect after the ratification, then the claim of the appellant is defeated by the terms of the treaty. These lands, having been thereby set apart to be surveyed and sold for the benefit of the Indians, were "otherwise appropriated," as much as they had been before the treaty was concluded, and were consequently reserved within the meaning of the excepting clause in the act.

Decree affirmed.

MR. JUSTICE SWAYNE, MR. JUSTICE FIELD, and MR. JUSTICE STRONG dissented.

NEWHALL *v.* SANGER.

1. The act of July 1, 1862 (12 Stat. 492), grants to the Western Pacific Railroad Company every alternate section of public land designated by odd numbers within the limits of ten miles on each side of its road, not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may not have attached at the time the line of the road is definitely fixed. The act of 1864 (13 Stat. 358) enlarges those limits, and declares that the grant by it, or the act to which it is an amendment, "shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler." *Held*, that lands within the boundaries of an alleged Mexican or Spanish grant, which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the road, are not embraced by the grant to the company.
2. The words "public lands" are used in our legislation to describe such lands as are subject to sale or other disposition under general laws.
3. The fiction of law, that a term consists of but one day, cannot be invoked to antedate the judicial rejection of a claim, so as to render operative a grant which would otherwise be without effect.

APPEAL from the Circuit Court of the United States for the District of California.

Submitted on printed arguments by *Mr. Montgomery Blair* for the appellant, and by *Mr. George F. Edmunds* for the appellee.

MR. JUSTICE DAVIS delivered the opinion of the court.

The object of this suit is to determine the ownership of a quarter-section of land in California. The appellee, who was the complainant, claims through the Western Pacific Railroad Company, to whom a patent was issued in 1870, in professed compliance with the requirements of the acts of Congress commonly known as the Pacific Railroad Acts. The appellant derives title by mesne conveyances from one Ransom Dayton, the holder of a patent of a later date, which recites that the land was within the exterior limits of a Mexican grant called Moquelamos, and that a patent had, by mistake, been issued to the company. The court below decreed that the appellee was the owner in fee-simple of the disputed premises; and that the junior patent, so far as it related to them, should be cancelled.

The act of July 1, 1862 (12 Stat. 492), grants to certain

railroad companies, of which the Western Pacific, by subsequent legislation, became one, every alternate section of public land designated by odd numbers, within ten miles of each side of their respective roads, not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may not have attached at the time the line of the road is definitely fixed. It requires that, within a prescribed time, a map designating the general route of each road shall be filed in the Department of the Interior, and that the Secretary thereof shall then cause the lands within a certain distance from such route to be withdrawn from pre-emption, private entry, and sale. The precise date when the Western Pacific Company filed its map is not stated in the record; but we infer that it was between the first day of the December Term (1864) of this court and the thirteenth day of February, 1865. At all events, the withdrawal for this road was made on the 31st of January, 1865; and our records show that the Moquelamos grant, which had been regularly presented to the commissioners, under the act of March 3, 1851, and duly prosecuted by appeal, was rejected here Feb. 13, 1865. It is a conceded fact, that the lands embraced by it fall within the limits of the railroad grant, which were enlarged by the amendatory act of 1864 (13 Stat. p. 358). This act also declares that any lands granted by it, or the act to which it is an amendment, "shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler."

There can be no doubt that, by the withdrawal, the grant took effect upon such odd-numbered sections of public lands within the specified limits as were not excluded from its operation; and the question arises, whether lands within the boundaries of an alleged Mexican or Spanish grant, which was then *sub judice*, are public within the meaning of the acts of Congress under which the patent, whereon the appellee's title rests, was issued to the railroad company.

The subject of grants of land to aid in constructing works of internal improvement was fully considered at the present term, in *Leavenworth, Lawrence, and Galveston Railroad Company* v. *United States*, *supra*, p. 733. We held that they did not embrace

tracts reserved by competent authority for any purpose or in any manner, although no exception of them was made in the grants themselves; and we confined a grant of every alternate section of "land" to such whereto the complete title was absolutely vested in the United States. The acts which govern this case are more explicit, and leave less room for construction. The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact, that to them alone could the order withdrawing lands from pre-emption, private entry, and sale, apply.

The *status* of lands included in a Spanish or Mexican claim, pending before the tribunals charged with the duty of adjudicating it, must be determined by the condition of things which existed in California at the time it was ceded, and by our subsequent legislation. The rights of private property, so far from having been impaired by the change of sovereignty and jurisdiction, were fully secured by the law of nations, as well as by treaty stipulation. It had been the practice of Mexico to grant large tracts to individuals, sometimes as a reward for meritorious public services, but generally with a view to invite emigration and promote the settlement of her vacant territory. The country, although sparsely populated, was dotted over with land claims. Exact information in regard to their extent and validity could hardly be obtained during the eager search for gold which prevailed soon after we acquired California. It was not until March 3, 1851, that our government created a commission to receive, examine, and determine them. As the operations of our land system, had it then been extended to California, would have produced the utmost confusion in titles to real estate within her limits, it was wisely withheld by Congress, until such claims should be disposed of. The act of that date declared that all lands, the claims to which should not have been presented within two years therefrom, should "be deemed, held, and considered to be a part of the public domain of the United States." This was notice to all the world that lands in California were held in reserve to afford a reasonable time to the claimant under an asserted Mexican or Spanish grant to maintain his rights before the

commission. He was not bound by its adverse decision; but was entitled to have it reviewed by the District Court, with a right of ultimate appeal to the Supreme Court. If he, however, neglected to take timely and proper steps to obtain such review, the decision was thereby rendered final and conclusive. The lands then fell into the category of public lands. The same remark will apply to the judgment of the District Court; but if he prosecuted his appeal to the tribunal of last resort, the reserved lands retained their original character in all the successive stages of the cause, and they were regarded as forming a part of our national domain only after the claim covering them had been "finally decided to be invalid."

A failure, therefore, to present the claim within the required time, or a rejection of it either by the commission or by the District Court, without seeking to obtain a review of their respective decisions, or by this court, rendered it unnecessary to further reserve the claimed lands from settlement and appropriation. They then became public in the just meaning of that term, and were subject to the disposing power of Congress.

It may be said that the whole of California was part of our domain, as we acquired it by treaty, and exercised dominion over it. The obvious answer to all inferences from this acknowledged fact, so far as they relate to this case, is, that the title to so much of the soil as was vested in individual proprietorship did not pass to the United States. It took the remaining lands subject to all the equitable rights of private property therein which existed at the time of the transfer. Claims, whether grounded upon an inchoate or a perfected title, were to be ascertained and adequately protected. This duty, enjoined by a sense of natural justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until an opportunity was afforded the parties in interest for a judicial hearing and determination. It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There was, in the opinion of Congress, no mode of separating them from those which were valid without investigation by a competent tribunal; and our legislation was so shaped that no title could be initiated under the laws of the United States to lands covered

by a Spanish or Mexican claim, until it was barred by lapse of time or rejected.

This is, in our opinion, the true interpretation of the act of 1851. Until recently, it governed the action of the Interior Department upon the advice of the law officers of the government (11 Op. Att'y-Gen. 493; 13 id. 388), and was, at least by implication, sanctioned by this court in *Frisbie* v. *Whitney*, 9 Wall. 187. No subsequent legislation conflicts with it. On the contrary, the excepting words in the sixth section of the act of March 3, 1853, introducing the land system into California (10 Stat. 246), clearly denote that lands such as these at the time of their withdrawal were not considered by Congress as in a condition to be acquired by individuals or granted to corporations. This section expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title. It is said that this means "lawfully" claimed; but there is no authority to import a word into a statute in order to change its meaning. Congress did not prejudge any claim to be unlawful, but submitted them all for adjudication. Besides the act of March 3, 1853, which authorized the settlement and purchase of the lands released by the operation of the law of 1851, there was a general law (id. 244) passed on the same day, which conferred upon a settler on lands theretofore reserved on account of claims under foreign grants, then or thereafter declared by the Supreme Court to be invalid, the rights granted by the pre-emption law, after the lands should have been released from reservation, — a class of lands which, from an early day, it had been the policy to reserve until the adjustment of all such claims. See act of 1811, 2 Stat., pp. 664, 665, sects. 6, 10. This provision clearly implies that no right of pre-emption previously attached to lands of that description by reason of settlement and cultivation.

It is unnecessary to dwell longer upon this question, or to review subsequent statutes touching the government lands in California. It suffices to say, that there is nothing in any of them which weakens the construction we have given to the act of 1851. This controversy depends upon that act and the Pacific Railroad acts which we have cited.

The appellee invokes the doctrine, that judgments of a court

during a term are, by relation, considered as having been rendered on the first day thereof. There is a fiction of law that a term consists of but one day; but such a fiction is tolerated by the courts only for the purposes of justice. *Gibson* v. *Chouteau*, 13 Wall. 92. To antedate the judicial rejection of a claim, so as to render operative a grant which would be otherwise without effect, does not promote the ends of justice, and cannot be sanctioned.

As the premises in controversy were not public lands, either at the date of the grant or of their withdrawal, it follows that they did not pass to the railroad company.

Decree reversed, and cause remanded with directions to dismiss the bill.

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE STRONG, dissenting.

I am not able to agree with the majority of the court in this case. The only exception made by Congress from its grant to the Western Pacific Railroad Company consisted of lands within certain limits, which, at the time the line of the road was definitely fixed, had been "sold, reserved, or otherwise disposed of by the United States," or to which a pre-emption or homestead claim had then attached. The exception was intended to keep the public lands open to settlement and sale until the line of the road was established. I cannot understand how the presentation of a fraudulent claim to any portion of the lands within the limits designated, founded upon an invalid or forged Mexican grant, could change their character as public lands, or impair the title of the company, or have any other effect than to subject the company to the annoyance and expense of exposing and defeating the claim. Nor can I perceive the bearing upon the case of the act of March 3, 1853, "to extend pre-emption rights to certain lands therein mentioned;" for that act applies only to pre-emption rights, and by its terms is limited to lands *previously* reserved.

I think the judgment of the court below should be affirmed.

INDEX.

ABEYANCE.

The maxim, that a fee cannot be in abeyance, is not of universal application; nor has it any weight in an inquiry as to the intent and effect of the act of July 17, 1862 (12 Stat. 589), and the joint resolution of even date therewith, for the confiscation of enemies' property. *Wallach et al.* v. *Van Riswick*, 202.

ADMIRALTY. See *General Average.*

1. Sailing rules and regulations prescribed by law furnish the paramount rule of decision, whenever they are applicable; but where, in any case, a disputed question of navigation arises, in regard to which neither they, nor the rules of this court regulating the practice in admiralty, have made provision, evidence of experts as to a general usage regulating the matter is admissible. *The "City of Washington,"* 31.
2. Where two vessels under steam, meeting end on, or nearly end on, neglect, until it is too late to avoid a collision, to comply with the rule requiring each to port her helm, it is no defence for either to prove that she ported her helm before the collision actually occurred. The act of compliance must be seasonable; otherwise it is without substantial merit. *The "America,"* 432.
3. In this case, as both vessels were in fault, the damages, and the costs in the courts below, should be apportioned between them. *Id.*
4. Where, in order to avoid a collision between two vessels propelled by steam, one going with and the other against the tide, it is conceded that one should stop, it is the duty of the vessel proceeding against the tide to do so, as her movements can be controlled with less difficulty than those of the other vessel. *The "Galatea,"* 439.
5. Where a collision occurs at sea, each vessel being at fault, and damage is thereby done to an innocent party, a decree should be rendered, not against both vessels *in solido* for the entire damage, interest, and costs, but against each for a moiety thereof, so far as the stipulated value of each extends; and it should provide that any balance of such moiety, over and above such stipulated value of either vessel, or which the libellant shall be unable to collect or enforce, shall be

ADMIRALTY (*continued*).
paid by the other vessel, or her stipulators, to the extent of her stipulated value beyond the moiety due from her. *The "Alabama" and the "Game-Cock,"* 695.

AGENCY. See *Contracts*, 6.

AGENT. See *Captured or Abandoned Property*, 2, 6–8.

ALEXANDRIA, COUNTY OF. See *District of Columbia.*

ALLOWANCES. See *Honorable Discharge.*
Under the term "allowances" of a soldier, bounty is included. *United States* v. *Landers*, 77.

AMENDMENTS TO THE CONSTITUTION. See *Constitutional Law*, 1, 3–5, 11, 13, 15, 16.

AMNESTY.
The amnesty proclamation of the President of the United States of Dec. 25, 1868, did not give back property which had been sold under the Confiscation Act, or any interest in it, either in possession or expectancy. *Wallach et al.* v. *Van Riswick*, 202.

APPEALS. See *Jurisdiction*, 6.

"APPLICATION AND DEMAND." See *Pleading*, 3; *Power of Attorney.*

"APPROPRIATE LEGISLATION." See *Constitutional Law*, 3, 6.

ARGUMENTS TO A JURY, OPEN AND CLOSE OF. See *Practice*, 17.

ASSIGNEE IN BANKRUPTCY. See *Bankruptcy*, 2; *Jurisdiction*, 11–13; *Set-off*, 2.

ASSIGNOR. See *Bills of Exchange and Promissory Notes.*

BANKRUPTCY. See *Evidence*, 2; *Federal Question; Jurisdiction*, 11–14.
1. W. & Co., having recovered judgment in a State court, sued out an execution thereon, which was levied upon the property of the defendant. He was subsequently declared a bankrupt, and an injunction issued by the District Court of the United States restraining W. & Co. and the sheriff from disposing of that property. W. & Co. thereupon filed their petition in the latter court, praying that the injunction be so modified as to allow the sheriff to sell. An order was made granting the prayer of the petition, prescribing the time and manner of the sale, and directing that the proceeds should be brought into the District Court. This order was served upon the sheriff, who, pursuant thereto, sold the property, and paid the proceeds into court. *Held*, that the sheriff was not liable to W. & Co. for not paying the money to them upon their execution. *O'Brien* v. *Weld et al.*, 81.
2. A., relying upon the representations of D., that the firm of B., C., and

BANKRUPTCY (*continued*).

D., of which he was a member, was perfectly solvent, and that B. was wealthy, sold it goods. D. having, without the knowledge of A., retired from the firm, an arrangement was entered into whereby the proceeds of the sale of such goods remaining in the hands of the agents of the firm of B., C., and D., were applied to discharge the debt due to A., and the unsold portion of such goods returned to him. A., at the time, believed that B. and C. were insolvent; and they were within four months from such arrangement adjudged bankrupts. *Held*, that the representations of D. were a fraud upon A., on account of which he could have rescinded the contract of sale, and followed the goods wherever he could find them; and the goods not having lost their identity, nor become part of the permanent stock of B. and C., upon which they obtained credit, their assignee cannot, in the absence of actual fraud in the arrangement for the payment of such proceeds, recover them in a suit against A. *Montgomery, Assignee*, v. *Bucyrus Machine Works*, 257.

3. The United States is entitled to priority of payment out of the effects of its bankrupt or insolvent debtor, whether he be principal or surety, or be solely, or only jointly with others, liable, and it is immaterial where the debt was contracted. *Lewis, Trustee*, v. *United States*, 618.

4. The United States was the creditor of a firm, A., B., & Co., doing business in London, and consisting of several persons, some of whom resided there. The others resided in this country, and, with another partner, constituted the firm of A. & Co. The members of the latter firm were duly declared bankrupt, and a trustee was appointed under the forty-third section of the Bankrupt Act of March 2, 1867. *Held*, that the relations of the bankrupt members of the firm of A., B., & Co. to the United States are the same as if they were severally liable to the United States; and that the United States is entitled to the payment of its debt out of their separate property, in preference and priority to all other debts due by them or either of them, or by the firm of A. & Co. *Id.*

BELLIGERENCY. See *Insurrection.*

BILL OF REVIEW. See *Practice*, 13.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

By the statute of Illinois, the assignor of a promissory note is liable on his contract of assignment, only in case the assignee has, by the exercise of due diligence, obtained judgment against the maker, and a return of *nulla bona*, unless such suit would have been impracticable or unavailing. *Wills et al.* v. *Claflin et al.*, 135.

BOARD OF EQUALIZATION. See *State Railroad Tax*, 6.

BOARD OF LIQUIDATION. See *Louisiana Consolidated Bonds.*

BONDHOLDERS. See *Equity*, 2; *Municipal Bonds*, 2–4, 8, 10–13.

BOUNTY. See *Allowances.*

BURDEN OF PROOF. See *Deed; Municipal Bonds*, 3.

Where, in an action against a life-insurance company brought by an administrator on a policy purporting to insure the life of the intestate, one of the defences set up was that the answers of the latter to certain questions propounded to him at the time of his application touching his habits of life, &c., were untrue, the burden of proving the truth of such answers does not rest on the plaintiff. *Piedmont and Arlington Life Insurance Co.* v. *Ewing, Administrator*, 377.

CAPTURE. See *Captured or Abandoned Property*, 3–6; *Insurrection.*

CAPTURED OR ABANDONED PROPERTY. See *Court of Claims*, 2; *Insurrection.*

1. Certain premises in Louisiana, belonging to a citizen of that State, were, during his absence therefrom, seized as abandoned property by the military authorities of the United States, who compelled the lessee then in possession to enter into a new lease, and to pay to them the rent thereafter due. *Held*, that the owner could not recover of the lessee the rent for the period during which he had paid it to the military authorities. *Harrison* v. *Myer, Executrix*, 111.
2. A. sold cotton to the Confederate States, accepted their bonds in payment therefor, but remained in possession of it until its seizure by the agents of the United States, who sold it, and paid the proceeds into the treasury. *Held*, that A. cannot recover such proceeds in an action against the United States. *Whitfield* v. *United States*, 165.
3. Notwithstanding active hostilities had ceased in Georgia, cotton, although private property, captured by the military forces of the United States, in obedience to an order of the commanding general, during their occupation and actual government of that State, was taken from hostile possession within the meaning of that term, and was, without regard to the *status* of the owner, a legitimate subject of capture. *Lamar, Exr.*, v. *Browne et al.*, 187.
4. What shall be the subject of capture, as against his enemy, is always within the control of every belligerent. It is the duty of his military forces in the field to seize and hold that which is apparently so subject; leaving the owner to make good his claim, as against the capture, in the appropriate tribunal established for that purpose. In that regard, they occupy on land the same position that naval forces do at sea. *Id.*
5. Unless restrained by governmental regulations, the capture of movable property on land changes the ownership of it without adjudication. It was authorized by law, in any State or Territory in rebellion against the government of the United States. Provision was made (12 Stat. 820) as well for the collection of captured or abandoned property as for its conversion into money to be deposited

CAPTURED OR ABANDONED PROPERTY (*continued*).
in the national treasury, and the claimant allowed within a prescribed time to sue in the Court of Claims, and to receive the net proceeds, on proof to its satisfaction, of his loyalty, and of his right to them. *Id.*

6. Neither the captors, nor the special agents of the treasury to whom they delivered the captured property, are liable to the owner thereof in an action at law for any thing by them done within the scope of their delegated powers. Acting for the government, they are protected by its authority; and he must look to it, not to them, for indemnity. *Id.*
7. It is incumbent upon a claimant, under the Captured or Abandoned Property Act, to establish by sufficient proof that the property captured or abandoned came into the hands of a treasury agent; that it was sold; that the proceeds of the sale were paid into the treasury of the United States; and that he was the owner of the property, and entitled to the proceeds thereof. *United States* v. *Ross*, 281.
8. Because the claimant's property was captured and sent forward by a military officer, and there is an unclaimed fund in the treasury derived from sales of property of the same kind, a court is not authorized to conclude, as matter of law, that the property was delivered by that officer to a treasury agent, that it was sold by the latter, and that the proceeds were covered into the treasury. *Id.*

CARONDELET COMMONS.
The deed of conveyance executed to the United States on the twenty-fifth day of October, 1854, by the city of Carondelet, of a part of the commons of Carondelet upon which Jefferson Barracks are situate, having been based upon an equitable compromise of a long-pending and doubtful question of title, is valid. *City of St. Louis* v. *United States*, 462.

CESTUI QUE TRUST. See *Parties*, 1.

CHARGE TO THE JURY. See *Court and Jury.*

CITIZENS. See *Constitutional Law*, 8–10.

COLLATERAL SECURITIES.
A creditor holding collaterals is not bound to apply them before enforcing his direct remedy against his debtor. *Lewis, Trustee*, v. *United States*, 618.

COLLISION. See *Admiralty*, 2–5.

COMMERCE. See *International Law*, 1–4.

1. The case of the *City of New York* v. *Miln*, 11 Pet. 103, decided no more than that the requirement from the master of a vessel of a catalogue of his passengers landed in the city, rendered to the mayor on oath, with a correct description of their names, ages, occupations, places of birth, and of last legal settlement, was a police regulation

COMMERCE (*continued*).
within the power of the State to enact, and not inconsistent with the Constitution of the United States. *Henderson et al.* v. *Mayor of the City of New York et al.*, 259.
2. The result of the *Passenger Cases*, 7 How. 283, is that a tax demanded of the master or owner of the vessel for every such passenger is a regulation of commerce by the State, in conflict with the Constitution and laws of the United States, and therefore void. *Id.*
3. These cases criticised, and the weight due to them as authority considered. *Id.*
4. A statute which imposes a burdensome and almost impossible condition on the ship-master as a prerequisite to his landing his passengers, with an alternative payment of a small sum of money for each one of them, is a tax on the ship-owner for the right to land such passengers, and, in effect, on the passenger himself, since the ship-master makes him pay it in advance as part of his fare. *Id.*
5. Such a statute of a State is a regulation of commerce, and, when applied to passengers from foreign countries, is a regulation of commerce with foreign nations. *Id.*
6. It is no answer to the charge, that such regulation of commerce by a State is forbidden by the Constitution, to say that it falls within the police power of the States; for, to whatever class of legislative powers it may belong, it is prohibited to the States if granted exclusively to Congress by that instrument. *Id.*
7. Though it be conceded that there is a class of legislation which may affect commerce, both with foreign nations and between the States, in regard to which the laws of the States may be valid in the absence of action under the authority of Congress on the same subjects, this can have no reference to matters which are in their nature national, or which admit of a uniform system or plan of regulation. *Id.*
8. The statutes of New York and Louisiana, here under consideration, are intended to regulate commercial matters which are not only of national, but of international concern, and which are also best regulated by one uniform rule, applicable alike to all the seaports of the United States. They are therefore void, because legislation on the subjects which they cover is confided exclusively to Congress by the clause of the Constitution which gives to that body the "right to regulate commerce with foreign nations." *Id.*
9. The constitutional objection to this tax on the passenger is not removed because the penalty for failure to pay does not accrue until twenty-four hours after he is landed. The penalty is incurred by the act of landing him without payment, and is, in fact, for the act of bringing him into the State. *Id.*
10. The court does not, in this case, undertake to decide whether or not a State may, in the absence of all legislation by Congress on the same subject, pass a statute strictly limited to defending itself

COMMERCE *(continued)*.

against paupers, convicted criminals, and others of that class, but is of opinion that to Congress rightfully and appropriately belongs the power of legislating on the whole subject. *Id.*

11. The statute of California, which is the subject of consideration in this case, does not require a bond for every passenger, or commutation in money, as do the statutes of New York and Louisiana, but only for certain enumerated classes, among which are "lewd and debauched women." *Chy Lung* v. *Freeman et al.*, 275.
12. But the features of the statute are such as to show very clearly that the purpose is to extort money from a large class of passengers, or to prevent their immigration to California altogether. *Id.*
13. The statute also operates directly on the passenger; for, unless the master or the owners of the vessel give an onerous bond for the future protection of the State against the support of the passenger, or pay such sum as the Commissioner of Immigration chooses to exact, he is not permitted to land from the vessel. *Id.*
14. The powers which the commissioner is authorized to exercise under this statute are such as to bring the United States into conflict with foreign nations, and they can only belong to the Federal government. *Id.*
15. If the right of the States to pass statutes to protect themselves in regard to the criminal, the pauper, and the diseased foreigner, landing within their borders, exists at all, it is limited to such laws as are absolutely necessary for that purpose; and this mere police regulation cannot extend so far as to prevent or obstruct other classes of persons from the right to hold personal and commercial intercourse with the people of the United States. *Id.*
16. The statute of California extends, in this respect, far beyond the necessity in which the right, if it exists, is founded, and invades the right of Congress to regulate commerce with foreign nations. It is, therefore, void. *Id.*

COMMISSIONER OF PATENTS, DECISIONS OF. See *Patents*, 1.

CONCESSIONS OF LAND BY THE MEXICAN OR SPANISH GOVERNMENT. See *Public Lands*, 9.

1. The Board of Land Commissioners, under the act of March 3, 1851 (9 Stat. 631), passed in 1855 a decree confirming a grant for all the land asked for in the petition, which was acquiesced in until 1872, when a petition praying that the estimate of quantity in the original petition be stricken out, and that the land as now claimed be confirmed, was presented to the District Court, — *Held*, that the claimants are without remedy under any act of Congress. *Williams et al.* v. *United States*, 457.
2. In an action of ejectment for land in California, where both parties assert title to the premises, — the plaintiff under a concession of the former government, confirmed by the tribunals of the United States,

CONCESSIONS OF LAND BY THE MEXICAN OR SPANISH GOVERNMENT (*continued*).

and an approved survey under the act of Congress of June 14, 1860, and the defendant under a patent of the United States issued upon a similar confirmed concession, — the inquiry of the court must extend to the character of the original concessions to ascertain which of the two titles gave the better right to the premises; and, if these do not furnish the means for settling the controversy, reference must be had to the proceedings before the tribunals and officers of the United States by which the claims of the parties were determined. *Miller et al.* v. *Dale et al.*, 473.

3. Where the original concessions in such cases were without specific boundaries, being floating grants for quantity, the one first located by an approved survey appropriated the land embraced by the survey. *Id.*

CONDITION PRECEDENT. See *Equity*, 1; *Land Grants*, 2; *Municipal Bonds*, 2–6, 8, 10–13.

CONFISCATION. See *Amnesty*.

1. The act of July 17, 1862 (12 Stat. 589), is an act for the confiscation of enemies' property, and provides for the seizure and condemnation of all their estate. When it has been carried into effect by appropriate proceedings in any given case, the offender has no longer any interest or ownership in the thing forfeited which he can convey, or any power over it which he can exercise in favor of another. *Wallach et al.* v. *Van Riswick*, 202.
2. The joint resolution of even date with that act was designed only to qualify, and not defeat it. The provision therein, that "no proceedings shall work a forfeiture beyond the life of the offender," obviously means that they shall not affect the ownership of the land after the termination of his natural life ; and that, after his death, it shall pass and be owned as if it had not been forfeited. It was intended for the exclusive benefit of his heirs, and to enable them to take the inheritance after his death. *Id.*

CONSOLIDATED BONDS. See *Louisiana Consolidated Bonds*.

CONSOLIDATION OF COMPANIES. See *Corporations*, 1–7.

CONSTITUTIONAL LAW. See *Commerce*, 1–16; *Duty on Exports*, 1; *State Railroad Tax*, 2.

1. A trial by jury in suits at common law pending in the State courts is not a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment of the Constitution of the United States to abridge. *Walker* v. *Sauvinet*, 90.
2. Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of that protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide, and may be

CONSTITUTIONAL LAW (*continued*).

varied to meet the necessities of a particular right. *United States* v. *Reese et al.*, 214.

3. The Fifteenth Amendment to the Constitution does not confer the right of suffrage; but it invests citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of servitude, and empowers Congress to enforce that right by "appropriate legislation." *Id.*

4. The power of Congress to legislate at all upon the subject of voting at State elections rests upon this amendment, and can be exercised by providing a punishment only when the wrongful refusal to receive the vote of a qualified elector at such elections is because of his race, color, or previous condition of servitude. *Id.*

5. The third and fourth sections of the act of May 31, 1870 (16 Stat. 140), not being confined in their operation to unlawful discrimination on account of race, color, or previous condition of servitude, are beyond the limit of the Fifteenth Amendment, and unauthorized. *Id.*

6. As these sections are in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, and cannot be limited by judicial construction so as to make them operate only on that which Congress may rightfully prohibit and punish, — *Held*, that Congress has not provided by "appropriate legislation" for the punishment of an inspector of a municipal election for refusing to receive and count at such election the vote of a citizen of the United States of African descent. *Id.*

7. The State of Louisiana passed an act entitled "An Act to regulate proceedings in contestations between persons claiming a judicial office."

Sect. 1 provided that "in any case in which a person may have been appointed to the office of judge of any court of this State, and shall have been confirmed by the senate, and commissioned thereto, . . . such commission shall be *prima facie* proof of the right of such person to immediately hold and exercise such office."

Sect. 2 provides "that if any person, being an incumbent of such office, shall refuse to vacate the same, and turn the same over to the person so commissioned, such person so commissioned shall have the right to proceed by *rule* before the court of competent jurisdiction, to have himself declared to be entitled to such office, and to be inducted therein. Such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately without jury, and by preference over all matter or causes depending in such court; . . . and the judgment thereon shall be signed the same day of rendition."

The next section provides that an appeal, if taken, shall be applied for within one day after the rendition of the judgment, and be made

CONSTITUTIONAL LAW (*continued*).

returnable to the Supreme Court within two days. The appeal has preference over all other business in that court, and the judgment thereon is final after the expiration of one day. *Held*, that the State, by proceedings under this act, which resulted in a judgment adverse to the title of the plaintiff in error to a certain judicial office, did not, through her judiciary, violate that clause of the Fourteenth Amendment to the Constitution of the United States which declares, "nor shall any State deprive any person of life, liberty, or property, without due process of law." *Kennard* v. *Louisiana ex rel. Morgan*, 480.

8. Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. The duty of a government to afford protection is limited always by the power it possesses for that purpose. *United States* v. *Cruikshank et al.*, 542.

9. There is in our political system a government of each of the several States, and a government of the United States. Each is distinct from the others, and has citizens of its own, who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State; but his rights of citizenship under one of these governments will be different from those he has under the other. *Id.*

10. The government of the United States, although it is, within the scope of its powers, supreme and beyond the States, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the States. *Id.*

11. The right of the people peaceably to assemble for lawful purposes, with the obligation on the part of the States to afford it protection, existed long before the adoption of the Constitution. The first amendment to the Constitution, prohibiting Congress from abridging the right to assemble and petition, was not intended to limit the action of the State governments in respect to their own citizens, but to operate upon the national government alone. It left the authority of the States unimpaired, added nothing to the already existing powers of the United States, and guaranteed the continuance of the right only against Congressional interference. The people, for their protection in the enjoyment of it, must, therefore, look to the States, where the power for that purpose was originally placed. *Id.*

12. The right of the people peaceably to assemble, for the purpose of petitioning Congress for a redress of grievances, or for any thing

CONSTITUTIONAL LAW (*continued*).
else connected with the powers or duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government republican in form implies that right, and an invasion of it presents a case within the sovereignty of the United States. *Id.*
13. The right to bear arms is not granted by the Constitution; neither is it in any manner dependent upon that instrument for its existence. The second amendment means no more than that it shall not be infringed by Congress, and has no other effect than to restrict the powers of the national government. *Id.*
14. Sovereignty, for the protection of the rights of life and personal liberty within the respective States, rests alone with the States. *Id.*
15. The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws; but it adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty. *Id.*
16. In *Minor* v. *Happersett*, 21 Wall. 178, this court decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In *United States* v. *Reese et al.*, *supra*, p. 214, it held that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The right to vote in the States comes from the States; the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been. *Id.*

CONTESTED CLAIMS, ADJUSTMENT OF. See *National Banks*, 1, 2.

CONTRABAND OF WAR. See *International Law*, 1–4.
Money, silver-plate, and bullion, when destined for hostile use or for the purchase of hostile supplies, are contraband of war. Where a foreign vessel entered New Orleans under the license of the President's proclamation of May 12, 1862, the determination of the question whether such articles, part of her outward-bound cargo, were

CONTRABAND OF WAR (*continued*).
contraband, devolved upon the commanding general at that city. Believing them to be so, he was authorized to order them to be removed from her, and her clearance to be withheld until his order should be complied with. *United States* v. *Diekelman*, 520.

CONTRACTS. See *Bankruptcy*, 2 ; *Bills of Exchange and Promissory Notes; Court of Claims*, 1 ; *Legal Representatives*, 2 ; *Municipal Bonds*, 5–7, 9 ; *Pleading*, 1 ; *Rewards*, 2 ; *Warranty*, 1, 2.

1. Where a party, knowing the pecuniary condition of a debtor, purchased a claim against him of an ascertained amount, an opinion, however erroneous, expressed by the seller as to the value of the claim, does not affect the validity of the sale. Under such circumstances, each party is presumed to rely upon his own judgment. *Blease* v. *Garlington*, 1.
2. Prior to the abolition of slavery in Mississippi, a contract there made between a slave and his master neither imposed obligations nor conferred rights upon either party. *Hall* v. *United States*, 27.
3. An action cannot be maintained against the government, in the Court of Claims, upon a contract for secret services during the war, made between the President and the claimant. *Totten, Administrator*, v. *United States*, 105.
4. An agreement between the agent of an insurance company and an applicant for insurance, whereby the former, without authority from the company, accepted articles of personal property by way of satisfaction of a premium payable in money, is a fraud upon the company, and no valid contract against it arises therefrom. *Hoffman* v. *John Hancock Mutual Life Insurance Co.*, 161.
5. While negotiations were still pending between an agent of the company and the applicant, touching the precise terms of a contract of insurance, the amount of premium, and the mode of payment, a friend paid the premium, but concealed from the agent the condition of the applicant, who was then *in extremis*, and died in a few hours. The agent, in ignorance of the facts, delivered the policy. *Held*, that no valid contract arose from the transaction. *Piedmont and Arlington Life Insurance Co.* v. *Ewing, Administrator*, 377.
6. The following memorandum of a contract of sale signed by the agents of the purchaser and the seller, to wit, —

"New York, July 10, 1867.

"Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (705) packs first quality Russia sheet-iron, to arrive at New York, at twelve and three quarters (12¾) cents per pound, gold, cash, actual tare.

"Iron due about Sept. 1, '67.

"White & Hazard, *Brokers.*"

— binds both parties thereto. *Butler* v. *Thomson et al.*, 412.
7. A certain instrument of writing (inserted in the report of the case) —

CONTRACTS (*continued*).

Held, not to be a mere power of attorney revocable at the pleasure of the maker ; but a contract under which rights for a specified time were acquired. *Burdell et al.* v. *Denig et al.*, 716.

8. Where an inventor signed several different agreements with the same party, on the same day, for the sale of his invention and for a license to use it, they must all be construed together ; and if it is apparent that he intended to convey the right to use a new invention in connection with former patents, under any renewal or extension of the former, the grantee or assignee is protected, though the improvement was never patented, and though the reissued patent was extended afterwards. It is a question of intention to be gathered from all the instruments of writing in the case. *Hammond et al.* v. *Mason and Hamlin Organ Co.*, 724.

CONTRACTS, OBLIGATIONS OF.

The constitution of a State cannot impair the obligation of a contract. *County of Moultrie* v. *Rockingham Ten-Cent Savings-Bank*, 631.

CONTRIBUTION.

Where the legislature of Wyoming Territory organized two new counties, and included within their limits a part of the territory of an existing county, but made no provision for apportioning debts or liabilities, — *Held*, that the old county, being solely responsible for the debts and liabilities it had previously incurred, has, on discharging them, no claim upon the new counties for contribution. *Commissioners of Laramie Co.* v. *Commissioners of Albany Co. et al.*, 307.

CORPORATIONS.

1. The consolidation of two companies does not necessarily work a dissolution of both, and the creation of a new corporation. Whether such be its effect, depends upon the legislative intent manifested in the statute under which the consolidation takes place. *Central Railroad and Banking Company* v. *Georgia*, 665.

2. An act of the legislature authorized two railroad companies (C. and M.) to unite and consolidate their stocks, and all their rights, privileges, immunities, property, and franchises, under the name and charter of C., in such manner that each owner of shares of the stock of M. should be entitled to receive an equal number of the shares of the stock of the consolidated companies. The act also declared that all contracts of both companies should be assumed by and be binding upon C., that its capital should not exceed their aggregate capital, and that all their benefits and rights should accrue to it. It was further enacted, that, upon the union and consolidation, each stockholder of M. should be entitled to receive a certificate for a like number of shares of the stock of C., upon his surrender of his certificate of stock in M. *Held*, that consolidation under this act was not a surrender of the existing charters of the two companies, and

CORPORATIONS (*continued*).

that it did not work the extinction of C., nor the creation of a new company. *Held further*, that the consolidated company continued to possess all the rights and immunities which were conferred upon each company by its original charter. *Id.*

3. Exemption from liability to any greater tax than one-half of one per centum of its net annual income having been conferred upon C. by its charter, — *Held*, that it is not in the power of the legislature to impose an increased tax after the consolidation was effected. *Held further*, that inasmuch as M. possessed no such immunity under its charter, the power of the legislature to tax its franchises, property, and income, remained unimpaired after its consolidation with C. *Id.*
4. The purpose and effect of the consolidating act were to provide for a merger of M. into C., and to vest in the latter the rights and immunities of the former, not to enlarge them. Therefore, M. having held its franchises and property subject to taxation, C., succeeding to the ownership, held them alike subject. *Id.*
5. In *Tomlinson* v. *Branch*, 15 Wall. 460, and *City of Charleston* v. *Branch*, id. 470, this court held that the respective roads and property of the two companies, which had become consolidated in the hands of the South Carolina Railroad Company, retained their original *status* towards the public and the State the same as if the consolidation had not taken place; that the entire line of road between Branchville and Charleston was subject to taxation; and that *prima facie* the railroad terminus and dépôt in Charleston and the property accessory thereto belonged to the South Carolina Canal and Railroad Company portion of the joint property. *Branch et al.* v. *City of Charleston et al.*, 677.
6. The holding, that, if it could be fairly shown that any of that company's property in Charleston was acquired by the South Carolina Railroad Company for the accommodation of the business belonging to its original roads, or for the joint accommodation of the entire system of roads under its control, such property would, *pro tanto* and in fair proportion, be exempt from taxation, was intended to meet the case of such property as the present company might have acquired in Charleston, either separately or in conjunction with the old company, had no consolidation taken place, and had the line between Branchville and Charleston used by both remained the property of the old company. *Id.*
7. In carrying out that principle, any repairs or improvements made on the old line or the property of the old company would become a part thereof, and be subject to taxation. An item, therefore, for replacing tracks and side-tracks within the city limits, as it fairly belongs to the old road, should have been taxed *in toto* and not *pro tanto*. *Id.*

COUNTY BONDS. See *Municipal Bonds.*

COUNTY, DIVISION OF. See *Contribution; Legislative Power.*

COUNTY WARRANTS.

Warrants issued on the county treasurer subsequently to the year 1860 by order of the board of supervisors of a county in Iowa, and duly signed by their clerk, were not, unless sealed with the county seal, genuine and regularly issued, and the treasurer was not authorized to pay them. *Smeltzer* v. *White*, 390.

COUPONS. See *Interest*.

The holder of coupons attached to town bonds, where the latter recite that they are issued in pursuance of a duly authorized subscription for stock of a railroad company, which before the subscription was actually made had become consolidated with another, thereby forming a third company, and the authority to subscribe was limited to the first company, is not entitled to recover thereon, as sufficient notice of the objection to the validity of the bonds is contained in their recitals. *Harshman* v. *Bates County*, 569.

COURT AND JURY.

1. Where the evidence merely tended to prove certain disputed facts in issue, it was error for the court to assume in its charge that they had been proved, and thus withdraw from the jury the right to weigh the evidence bearing upon such facts. *Burdell et al.* v. *Denig et al.*, 716.
2. In a suit upon acceptances amounting to $4,500, the defendants pleaded as a set-off the plaintiff's draft for a like sum, which had been indorsed to them by A., the payee thereof, and protested for non-payment. The plaintiff replied that his draft was given as a part of the proceeds of a discount by him of A.'s draft for $5,000, which had been procured by A. upon false and fraudulent representations, and that the consideration for it had wholly failed, of all which the defendants, when they received it, had notice. There was evidence at the trial that the plaintiff had, in a suit against A., recovered $4,000 on account of the $5,000 draft. The court instructed the jury that the issues were those tendered by the plaintiff, and that, if either was found in his favor, he was entitled to recover. *Held*, that while the instruction, so far as given, was correct, its general effect was misleading, as it tended to withdraw from the notice of the jury the evidence that the failure of consideration for the plaintiff's draft was only partial. *Hall et al.* v. *Weare*, 728.

COURT OF CLAIMS. See *Contracts*, 3.

1. Contractors for the transportation of the mails between New York and New Orleans, touching at Havana, and between Havana and Chagres, having subsequently established a direct line between New York and Chagres, which made the passage between the latter points in a shorter time, by two days, than the mail-ships running under the contract by way of Havana, consented to take the Chagres and

COURT OF CLAIMS (*continued*).

California mails outward and homeward by the direct steamers, without requiring from the Post-Office Department a prior stipulation to pay for the extra service, but without precluding themselves from applying to Congress for such compensation as it might deem just and reasonable. To this arrangement the Postmaster-General assented, with the understanding that his department did not thereby become responsible for any additional expense. Application was made to Congress for equitable relief, and an act passed referring the claim to the Court of Claims, with directions to examine the same, and determine and adjudge what, if any, amount was due for extra service. *Held*, that the Court of Claims is authorized to adjudge such an allowance as is required *ex æquo et bona* by all the circumstances of the case. *Roberts et al., Trustees*, v. *United States*, 41.

2. The Court of Claims found that cotton in large quantities captured from the respective owners thereof in Mississippi by the military forces of the United States was subsequently intermingled and stored in a common mass, and then sent forward and sold by the treasury agents in the same intermingled condition, and the proceeds thereof paid into the treasury as a common fund; that court further found as a fact that the cotton of each of the claimants in these suits contributed to and formed a part of the mass so intermingled and sold. Having ascertained the amount of that fund remaining in the treasury after deducting payments theretofore made to other claimants, the number of bales sold to create the fund for which payment had not already been made, and the number of bales contributed by each of the plaintiffs to the common mass, — the court thereupon gave judgment in favor of the plaintiff in each case for a sum which bore the same proportion to the whole fund still on hand that the number of his bales did to the whole number then represented by the fund. *Held*, that the judgment was proper. *Intermingled Cotton Cases*, 651.
3. While the Court of Claims cannot delegate its judicial powers, and must itself hear and determine all causes which come before it for adjudication, no reason exists why it may not use such machinery as courts of more general jurisdiction are accustomed to employ under similar circumstances to aid in their investigations. *Id.*
4. Where that court in certain cases before it, in which complicated accounts and facts were to be passed upon, referred them to a special commissioner to state the accounts, marshal the assets, and adjust the losses, "so that equal and exact justice should be done to all;" and upon consideration of his report, and after due deliberation, approved it, — *Held*, that the judgments as rendered are the result of the deliberation of the court, and not that of the commissioner alone. *Id.*

COVENANT. See *Lease.*

CREDITOR. See *Collateral Securities; Settlement.*

CRIMINAL LAW.

1. The counts of an indictment which charge the defendants with having banded and conspired to injure, oppress, threaten, and intimidate citizens of the United States, of African descent, therein named; and which in substance respectively allege that the defendants intended thereby to hinder and prevent such citizens in the free exercise and enjoyment of rights and privileges granted and secured to them in common with other good citizens by the constitution and laws of the United States; to hinder and prevent them in the free exercise of their right peacefully to assemble for lawful purposes; prevent and hinder them from bearing arms for lawful purposes; deprive them of their respective several lives and liberty of person without due process of law; prevent and hinder them in the free exercise and enjoyment of their several right to the full and equal benefit of the law; prevent and hinder them in the free exercise and enjoyment of their several and respective right to vote at any election to be thereafter by law had and held by the people in and of the State of Louisiana, or to put them in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted at an election theretofore had and held according to law by the people of said State, — do not present a case within the sixth section of the Enforcement Act of May 31, 1870 (16 Stat. 141). To bring a case within the operation of that statute, it must appear that the right the enjoyment of which the conspirators intended to hinder or prevent was one granted or secured by the constitution or laws of the United States. If it does not so appear, the alleged offence is not indictable under any act of Congress. *United States* v. *Cruikshank et al.*, 542.
2. The counts of an indictment which, in general language, charge the defendants with an intent to hinder and prevent citizens of the United States, of African descent, therein named, in the free exercise and enjoyment of the rights, privileges, immunities, and protection, granted and secured to them respectively as citizens of the United States, and of the State of Louisiana, because they were persons of African descent, and with the intent to hinder and prevent them in the several and free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States, do not specify any particular right the enjoyment of which the conspirators intended to hinder or prevent, are too vague and general, lack the certainty and precision required by the established rules of criminal pleading, and are therefore not good and sufficient in law. *Id.*
3. In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." The indictment must set forth the offence with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged; and every

CRIMINAL LAW (*continued*).

ingredient of which the offence is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading, that, where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it must state the species, — it must descend to particulars. The object of the indictment is, — first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances. *Id.*

4. By the act under which this indictment was found, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court. The indictment should, therefore, state the particulars, to inform the court as well as the accused. It must appear from the indictment that the acts charged will, if proved, support a conviction for the offence alleged. *Id.*

DAMAGES. See *Admiralty*, 3, 5; *International Law*, 4; *Patents*, 8–12.

DEALING IN STOCKS. See *National Banks*, 1–3.

DEED.

Where a party alleges that a deed executed by his attorney, under a power to convey, is invalid for matters not apparent on its face, the burden of proving them is on such party. *Clements* v. *Macheboeuf et al.*, 418.

DESERTION. See *Honorable Discharge.*

DISTRICT OF COLUMBIA.

Since 1847, pursuant to the act of Congress of the preceding year, the State of Virginia has been in *de facto* possession of the county of Alexandria, which, prior thereto, formed a part of the District of Columbia. The political department of her government has, since that date, uniformly asserted, and the head of her judicial department expressly affirmed, her title thereto. Congress has, by more than one act, recognized the transfer as a settled fact. A resident of that county, in a suit to recover the amount by him paid under protest for taxes upon his property there situate, is, therefore, estopped from raising the question as to the validity of the retrocession. *Phillips* v. *Payne*, 130.

DUE PROCESS OF LAW. See *Constitutional Law*, 7, 15.

DUTY ON EXPORTS.

1. The acts of Congress of July 20, 1868 (15 Stat. 157), and June 6, 1872 (17 id. 254), so far as they relate to snuff and tobacco intended for exportation, do not impose a tax or duty on exports within the meaning of that clause of the Constitution which declares that "no tax or duty shall be laid on articles exported from any State." *Pace* v. *Burgess*, *Collector*, 372.
2. The stamp thereby required was a means devised for the prevention of fraud by separating and identifying the tobacco intended for exportation; thus relieving it from the taxation to which other tobacco was subjected. *Id.*
3. The proper fees accruing in the due administration of the laws and regulations necessary for the protection of the government against imposition and frauds likely to be committed under the pretext of exportation, are, in no sense, a duty on exports. They are simply the compensation given for services properly rendered. *Id.*

DUTY ON IMPORTS.

The act of Feb. 26, 1845 (5 Stat. 727), prescribing the time and manner of making protest to a collector of customs in cases therein mentioned, continued in force until the passage of the act of June 30, 1864 (13 id. 202). *Barney*, *Collector*, v. *Watson et al.*, 449.

ENEMIES' PROPERTY. See *Captured or Abandoned Property*, 3–5; *Confiscation*, 1, 2.

ENFORCEMENT ACT. See *Criminal Law*, 1, 4.

ESTOPPEL. See *District of Columbia; Municipal Bonds*, 2, 3, 8, 10, 13.

EQUITY. See *Jurisdiction*, 10; *Practice*, 1–5; *South Carolina*, *Statute of Limitations of*; *Taxes*, *Collection of*, *Powers of Courts to Restrain*, 1–4.

1. Where a conveyance of a plantation had been obtained by fraud, and the only consideration alleged by the grantee was the cancellation of a certain bond executed by the grantor, and the court below set aside the deed and ordered that the bond, unaffected by any indorsement of credit or payment thereon, should be returned, and that it and the mortgage therewith given should have the same force and effect as if the conveyance had not been made and the bond had not been cancelled, — *Held*, that the decree was proper in not making the payment of the bond a condition precedent to the reconveyance of the plantation. *Neblett* v. *Macfarland*, 101.
2. Where land is conveyed to the State by a corporation as indemnity against losses on her bonds loaned to it, the bondholders have no equity for the application of the land to the payment of the bonds which can be enforced against the State, and her grantees take

EQUITY (*continued*).
the property discharged of any claim of the bondholders. *Chamberlain* v. *St. Paul and Sioux City Railroad Co. et al.*, 299.

EVIDENCE. See *Admiralty*, 1; *Burden of Proof; Captured or Abandoned Property*, 7; *Practice*, 1–4.

1. Where the lessors executed a lease and demised the lands in their own names, and not as agents, and the covenants of the lessee were all to them personally, and he entered into the lands, and remained in possession during the time specified in the lease, — *Held*, notwithstanding the recital in the lease that "the lessors were acting as a church-extension committee by authority and on behalf of the General Assembly of the Presbyterian Church, Old School," that the lease was competent evidence in an action brought by the lessors in their individual right to recover the rent; and that the lessee, having had the full benefit of the contract, could not dispute the title of the lessors. *Held further*, that the recital is not inconsistent with a holding of the legal title by the lessors in trust to enable them to better discharge their duties touching the property; and, as their act presupposes the prior act necessary to make it effectual, every reasonable presumption is to be made in favor of the validity of the lease. *Stott et al.* v. *Rutherford*, 107.
2. Where the declaration against the assignor of a promissory note upon his contract of assignment made in Illinois avers that a suit against the maker of the note would have been unavailing, and the defendant takes issue thereon, the record of an adjudication in bankruptcy against the maker of the note before suit could have been brought thereon is not only competent, but conclusive, evidence for the plaintiff. *Wills et al.* v. *Claflin et al.*, 135.
3. The presumption that public officers have done their duty does not supply proof of independent and substantive facts. *United States* v. *Ross*, 281.
4. The rule that where profits are the true measure of damages for the infringement of a patent, such profits as the infringer has made or ought to have made, govern, and not those which the *plaintiff* can show that *he* might have made, applies peculiarly and mainly to cases in equity. In actions at law, the rate at which sales of licenses of machines were made, or the established royalty, constitutes the primary and true criterion of damages. In the absence of satisfactory evidence of that class which is more appropriate in the forum where the case is pending, the other class may be resorted to as furnishing one of the elements on which the damages, or the compensation, may be ascertained. *Burdell et al.* v. *Denig et al.*, 716.
5. As a receipt for the use of four of plaintiff's machines, executed after the institution of the suit, was a valid acquittance of any claim for such use, it was properly admitted in evidence under the general issue, to reduce the amount of damages. *Id.*

EXCEPTIONS. See *Practice*, 9.

EXPERTS, EVIDENCE OF. See *Admiralty*, 1.

EXPORTS. See *Duty on Exports*, 1–3.

EXTRA ALLOWANCES. See *Court of Claims*, 1.

EXTRA SERVICES. See *Court of Claims*, 1.

FEDERAL QUESTION. See *Jurisdiction*, 5, 7.

The question, whether, under the Bankrupt Act, the District Court had authority to make an order enjoining a sheriff from selling, under an execution sued out on a judgment obtained in a State court, the property of a debtor, who, subsequently thereto, was adjudicated a bankrupt, and then modifying its previous order, and directing the sheriff to sell, and pay the proceeds of the sale into the District Court, and the decision of the highest State court adverse to that authority, are sufficient to sustain the Federal jurisdiction. *O'Brien* v. *Weld et al.*, 81.

FEE. See *Abeyance.*

FICTION OF LAW.

The fiction of law, that a term consists of but one day, cannot be invoked to antedate the judicial rejection of a claim, so as to render operative a grant which would otherwise be without effect. *Newhall* v. *Sanger*, 761.

FINAL DECREE. See *Practice*, 12, 13.

FINAL JUDGMENT. See *Jurisdiction*, 2.

FORFEITURE. See *Confiscation*, 1, 2.

Where a grant of land and connected franchises is made to a corporation for the construction of a railroad by a statute, which provides for their forfeiture upon failure to perform the work within a prescribed time, the forfeiture may be declared by legislative act without judicial proceedings to ascertain and determine the failure of the grantee. Any public assertion by legislative act of the ownership of the State after the default of the grantee — such as an act resuming control of the road and franchises, and appropriating them to particular uses, or granting them to another corporation to perform the work — is equally effective and operative. *Farnsworth et al., Trustees*, v. *Minnesota and Pacific Railroad Company et al.*, 49.

FRAUD. See *Bankruptcy*, 2; *Contracts*, 4; *Duty on Exports*, 2, 3; *Equity*, 1; *Insurance; Liens; Pleading*, 1; *Practice*, 14; *Settlement.*

GENERAL AVERAGE.

A vessel bound to the United States, having loaded at one of the guano islands where clearances were not granted, was on her way to Callao

GENERAL AVERAGE (*continued*).

for one, when she was badly injured by a collision with another vessel. Proceeding in distress to that, the nearest port, she came to anchor at the anchorage of vessels calling at that port for clearances. A survey revealed the fact that her damaged condition was such as to require her to be unladen and extensively repaired before prosecuting her voyage. She was, therefore, removed to a hulk nearer the pier, where most of her cargo was discharged, and thence to a dock for repairs. After they were finished, she was, with reasonable despatch, reloaded, and completed her voyage. Before the delivery of her cargo, the consignees gave an average bond, whereby they agreed to pay the owner of the ship their respective proportions of the expenses and charges incurred by him in consequence of such collision, as soon as the average should be adjusted conformably to law and the usages of the port of New York. *Held*, that as the services of her crew were necessary for her preservation and safety in hauling her to and from the hulk for unloading and reloading, and in moving her while in dock undergoing repairs, their wages and provisions, during the time they were so employed, were properly allowed in general average. *Held further*, that an adjustment of the amount paid for the services, board, travelling and incidental expenses of an agent sent by the owner of the ship, in good faith, to Callao to advise and assist the master, for the benefit of the ship and cargo, having been made in conformity with the usage of the port of New York, the charge was properly allowed. *Hobson et al.* v. *Lord*, 397.

GENERAL USAGE. See *Admiralty*, 1.

GEORGIA, STATUTE OF LIMITATIONS OF.

The insolvency of a bank having occurred prior to June 1, 1865, an action against a stockholder, under the individual liability clause of its charter, not commenced by Jan. 1, 1870, is barred by the Statute of Limitations of the State of Georgia of March 16, 1869. *Terry* v. *Tubman*, 156.

GOVERNMENT OF THE STATES. See *Constitutional Law*, 9–11, 13–16.

GOVERNMENT OF THE UNITED STATES. See *Constitutional Law*, 9–13, 15, 16.

GRANT. See *Fiction of Law; Public Lands*, 3–10.

1. Where rights claimed under the United States are set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them. *Leavenworth, Lawrence, and Galveston Railroad Co.* v. *United States*, 733.
2. The rule announced in the former decisions of this court, that a grant by the United States is strictly construed against the grantee,

GRANT (*continued*).
applies as well to grants to a State to aid in building railroads as to one granting special privileges to a private corporation. *Id.*

"GRANT" AND "DEMISE," EFFECT OF THESE WORDS IN A LEASE FOR YEARS. See *Lease.*

HABEAS CORPUS. See *Jurisdiction*, 6.

HEIRS. See *Confiscation*, 2; *Legal Representatives*, 1.

HONORABLE DISCHARGE. See *Allowances.*
An honorable discharge of a soldier from service does not restore to him pay and allowances forfeited for desertion. *United States* v. *Landers*, 77.

HOSTILE POSSESSION. See *Captured or Abandoned Property*, 3.

ILLINOIS, CONSTITUTION OF. See *Municipal Bonds*, 5, 6, 9.

ILLINOIS, CONTRACTS OF ASSIGNMENT IN. See *Bills of Exchange and Promissory Notes.*

IMPORTS. See *Duty on Imports; Questions of Fact.*

INCOME TAX. See *Statute of Limitations.*

INDICTMENT. See *Criminal Law*, 1–4.

INDIVIDUAL LIABILITY OF STOCKHOLDERS. See *Georgia, Statute of Limitations of.*
Where the charter of a bank contained a provision binding the individual property of its stockholders for the ultimate redemption of its bills in proportion to the number of shares held by them respectively, the liability of the stockholders arises when the bank refuses or ceases to redeem and is notoriously and continuously insolvent. *Terry* v. *Tubman*, 156.

INFRINGEMENT. See *Patents*, 4, 5, 8–12.

INJUNCTION. See *Louisiana Consolidated Bonds; Mandamus; Taxes, Collection of, Powers of Courts to Restrain*, 1–4.

INSURANCE. See *Burden of Proof; Contracts*, 4, 5.
A. having bought goods at an auction-store, and made part payment therefor, and having the disposal of them, permitted them to remain there for sale by and under his direction. He agreed that the first proceeds of the sale, to the amount of $3,150, should be paid to the vendor; and that the auctioneers, if they advanced money upon the goods, should retain the possession and control thereof as security. No advance was made. A. procured an insurance upon the goods for $2,500, representing that no other person was interested therein; that they were unincumbered; and that he estimated their value to be $12,000. Part of the goods were sold; and, the remainder having

INSURANCE (*continued*).

been destroyed by fire, A. brought suit against the company for the amount of the policy. The company set up by way of defence, that his statement as to the freedom of the goods from incumbrance was untrue; that he, knowing of its rule not to insure goods at more than three-fourths of their value, had overvalued them; and that they were, in fact, worth but $6,000. The jury found that the value of the goods destroyed was $7,204. *Held*, that the facts of the case do not justify the claim that the property was incumbered, or that the title of the insured therein was not absolute. *Held further*, that, as nothing appeared at the trial to show that the estimate of the value of the goods by A. was not an honest one, the charge of the court below, that such valuation, if made in good faith, and without intention to mislead or defraud the company, would not defeat a recovery, was without error. *Franklin Fire Insurance Co.* v. *Vaughan*, 516.

INSURER, VALUATION OF PROPERTY BY. See *Insurance.*

INSURRECTION.

The United States, in the enforcement of its constitutional rights against armed insurrection, has all the powers not only of a sovereign, but also of the most favored belligerent. As belligerent, it may by capture enforce its authority; and, as sovereign, by pardon, and restoration to all rights, civil as well as political, recall its revolted citizens to allegiance. *Lamar, Ex'r*, v. *Browne et al.*, 187.

INTEREST.

The holder of a coupon is entitled to recover interest thereon from the time it fell due. *Town of Genoa* v. *Woodruff et al.*, 502.

INTERNATIONAL LAW.

1. Unless treaty stipulations provide otherwise, a merchant vessel of one country visiting the ports of another for the purpose of trade, is, so long as she remains, subject to the laws which govern them. *United States* v. *Diekelman*, 520.
2. Where, in time of war, a foreign vessel, availing herself of a proclamation of the President of May 12, 1862, entered the port of New Orleans, the blockade of which was not removed, but only relaxed in the interests of commerce, she thereby assented to the conditions imposed by such proclamation that she should not take out goods contraband of war, nor depart until cleared by the collector of customs according to law. *Id.*
3. As New Orleans was then governed by martial law, a subject of a foreign power entering that port with his vessel under the special license of the proclamation became entitled to the same rights and privileges accorded under the same circumstances to loyal citizens of the United States. Restrictions placed upon them operated equally upon him. *Id.*

INTERNATIONAL LAW (*continued*).

4. Where the detention of the vessel in port was caused by her resistance to the orders of the properly constituted authorities whom she was bound to obey, she preferring such detention to a clearance upon the conditions imposed, — *Held*, that her owner, a subject of Prussia, is not "entitled to any damages" against the United States, under the law of nations or the treaty with that power. 8 Stat. 384. *Id.*

INVENTION. See *contracts*, 8; *Patents*, 13.

JUDGMENT IN A STATE COURT. See *Bankruptcy*, 1.

JUDICIAL COMITY. See *Practice*, 15.

1. When the construction of the constitution or the statutes of a State has been fixed by an unbroken series of decisions of its highest court, the courts of the United States accept and apply it in cases before them. *Township of Elmwood* v. *Marcy*, 289.
2. The Supreme Court of the State of Illinois having decided that a law of her legislature is valid under her constitution, and having construed the statute, this court adopts the decision of that court as a rule to be followed in the Federal courts. *State Railroad Tax Cases*, 575.

JUDICIAL POWERS, DELEGATION OF. See *Court of Claims*, 2, 3.

JURISDICTION. See *Special Finding*.

I. Of The Supreme Court.

1. Where suit was commenced, Nov. 16, 1868, for rent claimed to be due up to Aug. 8, 1865, and where, throughout the whole intervening time, the district within which the cause of action, if any, arose, was under the control of the Federal authorities, and the defendant could be served there with process, — *Held*, that the decision of the Supreme Court of the State, that the suit was barred by the Statute of Limitations, is not subject to re-examination here. *Harrison* v. *Myer, Executrix*, 111.
2. The judgment of a circuit court, reversing that of a district court and ordering a new trial, is not final; and this court has no jurisdiction to review it. *Baker et al., Assignees*, v. *White*, 176.
3. This court has no jurisdiction to re-examine the judgment of a State court in a case where the pleadings and the instructions asked for and refused present questions as to the effect, under the general public law, of a sectional civil war upon the contract which was the subject of the suit, and when it was not contended that that law, as applicable to the case, had been modified or suspended by the constitution, laws, treaties, or executive proclamations, of the United States. *New York Life Insurance Co.* v. *Hendren*, 286.
4. The decision of the highest State court in which such decision could

JURISDICTION (*continued*).

be had, adverse to a right under an act of Congress set up in a chancery suit or in any other case, where all the evidence becomes a part of the record in that court, the same record being brought here, can be re-examined upon the law and the facts, as far as may be necessary to determine the validity of that right. In a common-law action, where the facts are passed upon by a jury, or by a State court, or by a referee, to whom they have been submitted by waiving a jury, where the finding is by the State law conclusive, this court has the same inability to review those facts as it has in a case coming from a circuit court of the United States. *Republican River Bridge Co.* v. *Kansas Pacific Railroad Co.*, 315.

5. To give this court jurisdiction over the judgment of a State court, it must appear that the decision of a Federal question presented to that court was necessary to the determination of the cause, and that it was actually decided, or that, without deciding it, the judgment as rendered could not have been given. *Brown* v. *Atwell, Administrator*, 327.
6. Writs of error and appeals lie to this court from the Supreme Court of the Territory of Montana only in cases where the value of the property or the amount in controversy exceeds the sum of one thousand dollars, and from decisions upon writs of *habeas corpus* involving the question of personal freedom. Rev. Stat., sect. 1909. *Potts et al.* v. *Chumasero et al.*, 358.
7. Where, in ejectment for a part of the lands confirmed to the city of San Francisco by an act of Congress, the validity and operative effect of which were not questioned, the judgment of the Supreme Court of the State of California was adverse to the defendant, who endeavored to make out such possession as would, under the operation of the city ordinance and the act of the legislature, transfer, as he claimed, the title of the city to him, — *Held*, that this court has no jurisdiction. *McStay* v. *Friedman*, 723.

II. Of the Circuit Courts.

8. In cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different States, it rests with Congress to determine at what time and upon what conditions the power may be invoked, — whether originally in the Federal court, or after suit brought in the State court; and, in the latter case, at what stage of the proceedings, — whether before issue or trial by removal to a Federal court, or after judgment upon appeal or writ of error. *Gaines* v. *Fuentes et al.*, 10.
9. As the Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended, Congress may provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal judiciary. *Id.*

JURISDICTION (*continued*).

10. A suit to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate, is, in essential particulars, a suit in equity; and if by the law obtaining in a State, customary or statutory, such a suit can be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the Circuit Court of the United States, if the parties are citizens of different States. *Id.*
11. A bill in chancery was filed in the Circuit Court of the United States for the District of Louisiana by a citizen of Louisiana, the executrix of a deceased member of a firm, against the surviving partner, a citizen of Wisconsin, for an account as part of the partnership assets of the proceeds of a judgment recovered by the latter in said court, in his individual name, for a debt which she alleged was due the firm. The defendant, prior to the service of process on him, had on his petition been declared a bankrupt by the District Court of the United States for the District of Wisconsin; but, answering to the merits, he denied that the debt was due to the partnership. An amended and supplemental bill was afterwards filed, making a defendant the assignee in bankruptcy, who adopted in a separate answer the defence set up by the original defendant. He, in an answer subsequently filed, claimed that the said District Court had exclusive jurisdiction in the cause. During its progress, a receiver was appointed, who collected the amount due on the judgment. The Circuit Court dismissed the cause for want of jurisdiction. *Held*, that notwithstanding the proceedings in bankruptcy, and although the assignee thereunder may have been appointed and the assignment made to him prior to filing said bill, the Circuit Court, having possession of the subject-matter in controversy as well as jurisdiction of the parties, had jurisdiction of the cause, and should have decided it upon its merits. *Burbank* v. *Bigelow et al.*, 179.
12. Under sect. 4979 of the Revised Statutes, the Circuit Court of the United States has, without reference to the citizenship of the parties, jurisdiction of a suit against an assignee in bankruptcy, brought by any person claiming an adverse interest touching any property, or rights of property, transferable to or vested in such assignee. *Id.*
13. *Lathrop, Assignee*, v. *Drake et al.*, 91 U. S. 516, and *Eyster* v. *Gaff et al.*, id. 521, cited and approved. *Id.*
14. The United States was the creditor of the firm of A., B., & Co., doing business in London, and consisting of several persons, some of whom resided there. The others resided in this country, and, with another partner, constituted the firm of A. & Co. The members of the latter firm were duly declared bankrupt, and a trustee appointed under the forty-third section of the Bankrupt Act of March 2, 1867. *Held*, that the United States was under no obligation to pursue the partnership effects of A., B., & Co. before filing a bill against the trustee of the bankrupt members of the firm of A. & Co., to sub-

JURISDICTION (*continued*).

ject their separate property in his hands to the payment of the debt due to the United States from A., B., & Co.; and the Circuit Court had original jurisdiction of the case thereby made, although the fund arose, and the trustee was appointed, under the Bankrupt Act. *Lewis, Trustee*, v. *United States*, 618.

"LAND," CONSTRUCTION OF THE TERM IN A GRANT BY THE UNITED STATES. See *Public Lands*, 4–6.

LAND GRANTS. See *Forfeiture; Public Lands*, 4–10.

1. On the 3d of March, 1857 (11 Stat. 195), Congress passed an act granting certain lands to the Territory of Minnesota, for the purpose of aiding in the construction of several lines of railroad between different points in the Territory. The act declared that the lands should be exclusively applied to the construction of that road on account of which they were granted, and to no other purpose whatever; and that they should be disposed of by the Territory or future State only as the work progressed, and only in the manner following: that is to say, a quantity of land, not exceeding one hundred and twenty sections for each of the roads, and included within a continuous length of twenty miles of the road, might be sold; and when the governor of the Territory or the future State should certify to the Secretary of the Interior that any continuous twenty miles of any of the roads were completed, then another like quantity of the land granted might be sold; and so, from time to time, until the roads were completed. *Held*, that the construction of portions of the road on account of which lands were granted, as thus designated, was a condition precedent to a conveyance by the Territory or future State of any of the lands beyond the first one hundred and twenty sections. Accordingly, an act of the Territory, transferring to a railroad company these lands in advance of any work on its road, only conveyed title to the first one hundred and twenty sections. *Farnsworth et al., Trustees*, v. *Minnesota and Pacific Railroad et al.*, 49.
2. The act of Congress of March 3, 1857, granting certain lands to the Territory of Minnesota for the purpose of aiding in the construction of several lines of railroad between different points in the Territory, only authorized for each road, in advance of its construction, a sale of one hundred and twenty sections. No further disposition of the land along either road was allowed, except as the road was completed in divisions of twenty miles. *Chamberlain* v. *St. Paul and Sioux City Railroad Co. et al.*, 299.

LEASE. See *Evidence*, 1.

The words "grant" and "demise" in a lease for years create an implied warranty of title and a covenant for quiet enjoyment. *Stott et al.* v. *Rutherford*, 107.

LEGAL REPRESENTATIVES.

1. In 1802 a concession of six thousand arpents of land was made to S. by the acting Spanish governor of Upper Louisiana. An official survey, made by the officer designated in the concession, and in part fulfilment thereof, gives the boundaries of a tract situate on the river Des Pères, about eight miles from St. Louis, containing four thousand and two arpents. Another survey was made by the same surveyor, under the same concession, of another tract, upon the river Meramac, about twenty miles south-west of St. Louis, supposed to contain fourteen hundred arpents. The claim of S. was rejected in 1811 by the board of commissioners, but was confirmed by the recorder of land-titles for the quantity contained in a league square (seven thousand and fifty-six arpents), situate on the river Des Pères, and the decision of that officer, embraced in his report of February, 1816, was confirmed by an act of Congress, April 29, 1816. The surveyor of the United States for the Territory of Missouri surveyed for S., on the sixth and seventh days of May, 1818, a tract containing one league square, and including the four thousand and two arpents covered by the previous survey, and it was designated on the plat of the township as survey No. 1953. The recorder of land-titles made his certificate No. 1033, dated Sept. 13, 1825, setting forth that S. was entitled to receive a patent for the tract containing seven thousand and fifty-six arpents as contained in said survey No. 1953, and transmitted it to the Commissioner of the General Land-Office for a patent. The latter declined to issue it, as it varied from the original survey, and included land not therein embraced. S., by deed bearing date Aug. 29, 1818, conveyed to H. certain lands therein specifically described, which had been previously confirmed, and also the interest of said S. in all the land to which said S. was entitled by virtue of concessions under the Spanish government, ratified by act of Congress. S. died in 1824. Congress in 1842 directed a patent to issue to S., or his legal representatives, for seven thousand and fifty-six arpents, pursuant to patent certificate No. 1033, Sept. 13, 1825, and to the survey No. 1953. The patent was accordingly issued Feb. 1, 1869. *Held*, that by virtue of the deed of S. his grantee H. became his legal representative, and acquired as against the heirs-at-law of S. the title to all the tracts of land described in said patent. *Morrison et al.* v. *Jackson*, 654.
2. A contract concerning the use of a patented invention bound the "parties and their legal representatives to the covenants and agreements of the contract." A plea alleged that the defendants "are the legal representatives and successors and assignees in business and interest" of one of the parties. The question being on the sufficiency of this plea, *Held*, that the defendants were the legal representatives of that party within the meaning of the contract. *Hammond et al.* v. *Mason and Hamlin Organ Co.*, 724.

LEGISLATIVE POWER.

Unless the constitution of a State or the organic law of a Territory otherwise prescribes, the legislature has the power to diminish or enlarge the area of a county, whenever the public convenience or necessity requires. *Commissioners of Laramie Co.* v. *Commissioners of Albany Co. et al.*, 307.

LIENS. See *Mortgage*, 3–5.

A person cannot avail himself of a lien, the discharge of which has been fraudulently prevented by his own acts. *Carey et al.* v. *Brown*, 171.

LOCATION. See *Public Lands*, 1, 2.

LOUISIANA CONSOLIDATED BONDS.

On the 24th of January, 1874, the legislature of Louisiana passed "the Funding Act," which created a board of liquidation, consisting of the governor and other State officers. Its principal stipulations, aside from that which provided that, prior to the year 1914, the entire State debt should never be increased beyond the sum of fifteen million dollars, are: *First*, that the "consolidated bonds," the issue of which is thereby authorized, shall not exceed in amount fifteen million dollars, or so much thereof as may be necessary for the purpose of consolidating and reducing the floating and bonded debt of the State, amounting to twenty-five million dollars, and consisting of valid outstanding bonds, and valid warrants of the auditor theretofore issued; *secondly*, that they shall only be used for exchange for said debt at the rate of sixty cents in consolidated bonds for one dollar in such bonds and warrants; *thirdly*, that a tax of five and a half mills on the dollar of the assessed value of all the real and personal property of the State shall be annually levied and collected for paying the interest and principal of the bonds, and is set apart and appropriated for that purpose, and no other, any surplus beyond paying interest to be used for the purchase and retirement of the bonds; *fourthly*, that the power of the judiciary, by means of *mandamus*, injunction, and criminal procedure, shall be exerted to carry out the provisions of the act. An amendment of the constitution was subsequently adopted, which declared that the issue of the consolidated bonds should create a valid contract between each holder thereof and the State, which the latter should not impair; and directed that the tax should be levied and collected without further legislation. Thereafter, on the 2d of March, 1875, the legislature passed an act authorizing the board of liquidation to issue a portion of such consolidated bonds to the Louisiana Levee Company, in liquidation of a debt claimed to be due it under a contract made in 1871. This debt was not one of those to fund which the consolidated bonds had been issued; but the act, under which that contract was made, provided and set apart certain taxes, to be levied and collected throughout the State, to meet the payments

LOUISIANA CONSOLIDATED BONDS (*continued*).

which would accrue to the company. The Circuit Court, upon a bill filed for that purpose by a citizen of Delaware, who had surrendered his old bonds, and taken sixty per cent of the amount in consolidated bonds, two millions of which had then been issued, granted an injunction restraining the board from using the consolidated bonds, and from issuing any other State bonds in payment of said pretended debt. *Held*, that as the proposed funding of the levee debt at par in the consolidated bonds destroys all benefits anticipated from the funding, on which benefits those who accepted its terms had a right to rely, and makes an unjust discrimination between one class of creditors and another, the injunction, so far as it restrained the funding of said debt in consolidated bonds issued, or to be issued, under the act of Jan. 24, 1874, was properly granted. *Board of Liquidation et al.* v. *McComb*, 531.

LOUISIANA, PRACTICE CODE OF.

1. Under the Code of Practice in Louisiana, a suit may be brought and distinct judgments rendered against a defendant, as administratrix of her deceased husband, as widow in community, and as tutrix of his minor heirs. *Kittredge* v. *Race et al.*, 116.
2. There was no error in this case in rendering judgment against the minor heirs, declaring that each is liable for his or her proportional share of the father's half of the estate, with benefit of inventory. The legal effect is the same as if the judgment had been against the defendant as tutrix ; nor was there error in rendering judgment for all the costs against her and the minor heirs *in solido*. *Id.*

MANDAMUS.

Although a State, without its consent, cannot be sued by an individual, nor can a court substitute its own discretion for that of executive officers, in matters belonging to their proper jurisdiction, yet, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void. *Board of Liquidation* v. *McComb*, 531.

MARTIAL LAW. See *International Law*, 3.

MECHANICAL EQUIVALENT. See *Patents*, 4.

MERGER. See *Corporations*, 1–4.

MINNESOTA, GRANT OF LANDS TO. See *Land Grants*, 1, 2.

MISSISSIPPI. See *Contracts*, 2.

MISSOURI, CONSTITUTION OF.

Sect. 14 of art. 11 of the Constitution of Missouri, adopted in 1865, declaring that "The general assembly shall not authorize any county, city, or town, to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto," extends as well to townships as to counties, cities, and towns. *Harshman* v. *Bates County*, 569.

"MONEY, SILVER-PLATE, AND BULLION." See *Contraband of War*.

MORTGAGE.

1. Where mortgaged property is sold under a power, the absence of objection on the part of the mortgagor to the sale as made cures any defect which exists therein, and gives it validity. *Markey et al.* v. *Langley et al.*, 142.
2. Where the mortgagees are expressly authorized to sell for cash or on credit, they may do either, or combine them in the sale; nor is a sale for part in cash and part on credit under a power requiring it to be made for cash invalid, if the departure from the terms of the power is beneficial to the mortgagor. It is immaterial whether such arrangement for payment is made before or after the sale. *Id.*
3. Where property, subject to mortgage and other liens, is sold by the first mortgagee, he becomes the trustee for the benefit of all concerned. If he regards the interest of others as well as his own, seeks to promote the common welfare, and keeps within the scope of his authority, a court of equity will in no wise hold him responsible for mere errors of judgment or results, however unfortunate, which he could not reasonably have anticipated. *Id.*
4. Upon the sale of such property, the liens attach to the proceeds thereof in the same manner, order, and effect as they bound the premises before the sale, the new securities standing in substitution for the old. *Id.*
5. Where the Cairo and Fulton Railroad Company accepted certain bonds issued under an act of the general assembly of the State of Missouri, which declared that they "should constitute a first lien and mortgage upon the road and property" of the company, — *Held*, that the word "property" included all the lands of the said company, and that a valid lien on them was created by the act. *Wilson* v. *Boyce*, 320.
6. The title of a subsequent purchaser from the company of its lands is destroyed by the sale of them under the mortgage. *Id.*

MUNICIPAL BONDS. See *Missouri, Constitution of.*

1. This court, conformably to the opinion of the Supreme Court of Illinois, holds that the bonds issued April 27, 1869, by the supervisor and town-clerk of the township of Elmwood, in that State, by way of payment for an additional subscription of $40,000 of stock of the Dixon, Peoria, and Hannibal Railroad Company, over and above the amount authorized by the original charter of said company, are not binding on the township. *Township of Elmwood* v. *Marcy*, 289.
2. Where, by legislative enactment, authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the enactment that the officers of the municipality were invested with power to decide whether that condition has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal. *Town of Coloma* v. *Eaves*, 484.
3. An act of the legislature of New York authorized the supervisor of any town in the county of Cayuga, and the assessors of such town, who were thereby appointed to act with the supervisor as commissioners, to borrow money to the amount of $25,000 to aid in the construction of a railroad passing through the town, and execute the bonds of the town therefor. The act, however, provided that the supervisor and commissioners should have no power to issue the bonds until the written assent of two-thirds of the resident tax-payers, as appearing on the assessment-roll of such town next previous to the time when such money may be borrowed, should have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of said county, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed comprise two-thirds of all the resident tax-payers of said town on the assessment-roll of such town next previous thereto. Subsequently a written assent to the effect required was filed in that office, the persons who signed it representing themselves to be such resident tax-payers. Upon this instrument was indorsed the affidavit of the supervisor and one of the commissioners, that the persons whose names were subscribed to the assent composed two-thirds of all the resident tax-payers of said town. The bonds were issued, signed by the supervisor and commissioners, reciting that, in pursuance of said act of the legislature, "and the written assent of two-thirds of the resident tax-payers of said town obtained and filed in the office of the clerk of the county of Cayuga," said town promised to pay the sum of money therein named to bearer. *Held*, 1. That it was the appointed

MUNICIPAL BONDS (*continued*).

province of the supervisor and commissioners to decide the question, whether the condition precedent to the exercise of their authority had been fulfilled; that they did decide it by issuing the bonds; and that the recital in the bonds was a declaration of their decision. 2. That the supervisor and commissioners, who procured what purported to be the written assent of the tax-payers, had means of knowledge touching the genuineness of the signatures to the paper, which, from the nature of the case, the purchaser could not have; and that, in a suit by a *bona fide* holder of the bonds, the town was estopped from disputing their validity, and that he was not bound to prove the genuineness of the signatures to the written assent. *Town of Venice* v. *Murdock*, 494.

4. Pursuant to the authority conferred by the act of the legislature of the State of Kansas, and by virtue of a popular election thereby authorized, the mayor and council of the "City of Fort Scott" were empowered to issue $25,000 of bonds of the city for the purpose of procuring the right of way for the Missouri, Kansas, and Texas Railway Company through that city, and also procuring grounds for dépôts, engine-houses, machine-shops, and yard-room, and donating the same to the company, provided that the company, in the judgment of the mayor and council, had first given evidence of their intention to comply with certain specified conditions. The company complied with the conditions. The mayor and council then, upon an understanding with the company, agreed to deliver to it the $25,000 of bonds in lieu of said grounds and right of way, and in full satisfaction of all the obligations resting on the city in relation thereto. The bonds were duly issued, and registered in the office of the State auditor, who certified upon each that it had been regularly and legally issued, that the signature to it was genuine, and that it had been duly registered in accordance with the State law. They were thereupon delivered to the railroad company. *Held*, that they were binding on the city. *Converse* v. *City of Fort Scott*, 503.

5. An act of the general assembly of the State of Illinois in force March 7, 1867, authorized towns acting under the Township Organization Law of the State — of which the town of Concord was one — to appropriate money to aid in the construction of a certain railroad, to be paid to said company as soon as its track should have been located and constructed through such towns. At a popular election held in the town of Concord, on the 20th of November, 1869, the proposition to make such appropriation was submitted to the legal voters thereof, as required by the act; and the town voted the appropriation, provided the company would run its road through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation; and on the 9th of October, 1871, town bonds representing such donation were issued by the supervisor and town-clerk. *Held*, 1. That under the statute the town could not make an appropriation

MUNICIPAL BONDS (*continued*).
or donation in aid of the company until its road was located and constructed through the town. 2. That the constitution of the State, which came into operation July 2, 1870, annulled the power of any city, town, or township, to make donations or loan its credit to a railroad company, and, after that date, rendered the act of 1867 ineffective. 3. As the town had no authority to make a contract to give, and the acceptance by the company was an undertaking to do nothing which it was not bound to do, before the authority of the town to make or to engage to make a donation came into existence, no valid contract arose from such offer and acceptance. 4. That the bonds so issued are void. *Town of Concord* v. *Portsmouth Savings-Bank*, 625.

6. An act of the general assembly of the State of Illinois, approved March 26, 1869, authorized the board of supervisors of Moultrie County to subscribe to the stock of the Decatur, Sullivan, and Mattoon Railroad Company, to an amount not exceeding $80,000, and to issue bonds therefor when the road should be opened for traffic between the city of Decatur and the town of Sullivan. In December, 1869, the board of supervisors ordered that a subscription to the stock of that company, in the sum of $80,000, be made by the county; and that, in payment therefor, bonds payable to said company should be issued and delivered to it, when the road should be so open for traffic. No subscription was actually made on the books of the company; but its president and clerk entered of record the resolution of the board of supervisors, and the company, by a contract made April 15, 1870, appropriated the bonds that would be received in payment of that subscription. The bonds were delivered to the company and the road was so open to traffic early in 1873. By the constitution of the State, which took effect July 2, 1870, counties were prohibited from subscribing to the capital stock of any railroad or private corporation, or from making donations to or loaning their credit in aid of such corporations. *Held*, that whether the action of the board in December, 1869, be in substance and legal effect a subscription, or only an undertaking to subscribe which was accepted by the company, a valid contract existed between the county and the company, which, when the new constitution took effect, authorized the subsequent delivery of the bonds. *County of Moultrie* v. *Rockingham Ten-Cent Savings-Bank*, 631.

7. The board of supervisors, acting under the authority of the act in question, could bind the county by a resolution, which, in favor of private persons interested therein, might, if so intended, operate as a contract; and the obligation thereby assumed would continue in force after July 2, 1870, although the power to *enter* into such a contract was, *after that date*, withdrawn. *Id.*

8. The holder of the bonds purchased them before their maturity, and without notice of any defence. They recite that they are issued by

MUNICIPAL BONDS (*continued*).

the county in pursuance of the subscription of the capital stock of said company, made by the board of supervisors of the county, December, 1869, in conformity to the provisions of an act of the general assembly above mentioned. The purchaser was thus assured that the subscription was made when they had authority to make it; and it would be tolerating a fraud to permit the county, when called upon for payment, to set up that it was not made until after July 2, 1870, when their authority had expired. *Id.*

9. The constitution of a State cannot impair the obligation of a contract; but the Constitution of Illinois declares that the contracts of bodies corporate shall continue to be as valid as if it had not been adopted. The power to subscribe carried with it authority to issue bonds for the sum subscribed, and, the subscription being valid, the bonds are equally so. *Id.*

10. An act of the legislature of Kansas of Feb. 25, 1870, provides, that whenever fifty of the qualified voters, being freeholders of any municipal township in any county, shall petition the board of county commissioners of such county to submit to the qualified voters of the township a proposition to take stock in any railroad proposed to be constructed into or through such township, and shall designate in the petition the railroad company, and the amount of stock proposed to be taken, it shall be the duty of the board to cause an election to be held, to determine whether such subscription shall be made; provided, that the amount of bonds voted shall not be above such a sum as will require a levy of more than one per cent per annum on the taxable property of the township, to pay the yearly interest on the amount of bonds issued. In the event of the vote being favorable, the board of county commissioners were to issue the bonds in the name of the township. The bonds in question here were regularly executed by the chairman of the board, and attested by the county-clerk and seal of the county. They recite that they are issued in accordance with said act, and in pursuance of the votes of three-fifths of the legal voters of the township at a special election duly held. *Held*, that in a suit brought on some of the coupons by a *bona fide* holder for value, it cannot be shown as a defence to a recovery, that, at the time of voting and issuing the bonds, the value of the taxable property of the township was not in amount sufficient to authorize the voting and issuing of the whole series of them. *Marcy* v. *Township of Oswego*, 637.

11. All prerequisite facts to the execution and issue of the bonds were, by the statute, referred to the board of county commissioners; and the plaintiff was not bound, when he purchased, to look beyond the legislative act and the recitals of the bonds. *Id.*

12. A bond of the tenor following, —

"Be it known that Humboldt Township, in the county of Allen and State of Kansas, is indebted to the Fort Scott and Allen County

MUNICIPAL BONDS (*continued*).

Railroad Company, or bearer, in the sum of $1,000, lawful money of the United States, with interest at the rate of seven per cent per annum, payable annually on the first days of January in each year, at the banking-house of Gilman, Son, & Co., in the city of New York, on the presentation and surrender of the respective interest-coupons hereto annexed. The principal of this bond shall be due and payable on the thirty-first day of December, A.D. 1901, at the banking-house of Gilman, Son, & Co., in the city of New York. This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through said township, in pursuance of and in accordance with an act of the legislature of the State of Kansas, entitled 'An Act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same,' approved Feb. 25, A.D. 1870; and for the payment of said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humboldt Township, as also its property, revenue, and resources, is pledged.

"In testimony whereof, this bond has been signed by the chairman of the board of county commissioners of Allen County, Kan., and attested by the county-clerk of said county, this twelfth day of October, 1871.

"Z. WISNER,
"*Chairman County Commissioners.*
"Attest: W. E. WAGGONER, *County-Clerk.*"

— is negotiable, and a *bona fide* holder is entitled to the rights of a holder of negotiable paper taken in the ordinary course of business before maturity. *Humboldt Township* v. *Long et al.*, 642.

13. Although the election authorizing the issue of the bonds was held within less than thirty days after the day of the order calling it, they are not thereby rendered invalid in the hands of a *bona fide* holder for value, who, without any knowledge of the process through which the legislative authority was exercised, relied upon the recitals in them that they had been issued in accordance with law. The recitals are conclusive in a suit brought by him against the township. *Id.*

MUNICIPAL BONDS, EFFECT OF RECITAL IN. See *Coupons; Municipal Bonds*, 2, 3, 8, 10, 11, 13.

MUNICIPAL ELECTIONS. See *Constitutional Law*, 4–6.

MUNICIPAL OFFICERS, ACTS OF. See *Municipal Bonds*, 1.

NATIONAL BANKS.

1. In adjusting and compromising contested claims against it growing out of a legitimate banking transaction, a national bank may pay a

NATIONAL BANKS (*continued*).

larger sum than would have been exacted in satisfaction of them, so as to thereby obtain a transfer of stocks of railroad and other corporations, in the honest belief, that, by turning them into money under more favorable circumstances than then existed, a loss which it would otherwise suffer from the transaction, might be averted or diminished. So, also, it may accept stocks in satisfaction of a doubtful debt, with a view to their subsequent sale or conversion into money in order to make good or reduce an anticipated loss. *First National Bank of Charlotte* v. *National Exchange Bank of Baltimore*, 122.

2. Such transactions would not amount to dealing in stocks, and they come within the general scope of the powers committed to the board of directors and the officers and agents of a national bank. Subject to such restraints as its charter and by-laws impose, they may do in this behalf whatever natural persons can lawfully do. *Id.*
3. Dealing in stocks by a national bank is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. *Id.*

NEGOTIABLE BONDS. See *Municipal Bonds*, 13.

NEGOTIABLE INSTRUMENT, AUTHORITY TO FILL BLANKS IN, IMPLIED BY THE DELIVERY OF IT TO ANOTHER PARTY. See *Municipal Bonds*, 12.

1. Where a party to a negotiable instrument intrusts it to another for use as such with blanks not filled, it carries on its face an implied authority to complete it by filling them, but not to vary or alter its material terms by erasing what is written or printed as a part thereof, nor to pervert its scope or meaning by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument. *Angle* v. *North-Western Mutual Life Insurance Co.*, 330.
2. It is a principle of universal application, that an unauthorized material alteration of a written instrument renders it void. *Id.*

NEW-MADRID CERTIFICATE. See *Public Lands*, 2.

NEW TRIAL, REFUSAL OF A COURT TO GRANT. See *Practice*, 17.

OFFICIAL DUTY. See *Mandamus*.

OSAGE INDIAN RESERVATION. See *Public Lands*, 7, 8.

PARTIES.

1. Where a suit, brought by a trustee to recover trust-property, or to reduce it to possession, in no wise affects his relations with his *ces-*

PARTIES (*continued*).

tuis que trust, it is unnecessary to make them parties. *Carey et al.* v. *Brown*, 171.

2. Where the want of parties does not appear on the face of a bill in equity, the objection must be set up by plea or answer, and cannot be made for the first time in this court. *Id.*

PASSENGERS. See *Commerce*, 1–16.

PATENTS. See *Contracts*, 8; *Legal Representatives*, 2.

1. The decision of the Commissioner of Patents in the allowance and issue of a patent creates a *prima facie* right only; and, upon all the questions involved therein, the validity of the patent is subject to examination by the courts. *Reckendorfer* v. *Faber*, 347.
2. A combination, to be patentable, must produce a different force, effect, or result in the combined forces or processes from that given by their separate parts. There must be a new result produced by their union; otherwise it is only an aggregation of separate elements. *Id.*
3. A combination, therefore, which consists only of the application of a piece of rubber to one end of the same piece of wood which makes a lead-pencil is not patentable. *Id.*
4. Where an improvement in sawmills, for which letters-patent were issued, consists of the combination of the saw with a pair of curved guides at the upper end of the saw, and a lever, connecting-rod or pitman, straight guides, pivoted cross-head, and slides or blocks and crank-pin, or their equivalents, at the opposite end, whereby the toothed edge of the saw is caused to move unequally forward and backward at its two ends while cutting, and the claim is, "giving to the saw in its downward movement a rocking or rolling motion by means of the combination of the cross-head working in the curved guides at the upper end of the saw, the lower end of which is attached to a cross-head, working in straight guides and pivoted to the pitman below the saw, with the crank-pin substantially as described," the use by another party of guides consisting of two straight lines representing two consecutive cords of the curve of the guides of the patentee, and arranged in other respects in the same manner as this curve, is clearly the employment of a mechanical equivalent, and is an infringement of the patent. *Ives et al.* v. *Hamilton, Executor*, 426.
5. It is not a change in principle to pivot the lower end of the saw to the pitman *below* the cross-head, and, by a reverse motion of the crank or driving-wheel, produce the same motion of the saw as when the pitman is pivoted above the cross-head. *Id.*
6. The description in a patent for an improvement, is sufficient, if a practical mechanic, acquainted with the construction of the old machine in which the improvement is made, can, with the patent and diagram before him, adopt such improvement. *Id.*
7. The essence of the improvement does not consist in the precise posi-

PATENTS (*continued*).
tion in which any part is placed, but in a combination of mechanical means for producing a certain result. *Id.*
8. In cases where profits are the proper measure of damages for the infringement of a patent, such profits as the infringer has made, or ought to have made, govern, and not those which the *plaintiff* can show that *he* might have made. *Burdell et al.* v. *Denig et al.*, 716.
9. The above rule applies peculiarly and mainly to cases in equity, and is based upon the idea that as to such profits the infringer of the patent should be treated as a trustee for the owner thereof. On the other hand, in actions at law, it has been repeatedly held that the rate at which sales of licenses of machines were made, or the established royalty, constitutes the primary and true criterion of damages. *Id.*
10. In the absence of satisfactory evidence of that class which is more appropriate in the forum where the case is pending, the other class may be resorted to, as furnishing one of the elements on which the damages, or the compensation, may be ascertained. *Id.*
11. A certain instrument (*supra*, p. 717), held not to be a mere power of attorney, revocable at the pleasure of the maker, but a contract under which rights for a specified time were acquired. *Id.*
12. As a receipt for the use of four of plaintiffs' machines, executed after the institution of the suit, was a valid acquittance of any claim for such use, it was properly admitted in evidence, under the general issue, to reduce the amount of damages. *Id.*
13. The rights growing out of an invention may be sold, including the right to use it, though no patent ever issues for it. *Hammond et al.* v. *Mason and Hamlin Organ Co.*, 724.

PLEADING. See *Criminal Law*, 2–4; *Legal Representatives*, 2; *Parties*, 1, 2; *South Carolina*, *Statute of Limitations of*.
1. In a suit by a company organized under the laws of the State of New York against citizens of the State of Alabama, on a bond conditioned for the faithful performance of duty, and the payment of money received for it, executed by the agent of the company who transacted business as such in the city of Mobile, where he resided, and by them as his sureties, the latter pleaded that the company, as a condition upon which it would retain in its employment the agent then largely indebted to it, required such bond, and also his agreement to apply all his commissions thereafter earned to his former indebtedness to it; that the agreement was made, and the commissions were so applied; that the company knew that the agent had no property, and depended upon his future acquisitions for the support of himself and family; that the defendants were ignorant of such indebtedness and agreement; that, had they been informed thereof, they would not have executed the bond; that the agreement as to the commissions and its performance were a fraud on them; and that the bond as to

PLEADING (*continued*).

them was thereby avoided. *Held*, that the plea was bad, as it set forth neither the circumstances attending the delivery of the bond, nor averred misrepresentations, fraudulent concealment, opportunities to make disclosure on the part of the company, inquiries by the sureties before the bond was delivered, or knowledge by the company that the sureties were ignorant of the facts complained of. *Held further*, that this agreement had no such connection with the undertaking of the sureties as to give them a right to be informed thereof, except in answer to inquiries. As none were made, the company was under no obligation to volunteer the disclosure. *Magee et al.* v. *Manhattan Life Insurance Co.*, 93.

2. In a suit against the assignor of a promissory note by the assignee thereof under an assignment made in Illinois, the non-averment of any special fact or reason why a suit against the maker would have been unavailing renders the declaration bad on demurrer; but the defect is cured by verdict. *Wills et al.* v. *Claflin et al.*, 135.

3. An allegation in a declaration that a patentee refused to manufacture and furnish his invention as he had agreed to do, is equivalent to an allegation of a demand on him to do so, and a refusal. *Hammond et al.* v. *Mason and Hamlin Organ Co.*, 724.

POSSESSION OF LAND OWNED BY THE UNITED STATES.

Mere possession of public land, though open, exclusive, and uninterrupted, creates no impediment to a recovery by the government or by one who receives its conveyance. The statute only begins to run after the title has passed from the government to its grantee. *Oaksmith's Lessee* v. *Johnston*, 343.

POWER OF ATTORNEY. See *Burden of Proof; Deed.*

Where a party, holding a patent from the United States for certain lands, authorized by a power of attorney, his agent "to act upon the application and demand of any person actually owning" town-lots in Denver City, within the limits of the lands, and to execute and deliver deeds to such persons who "may apply for the same within three months from" a certain date, — *Held*, that the "application and demand" must be made within that time; but the authority of the agent to adjudicate the claims was not so limited. *Clements* v. *Macheboeuf et al.*, 418.

POWER OF SALE. See *Mortgage*, 1–4.

POWER TO CONVEY. See *Deed.*

POWERS RESERVED TO THE UNITED STATES. See *Commerce*, 6–16; *Constitutional Law*, 10, 11, 13–15.

PRACTICE. See *Admiralty*, 1; *Parties*, 2.

1. Cases in equity come here from the circuit courts, and the district courts sitting as circuit courts, by appeal, and are heard upon the

PRACTICE (*continued*).

proofs sent up with the record. No new evidence can be received here. *Blease* v. *Garlington*, 1.

2. So much of the Judiciary Act of 1789 as relates to the oral examination of witnesses in open court in causes in equity was not expressly repealed until the adoption of the Revised Statutes, sect. 862 of which provides that "the mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to the rules now or hereafter prescribed by the Supreme Court, except as herein specially provided." *Id.*
3. While this court does not say, that, even since the Revised Statutes, the circuit courts may not in their discretion, under the operation of existing rules, permit the examination of witnesses orally in open court upon the hearing of cases in equity, it does say that they are not now by law required to do so. If such practice is adopted in any case, the testimony presented in that form must be taken down, or its substance stated in writing, and made part of the record, or it will be entirely disregarded here on an appeal. *Id.*
4. If testimony is objected to and ruled out, it must still be sent here with the record, subject to objection, or the ruling will not be considered. A case will not be sent back to have the rejected testimony taken, even though this court might, on examination, be of opinion that the objection ought not to have been sustained. *Id.*
5. The act of 1872 (17 Stat. 197; Rev. Stat., sect. 914), so far as it relates to matters of practice, has no application to a case in equity. *Id.*
6. Questions presented by the assignment of error cannot be considered here, unless the record shows that they were brought to the attention of the court below. *Walker* v. *Sauvinet*, 90.
7. Where an objection to the institution of a suit in a circuit court of the United States for the District of Louisiana, against the defendant in three distinct capacities, — as administratrix, widow in community, and tutrix of her minor children, — even if it would have been valid, was not taken in the court below at any stage in the case, it cannot be taken here. *Kittredge* v. *Race et al.*, 116.
8. The exception that a suit in equity was pending in which the plaintiffs asked for a decree for the same money, was no ground for abatement of this action at law, as the result of the action may be necessary for the perfecting of a decree in that suit. *Id.*
9. An exception is waived by going to trial on the merits. *Id.*
10. Since the passage of the act which gives the presiding judge the casting vote in cases of division, and authorizes a judgment in accordance with his opinion (Rev. Stat., sect. 650), this court, if it finds that the judgment as rendered is correct, need do no more than affirm it. If, however, that judgment is reversed, all questions certified, which are considered in the final determination of the case here, should be answered. *United States* v. *Reese et al.*, 214.

PRACTICE (*continued*).

11. Congress, by joint resolution, granted to the defendant, subject to the approval of the President, "fractional section one" on the west side of a military reservation, provided the usefulness of the latter would not, in his opinion, be impaired for military purposes. The President, by an executive order, set aside to the defendant said fractional section as designated on a map of survey accompanying the letter of the Secretary of the Interior. The court which tried the facts having found that the fractional section was inside of the reservation, was in the possession of the defendant, and was the land claimed in this action, held that the title thereto was vested in the defendant. *Held*, that the finding being upon a mixed question of law and fact, largely depending for its correctness on surveys not produced here, and there being no plat in the record, was not open to inquiry here. *Republican River Bridge Co.* v. *Kansas Pacific Railroad Co.*, 315.
12. The holder of the notes of an insolvent bank, the stockholders whereof are liable for so much of the just claims of creditors as remain unpaid after the assets of the bank shall be exhausted, filed a bill in equity to wind up the affairs of the institution under the provisions of its charter. The stockholders were not made parties, nor served with process; nor was any motion, petition, or prayer filed to subject them to liability. *Held*, that so much of the final decree as discharged them from all liability for and on account of any debt or demand against them or the bank was erroneous. *Terry* v. *Commercial Bank of Alabama*, 454.
13. Where, after a final decree on the merits had been rendered upon the report of the receiver and upon the reports of the master to whom it had been referred, all of which had been confirmed without exception, the complainant filed a petition supported by his affidavit asserting that his solicitor had deserted his interests, failed to except to the reports, and improperly consented to the decree, — *Held*, that this court cannot consider the alleged errors in the reports of the master, or review the action of the court below in refusing to set aside the decree upon an application addressed mainly to its discretion. *Id.*
14. If the complainant desired to place the case in a position where the action of the court below could be reviewed here, he should have filed his bill of review, and supported it by depositions. Such a bill is also the appropriate remedy where a decree has been obtained by fraud. *Id.*
15. The decisions of the Court of Appeals of the State of New York on cases arising upon the statute authorizing the issue of town bonds, and a similar state of facts to those involved in this case, are not conclusive on this court, as such decisions do not present a case of statutory construction. *Town of Venice* v. *Murdock*, 494.
16. Where the questions of fact in a suit in chancery are involved in great

PRACTICE *(continued)*.

doubt by conflicting or insufficient evidence, it is proper for the court to send the issues to be tried at law. The findings of the jury upon such issues are regarded as influential, but not conclusive in an appellate court. *Garsed* v. *Beall et al.*, 684.

17. The decision of a court below, granting counsel the right to open and close arguments to a jury, will not be reviewed here; nor is a refusal to grant a new trial assignable in error. *Hall et al.* v. *Weare*, 728.

PRE-EMPTION. See *Public Land*, 1, 2.

PRESUMPTION. See *Evidence*, 1, 3.

PRESUMPTION OF A GRANT FROM THE GOVERNMENT.

1. In this country there can seldom be occasion to invoke the presumption of a grant from the government, except in cases of very ancient possessions running back to colonial days, as, since the commencement of the present century, a record has been preserved of all such grants, and of the various preliminary steps up to their issue; and provision is made by law for the introduction of copies of the record when the originals are lost. *Oaksmith's Lessee* v. *Johnston*, 343.

2. In ejectment for a lot in Washington City, both parties admitted that the original title was in the United States. The plaintiff relied principally upon evidence of title arising from uninterrupted and exclusive possession by his lessor, and the parties through whom he claims from 1828 to 1867. During the latter year the defendant entered. He traced title through a conveyance of the mayor of Washington, executed in October, 1866, in completion of a sale made under the act of Congress of May 7, 1822 (3 Stat. 691), and an ordinance of the city of the same year, creating a board of commissioners to carry the act into effect, and direct the sales of lots. The act required the deeds executed to the purchasers by the mayor to be recorded among the land-records of the county of Washington within the time prescribed for the recording of conveyances of real estate. The ordinance provided that the board should keep regular minutes of their acts and proceedings, and lay the same before the board of aldermen and common council at the commencement of every session of the council. The records and minutes were not produced, nor proof of their contents offered by the plaintiff. *Held*, that no presumption can legitimately arise that any other deed of the demanded premises was executed by the mayor than the one put in evidence, and that the possession created no title upon which the plaintiff can recover. *Id.*

PRESUMPTION OF LAW. See *Captured or Abandoned Property*, 8.

PRIORITY OF PAYMENT. See *Bankruptcy*, 3.

"PROPERTY," CONSTRUCTION OF THE TERM IN A MORTGAGE. See *Mortgage*, 5.

PROTEST. See *Treasury Notes*, 1, 2.

PRUSSIA, TREATY WITH. See *International Law*, 1, 5.

PUBLIC LANDS. See *Land Grants*.

1. The third section of an act of Congress, approved April 20, 1832 (4 Stat. 505), which is still in force, enacts that four sections of land, including the hot springs in Arkansas, shall be reserved for the future disposal of the United States, and shall not be entered, located, or appropriated for any other purpose whatever. The Indian title to them was not extinguished until Aug. 24, 1818, nor were the public surveys extended over them until 1838, nor has the sale of them ever been authorized by law. No part of said sections was, therefore, ever subject to pre-emption or to location; and no claim thereto has been validated or confirmed by any act of Congress. *Hot Springs Cases*, 698.
2. The "Act for the relief of the inhabitants of the late county of New Madrid in Missouri Territory, who suffered by earthquakes," approved Feb. 17, 1815 (3 Stat. 211), required the following steps to be taken: Application to the recorder of land-titles, showing the party's claim, and praying a certificate of location — certificate of location issued by the recorder, setting forth the amount of land to which the applicant was entitled — application to the surveyor, presenting the certificate of location, and designating the lands which the party desired to appropriate — survey and plat made by the surveyor — return of the survey and plat to the recorder to be filed and recorded, with a notice designating the tract located and the name of the claimant — certificate of the recorder, stating the facts, and that the party was entitled to a patent — transmission of this certificate to the General Land-Office — the patent. In addition to these requisites, the land thus appropriated must have been a part of the public lands of the Territory, the sale of which was authorized by law. A survey, therefore, of part of said four sections made in 1820, if never returned to the recorder's office, did not within the meaning of said act, or of the act of April 26, 1822 (4 Stat. 668), locate, or segregate from the public domain, the land thereby covered, and so appropriate it to the claimant as to give him a vested right thereto, and prevent the operation of the said act of April 20, 1832. *Id.*
3. The doctrine in *Wilcox* v. *Jackson*, 13 Pet. 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it, or to operate upon it, although no exception be made of it, reaffirmed and held to apply with more force to Indian, than to military, reservations, inasmuch as the latter are the absolute property of the government, whilst in the former other rights are vested. *Leavenworth, Lawrence, and Galveston Railroad Co.* v. *United States*, 733.

PUBLIC LANDS (*continued*).

4. Where Congress enacts "That there be and is hereby granted" to a State, to aid in the construction of a specified railroad, "every alternate section of land, designated by odd numbers," within certain limits of each side of the road, the State takes an immediate interest in land, so situate, whereto the complete title is in the United States at the date of the act, although a survey of the land and a location of the road are necessary to give precision to the title and attach it to any particular tract. Such a grant is applicable only to public land owned absolutely by the United States. No other is subject to survey and division into such sections. *Id.*
5. Where the right of an Indian tribe to the possession and use of certain lands, as long as it may choose to occupy the same, is assured by treaty, a grant of them, absolutely or *cum onere*, by Congress, to aid in building a railroad, violates an express stipulation; and a grant in general terms of "land" cannot be construed to embrace them. *Id.*
6. A proviso, that any and all lands heretofore reserved to the United States, for any purpose whatever, are reserved from the operation of the grant to which it is annexed, applies to lands set apart for the use of an Indian tribe under a treaty. They are reserved to the United States for that specific use; and, if so reserved at the date of the grant, are excluded from its operation. It is immaterial whether they subsequently become a part of the public lands of the country. *Id.*
7. The act of March 3, 1863 (12 Stat. 772), to aid in the construction of certain railroads in Kansas, embraces no part of the lands reserved to the Great and Little Osages by the treaty of June 2, 1825 (7 Stat. 240); and the treaty concluded Sept. 29, 1865, and proclaimed Jan. 21, 1867 (14 Stat. 687), neither makes nor recognizes a grant of such lands. The effect of the treaty is simply to provide that any rights of the companies designated by the State to build the roads should not be barred or impaired by reason of the general terms of the treaty, but not to declare that such rights existed. *Id.*
8. The act of Congress of even date with said act (12 Stat. 793), authorizing treaties for the removal of the several tribes of Indians from the State of Kansas, and for the extinction of their title, and a subsequent act for relocating a portion of the road of the appellant (17 Stat. 5), neither recognize nor confer a right to the lands within the Osage country. *Id.*
9. The act of July 1, 1862 (12 Stat. 492), grants to the Western Pacific Railroad Company every alternate section of public land designated by odd numbers within the limits of ten miles on each side of its road, not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may not have attached at the time the line of the road is definitely fixed. The act of 1864 (13 Stat. 358) enlarges those limits, and declares that

PUBLIC LANDS (*continued*).

the grant by it, or the act to which it is an amendment, "shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler." *Held*, that lands within the boundaries of an alleged Mexican or Spanish grant, which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the road, are not embraced by the grant to the company. *Newhall* v. *Sanger*, 761.

10. The words "public lands" are used in our legislation to describe such lands as are subject to sale or other disposition under general laws. *Id.*

PUBLIC PROCLAMATION. See *International Law*, 2, 3; *Rewards*, 2.

PUBLIC SURVEYS. See *Public Lands*, 1, 2.

QUESTIONS OF FACT.

The question, whether an imported article is or is not known in commerce by the word or terms used in the act imposing the duty, is one of fact for the jury. *Tyng* v. *Grinnell, Collector*, 467.

RAILROADS, TAXATION OF. See *State Railroad Tax*, 1–6.

RECORD. See *Practice*, 1, 3, 4, 6.

RECORDER OF LAND-TITLES. See *Legal Representatives*, 1; *Public Lands*, 2.

REMEDY. See *Collateral Securities*.

REMOVAL OF CAUSES. See *Jurisdiction*, 8–10.

The act of Congress of March 2, 1867 (14 Stat. 558), in authorizing and requiring the removal to the Circuit Court of the United States of a suit pending or afterwards brought in *any* State court involving a controversy between a citizen of the State where the suit is brought and a citizen of another State, thereby invests the Circuit Court with jurisdiction to pass upon and determine the controversy when the removal is made, though that court could not have taken original cognizance of the case. *Gaines* v. *Fuentes et al.*, 10.

RESERVATION. See *Public Lands*, 3, 5–7, 9.

REVISED STATUTES OF THE UNITED STATES.

The following sections, among others, referred to, commented on, and explained: —

Sect. 650. See *Practice* 10.
Sect. 862. See *Practice*, 2–4.
Sect. 914. See *Practice*, 5.
Sect. 1909. See *Jurisdiction*, 6.
Sect. 4979. See *Jurisdiction*, 12.

REWARDS.

1. Where a "liberal reward" was offered for information leading to the apprehension of a fugitive from justice, and a specific sum for his apprehension, — *Held*, that a party giving the information which led to the arrest was entitled to the "liberal reward," but not to the specific sum, unless he, in fact, apprehended the fugitive, or the arrest was made by his agents. *Shuey, Ex'r*, v. *United States*, 73.
2. Where the offer of a reward is made by public proclamation, it may, before rights have accrued under it, be withdrawn through the same channel in which it was made. No contract arises under such offer until its terms are complied with. The fact that the claimant of such reward was ignorant of its withdrawal is immaterial. *Id.*

RIGHT OF SUFFRAGE. See *Constitutional Law*, 3–6, 16.

RIGHT TO BEAR ARMS. See *Constitutional Law*, 13.

RIGHT TO PEACEABLY ASSEMBLE. See *Constitutional Law*, 11, 12.

RIGHTS OF THE PEOPLE. See *Constitutional Law*, 10–16.

SAILING RULES AND REGULATIONS. See *Admiralty*, 1.

SALE UNDER A POWER IN A MORTGAGE. See *Mortgage*, 1–4.

SECRET SERVICES. See *Contracts*, 3.

SET-OFF.

1. A banker, who was a director of an insurance company, can set off against its demand for money it deposited with him, bearing interest and payable on call, the amount due on its policies issued to and held by him. *Scammon* v. *Kimball, Assignee*, 362.
2. The company having been adjudicated a bankrupt, his right to such a set-off is equally available against its assignee. *Id.*

SETTLEMENT.

In order to defeat a settlement by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or those whose rights may and do supervene. *Smith et al.* v. *Vodges, Assignee*, 183.

SLAVERY. See *Contracts*, 2.

SOUTH CAROLINA, STATUTE OF LIMITATIONS OF.

The Exchange Bank of Columbia, S. C., failed in February, 1865. In June, 1872, its creditors filed a bill in equity to enforce their claims against the stockholders under a clause of the charter, which, "upon the failure of the bank," rendered them individually liable for any sum not exceeding double the value of their respective shares. The defence set up the Statute of Limitations of 1712, which requires actions upon the case, and actions of debt, grounded upon any contract without specialty, to be brought within four

SOUTH CAROLINA, STATUTE OF LIMITATIONS OF (*continued*).
years. *Held*, that as the liability of the stockholders arose from their acceptance of the act creating the corporation, and their implied promises to fulfil its requirements, the proper remedy was an action upon the case; and that, as the statute barred such an action at law, it was also a good defence in equity. *Carrol et al.* v. *Green et al.*, 509.

SOVEREIGNTY. See *Insurrection.*

1. Sovereignty for the protection of rights and immunities created by or dependent upon the Constitution, rests with the United States. *United States* v. *Reese et al.*, 214.
2. Sovereignty for the protection of the rights of life and personal liberty within the respective States, rests alone with the States. *United States* v. *Cruikshank et al.*, 542.

SPECIAL FINDING.

A special finding by the court upon issues of fact, where the parties or their attorneys have duly filed a stipulation, waiving a jury, has the same effect as a verdict, and is not subject to review by this court except as to the sufficiency of the facts found to support the judgment. *Tyng* v. *Grinnell, Collector*, 467.

STATE RAILROAD TAX.

1. While the Constitution of Illinois requires taxation, in general, to be uniform and equal, it declares, in express terms, that a large class of persons engaged in special pursuits, among whom are persons or corporations owning franchises and privileges, may be taxed as the legislature shall determine, by a general law, *uniform as to the class upon which it operates;* and under this provision a statute is not unconstitutional which prescribes a different rule of taxation for railroad companies from that for individuals. *State Railroad Tax Cases*, 575.
2. Nor does it violate any provision of the Constitution of the United States. *Id.*
3. The capital stock, franchises, and all the real and personal property of corporations, are justly liable to taxation; and a rule which ascertains the value of all this, by ascertaining the cash value of the funded debt and of the shares of the capital stock as the basis of assessment, is probably as fair as any other. *Id.*
4. Deducting from this the assessed value of all the tangible real and personal property, which is also taxed, leaves the real value of the capital stock and franchise subject to taxation as justly as any other mode, all modes being more or less imperfect. *Id.*
5. It is neither in conflict with the Constitution of Illinois, nor inequitable, that the entire taxable property of the railroad company should be ascertained by the State board of equalization, and that the state, county, and city taxes should be collected within each municipality

STATE RAILROAD TAX (*continued*).

on this assessment, in the proportion which the length of the road within such municipality bears to the whole length of the road within the State. *Id.*

6. The action of the board of equalization, in increasing the assessed value of the property of a railroad company or an individual above the return made to the board, does not require a notice to the party to make it valid; and the courts cannot substitute their judgment as to such valuation for that of the board. *Id.*

STATUTE, CONSTRUCTION OF.

1. In whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect. *Henderson et al.* v. *Mayor of the City of New York et al.*, 259.

2. Looking to the manifest intent of the joint resolution granting to the defendant "fractional section one" on the west side of a military reservation, and to the fact that the grant was not to be consummated until the President had determined that the usefulness of the reservation would not be thereby impaired, the description in the joint resolution meant such a fractional section *within* the reservation on its west side. The title of the defendant became absolute on the issue of the President's order, and had relation back to the date of the passage of the joint resolution. *Republican River Bridge Co.* v. *Kansas Pacific Railroad Co.*, 315.

STATUTE OF LIMITATIONS.

A party against whom an assessment was made in 1865, for an income-tax, appealed therefrom to the Commissioner of Internal Revenue, who, Oct. 7, 1867, set it aside, and ordered a new one, which was made March 15, 1868. The sum thereby assessed, with interest and penalty, was paid in instalments. Suit to recover the money so paid was brought Jan. 15, 1869. *Held*, that the party had no right of action, inasmuch as he failed to sue within six months from the date of the decision of the commissioner on the appeal, and had taken no appeal from the second assessment. *Cheatham et al.* v. *United States*, 85.

STATUTES OF THE UNITED STATES.

The following, among others, referred to, commented on, and explained: —

1789. Sept. 24. See *Practice*, 2.
1815. Feb. 17. See *Public Lands*, 2.
1822. April 26. See *Public Lands*, 2.
1822. May 17. See *Presumption of a Grant from the Government*, 2.
1832. April 20. See *Public Lands*, 1, 2.
1845. Feb. 26. See *Duty on Imports*.
1851. March 3. See *Concessions of Land by Mexican or Spanish Government*, 1.

STATUTES OF THE UNITED STATES (*continued*).

1857. March 3. See *Land Grants*, 1, 2.
1860. June 14. See *Concessions of Land by Mexican or Spanish Government*, 1; *Survey of a Confirmed Claim to Lands in California.*
1861. July 17. See *Treasury Notes*, 1.
1862. July 1. See *Public Lands*, 9.
1862. July 17. See *Abeyance; Confiscation*, 1, 2.
1863. March 3. See *Captured or Abandoned Property*, 5, 6.
1863. March 3. See *Public Lands*, 7, 8.
1864. June 30. See *Duty on Imports.*
1864. July 2. See *Public Lands*, 9.
1867. March 2. See *Bankruptcy*, 4; *Jurisdiction*, 7.
1867. March 2. See *Removal of Causes.*
1868. July 20. See *Duty on Exports*, 1, 2.
1870. May 31. See *Constitutional Law*, 5, 6; *Criminal Law*, 1.
1871. April 19. See *Public Lands*, 8.
1872. June 1. See *Practice*, 5.
1872. June 6. See *Duty on Exports*, 1, 2.

STOCK SUBSCRIPTIONS. See *Municipal Bonds*, 2, 5.

Although a subscription for stock of a railroad company be duly authorized by the requisite number of the qualified voters of a township, if the company, before the subscription be actually made, becomes consolidated with another, thereby forming a third, the County Court in Missouri is not empowered to subscribe, on behalf of the township, for stock of the new company, and issue bonds in payment therefor. *Harshman* v. *Bates County*, 569.

STOCKHOLDERS, LIABILITY OF. See *Individual Liability of Stockholders; Georgia, Statute of Limitations of; South Carolina, Statute of Limitations of.*

SUFFRAGE, RIGHT OF. See *Constitutional Law*, 3–6, 16.

SURVEY OF A CONFIRMED CLAIM TO LANDS IN CALIFORNIA.

The object of the proceeding before the tribunals of the United States for the approval of a survey of a confirmed claim to land in California under a Mexican or Spanish grant, pursuant to the act of Congress of June 14, 1860 (12 Stat. 34), was to insure conformity of the survey with the decree of confirmation, and not to settle any question of title against other claimants. The approval of the court established the fact, that the survey was in conformity with the decree of confirmation; or, if the decree was for quantity only, that the survey was authorized by it, and is conclusive as to the location of the land against all floating grants not previously located. *Miller et al.* v. *Dale et al.*, 473.

TAXATION. See *Corporations*, 2–7.

TAX ON PASSENGERS. See *Commerce*, 2–16.

TAXES, COLLECTION OF, POWERS OF COURTS TO RESTRAIN.

1. While this court does not lay down any absolute rule limiting the powers of a court of equity in restraining the collection of taxes, it declares that it is essential that every case be brought within some of the recognized rules of equity jurisdiction, and that neither illegality or irregularity in the proceedings, nor error or excess in the valuation, nor the hardship or injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after the payment of the tax, will authorize an injunction against its collection. *State Railroad Tax Cases*, 575.
2. This rule is founded on the principle that the levy of taxes is a legislative and not a judicial function, and the court can neither make nor cause to be made a new assessment if the one complained of be erroneous, and also in the necessity that the taxes, without which the State could not exist, should be regularly and promptly paid into its treasury. *Id.*
3. *Quære:* Whether the same rigid rule against equitable relief would apply to taxes levied solely by municipal corporations for corporate purposes as that here applied to State taxes. Probably not. *Id.*
4. No injunction, preliminary or final, can be granted to stay collection of taxes until it is shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, have been paid or tendered without demanding a receipt in full. *Id.*

TITLE, WARRANTY OF. See *Lease*.

TOWN BONDS. See *Municipal Bonds*.

TREASURY AGENTS. See *Captured or Abandoned Property*, 2, 6–8.

TREASURY-NOTES.

1. The holder of treasury-notes, payable three years after date, which were issued under the authority of an act of July 17, 1861 (12 Stat. 259), demanded payment in gold of the principal and interest due thereon. The Secretary of the Treasury refused payment in that medium, but offered it in legal-tender notes. The holder, under protest, received the offered payment in full discharge of the notes, surrendered them to be cancelled, and brought an action against the United States to recover the difference in the market-value of gold and of legal-tender notes at the date of such payment. *Held*, that by accepting the medium offered, and surrendering the treasury-notes, the holder waived all claim, independently of the question whether or not that medium was a legal tender in payment of them. *Savage, Executrix*, v. *United States*, 382.
2. The protest, being unauthorized by law, had no efficacy to qualify the voluntary surrender of the treasury-notes. *Id.*

TREATY. See *International Law*, 1, 4; *Public Lands*, 5–7.

TRIAL BY JURY. See *Constitutional Law*, 1.

TRIALS IN STATE COURTS. See *Constitutional Law*, 1.

TRUSTEE. See *Mortgage*, 3 ; *Parties*, 1.

UNCONSTITUTIONAL LAW. See *Mandamus*.

An unconstitutional law will be treated by the courts as null and void. *Board of Liquidation* v. *McComb*, 531.

VERDICT. See *Pleading*, 2.

WAIVER. See *Treasury Notes*.

WARRANTY. See *Lease*.

1. Under authority of acts of the legislature of Kansas, the city of Topeka issued certain bonds payable to a party named, or bearer. They became the property of a bank, which put them upon the market, and disposed of them. This court having decided that the legislature had no power to pass the acts, and that the bonds were void, the purchasers brought suit on the ground of failure of consideration to recover the amount paid for them. *Held*, that, as the bank gave no warranty, it cannot be charged with a liability it did not assume. *Otis et al.* v. *Cullom, Receiver*, 447.
2. The vendor of such securities is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him, and are not forgeries. Where there is no express stipulation, there is no liability beyond this. *Id.*

WARRANTY, BREACH OF.

Where certain county warrants were sold by a citizen of Iowa, where they were issued, to a citizen of another State, with a guaranty that they were "genuine and regularly issued," — *Held*, that the former thereby undertook that they were not, in a suit brought against the county, subject to any defence founded upon a want of legal form in the signatures or seals ; and that, the absence of the county seals being a breach of the warranty, the vendee, without returning or tendering the warrants, was entitled to recover of the vendor the damages which he had sustained by such breach. *Smeltzer* v. *White*, 390.

WRITS OF ERROR. See *Jurisdiction*, 6.

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