REPORTS OF THE SUPREME COURT

OF THE

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CASES

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1877.

REPORTED BY

WILLIAM T. OTTO.

VOL. V.

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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. WILLIAM STRONG.
HON. WARD HUNT.
HON. NOAH H. SWAYNE.
HON. STEPHEN J. FIELD.
HON. JOSEPH P. BRADLEY.
HON. JOHN M. HARLAN.

ATTORNEY-GENERAL.

HON. CHARLES DEVENS.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

MEMORANDUM.

THE Honorable JOHN M. HARLAN, whose commission as an Associate Justice of this Court bears date Nov. 29, 1877, took the oath of office in open Court on the 10th of the following month. Mr. Justice HARLAN took no part in the decision of the cases reported in this volume preceding *United States* v. *Fox*, p. 670.

TABLE OF CASES.

REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1877.

Pacific Railroad of Missouri *v.* Ketchum.

1. Appeals in equity are heard in this court upon the pleadings and proofs below. No new evidence can be submitted, nor can the pleadings be amended here.
2. Without deciding whether a case may not arise in which it would appoint a receiver pending an appeal here, the court declines to do so upon the showing made in this case.

Motion by the appellant for a rule upon the appellee to show cause why a receiver should not be appointed pending the appeal in this court.

In this cause, a decree of foreclosure and sale was entered in the Circuit Court July 6, 1876, by consent of the present appellant corporation. Pursuant to this decree, the property was sold to James Baker, who, as is alleged, was at the time the solicitor of the company. The answer filed by him for the appellant admitted all the allegations in the bill, and made no defence whatever against the foreclosure. This was authorized by the then directors of the corporation. The purchase-money was paid by Baker, principally in the third-mortgage bonds of the company. The sale was confirmed without objection by the appellant. The owners of the bonds thus paid over organized themselves into a new corporation, and Baker assigned to them the property purchased. On the 24th of October, 1876, the Circuit Court discharged its receiver, and directed him to

turn over all the property in his hands to the new corporation.

On the 1st of November, 1876, the new company made a mortgage on the property, greater in amount than that which had been cancelled by the foreclosure, and delivered the bonds to the parties who had been the holders of those surrendered in payment of the purchase-money, and to certain other persons provided for in a scheme of reorganization. The new company is now running and operating the road, and applying its revenues to the payment of the interest on the bonded indebtedness, including that covered by the new mortgage.

On the 14th of December, 1876, the stockholders of the appellant, at an adjourned annual meeting, passed an order repudiating the action of the directors in allowing their counsel to consent to the decree of foreclosure, discharged Baker as the counsel of the company, and appointed a committee to take charge of their interests without molestation from the directors, and to prosecute and defend all such suits as they might deem for the interest of the company, including an appeal from the decree of foreclosure.

Under this authority, the present appeal was taken in the name of the old corporation, by which a motion is now made for a rule upon the new corporation to show cause why a receiver should not be appointed by this court, "with directions to take the general supervision of the road to the limited extent that the parties now in possession thereof be directed to operate the same under the general directions of the receiver, and to pay over to said receiver any moneys remaining after paying operating expenses, including taxes and such renewals and additions as the receiver approves, and the interest on the first and second mortgages and the sinking funds appertaining to them," and that the new corporation be enjoined from paying interest upon its own issue of bonds pending the appeal.

Mr. N. A. Cowdrey in support of the motion.

No opposing counsel.

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

Without undertaking to decide whether a case may not

arise in which we would exercise the power of appointing a receiver, pending an appeal in this court, we are clearly of the opinion that we ought not to do so upon the showing made here. Appeals in equity are heard upon the pleadings and proofs below. No new evidence can be admitted, and the pleadings cannot be amended in this court.

In this case, the pleadings fail entirely to disclose the defence which the appellant seeks now to make, and it does appear affirmatively that the original decree was by consent. Although the sale was in form to the attorney of the appellant, it was in reality to the bondholders in whose interest the foreclosure was had. No irregularities in the sale itself except this are now complained of, and none whatever were insisted upon below.

Being entirely satisfied that the facts stated in the application for the rule are not sufficient to entitle the plaintiff to the relief it asks, we refuse the rule. *Motion denied.*

PHIPPS *v.* SEDGWICK.

PLACE *v.* SEDGWICK.

1. The court, upon consideration of the facts in this case, holds that certain real estate settled upon a woman by her husband was purchased with the assets of the firm whereof he was a member, and that the assignee in bankruptcy of the firm is, after the payment of the mortgage thereon, entitled to the proceeds thereof.
2. Where property is conveyed to a wife in fraud of her husband's creditors, a judgment *in personam* for its value cannot be taken against her, nor, in case of her death, against her executors.

APPEALS from the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

The first case was argued by *Mr. William M. Evarts* for the appellants, and by *Mr. F. N. Bangs* for the appellees. The second case was argued by *Mr. F. K. Haywood* for the appellants, and by *Mr. F. N. Bangs*, *contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

These are appeals presented by two different parties, against whom decrees were obtained in the Circuit Court by the

appellee, Sedgwick, who sued as assignee in bankruptcy of James K. Place and James D. Sparkman, doing business in the city of New York as partners, under the style of James K. Place & Co.

The controversy in the District Court, where it was commenced, and in the Circuit Court, where it was heard on appeal, turned mainly on questions of fact, to be determined by the weight of evidence; and the most important part of it does so here. The evidence is voluminous and complicated, the record amounting to over eight hundred pages of printed matter. It cannot be expected that in delivering our judgment we should sustain it by any minute analysis of this testimony. We can profitably do no more than state the propositions in controversy, and the results of our inquiry upon them.

Place and Sparkman, succeeding to the business of J. K. & E. B. Place, as wholesale grocers, commenced business as partners on the first day of December, 1865, and so continued until Dec. 23, 1867. Their operations amounted to several millions of dollars. On the day last mentioned, finding themselves insolvent, they made a general assignment to Lewis W. Burrit and Thomas T. Sheffield; and, on the twenty-seventh day of February, 1868, they filed a petition in bankruptcy, under which the appellee, Sedgwick, was appointed assignee.

Some time after this, the assignee brought his bill in chancery in the District Court for the Southern District of New York, where the bankruptcy proceedings were pending, against the two bankrupts, and sundry other persons supposed to have money or property which ought to come to the assignee, or to have liens or other claims on such property. A decree was rendered which settled finally much that was in controversy, but in reference to two important matters appeals were taken to the Circuit Court; and it is in regard to the same matters that the two appeals now before us are taken.

The first of these, involved in the first case, grows out of the allegation in the bill that certain real estate, which we shall call the Fifth Avenue property (and which was sold under order of the court pending the suit and the proceeds paid into court), was, in law and equity, the property of the bankrupts, and that the proceeds should go to the assignee, to be admin-

istered as part of the assets of the bankrupt firm. John L. Phipps & Co. asserted a claim to this property and these proceeds, which we will presently consider. The District Court decided that the Fifth Avenue property was but a fair and reasonable settlement of James K. Place upon his wife, which was not fraudulent as to his creditors, and ordered the proceeds of the sale to be paid to Phipps & Co., who asserted rights under Mrs. Place. On appeal, the Circuit Court reversed this decree, and held that the settlement was fraudulent as to creditors, and ordered the proceeds of the sale, amounting to $93,161.42 to be paid to the assignee. From this branch of the decree Phipps & Co. appeal to this court.

The other branch of the case relates to what we shall call the Forty-third Street lots.

A similar allegation is made in the bill as regards these lots, which, having been conveyed to Mrs. Place, and by her to other parties, and several exchanges and purchases and sales made by her, the assignee claims to have identified the property until the last sale, for which it is alleged that she received $16,000; and for this sum the assignee recovered a decree against the executors of Mrs. Place, who died pending the suit. This decree of the District Court was affirmed in the Circuit Court, and from it the executors appeal to this court, which constitutes the second case.

1. As regards the Fifth Avenue property, it may be as well to state the relation to it of Phipps & Co., the appellants. It appears that they were largely creditors of J. K. Place & Co. at the time of their failure, and, in endeavoring to secure payment of their debt after the assignment of that firm, a mortgage was given by Mrs. Place on the Fifth Avenue property to secure the sum of $50,000. Mr. Place joined in this mortgage. On the very day of the application of Place & Co. to be declared bankrupts, a personal judgment was obtained against them on the debt of Phipps & Co. It seems to be clear that the mortgage was taken under such circumstances of notice of the nature of Mrs. Place's title on the part of Phipps & Co., that their claim under that mortgage is no better than the title of Mrs. Place. The whole matter, therefore, turns upon the question of the validity of the conveyance to

her, as a fair and honest provision made by a husband engaged in business, by appropriating a part of the means embarked in that business to that purpose. For it is not denied that the entire sum which went to purchasing the ground lease, building the house, and furnishing it, amounting to more than $100,000, was paid out of the moneys of the firm of J. K. Place & Co.

The evidence affecting the validity of this settlement is voluminous, consisting of an examination of the books of account of the insolvent firm, the testimony of Mr. Place and many other witnesses, accompanied with deeds, assignments, and other papers in writing. We cannot go over all this, and, concurring as we do with the opinion of the Circuit Court, it is unnecessary. A few observations must suffice.

The basis on which the honesty and fairness of the settlement is supported in argument is, that on the first day of December, 1865, — the day on which the old partnership of J. K. Place & E. B. Place was superseded by the firm of J. K. Place & Co., composed of J. K. Place and Sparkman, — Mr. Place was worth $227,000. This estimate resulted from the balance-sheet of the old firm; and that sum constituted the capital which he put into the new firm. It was in the month of September previous to this that he bought the ground lease of the lots in questions, taking the assignment to himself; and between that time and the 1st of December he entered into contracts for the erection of a building on the lots, which were supposed to amount to $50,000 or $60,000, but which in the end came to about $90,000.

There is some question whether the assignment of the lease of these lots to his wife was made on the first day of December, when it bears date, or on the first day of the next April, when it was acknowledged or recorded, with a preponderance of evidence, as we think, in favor of the latter. But upon the supposition that Mr. Place was, on the first day of December, fairly entitled to consider his interest in the business as worth $227,000, was it good faith to his creditors to withdraw about one-third of that capital and invest it in his wife's name, so that it was placed beyond the reach of his creditors, and made to constitute a luxurious home for himself? If the business

which the partnership was doing was a small and a safe business, and the shape in which this sum of $227,000 stood was such as made it unquestionable as representing so much money, while the withdrawal of $90,000, if otherwise fair, might be sustained, it would still be of doubtful validity as against creditors.

But there are other and controlling circumstances in this case which we will refer to: —

1. The business of the partnership was not a small one. On the contrary, it was very large, and must have amounted to several millions per annum. The very balance-sheet on which the transaction is defended showed that the debts of the firm at that date were near $4,000,000, and the credit side consisted in goods on hand and in debts due the firm. Of course, the real value of this balance was conjectural and uncertain.

2. The proportion of this balance was not more than ten per cent of the debts of the firm, a very small capital for such a large business; and it was unfair to the creditors to withdraw one-third of that.

3. There is strong reason to believe that other liabilities of Mr. Place in other ventures, and in regard to his purchase of his brother's interest in the old firm, when fairly taken into the account and charged against this balance, would have reduced it very considerably. How much, cannot be precisely ascertained.

4. But, though Mr. Place had given his obligations to pay what amounted to $90,000 on the house building, that was his personal obligation, and at its date was not a debt of the firm. If he afterwards took the money of the firm to pay those individual debts, at a time when the business of the firm could not stand it, the transaction must be treated as of the date when the money was so withdrawn, and its honesty tested by the condition of the business at that time. The books of the firm show that there was paid on this account up to Dec. 31, 1866, or within one year and one month after the new firm began, $82,000, including that paid before, and in the first three months of the next year, $13,000. These same books show that during this time the condition of the partnership had changed largely for the worse, independently of these outlays.

The losses on the rapid decline of gold, which affected the value of their goods, and the amounts lost on the gold which they carried, was estimated at $150,000 for the first year. Losses in two collateral concerns, in which one or both of the partners were interested, also became apparent; so that before the end of the first year any prudent man must have seen that, in withdrawing so much cash from his business, he was choosing between the danger of the bankruptcy of his firm on one side, and a luxurious home for himself and wife on the other.

5. Mr. Place had agreed with his partner, Sparkman, to put into the business $600,000 of capital, to $200,000 by Sparkman. This was a moneyed obligation which he was bound to perform, but which he never did perform; and, instead of enlarging the nominal capital of $227,000, we have shown that he took over $100,000 from it for this house.

6. The books of the firm were kept in a manner which, on inspection, would show that the Fifth Avenue property was an investment which belonged to the firm, and should be counted as part of its assets; and this remained the condition of the books until after the assignment, when the book-keeper charged the whole up to Mr. Place, and thus by a stroke of the pen after insolvency, and after the assignment, $100,000, which had appeared as property of the firm, became nothing but the debt of an insolvent partner of that firm.

For these reasons, we think the decree of the Circuit Court, that the assignee was entitled to the proceeds of this property after paying a mortgage admitted to be a just claim, is right.

In reference to the decree for the payment of money against the executors of Mrs. Place on account of the Forty-third Street lots, we are of a different opinion.

The lots in which the money of the firm was first invested, and which was the beginning of this separate real-estate transaction, are estimated by the master at the value of $4,000. By subsequent exchanges or sales, the fund is traced to another piece of real estate, which is supposed to be worth $16,000; for which sum with interest a judgment is rendered against Mrs. Place.

But we are of opinion that Mrs. Place, if living, could not

be subjected to such a decree, if all that is said be true ; nor can her executors be now.

While the books of reports are full of cases in which real or personal property conveyed to the wife in fraud of the husband's creditors has been pursued and subjected to the payment of his debts after it had been identified in her hands, or in the hands of voluntary grantees or purchasers with notice, we are not aware of any well-considered case of high authority where the pursuit of the property has been abandoned, and a judgment *in personam* for its value taken against the wife.

Certainly no such doctrine is sanctioned by the common law; and, though the present suit is a bill in chancery, the decree in this case is nothing more than a judgment at law, and could as well have been maintained in a separate suit at law for the money as in this suit. And the liability of the executors of the wife to this personal judgment must depend on the same principle as if, abandoning the pursuit of the *res*, the assignee had brought an action at law for the money.

The statutes of the different States have gone very far in this country to modify the peculiar relations of husband and wife, as they existed at common law, in reference to their property. But they have not, except perhaps in Louisiana, gone so far as to recognize the civil-law rule of perfect independence in dealing with each other. While the statutes of New York have recognized certain rights of the wife to deal with and contract in reference to her separate property, they fall far short of establishing the principle that out of that separate property she can be made liable for money or property received at her husband's hands, which in equity ought to have gone to pay his debts. Equity has been ready, where such property remains in her hands, to restore it to its proper use, but not to hold her separate estate liable for what she has received, and probably spent at his dictation. Such a proposition would be a very unjust one to the wife still under the dominion, control, and personal influence of the husband. In receiving favors at his hands, which she supposed to be the offerings of affection, or a proper provision for her comfort, she would be subjecting that which was her own, or which might afterwards come to her from other sources, to unknown and unsuspected charges,

of the amount and nature of which she would be wholly ignorant. It answers the demands of justice in such cases if the creditor, finding the property itself in her hands or in the hands of one holding it with notice, appropriates it to pay his debt. But, if it is beyond his reach, the wife should no more be made liable for it than if the husband himself had spent it in support of his family, or even of his own extravagance.

For these reasons, we are of opinion that so much of the decree of the Circuit Court as directs the payment of the proceeds of the Fifth Avenue property to Sedgwick, the assignee, must be affirmed, but without prejudice to the right of the holder of Phipps & Co.'s debt to present it for allowance as a claim against the bankrupts' assets, in regard to which we decide nothing. The decree against the executors of Mrs. Place will be reversed. In all other respects, the decree of the Circuit Court will be affirmed, and the cause remanded for further proceedings in conformity to this opinion; and it is

So ordered.

SHAW *v.* BILL.

1. The appearance of counsel specially for a corporation, and his moving to dismiss the petition of an individual creditor for the appointment of a receiver of its property, do not preclude him from subsequently appearing for the trustee of the bondholders in proceedings to foreclose mortgages given by the corporation.
2. Upon a supplemental bill in chancery, a subpœna is not required unless new parties are made. A rule upon parties already served to answer the supplemental bill is sufficient.
3. Where a corporation is insolvent, and has no funds at the place where its bonds are payable, demand of payment at such place need not be made before suit brought to foreclose its mortgages executed to secure the bonds.
4. A mortgage by a railroad corporation which in terms covers "all the following, present, and in future to be acquired property" of the corporation, naming in the description of such property its engines, cars, and machinery, carries not only the cars, engines, and machinery in existence at the date of the mortgage, but such as take their place or are subsequently added to them by the company and are in existence at the time of the foreclosure.

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

In 1849, the New Albany and Salem Railroad Company was

incorporated under the laws of Indiana, with power to construct a railroad from New Albany, on the Ohio River, to Michigan City, on Lake Michigan. To enable the company to raise the necessary means to complete and equip the road, it issued at different times a large amount of bonds, secured by mortgages upon its property. There were five issues of bonds, varying in amount from $500,000 to over $2,000,000, and carrying interest from seven to ten per cent per annum, payable semi-annually. Each issue was secured by a separate mortgage. The first mortgage was executed in February, 1851; the second, in February, 1852; the third, in November, 1853; the fourth, in February, 1855; and the fifth, in December, 1856. They were all made to Douw Williamson, as trustee for the bondholders, the complainant, Charles E. Bill, being named as substitute or successor, in whom the estate and the powers of the trustee were to vest in case of the death, incapacity, or resignation of Williamson.

The several bonds as they matured, and the interest stipulated, not being paid, the trustee, in August, 1857, filed a bill in the Circuit Court of the United States for the District of Indiana, for the foreclosure of the several mortgages. The corporation was served with process of subpœna, appeared to the suit and demurred to the bill. It does not appear from the record what disposition was made of the demurrer, but it is to be inferred from the subsequent proceedings that it was abandoned. At any rate, in December of the following year (1858), a decree was entered in the case by consent of parties, — one not foreclosing the mortgages as prayed in the bill, but declaring the rights and interests of the bondholders and stockholders under the several mortgages, — in accordance with what was termed a basis of adjustment and settlement, proposed to them by the president and directors of the company. The practical effect of the decree was to extinguish all the liens upon the property of the company, except such as were created by the first and second mortgages; to provide for a reorganization of the company, and to convert the subsequent bonds into common stock of the reorganized company.

Before this decree was rendered, the bondholders, waiving their priority, had consented to an interlocutory decree, entered

in June, 1858, authorizing the trustee to borrow $200,000 to pay certain unsecured debts, and to hold possession of the mortgaged property until this loan should be repaid with interest. The decree of December, 1858, provided for the prior payment of this sum, and also of a mortgage of another company for $175,000, which had been previously assumed.

Nearly ten years afterwards, in August, 1868, the bondholders secured by the first and second mortgages, or at least a large portion of them, demanded that the trustee should take proceedings to foreclose those mortgages. The trustee, acting upon the assumption that the original suit, brought in the Circuit Court for that purpose in 1857, was ended by the decree of December, 1858, commenced suit for the foreclosure desired, in a court of the State of Indiana. That suit proceeded to a final decree, under which the property was sold in May, 1869. The purchasers organized themselves under the law of Indiana into a new company, called the Louisville, New Albany, and Chicago Railway Company, which held possession of the property until it was transferred to a receiver, upon the application of the appellant, John S. Shaw. This appellant held a bond of the fourth-mortgage issue, and some stock of the company issued for bonds surrendered under the decree of December, 1858. Upon his petition, purporting to be filed on the foot of that decree, and alleging various irregularities and fraudulent practices on the part of the trustee and the first and second mortgage creditors, a receiver of the property of the company was appointed. His position was that the railroad property was placed under the exclusive wardship of the Circuit Court of the United States, by virtue of the two decrees of June and December, 1858, and that, consequently, the foreclosure proceedings in the State court were irregular and void. Ultimately, and after protracted litigation, this view of the appellant was sustained by the Circuit Court. It is unnecessary to detail the various steps taken by the parties upon the petition of Shaw. It is sufficient to mention that they led Charles E. Bill, the successor of the original trustee, to apply for leave to file a supplemental bill for the foreclosure of the mortgages remaining in force, and that his application was granted. It is upon the subsequent proceedings, resulting in a final decree of foreclosure,

from which Shaw and others appealed, that the questions arise for determination here.

Mr. Samuel A. Huff for the appellants.

1. The decree against the Louisville, New Albany, and Chicago Railroad Company is erroneous, because it appears that the company was defaulted at the instance of counsel who had theretofore appeared specially for the company, and process of subpœna upon the supplemental bill was not taken out against the company before such default, nor at any time thereafter.

2. The supplemental bill upon which the final decree is founded shows upon its face that the complainant trustee, and those in whose behalf he prosecuted it, are not entitled to the relief therein prayed, nor to any relief whatever. It does not even aver that a demand of payment of the bonds was made when they were payable.

3. In the final decree, the provisions of the several mortgages touching the property covered by them respectively are wholly disregarded by the court in this, to wit, —

a. The mortgage of 1851 and that of 1852, being the first and second of the series, in express terms limit their respective operation as to the future-acquired property of the company to such as may be purchased with the bonds thereby secured, or with the money obtained therefor.

b. The mortgages of 1853 and 1855, being the third and the fourth of the series, pledged, as security for the payment of the bonds by them respectively secured, the property that might be purchased with such bonds, or with money obtained therefor.

Whereas, by the final decree of the Circuit Court, the mortgages of 1851 and 1852 are held to cover all the property of the company, whether acquired by purchase with the bonds secured by the subsequent mortgages, or with money obtained for such latter bonds, or otherwise.

4. The parties in whose sole behalf the decree was passed, having, before the filing of the supplemental bill upon which it rests, surrendered the bonds secured by the mortgages foreclosed in their behalf, in such form as to forfeit their standing in court, should therefore have been denied any relief.

Mr. Henry Crawford, contra.

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

It seems from the record, that, when the petition of Shaw for the appointment of a receiver was presented to the court, Mr. Hendricks, with others, appeared as special counsel for the company, and moved its dismissal. Subsequently, Mr. Hendricks appeared as counsel for the trustee in the proceedings on the supplemental bill for the foreclosure of the mortgages, and on his motion the default of the company was entered. This second appearance of counsel against the company is regarded by the appellant as exhibiting "an anomaly in chancery practice" so great as to vitiate the decree. We do not perceive any anomaly or irregularity or impropriety in the conduct of the counsel. He might very well have appeared for the company to defeat a petition of a single creditor asking for the appointment of a receiver of its property, and yet subsequently have appeared for the trustee to foreclose its mortgages. There was nothing in the duties required on the motion which in any way conflicted with the duties required in the subsequent proceedings. There is not even a colorable pretext for calling in question the propriety of the action of counsel.

The fact that process of subpœna was not issued upon the supplemental bill is of no consequence. Such process is only necessary where new parties are brought in. The supplemental bill is a mere adjunct to the original bill, and, where the parties have already been served, no further subpœna for them is required. In this case, the company was ruled to answer; and the new parties appeared by counsel, and both demurred and answered. The fact that leave was granted upon motion of counsel to issue a subpœna against the company some months after its default had been entered, does not alter the case. Nothing appears to have been done upon the leave, and it was probably asked inadvertently.

The position that the appellants' demurrer to the supplemental bill should have been sustained, because it did not aver a demand of payment at the place where the bonds were payable, is without merit. No such ground is stated in the demurrer, which is special; and, had it been, it would have been unavailing. The insolvency of the company and its want of funds at the

place designated appear from the allegations of the bill; and, where such is the fact, no demand at the place is required. The law does not exact in such a case the performance of a fruitless act.

The objection that the decree covers property not embraced or intended to be embraced by the mortgages is equally untenable. The terms of the mortgages are as broad and comprehensive as could be used. They embrace all existing property of the company, except such surplus lands as were not required for the roadway, depots, and stations, and other uses of the road, and all its future property, both such as might be purchased with the proceeds of the bonds issued and such as might be acquired by other means. The language used is, "all the following, present, and in future to be acquired property of the parties of the first part" pertaining to the road; "that is to say, their road made and to be made, including the right of way and land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials used therein or procured therefor, inclusive of the iron rails purchased or to be purchased or paid for with the above-described bonds, or the money obtained therefor, and the machinery purchased with the same; bridges, viaducts, culverts, fences, depot-grounds and buildings thereon, engines, tenders, cars, tools, materials, machinery, and all other personal property, right thereto or interest therein pertaining as aforesaid, together with the tolls, rents, or income to be had or levied therefrom, and all franchises, rights, and privileges of the said parties of the first part of, in, to, or concerning the same;" with a proviso that the surplus lands mentioned might be sold.

The reference made in this description to the property which might be afterwards purchased with the bonds issued, does not operate as a limitation of the lien of the mortgage to such future-acquired property, but only to remove any doubt that might otherwise possibly arise whether the property thus purchased would also go to increase the security offered. We do not deem it of any moment whether the rolling-stock and machinery in use by the company at the date of the decree were acquired with the proceeds of the bonds or with the subsequent earnings of the company. A mortgage by a railroad company

which covers, in the terms of the two mortgages in suit, its engines, cars, and machinery, carries not only the cars, engines, and machinery in existence at the date of the mortgage, but such as take their place, or are subsequently added to them by the company, and are in existence at the time of the foreclosure. This kind of property is necessarily undergoing constant wear and consequent destruction; and the mortgages in suit, so far as that property is concerned, would have been of little value if their lien did not extend to such as took its place, or was added to it by the company. *Pennock* v. *Coe*, 23 How. 117; *Philadelphia, Wilmington, & Baltimore R. R. Co.* v. *Woelpper*, 64 Penn. St. 366; *Phillips* v. *Winslow*, 18 B. Mon. (Ky.) 431.

We perceive no error in the rulings of the court below.

Decree affirmed.

MR. JUSTICE HUNT did not sit in this case, nor take part in its decision.

NEW ORLEANS CANAL AND BANKING COMPANY *v.* MONTGOMERY.

1. In the absence of proof to show when promissory notes were transferred by the payee, the law presumes that they were, when under-due, taken in good faith by the transferee, without notice of any infirmity attaching to them, and he is entitled to the benefit of the deed of trust given to secure them.
2. The trustee named in the deed is, like a mortgagee, a purchaser for value. Both occupy the same ground with respect to notice, either actual or constructive, of any outstanding equities.
3. Where, therefore, the records of the proper office showed that in 1866, when the deed was executed, there was no prior incumbrance upon the land,— *Held*, that a party claiming under a deed executed and recorded in 1848, which he alleges was intended to embrace the same land, but which misdescribes it, which misdescription was not asserted in any judicial proceeding, nor notice thereof given before action commenced by the holders of said notes to enforce their trust, is not entitled to have his deed reformed against their intervening rights.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The facts are stated in the opinion of the court.

Argued by *Mr. William A. Maury*, and submitted on printed

arguments by *Mr. Philip Phillips* and *Mr. Thomas Hunton* for the appellants.

No counsel appeared for the appellees.

Mr. Justice Swayne delivered the opinion of the court.

This is an appeal in equity. The appellants are the complainants in the bill. The facts material to the determination of the case lie within a narrow compass, and may be briefly stated. There is no controversy about them.

On the 22d of May, 1866, the appellee, A. B. Montgomery, was indebted to the firm of Estlin & Co., of New Orleans, in the sum of $158,777.55. He made his sixty promissory notes of that date, amounting in the aggregate to the sum named, all drawn to his own order, and payable, respectively, one, two, three, four, and five years from date, with interest until paid. The maker indorsed them in blank, and secured them by a deed of trust of certain lands therein described, situated in Washington County, Mississippi. He delivered the notes so indorsed and the deed of trust to Estlin & Co. They transferred the notes in the course of business to other parties. Portions of them are held by each of the several complainants. The bill was filed to enforce the deed of trust. It avers that a part of the notes are outstanding in other hands, but that the holders are unknown and cannot be ascertained. It sets forth that it is filed for the benefit of such parties as well as the complainants, and prays that the former may be permitted to come in and prove their rights, and participate in the avails of the decree.

The defendants in their answers set up another deed of trust, executed by A. B. Montgomery, on the 13th of July, 1848, to secure certain other liabilities of his therein set forth. The lands covered by this deed of trust were described as in *range nine*, while all those, except one tract embraced in the other deed, were described as in *range eight*. With this exception, the description in the earlier deed applied to the lands described in the later one. The defendants insisted that the number of the range in the first deed was a mistake of the scrivener who drew it, that the number was intended to be *eight* instead of nine; and they insisted that the instrument

should be reformed accordingly, and that the liabilities intended to be secured by it should be made the first lien upon those premises. The court below decreed in conformity to this view, and the appellants thereupon removed the case to this court by appeal for review. There is neither allegation nor proof that the complainants or the other holders of the notes delivered to Estlin & Co. had any notice of the alleged mistake when they took the paper, nor is there any averment or proof of such notice to the trustee when the deed was delivered. It is not shown by the proofs when the notes were transferred by Estlin & Co., nor when they came into the hands of the present holders. In the absence of such proof, the law presumes they were taken under-due, in good faith, and without notice of any infirmity attaching to them. *Pinkerton* v. *Bailey*, 8 Wend. (N. Y.) 600; 2 Parsons on Bills and Notes, 9. Estlin & Co., however, unquestionably so took them in fact, and this protects the subsequent takers.

The deed of trust securing the payment of the notes was an incident, and accessory to them. The transfer of the notes carried with it to the transferees the benefit of the security. The trustee in such cases, like a mortgagee, is a purchaser for a valuable consideration. Both occupy the same ground with respect to notice, actual and constructive. It is that of a *bona fide* purchaser until the contrary is made to appear. *Carpenter* v. *Longan*, 16 Wall. 271. Generally, the rules which apply to legal apply also to equitable estates. *Croxall* v. *Sherard*, 5 Wall. 268. Here the law of notice as to the trustee and *cestui que trust* is the same.

Neither actual nor constructive notice to the trustee, nor to Estlin & Co., nor to either of the other holders, in season to have any effect, is shown.

There are other considerations belonging to the subject which must not be overlooked.

When the notes and deed of trust were delivered, a thorough examination was made in the proper office, to ascertain if there was any prior incumbrance. None was found. In fact, none existed. The prior deed described wholly different lands. On the faith of this condition of things Estlin & Co. acted. The misdescription in the prior deed was not asserted in any judi-

cial proceeding to which the trustee or any *cestui que trust* under the later deed was a party until it was put forth in this suit, which was instituted on the 7th of June, 1869, more than twenty years after the mistake occurred. As between Montgomery, the grantor in the prior deed, and the *cestuis que trust* under that deed, the deed might have been reformed, and enforced as corrected. *Davenport* v. *Sovil's Heirs*, 6 Ohio St. 459. But this cannot be done against the intervening rights of others acquired in good faith. *Ohio Life & Trust Co.* v. *Urbana Insurance Co.*, 13 Ohio, 220.

Such a result would be contrary alike to the plainest principles of reason, justice, and the law.

Decree reversed, and the cause remanded with directions to enter a decree and proceed in conformity to this opinion.

ADAMS v. NASHVILLE.

1. The act of Congress, approved June 3, 1864 (13 Stat. 99), was not intended to curtail the power of the States on the subject of taxation, or to prohibit the exemption of particular kinds of property, but to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power.
2. *People* v. *The Commissioners*, 4 Wall. 244, and *Hepburn* v. *The School Directors*, 23 id. 480, cited and approved.
3. The Supreme Court of Tennessee having decided that the act of the legislature of that State, requiring that all personal property of every kind and nature shall be listed and assessed for taxation, overrides and repeals the previous ordinance of the city of Nashville exempting from municipal taxation certain city bonds, and brings them within the scope of general taxation, that decision is binding upon this court.

ERROR to the Supreme Court of the State of Tennessee.

The facts are stated in the opinion of the court.

Mr. Edward Baxter for the plaintiffs in error.

Mr. J. E. Bailey, *contra*.

MR. JUSTICE HUNT delivered the opinion of the court.

The plaintiffs in error, stockholders in the Fourth National Bank of Nashville, Tenn., filed their bill in the Chancery Court of Davidson County in that State against the Mayor and

City Council of Nashville, to enjoin the collection of a tax imposed upon their shares of stock by that municipal corporation, and to have the tax declared illegal and void.

The bill was demurred to. The Chancellor sustained the demurrer and dismissed the bill. Upon appeal to the Supreme Court of Tennessee, the highest court of law or equity in the State, the decree of the Chancellor was affirmed; and thereupon the case was brought to this court by writ of error.

It is contended that the statute of the United States, which authorizes the taxation by State authority of the shares of stock in a national bank, but provides that such taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals, has been violated in the case of the present plaintiffs. 13 Stat. 102. The first cause of complaint arises out of the act of the legislature of the State of Tennessee of March 1, 1869. The act, it is said, provides that no tax shall be assessed upon the capital of any bank or joint-stock company organized under the laws of that State or of the United States. This, it is insisted, is an exemption from taxation of property in the hands of individual citizens, and operates to produce a greater rate of taxation on the plaintiffs' shares in the Fourth National Bank of Nashville than is assessed on other moneyed capital in the hands of individuals, to wit, on such banking capital, and hence that such taxation is illegal.

The statute enacts that no tax shall be assessed upon the capital of a State bank, but proceeds, in the same section, to say that its shares shall be included in the valuation of the personal property of the owner, for the purpose of assessment for State, county, and municipal taxation, at the same rate that is assessed upon other moneyed capital, and that, in addition thereto, the real estate owned by the bank shall be subject to the same taxation as other real estate.

This objection, in its general character, may be considered in connection with the second objection. The answer to both of them is found in the principle thus laid down in *People* v. *The Commissioners*, 4 Wall. 256: "That the rate of taxation upon the shares should be the same or not greater than upon the moneyed capital of the individual citizen which is liable to

taxation; that is, no greater in proportion or percentage of tax in the valuation of shares should be levied than upon other moneyed taxable capital in the hands of the citizens." See also *Hepburn* v. *The School Directors*, 23 id. 480.

By an ordinance of the defendants' corporation, passed on the 18th of April, 1870, it is provided that certain interest-paying bonds issued by the said corporation shall be exempt from taxation by said corporation. It is said that there are many such bonds in existence in the hands of individuals; that by such exemption the complainants' shares are taxed at a greater rate than is assessed upon such bonds; and that, therefore, the taxation complained of is in violation of the act of Congress forbidding the taxation of national shares at a greater rate than is assessed upon other moneyed capital in the hands of individuals.

There are several answers to this objection: —

1. It is not alleged in the bill that the bonds therein referred to are in fact exempted from taxation for municipal purposes. After reciting the issue and proposed exemption, the bill says that said property is "thus exempted from all municipal taxes;" that is, that, as a matter of law, it follows from the facts before stated that it is thus exempt.

This is not sufficient, especially when it is alleged in the brief opposed that the fact is otherwise.

2. By the statutes of the State of Tennessee, passed subsequently to the issue of the bonds, all personal property, of every kind and nature, is required to be listed and assessed for taxation.

The Supreme Court of Tennessee hold, in the case before us, that this statute repeals and overrides the ordinance of exemption, and brings these bonds within the scope of general taxation. This is a decision of a State tribunal upon the construction of its own statutes, which we are bound to respect.

3. Considering the objection on its merits and in connection with the objection first described, the case is met by *Hepburn* v. *The School Directors*, *supra*.

By a statute of Pennsylvania, it was enacted that "all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate shall be exempt

from taxation, except for State purposes." There, as here, it was objected that this exemption, by relieving certain specified property from taxation, brought the case within the prohibition of the act of Congress, and thus vitiated the tax sought to be enforced. This court held otherwise.

The act of Congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the legislature chose to do so. Homesteads, to a specified value, a certain amount of household furniture (the six plates, six knives and forks, six teacups and saucers, of the old statutes), the property of clergymen to some extent, schoolhouses, academies, and libraries, are generally exempt from taxation. The discretionary power of the legislature of the States over all these subjects remains as it was before the act of Congress of June, 1864. The plain intention of that statute was to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power. That particular persons or particular articles are relieved from taxation is not a matter to which either class can object.

The third objection is equally untenable. The statute referred to does not purport to relieve any property from taxation. It provides a mode for ascertaining the average capital of the merchant, and for giving a license to carry on the business of a merchant. He is required to pay an *ad valorem* tax on all his capital, and a license tax in addition.

The observations already made are pertinent under this head.

Judgment affirmed.

REED v. INSURANCE COMPANY.

1. A policy of insurance on a vessel at and from Honolulu, *via* Baker's Island, to a port of discharge in the United States, contained a clause, "the risk to be suspended while vessel is at Baker's Island loading." *Held*, in view of the circumstances which must be supposed to have appeared to the parties at the time of making the contract, that the meaning of the clause is that the risk was to be suspended while the vessel was at Baker's Island for the purpose of loading, whether actually engaged in the process of loading or not.
2. Although a written agreement cannot be varied by proof of the circumstances out of which it grew, and which surrounded its adoption, they may be resorted to for the purpose of ascertaining its subject-matter, and the standpoint of the parties in relation thereto.
3. *Quære*, Can a demand arising out of contract be enforced by a libel *in personam* in admiralty when a suit to recover it, if brought in a State court of concurrent jurisdiction, would be barred by the Statute of Limitations?

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

The circumstances of this case, as gathered from the pleadings and evidence, particularly the agreed statement made by the parties themselves, are substantially as follows: —

In November, 1867, the libellant, Samuel G. Reed, of Boston, was owner of the ship "Minnehaha," then lying at Honolulu, in the Sandwich Islands, and about to sail from that place in ballast *via* Baker's Island, with the intention of there taking in a cargo of guano, to a port of discharge in the United States. Baker's Island is a small rocky island in mid-ocean, nearly under the equator, and about two thousand miles south-westerly from the Sandwich Islands, having no harbor or anchorage, and only frequented for its guano. When ships arrive there, they are moored in the open sea, in an exposed and perilous position. The mooring is effected by means of a heavy stationary anchor, weighing five thousand six hundred pounds, fastened to a coral reef in about one hundred fathoms of water, to which anchor a large buoy is attached by a heavy pendant chain. This chain is braced by two other chains, each over a thousand feet long, attached to anchors fastened to another coral reef nearer to the island. By still another chain the ship is moored to the first-mentioned pendant chain as long as she remains at the island; and her cargo is sent aboard from the

island in small boats. The place is subject to strong currents and heavy gales, and vessels are, in consequence of the weather, frequently obliged to put to sea while loading.

On the 6th of January, 1868, the libellant, through a firm of insurance brokers in New York, made application by mail to the Merchants' Mutual Insurance Company of Baltimore for insurance on the said ship "Minnehaha," in the following terms: —

"Application for insurance is hereby made by Johnson & Higgins, as agents, in the name of Samuel G. Reed, account of whom it may concern. Loss, if any, payable to them or order. For [$5,000, at seven per cent net] on ship 'Minnehaha,' valued at $60,000, at and from Honolulu, *via* Baker's Island, to a port of discharge in the United States not east of Boston, with liberty to use Hampton Roads for orders; the risk to be suspended while vessel is at Baker's Island loading."

This application was enclosed in the following letter: —

"OFFICE OF JOHNSON & HIGGINS, &c.,
"87 Wall Street, New York,
"Jan. 6, 1868.

"GEORGE R. COALE, Esq., *Secretary:*

"DEAR SIR, — Enclosed please find two applications for Samuel G. Reed: viz., one on the 'Minnehaha' (our companies here are averse to Baker's Island risks, and for that reason the owners suspend the risk while at Baker's Island loading. The Atlantic have taken a large line on vessel and freight at seven per cent, with scrip); also, one on the 'Guiding Star,' now loading under inspection of Captains Ellis and Story, for underwriters. Please let us know how much your companies will take on each, and the lowest respective rates. Should like to hear by telegraph.

"Yours respectfully,
"JOHNSON & HIGGINS,
"Per TOOKER."

In pursuance of this application, the company issued the policy on which the present suit is brought, the operative clause of which is in these words: —

"The Merchants' Mutual Insurance Company of Baltimore have insured, and do hereby insure, agreeably to order, Samuel G. Reed, for account of whom it may concern, lost or not lost, at and from Honolulu, *via* Baker's Island, to a port of discharge in the United

States not east of Boston, with liberty to use Hampton Roads for orders, the risk to be suspended while vessel is at Baker's Island loading, $5,000, upon the body, tackle, &c., of the good ship 'Minnehaha.'"

The ship sailed in ballast from Honolulu the 7th of November, 1867, and arrived near Baker's Island on the afternoon of the twentieth day of that month. She came to her mooring near the island in safety; shortly after which a heavy gale and heavy surf arose, and continued with violence until the 3d of December, when the ship parted her moorings, and was totally wrecked and lost. At no time after her arrival at that island was it possible to discharge ballast or receive cargo, or commence the process of loading, or even the preparation for loading.

Proof of loss and of interest and adjustment was duly presented to the company, and payment demanded therefor and refused.

On May 20, 1872, Reed exhibited his libel in the District Court of the United States for the District of Maryland against said company. That court upon hearing dismissed the cause; and the Circuit Court having affirmed the decree, the libellant brought the case here.

The Statute of Limitations in force in Maryland provides as follows: —

"All actions of account, actions of assumpsit or on the case, actions of debt on simple contract, or for rent in arrears, detinue, and replevin, all actions for trespass for injuries to real or personal property, shall be commenced or sued within three years from time the cause of action accrues."

Mr. Frederick E. Bryant and *Mr. Charles B. Goodrich* for the appellant.

1. The policy covers the voyage during which the loss occurred, and the appellant is *prima facie* entitled to recover the amount of such loss. The vessel was insured from Honolulu, *via* Baker's Island, to her port of discharge; and the intention of the assured and insurer that she should stop there is thus clearly manifested.

2. The excepting clause, "the risk to be suspended while the vessel is at Baker's Island loading," has no bearing upon

the rights of the parties; because no loading was made or attempted. The appellee gives to that clause a broader signification than its terms justify, and makes it include a suspension of the risk before the process of loading began. If it be ambiguous (which we deny), it should receive a construction least favorable to the company. 2 Parsons, Contr. 19 (ed. 1860); *Dann* v. *Spurrier*, 3 B. & P. 399; *Doe* v. *Dixon*, 9 East, 15; *Throckmorton* v. *Wacy*, Plowd. 154; *Melvin* v. *Prop., &c. on Merrimack River*, 5 Met. (Mass.) 27. Usage is never admissible to contradict what is plain. *Hearne* v. *Marine Insurance Co.*, 20 Wall. 492; *Haskins* v. *Warren*, 115 Mass. 535; *Dickenson* v. *Gay*, 7 Allen (Mass.), 34; *Black* v. *Bachelder*, 120 Mass. 171. Nothing can be plainer than that the risk was to be suspended only while the vessel was at Baker's Island *loading*. Any other construction would do violence to the rule that full force and effect should be given to every word of a written contract. 2 Parsons, Contr. 16, 17 (ed. 1860); *Evans* v. *Sanders*, 8 Port. (Ala.) 497; *Stratton* v. *Pettit*, 16 C. B. 520.

The statement made in the letter of Johnson & Higgins, which accompanied the application for the policy, that the New York companies were averse to Baker's Island risks, &c., even if fraudulently made, which it was not, is immaterial, and does not vitiate the insurance, as neither the appellee nor its agent was thereby influenced to take the risk. 1 Phillips, Ins., sects. 539–541; *Salem India-Rubber Co.* v. *Adams*, 23 Pick. (Mass.) 256; 1 Parsons, Mar. Ins. 465; *Flinn* v. *Tobin*, 1 Moo. & M. 367; *Flinn* v. *Headlam*, 9 B. & C. 693.

In regard to the position taken on the other side, that the lapse of time bars this suit, it is submitted that statutes of limitation are, like all statutes in derogation of the common law, construed strictly. This, moreover, is a proceeding in admiralty. The act of Maryland cannot affect the *status* of the appellant in a court of the United States, nor even furnish any analogy to control the exercise of its jurisdiction. The company has not been injured by delay, and sustaining the bill will not produce public inconvenience. The imputed laches, therefore, furnish no legal or equitable ground for depriving him of his right to a determination of the case upon its merits. *Pickering* v. *Lord Stamford*, 2 Ves. Jr. 583; *Allore* v. *Jewell*,

94 U. S. 506; *Bingham* v. *Wilkins*, Crabbe, 50; *Brown* v. *Jones*, 2 Gall. 477; *Willard* v. *Dorr*, 3 Mas. 95; *The Key West*, 14 Wall. 653.

Mr. John H. Thomas, *contra*.

The letter of Johnson & Higgins to the agent of the appellee was intended to produce, and did produce, on his mind the impression that the New York companies had excluded the risks of Baker's Island by suspensions coextensive with that mentioned in the application. If they had not, the policy was obtained by misrepresentation, and is null and void. 1 Parsons, Mar. Ins. 409, 410.

The policy without the suspending clause would not have covered the vessel at Baker's Island, but only during her voyage *via* that island. When property is intended to be covered by a marine insurance at a place, not constituting a part of the voyage, apt and express words adequate to that purpose are always used; as, for example, "*at* and from," "to, *at*, and from," "to, *while there*, and thence," "with liberty to *touch at*," "with liberty *to touch and stop at*," "with liberty to *touch and load* at," &c. 1 Phillips, Ins., sects. 928, 1005, 1014; 2 Parsons, Mar. Ins. 16, and notes; Park, Ins. 388; *Barber* v. *Fleming*, 5 Law Rep. Q. B. 59; *Stitts* v. *Wardell*, 2 Esp. 610; *Sheriff* v. *Potts*, 5 id. 96; *United States* v. *The Paul Shearman*, 1 Pet. C. Ct. 98–104; *Cross* v. *Shuttliffe*, 2 Bay (S. C.), 220.

The words "*via* Baker's Island" are descriptive of the voyage. Without them the vessel would have been obliged to pursue the accustomed route. Passing that island, if unusual and unnecessary, and, *a fortiori*, stopping, loading, or even touching there, would have been a deviation, causing a forfeiture of the policy. The words suspending the risk, "while at Baker's Island loading," were introduced to limit and not enlarge the operation of the instrument. If the intention had been to suspend the risk "while loading," the collocation of them would have been "while loading at Baker's Island." Place is the controlling idea of the words as used; "loading" is subordinate. It indicates the purpose of being at the place, not the terms of the risk. *Devoux* v. *J'Anson*, 5 Bing. N. C. 539.

If the construction here contended for is not the natural one,

looking at the policy alone, it is proper to invoke, in aid of its interpretation, the letter enclosing the application, and therefore a part of it. Looking at the entire instrument, the object sought to be accomplished, and all the circumstances of the case, it seems impossible to resist the conclusion that the words in the clause were employed to describe the place at which the risk was to be suspended, and the purpose for which the vessel was to be there, without reference to the mode in which her crew might be employed. Courts have gone so far in this line of interpretation as to decide, that, although the literal and grammatical construction of a policy would make it attach only on goods "at" a designated place, "it may attach although the ship be at another place, if the policy and all the circumstances make it certain that the name of the place is either surplusage or a mere term of description." 2 Parsons, Mar. Ins. 45.

If the name of a place can be so rejected, for the purpose of carrying into effect the intention of the parties, why, on the same principle, may not a word designating only the contemplated employment of the crew at a place be rejected? Id. 50.

Exceptions in a policy must always be construed according to the actual intention of the parties, so as to carry the contract into effect. 1 Parsons, Mar. Ins. 64, note 1; id. 623; *Cross* v. *Shuttliffe*, 2 Bay (S. C.), 23; *Yeaton* v. *Fry*, 5 Cranch, 335. When the policy was issued, it is clear that neither Johnson & Higgins nor the appellant considered that it covered the vessel when at the island, whether she was engaged in loading or not. If there is any doubt as to the true meaning of the instrument, their construction of it, concurring with that of the appellee, is entitled to great and conclusive weight. *Railroad Company* v. *Trimble*, 10 Wall. 367. Resort may be properly had to the testimony of experts to aid in interpreting the clause of exemption. 1 Parsons, Mar. Ins. 77, 83, 627, 628; *Salmon Falls Man. Co.* v. *Goddard*, 14 How. 447; *Grey* v. *Harper*, 1 Story, 574; *Shaw* v. *Wilson*, 9 Cl. & Fin. 555; *Smith* v. *Wilson*, 3 Barn. & Ad. 728; *Williams* v. *Wood*, 16 Md. 251; *Merchants' Bank* v. *State Bank*, 10 Wall. 667; 2 Taylor, Evid., p. 1009, 1010, sects. 1060, 1062, 1068; 1 Greenl. Evid., sects. 280–282.

This suit, when brought, was barred by the Statute of Limitations of Maryland. 1 Md. Code, p. 395.

In cases of concurrent jurisdiction, courts of equity adopt the period of limitation prescribed for courts of law. *Lewis* v. *Marshall*, 5 Pet. 470; *Peyton* v. *Smith*, id. 485; *Miller* v. *McIntyre*, 6 id. 61; *Bank of United States* v. *Daniel*, 12 id. 56; *Elmendorff* v. *Taylor*, 10 Wheat. 152; *Thomas* v. *Harvies's Heirs*, id. 149, 150; *Burke* v. *Smith*, 16 Wall. 401; *Hirtle* v. *Schwartz*, 3 Md. 383; *Teackle* v. *Gibson*, 8 id. 87; *Knight* v. *Brown*, 14 id. 7; *Dugan* v. *Gittings*, 3 Gill (Md.), 161.

Admiralty courts are chancery courts of the sea, and are governed by chancery rules in the administration of their remedies. *Packard* v. *Sloop Louisa*, 2 Woodb. & M. 60; *Brig Sarah Ann*, 2 Sumn. 212; *Pittman* v. *Hooper*, 3 id. 305; *Willard* v. *Dorr*, 3 Mas. 163; *Joy* v. *Allen*, 2 Woodb. & M. 304.

The Key City, 14 Wall. 653, was a proceeding *in rem* exclusively of admiralty jurisdiction. The principles there enunciated are expressly confined to such a case. It establishes nothing at variance with what is here contended for. In a matter solely within their cognizance, courts of equity do not inflexibly adhere to the common-law period of limitation. *Wisner* v. *Barnet*, 4 Wash. 640; *Kane* v. *Bloodgood*, 7 Johns. (N. Y.) Ch. 90. Nor do the admiralty courts; but that doctrine has no application to this suit.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a cause of contract, civil and maritime, commenced by a libel *in personam* by Samuel G. Reed, the appellant, against the Merchants' Mutual Insurance Company of Baltimore, the appellee, to recover $5,000, the amount insured by the latter on the ship "Minnehaha," belonging to the libellant. The policy was dated the fourteenth day of January, 1868, and insured said ship in the amount named, lost or not lost, at and from Honolulu, *via* Baker's Island, to a port of discharge in the United States not east of Boston, with liberty to use Hampton Roads for orders, "the risk to be suspended while vessel is at Baker's Island loading." The ship was lost at Baker's Island, where she had gone for the purpose of loading, on the third day of December, 1868. The defence was that

the loss occurred whilst the risk was suspended under the clause above quoted; also laches by reason of the delay in commencing suit, being more than four years after the cause of action accrued.

This case, upon the merits, depends solely upon the construction to be given to the clause in the policy before referred to, namely, "the risk to be suspended while vessel is at Baker's Island loading;" and turns upon the point whether the clause means, while the vessel is at Baker's Island *for the purpose of loading*, or while it is at said island *actually loading*. If it means the former, the company is not liable; if the latter, it is liable.

A strictly literal construction would favor the latter meaning. But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the stand-point of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities. On this subject Professor Greenleaf says: "The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the courts in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the

words they have used." 1 Greenl. Evid., sect. 277. Mr. Taylor uses language of similar purport. He says: "Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter. With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument." Taylor, Evid., sect. 1082. Again he says: "It may, and indeed it often does, happen, that, in consequence of the surrounding circumstances being proved in evidence, the courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received, had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it." Id., sect. 1085. See *Thorington* v. *Smith*, 8 Wall. 1, and remarks of Mr. Justice Strong in *Maryland* v. *Railroad Company*, 22 id. 105.

The principles announced in these quotations, with the limitations and cautions with which they are accompanied, seem to us indisputable; and, availing ourselves of the light of the surrounding circumstances in this case, as they appeared, or must be supposed to have appeared, to the parties at the time of making the contract, we cannot doubt that the meaning of the words which are presented for our consideration is that the risk was to be suspended while the vessel was at Baker's Island for the purpose of loading, whether actually engaged in the process of loading or not. Taking this clause in absolute literality, the risk would only be suspended when loading was actually going on. It would revive at any time after the loading was commenced, if it had to be discontinued by stress of weather, or any other cause. It would even revive at night, when the men were not at work. This could not have been the intent of the parties. It could not have been what they meant by the words "while vessel is at Baker's Island loading." It was the place, its exposure, its unfavorable moorage, which the insurance companies had to fear, and the risk

of which they desired to avoid. The whole reason of the thing and the object in view point to the intent of protecting themselves whilst the vessel was in that exposed place for the purpose referred to, not merely to protect themselves whilst loading was actually going on. Her visit to the island was only for the purpose of loading; as between the contracting parties, she had no right to be there for any other purpose; and, supposing that they intended that the risk should be suspended whilst she was there for that purpose, it would not be an unnatural form of expression to say, "the risk to be suspended while vessel is at Baker's Island loading." And we think that no violence is done to the language used, to give it the sense which all the circumstances of the case indicate that it must have had in the minds of the parties.

If we are right in this construction of the contract, there can be no uncertainty as to its effect upon the liability of the underwriters. The loss clearly accrued at a time when, by the terms of the policy, the risk was suspended. The ship sailed in ballast from Honolulu on or about the 7th of November, 1867, and arrived at Baker's Island on the afternoon of the twentieth day of November, 1867. She came to her mooring in safety, and her sails were furled, shortly after which a heavy gale and heavy surf arose. The gale and surf continued with violence until the 3d of December, 1867, when the ship parted her moorings, and was totally wrecked and lost. At no time after her arrival at Baker's Island was it possible to discharge ballast or receive cargo or to commence the progress of loading. The violence of the winds, current, and waves, and their adverse course and direction, prevented the ship from slipping her cables and getting to sea, or otherwise escaping the perils that surrounded her.

These facts are indisputable; and they show that, when the loss occurred, the vessel was at Baker's Island for the purpose of loading. That the process of loading had not actually commenced is of no consequence. The suspension of the risk commenced as soon as the vessel arrived at the island and was safely moored in her proper station for loading.

The appellee, as a further defence, set up laches in bringing suit. The libel was not filed until more than four years had

elapsed after the cause of action had accrued. The Statute of Limitations of Maryland requires actions of account, assumpsit, on the case, &c., to be brought within three years; and the counsel for the appellee insists that by analogy to this statute the Admiralty Court, having concurrent jurisdiction with the State courts in this case, should apply the same rule. We had occasion, in the case of *The Key City*, 14 Wall. 653, to explain the principles by which courts of admiralty are governed when laches in bringing suit is urged as an exception in cases cognizable therein. In view of the construction which we have given to the contract in this case, it is not necessary to pass upon the precise question now raised by the appellee.

It is also unnecessary to examine other questions which were mooted on the argument. *Decree affirmed.*

VAN REYNEGAN *v.* BOLTON.

1. Under the Mexican law, when a grant of land is made by the government, a formal delivery of possession to the grantee by a magistrate of the vicinage is essential to the complete investiture of title. This proceeding, called, in the language of the country, the delivery of juridical possession, involves the establishment of the boundaries of the land granted, when there is any uncertainty with respect to them. A record of the proceeding is preserved by the magistrate, and a copy delivered to the grantee.
2. Unless the decree of the tribunals of the United States, confirming a claim under such a grant, otherwise limits the extent or the form of the tract, the boundaries thus established should control the officers of the United States in surveying the land.
3. A survey, by a surveyor-general of the United States, of a claim thus confirmed, is inoperative, until finally approved by the Land Department at Washington.
4. Where a quantity of land in California was granted by the Mexican government within a tract embracing a larger amount, in the possession of which tract the grantee was placed, he is entitled to retain such possession until that quantity is segregated from the tract by the officers of the government and set apart to him; and he may maintain ejectment for the whole tract, or any portion of it, against parties in possession claiming under the pre-emption laws of the United States.
5. Lands claimed under Mexican grants in California are excluded from settlement under the pre-emption laws, so long as the claims of the grantees remain undetermined by the tribunals and officers of the United States.

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

The facts are stated in the opinion of the court.

Submitted on printed arguments by the plaintiffs in error, and by *Mr. B. S. Brooks* for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This is an action of ejectment for the possession of a tract of land situated in the county of Marin, in the State of California. The plaintiff traces title to the demanded premises from the Mexican government through a grant made to one John Reed in 1834, and confirmed by the tribunals of the United States. The defendants, against whom judgment was recovered, held separate parcels of the premises, claiming to be rightfully in possession under the pre-emption laws of the United States.

It appears from the findings of the court that in 1834 the Mexican governor of California, José Figueroa, granted to Reed a tract of land known as Corte Madera del Presidio, bounded by the mission of San Rafael and the port of San Francisco, the quantity being specified in the grant as "one square league, a little more or less, as explained by the map attached to the proceedings" (*expediente*). In the following year, possession of the tract was delivered to the grantee by the proper Mexican officials; and from that time he continued in its possession and enjoyment until his death. The demanded premises are a parcel of this tract. In 1852, the heirs of Reed presented their claim under the grant for confirmation to the board of land commissioners for the settlement of land-titles in California, created by the act of March 3, 1851; and in 1854, by a decree of the board, the claim was confirmed. On appeal to the District Court this decree was affirmed. No further proceedings appear to have been prosecuted by the government, and the confirmation thus became final.

The grant is not set forth in the record; but we must presume that it was in the ordinary form of grants made by former governors of California, under the Mexican colonization law of 1824, as under no other law were those governors empowered to make grants of the public domain. Those grants were some-

times of tracts designated by well-defined boundaries, sometimes of a specified quantity of land lying within exterior boundaries embracing a greater amount, and sometimes of places by name where these were well known, and thus capable of ready identification. All of them were made subject to the approval of the assembly of the department; and, until they received such approval, the estate granted was liable to be defeated. And, when the approval was obtained, there was another proceeding to be taken, which was essential to the complete investiture of title; and that was, a formal delivery of possession of the property by a magistrate of the vicinage, called, in the language of the country, the delivery of juridical possession. This proceeding involved the establishment of the boundaries of the tract, when there was any uncertainty respecting them. If these were designated in the grant, it required their ascertainment and identification; if they were not thus designated, it required the measurement of the quantity granted and its segregation from the public domain. The regulations prescribed by law for the guidance of the magistrate in these matters made it his duty to preserve a record of the various steps taken in the proceeding, to have the same attested by the assisting witnesses, and to deliver an authentic copy to the grantee.

Ordinarily, the boundaries thus established would be accepted as conclusive by our government. Unless there is something in the decree of confirmation otherwise limiting the extent or the form of the tract, they should control the officers of the United States in making their surveys. It was so held by this court in *Graham* v. *United States*, 4 Wall. 259, and in *Pico* v. *United States*, 5 id. 536.

In the case at bar, the surveyor-general for California disregarded the boundaries established upon the juridical possession delivered to the grantee. He proceeded upon the conclusion that the confirmees were restricted by the decree to one square league, to be measured out of the tract within those boundaries, which exceeded that amount by about fifteen hundred acres. Whether the terms of the decree justified his conclusion is a question upon which it is unnecessary for us to express an opinion. That is a question which must, in the first instance, be determined by the Land Department in carrying the decree

into execution by a survey and patent. It is sufficient for the present case that the survey made was contested by the confirmees, and the contest was undetermined when this action was tried. Until finally approved, the survey could not impair their right to the possession of the entire tract as delivered by the former government to the grantee under whom they claim. Until then, it was inoperative for any purpose. Even if the limitation to one square league should ultimately be held correct, that square league might be located in a different portion of the tract by direction of the Land Department, to which the supervision and correction of surveys of private land-claims are intrusted. The confirmees could not measure off the quantity for themselves, and thus legally segregate it from the balance of the tract. The right to make the segregation rested exclusively with the government, and could only be exercised by its officers. Until they acted and effected the segregation, the confirmees were interested in preserving the entire tract from waste and injury, and in improving it; for until then they could not know what part might be assigned to them. Until then, no third person could interfere with their right to the possession of the whole. No third person could be permitted to determine, in advance of such segregation, that any particular locality would fall within the surplus, and thereby justify his intrusion upon it and its detention from them. If one person could in this way appropriate a particular parcel to himself, all persons could do so; and thus the confirmees would soon be stripped of the land which was intended by the government as a donation to its grantee, whose interests they have acquired, for the benefit of parties who were never in its contemplation. If the law were otherwise than as stated, the confirmees would find their possessions limited, first in one direction, and then in another, each intruder asserting that the parcel occupied by him fell within the surplus, until in the end they would be excluded from the entire tract. *Cornwell* v. *Culver*, 16 Cal. 429; *Riley* v. *Heisch*, 18 id. 198; *Mahoney* v. *Van Winkle*, 21 id. 552.

The defendants acquired no rights as pre-emptioners under the laws of the United States. Lands claimed under Mexican grants in California are restricted from settlement so long as

the claims of the grantees remain undetermined. 10 Stat. 246. Their possession, therefore, was that of simple intruders and trespassers without color of right.[1]

Judgment affirmed.

McMillen v. Anderson.

1. The revenue laws of a State may be in harmony with the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty, or property without due process of law, although they do not provide that a person shall have an opportunity to be present when a tax is assessed against him, or that the tax shall be collected by suit.
2. A statute which gives a person against whom taxes are assessed a right to enjoin their collection, and have their validity judicially determined, is due process of law, notwithstanding he is required, as in other injunction cases, to give security in advance.

Error to the Supreme Court of the State of Louisiana.

The petition in the case alleges that the defendant, on the 19th of April, 1873, broke into the store of the plaintiff, and carried away certain merchandise, and prays for an injunction. Upon the plaintiff giving the required bond and security, an injunction restraining the defendant from further trespass, and from advertising and selling the property which he had already seized, was granted.

The defendant set up that the plaintiff was a delinquent tax-payer, and that in making the seizure the defendant was acting in the discharge of his duty as tax-collector of the parish of Carroll, Louisiana, under the act of that State, of March 14, 1873, which provides: —

"That in all cases of neglect or refusal to pay their licenses of any description by any person, firm, company, or corporation doing business in this State, the tax-collector shall give ten days' written or printed notice to such delinquent tax-payer to pay such licenses, if such delinquent can be found; otherwise, the notice shall be given by publication for ten days in the official journal, if there be one in the parish; if there be no official journal published in the parish,

[1] For the final decision of the Land Department upon the survey made, see Copp's Public Land Laws, 534–540.

the notice may be posted at the court-house door; and if at the expiration of said notice the license, together with all costs, be not fully paid, the tax-collector may, without any judicial formality, proceed to seize and sell, after ten days' advertisement, the property, rights, and credits of such delinquent tax-payer, or so much thereof as may be necessary to satisfy the claims of the State as aforesaid, together with all the costs and charges.

"That all causes which may be commenced hereafter in any of the courts of this State, in which it is sought to enjoin the collection of any licenses or taxes whatever, whether State or parish, general or special, imposed by competent authority, shall be regarded as preference cases, and the court shall proceed to final trial and determination of the same at the earliest moment compatible with the ends of justice; and tax-collectors shall not be liable for damages for prosecuting such cases; and, upon a dissolution of any injunction hereafter granted to enjoin or delay the collection of any such taxes so levied or imposed upon any person or property in this State, the court ordering such injunction to be dissolved shall enter a decree against the person or persons suing out the same, and his or their securities, on their injunction bond for the sum of one hundred per cent on the amount of all taxes the collection of which was so delayed or enjoined, and all costs of suits; and said decrees shall be enforced as other decrees are enforced, and the money collected and paid into the proper treasury.

"That the tax-payers who are now or shall become delinquents by the non-payment of taxes on real estate, as provided for in this act, and shall have been so returned upon the rolls of the tax-collector to the auditor of public accounts, the auditor shall publish in the official journal of the parish in which such delinquent resides, or by public notice, when there is no official journal, by three insertions within ten days, the name, residence of, and amount due from, such delinquent tax-payer; and such delinquent tax-payer shall after thirty days forfeit his right to bring suit or be a witness for or in his own behalf before any justice, parish, district, or State court; and every court having jurisdiction within the State shall deny and refuse to issue a civil process of any kind or nature whatever in his own name or for his own benefit, until he shall, if a resident of the parish of Orleans, have procured from the auditor of public accounts, or, if a resident of a country parish, from the tax-collector thereof, a certificate setting forth that all such claims for delinquent taxes and costs thereon against such delinquent tax-payer have been paid."

The revenue law in relation to licensing or taxing retail merchants and retailers of spirituous liquors, provides as follows: —

"There shall be levied and collected an annual amount as a license or tax . . . from each and every retail merchant, fifteen dollars; . . . from the proprietors of all coffee-houses, beer saloons or gardens, or cabarets, eighty-five dollars; all retail groceries selling by the glass shall pay, in addition to the grocery license, a coffee-house license."

The amount of tax claimed to be due upon the business of the plaintiff was the sum of one hundred dollars. The injunction was dissolved, and a judgment rendered in favor of the defendant. That judgment having been affirmed by the Supreme Court of the State, the plaintiff brought the case here, and assigns for error that the statute under which the defendant acted deprived the plaintiff of his property without due process of law, and is, therefore, in violation of the Fourteenth Amendment to the Constitution of the United States, and void.

Mr. J. E. Leonard for the plaintiff in error.

Although taxes may be collected summarily and without the aid of the courts, there must be due process of some kind. It is not in the power of the legislature to make any process due process of law. *Murray's Lessee* v. *Hoboken Land Company*, 18 How. 272; *Allen* v. *Armstrong*, 16 Iowa, 508; *Ervine's Appeal*, 16 Penn. St. 256. The so-called license, the collection of which is resisted by the plaintiff, is, in reality, a tax. A license to sell liquor is granted only by the parish; the State then taxes the occupation or traffic. Rev. Stat. La., sect. 2779.

The act deprives the plaintiff of his property without due process of law, because it condemns him without a hearing. It fixes the tax to be paid by a retail liquor-dealer, but points out no method by which it may be ascertained whether a particular person is such a dealer. No one can be condemned without an opportunity to be heard. *Fisher* v. *McGirr*, 1 Gray (Mass.), 1.

If the tax-collector's proceedings were authorized by the law (and the State court has decided that they were), he was armed by the statute with a general search-warrant, and that,

too, unsupported by oath. *Entick* v. *Carrington*, 19 St. Tr. 1030; *Attorney-General* v. *Racine*, 4 Mee. & W. 419.

The legislature cannot change the legal presumptions of evidence, nor declare that an individual shall be deemed to be guilty of a particular crime or to owe a particular debt, until he proves the contrary. *Wynehamer* v. *People*, 13 N. Y. 447.

The plaintiff was not permitted under the law of Louisiana to contest the claim of the State, until he had given security for the payment of costs and penalties as a condition for having a hearing. The law, therefore, establishes one rule for the rich and another for the poor. He who has neither wealth, nor wealthy friends to become his sureties, is not allowed a hearing under any circumstances. This is not due process of law. *Greene* v. *Briggs*, 1 Curt. 325.

No counsel appeared for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

The defendant, tax-collector of the State of Louisiana for the parish of Carroll, seized property of the plaintiff, and was about to sell it for the payment of the license tax of one hundred dollars, for which the latter, as a person engaged in business, was liable. In accordance with the laws of Louisiana, plaintiff brought an action in the proper court of the State for the trespass, and in the same action obtained a temporary injunction against the sale of the property seized. Defendant pleaded that the seizure was for taxes due, and that his duty as collector required him to make it. On a full hearing, the court sustained the defence, and gave a judgment under the statute against plaintiff and his sureties on the bond for double the amount of the tax, and for costs.

Plaintiff thereupon took an appeal to the Supreme Court of Louisiana, and in his petition for appeal alleged that the law under which the proceedings of defendant were had is void, because it is in conflict with the Constitutions of Louisiana and of the United States, and, as he now argues, is specifically opposed to the provision of the Fourteenth Amendment of the latter, which declares that no State shall deprive any person of life, liberty, or property without due process of law.

The judgment of the Supreme Court of Louisiana, to which the present writ of error is directed, affirming that of the inferior court, must be taken as conclusive on all the questions mooted in the record except this one. It must, therefore, be conceded that plaintiff was liable to the tax; that, if the law which authorized the collector to seize the property is valid, his proceedings under it were regular; and that the judgment of the court was sustained by the facts in the case.

Looking at the Louisiana statute here assailed — the act of March 14, 1873, — we feel bound to say, that, if it is void on the ground assumed, the revenue laws of nearly all the States will be found void for the same reason. The mode of assessing taxes in the States by the Federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done.

But that does not mean, nor does the phrase "due process of law" mean, by a judicial proceeding. The nation from whom we inherit the phrase "due process of law" has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. We need not here go into the literature of that constitutional provision, because in any view that can be taken of it the statute under consideration does not violate it. It enacts that, when any person shall fail to refuse or pay his license tax, the collector shall give ten days' written or printed notice to the delinquent requiring its payment; and the manner of giving this notice is fully prescribed. If at the expiration of this time the license "be not fully paid, the tax-collector may, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property" of the delinquent, or so much as may be necessary to pay the tax and costs.

Another statute declares who is liable to this tax, and fixes the amount of it. The statute here complained of relates only to the manner of its collection.

Here is a notice that the party is assessed, by the proper officer, for a given sum as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceed-

ing? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the States now have boards of revisers of tax assessments does not prove that taxes levied without them are void.

Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that State, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party, and recover back the money as paid under duress, if the tax was illegal.

But however that may be, it is quite certain that he can, if he is wrongfully taxed, stay the proceeding for its collection by process of injunction. See Fouqua's Code of Practice of Louisiana, arts. 296–309, inclusive. The act of 1874 recognizes this right to an injunction, and regulates the proceedings when issued to stay the collection of taxes. It declares that they shall be treated by the courts as preferred cases, and imposes a double tax upon a dissolution of the injunction.

But it is said that this is not due course of law, because the judge granting the injunction is required to take security of the applicant, and that no remedial process can be within the meaning of the Constitution which requires such a bond as a condition precedent to its issue.

It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another. *Judgment affirmed.*

PRATT *v.* RAILWAY COMPANY.

1. The liability of an intermediate common carrier for the safety of goods delivered to him for carriage is discharged by their delivery to and acceptance by a succeeding carrier or his authorized agent.
2. If there is an agreement between two persons, occupying the relative positions of intermediate and succeeding carrier, that property intended for transportation by the latter may be deposited at a particular place without express notice to him, such deposit amounts to notice, and is a delivery.
3. The acceptance by the succeeding carrier is complete and his liability fixed whenever the property thus, with his assent, comes into his possession.

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. William Jennison for the plaintiffs in error.

Mr. Isaac P. Christiancy, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

The Grand Trunk Railway Company is engaged as a common carrier in the transportation of persons and property. This action seeks to recover damages for a violation of its duty in respect to certain merchandise shipped from Liverpool to St. Louis, and carried over its road from Montreal to Detroit. The goods reached the city of Detroit on the 17th of October, 1865, and on the night of the 18th of the same month were destroyed by fire.

The defendant claims to have made a complete delivery of the goods to the Michigan Central Railroad Company, a succeeding carrier, and thus to have discharged itself from liability before the occurrence of the fire.

If the liability of the succeeding carrier had attached, the liability of the defendant was discharged. *Ransom* v. *Holland*, 59 N. Y. 611; *O'Neil* v. *N. Y. Central Railroad Co.*, 60 id. 138.

The question, therefore, is, Had the duty of the succeeding carrier commenced when the goods were burned?

The liability of a carrier commences when the goods are delivered to him or his authorized agent for transportation, and are accepted. *Rogers* v. *Wheeler*, 52 N. Y. 262; *Grosvenor* v. *N. Y. Central Railroad Co.*, 59 id. 34.

If a common carrier agrees that property intended for transportation by him may be deposited at a particular place without express notice to him, such deposit amounts to notice, and is a delivery. *Merriam* v. *Hartford Railroad Co.*, 24 Conn. 354; *Converse* v. *N. & N. Y. Tr. Co.*, 33 id. 166.

The liability of the carrier is fixed by accepting the property to be transported, and the acceptance is complete whenever the property thus comes into his possession with his assent. *Illinois Railroad Co.* v. *Smyser*, 38 Ill. 354.

If the deposit of the goods is a mere accessory to the carriage, that is, if they are deposited for the purpose of being carried without further orders, the responsibility of the carrier begins from the time they are received; but, when they are subject to the further order of the owner, the case is otherwise. *Ladere* v. *Griffith*, 25 N. Y. 364; *Blossom* v. *Griffin*, 13 id. 569; *Wade* v. *Wheeler*, 47 id. 658; *Michigan Railroad* v. *Schurlz*, 7 Mich. 515.

The same proposition is stated in a different form when it is said that the liability of a carrier is discharged by a delivery of the goods. If he is an intermediate carrier, this duty is performed by a delivery to the succeeding carrier for further transportation, and an acceptance by him. Auth. *supra.*

The precise facts upon which the question here arises are as follows: —

At the time the fire occurred, the defendant had no freight room or depot at Detroit, except a single apartment in the freight-depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length, and some three or four hundred feet in width, and was all under one roof. It was divided into sections or apartments, without any partition-wall between them. There was a railway track in the centre of the building, upon which cars were run into the building to be loaded with freight. The only use which the defendant had of said section was for the deposit of all goods and property which came over its road, or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as hereinafter mentioned. The defendant employed in this section two men, who checked

freight which came into it. All freight which came into the section was handled exclusively by the employés of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundred-weight. Goods which came into the section from defendant's road, destined over the road of the Michigan Central Railroad Company, were, at the time of unloading from defendant's cars, deposited by said employés of the Michigan Central Railroad Company in a certain place in said section, from which they were loaded into the cars of said latter company by said employés when they were ready to receive them; and, after they were so placed, the defendant's employés did not further handle said goods. Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight-building set apart for the use of the defendant, destined over the line of said Central Railroad, he would call upon the agent of the defendant in said freight-building, and, from a way-bill exhibited to him by said agent, he would take a list of said goods, and would then, also, for the first time, learn their ultimate place of destination, together with the amount of freight-charges due thereon; that, from the information thus obtained from said way-bill in the hands of the defendant's agent, a way-bill would be made out by the Michigan Central Railroad Company for the transportation of said goods over its line of railway, and not before.

These goods were, on the 17th of October, 1865, taken from the cars and deposited in the apartment of said building used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined.

At the time the goods in question were forwarded from Montreal, in accordance with the usage in such cases, a way-bill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned, and the amount of charges against them from Liverpool to Detroit. One of these way-bills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit,

the conductor delivered his copy of said way-bill to the checking-clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way-bill in the custody of said checking-clerk, in the manner aforesaid, the place of destination and a list of said goods and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier.

We are all of the opinion that these acts constituted a complete delivery of the goods to the Michigan Central Company, by which the liability of the Grand Trunk Company was terminated.

1. They were placed within the control of the agents of the Michigan Company.

2. They were deposited by the one party and received by the other for transportation, the deposit being an accessory merely to such transportation.

3. No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company, and forwarded, without further action of the Grand Trunk Company.

4. Under the arrangement between the parties, the presence of the goods in the precise locality agreed upon, and the marks upon them, "P. & F., St. Louis," were sufficient notice that they were there for transportation over the Michigan road towards the city of St. Louis; and such was the understanding of both parties.

The cases heretofore cited in 20 Conn. 354, and 33 id. 166, are strong authorities upon the point last stated.

In the latter case, a railroad company and a steamboat company had a covered wharf in common, at their common terminus, used as a depot and a wharf; and it was the established usage for the steamboat company to land goods for the railroad, on the arrival of its boats in the night, upon a particular place in the depot, whence they were taken by the railroad company, at its convenience, for further transportation, both

companies having equal possession of the depot. There was no evidence of an actual agreement that the goods deposited were in the possession of the railroad company, and the goods in question had not been in the manual possession of the railroad company when they were destroyed by fire on the Sunday afternoon following their deposit on the previous night. It was held that there was a tacit understanding that the steamboat company should deposit their freight at that particular spot, and that the railroad should take it thence at their convenience. The delivery to the succeeding carrier was held to be complete, and a recovery against the first carrier for the loss of the goods was reversed.

In *Merriam* v. *Hartford Railroad Co.*, *supra*, it was held that if a common carrier agree that property intended for transportation by him may be deposited at a particular place without express notice to him, such deposit alone is a sufficient delivery; and that such an agreement may be shown by a constant practice and usage so to receive property without special notice.

The plaintiff contends that the goods were not in the custody and under the control of the Michigan road, for the reason that the case states that they "are in a section of the freight-depot set apart for the use of the defendant." This is not an accurate statement of the position. The expression quoted is used incidentally in stating that, when the agent of the Michigan road saw "goods deposited in the section of the freight-building set apart for the use of the defendant, destined on the line of said Central railroad, he would call upon the agent of defendant, and, from a way-bill," obtain a list of the goods, and their destination. Just how and in what manner it was thus set apart appears from the facts already recited. It was a portion of the freight-house of the Michigan Company, in which a precise spot was selected or set apart, where the defendant might deposit goods brought on its road and intended for transportation over the Michigan road, and which, by usage and practice and the expectation of the parties, were then under the control of the Michigan Company, and to be loaded on to its cars at its convenience, without further orders from the defendant.

We are of the opinion that the ruling and direction of the

circuit judge, that upon the facts stated the defendant was entitled to a verdict and judgment in its favor, was correct, and the judgment should be affirmed.

Judgment affirmed.

HATCH *v.* CODDINGTON.

1. A general power conferred upon the agent of a railroad company to borrow money on its behalf, in such sums, for such length of time, and at such a rate of interest as he may think proper, and to purchase iron rails, locomotives, machinery, &c., on such terms as he may deem advisable, and, in order so to do, to make, execute, and deliver obligations, bills of exchange, contracts, and agreements of the company, includes authority to give to the lender of the money borrowed, or to the seller of the things purchased, the ordinary securities.
2. Persons who deal with an agent before notice of the recall of his powers are not affected by the recall.
3. Upon consideration of the written evidence in this case, the court holds, 1. That the contract entered into April 21, 1859, between the defendant and the Minnesota and Pacific Railroad Company, by Edmund Rice, its president, was authorized by the resolution of the board of directors of that company, passed July 13, 1858. 2. That the resolution of said board, passed May 13, 1859, was an acknowledgment that the contract was a binding obligation upon the company.

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

This action was trover by Edwin A. C. Hatch against Thomas B. Coddington for the conversion of forty-five Minnesota State bonds. Each party claimed them under the Minnesota and Pacific Railroad Company, to whom they had, on the 3d of February, 1859, been issued by the State, under a provision of its Constitution authorizing the issue of such bonds for the purpose of expediting the construction of certain railroads.

The plaintiff claimed title by the following transfers, both dated May 13, 1859: —

"For value received, we, the Minnesota and Pacific Railroad Company, hereby sell, assign, transfer, and set over to Selah Chamberlain and his assigns forty-five bonds for $1,000 each, issued by the State of Minnesota to us, and now in the hands of Thomas B. Coddington & Co., of the city of New York, and authorize and empower him to have and receive the same.

"In witness whereof, we have caused these presents to be signed by our president, Edmund Rice, and attested by our secretary, James W. Taylor, and our corporate seal to be thereto affixed, this thirteenth day of May, in the year 1859.

[SEAL.] "EDMUND RICE, *President.*

"Attest: JAMES W. TAYLOR, *Secretary.*"

"For value received, I hereby assign, transfer, and set over unto Edwin A. C. Hatch, the forty-five Minnesota State railroad bonds of the denomination of $1,000 each, now in the hands of T. B. Coddington & Co., of the city of New York, and all my right, title, and interest therein, being the bonds issued to the Minnesota and Pacific Railroad Company, and transferred by said company to me.

"S. CHAMBERLAIN."

The bonds had been deposited with Thomas B. Coddington & Co., the defendant's firm, as security for the obligations of a contract which they made with the company on the 21st of April, 1859.

The plaintiff alleged that this contract had been executed by Edmund Rice without authority, and only conditionally delivered, and that it consequently never took effect.

At the date of its execution, said Rice was president, Rensselaer R. Nelson was vice-president, and William H. Newton and said Hatch were directors of the company.

The contract was negotiated by Newton in concert with Rice, both being at the time in New York. As evidence of his authority to make the contract, Rice gave to Newton, to hand to T. B. Coddington & Co., the charter of the company, copies of legislative acts and of the provision of the constitution authorizing the bonds, and also of the following resolution of the board of directors of the company, passed July 13, 1858:—

"Whereas the interests of the Minnesota and Pacific Railroad Company require that no default in the performance of the conditions under which the credit of the State of Minnesota has been loaned to this company shall occur, and that means shall be promptly provided, with the aid of said loan of State credit, to construct one hundred miles of road at an early day, thereby vesting in the company the right to sell, unconditionally, three hundred and eighty-four thousand acres of land: Therefore,

"*Resolved*, That Edmund Rice, president of the Minnesota and Pacific Railroad Company, or any agent or agents duly appointed by him in writing to execute the trusts and powers conferred by this resolution, be, and are hereby, authorized and empowered, in pursuance of sect. 21 of the charter, to sell, loan, pledge, hypothecate, or otherwise dispose of the first-mortgage bonds of the company in conformity to the provisions of the trust mortgage deed of said company at par, or any price less than par, and for such sum or sums as to the said Rice or agents appointed by him shall appear most for the interest of the company; and the said president, or such agent or agents as he may appoint, is and are hereby authorized to borrow such sum or sums of money for such length of time and for such rate of interest as to him or such agent or agents may seem proper, for or on behalf of the company, and also to purchase such quantity of iron rails, locomotives, cars, tenders, rolling-stock, and machinery for such road, and upon such terms as he or such agent or agents may deem advisable, and to make, execute, and deliver, in the name and on behalf of said company, such obligations, bills of exchange, contracts, and agreements, in writing, as will enable him or such agent or agents to carry out the powers and authority above conferred upon him or them, making monthly reports to the board of his acts in the premises; all which acts thereunder done are hereby ratified and confirmed: *Provided*, that the whole amount of obligations to be incurred on behalf of the company under this resolution shall not exceed the sum of $1,750,000.

"A true copy from the minutes.

[L. S.] "Attest: JAMES W. TAYLOR, *Secretary*."

The plaintiff also contended that, if originally sufficient, the powers given by the resolution were withdrawn by the following resolutions of the executive committee of the directors, passed Jan. 23 and Feb. 3, 1859: —

"ST. PAUL, Jan. 23, 1859.

"At a meeting of the executive committee.

"On motion,

"*Resolved*, That R. R. Nelson, acting president of the Minnesota and Pacific Railroad Company, be authorized to make application and receive from the governor $100,000 of the State bonds, which said company are now entitled to.

"*Resolved*, That the acting president be instructed to appropriate the $100,000 of the State bonds which the Minnesota and Pacific

Railroad Company are now entitled to from the State to pay the actual current expenses which have accrued up to date, and which may hereafter accrue, including salaries of officers, interest of the first-mortgage bonds of the company already disposed of, and other incidental expenses.

"R. R. NELSON, *Chairman.*

"WM. H. NEWTON, *Secretary.*"

"ST. PAUL, Feb. 3, 1859.

"At a meeting of the executive committee.

"On motion,

"*Resolved*, That R. R. Nelson, as acting president of the Minnesota and Pacific Railroad Company, be, and is hereby, authorized to sell all or any portion of the State bonds in his hands at such rates as he may deem to the best interests of the company, and apply the proceeds as heretofore directed by resolution of the executive committee, and any or all of said proceeds be placed to the credit of R. R. Nelson, the vice-president of this company, for the benefit of said company, as he may direct.

"R. R. NELSON, *Chairman.*

"WM. H. NEWTON, *Secretary.*"

There was no evidence that these resolutions were ever brought home to the defendant. The evidence as to the absolute delivery of the contract was conflicting, and took a wide range. The contract provided for a purchase and sale of railroad iron, and an advance by T. B. Coddington & Co. of $16,000 to the company, on its notes. The company was to deposit as security eighty-five bonds; but it had in New York, at the time the contract was executed, only the forty-five in question.

The contract was made in duplicate, and signed at New York on the part of the company by Rice, the president. At the same time were signed three notes for the $16,000. Rice received one of the contracts, and a letter of credit authorizing drafts for the $16,000; the other contract and the notes were delivered to T. B. Coddington & Co. The bonds were delivered with the following letter: —

"NEW YORK, 21st April, 1859.

"Messrs. T. B. CODDINGTON & Co.:

"DEAR SIRS, — In conformity with an agreement made with you this day, I hand you, by Mr. William H. Newton, $45,000 of Min-

nesota State bonds, and will send you, without delay, a further amount of $40,000 of like description of State bonds, as collateral and for negotiations, as per same agreement.

"I also hand you our three notes, bearing this date, at six months, with interest at seven per cent, — one for $6,000 and two $5,000 each, in all $16,000, against which you will please grant a letter of credit for $16,000, in favor of William H. Newton, stipulating that, on your receiving the remaining $40,000 of bonds above referred to, you will accept drafts drawn by him at one day's sight on you.

"I am, yours respectfully,

"EDMUND RICE,

"*Pres. Minn. & Pac. R. R. Co.*"

Rice testified that he gave Newton the papers to be left with T. B. Coddington & Co., but not to take effect unless ratified by the board of directors, nor if Nelson had disposed of the forty bonds then supposed to be in his hands.

There was no evidence that any condition affecting the delivery was brought home to the defendant or his firm. He testified that the papers were exchanged absolutely, he being represented by his clerk; and Newton testified that there was no condition of any kind in reference to the delivery.

The contract, the three notes, the letter of credit, and the letter undertaking to send forty more bonds were all executed April 21, 1859. Rice and Newton at once telegraphed to Nelson, at St. Paul, "Interest on State bonds provided for, and a thousand tons of iron purchased," and started for that place the next day, where they arrived on or before the 29th of April. On that day and the next, and on the 6th, 9th, 10th, 11th, 12th, and 13th of May, they attended meetings of the board.

On the 30th of April Rice wrote to defendant the following letter, which was the first communication he sent after leaving New York for St. Paul: —

"OFFICE OF THE MINNESOTA & PACIFIC R. R. Co.,

"ST. PAUL, April 30, 1869.

"GENTLEMEN, — I found upon my arrival here that the acting president of this company had disposed of the forty Minnesota State bonds, which were to have been forwarded to you by the terms of

the contract made between us in New York. You will perceive, therefore, that it is impossible for the company to comply with its undertaking. Some action of the board of directors will be had upon the subject, of which I shall take pleasure in advising you at the earliest moment.

"Very respectfully, your obedient servant,

"EDMUND RICE,

"*Pres. Minn. & Pac. R. R. Co.*"

"T. B. CODDINGTON & Co., New York."

The proceedings of the board do not show any action adverse to the contract as having been unauthorized, or as not consummated.

On the 14th of May, 1859, the following communication was addressed to Coddington & Co.: —

"OFFICE OF THE MINNESOTA & PACIFIC R. R. Co.

"ST. PAUL, May 14, 1859.

"Messrs. T. B. CODDINGTON & Co.:

"GENTS, — You will please deliver to Messrs. Rice or William H. Newton forty-five Minnesota State seven per cent bonds, of the denomination of $1,000 each, now in your hands, issued by the State to the Minnesota and Pacific Railroad Company, said bonds belonging to the railroad company.

"Very respectfully, yours,

"R. R. NELSON,

"*Acting Pres. M. & Pac. R. R. Co.*"

On the 17th, Rice wrote them, enclosing a copy of the following resolution of the board: —

"SECRETARY'S OFFICE, MINNESOTA & PACIFIC R. R. Co.

"At a meeting of the board of directors of the Minnesota and Pacific Railroad Company, held in St. Paul, May 13, 1859, the following resolution was unanimously adopted: —

"'Whereas circumstances have arisen in the affairs of this company whereby it has become impossible to comply with the terms of the contract made by the president thereof, on behalf of the company, with T. B. Coddington & Co., of the city of New York, under date of April 21, 1859: Therefore,

"'*Resolved*, That William H. Newton, Esq., be, and he is hereby, authorized to proceed to New York and procure a surrender of said contract and a return of the forty-five Minnesota State bonds

transferred to Messrs. T. B. Coddington & Co., upon such equitable terms as may be agreed upon.'

[CORPORATE SEAL.] "T. M. METCALF, *Secretary.*"

These papers and some subsequent correspondence were, without objection, received in evidence as bearing on the disputed question whether the delivery was in fact conditional, and also as showing, if it was, a ratification of the president's acts, and a waiver of the condition.

The plaintiff requested the court to charge as matter of law that there had been no ratification. The court refused so to charge, but left the evidence of the conduct of the company and its officers to the jury, with the instruction, however, requested by the plaintiff, that "to constitute ratification there must have been a direct sanction of the contract by the board of directors, or conduct, or acts, or a resolution or resolutions inconsistent with any other supposition than an assent to such contract by said board."

The court also left the evidence of the conduct of the company and its officers, after the date of the contract, to the jury, as bearing "upon the question whether either of the conditions . . . were impressed upon the contract, so as to make the delivery conditional and dependent upon the fulfilment of the conditions . . . as having a proper bearing as evidence upon the fact whether the condition was imposed."

To this instruction the plaintiff excepted.

The court also charged the jury that, under the resolution of July 13, 1858, Rice had authority to make the contract of April 21, 1859, and that that authority was not withdrawn by the resolutions of Jan. 23 and Feb. 3, 1859; nor did those resolutions derogate, detract from, or in any manner impair the force and efficiency of said resolution of July 13, 1858. The plaintiff excepted to this charge, and assigns it for error here.

There was a verdict for the defendant; and, judgment having been rendered thereon, the plaintiff removed the case here. The assignments of error not passed upon by the court are omitted.

Mr. E. W. Stoughton for the plaintiff in error.

Mr. William M. Evarts and *Mr. S. P. Nash*, *contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

We concur with the Circuit Court in the opinion that Mr. Rice was authorized by the resolution of the board of directors of July 13, 1858, to make the contract with the defendant, which it is claimed he made on the 21st of April, 1859. That resolution was very broad. As appears from its preamble, it aimed to provide, promptly, means for the construction of one hundred miles of the company's railroad, and to guard against default in the performance of the conditions upon which the credit of the State had been loaned; and these aims were intended to be secured, in part, with the aid of the State loan, that is, with the aid of the State bonds delivered to the company. The preamble, having avowed such purposes, was followed by a resolution which expressly conferred upon Mr. Rice, the president of the company, several distinct powers. The first was to sell or hypothecate the first-mortgage bonds of the company (thereafter to be issued) for such sum or sums as he might think for the interest of the company. A second power given was to borrow money on behalf of the company in such sums, for such length of time, and at such a rate of interest as he might think proper. And, thirdly, he was empowered to purchase iron rails, locomotives, machinery, &c., for the company, on such terms as he might deem advisable; and, to enable him to carry out these powers and authority, he was empowered to make, execute, and deliver obligations, bills of exchange, contracts, and agreements of the company. It is difficult to see what words would have been more comprehensive for the grant of power to do every thing which, in the judgment of Mr. Rice, was necessary or advisable, either for borrowing money or purchasing iron for the company. A general power to borrow money includes authority to give to the lender the ordinary securities for the sum borrowed. Among these are bonds, notes, or acceptances, and collaterals. But the resolution went further. It conferred power to make contracts and agreements, such as would enable Mr. Rice to borrow money or to make purchases of railroad iron; not merely contracts of purchase, but contracts and agreements that might enable him to effect a purchase. An engagement to give collaterals as a security for money borrowed, or for the payment of a

debt incurred for iron, is surely within the limits of such a power. This disposes of the first question raised by the assignments of error. We hold that there is nothing in the agreement of April 21, 1859, transgressive of the power with which the president of the company was clothed by the resolution of the directors.

We are also of opinion that the power thus conferred was not revoked or withdrawn by the subsequent resolutions of Jan. 23 and Feb. 3, 1859. They made no reference to the action of the board in 1858, or to any powers conferred by that action upon the president of the company. Undoubtedly, they conferred authority upon Mr. Nelson, acting as president of the company in the absence of the president, to dispose of the bonds; but such authority was not inconsistent with the concurrent existence of the like power in Rice. Two persons may be employed separately to negotiate the sale or hypothecation of bonds, and either may thus dispose of them. If a disposition be made by one, of course the other will be unable to exercise the power with which he was clothed; but, until a sale or hypothecation is made, either may make it. Moreover, in this case there is no evidence that knowledge of the resolutions of Jan. 23 and Feb. 3, 1859, was ever communicated or intended to be communicated to the defendant. The authority given to Mr. Rice was exhibited to him. On its face it was a continuing authority, on which he had a right to rely until notified of its revocation. Persons who deal with an agent before notice of the recall of his powers are not affected by the recall. 2 Kent, Com. 644, note; *Fellows* v. *Steamboat Company*, 38 Conn. 197; *Tier* v. *Sampson*, 35 Vt. 179; *Morgan* v. *Stell*, 5 Binn. (Pa.) 305. It follows, therefore, very plainly there was no error in the refusal of the circuit judge to instruct the jury, that, if the resolution of July 13, 1858, conferred upon Mr. Rice authority to make the contract, the authority was withdrawn by the resolutions of Jan. 23 and Feb. 3, 1859.

At the trial in the court below there was some evidence that the contract set up as a defence by the defendant was not unconditionally delivered. The plaintiff alleged that when it left the hands of Mr. Rice, on its way to the defendant, after his signature, two conditions accompanied it. One was that it should not be

binding, and that the delivery of the bonds should be inoperative, unless the board of directors of the company, after being advised thereof, should approve, ratify, and confirm it. The other condition alleged was, that if forty of the bonds, making up, with the forty-five deposited with the defendant, the eighty-five called for by the contract, had been disposed of at St. Paul by the proper officer of the company who had them in charge, the contract should not be binding. Whether such conditions had been imposed was a question of fact properly submitted to the jury, with the instruction that, if they had been, the contract was not binding unless the company afterwards ratified and adopted it. It therefore became a material inquiry in one aspect of the case whether there had been such an adoption or ratification; and the defendant asked the court to instruct the jury that there had been no ratification by the railroad company, and especially that a certain resolution of the company, adopted May 13, 1859, and communicated to the defendant, was not a ratification. The court declined to give such instructions, and, we think, properly. We think the resolution referred to was a plain acknowledgment that the contract made by Mr. Rice with the defendant was binding upon the company, and, as it was communicated to the defendant, it was notice to him that the company acknowledged its obligation. In the resolution and its preamble there is nothing which denies that the contract to which it refers had been made, or asserts that no obligation had been assumed. On the contrary, all its language is appropriate to a contract perfected. It is an admission that the company had confirmed and accepted it. It speaks of the contract as made, not merely proposed, and asserts an impossibility to comply with its terms, not of an impossibility to enter into the engagement. It authorizes Newton to procure a surrender of the contract and a return of the bonds, which it states had been transferred to Coddington & Co. upon such terms as might be agreed upon. All this is plain recognition of the contract as a binding obligation, and an assertion of a wish to obtain a release from it. To say the least, it is inconsistent with any intent to treat the contract as imperfect and inoperative. In view of it, we think the court was justified in refusing to charge the jury as requested; and, if there was error in the mode in which

the question of ratification was submitted, it was error of which the plaintiff cannot complain.

It is unnecessary to notice the other assignment of error, in view of what we have said. *Judgment affirmed.*

McHenry *v.* La Société Française D'Épargnes.

1. Mortgagees who prove their debt in the bankruptcy proceedings against the mortgagor become creditors of his general estate only for the balance of the debt after deducting the value of the mortgaged property, to be ascertained by agreement, sale, or in such other manner as the bankrupt court may direct.
2. Mortgagees may, pursuant to leave of that court, institute a suit against the bankrupt in another court for the foreclosure of his equity of redemption and the sale of the mortgaged premises.
3. An assignee in bankruptcy is not required to take measures for the sale of the mortgaged property of the bankrupt, unless its value exceeds the incumbrance.

Error to the Supreme Court of the State of California.

On the 18th of June, 1870, John McHenry, being indebted to a society known as La Société Française D'Épargnes in the sum of $14,000, made his promissory note for that amount, payable twelve months after date, and secured its payment by a mortgage on certain property in the city of San Francisco, in the execution of which his wife did not join. McHenry was, March 20, 1872, duly adjudicated a bankrupt in the District Court of the United States for the District of California, and on the 14th of June following the society proved its debt before the register. Aug. 15, 1872, proceedings in foreclosure were commenced by the society in the District Court of the nineteenth judicial district of the State of California against the assignee in bankruptcy, McHenry, his wife and other parties claiming interests in the property. The assignee made no defence. McHenry and wife demurred, and, among other grounds, set up the bankruptcy proceedings and the absence of leave of the bankrupt court to commence the suit. Oct. 4, 1872, application was made to the latter court for such leave; and, the assignee having so consented in open court, the order was

granted, provided that in said action no judgment for any deficiency be taken against the bankrupt or his assignee. The cause was then, notwithstanding certain special defences of the wife, prosecuted to a decree, which made no provision for enforcing the payment of any sum that might remain due after the sale of the mortgaged premises. McHenry and wife appealed to the Supreme Court of the State, where the decree below was affirmed. The case was then brought here.

Mr. Thomas J. Durant for the plaintiffs in error.
Mr. Edmond L. Goold, contra.

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

In *Claflin* v. *Houseman*, 93 U. S. 130, we decided that, under the law as it stood previous to the adoption of the Revised Statutes, the courts of the United States did not have exclusive jurisdiction of suits for the settlement of conflicting claims to property belonging to the estate of a bankrupt, and that an assignee in bankruptcy might sue in a State court to collect the assets. In *Mays* v. *Fritton*, 20 Wall. 414, we also held, that if an assignee in bankruptcy submitted himself to the jurisdiction of a State court in a suit affecting the estate which was pending when the proceedings in bankruptcy were commenced, he was bound by any judgment that might be rendered. And in *Eyster* v. *Gaff*, 91 U. S. 525, Mr. Justice Miller, speaking for the court, said: —

"The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of his rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred jurisdiction for the benefit of the assignee in the Circuit and District Courts of the United States, it is concurrent, and does not divest that of the State courts."

The principles upon which those cases rest are decisive of this. The complainant, having a debt against the bankrupt secured by mortgage, proved the claim against the estate.

This, under sect. 20 of the bankrupt law, 14 Stat. 526, Rev. Stat., sect. 5075, admitted the complainant as a creditor of the general estate only for the balance of the debt after deducting the value of the mortgaged property, to be ascertained by agreement, sale, or in such other manner as the bankrupt court might direct. The assignee is not required to take measures for the sale of mortgaged property, unless its value is greater than the incumbrance. His duties relate chiefly to unsecured creditors, and he need not trouble himself about incumbered property, unless something may be realized out of it on their account, or unless it becomes necessary to do so in order to ascertain the rights of the secured creditor in the general estate. If he does, and it becomes necessary to adjust the liens before his sale, he may, under the ruling in *Claflin* v. *Houseman*, institute the necessary proceedings for that purpose in the courts of the United States, or of the State, as he chooses. If he does not, the secured creditor who wishes to make his security available must act; and, having obtained leave of the bankrupt court to bring his action for that purpose, he may proceed in the State court, if the assignee does not object, or in the courts of the United States, at his election. Here the necessary leave to sue was obtained before the decree was rendered, and the assignee, instead of objecting to the jurisdiction of the State court, consented to that mode of proceeding. The bankrupt and his wife alone objected; but as to them, as we held in *Eyster* v. *Gaff*, the jurisdiction of the State court was not divested by the proceedings in bankruptcy.

Judgment affirmed.

CHOUTEAU *v.* UNITED STATES.

A., having a claim against the government under his contract with the Navy Department for building the iron-clad steam-battery "Etlah," executed to B. a power of attorney authorizing him to sue for, recover, and receive all such sum or sums of money, debts, goods, wares, and other demands whatsoever, and especially payments that were or would be due on his contract for building the "Etlah," with full power in and about the premises; to have, use, and take all lawful means and ways in his name for the purposes aforesaid; and to make acquittances or other sufficient discharges for him and in his name, and generally to do all other acts necessary and lawful to be done in and about the premises. The contract fixed the amount to be paid for the battery, and provided for its completion and delivery within eight months from June 24, 1863. For every month that the delivery might be made earlier than the time fixed, the contractor should receive $4,500, and for every month later he should pay a like sum. It also provided that the department might, at any time during the progress of the work, make such alterations and additions to the plans and specifications as it might deem necessary and proper, the extra expense caused thereby to be paid at fair and reasonable rates, to be determined when the changes were directed to be made. The battery was finished for delivery in November, 1865, and the proper authorities of the department certified that the extra work and materials, rendered necessary in making the alterations and additions that were ordered, amounted to $116,111. A portion of that sum having previously been paid, a voucher, in favor of A., for $26,653.17, "being the full and final payment on all extras, and in full for all claims and demands for that work," was approved by the department April 24, 1866, and paid May 11 following to B., who, under his power of attorney, receipted it in full. A.'s assignee, asserting that the extra work amounted to $172,273.55, brought suit in the Court of Claims to recover the excess over the amount paid, and $118,283.30 alleged to be due, irrespective of extras, on account of an increase in the price of labor and materials during the time that the completion of the vessel was delayed by reason of such alterations and additions. *Held*, 1. That the power of attorney authorized B. to accept payment of the voucher, which upon its face declared it was the last and full payment for the extra work, and that his acceptance bound A., and barred a recovery for such work. 2. That the United States is not liable to A. for the increased cost of the labor and materials.

APPEAL from the Court of Claims.

On the ninth day of July, 1863, Charles W. McCord entered into a written contract for building at St. Louis an iron-clad steam-battery, which was built and delivered, and was called the "Etlah." Complete specifications for its construction were part of the contract; and the United States agreed to pay for the battery the sum of $386,000. The contract also provided that the Navy Department might make alterations and additions to the plans and specifications at any time during the

progress of the work, as it might deem necessary and proper, and should pay any extra expense caused by such changes, at fair and reasonable rates, to be determined when the changes were directed to be made. It was also agreed that the battery should be completed and delivered within eight months from the 24th of June, 1863, and that for every month that the delivery might be made earlier than that time McCord should receive $4,500, and for every month later he should pay a like sum.

The vessel was not finished ready for delivery until November, 1865, more than twenty months after the date fixed by the contract; but the Court of Claims found that her completion within the stipulated time was prevented by the United States, and that the cost of the work required by the contract was, owing to the increased price of materials and skilled labor, enhanced $118,283.20 above the sum originally specified. Many and important changes were made in the plan and specifications for the battery by the bureau of construction and repair of the Navy Department; but no agreement as to the additional cost of the work was made, as the contract provided for, except in some matters not now in controversy.

This extra work the petition alleges was of the value of $172,273.55; and the Court of Claims so found. $116,111 was paid for it; and in this action the recovery of the difference of $56,162.55 is sought. Under the finding, the only defence to this branch of the case is that the sum paid was received and accepted as payment in full, as appears by the following voucher, certified by the auditor of the treasury for the Navy Department: —

"ETLAH. — PAYMENT ON ACCOUNT OF EXTRAS.

"NEW YORK, April 24, 1866.

"*U. S. Navy Department to Charles W. McCord, Dr.*

"(Appropriation: 'Construction and Repair.')

For work done to the light-draft monitor 'Etlah,' which is extra to the contract dated June 24, 1863, being the full and final payment on all extras, and in full for all claims and demands for that work	$31,114.00

Less amount paid E. W. Barstow & Son, as per order	$605.65	
Outfits and equipments called for by the contract, but not furnished	3,852.18	
		$4,457.83
		$26,653.17

"I certify that the materials and labor which are extra to the contract dated June 24, 1863, put upon the vessel 'Etlah,' built by Charles W. McCord, amount in value to $116,111 (certificates having been previously given for $85,000), and they are according to directions which have been given from time to time.

"ROBERT DANBY,
"*General Inspector Steam-Machinery for the Navy.*"

"Approved:

"F. H. GREGORY,
"*Rear-Admiral Superintending.*"

"NAVY DEPARTMENT,
"BUREAU 'CONSTRUCTION,' &c.,
"$26,653.17.] "April 26, 1866.

"Approved in triplicate for twenty-six thousand six hundred and fifty-three dollars and seventeen cents, payable by the paymaster at New York.

"JOHN LENTHALL, *Chief of Bureau.*"

"PAYMASTER'S OFFICE, U. S. NAVY,
"29 BROADWAY, NEW YORK, May 11, 1866.

"Received of J. C. Eldredge, paymaster, twenty-six thousand six hundred and fifty-three $\frac{17}{100}$ dollars, in full of the within bill, and have signed duplicate receipts.

"$26,653.17.] CHARLES W. MCCORD,
"Per GILMAN, SON & CO., *Att'ys.*
"1,887. 21,519 B_2."

"I certify that the above is a true copy of the voucher on file in this office.

"S. J. W. TABOR, *Auditor.*"

The powers of attorney under which the voucher was signed by Gilman, Son & Co. are as follows: —

"Know all men by these presents, that I, Charles W. McCord, of St. Louis, in the State of Missouri, have made, constituted, and appointed, and by these presents do make, constitute, and appoint,

Gilman, Son & Co., or either member of said firm, in the city of New York, my true and lawful attorney, for me and in my name, place, and stead, to collect from the navy agent or authorized officer of the United States government all payments due or to become due to me for building an iron-clad vessel at St. Louis, Missouri, named the 'Etlah,' as per contract dated 24th June, 1863, giving and granting unto my 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 I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

"In witness whereof, I have hereunto set my hand and seal the twenty-fourth day of November, in the year 1863.

"CHARLES W. MCCORD. [SEAL.]

"Sealed and delivered in the presence of

"THOMAS L. THORNELL."

"STATE OF NEW YORK, }
County of New York, } ss.

"Be it known, that, on the twenty-fourth day of November, 1863, before me, a notary public in and for the State of New York, duly commissioned and sworn, dwelling in the city of New York, personally came Charles W. McCord, and acknowledged the above letter of attorney to be his act and deed.

"In testimony whereof, I have hereunto subscribed my name and affixed my seal of office the day and year last above written.

"THOMAS L. THORNELL, *Notary Public*."

[Internal-revenue stamp, one dollar.]

"Know all men by these presents, that Charles W. McCord, of the city of St. Louis and State of Missouri, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Messrs. Gilman, Son & Co., of the city of New York, my true and lawful attorney, for me and in my name, and for my use, to ask, demand, sue for, recover, and receive all such sum or sums of money, debts, goods, wares, and other demands whatsoever which are or shall be due, owing, payable, and belonging to me, by any manner or means whatsoever; especially to receive any payments that are and will be due me by virtue of a contract entered into with the Navy Department to build a light-draft monitor named 'Etlah,' said contract bearing date June 24, 1863, for which I am

to receive, upon the full compliance of said contract, the sum of $386,000, in eight equal payments, the Navy Department reserving twenty-five per cent on such payments until completion and reception of said vessel: giving and granting unto my said attorneys by these presents full power and authority in and about the premises to have, use, and take all lawful ways and means, in my name, for the purposes aforesaid; and upon the receipt of any such debts, dues, or sums of money (as the case may be), acquittances, or other sufficient discharges, for me and in my name to make and give, and generally to do all other acts and things in the law whatsoever needful and necessary to be done in and about the premises; for me and in my name to do, execute, and perform, as fully and to all intents and purposes as I might or could do if personally present; attorneys one or more under him, for the purposes aforesaid, to make, constitute, and again at pleasure to revoke. Hereby ratifying and confirming all and whatsoever my said attorneys shall lawfully do in and about the premises by virtue hereof.

"In witness whereof, I have hereunto set my hand and seal, this second day of January, in the year of our Lord 1864.

"CHARLES W. MCCORD." [SEAL.]

"STATE OF MISSOURI, }
County of St. Louis, } ss.

"Be it remembered, that on the second day of January, 1864, before me, the undersigned, John Jecko, a notary public duly commissioned and qualified, within and for the county aforesaid, came Charles W. McCord, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto, and acknowledged the same to be his act and deed for the purposes therein mentioned.

"In witness whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

"JOHN JECKO, *Notary Public*."

The court decided that the claim for extras was barred by McCord's receipt, and that the United States was not liable to the contractor for the enhanced cost of labor and materials. Chouteau, assignee of McCord, brought the case here.

Mr. Edward Lander and *Mr. A. L. Merriman* for the appellant.

The receipt by Gilman, Son & Co. of a less amount than was actually due on McCord's claim, and which was outside

the contract, cannot bind him and discharge the debt. When certain special objects are enumerated in a power of attorney, the general words and power will be restrained by the objects specified. Byles on Bills, 32; *Rosseter* v. *Rosseter*, 8 Wend. (N. Y.) 494; *Wallace* v. *Branch Bank at Mobile*, 1 Ala. 565; *Kingsley* v. *Bank of State*, 3 Yerg. (Tenn.) 107; Story on Agency, 98, 99.

The extension of time required by the contractor for completing the work was caused solely by the changes and alterations in the original plan and specifications that were ordered by the bureau of construction and repair. The United States is therefore liable to him for such an amount as will cover his increased outlay, occasioned by the rise in the price of work and materials that took place during that time. *Dermott* v. *Jones*, 2 Wall. 1; *Dubois* v. *Delaware & Hudson Canal Co.*, 4 Wend. (N. Y.) 291; *Robson* v. *Godfrey*, 1 Hall (N. Y.), 236; *Lee et al.* v. *Partridge*, 2 Duer (N. Y.), 463; *Merrill* v. *Ithaca & Owego Railroad Co.*, 16 Wend. (N. Y.) 556.

Mr. Assistant Attorney-General Smith, contra.

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

It appears from the findings of the Court of Claims that the proper officer of the Navy Department estimated the same extra work and material at $116,111, which that court now estimates at $172,273.55; and that McCord accepted this sum, if the voucher is binding on him, as the full value of his labor and materials, and acknowledged it to be payment in full.

His name is signed to this receipt by Gilman, Son & Co., his attorneys; and it is insisted by counsel that they could only bind him for the sum received, and not for its acceptance as full compensation. It is said in argument that they were bankers in New York, and had no other power than to receipt for such sums as might be paid them.

Two powers of attorney are produced from McCord to Gilman, Son & Co., — one of the date of Nov. 24, 1863, and the other Jan. 2, 1864. These are very full, and especially the latter. It makes them his true and lawful attorneys, "to sue for, recover, and receive all sums of money, debts, goods, wares, and

other demands whatsoever," and especially payments that are or will be due on his contract for building the "Etlah;" gives "them full power in and about the premises to have, use, and take all lawful ways and means in his name for the purposes aforesaid, and to make such acquittances, or other sufficient discharges, for me and in my name, and generally to do all other acts necessary and lawful to be done in and about the premises."

We are of opinion that this authorized Gilman, Son & Co. to accept payment of a voucher which declared on its face that it was the last, the full payment for the extra work done on the vessel, and thereby bind their principal to such acceptance.

But if we could be mistaken in this, the reasonable presumption is that Gilman, Son & Co. had nothing to do with obtaining this voucher from the Navy Department, but that it was so obtained by McCord himself, and forwarded by him to Gilman, Son & Co. for collection of the paymaster at New York. This is quite consistent with the fact that they were mere bankers. It is certainly fair to suppose that McCord presented his own statement of the account to the navy officers, and the final approval of the chief of the bureau of construction at Washington is dated April 26, 1866. The payment as indorsed on that same voucher by the paymaster at New York to Gilman, Son & Co. is dated May 11, 1866, which is just about a reasonable time for the voucher to have been received from Washington by McCord at St. Louis, and by him forwarded to Gilman, Son & Co. at New York for collection. If this be the true history of the voucher, McCord is bound by his own actions; for the voucher, while in his hands, had on its face the clearest statement that the sum therein allowed was "the full and final payment on all extras, and in full for all claims and demands for that work," and if he forwarded it in this shape to his bankers to get the money on it, without protest, he must be bound by that statement in the voucher.

The Court of Claims finds that the delay in completing the vessel was caused by the changes ordered by the United States, and that, owing to the rise in the prices of the labor and materials on the work done under the original contract, and without reference to the changes, the cost of that work was increased to the builder $118,283.20.

The appellants asserted a claim for this amount also, which the court refused.

It is very clear that both parties contemplated the probability that the work would not be completed at the precise period of eight months from the date of the contract. They also contemplated that changes would be made in the construction of the battery. They made such provision for these matters as they deemed necessary for the protection of each party. For the reasonable cost and expenses of the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed, no provision was made. There was a provision for delay, by which the contractor was to submit to pay $4,500 for every month of that delay. This provision, the only one on that subject, if strictly enforced, might have made him a still greater loser; but it seems to have been waived. But we are very clear that without any such provision he must be held to have taken the risk of the prices of the labor and materials which he was bound to furnish, as every other contractor does who agrees to do a specified job at a fixed price. It is one of the elements which he takes into account when he makes his bargain, and he cannot expect the other party to guarantee him against unfavorable changes in those prices. *Judgment affirmed.*

EX PARTE EASTON.

1. Claims for wharfage, arising out of either an express or an implied contract, are cognizable in admiralty.
2. Where the wharfage has not been agreed upon by the parties, the wharfinger is entitled, as upon an implied contract, to a just and reasonable compensation for the use of his wharf.
3. If the vessel or water-craft is a foreign one, or belongs to a port of a State other than that where the wharf is used, the claim of the wharfinger for such use is a maritime lien against the vessel, which he may enforce by a proceeding *in rem*, or he may resort to a libel *in personam* against the owner of such vessel or water-craft.
4. Whether a writ of prohibition should be issued to the District Court, when proceeding as a court of admiralty and maritime jurisdiction, depends upon the facts stated in the record upon which that court is called to act. Matters *dehors* that record, which are set forth in the petition for the writ, cannot be considered here.

PETITION for a writ of prohibition to restrain the District Court of the United States for the Eastern District of New York from exercising jurisdiction in a proceeding *in rem* to enforce an alleged lien for wharfage against the canal-boat or barge "John M. Welch."

As the facts in the case are fully stated in the opinion of the court, they are omitted here.

Mr. Edward D. McCarthy and *Mr. J. E. Gowen* for the petitioners.

The District Court has no jurisdiction over the barge "John M. Welch," because, 1, a contract of wharfage is not a maritime contract. *The Genesee Chief*, 12 How. 443; *The Lottawanna*, 21 Wall. 558; *The Belfast*, 7 id. 624; *Insurance Company* v. *Dunham*, 11 id. 1; *Rex* v. *Humphrey*, 1 McCle. & Yo. 194; *Platt* v. *Hibbard*, 7 Cow. (N. Y.) 497; *Barry* v. *Langmore*, 12 Ad. & E. 640; *Speares* v. *Hartley*, 3 Esp. 81; *Richardson* v. *Goss*, 3 Bos. & Pul. 119.

2. The maritime law gives no lien for wharfage. *The Coal Barges*, 3 Wall. Jr. 53; *The General Smith*, 4 Wheat. 438; *The Lottawanna*, 21 Wall. 558; *Cunningham* v. *Hall*, 1 Cliff. 51; *The Thomas*, 7 Am. Law Rev. 381; *The Gem*, Browne, Adm. 37; *The Asa R. Swift*, 1 Newb. Adm. 543; *The Alexander McNeil*, 20 Int. Rev. Rec. 175.

3. If the statutes of New York gave a lien against the vessel, which they do not, it could not be enforced in a court of admiralty by a proceeding *in rem*. *Wick* v. *The Samuel Strong*, 6 McLean, 587; *The Laurel*, 1 Newb. Adm. 269; *Maguire* v. *Card*, 21 How. 248; *The Lottawanna*, 21 Wall. 558; *Delovio* v. *Boit*, 2 Gall. 398; *People's Ferry Company* v. *Beers*, 20 How. 393; *The Circassian*, 1 Ben. 209; *Graham* v. *Haskins*, Olc. Adm. 227; *The Ship Harriet*, id. 229; *The Ottawa*, 5 Am. Law T. 147; *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 6 How. 344; *Allen* v. *Newberry*, 21 id. 246; *Ransom* v. *Mayo*, 3 Blatchf. 71; *Cunningham* v. *Hall*, 1 Cliff. 51; *The Two Friends*, Bee, Adm. 440; *Brig Hannah*, id. 421; *The Lady Horatio*, id. 169; *Cox* v. *Murray*, Abb. Adm. 343; *Garvey* v. *Crocket*, id. 490; *The Amstel*, 1 Blatchf. & H. Adm. 215; *McDermott* v. *The S. S. Owens*, 1 Wall. Jr. 370; *The Grand Turk*, 2 Pittsb. (Pa.) 326; *Philips* v. *Scattergood*, Gilp. 3; *Nicoll* v. *Gard-*

ner, 13 Wend. (N. Y.) 290; *Sacramento* v. *New World*, 4 Cal. 44; Story, Bailm., sects. 451, 453; 2 Kent, Com. 635, 642; *Gaisede* v. *Trent & Mersey Navigation Co.*, 4 T. R. 581; *Steinman* v. *Wilkins*, 7 Serg. & R. 466.

Mr. F. A. Wilcox, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Judicial power under the Federal Constitution extends to all cases of admiralty and maritime jurisdiction, and it was doubtless the intention of Congress, by the ninth section of the Judiciary Act, to confer upon the District Court the exclusive original cognizance of all admiralty and maritime causes, the words of the act being in terms exactly coextensive with the power conferred by the Constitution. In order, therefore, to determine the limits of the admiralty jurisdiction, it becomes necessary to ascertain the true interpretation of the constitutional grant. On that subject three propositions may be assumed as settled by authority, and to those it will be sufficient to refer on the present occasion, without much discussion of the principles on which the adjudications rest: 1. That the jurisdiction of the district courts is not limited to the particular subjects over which the admiralty courts of the parent country exercised jurisdiction when our Constitution was adopted. 2. That the jurisdiction of those courts does not extend to all cases which would fall within such jurisdiction, according to the civil law and the practice and usages of continental Europe. 3. That the nature and extent of the admiralty jurisdiction conferred by the Constitution must be determined by the laws of Congress and the decisions of this court, and by the usages prevailing in the courts of the States at the time the Federal Constitution was adopted. No other rules are known which it is reasonable to suppose could have been in the minds of the framers of the Constitution than those which were then in force in the respective States, and which they were accustomed to see in daily and familiar practice in the State courts.

Authority is conferred upon the libellants, as the proprietors of the wharf and slip in question, by the law of the State, to charge and collect wharfage and dockage of vessels lying

at said wharf, and within the slip adjoining the wharf of the libellants.

Sufficient appears to show that the respondents are the owners of the barge named in the libel; that on the 10th of October, 1876, she completed a trip from the port of Baltimore for the port of New York, and that she took wharfage at the wharf or pier of the libellants, where she remained for eleven days. For the use of the berth occupied by the barge the libellants charged $34.20, as wharfage and dockage. Due demand was made; and, payment being refused, the libellants instituted the present suit, which is a libel *in rem* against the barge to recover the amount of that charge. Process was served; and the respondents appeared and excepted to the libel, and set up that process of condemnation should not issue against the barge, for the following reasons: 1. Because no maritime lien arises in the case for the matters set forth in the libel. 2. Because no lien in such a case is given for wharfage against boats or vessels by the laws of the State. 3. Because the law of the State referred to in the libel as giving a lien for wharfage is unconstitutional and void, for the following reasons: (1.) Because it imposes a restriction on commerce. (2.) Because it imposes a duty of tonnage on all vessels of the character and description of that of the respondents. (3.) Because it discriminates against the boats or barges of persons who are not citizens of the State where the proprietors of the wharf reside.

Pending the proceedings in the District Court, the respondents presented a petition here, asking leave to move this court for a prohibition to the court below forbidding the District Court to proceed further in the case.

Pursuant to said petition, this court entered an order permitting argument upon the merits of the petition, and directing that due notice be given to the libellants and the clerk of the District Court. Hearing was had in conformity to that order, and the case was held under advisement.

Power is certainly vested in the Supreme Court to issue the writ of prohibition to the District Court, when that court is proceeding in a case of admiralty and maritime cognizance of which the District Court has no jurisdiction. 1 Stat. 81; *United States* v. *Peters*, 3 Dall. 12.

Where the District Court is proceeding in a cause not of admiralty and maritime jurisdiction, the Supreme Court cannot issue the writ, nor can the writ be used except to prevent the doing of something about to be done, nor will it ever be issued for acts already completed. *Ex parte Christy*, 3 How. 292; *United States* v. *Hoffman*, 4 Wall. 158.

Admiralty and maritime jurisdiction is conferred by the Constitution, and Judge Story says it embraces two great classes of cases, — one dependent upon locality, and the other upon the nature of the contract.

Damage claims arising from acts and injuries done within the ebb and flow of the tide have always been considered as cognizable in the admiralty; and, since the decision in the case of *The Genesee Chief*, 12 How. 443, it is considered to be equally well settled that remedies for acts and injuries done on public navigable waters, not within the ebb and flow of the tide, may be enforced in the admiralty, as well as for those upon the high seas and upon the coast of the sea.

Speaking of the second great class of cases cognizable in the admiralty, Judge Story says, in effect, that it embraces all contracts, claims, and services which are purely maritime and which respect rights and duties appertaining to commerce and navigation. 2 Story, Const., sect. 1666.

Public navigable waters, where inter-state or foreign commerce may be carried on, of course include the high seas, which comprehend, in the commercial sense, all tide-waters to high-water mark.

Maritime jurisdiction of the admiralty courts in cases of contracts depends chiefly upon the nature of the service or engagement, and is limited to such subjects as are purely maritime, and have respect to commerce and navigation within the meaning of the Constitution.

Wide differences of opinion have existed as to the extent of the admirality jurisdiction; but it may now be said, without fear of contradiction, that it extends to all contracts, claims, and services essentially maritime, among which are bottomry bonds, contracts of affreightment and contracts for the conveyance of passengers, pilotage on the high seas, wharfage, agreements of consortship, surveys of vessels damaged by the perils of the seas,

the claims of material-men and others for the repair and outfit of ships belonging to foreign nations or to other States, and the wages of mariners; and also to civil marine torts and injuries, among which are assaults or other personal injuries, collision, spoliation, and damage, illegal seizures or other depredations on property, illegal dispossession or withholding of possession from the owners of ships, controversies between the part owners as to the employment of ships, municipal seizures of ships, and cases of salvage and marine insurance. Conkl. Treatise (5th ed.), 254.

Wharf accommodation is a necessity of navigation, and such accommodations are indispensable for ships and vessels and water-craft of every name and description, whether employed in carrying freight or passengers, or engaged in the fisheries. Erections of the kind are constructed to enable ships, vessels, and all sorts of water-craft to lie in port in safety, and to facilitate their operation in loading and unloading cargo and in receiving and landing passengers.

Piers or wharves are a necessary incident to every well-regulated port, without which commerce and navigation would be subjected to great inconvenience, and be exposed to vexatious delay and constant peril.

Conveniences of the kind are wanted both at the port of departure and at the place of destination, and the expenses paid at both are everywhere regarded as properly chargeable as expenses of the voyage. Commercial privileges of the kind cannot be enjoyed where neither wharves nor piers exist; and it is not reasonable to suppose that such erections will be constructed for general convenience, unless the proprietors are allowed to make reasonable charges for their use.

Compensation for wharfage may be claimed upon an express or an implied contract, according to the circumstances. Where a price is agreed upon for the use of the wharf, the contract furnishes the measure of compensation; and when the wharf is used without any such agreement, the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred.

Such erections are indispensably necessary for the safety and convenience of commerce and navigation, and those who take

berth alongside them to secure those objects derive great benefit from their use. All experience supports that proposition, and shows to a demonstration that the contract of the wharfinger appertains to the pursuit of commerce and navigation.

Instances may, doubtless, be referred to where wharves are erected as sites for stores and storehouses; but the great and usual object of such erections is to advance commerce and navigation, by furnishing resting-places for ships, vessels, and all kinds of water-craft, and to facilitate their operation in loading and unloading cargo and in receiving and landing passengers.

Nor is the nature of the service or the character of the contract changed by the circumstance that the water-craft which derived the benefit in the case before the court was without masts or sails or other motive power of her own. Sail-ships, and even steamships and vessels, are frequently propelled by tugs; and yet, if they secure a berth at a wharf, or in a slip at the place of landing or at the port of destination, and actually occupy the berth as a resting-place or for the purpose of loading or unloading, no one, it is supposed, will deny that the ship or vessel is just as much liable to the wharfinger as if she had been propelled by her own motive power.

Neither canal-boats nor barges ordinarily have sails or steam-power, but they usually have tow-lines; and it clearly cannot make any difference, as to their liability for wharfage, whether they are propelled by steam or sails of their own, or by tugs, or horse or mule power, if it appears that the boat or barge actually occupied a berth at the wharf or slip at the commencement or close of the trip as a resting-place, or for the purpose of loading or unloading cargo, or receiving or for landing passengers.

Goods to a vast amount are transported by such means of conveyance, and all experience shows that boats of the kind require wharf privileges as well as ships and vessels, or any other water-craft engaged in navigation. *The Northern Belle*, 9 Wall. 526.

Access to the ship or vessel rightfully occupying a berth at a wharf, for the purpose of lading and unlading, is the undoubted right of the owner or charterer of such ship or vessel for which such right has been secured. *Wendell* v. *Baxter*, 12 Gray (Mass.), 494.

Privileges of the kind are essential to the carrier by water, whether he is engaged in carrying goods or passengers.

Repairs to a limited extent are sometimes made at the wharf; but contracts of the kind usually have respect to the voyage, and are made to secure a resting-place for the vessel during the time she is being loaded or unloaded. Such contracts, beyond all doubt, are maritime, as they have respect to commerce and navigation, and are for the benefit of the ship or vessel when afloat.

Carrying-vessels would be of little or no value unless they could be loaded; and they are usually loaded from the wharf, except in a limited class of cases, where lighters are employed, the vessel being unable to come up to the wharf in consequence of shallow water.

Accommodations at the port of destination are equally indispensable for the voyage as those at the port of departure. Consignments of goods and passengers must be landed, else the carrier is not entitled to freight or fare. Where the contract is to carry from port to port, an actual delivery of the goods into the possession of the owner or consignee, or at his warehouse, is not required in order to discharge the carrier from his liability. He may deliver them on the wharf; but, to constitute a valid delivery there, the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods, or to put them under proper care and custody. Delivery on the wharf, under such circumstances, is valid, if the different consignments be properly separated, so as to be open to inspection, and conveniently accessible to their respective owners. *The Eddy*, 5 Wall. 481.

These remarks are sufficient to show that wharves, piers, or landing-places are wellnigh as essential to commerce as ships and vessels, and are abundantly sufficient to demonstrate that the contract for wharfage is a maritime contract, for which, if the vessel or water-craft is a foreign one, or belongs to a port of a State other than that where the wharf is situated, a maritime lien arises against the ship or vessel in favor of the proprietor of the wharf.

Standard authorities, as well as reason, principle, and the necessities of commerce, support the theory that the contract

for wharfage is a maritime contract, which, in the case supposed, gives to the proprietor of the wharf a maritime lien on the ship or vessel for his security.

From an early period, wharf-owners have been allowed to exact from ships and vessels using a berth at their wharves a reasonable compensation for the use of the same; and the ship or vessel enjoying such a privilege has always been accustomed to pay to the proprietor of the wharf a reasonable compensation for the use of the berth. *The Kate Tremaine*, 5 Ben. 60.

Ancient codes and treatises, such as are frequently recognized as the source from which the rules of the maritime law are drawn, usually treat such contracts as maritime contracts, for which the ship or vessel is liable. *The Maggie Hammond*, 9 Wall. 435; *Delovio* v. *Boit*, 2 Gall. 398.

Charges for wharfage were adjudged to be lien claims in the District Court of the third circuit more than seventy years ago; and, in speaking of that case, Judge Story says, that it seems to him that the decision was fully supported in principle by the doctrines as well of the common law as of the civil law, and by the analogous cases of materials furnished and repairs made upon the ship. *Gardner* v. *Ship New Jersey*, 1 Pet. Adm. 223; *Ex parte Lewis*, 2 Gall. 483, where it was expressly adjudged that the contract was necessarily maritime, giving as the reason for the conclusion that the use of the wharf is indispensable for the preservation of the vessel. *Johnson* v. *McDonough*, Gilpin, 101.

Other eminent admiralty judges have decided in the same way, and among the number the late Judge Ware, whose opinion in cases involving the question of admiralty jurisdiction is entitled to the highest respect. *The Phœbe*, Ware, 265; 2 Conkl. Adm. (2d ed.) 515; *Bark Alaska*, 3 Ben. 391; *Hobart* v. *Drogan*, 10 Pet. 108; *The Mercer*, 1 Sprague, 284; *The Ann Ryan*, 7 Ben. 20; Dunlap, Adm. 75; Abbott, Ship. (5th ed.) 423.

Water-craft of all kinds necessarily lie at a wharf when loading and unloading; and Mr. Benedict says, that the pecuniary charge for the use of the dock or wharf is called wharfage or dockage, and that it is the subject of admiralty jurisdiction;

that the master and owner of the ship and the ship herself may be proceeded against in admiralty to enforce the payment of wharfage, when the vessel lies alongside the wharf, or at a distance, and only uses the wharf temporarily for boats or cargo. Benedict, Adm. (2d ed.) sect. 283.

Application for the writ of prohibition is properly made in such a case, upon the ground that the District Court has transcended its jurisdiction in entertaining the described proceeding; and whether it has or not must depend not upon facts stated *dehors* the record, but upon those stated in the record upon which the District Court is called to act, and by which alone it can regulate its judgment. Mere matters of defence, whether going to oust the jurisdiction of the court or to establish the want of merits in the libellants' case, cannot be admitted under such a petition here to displace the right of the District Court to entertain suits, the rule being that every such matter should be propounded by suitable pleadings as a defence for the consideration of the court, and to be supported by competent proofs, provided the case is one within the jurisdiction of the District Court. *Ex parte Christy*, 3 How. 292.

Congress has empowered the Supreme Court to issue writs of prohibition to the district courts "when proceeding as courts of admiralty and maritime jurisdiction," by which it is understood that the power is limited to a proceeding in admiralty. Conkl. Treatise (5th ed.), 56. Such a writ is issued to forbid a subordinate court to proceed in a cause there depending, on suggestion that the cognizance thereof belongeth not to the court. F. N. B. 39; 3 Bl. Com. 112; 2 Pars. Ship. 193; 8 Bac. Abr. 206.

Viewed in the light of these considerations, it is clear that a contract for the use of a wharf by the master or owner of a ship or vessel is a maritime contract, and, as such, that it is cognizable in the admiralty; that such a contract, being one made exclusively for the benefit of the ship or vessel, a maritime lien in the case supposed arises in favor of the proprietor of the wharf against the vessel for payment of reasonable and customary charges in that behalf for the use of the wharf, and that the same may be enforced by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner.

Many other questions were discussed at the bar which will not be decided at the present time, as they are not properly involved in the application before the court.

Petition denied.

RAILROAD COMPANY *v.* ROSE.

A railroad company paid to the holders of its bonds the entire amount of semi-annual interest accruing thereon from Jan. 1 to July 1, 1870. *Held,* that the proper internal revenue officer of the United States rightfully assessed against the company a tax of five per cent upon the amount so paid.

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

The facts are stated in the opinion of the court.

Mr. James Mason, *Mr. Samuel Shellabarger*, and *Mr. Jeremiah M. Wilson* for the plaintiff in error.

The Solicitor-General, *contra.*

MR. JUSTICE SWAYNE delivered the opinion of the court.

This action was brought by the Lake Shore and Michigan Southern Railroad Company. A demurrer to its petition was sustained by the court below, and judgment was given for the defendant. We must, therefore, look to the petition for the point to be decided. The facts well pleaded are to be taken as true. The case made by the petition is as follows: —

The plaintiff was bound to pay the interest upon certain bonds. The interest accruing from the 1st of January to the 1st of July, 1870, amounting to $185,500, matured upon the latter day, and within ten days from that time were paid to the bondholders respectively. Neither five per cent nor any other sum was withheld on account of taxes. On the 14th of July, 1870, Rose, the proper internal revenue officer of the United States, assessed against the plaintiff the sum of $9,279.50 as a tax of five per cent upon the amount so paid over to the bondholders. Payment was compelled by the seizure of property. The amount of the tax paid to the collector is alleged to have been exacted without warrant of law, and this suit was instituted to recover it back.

The question presented for our determination is whether the imposition of this tax was warranted by law. We think it was.

The tax was levied under sect. 122 of the act of June 30, 1864, 13 Stat. 284, as amended by the act of July 13, 1866, 14 Stat. 138, and amended finally by the act of July 14, 1870, sect. 17, 16 Stat. 261. The purport of the amendment last mentioned was to give continuity to sect. 122, and other sections named, of the act of 1864, as amended, until the 1st of August, 1870, the taxes imposed by all those sections then to cease. The tax specified in sect. 122 was levied upon railroad, canal, turnpike, canal navigation, and slack-water companies. The section did not include the tax upon the income of individuals. That was provided for always in other separate and distinct sections. Sect. 122, as amended, was in force when the act of 1870 was passed, and, without further legislation, would have continued in force indefinitely, unless there was a previous limit to its duration imposed by the act of March 2, 1867, 14 Stat. 480. After a careful examination of the subject, we are of the opinion that this limitation in the act of 1867 had not, and was not intended to have, any effect upon sect. 122, as amended; and that it applies exclusively to the tax upon the income of individuals. Nothing else was within its scope. It was confined to that subject. This limitation was not in the original internal revenue act of Aug. 5, 1861, 12 Stat. 292, although that act imposed the income tax.

The limitation appeared first in the act of July 1, 1862, 12 Stat. 474, sect. 92. It appeared again successively in the act of June 30, 1864, 13 Stat. 283, sect. 119; in the act of June 13, 1866, 14 Stat. 138; and in the act of March 2, 1867, 14 Stat. 480. In all these instances, the collocation of the provision and the context which precedes it, and that which follows as well, show, with a clearness approaching to a demonstration, that the construction we have given to it is the proper one. The subject was exhaustively examined in the concurring opinion in *Stockdale* v. *Insurance Companies*, 20 Wall. 333, and, as a consequence, the conclusion was reached to which we have come. It would be a waste of time to reproduce any thing said in that opinion. It is sufficient for our purpose to refer to the

argument there to be found. If this view be correct, it is conclusive of the case.

But conceding, for the purposes of this opinion, that we are in error upon the point we have considered, and that the limitation did terminate the tax prescribed in sect. 122, and in the other sections specified in the seventeenth section of the act of 1870, then it is clear that the section last named revived the sections therein named, including sect. 122, and gave them the same effect down to the 1st of August, 1870, in all respects as if those sections had not been intermediately suspended or abrogated.

This proposition is maintained, and every objection taken to it elaborately considered and answered, by the opinion of this court in *Stockdale* v. *Insurance Companies*, 20 Wall. 328, before referred to. We are entirely satisfied with respect to the soundness of that judgment, and feel no disposition to re-examine the grounds upon which it was placed.

This, also, is conclusive of the present controversy.

Judgment affirmed.

PACKET COMPANY *v.* KEOKUK.

1. A municipal corporation having, by its charter, an exclusive right to make wharves on the banks of a navigable river upon which it is situated, collect wharfage, and regulate wharfage rates, can, consistently with the Constitution of the United States, charge and collect from the owner of enrolled and licensed steamboats, which moor and land at a wharf constructed by it, wharfage proportioned to their tonnage.
2. Statutes which are constitutional in part only will be upheld and enforced so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable.

ERROR to the Supreme Court of the State of Iowa.

The act of the legislature of Iowa creating the city of Keokuk a municipal corporation gave to the city council power to establish and regulate wharves, and to fix the rates of landing and wharfage of all boats, rafts, and water-craft moored at or landing at the wharves. By virtue of this power, the city council, on the 26th of February, 1872, passed an ordinance, the first section of which ordained that all the ground then lying,

or which might thereafter be made, between Water Street, in the said city, and the middle channel of the Mississippi River, should be declared a wharf, and should be subject to be used for such purposes, under such conditions as might be prescribed by ordinance. The second section declared that the whole of Water Street, as well as the land described in the foregoing section, should be open for the uses and purposes of a wharf, subject to the rules and regulations prescribed by ordinance for its government, and that all boats, rafts, and water-craft that are moored to or landed at any part of Water Street, and the persons owning, claiming, and having charge of the same, should be subject to the same rules, regulations, wharfage, and penalties as were provided by the ordinance in relation to boats, rafts, and other water-craft landing or mooring at the wharf, as defined by the third section. The third section ordained that any steamboat that should make fast to any part of said wharf or Water Street, or to any vessel or other thing at or upon said wharf or street, or should receive or discharge any passengers or freight thereon, or should use any part of said wharf or street for the purpose of discharging, receiving, or landing any freight or passenger, should be liable to a wharfage fee. This fee, the ordinance declared, should be one dollar, if the tonnage of the boat was less than fifty tons; one dollar and fifty cents, if the tonnage of the boat was less than one hundred tons and more than fifty; two dollars, if the tonnage was one hundred tons and less than two hundred; three dollars for boats of two hundred tons and less than three hundred; four dollars for boats of three hundred tons and less than four hundred; and five dollars for all boats of four hundred tons and upwards. The section also ordained that each boat that should remain at the wharf or street over two and less than five days should pay a wharfage fee of one dollar and fifty cents for each day after the first two days, and one dollar per day for every day over five days it might remain at the wharf or street. The fourth section of the ordinance applied the provision of the third section to barges, canal-boats, or keel-boats used in the carrying trade, landing at the wharf, whether in tow or otherwise. This ordinance the plaintiffs in error claim to be in conflict with the Constitution. They are the owners of several steam-

boats which have landed at the wharves of the city from time to time, and occupied them for the purpose of receiving and discharging freight and passengers. Wharfage dues were regularly demanded, but refused. Their boats were engaged in navigating the Mississippi River between St. Louis, Mo., and St. Paul, Minn., and they landed at Keokuk, one of their regular ports. While so employed, they were duly licensed and enrolled for the coasting trade, under the acts of Congress for the regulation of commerce.

These are all the material facts of the case, except that the landing of the boats was at an improved wharf which the city had built within its limits, extending about one thousand feet along the line of the river; a wharf which the city had paved, and in building, extending, and repairing of which it had expended a large sum of money. The money had been borrowed; and, to pay the interest of the debt, it became necessary to charge and collect reasonable wharfage. That the rates charged, if any charge is lawful, were reasonable, is not denied. They were no more than sufficient to meet the interest of the debt incurred for building and improving the wharf.

Suit having been brought to recover the wharfage prescribed by the ordinance, and a judgment for the amount having been recovered and affirmed by the Supreme Court of the State, the plaintiffs in error have brought the case here, and they now contend that the ordinance is invalid for several reasons. Of these, the principal alleged are, that it imposes a duty of tonnage, and that it is a regulation of commerce such as Congress only is authorized to make.

Mr. Robert H. Gilmore and *Mr. James H. Anderson* for the plaintiff in error.

1. The ordinance of the city of Keokuk imposes a wharfage tax measured by the carrying capacity of the vessel, and lays a duty of tonnage.

2. A tax on the vehicle of commerce is as much a duty as if it were levied on articles exported from the State.

3. The ordinance is therefore a regulation of commerce.

4. So far as it seeks to levy a tax upon citizens of another State who are engaged in the navigation of the Mississippi, a free public highway, it is contrary to the ordinance of 1787,

and the act of Congress admitting the State of Iowa into the Union.

5. It is also contrary to the act of Congress whereby vessels enrolled and licensed for the coasting trade are exempted from any toll or tax for the privilege of entering or stopping in a port of the United States.

These propositions are sustained by the following authorities: Constitution of the United States, art. 1, sects. 8–10; Ordinance of 1787, art. 4, last clause; 5 Stat. 10; id. 742; Rev. Stat., sects. 4311, 4320; Story on the Constitution, sects. 1016, 1018; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *Maryland*, 12 id. 419; *Smith* v. *Turner*, 7 How. 283; *Sinnot et al.* v. *Davenport et al.*, 22 id. 227; *Almy* v. *State of California*, 24 id. 169; *Steamship Company* v. *Port Wardens*, 6 Wall. 31; *State Tonnage Tax Cases*, 12 id. 204; *Peete* v. *Morgan*, 19 id. 581; *Cannon* v. *New Orleans*, 20 id. 577; *Hackley* v. *Geraghty*, 34 N. J. L. 332; *People* v. *Raymond*, 34 Cal. 492; *People* v. *Moring*, 47 Barb. (N. Y.) 642; *Alexander* v. *Railroad Company*, 3 Strobh. (S. C.) 594; *Sheffield* v. *Parsons*, 3 Stew. & P. (Ala.) 302; *Lott* v. *Morgan*, 41 Ala. 250; *North-western Union Packet Co.* v. *St. Paul*, 3 Dill. 454; *Inman Steamship Co.* v. *Tinker*, 94 U. S. 238.

Mr. John H. Craig for the defendant in error.

The ordinance of the city of Keokuk does not lay a duty of tonnage, or an impost or duty on imports or exports, nor does it regulate commerce or navigation. This is merely a case of wharfage. Decided cases affirm the following propositions: —

1. Wharves erected by individual enterprise are private property.

2. For their use a reasonable compensation can be exacted.

3. The State has the power to regulate this compensation, and may delegate it to the local municipal authorities; and, when the power has been delegated to a city owning wharves to assist vessels landing within its limits, it can rightfully exact this compensation. *Barney* v. *Keokuk*, 94 U. S. 324; *Dutton* v. *Strong*, 1 Black, 1; *Railroad Company* v. *Schurmeir*, 7 Wall. 272; *Yates* v. *Milwaukee*, 10 id. 497; *The Wharf Case*, 3 Bland (Md.), 361; *Ward* v. *Thompson*, 6 Gill & J. (Md.) 349; *City of Pittsburgh* v. *Grier*, 22 Penn. St. 54; *Bucker* v. *Brown*,

21 Wend. (N. Y.) 710; *Wiswall* v. *Hall*, 3 Paige (N. Y.), Ch. 313; *Schwartz* v. *Flatboats*, 14 La. Ann. 243; *Geiger* v. *Felor*, 8 Fla. 325; *Murphy* v. *Montgomery*, 11 Ala. 586; *Sacramento* v. *Confidence*, 4 Cal. 45; *People* v. *Broadway Wharf Co.*, 31 id. 34; *Haight* v. *City of Keokuk*, 4 Iowa, 199; *Grant* v. *City of Davenport*, 18 id. 181; *County of St. Clair* v. *Lovingston*, 23 Wall. 46; *Ingraham, Kennedy, & Day* v. *Chicago, D. & M. Railroad Co.*, 34 Iowa, 249; *Atlee* v. *The Packet Company*, 21 Wall. 290.

Admitting that parts of the ordinance under consideration may be in conflict with the Constitution and laws of the United States, it does not follow that its unobjectionable provisions, when capable of being separately enforced, will be set aside, and its legitimate purposes defeated.

MR. JUSTICE STRONG delivered the opinion of the court.

The principal question presented by the record of this case is, whether a municipal corporation of a State, having by the law of its organization an exclusive right to make wharves, collect wharfage, and regulate wharfage rates, can, consistently with the Constitution of the United States, charge and collect wharfage proportioned to the tonnage of the vessels from the owners of enrolled and licensed steamboats mooring and landing at the wharves constructed on the banks of a navigable river.

The city of Keokuk is such a corporation, existing by virtue of a special charter granted by the legislature of Iowa. To determine whether the charge prescribed by the ordinance in question is a duty of tonnage, within the meaning of the Constitution, it is necessary to observe carefully its object and essence. If the charge is clearly a duty, a tax, or burden, which in its essence is a contribution claimed for the privilege of entering the port of Keokuk, or remaining in it, or departing from it, imposed, as it is, by authority of the State, and measured by the capacity of the vessel, it is doubtless embraced by the constitutional prohibition of such a duty. But a charge for services rendered or for conveniences provided is in no sense a tax or a duty. It is not a hindrance or impediment to free navigation. The prohibition to the State against the imposi-

tion of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited: something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. The character of the service is the same whether the wharf is built and offered for use by a State, a municipal corporation, or a private individual; and, when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property. A passing vessel may use the wharf or not, at its election, and thus may incur liability for wharfage or not, at the choice of the master or owner. No one would claim that a demand of compensation for the use of a dry-dock for repairing a vessel, or a demand for towage in a harbor, would be a demand of a tonnage tax, no matter whether the dock was the property of a private individual or of a State, and no matter whether proportioned or not to the size or tonnage of the vessel. There is no essential difference between such a demand and one for the use of a wharf. It has always been held that wharfage dues may be exacted; and it is believed that they have been collected in ports where the wharves have belonged to the State or a municipal corporation ever since the adoption of the Constitution. In *Cannon* v. *New Orleans*, 20 Wall. 577, this court, while holding an ordinance void that fixed dues upon steamboats which should moor or land in any part of the port of New Orleans, measured by the number of tons of the boats, because substantially a tax for the privilege of stopping in the port, and, therefore, a duty or tonnage, carefully guarded the right to exact wharfage. The language of the court was: "In saying this (namely, denying the validity of the ordinance then before it), we do not understand that this principle interposes any hindrance to the recovery from any vessel landing at a wharf or pier owned by an individual, or by a municipal or other corporation, a just compensation for the use of such property. It is a doctrine too well settled, and a practice too

common and too essential to the interests of commerce and navigation, to admit of a doubt, that for the use of such structures, erected by individual enterprise and recognized everywhere as private property, a reasonable compensation can be exacted. And it may be safely admitted, also, that it is within the power of the State to regulate this compensation, so as to prevent extortion, a power which is often very properly delegated to the local municipal authority. Nor do we see any reason why, when a city or other municipality is the owner of such structures, built by its own money, to assist vessels landing within its limits in the pursuit of their business, the city should not be allowed to exact and receive this reasonable compensation as well as individuals."

No doubt, neither a State nor a municipal corporation can be permitted to impose a tax upon tonnage under cover of laws or ordinances ostensibly passed to collect wharfage. This has sometimes been attempted, but the ordinances will always be carefully scrutinized. In *Cannon* v. *New Orleans*, the ordinance was held invalid, not because the charge was for wharfage, nor even because it was proportioned to the tonnage of the vessels, but because the charge was not for wharfage or any service rendered. It was for stopping in the harbor, though no wharf was used. Such, also, was *North-western Packet Co.* v. *St. Paul*, 3 Dill. 454. So, in *Steamship Company* v. *Port Wardens*, 6 Wall. 31, the statute held void imposed a tax upon every ship entering the port. This was held to be alike a regulation of commerce and a duty of tonnage. It was a sovereign exaction, not a charge for compensation. Of the same character was the tax held prohibited in *Peete* v. *Morgan*, 19 id. 581.

It is insisted, however, on behalf of the plaintiffs in error, that the charge prescribed by the ordinance must be considered as an imposition of a duty of tonnage, because it is regulated by and proportioned to the number of tons of the vessels using the wharf; and the argument is attempted to be supported by the ruling of this court in *State Tonnage Tax Cases*, 12 Wall. 204. But this is a misconception of those cases. The statute of Alabama declared invalid was not a provision to secure or regulate compensation for wharfage, or for any services rendered

to the vessels taxed. It imposed a tax "upon all steamboats, vessels, and other water-crafts plying in the navigable waters of the State," to be levied "at the rate of one dollar per ton of the registered tonnage thereof." It did not tax the boats as property in proportion to their value, but according to their capacity, or, as was said, "solely and exclusively on the basis of their cubical contents, as ascertained by the rules of admeasurement and computation prescribed by Congress." It was the nature of the tax or duty, coupled with the mode of assessing it, which made the law a violation of the Constitution. As stated, the vessels taxed were such as were plying in the navigable waters of the State. If not plying in those waters, they were not taxed. The tax was, therefore, an impediment to navigation in those waters, which led the court to say that it was as instruments of commerce and not as property the vessels were required to contribute to the revenues of the State. The fact that the tax was proportioned to the tonnage of the vessels taxed was relied upon only as supporting the conclusion that they were not taxed as property, but as instruments of commerce; and the court, in view of all these considerations, remarked, "Beyond all question, the act is an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed or to the ship-owners, and consequently it is not to be upheld by virtue of the rules applied in the construction of laws regulating pilot dues and port charges." Nothing in these cases justifies the assertion that either wharfage or port charges are duties of tonnage, merely because they are proportioned to the actual tonnage or cubical capacity of vessels. It would be a strange misconception of the purpose of the framers of the Constitution were its provisions thus understood. What was intended by the provisions of the second clause of the tenth section of the first article was to protect the freedom of commerce, and nothing more. The prohibition of a duty of tonnage should, therefore, be construed so as to carry out that intent. A mere adherence to the letter, without reference to the spirit and purpose, may in this case mislead, as it has misled in other cases. It cannot be thought the framers of the Constitution, when they drafted the prohibition, had in mind charges for services rendered or for conveniences furnished to

vessels in port, which are facilities to commerce rather than hindrances to its freedom; and, if such charges were not in mind, the mode of ascertaining their reasonable amount could not have been. In *Cooley* v. *The Board of Port Wardens*, 12 How. 299, this court recognized a clear distinction between wharfage and duties on imports or exports, or duties on tonnage. Referring to the second paragraph of sect. 10, art. 1, of the Constitution, Curtis, J., speaking for the court, said: "This provision of the Constitution was intended to operate upon subjects actually existing and well understood when the Constitution was formed. Imposts, and duties on imports, exports, and tonnage, were then known to the commerce of the civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial States enforced their laws, as they were from charges for wharfage or towage, or any other local port charges for services rendered to vessels or cargoes, and to declare that such pilot fees or penalties are embraced within the words imposts, or duties on imports, exports, or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who used this language. . . . It is the thing and not the name that is to be considered."

For these reasons, we hold that the ordinance cannot be considered as imposing a duty of tonnage, and what we have said is sufficient to show that most of the other objections of the plaintiffs in error to its validity have no substantial foundation. It is in no sense a regulation of commerce between the States, nor does it impose duties upon vessels bound to or from one State to another, nor compel entry or clearance in the port of Keokuk; nor is it contrary to the compact contained in the ordinance of 1787, since it levies no tax for the navigation of the river; nor is it in conflict with the act of Congress respecting the enrolment and license of vessels for the coasting trade. All these objections rest on the mistaken assumption that port charges, and especially wharfage, are taxes, duties, and restraints of commerce.

In nothing that we have said do we mean to be understood as affirming that a city can, by ordinance or otherwise, charge or collect wharfage for merely entering its port, or stopping

therein, or for the use of that which is not a wharf, but merely the natural and unimproved shore of a navigable river. Such a question does not arise in this case. The record shows that the wharfage charged to these plaintiffs in error was for the use of a wharf, built, paved, and improved by the city at large expense. So far as the ordinance imposes and regulates such a charge, it is not obnoxious to the accusation that it is in conflict with the Constitution. A different question would be presented had the steamboats landed at the bank of the river where no wharf had been constructed or improvement made to afford facilities for receiving or discharging cargoes. We adhere to all that was decided in *Cannon* v. *New Orleans*. In that case, the city ordinance imposed what were called "levee dues" on all steamboats that should moor or land in any part of the harbor of New Orleans. It was subsequently amended by the substitution of the words "levee and wharfage dues" for "levee dues;" but, even as amended, it did not profess to demand wharfage. The plaintiff filed a petition for an injunction against the collection of the dues prescribed by it, and for the recovery of those he had been compelled to pay. It did not appear that he had ever made use of any wharf or improved levee; and what we decided was, that the city could not impose a charge for merely stopping in the harbor. The case in hand is different. The ordinance of Keokuk has imposed no charge upon these plaintiffs which it was beyond the power of the city to impose. To the extent to which they are affected by it there is no valid objection to it. Statutes that are constitutional in part only, will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable. We think a severance is possible in this case. It may be conceded the ordinance is too broad, and that some of its provisions are unwarranted. When those provisions are attempted to be enforced, a different question may be presented.

Judgment affirmed.

GOOD *v.* MARTIN.

1. In a suit upon a promissory note, the court below charged the jury that if the defendant, without making any statement of his intention in so doing, wrote his name on the back of the note before its delivery to the payee, he is presumed to have done so as the surety of the maker, for his accommodation, and to give him credit with the payee; and that, if such presumption is not rebutted by the evidence, he is liable on the note as maker. *Held*, that the charge was not erroneous.
2. The proviso to the third section of the act of Congress, approved July 2, 1864 (13 Stat. 351), that in the courts of the United States no witness shall be excluded in any civil action because he is a party to, or interested in, the issue tried, has no application to the courts of a Territory.
3. The act of the Territory of Colorado of Feb. 11, 1870, rendering parties to a suit competent witnesses, did not apply to cases which were at issue at the time of its passage.

ERROR to the Supreme Court of the Territory of Colorado.

This action was brought by Ida Martin, the defendant in error, in the District Court of Arapahoe County, Colorado Territory, against Parker B. Cheeney, William N. Shepard, and John Good, as joint makers of a certain promissory note executed there June 29, 1866, and payable sixty days thereafter to the order of Alexander Davidson, by whom it was, before maturity, indorsed to the plaintiff. The note was signed by the first two defendants, and, before its delivery to the payee thereof, indorsed in blank by Good.

Judgment by default was rendered against Cheeney and Shepard. Good appeared, and pleaded the general issue.

There was a judgment against all the defendants, which was affirmed by the Supreme Court of the Territory. Good sued out this writ of error.

As the other facts in the case, as well as the assignments of error, are fully set out in the opinion of the court, they are omitted here.

Mr. Richard T. Merrick and *Mr. M. F. Morris* for the plaintiff in error.

1. The rule of law is, that a party whose name appears on the back of a negotiable instrument, under circumstances like those connected with this note, is *prima facie* an indorser; that parol testimony is admissible to show in what character he signed, whether as surety, guarantor, or indorser; that the

presumption of law does not arise to charge the party as surety, but favors his being regarded as an indorser; and that it is incumbent on the plaintiff who seeks to make him liable as a maker to rebut that presumption. The instruction of the court on this point was, therefore, erroneous. *Rey* v. *Simpson*, 22 How. 341; Story, Pr., sect. 133.

2. The exclusion of the defendants Good and Shepard as witnesses, because of their interest, was also erroneous.

The sixteenth section of the act of Congress of Feb. 28, 1861, 12 Stat. 176, organizing the Territory of Colorado, provides that all laws of the United States which are not locally inapplicable shall have the same force and effect within that Territory as elsewhere within the United States. The act of July 2, 1864, 13 id. 351, declaring that in the courts of the United States no witness shall be excluded in any civil action because he is a party to or interested in the issue tried, is not locally inapplicable; and the territorial court, though but a legislative court, is still a court of the United States, entirely liable to be controlled in all things by the laws of Congress. There is, therefore, no reason why the latter act should not have been applied to this case.

Again, it does not appear very plainly why the territorial act of 1870, rendering parties to suits competent witnesses, though passed after issue was joined in this case but before the trial took place, should not have governed. The legislative power may modify or change existing remedies without thereby impairing the rights of parties, and questions of practice are to be determined in accordance with the forms in force at the time of trial. *Calder* v. *Bull*, 3 Dall. 386; *Baltimore, &c. Railroad Co.* v. *Nesbit*, 10 How. 395.

Mr. H. C. Alleman, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Decisions of a conflicting character exist as to the nature and legal effect of the obligation which a third person assumes who indorses his name in blank on a negotiable promissory note before the payee and before the instrument is delivered to take effect. Courts of justice, in some jurisdictions, hold that such a party is a second indorser, even though it be true that the payee

may never indorse the instrument. *Phelps* v. *Vischer*, 50 N. Y. 69; *Shafer* v. *Farmers' & Mechanics' Bank*, 59 Penn. St. 144.

Even elementary rules show that he cannot be first indorser, for the reason that he is not payee; and it is well settled law that no one but the payee can sustain that relation to the maker, or put the note in circulation as a negotiable instrument. *Essex Company* v. *Edmunds*, 12 Gray (Mass.), 272; *Moies* v. *Bird*, 11 Mass. 436.

Three of the counts of the declaration are framed upon a promissory note, dated June 29, 1866, payable to Alexander Davidson or order sixty days after date, signed by the first two defendants; and the record shows that it was indorsed by Good, the other defendant, before it was indorsed by the payee, and before it was delivered to take effect as a negotiable instrument. His indorsement was in blank, and, of course, was without any written explanation as to its nature and intended effect.

Besides the three counts framed upon the promissory note, the declaration also contained the common counts, in which it was alleged that the defendants were indebted to the plaintiff in the sum of $2,000 for work and labor done and performed, and in the same sum for goods, wares, and merchandise sold and delivered, and in the same sum for money had and received, and other counts *in indebitatus assumpsit*.

Service was made; but the two defendants first named failed to appear, and were defaulted. Instead of that, Good appeared, pleaded the general issue, and went to trial. Evidence was introduced on both sides; and the verdict and judgment were for the plaintiff in the sum of $3,625.33. Exceptions were filed by Good; and he sued out a writ of error, and removed the cause into this court.

Only two of the exceptions are embodied in the assignment of errors, and those only will be re-examined: 1. That the court erred in instructing the jury that if they found from the evidence that the defendant wrote his name upon the back of the note before the delivery of the same to the payee, and that he did not then make any statement of his intention in so doing, he is presumed to have done so as the surety of the makers, and for their accommodation, to give them credit with the payee,

and is liable for the payment of the note in this action; and that if that presumption is not rebutted by the evidence in the case, they must find for the plaintiff in the issue joined between her and Good. 2. That the court erred in excluding the testimony of the two defendants called as witnesses by Good.

Decided cases almost innumerable affirm the rule, that, if one not the promisee indorses his name in blank on a negotiable promissory note before it is indorsed by the payee, and before it is delivered to take effect as a promissory note, the law presumes that he intended to give it credit by becoming liable to pay it either as guarantor or as an original promisor. *Bryant* v. *Eastman*, 7 Cush. (Mass.) 111; *Benthal* v. *Judkins*, 13 Met. (Mass.) 265; *Colbun* v. *Averill*, 30 Me. 310.

Different courts, as remarked in that case, hold different views in respect to the question here involved; but all concur that such an act constitutes a contract which is to receive a reasonable and an available construction. Great conflict exists in the decided cases; but the better opinion is, that there are certain general rules and principles to be followed in the interpretation of such a contract, which, in the absence of other evidence, will lead to satisfactory results, even amid the conflicting decisions.

Beyond all doubt, the contract should be construed as it was at the time it was made. If made at the inception of the note, it is presumed to have been for the same consideration and a part of the original contract expressed by the note. If made subsequently to the date of the note and without a prior indorsement by the payee, it will be presumed that it was not made for the same consideration, and the party, if liable at all, will be regarded as a guarantor. Such a contract to guarantee the debt of a third person must be in writing, and there must be sufficient proof of the consideration. *Brewster* v. *Silence*, 8 N. Y. 207; *Leonard* v. *Vredenburg*, 8 Johns. (N. Y.) 29; *Hall* v. *Farmer*, 5 Den. (N. Y.) 484.

These remarks apply where the third person indorses the note before the payee; but, where such a person indorses the note after a prior indorsement by the payee, the law presumes it to have been done in aid of the negotiation of the note, and the party will be regarded as a subsequent indorser,

the rule being, that, if the indorsement is without date, it will be presumed to have been made at the inception of the note. *Ranger* v. *Cary*, 1 Met. (Mass.) 369; *Noxon* v. *De Wolf*, 10 Gray (Mass.), 343; *Collins* v. *Gilbert*, 94 U. S. 753.

Irregularities of the kind in the execution of promissory notes are noticed by Judge Story in his work on Promissory Notes, and he says that the maker and such a party are both to be deemed original promisors, and the note a joint and several promissory note to the payee, although as between the maker and the other party they stand in the relation of principal and surety. Standard authorities, too numerous for citation here, are referred to by the author in support of the proposition. Story, Pr., sect. 58; *Sylvester* v. *Downer*, 20 Vt. 355; *Lewis* v. *Harvey*, 18 Mo. 74; 1 Parsons, Contr. (6th ed.) 243.

None will deny, it is presumed, that the cases cited sustain the proposition where the third person indorses his name in blank on the note at the time when it was made and before it was indorsed by the payee; and the same learned author admits that the rule would be otherwise if the party actually wrote his name at a subsequent period, unless it was done in compliance with an agreement made before the note was executed. *Hawkes* v. *Phillips*, 7 Gray (Mass.), 284; *Leonard* v. *Wilder*, 36 Me. 265; *Champion* v. *Griffith*, 13 Ohio, 228. Prior decisions of this court are to the same effect, as appears by the following citation. *Rey et al.* v. *Simpson*, 22 How. 341.

When a promissory note made payable to a particular person or order is first indorsed by a third person, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place.

1. If he put his name in blank on the back of the note at the time it was made and before it was indorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker of the note. *Schneider* v. *Schiffman*, 20 Mo. 571; *Irish* v. *Cutler*, 31 Me. 536.

2. Reasonable doubt of the correctness of that rule cannot be entertained; but if his indorsement was subsequent to the making of the note and to the delivery of the same to take

effect, and he put his name there at the request of the maker, pursuant to a contract of the maker with the payee for further indulgence or forbearance, he can only be held as guarantor, which can only be done where there is legal proof of consideration for the promise, unless it be shown that he was connected with the inception of the note.

3. But if the note was intended for discount, and he put his name on the back of the note with the understanding of all the parties that his indorsement would be inoperative until the instrument was indorsed by the payee, he would then be liable only as a second indorser, in the commercial sense, and as such would clearly be entitled to the privileges which belong to such an indorser.

Considerable diversity of decision, it must be admitted, is found in the reported cases where the record presents the case of a blank indorsement by a third party, made before the instrument is indorsed by the payee and before it is delivered to take effect, the question being whether the party is to be deemed an original promisor, guarantor, or indorser. Irreconcilable conflict exists in that regard; but there is one principle upon the subject almost universally admitted by them all, and that is, that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties, and in most cases it is admitted that proof of the facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed. *Denton* v. *Peters*, Law Rep. 5 Q. B. 475.

Facts and circumstances attendant at the time the contract was made are competent evidence for the purpose of placing the court in the same situation, and giving the court the same advantages for construing the contract which were possessed by the actors. *Cavazos* v. *Trevino*, 6 Wall. 773.

Courts of justice may acquaint themselves with the facts and circumstances that are the subjects of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. *Shore* v. *Wilson*, 9 Cl.

& Fin. 352; *Clayton* v. *Grayson*, 4 Nev. & M. 602; Addison, Contr. (6th ed.) 918; 2 Taylor, Evid. (6th ed.) 1035.

Evidence to show that the indorsement of the defendant in this case was made before the instrument was indorsed by the payee or delivered to take effect was admitted without objection; but it is not necessary to rest the decision upon that suggestion, as it is clear that the evidence would have been admissible, even if seasonable objection had been made to its competency. *Hopkins* v. *Leek*, 12 Wend. (N. Y.) 105.

Like a deed or other written contract, a promissory note takes effect from delivery; and, as the delivery is something that occurs subsequently to the execution of the instrument, it must necessarily be a question of fact when the delivery was made. Parol proof is, therefore, admissible to show when that took place, as it cannot appear in the terms of the note. 2 Taylor, Evid. (6th ed.) 1001; *Hall* v. *Cazenove*, 4 East, 477; *Cooper* v. *Robinson*, 10 Mee. & W. 694.

Opposed to that the suggestion is, that, if a holder produces a note having a blank indorsement of one not the payee, the presumption is that it was made at the inception of the instrument. *Childs* v. *Wyman*, 44 Me. 433. Grant that, and still it is a mere presumption of fact, which may be rebutted and controlled by parol proof, that it was not there when the note was delivered, or that it was made at a subsequent date. *Essex Company* v. *Edmunds*, 12 Gray (Mass.), 273.

Third persons indorsing a negotiable promissory note before the payee, and before it is delivered to take effect, cannot be held as first indorsers, for the reason that they are not payees; and no party but the payee of the note can be the first indorser, and put the instrument in circulation as a commercial negotiable security. Such a third party may, if he chooses, take upon himself the limited obligation of a second indorser; but, if he desire to do so, he must employ proper terms to signify that intention, the rule being that a blank indorsement supposes that there are no such terms employed, and that he is liable either as promisor or guarantor.

Blank indorsements may be filled up to express the legal contract; and the true commercial rule is, that, when the blank is filled. the instrument shall have the character of a written

instrument, and not depend on parol proof to give it effect, nor be subject to be altered or contradicted by parol proof. Indorsements of the kind are or may be valid, as the law presumes that such an indorser intended to be liable in some form. It does not charge him as indorser, unless the terms employed are proper to express such an intent; but if any one not the payee of a negotiable note, or, in the case of a note not negotiable, if any party writes his name on the back of the note, at or sufficiently near the time it is made, his signature binds him in the same way as if it was written on the face of the note and below that of the maker; that is to say, he is held as a joint maker, or as a joint and several maker, according to the form of the note. Cases also arise where the signature of a third person is subsequent to the making and delivery of the note, and in that case the third person, as to the payee, is not a maker, but a guarantor, and his promise is void if without consideration; but the consideration may be the original consideration if the note was received at his request and upon his promise to guarantee the same, or if the note was made at his request and for his benefit. 1 Parsons, Contr. (6th ed.) 244.

Judge Story says that the interpretation ought to be just such as carries into effect the true intention of the parties, which may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. If the party intended at the time to be bound only as guarantor of the maker, he shall not be an original promisor; and, if he intended to be liable only as a second indorser, he shall never be held to the payee as first indorser. Story, Pr., sect. 479.

Where the evidence on these points is doubtful, obscure, or totally wanting, courts of law adopt rules of interpretation as furnishing presumptions as to the actual intention of the parties. Difficulty in that regard can never arise where the indorsement is special, if it contains words proper to show that the party intended to be liable only as second indorser. Where the indorsement is in blank, if made before the payee, the liability must be either as an original promisor or guarantor; and parol proof is admissible to show whether the indorsement was made before the indorsement of the payee and before the instrument was delivered to take effect, or after the payee had become the

holder of the same; and, if before, then the party so indorsing the note may be charged as an original promisor, but if after the payee became the holder, then such a party can only be held as guarantor, unless the terms of the indorsement show that he intended to be liable only as second indorser, in which event he is entitled to the privileges accorded to such an indorser by the commercial law.

Whether regarded as a second indorser or an original promisor, it is not necessary to allege or prove any other than the original consideration; but, if it be attempted to charge the party as a guarantor, a distinct consideration must appear. *Essex Company* v. *Edmunds*, 12 Gray (Mass.), 272; *Brewster* v. *Silence*, 7 N. Y. 207.

Viewed in the light of these suggestions, it is clear that the first assignment of error must be overruled.

Territorial courts are not courts of the United States, within the meaning of the Constitution, as appears by all the authorities. *Clinton et al.* v. *Englebrecht*, 13 Wall. 434; *Hornbuckle* v. *Toombs*, 18 Wall. 648. A witness in civil cases cannot be excluded in the courts of the United States because he or she is a party to, or interested in, the issue tried; but the provision has no application in the courts of a Territory where a different rule prevails. 13 Stat. 351; *Bowman* v. *Noyes*, 12 N. H. 302; *Bridges et al.* v. *Armour et al.*, 5 How. 91; *Bailey* v. *Knapp*, 19 Penn. St. 192; *Halz* v. *Snyder*, 26 id. 511.

Suppose that is so, then the two defendants called as witnesses were rightly rejected as witnesses. 13 Stat. 351.

Special reference is made to the territorial act of the 11th of February, 1870, as inconsistent with the ruling of the court; but that act contains the following proviso: that the act "shall not apply to cases pending at the passage thereof in the district courts, on appeals from justices of the peace, nor to cases at issue at the passage of the same in the district and probate courts." Sufficient appears to show that the case before the court was at issue in the court below one whole year before the passage of that act.

Tested by these considerations, it is clear that the second assignment of error must also be overruled, and that there is no error in the record. *Judgment affirmed.*

BUFFINGTON *v.* HARVEY.

1. The court approves the ruling in *Whiting et al.* v. *The Bank of the United States*, 13 Pet. 6, and *Putnam* v. *Day*, 22 Wall. 60, that the only questions open in a bill of review, except when it is filed on the ground of newly discovered evidence, or contains new matter, are such as arise upon the pleadings, proceedings, and decree.
2. Should such a bill set forth the evidence in the original cause, a demurrer, specially assigning that error alone, should be sustained, or the evidence might, on motion, be stricken out; but a general demurrer must be overruled, if the bill shows any substantial error in the record.
3. Granting a rehearing, or granting or dissolving a temporary injunction, rests in the sound discretion of the court, and furnishes no ground for an appeal.
4. To a bill filed by the assignee in bankruptcy to set aside, as a fraud upon creditors, a conveyance of real and personal property by the bankrupt, the latter is not a necessary party.

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

The facts are stated in the opinion of the court.

Mr. Thomas J. Henderson for the appellant.

No counsel appeared for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an appeal from a decree sustaining a demurrer to a bill of review, and dismissing the bill, the effect of which is to leave the decree in the original cause in full force and effect. The only questions open for examination on this appeal are such as were open on the bill of review, and these, as shown in *Whiting et al.* v. *The Bank of United States*, 13 Pet. 6, and *Putnam* v. *Day*, 22 Wall. 60, were only such as arose upon the pleadings, proceedings, and decree, without reference to the evidence in the cause. The decision of the court upon the issues of fact, so far as they depend upon the proofs, are conclusive on a bill of review. It was error, therefore, to insert in the bill, as was done in this case, the evidence taken in the original cause. Had this error been specially assigned, the demurrer might have been sustained on that ground alone, or the evidence might have been stricken out of the bill as surplusage, on motion. But as the demurrer was a general one, if the bill of review showed any substantial error in the record,

the demurrer should have been overruled, and the original decree should have been opened or reversed. 2 Smith, Ch. Pr. 56, 63. A general demurrer must be overruled if the pleading demurred to contain any good ground to support it. It was the duty of the court below, therefore, to inquire whether the record, exclusive of the evidence, contained any substantial error pointed out by the bill of review. 2 Smith, Ch. Pr. 57. The result to which the court came was that no such error existed; and therefore the demurrer was sustained, and the bill of review was dismissed.

The errors assigned to this decree are five: 1st, Because the court sustained the demurrer; 2d, because it entered a decree for the complainant; 3d, because it overruled a petition for a rehearing; 4th, because it found the issues for the complainant; 5th, because it overruled a motion to dissolve the injunction. The three last assignments are totally inadmissible. The granting of a rehearing is always in the sound discretion of the court, and, therefore, granting or refusing it furnishes no ground of appeal. *Steines* v. *Franklin County*, 14 Wall. 15. The granting or dissolution of a temporary injunction stands on the same footing. The granting of a permanent injunction is part of the final decree, and abides the fate of the decree itself. And as to the finding of the issues for the complainant, that, as we have seen, is not a matter that can be examined on a bill of review. The only assignment, therefore, which we can recognize, is the general one, that the court erred in sustaining the demurrer to the bill of review, and entering a decree for the complainant.

We must look, then, at the bill of review, and see whether it points out and demonstrates any substantial error in the pleadings, proceedings, or decree, supposing the issues of fact to have been properly passed upon by the court. In order to understand the force and effect of this bill, however, it will be necessary to state the nature and objects of the original suit.

The bill in the original cause was filed on the 20th of March, 1872, by Harvey, the present appellee, as assignee in bankruptcy of one Isaac Fitzgerrel, against Titus Buffington, the appellant, to set aside a conveyance of real and personal property made by the bankrupt to Buffington on the thirtieth day

of December, 1867. It is alleged that this conveyance was made by the bankrupt in contemplation of insolvency, to put his property out of his hands, so as to hinder and delay his creditors, and to defeat the operation of the bankrupt law; that it was a pretended sale, without any real consideration, though Buffington's notes were given therefor at long dates; and various circumstances with regard to the bankrupt remaining in possession of the property and using and disposing of it as his own, are detailed as evidence of the fraudulent intent.

To this bill the defendant filed an answer, in which he insisted on the *bona fides* of the transaction, endeavored to explain the circumstances charged in the bill as evidence of fraud, and alleged that, on a petition to have Fitzgerrel declared a bankrupt, an injunction had been issued against the defendant in April, 1868, prohibiting him from selling or disposing of the goods, but was afterwards dissolved, and he supposed the question of his title was settled. This answer being excepted to, a second and third answer were filed by the defendant, going more into detail of the circumstances of his connection with the property, and stating that the injunction against him was dissolved after a full hearing in June Term, 1868.

The plaintiff filed a general replication, the cause went to proofs, and a large amount of evidence was taken. A final decree was made on the 3d of February, 1873, by which the conveyances in question were set aside and vacated, and the defendant was directed to deliver up possession of the lands, and to pay the sum of $3,891.88 to the assignee, besides costs. A motion was made for a rehearing, and was refused, and the bill of review was filed in October, 1873.

As before stated, this bill not only sets forth the pleadings, proceedings, and decree in the original suit, but all the evidence taken therein. The only errors assigned in the bill relate to the facts as supposed to be evinced by the evidence. After stating the pleadings, evidence, and decree, the bill proceeds thus: —

"Your orator would further represent unto your Honor that he believes that there is manifest error in finding the issues for the complainant on the foregoing evidence; that said evidence is insufficient to sustain the said decree because of want of proof to sustain

the bill, and that the bill should have been dismissed; also, because the evidence shows that more than two years had elapsed from the making of the deed and before the bill was filed, and that, therefore, by the Statute of Limitations, the bill could not be sustained.

"And your orator would further assign for error the fact that the decree in this cause made gives a judgment against the defendant for a larger sum of money by over $1,000 than there are debts proven against the bankrupt.

"Also, the fact, shown by the evidence of Barkley and Forth, that they had known Fitzgerrel for more than ten years, and that they had no reason to suppose that he was insolvent or contemplated insolvency, corroborating the evidence of Buffington, that he had no reasonable cause to believe the said Fitzgerrel to be insolvent when he purchased the property."

These are all the errors assigned in the bill. A bare statement of them is enough to show that the bill of review was totally misconceived. It attempted to review the decision of the court solely upon the facts as evinced by the evidence, which, as we have seen, is entirely inadmissible on such a bill.

The appellant, in his brief, insists upon the lapse of more than two years after the cause of action accrued before the original bill was filed, relying upon the period of limitation prescribed in the second section of the bankrupt law. Rev. Stat. 5057. But the record does not show, independently of the evidence (and we do not know that it appears even by that), when the cause of action did accrue. The bill shows, it is true, that the conveyance alleged to be fraudulent was made in December, 1867, and the bill was not filed till March, 1872; but that is not decisive of the question. The cause of action does not accrue to the assignee until his appointment; and when the assignee in this case was appointed does not appear. The bill says that the present assignee was appointed in 1871, which is within the time of limitation. If there was a prior assignee, the time of his appointment is not shown. Besides, the defendant did not set up the Statute of Limitations in his answer. We hear of this defence for the first time in the bill of review.

The appellant also insists that the original bill was defective

for want of parties in not making the bankrupt a party. This objection is not even made in the bill of review, and was not made in the original cause; and, if it had been made, in our judgment it would not have been a valid objection. The bankrupt had no interest to be affected except what was represented by his assignee in bankruptcy, who brought the suit. As to the bankrupt himself, the conveyance was good; if set aside, it could only benefit his creditors. He could not gain or lose, whichever way it might be decided.

To avoid misapprehension in what we have said with regard to the proceedings on a bill of review, it will be observed that in this case the bill is a pure bill of review, containing no new matter, such as an allegation of newly discovered evidence, or any thing else of an original character admissible in such a bill. What we have said is specially applicable to the case before us. Bills containing new matter, of course, are in the nature of original bills, so far forth as such new matter is concerned, and admit of an answer and a replication, and proceedings appertaining to an issue of fact; but only as it relates to the truth and sufficiency of such new matter, and the propriety of its admission for the purpose of opening the decree in the original cause. If decided to be founded in fact, sufficient to affect the decree, and properly admissible, the original decree will be opened, and, if necessary, a new hearing had; but, if not so found, the bill of review will be dismissed, and the original decree will stand. But even in this case, as well as in that of a pure bill of review, the evidence in the original cause cannot be discussed for the purpose of questioning the propriety of the original decree as based on such evidence. It can only be adverted to, if at all, for the purpose of showing the relevancy and bearing of the new matter sought to be introduced into the cause.

Decree affirmed.

NEW JERSEY *v.* YARD.

1. A statute of a State, which declares that all charters of corporations granted after its passage may be altered, amended, or repealed by the legislature, does not necessarily apply to supplements to an existing charter which were enacted subsequently to the statute.
2. Nor does a provision, which declares that "this supplement, and the charter to which it is a supplement, may be altered or amended by the legislature," apply to a contract with the corporation made in a supplement thereafter passed.
3. Such statutory reservations of the right to repeal, unlike similar constitutional provisions, are only binding on a succeeding legislature so far as it chooses to conform to them; and, if it so intends, an irrepealable legislative contract may be made. It is, therefore, in every case a question whether the legislature making the contract intended that the former provision for repeal or amendment should, by implication, become a part of the new contract.
4. In this case, the contract of 1865 for a specific rate of taxation is inconsistent with any such implication, because: 1. There was a subject of dispute and a fair adjustment of it for a valuable consideration on both sides. 2. The contract assumed, by legislative requirement, the shape of a formal written contract. 3. The terms of the contract, that "this tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this State, or any law thereof," exclude, in view of the whole transaction, the right of the State to revoke it at pleasure.

ERROR to the Court of Errors and Appeals in and for the State of New Jersey.

The Morris and Essex Railroad Company was, by an act of the legislature of New Jersey, passed Jan. 29, 1835, created a corporation.

The fifteenth section of the charter enacted, that, as soon as the net proceeds of said railroad amounted to seven per cent on its costs, the corporation should pay to the treasurer of the State a tax of one-half of one per cent on the cost of said road, to be paid annually thereafter on the first Monday of January of each year; provided, that no other tax or impost should be levied or assessed upon the corporation.

The twentieth section reserved to the legislature the right to alter, amend, or repeal the act, whenever it should think proper.

A supplement to the charter, passed March 2, 1836, gave power to build a branch and lateral roads, and repealed the twentieth section of the original charter; but reserved the right

of the legislature to alter or amend the supplement, or the act to which it is a supplement, whenever the public good may require it.

On the 14th of February, 1846, a general act relating to corporations was approved, which enacted that the charter of every corporation which should thereafter be granted by the legislature should be subject to alteration, suspension, and repeal, in the discretion of the legislature.

On March 28, 1862, a general tax act was approved, the eighth section of which enacts that all private corporations of the State, except those which, by virtue of any irrepealable contract in their charters or other contracts with the State, are expressly exempted from taxation, should be and were thereby required to be respectively assessed and taxed at the full amount of their capital stock paid in, and accumulated surplus.

Sect. 13 enacts that the real estate of private corporations situate within the State shall be assessed against said corporation in the township or ward in which it is located, in the same manner as the real estate of individuals; and the amount of such assessment shall be deducted from the amount of the capital stock, &c.

The twenty-first section repeals all acts and parts of acts, whether special or local, or otherwise, inconsistent with the provisions of the act.

Another supplement was approved on the 23d of March, 1865. It authorizes a branch road through Boonton and to Paterson; and for that purpose empowers the company to exercise all the powers and franchises given by the original act and supplements, subject, however, to all the restrictions, limitations, and conditions of said original act and supplements which may be applicable to the powers and franchises conferred by this supplement.

The third section enacts that the tax of one-half of one per cent, provided by the said original act of incorporation to be paid by said company to the State whenever the net earnings of the company amounted to seven per cent upon the cost of the road, shall be paid at the expiration of one year from the time when the road of the company shall be open and in use

to Phillipsburgh, and annually thereafter; which tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of the State, or any law thereof: provided, that the section shall not go into effect or be binding upon the company until it, by an instrument duly executed under its corporate seal and filed in the office of the secretary of State, shall have signified its assent hereto, which assent shall be signified within sixty days after the passage of the act, or the act shall be void.

The fifth section enacts that the act shall take effect immediately.

In due time, the company filed a paper under its seal, bearing date April 24, 1865, reciting said third section, and setting forth that the company had received a copy of the act, and had considered it. It then declares that, in consideration of the terms and conditions of the said supplement, and more especially of the third section thereof, the company has assented, and does thereby assent, to the said act; and has agreed, and does thereby agree, to be subject to the provisions of the said act, and to pay the tax therein named, as therein specified.

On the 5th of March, 1867, another supplement to the charter was approved, which, after reciting that the company had lately extended its railroad from Hackettstown to Phillipsburgh, gives power to increase its stock and straighten its road, and declares that the company for this purpose shall be invested with all the powers conferred by the charter and supplements, subject to the duties and liabilities thereby imposed. It enacts that no tax by or under the authority of the State shall be imposed upon any property purchased, held, or used by said company for the purposes of its charter, or any of the supplements thereto; except the tax of one-half of one per cent on the cost of its road, which, by the said charter and the supplement thereto approved on the twenty-third day of March, 1865, was required to be paid by said company in lieu of all other taxes, any act to the contrary notwithstanding.

No formal acceptance of this act was provided for or given.

On the 2d of April, 1873, an act, entitled "An Act to establish just rules for the taxation of railroad corporations, and to

induce their acceptance and uniform adoption," was passed. The preamble recites as follows: —

"Whereas, for the encouragement of railroad enterprise, laws creating and regulating railways in this State usually provide for the payment by them, in consideration of their chartered privileges, of a fixed rate upon the capital stock, or the cost of their works, in lieu of all other public impositions whatever; that it is nevertheless contended that the property of such corporations, being largely acquired for or through the growth and extension of their prosperity, should contribute to the charges and expenses essential for municipal and county purposes; that it is desirable, in order to the avoidance of litigation and future dissatisfaction, that such municipal and county taxation shall be authorized, and that the same shall be permanently fixed and regulated."

Sect. 1 then enacts that all taxation upon all railroad companies occupying and using railroads in the State, whether as lessees or otherwise, shall hereafter be made as follows: First, Such companies shall pay upon the cost, equipment, and appendages of said railroads, respectively, a State tax after such rate of taxation as may have heretofore been fixed by law upon such companies, or, in default thereof, after the rate of one-half of one per cent upon such cost. Second, A tax of one per cent on the value of the corporations' real estate (except the track, roadbed, and ten acres at the termini), for the benefit of the counties and municipalities in which it lies.

The ninth section makes the corporation liable for city improvements beneficial to such property, for the purposes for which it is used, except that made subject to State tax, but provides that the laws relating in other respects to such city improvements be not thereby altered.

The act then recites that "whereas certain railroad corporations, owning or occupying railroads in this State, claim exemption from all taxation, whether State, county, or municipal, further than is provided for by their charters, or by special laws for their benefit now existing, which claims, even if legal, subject said corporations to public ill-will, and make it their interest to forego the same and agree to the scheme of taxation hereby established."

Sect. 10 then enacts that any such railroad corporation may,

within six months from the approval of the act, make and execute, under its common seal and the signature of its president, and file in the office of the secretary of State, a declaration, in writing, surrendering all claim to exemption from taxation by it heretofore had or made, and accepting the provisions of this act in lieu thereof.

Sect. 11 repeals all acts and parts of acts inconsistent with said act, and declares that the act shall take effect immediately.

Yard, the tax commissioner provided for in the act, made the statement and valuation required by it with respect to the Morris and Essex Railroad Company's real estate. By this it appears that its real estate, to the amount of $2,089,520, is subject to a tax of one per cent for the years 1873, 1874, and 1875, for the benefit of the counties and municipalities where it is situate.

This valuation was removed to the Supreme Court of New Jersey by *certiorari;* and the reasons assigned for setting it aside were four: 1st, The commissioner had no power to make the valuation. 2d, The act of 1873 does not apply to the Morris and Essex Railroad Company. 3d, If it does apply, it impairs a contract between the State and the company. 4th, General illegality and violation of vested rights.

The contract was, it is alleged, created by the company's acceptance under its seal of the said third section of the supplement to its charter, approved March 23, 1865.

The Supreme Court rendered a judgment sustaining the assessment.

That judgment having been affirmed by the Court of Errors and Appeals, the State of New Jersey, on the prosecution of the company, brought the case here.

Mr. Frederick T. Frelinghuysen and *Mr. J. G. Shipman* for the plaintiff in error.

The supplements of 1865 and 1867, and the acceptance by the Morris and Essex Railroad Company, constitute an irrepealable contract between it and the State. *State* v. *Miller*, 30 N. J. L. 368; 2 Kent, Com. 306; *Gordon* v. *Appeal Tax Court*, 3 How. 333; *Commonwealth* v. *Essex Company*, 13 Gray (Mass.), 239; *Miller* v. *The State*, 15 Wall. 478; *State* v. *James*,

4 Mo. 570; *Millin* v. *New York & Erie Railroad Co.*, 21 Barb. (N. Y.) 513; *Commonwealth* v. *Canal Company*, 66 Pa. 41; *Zabriski* v. *Hackensack Railroad Co.*, 18 N. J. Eq. 178; *Railroad* v. *Teazie*, 39 Me. 587; *City of Erie* v. *Erie Canal Co.*, 59 Pa. 174; *Story* v. *Jersey & Bergen Point Railroad Co.*, 16 N. J. Eq. 13; *State* v. *Person*, 32 N. J. L. 134; *Tomlinson* v. *Jessup*, 15 Wall. 454; *Fletcher* v. *Peck*, 6 Cranch, 87; *State* v. *Jersey City*, 31 N. J. L. 576; *The Home of the Friendless* v. *Rouse*, 8 Wall. 430; *Humphrey* v. *Pegues*, 16 id. 244; *McGee* v. *Mathias*, 4 id. 156; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 439; *New Jersey* v. *Wilson*, 7 Cranch, 164; *State Bank of Ohio* v. *Knoop*, 16 How. 369; Cooley, Const. Lim. 279–281; *McGavisk* v. *The State*, 34 N. J. L. 509.

If the contract be repealable, the legislature did not, by the act of 1873, in fact, repeal it; nor did it so intend. *Erie Railway Co.* v. *The State*, 31 N. J. L. 531; Constitution of New Jersey, art. 4, sect. 7; *State* v. *Minton*, 3 Zab. (N. J.) 529; *State* v. *Brannin*, 2 id. 485; *Mechanics' & Traders' Bank* v. *Bridge and Boyer*, 30 N. J. L. 113; *State* v. *Miller*, *supra*, and 31 N. J. L. 529; *State* v. *Jersey City*, *supra*.

Mr. Robert Gilchrist, *contra*.

The act of April 2, 1873, subjects to the new taxes the Morris and Essex Railroad Company, unless it has an irrepealable contract with the State. *Proprietors of Bridges* v. *Hoboken Company*, 2 Beas. 98; *State* v. *Miller*, 30 N. J. L. 368; 31 id. 529.

The act of 1865 and its acceptance do not create an irrepealable contract as to taxation; nor does that of 1867. The original act incorporating the company, and the subsequent amendments and supplements, are to be treated as one act of legislation; and the act of March 2, 1836, granting a supplement to the charter, which the company accepted, expressly reserved the right of amendment or repeal. Story and Washington, JJ., in 4 Wheat. 684; *State* v. *Mayor*, 31 N. J. L. 580; *Newark City Bank* v. *The Assessor*, 30 id. 22; *State* v. *Bergen*, 34 id. 439; *State* v. *Douglass*, id. 84; *State* v. *Person*, 32 id. 134; *Morris Canal* v. *State*, 4 Zab. (N. J.) 70; *Delaware & Raritan Canal and Camden & Amboy R. & T. Co.* v. *Rari-*

tan & Delaware Bay Railroad Co., 16 N. J. Eq. 321; *Bank of Utica* v. *Magher*, 18 Johns. (N. Y.) 344; *Oleson* v. *Green Bay Company*, 36 Wis. 389; *Tomlinson* v. *Jessup*, 15 Wall. 454; *Tomlinson* v. *Branch*, id. 460; *Humphreys* v. *Peques*, 16 id. 244; *Walker* v. *Whitehead*, id. 314; *Trask* v. *Maguire*, 18 id. 391; *North Missouri Railroad* v. *Maguire*, 20 id. 46; *United States* v. *Herron*, id. 251; *Tucker* v. *Ferguson*, 22 id. 527; *Iron Bank* v. *Pittsburgh*, 37 Pa. 349; *Morgan* v. *Louisiana*, 93 U. S. 217; *West Wisconsin Railway Co.* v. *Supervisors*, id. 595; *Att'y-Gen.* v. *Lupton Board*, 2 Jur. N. S. 180; Cooley, Const. Lim. 281.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Court of Errors and Appeals of the State of New Jersey.

The plaintiff invokes the jurisdiction of this court, on the ground that an act of the legislature of that State, approved April 2, 1873, concerning taxation of railroad corporations, impairs the obligation of a contract between the State and the plaintiff, found in an act of March 23, 1865, and the written acceptance of that act by the company, dated April 24 of that year.

The third section of the act of 1865 reads as follows: —

"Be it enacted, that the tax of one-half of one per cent provided by their said original act of incorporation, to be paid by the said company to the State whenever the net earnings of the said company amount to seven per cent upon the cost of the road, shall be paid at the expiration of one year from the time when the road of the said company shall be open and in use to Phillipsburgh, and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever, by or under the authority of this State, or any law thereof: *Provided*, that this section shall not go into effect or be binding upon the said company until the said company, by an instrument duly executed under its corporate seal, and filed in the office of the secretary of State, shall have signified its assent hereto, which assent shall be signified within sixty days after the passage of this act, or this act shall be void."

The act of 1873 imposed a more burdensome tax than this on all railroad companies not protected by irrepealable contracts; and the Court of Errors held that this statute was applicable

to the plaintiff, because the contract of 1865, which had been formally accepted by the company, was repealable by the legislature of the State.

The single question, therefore, for our consideration is, whether the act of March 23, 1865, and its acceptance by the Morris and Essex Railroad Company, constituted a contract which could not be impaired by any subsequent legislation of the State.

The Court of Errors decided, that, while the act of 1865 was a contract, it must be taken in connection with other legislation of the State on that subject, by which the legislature reserved the right to alter and amend the contract, and that this right entered into and became a part of it; therefore, the exercise of this right did not impair its obligation.

The solution of the question here presented must depend, first, upon an inquiry into this supposed reservation of power; and, secondly, into the essential character of the contract of 1865.

The case before us differs from those in which, by the Constitution of some of the States, this right to alter, amend, and repeal all laws creating corporate privileges becomes an inalienable legislative power. The power thus conferred cannot be limited or bargained away by any act of the legislature, because the power itself is beyond legislative control. The right asserted in this case to amend or repeal legislative grants to corporations, being itself but the expression of the will or purpose of the legislature for one particular session or term of the State of New Jersey, cannot bind any succeeding legislature which may choose to make a grant or a contract not subject to be altered or repealed; or, if any succeeding legislature to that of 1846, which enacted that "the charter of every corporation which shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal in the discretion of the legislature," shall grant a charter or amend a charter, declaring in the act that it shall not be subject to alteration and repeal, the former act is of no force in that case. So it can by a general law repeal this general reservation of the right to repeal, and all special reservations in separate charters. It follows that, unlike the constitutional provision in other States,

it is in New Jersey a question, in every case of a contract made by the legislature, whether that body intended that the right to change or repeal it should inhere in it, or whether, like other contracts, it was perfect, and not within the power of the legislature to impair its obligation.

The Morris and Essex Railroad Company was chartered by an act of the legislature, Jan. 29, 1835. Sect. 16 enacts that, "as soon as the net proceeds of said railroad shall amount to seven per cent (in any one year) upon its cost, the said corporation shall pay to the treasurer of the State a tax of one-half of one per cent on the cost of said road, to be paid annually thereafter on the first Monday of January of each year; provided, that no other tax or impost shall be levied or assessed."

By sect. 20, "the legislature reserve to themselves the right to alter, amend, or repeal this act, whenever they think proper."

The next succeeding legislature, in a supplement to the charter, repealed sect. 20, and substituted this language: "The legislature reserve to themselves the right to alter or amend this supplement, or the act to which this is a supplement, whenever the public good may require it." It is this last clause which counsel insist became, by operation of law, a part of the contract of the act of 1865, concerning taxation, already quoted.

The argument is that the original charter, and all subsequent amendments and supplements, are to be treated merely as parts of one act, and that this reserve of the right to alter or amend became a part of every new law which has reference to that railroad company.

In support of this proposition, the cases of *Newark City Bank* v. *The Assessor*, 30 N. J. L. 22, and *State* v. *Bergen*, 34 id. 439, are cited.

They announce the general principle that a charter and its amendments are to be considered as acts *in pari materia* in construing them, and they do little more. The precise point held is, that a city charter, being declared to be a public act, supplements and amendments to it are also to be treated as public acts. But this falls short of establishing the principle that a

reservation in a charter to a private corporation, of the right to repeal or amend it, shall extend to every subsequent amendment of the charter. It is not easy to see why such a provision should be extended beyond the terms in which it is expressed; and all the force which properly belongs to it is given when the exemption from the constitutional provision against impairing the obligation of contracts is extended as far as the language of the exemption justifies, and it should be extended no further by implication. The language in the statute we are construing covers the supplement of 1836 and the original act, and nothing more, — "the right to alter or amend this supplement, or the act to which this is a supplement," — leaving future supplements to make the same reservation, if the legislature so intends.

Sect. 6 of the general act of 1846 is by its terms limited to charters of corporations granted after its passage; and it requires a very strong implication to make it applicable to amendments to charters in existence before its passage, though the amendments were executed subsequently.

But, as we have already said, since the legislature which passed the act of 1865 had the power to make a contract which should not be subject to repeal or modification by one of the parties to it without the consent of the other, the main question here is, Did they intend to make such a contract?

The principal function of a legislative body is not to make contracts, but to make laws. These laws are put into a form which, in all countries using the English language and inheriting the English common law, is called a statute.

Unless forbidden by some exceptional constitutional provision, the same authority which can make a law can repeal it. The Constitution of the United States has imposed such a limitation upon the legislative power of all the States, by declaring that no State shall pass any law impairing the obligation of a contract. The frequency with which this court has been called on to declare State laws void, because they do impair the obligation of contracts, shows how very important and far-reaching that provision is.

It may safely be said that in far the larger number of cases brought to this court under that clause of the Constitution, the

question has been as to the existence and nature of the contract, and not the construction of the law which is supposed to impair it; and the greatest trouble we have had on this point has been in regard to what may be called legislative contracts, — contracts found in statute laws of the State, if they existed at all. It has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the State within the protection of the clause referred to of the Federal Constitution.

The difficulty in this class of cases has always been to distinguish what is intended by the legislature to be an exercise of its ordinary legislative function in making laws, which, like other laws, are subject to its full control by future amendments and repeals, from what is intended to become a contract between the State and other parties when the terms of the statute have been accepted and acted upon by those parties. This has always been a very nice point; and, when the supposed contract exists only in the form of a general statute, doubts still recur, after all our decisions on that class of questions.

These doubts are increased when the terms of the statute relate to a matter which is in its essential nature one of exclusive legislative cognizance, and which at the same time requires money or labor to be expended by individuals or corporations. In such cases, the legislature may be supposed to be merely exercising its power of regulating the burdens which are to be borne for the public service, in which case it could be modified from time to time as legislative discretion might determine; or it might be a contract founded on a fair consideration moving from the party concerned to the State, and which in that case would be beyond the power of the State to impair. Statutes fixing the taxes to be levied on corporations, partake, in a striking manner, of this dual character, and require for their construction a critical examination of their terms, and of the circumstances under which they are created.

The writer of this opinion has always believed, and believes now, that one legislature of a State has no power to bargain away the right of any succeeding legislature to levy taxes in

as full a manner as the Constitution will permit. But, so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made.

In the case now under consideration, it is conceded on all hands that the act of 1865 was a contract for a tax of one-half of one per cent per annum on the cost of the Morris and Essex Railroad, and no more. But counsel for defendant says the contract was repealable; that the legislature of its own volition could impose other and more burdensome taxes, at its discretion; that it was a contract so long as the legislature of New Jersey was satisfied with it, and no longer. It is conceded, also, that this construction of it cannot be sustained, unless we are bound to import into it either the reservation clause of the act of 1836, or what is called the interpretation act of 1846. We have already shown how little reason there is for doing this on general principles of construction. We think it still clearer that it cannot be done, because it is inconsistent with the legislative intent in passing the act of 1865.

1. The legislature was not willing to rest this contract in the usual statutory form alone, depending for its validity as a contract upon some action of the corporation under it to bind it to its terms; but they required of the company a formal written acceptance within sixty days, or else it became wholly inoperative. The company duly executed this acceptance. There was, then, the complete formal, written instrument evidencing this contract, signed by the presiding officers of the two houses of the New Jersey legislature, and the governor, for one party, and the president and secretary and seal of the railroad company, of the other party. It does seem as if the legislative intention was to make a contract in the same manner, and on the same terms of equal obligation, as other contracts are made, and not to pass a statute which it could repeal or amend the day after it was signed by the parties.

2. There was a well-understood subject of contract. The corporation wished authority to build a branch road or roads, with favorable route, and power to acquire right of way; and the State wished the vexed question of the right to tax the corporation to be settled. For the company denied the right

of the State to tax them under their charter, until the road paid them a net income of seven per cent per annum on its cost.

The legislature said, If you will consent to pay the one-half of one per cent tax as originally agreed, and commence to do this within one year from the time the road shall be open and in use to Phillipsburgh, we will authorize an increase of ten millions of your capital stock and the franchises you seek as to the branch roads, and will agree that the tax shall be fixed at one-half of one per cent. Here was a subject of disagreement adjusted, additional rights granted, and the tax fixed, both as to its rate and the time of commencement.

Can it be believed that it was intended by either party to this contract that, after it was signed by both parties, one was bound for ever, and the other only for a day? That it was intended to be a part of the contract that the State of New Jersey was, at her option, to be bound or not? That there was implied in it, when it was offered to the acceptance of the company, the right on the part of the legislature to alter or amend it at pleasure? If the State intended to reserve this right, what necessity for asking the company to accept in such formal manner the terms of a contract which the State could at any time make to suit itself?

3. The language used by the legislature is inconsistent with the right claimed.

"Which tax (one-half of one per cent) shall be in lieu and satisfaction of all other taxation or impositions whatsoever by or under authority of this State, or any law thereof." Is there here to be implied "except such laws as may hereafter be enacted"? Such a provision would be to nullify the whole contract. How could the tax be in lieu and satisfaction of all other taxation, if other taxes might be imposed next day? or how can it be said to be in satisfaction of all taxes whatsoever under authority of the State, if the State could immediately impose another and more burdensome tax?

We admit the force of the doctrine, that, when it is asserted that a State has bargained away her right of taxation in a given case, the contract must be clear, and cannot be made out by dubious implications.

But of the existence of the present contract there is no doubt. Its meaning and its terms are clear enough, and, taken alone, no one denies but that it is a contract which would be protected by the Constitution of the United States. The implication is of a right to revoke it, and comes from the other quarter, and is one which we do not think exists by fair construction, and which we do not feel at liberty to import into the contract to defeat its manifest purpose.

Judgment reversed, and cause remanded for further proceedings in conformity to this opinion.

MR. JUSTICE BRADLEY took no part in the consideration of this case.

INSURANCE COMPANY *v.* BOON.

1. Where the issues are tried by the court, its finding belongs to the record as fully as does the verdict of a jury.
2. Where the court tried the issues of fact, and its opinion, embodying its findings and the conclusions of law thereon, was filed concurrently with the entry of the judgment, but there was no formal finding of facts, and the court, at the next following term, upon a rule awarded, and, after hearing the parties, made an order that a special finding, with the conclusions of law conformable to that opinion so filed, be entered *nunc pro tunc*, and made part of the record as of the term when the judgment was rendered, — *Held*, that the order was within the discretion of the court, and that by it such special finding became a part of the record of the cause, and that the judgment upon it is, without a bill of exceptions, subject to review here.
3. A policy of insurance for one year, issued Sept. 2, 1864, upon certain goods then in a store at the city of Glasgow, Mo., contained the following stipulation: "*Provided always*, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." At an early hour on the morning of the fifteenth day of October, 1864, an armed force of the rebels, under military organization, surrounded and attacked the city. It was defended by Colonel Harding and the forces of the United States under his command, and a battle between them and the rebel forces continued for many hours. When it became apparent to Colonel Harding that the city could not be successfully defended, he, in order to prevent the military stores deposited in the city hall from falling into the possession of the rebel forces, set fire to the city hall. It, with its contents, was consumed. Without other interference, agency, or instrumentality, the fire spread to the building next adjacent to the city hall, and from building to building through two other intermediate buildings to the store containing the goods insured, and

destroyed them. During this time, and until after the fire had consumed such goods, the battle continued, and no surrender had taken place, nor had the rebel forces, nor any part thereof, entered the city. *Held*, that the fire which destroyed the goods was excepted from the risk undertaken by the insurers.

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

This was an action commenced in September, 1868, to recover $6,000, the amount of a policy of insurance, bearing date Sept. 2, 1864, issued to the plaintiffs below by the Ætna Fire Insurance Company of Hartford, Conn., for one year, upon certain goods, wares, and merchandise then in their store at Glasgow, Mo., which were destroyed by fire Oct. 15, 1864.

By written stipulation, a jury was waived, and the issues of fact tried by the court.

On April 28, 1874, the court filed a written opinion declaring their finding of facts upon the evidence, with their conclusions of law thereon, and rendered judgment accordingly for the plaintiffs. No other findings of fact were had, nor was a bill of exceptions tendered at that time. On the 13th of July following, the defendant applied to the circuit judge in vacation for a rule on the plaintiffs to show cause why the findings of fact and the conclusions of law thereon should not be stated by the court, and a bill of exceptions signed and filed *nunc pro tunc*. Leave for that purpose having been granted, execution of the judgment was stayed. August 22, the parties stipulated in writing that the rule should be heard before the district judge at chambers. Upon the hearing, he, on the twenty-fourth day of that month, granted the rule. At the September Term of the court, the findings of fact and conclusions of law thereon were duly entered *nunc pro tunc* as of the April Term, and the bill of exceptions was signed by both judges. The findings, so far as they involve any question argued by counsel here, are as follows: —

"That the policy, which was duly executed by the defendant and delivered to the plaintiffs, contained the following express provisions, annexed to the agreement of insurance and in the body of the policy, namely: —

"*Provided always*, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which

may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire."

That the facts and circumstances showing the cause of the fire are as follows, namely: At and before the time of the fire in question, the city of Glasgow, within which the said store of the plaintiffs was situated, was occupied as a military post of the United States, by the military forces and a portion of the army of the United States engaged in the civil war then, and for more than three years theretofore, prevailing between the government and the citizens of several Southern States who were in rebellion and seeking to establish an independent government, under the name of the Confederate States of America. As such military post, the said city of Glasgow was made the place of deposit of military stores for the use of the army of the United States, which stores were in a building called the city hall of the said city of Glasgow, situated on the same street, on the same side of the street, and about one hundred and fifty feet distant from the plaintiffs' said store, three buildings, nevertheless, being located in the intervening space, not, however, in actual contact with either. Colonel Chester Harding, an officer of the United States government, and in command of the military forces of the United States, held the possession of the said city, and had lawful charge and control of the military stores aforesaid. On the fifteenth day of October, 1864, an armed force of the rebels, under military organization, surrounded and attacked the city at an early hour in the morning, and threw shot and shell into the town, penetrating some buildings, and one thereof penetrating the said store of the plaintiffs, but without setting fire thereto or causing any fire therein, and some of said shell killing soldiers and citizens. The city was defended by Colonel Harding and the military forces under his command, and battle between the loyal troops and the rebel forces continued for many hours. The citizens fled to places of security, and no civil government prevailed in the city. The rebel forces were superior in numbers, and, after a battle of several hours, drove the forces of the government from their position, compelled their surrender, and entered and occupied the city.

During the battle, and when the government troops had been driven from their exterior lines of defence, it became apparent to Colonel Harding that the city could not be successfully defended, and he thereupon, in order to prevent the said military stores from falling into the possession of the said rebel forces, ordered Major Moore, one of the officers under his command, to destroy them.

In obedience to this order to destroy the said stores, and having no other means of doing so, Major Moore set fire to the said city hall, and thereby the said building, with its contents, was consumed. Without other interference, agency, or instrumentality, the fire spread along the line of the street aforesaid to the building next adjacent to the city hall, and from building to building through two other intermediate buildings to the store of the plaintiffs, and destroyed the same, together with its contents, including the goods insured by the defendant's policy aforesaid. During this time, and until after the fire had consumed such goods, the battle continued, and no surrender had taken place, nor had the forces of the rebels, nor any part thereof, obtained the possession of or entered the city.

It was conceded that the order of Colonel Harding was, in the exigency, a lawful and discreet use of the military authority vested in him.

The court declared, as conclusions of law upon the facts found, that the defendant was not exempted by virtue of the said proviso from liability to the plaintiffs under said policy, and that the plaintiffs were entitled to judgment for $6,000, the value of the property destroyed, with interest thereon from July 1, 1865, and costs of suit.

On the 7th of October, 1874, the defendant sued out this writ of error.

Mr. Francis Fellowes for the defendants in error, in support of the judgment below.

The record presents no question which can be reviewed here, as the court below had no jurisdiction of the cause after the close of the term at which the judgment was rendered. *Sheppard* v. *Wilson*, 6 How. 275; *Turner* v. *Yeates*, 16 id. 14; *Walton* v. *United States*, 9 Wheat. 657; *Muller* v. *Ehlers*, 91 U. S.

249; Phillip's Practice, 122, 123, 127; 3 Bl. Com. 275, 316; Petersdorff's Abridgment, tit. Amend. 504; *Albers* v. *Whitney*, 1 Story, 310; *Brush* v. *Robins*, 3 McLean, 487; *Carman* v. *Roberts*, 3 Wheat. 591; *Bank of The United States* v. *Massachusetts*, 6 How. 31.

But, if the findings can be considered a part of the record, it is submitted the loss in question must be attributed to its proximate cause, *Gen. Mutual Insurance Co.* v. *Sherwood*, 14 How. 352; *Insurance Company* v. *Tweed*, 7 Wall. 44; *Welts* v. *Conn. Mutual Life Insurance Co.*, 48 N. Y. 34; and that is the cause next preceding the effect, and capable of producing it. In this case, this cause was clearly the act of Colonel Harding in setting fire to the city hall; and no other cause "intervened between this act and the fact accomplished." Invaders, persons in insurrection, riot, or civil commotion, did not set the fire, nor have any part in the destruction of the insured property. The destruction was adverse to their interest. They took the town, but destroyed nothing.

The so-called military necessity is not named in the contract as a cause of exception. Besides, it had, in itself, no causal power. Furnishing a motive for, and in this sense an antecedent to, the act of Colonel Harding, it had nothing to do with causation.

His act was not that of a military or usurped power. Power, in itself, means simply *power*, not lawful authority. Military power is not lawful military authority, but rests upon mere force of arms, and must, therefore, of necessity be usurped. The word "or" in the proviso of the policy is used as conjunctive, not as disjunctive. It means both military and usurped. It is used to express equivalents. Thus, the exceptions signify that any loss happening by means of any military power, *or*, which is the same thing, of any usurped power, shall be excepted. *Or* is often so used. Thus we say a thing is a square, *or* a figure under four equal sides and angles. And the policy says, loss *or* damage, goods *or* merchandise, happen *or* take place, military *or* usurped.

This construction is sustained by the implied antithesis.

Military has its antithesis in civil; military power, in civil power.

The words "military or usurped power" were first introduced into policies of insurance in Great Britain soon after the Rebellion of 1715. They referred to the power of the Pretender, and not to any lawful military authority or power of the realm. Ellis, Ins. 41; Park, Ins. 657; Marsh. Ins. 791. Prior to that time, the exceptions were "fire occasioned by invasion and foreign enemy." The framers of them seem to have considered either invasion or foreign enemy as a military power, and then, lest they might not be comprehensive enough to embrace domestic rebels, like the Pretenders and their followers, "*any* military or usurped power whatsoever" was added. Manifestly, "military" and "usurped" were synonymous. 1 Bell, Com. 672. The courts of Great Britain and of this country treat them as signifying rebellion conducted by authority. *Drinkwater* v. *The London Assurance Co.*, 2 Wilson, 363; *Langdale* v. *Mason*, 2 Marsh. Ins. 791; *City Fire Insurance Co.* v. *Corlies*, 21 Wend. (N. Y.) 367; *Sprull* v. *North Carolina Mut. Life Insurance Co.*, 1 Jones (N. C.), 126; *Harris* v. *York Insurance Co.*, 50 Penn. 341. And the parties to the contract are bound by the settled judicial construction of the words. *City Fire Insurance Co.* v. *Corlies*, *supra*.

The maxim *noscitur a sociis* furnishes, in this case, the true rule of interpretation. Every other cause of exception named in the proviso, "invasion, insurrection, riot, civil commotion," being unlawful, the words "military power," in the same category, signify an unlawful military power, not the lawful military authority of the country. This observation derives especial force from the fact that "military" stands here in such close fellowship with "usurped." Military *or* usurped is the expression. *Breasted* v. *The Farmers' Loan & Trust Co.*, 8 N. Y. 304; *Harper's Adm'rs* v. *Phœnix Insurance Co.*, 19 Mo. 506; *Cluff* v. *Mut. Benefit Life Insurance Co.*, 13 Allen (Mass.), 308.

The act of Colonel Harding, so far from being the act of a military or usurped power, was an act of civil jurisdiction, whereby he asserted, in behalf of the nation, their paramount title to the property, by virtue of the right of eminent domain. *Mitchell* v. *Harmony*, 13 How. 113; *Grant* v. *United*

States, 1 Ct. Cl. p. 41; *Wiggin's Case*, 3 id. p. 412; *Harris* v. *York Insurance Co.*, 50 Penn. 341.

This, however, does not exempt the insurers from liability. But, on paying the loss, they are substituted to the rights of the insured.

If the destruction of the goods was not the intended consequence of the act of Colonel Harding, and, therefore, not a taking of private property for public use, but was accidental, it was one of those accidents the peril of which the insurers assumed. It was not thereby converted into the act of rebels, nor did it, therefore, happen by means of invasion, insurrection, riot, civil commotion, or of any military or usurped power.

The underwriters made their own exceptions, and the *onus* of proving the loss to be within the exceptions is on them. If, therefore, there is any ambiguity in the words employed, or any doubt as to the loss being within the exceptions, the principle of *fortius contra proferentem* furnishes the rule.

The obvious natural import of the words employed designates plainly the unlawful character of the causes excepted; the history of their first introduction into policies of insurance shows the nature of the risks intended to be excluded; and the subsequent adjudications of the meaning of the words render it certain that the words "military or usurped power" have no reference to acts of constitutional sovereignty, but are limited to acts of rebellion. The act of Colonel Harding, which caused the loss, was not an act of rebellion. The loss was not, therefore, excepted by the proviso.

Mr. G. W. Parsons and *Mr. R. D. Hubbard*, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

Preliminary to any consideration of the assignments of error is the question whether the bill of exceptions and the special finding of facts can be considered as a part of the record. The issues formed by the pleadings were tried by the court, without the intervention of a jury, in September, 1873, and judgment for the plaintiffs was ordered at April Term, 1874. It does not appear that any exceptions were taken to the rulings of the court during the progress of the trial, and that which is now claimed to be a bill of exceptions has no reference to any such

rulings. It relates only to the judgment given on the findings of the issues of fact. The act of Congress which authorizes trials by the court, 13 Stat. 500, sects. 649, 700, Rev. Stats., has enacted that the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury; and that, when the finding is special, the review by the Supreme Court upon a writ of error may extend to the determination of the sufficiency of the facts found to support the judgment. No bill of exceptions is required, or is necessary, to bring upon the record the findings, whether general or special. They belong to the record as fully as do the verdicts of a jury. If the finding be special, it takes the place of a special verdict; and, when judgment is entered upon it, no bill of exceptions is needed to bring the sufficiency of the finding up for review. But there must be a finding of facts, either general or special, in order to authorize a judgment; and that finding must appear on the record. In this case, there was no formal finding of facts when the judgment was ordered. It is to be inferred, it is true, from the judgment and from the entry of the clerk, that the issue made by the pleadings was found for the plaintiffs, but how, whether generally or specially, does not appear. There was, therefore, a defect in the record, which it was quite competent for the court to supply by amendment; and such an amendment was made. After the close of the April Term, and in the vacation next following, the judge of the court, on application of the defendants, granted an order upon the plaintiffs to show cause why the defendants should not have leave *inter alia* to make and serve a case or bill of exceptions, containing the evidence given at the trial, special findings of fact and law, and such exceptions thereto as the defendants might desire to make, and why such case or bill of exceptions when made and settled should not be filed, *nunc pro tunc*, as of the term when the judgment was entered. Upon this rule both parties were heard; and the result was an order that "a finding of facts in the cause, with the conclusions of the court thereupon, conformably to the opinion of the court theretofore filed," be prepared, to be approved by the court at the next following term (September); that the defendants have leave to prepare a bill of exceptions to be allowed and signed

at said term, and that "said special finding of facts" and bill of exceptions should be made, allowed, and entered of record, *nunc pro tunc*, as of the April Term, 1874, of the court. Such a special finding was accordingly prepared, and at the September Term signed by both the judges of the Circuit Court, the order made in vacation was made the order of the court, and the separate findings of fact and conclusions of law, together with the bill of exceptions, also signed, were ordered to be filed, *nunc pro tunc*, as of April Term, 1874, and made part of the record of the cause. Had the court power to make such an order respecting a special finding, and, if it had, does the order have the effect of making the special finding a part of the record? It is not necessary to inquire whether the court, at a term subsequent to the judgment, could lawfully allow and sign a bill of exceptions not noted at the trial. It may be admitted that a court has no such power; but, as already remarked, no bill of exceptions was needed to bring any thing upon the record. If the special finding of facts was properly there, or was rightfully supplied, the judgment of the court is subject to review independently of any bill of exceptions, the only office of which is to bring upon the record rulings that without it would not appear. It remains, therefore, to consider whether the court could at the September Term, by an order, correct the record by incorporating into it, *nunc pro tunc*, a special finding of the facts upon which the judgment had been rendered. It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the time; and, whatever may have been the rule announced in some of the old cases, the modern doctrine is that some orders and amendments may be made at a subsequent term, and directed to be entered and become of record as of a former term. In *Rhoads* v. *The Commonwealth*, 35 Penn. St. 276, Gibson, C. J., said: "The old notion that the record remains in the breast of the court only till the end of the term has yielded to necessity, convenience, and common sense. Countless instances of amendment after the term, but ostensibly made during it, are to be found in our own books and those of our neighbors." Even judgments may be corrected in accordance with the truth. It has been held by this court that, at

a subsequent term, when a judgment had before been arrested, an amendment may be made to apply the verdict to a good count, if another be bad, and the minutes of the judge show that the evidence sustained the good one. *Matheson's Adm'r* v. *Grant's Adm'r*, 2 How. 282. And this has been repeatedly held elsewhere. Generally, it may be admitted that judgments cannot be amended after the term at which they were rendered, except as to defects or matters of form; but every court of record has power to amend its records, so as to make them conform to and exhibit the truth. Ordinarily, there must be something to amend by; but that may be the judge's minutes or notes, not themselves records, or any thing that satisfactorily shows what the truth was. Within these rules, we think, was the order made at September Term, that the special finding of facts and conclusions of law be signed by the judges and allowed, conformably to the opinion of the court theretofore filed, and that it, together with the order, should be filed *nunc pro tunc* as of April Term, and made part of the record. It was but an amendment or correction of form, the form of the finding, not of its substance, and there was enough to amend by. The opinion, which was filed concurrently with the entry of the judgment, contained substantially, almost literally, the same statement of facts, and relied upon it as the foundation of the judgment given. True, that opinion is no part of the record, any more than are a judge's minutes; but it was a guide to the amendment made, and it seems altogether probable it was intended to be itself a special finding of the facts. The order of September, 1874, recites that the court had at April Term filed, announced, and declared their findings of facts, with their conclusions of law thereupon, which findings and conclusions were embodied in the opinion of the court announced and filed in the cause. And all that was wanting to make it a sufficient special finding was that it was not entitled "finding of facts." The amendment or correction, therefore, contradicts nothing in the record as made at April Term, and it is in strict accordance with the truth. We conclude, then, that the order of September Term was within the discretion of the court, and that by it the special finding returned became a part of the record of the cause, and that the judgment founded upon

it is subject to review in this court without any bill of exceptions.

In so holding, we do not depart from any thing we have ever decided respecting the power of a court to make up a case, after the expiration of a term, for bills of exceptions not claimed at the trial. This is not a case of that kind. It is the case of a correction of the record, not merely an allowance of exceptions never taken, and necessary to have been taken, to bring an interlocutory ruling upon it. We hold now, as we have always holden, that when bills of exceptions are necessary to bring any matter upon record so that it can be reviewed in error, it must appear by the record that the exception was taken at the trial. A judge cannot afterwards allow one not taken in time. Could he allow it, the record would be made to speak falsely.

Coming, then, to the merits of the case, the main question is, whether the fire which destroyed the plaintiff's property "happened or took place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." If it did, the loss was excepted from the risk taken by the insurers.

The policy contains this express stipulation: "Provided always, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire." The general purpose of this proviso is clear enough, but there is controversy respecting the extent of the exemption made by it. It has been very strenuously argued that the words "military or usurped power" must be construed as meaning military *and* usurped power; that they do not refer to military power of the government, lawfully exercised, but to usurped military power, either that exerted by an invading foreign enemy, or by an internal armed force in rebellion, sufficient to supplant the laws of the land and displace the constituted authorities. There is, it must be admitted, considerable authority, and no less reason, in support of this interpretation. In our view of the present case, however, we are not called upon to affirm positively that such is the true meaning of the words in the connection in which they were used in the policy now under review; for, if it be con-

ceded that it is, we are still of opinion that the fire which destroyed the premises of the plaintiffs below "happened," "took place," or occurred by means of a risk excepted in the policy. In other words, it was caused by invasion, and the usurped military power of a rebellion against the government of the United States, as the contracting parties understood the terms "invasion" and "military or usurped power."

Policies of insurance, like other contracts, must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties. This is entirely consistent with the rule that ambiguities should be construed most strongly against the underwriters, and most favorably to the assured. *Manhattan Insurance Co.* v. *Stein*, 5 Bush (Ky.), 652. It was well said recently by the New York Court of Appeals, that, in construing contracts, words must have the sense in which the parties understood them. And, to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circumstances must be considered. *Cushman* v. *United States Life Insurance Co.*, 6 Law Jour., p. 601.

Apply, now, these principles to the present case. The policy was issued in 1864, while the country was convulsed by a civil war. The property insured was in a State bordering upon sections, the people of which were in insurrection against the general government, and confederated as a usurping power. The State had been the theatre of civil commotion and of armed invasion during the struggle between the confederated States and the Federal government, a struggle not then ended. It was quite possible that new invasions might be made and new destruction of property might be caused by the military or usurped power then in rebellion. It is evident that the insurers were willing to assume only ordinary risks, and that, to guard against more extended liability, the excepting clause was introduced into the policy. The provision must have been intended to be a protection to the company against extraordinary risks, attendant upon the condition of things then existing. Invasion involved, of necessity, resistance by the constituted authorities of the government, and the employment of its military force. Destruction of property by fire was quite as likely

to be caused by resistance to the usurping military power as by the direct action of that power itself. This must have been foreseen and considered when the insurance was effected. It is difficult, therefore, to believe that the parties intended to confine the stipulated exemption within the limits to which the assured would now confine it. That the destruction of the plaintiff's property by fire was a consequence of the attack of the organized rebel military forces upon the forces of the United States holding possession of Glasgow, the special finding of facts clearly shows. Glasgow was a military post, and a place of deposit for the military stores of the United States, which were in the city hall. The city was guarded and defended by a military force under the command of Colonel Harding.

At an early hour of the morning of the fifteenth day of October, 1864, an armed force of the rebels, under military organization, surrounded and attacked the city and threw shot and shell into it, penetrating some buildings, and one thereof penetrating the store of the plaintiffs, but without setting fire thereto or causing any fire therein, and some of the shell killing soldiers and citizens. The city was defended by Colonel Harding and the military forces under his command, and a battle between the loyal troops and the rebel forces continued for many hours. The citizens fled to places of security, and no civil government prevailed in the city. The rebel forces were superior in number, and drove the forces of the government from their position, compelled their surrender, and entered and occupied the city.

During the battle, and when the government troops had been driven from their exterior lines of defence, it became apparent to Colonel Harding that the city could not be successfully defended, and he thereupon, in order to prevent the said military stores from falling into the possession of the rebel forces, ordered Major Moore, one of the officers under his command, to destroy them.

In obedience to this order to destroy the said stores, and having no other means of doing so, Major Moore set fire to the city hall, and thereby the said building, with its contents, was consumed. Without other interference, agency, or instrumen-

tality, the fire spread along the line of the street aforesaid to the building next adjacent to the city hall, and from building to building through two other intermediate buildings to the store of the plaintiffs, and destroyed the same, together with its contents, including the goods insured by the defendant's policy aforesaid. During this time, and until after the fire had consumed such goods, the battle continued; and no surrender had taken place, nor had the forces of the rebels, nor any part thereof, obtained the possession of or entered the city.

In view of this state of facts found by the court, the inquiry is, whether the rebel invasion or the usurping military force or power was the predominating and operative cause of the fire. The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim *causa proxima, non remota spectatur.*

The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. A careful consideration of the authorities will vindicate this rule. Mr. Phillips, in his work on Insurance, sect. 1097, in speaking of a *nisi prius* case of a vessel burnt by the master and crew to prevent its falling into the hands of the enemy, *Gordon* v. *Rimmington*, 1 Camp. 123, says, the "maxim *causa proxima spectatur* affords no help in these cases, but is, in fact, fallacious; for if two causes conspire, and one must be chosen, the more scientific inquiry seems to be, whether one is not the efficient cause, and the other merely instrumental or merely incidental, and not which is nearer in place or time to the consummation of the catastrophe." And again, in sect. 1132: "In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster." In *Brady* v. *North-western Insurance Co.*, 11 Mich. 425, Martin, C. J., in delivering the opinion of the court, said: "That which is the

actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed." In *St. John* v. *American Mutual Insurance Co.*, 11 N. Y. 519, the insurance was against fire, but the policy exempted the insurers from any loss occasioned by the explosion of a steam-boiler. A fire occurred, caused by an explosion, which destroyed the insured property. The court, regarding the explosion, and not the fire, as the predominating cause of the loss, held the insurers not liable. Decisions are numerous to the same effect. Policies of insurance do not protect an assured against his voluntary destruction of the thing insured. Yet in *Gordon* v. *Rimmington*, *supra*, it was held that, when the captain of a ship insured against fire burned her to prevent her falling into the hands of the enemy, it was a loss by fire within the meaning of the policy. It was because the fire was caused by the public enemy. The act of the captain was the nearest cause in time, but the danger of capture by the public enemy was regarded as the dominating cause. *Vide* also Emerigon, tom. i. p. 434. And we find the same principle followed in common practice. Often, in case of a fire, much of the destruction is caused by water applied in efforts to extinguish the flames. Yet it is not doubted all that destruction is caused by the fire, and insurers against fire are held liable for it. In *Lynd* v. *Tynsboro'*, 11 Cush. (Mass.) 563, where it appeared that a traveller had been injured by leaping from his carriage, exercising ordinary care and prudence, in consequence of a near approach to a defect in a highway, the town was held liable, though the carriage did not come to the defect. The defect was regarded as the actual, the dominating, cause. And in this court similar doctrine has been asserted. *Insurance Company* v. *Tweed*, 7 Wall. 44, the principle of which case, we think, should rule the present. There it was, in effect, ruled that the efficient cause, the one that set others in motion, is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster.

In *Butler* v. *Wildman*, 3 B. & A. 398, may be found a case where the captain of a Spanish ship, in order to prevent a

quantity of Spanish dollars from falling into the hands of an enemy by whom he was about to be attacked, threw them into the sea. The suit was upon a policy insuring the dollars, and judgment was given for the plaintiff. Bayley, J., said, "It was the duty of the master to prevent any thing which could strengthen the hands of the enemy from falling into their possession. Now, as money would strengthen the enemy, it was the duty of the master to throw it overboard; and the sacrifice of the money was, therefore, *ex justa causa*. It seems to me, therefore, this is a loss by jettison. But it is not a loss by jettison: it is a loss by enemies. It clearly falls within the principle stated by Emerigon, in the case of the destruction of a ship by fire; and I think the enemy was the proximate cause of the loss." Holroyd, J., said, "It seemed to him it was a loss by enemies, for the meditated attack was the direct cause of the loss." A similar doctrine was asserted in *Barton* v. *The Home Insurance Co.*, 42 Mo. 156; and in *Marcy* v. *Merchants' Mutual Insurance Co.*, 19 La. Ann. 388. It is a doctrine resting upon reason, and in accord with the common understanding of men. Applying it to the facts found in the present case, the conclusion is inevitable, that the fire which caused the destruction of the plaintiffs' property happened or took place, not merely in consequence of, but by means of, the rebel invasion and military or usurped power. The fire occurred while the attack was in progress, and when it was about being successful. The attack, as a cause, never ceased to operate until the loss was complete. It was the *causa causans* which set in operation every agency that contributed to the destruction. It created the military necessity for the destruction of the military stores in the city hall, and made it the duty of the commanding officer of the Federal forces to destroy them. His act, therefore, in setting fire to the city hall, was directly in the line of the force set in motion by the usurping power, and what that power must have anticipated as a consequence of its action. It cannot be said that was not anticipated which military necessity recognized. And the insurers and the assured must have looked for such action by the Federal forces as a probable and reasonable consequence of an overpowering attack upon the city by an invading rebellious force. Having excepted

from the risk undertaken responsibility for such an attack, they excepted with it responsibility for the consequences reasonably to be anticipated from it.

The court below regarded the action of the United States military authorities as a sufficient cause intervening between the rebel attack and the destruction of the plaintiffs' property, and therefore held it to be the responsible proximate cause. With this we cannot concur.

The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. In *Milwaukee & Saint Paul Railway Co.* v. *Kellogg*, 94 U. S. 469, we said, in considering what is the proximate and what the remote cause of an injury, "The inquiry must always be whether there was any intermediate cause *disconnected from the primary fault*, and self-operating, which produced the injury." In the present case, the burning of the city hall and the spread of the fire afterwards was not a new and *independent* cause of loss. On the contrary, it was an incident, a necessary incident and consequence, of the hostile rebel attack on the town, — a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power, — events so linked together as to form one continuous whole. The case is, therefore, clearly within the doctrine asserted by Emerigon, and held in *Butler* v. *Wildman*, and in the other cases we have cited. Hence it must be concluded that the fire which destroyed the plaintiffs' property took place by means of an invasion or military or usurped power, and that it was excepted from the risk undertaken by the insurers.

Judgment reversed and record remitted, with instructions to enter judgment for the defendant below.

MR. JUSTICE CLIFFORD, MR. JUSTICE MILLER, and MR. JUSTICE FIELD dissented.

MR. JUSTICE CLIFFORD. Parties in civil cases pending in the Circuit Court, or their attorneys of record, may file a stipulation in writing with the clerk of the court, waiving a jury; and,

whenever they do so, the issues of fact in the case may be tried and determined by the court without the intervention of a jury.

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 an issue of fact is found by a jury; but where the finding is general, the parties are concluded by the determination of the court, except in cases where exceptions are taken to the rulings of the court in the progress of the trial.

Such rulings, if duly presented by a bill of exceptions, may be reviewed here, even though the finding is general; but the finding of the court, if general, cannot be reviewed in this court by bill of exceptions, or in any other manner, as the act of Congress provides that the finding "shall have the same effect as the verdict of a jury" in a case where no such waiver is made. 13 Stat. 501; *Insurance Company* v. *Folsom*, 18 Wall. 237; *Norris* v. *Jackson*, 9 id. 125; *Insurance Company* v. *Sea*, 21 id. 138; *Copelin* v. *Insurance Company*, 9 id. 461.

Facts found by a jury could only be re-examined under the rules of the common law, either by the granting of a new trial by the court where the case was tried or to which the record was returnable, or by the award of a *venire facias de novo* by the appellate court for some error of law which intervened in the proceedings. *Parsons* v. *Bedford*, 2 Pet. 448; 2 Story, Const., sect. 1770.

Nothing, therefore, is open to re-examintion in such a case, except such of the rulings of the court made in the progress of the trial as are duly presented by a bill of exceptions.

When a court sits in the place of a jury, and finds the facts, this court cannot review that finding. If there is any error in such a case, shown by the record, in admitting or rejecting testimony, it can be reviewed here; but when the court, by permission of the parties, takes the place of the jury, its finding of facts is conclusive, precisely as if a jury had found them by verdict. *Basset* v. *United States*, 9 Wall. 38.

Matters of fact under such a submission must be found by the Circuit Court and not by the Supreme Court, as the act of Congress provides that the issues of fact may be tried and determined by the Circuit Court where the suit is brought.

Goods and merchandise deposited in a two-story brick store-

house, to a large amount, were owned by the plaintiffs; and they procured the storehouse and the goods to be insured by the defendants against loss or damage by fire, in the company of the defendants, to the amount of $6,000, to be paid within sixty days after notice and proof of loss made by the assured, in conformity with the conditions of the policy, subject to the proviso that the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire.

On the 15th of October, 1864, the storehouse, with the goods insured, was consumed by fire, as is more fully explained in the transcript. Payment of the loss being refused, the plaintiffs instituted the present suit. Service was made; and the defendants appeared and pleaded the general issue, with notice of special matter to be offered under that plea. Pursuant to the act of Congress, the parties filed a stipulation in writing with the clerk of the court, waiving a trial by jury; and the court proceeded to try and determine the issues of fact in the case, and the statement is, that the parties and their counsel were fully heard.

By the record, it also appears that the court, upon due consideration, "found the issues for the plaintiffs, and rendered judgment in their favor" for the sum of $9,177.50 damages and costs of suit; and that execution issued therefor. Superadded to that is the statement of the clerk, that, upon the rendering of said judgment, the opinion of the court was filed in said matter in the words and figures set forth in the printed transcript. Judgment was rendered on the 28th of April, 1874, and on the first day of June in the same year execution against the defendants was issued to the plaintiffs, which, on the 17th of August thereafter, was returned unsatisfied; and on the same day an *alias* execution was issued in their favor, which has not yet been returned.

Application was made to the circuit judge by the defendants, July 13, 1874, for leave to make a case, or bill of exceptions in the case, to contain the evidence given at the trial, special findings of fact and law to be signed by the court or one of the

justices who presided in the trial, and to contain such exceptions thereto as the defendants may desire to make; and that the same, when made and settled, may be filed *nunc pro tunc* as of the term when the judgment was rendered, and for a stay of execution. Instead of granting the application, the circuit judge laid a rule on the plaintiffs or their counsel to show cause, on a day and at a place named, why the defendants should not have the leave requested in the application.

Subsequently the parties, by stipulation, changed the time and place for hearing the rule to show cause, and agreed that it might be heard by Judge Shipman, subject to the right of the plaintiffs to object to the jurisdiction of the court or any judge thereof to entertain such an application after the expiration of the term when the judgment was rendered. Due hearing was had before the district judge, and he passed an order to the effect following: that a finding of facts in the cause, with the conclusions of the court thereon, conformably to the opinion of the court heretofore filed, be prepared by the defendants and be submitted to the plaintiffs, to be approved and signed by the court at the September Term of the Circuit Court, to be holden at Hartford on the third Tuesday of September, 1874, and that the defendants have leave to prepare a bill of exceptions which shall be allowed and signed by the judge of said court at said term, which said special finding of facts and a bill of exceptions shall be made and allowed and entered of record *nunc pro tunc* as of the April Term, 1874, of said court, and that execution be stayed as therein provided.

In conformity with that order, the special finding of facts and the bill of exceptions exhibited in the transcript were, on the third Tuesday of September, signed, filed, and entered of record *nunc pro tunc* as of the previous April Term of the said court, in the words and figures specially set forth in the transcript. Just preceding the entry of the judgment, the record states that the court found the issues for the plaintiffs, and rendered judgment in their favor. Five months after that, the court allowed the defendants to prepare a special finding, and made an order that it be entered of record as of the day of the judgment rendered at the preceding term, in direct contradiction of the entry made at the judgment term.

Beyond all doubt, the finding which preceded the judgment, as set forth in the transcript, is *general*, and it is equally clear that the judgment was rendered on the 28th of April, in pursuance of that finding. What is now called the "finding of facts" and the bill of exceptions were filed at the next term of the court, which was held at Hartford the following September, nearly five months after the judgment was rendered. Both of those papers were filed and entered of record subject to the objections of the plaintiffs; and the defendants sued out the present writ of error, and removed the cause into this court.

Two errors are assigned by the defendants, as follows: 1. That the court, instead of adjudging that the defendants were liable, should have decided that they were exempt from liability, by virtue of the proviso in the policy. 2. That the judgment, instead of being for the plaintiffs, should have been for the defendants.

Any discussion of the question touching the regularity of the bill of exceptions, or of any question therein raised, is wholly unnecessary, as the errors assigned do not present any question of the kind; and, if they did, it is clear that no such question could be of any benefit to the defendants, for two reasons, either of which is conclusive against the defendants: 1. Because the record does not show that the defendants objected to any ruling of the court during the progress of the trial.

Repeated decisions of this court have settled the rule that the exception must show that it was taken and reserved by the party at the trial, but that it may be drawn out and signed or sealed by the judge afterwards. *United States* v. *Breitling*, 20 How. 252; *Dredge* v. *Forsyth*, 2 Black, 563; *Kellogg* v. *Forsyth*, 2 id. 571.

2. Because the bill of exceptions was neither made, signed, nor entered of record until the next term, nearly five months after the judgment was rendered. *Flanders* v. *Tweed*, 9 Wall. 425.

Unless it appears that the objection to the ruling of the court was taken at the trial, the bill of exceptions drawn up and signed subsequently to the judgment, if it has no other foundation than a ruling of the court not objected to at the time, cannot properly be regarded as a part of the record.

Tested by these considerations, it is clear that the questions presented in the paper called the bill of exceptions must be overruled, for the reason that the paper in question was never signed, filed, or entered of record in season to constitute a part of the record.

Suppose that is so, then it is clear that there is no proper bill of exceptions in this case. Concede that, and it follows that the paper called "finding of facts" is the only matter that remains for re-examination.

Even the defendants do not contend that the opinion of the court filed in the case, at the date of the judgment, is the special finding contemplated by the act of Congress empowering parties to waive a jury, nor do they deny that the general finding therein specified concludes the parties where there are no proper exceptions to the rulings of the court during the progress of the trial. Such a denial, if made, would be of no avail, as the act of Congress provides that the finding, whether general or special, shall have the same effect as the verdict of a jury; and every one knows that the seventh amendment provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

Confirmation of those views, if any be needed, is found in numerous decisions of this court, in which the very point as to the legal effect of a general finding of the Circuit Court is expressly adjudged and determined. *Cooper* v. *Omohundro*, 19 Wall. 65; *Crews* v. *Brewer*, id. 70; *Insurance Company* v. *Sea*, 21 id. 158.

Issues of fact in such a case may be tried and determined by the Circuit Court; and, if it be true that the general finding of the court shall have the same effect as the verdict of a jury, then it follows that the finding can only be re-examined either by a motion for a new trial in the court where the finding was made, or by the award of a *venire facias de novo* in the appellate court. When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment; but "if the jury is waived, and the court chooses to find generally for one side or the other, the losing party," says Mr. Justice Bradley, "has no redress, on

error, except for the wrongful admission or rejection of evidence." *Dirst* v. *Morris*, 14 id. 484.

Viewed in the light of these suggestions, it is clear that the general finding in such a case concludes the right of the parties, unless there is some proper exception to the ruling of the court in the progress of the trial.

Where the finding is general, nothing is open to review here except such rulings of the court in the progress of the trial as are duly presented in a bill of exceptions, and, even when the finding is special, the re-examination can only extend to the question whether the facts found are sufficient to support the judgment. Propositions of fact found by the Circuit Court in such a case are equivalent to a special verdict, and, consequently, are irreviewable here except for the purpose of determining the single question whether they are sufficient to warrant the judgment; nor is the Circuit Court required to make a special finding, as the act of Congress provides that the finding of the Circuit Court may be either general or special, giving the Circuit Court the same power in that regard as has always been possessed by a jury. *Insurance Company* v. *Folsom*, 18 Wall. 237; 1 Archb. Pr. (2d Am. ed.) 213; Co. Litt. 228 *b;* Litt., sect. 386; 3 Bl. Com. 378.

Exceptions are allowed to the rulings of the court in the progress of the trial, and the provision is, that the review, if the finding is special, may also extend to the determination of the sufficiency of the facts found to support the judgment; but if there be no exceptions to the rulings of the court in the progress of the trial, and no special finding of the facts, the judgment must be affirmed, as this court has no power to re-examine any question decided by the Circuit Court.

Sufficient has already been remarked to show that there is no valid bill of exceptions in the case, and that the paper in the record called "finding of facts" was not signed or filed until the next term after the general finding was made, and nearly five months after the judgment was rendered.

Redress here by writ of error can only be had when a party is aggrieved by some error in the foundation, proceedings, judgment, or execution of a suit in a court of record; and it is for that reason that the bill of exceptions is allowed, in order that

certain matters resting in parol may be incorporated into the record for the inspection of the proper appellate tribunal. *Suydam* v. *Williamson*, 20 How. 427.

Matters resting in parol, like the opinion of the court, are not a part of the record, and nothing therein contained can be assigned for error. *Williams* v. *Norris*, 12 Wheat. 118; *Davis* v. *Packard*, 6 Pet. 41; *Medbury* v. *State*, 24 How. 414.

Findings of fact in the form called special findings, like a special verdict, furnish the means of reviewing such questions of law arising in the case as respect the sufficiency of the facts found to support the judgment; but, where the finding is general, the losing party cannot claim the right to review any question of law arising in the case, except such as grow out of the rulings of the Circuit Court in the progress of the trial, which do not in any sense whatever include the general finding, nor the conclusions of the Circuit Court embodied in the general finding, as the general finding is in the nature of a general verdict, and constitutes the foundation of the judgment.

No review of a judgment in such a case can be made here under the writ of error, unless it is accompanied by a special finding or an authorized statement of facts, without imposing upon this court the duty of hearing the whole case, law and fact, as on appeal in equity or admiralty, which would operate as a repeal of the act of Congress authorizing parties to waive a trial by jury, and also would violate the provision of the Judiciary Act, which prohibits the Supreme Court from reversing any case "for any error in fact." 1 Stat. 85.

Three propositions are admitted by the plaintiffs, which it is important to bear in mind, as follows: 1. That no formal special finding was made, signed, or filed until the commencement of the Circuit Court at the next term after the judgment was rendered, when the paper called in the transcript "finding of facts" was signed, filed, and entered of record. 2. That it has been repeatedly decided by this court that the opinion of the court below does not constitute such a formal finding as that required in such a case. *Insurance Company* v. *Tweed*, 7 Wall. 44; *Dickinson* v. *The Planters' Bank*, 16 id. 250. 3. That the record shows that the opinion of the court was the only finding filed at the time the judgment was rendered, from which it is

suggested rather than argued that the judgment was unauthorized or irregular.

But the suggestion is entirely without merit, as neither the law nor justice requires that the general finding of the court shall be in writing. On the contrary, the conclusion may be orally announced, and the direction to the clerk to enter the judgment may also be oral. Nor is it correct to suppose that the statement in the transcript, that the court, upon due consideration, found the issues for the plaintiffs, is either unauthorized or without legal effect. What is stated in the conclusion of the opinion, to wit, that the plaintiffs are entitled to judgment for the amount of the insurance, would have been sufficient to authorize the clerk to enter judgment if the announcement had been oral instead of in writing, as it was, and it is abundantly sufficient, when taken in connection with the judgment and the statement immediately preceding it, to warrant the conclusion that the issues were duly found for the plaintiffs, and that the judgment in their favor is regular, and that it was duly recorded.

Power is vested in this court, where the finding is special, to inquire and determine, on writ of error, whether the facts found are sufficient to support the judgment; but a report of the evidence, without such special finding, will not give this court jurisdiction to re-examine that question; nor will the fact that the court below stated some of the facts in an opinion accompanying the judgment alter things in the least, it appearing that the facts exhibited in the opinion were stated, not as a special finding, but rather as a ground to show why the judge came to the conclusion set forth in the record. *Dickinson* v. *The Planters' Bank*, *supra*.

Argument to show that the facts exhibited in the opinion filed in the case, which are not stated as a special finding, are insufficient to give jurisdiction in such a case, is unnecessary, as that proposition is admitted by the defendants. Certain facts are stated in the opinion of the court which was filed in the case, but they are not stated as a special finding. Instead of that, they are merely facts advanced, as Mr. Justice Strong said in the case last cited, as reasons why the Circuit Court came to the conclusion that the plaintiffs were entitled to judgment for the amount of the insurance.

Grant all that, and still it is insisted by the defendants that it was entirely within the power and discretion of the Circuit Court to make the order in question at the time it was made, and to put the findings of the court into more formal shape; but it is unfortunate for the defendants that the law is well settled the other way, nor do the authorities which the defendants cite, when properly applied, warrant any other conclusion.

Exceptions are prepared by the complaining party. Special findings are prepared by the court. Where the exception is duly taken and reserved at the trial, it may, in the discretion of the judge, be drawn out, and be signed or sealed by the judge afterwards. *United States* v. *Breitling*, 20 How. 252. Decided cases to the same effect are numerous.

It is a settled principle, say the court, in *Walton* v. *United States*, 9 Wheat. 651, cited by defendants, that no bill of exceptions is valid which is not for matter excepted to at the trial. We do not mean to say, remarked the court in that case, that the bill of exceptions should be formally drawn and signed before the trial is at an end. It will be sufficient if the exception be taken at the trial and noted by the court with the requisite certainty; and, where that is done, it may be reduced to form, and be signed by the judge during the term. *Stanton* v. *Embry*, 93 U. S. 548.

Authorities of the kind give no support whatever to the proposition of the defendants, in view of the facts of the case as they appear in the transcript. Judgment was rendered for the plaintiffs in the usual course, without any intimation from the court that any special finding would be filed in the case, or any request being made by the defendants for such a finding; and the record shows that the plaintiffs in the mean time had taken out execution for the amount of the judgment. *Muller* v. *Ehlers*, 91 U. S. 249. Valid exceptions can never be allowed, unless taken at the trial; and they will never be sustained, unless completed within the term.

Prompt action in respect to a statement of facts is also required; and, where it appeared that nearly three months had elapsed from the rendition of the judgment before it was filed, this court held that it was an irregularity, for which the court

was bound to disregard it, and to treat it as no part of the record. *Flanders* v. *Tweed*, 9 Wall. 425.

Execution had issued in this case before the court granted the order that a special finding should be made, signed, and entered of record; and, inasmuch as the term in which the judgment was rendered had then expired, it is clear that the court below had not at that time any power to supply a special finding of facts. *Noonan* v. *Bradley*, 12 Wall. 121; *Washington Bridge Co.* v. *Stewart*, 3 How. 413; *Skillin's Ex'rs* v. *May's Ex'rs*, 6 Cranch, 267; *Ex parte Sibbald*, 12 Pet. 488; *Peck* v. *Sanderson*, 18 How. 42; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Roemer* v. *Simon*, 91 U. S. 149.

Support to the theory that the special finding, if any, in such a case should be prepared and filed before or at the time the judgment is rendered, is derived from the present rule of the Court of Claims. Prior to its adoption, the finding of facts in that court was sometimes prepared and filed subsequent to the rendition of judgment, which was not satisfactory. Dissatisfaction arising, this court adopted the rule that, in all cases in which either party is entitled to appeal to the Supreme Court, "the Court of Claims shall make and file their finding of facts and their conclusions of law thereon in open court before or at the time they enter their judgment in the case," which provision, it is believed, is universally approved by the legal profession; but the requirement is much greater where the special finding is made by the Circuit Court, for the reason that the act of Congress provides that the findings, whether general or special, shall have the same effect as the verdict of a jury, and no one ever supposed that the judgment might precede the return of the verdict on which it is required to be founded.

MR. JUSTICE MILLER concurred with MR. JUSTICE CLIFFORD.

MR. JUSTICE FIELD agreed with MR. JUSTICE CLIFFORD and MR. JUSTICE MILLER that there were no special findings in the record which the court could consider; but as the majority of the court reached a different conclusion, and held that the case was properly here on its merits, he was of opinion that the law was with the defendant below, — that the loss incurred was within the exception of the policy.

MOVIUS *v.* ARTHUR.

1. The act of Congress, approved June 6, 1872 (17 Stat. 230), does not repeal the provisions in the acts of March 2, 1861 (12 id. 189), Aug. 5, 1861 (id. 293), and July 14, 1862 (id. 555), imposing duties on japanned, patent, or enamelled leather or skins.
2. It is a general rule in the construction of revenue statutes, that specific provisions for duties on a particular article are not repealed or affected by the general words of a subsequent statute, although the language is sufficiently broad to cover that article.
3. The expression "not herein otherwise provided for," in the act of June 6, 1872, *supra*, has reference to the provisions of that act, and not to those of some previous act.

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

This is an action by Joseph Movius, surviving partner of the firm of F. Wigand & Co., to recover $172.39 being the amount of certain import duties alleged to have been unlawfully demanded and collected from them by the defendant in error, as the collector of the port of New York.

Between Aug. 1 and Dec. 31, 1872, Wigand & Co. imported from foreign countries into the port of New York, and duly entered at that custom-house, several invoices of "varnished calf-skins," and a further invoice of goods, designated therein as "varnished cow-skins."

The collector of customs, under the classification of "patent, japanned, or enamelled leather or skins of all kinds," in the acts of March 2, 1861, sect. 22, and July 14, 1862, sect. 13, imposed and collected on all the said goods a duty at thirty-five per cent, granting thereon the reduction of ten per cent, provided by sect. 2 of the act of June 6, 1872, for "leather not otherwise herein provided for." Wigand & Co., claiming that the goods were dutiable at twenty per cent only under the provisions of sect. 1 of the act of June 6, 1872, for "upper leather of all other kinds, and dressed and furnished skins of all kinds not herein otherwise provided for," duly protested, and appealed to the Secretary of the Treasury, who sustained the decision of the collector. This action was then brought.

The court below found for the collector, whereupon the case was removed here.

Mr. Edward Hartley for the plaintiff in error.
The Solicitor-General, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

The question in this case arises upon the construction of the revenue acts of the United States, there being no disputed questions of fact.

By the twentieth section of the act of March 2, 1861, 12 Stat. 189, it is enacted as follows: —

"From and after the day and year aforesaid there shall be levied, collected, and paid a duty of twenty per cent on the importation of the articles hereinafter mentioned and embraced in this section; that is to say, . . . leather tanned, bend or sole, leather upper, of all kinds except tanned calf-skins, which shall pay twenty-five per cent *ad valorem*, . . . skins tanned and dressed of all kinds."

"SECT. 22. From and after the day and year aforesaid there shall be levied, collected, and paid a duty of thirty per cent on the importation of the articles hereinafter mentioned and embraced in this section; that is to say, japanned, patent, or enamelled leather or skins of all kinds, . . . manufactures and articles of leather, or of which leather shall be a component part, not otherwise provided for."

By the act of Aug. 5, 1861, sect. 2, id. 293, it is enacted: —

"From and after the day and year aforesaid there shall be levied, collected, and paid on the importation of the articles hereinafter mentioned the following duties; that is to say, . . . on sole and bend leather, thirty per cent *ad valorem*."

By the thirteenth section of the act of July 14, 1862, id. 555–557, it is enacted: —

"From and after the day and year aforesaid, in addition to the duties heretofore imposed by law on the articles hereinafter mentioned, there shall be levied, collected, and paid on the goods, wares, and merchandise enumerated and provided for in this section, imported from foreign countries, a duty of five per cent *ad valorem*.

"Japanned, patent, or enamelled leather or skins of all kinds.

"Leather tanned of all descriptions.

"Manufactures and articles of leather, or of which leather shall be a component part, not otherwise provided for.

"Morocco skins."

By the act of June 6, 1872, 17 id. 230, it is provided as follows: —

"SECT. 1. On and after the first day of August, 1872, in lieu of the duties heretofore imposed by law on the articles hereinafter enumerated or provided for, imported from foreign countries, there shall be levied, collected, and paid the following duties and rates of duties; that is to say, —

"On bend or belting leather, and on Spanish or other sole leather, fifteen per cent *ad valorem*. On calf-skins, tanned or tanned and dressed, twenty-five per cent *ad valorem*. On upper leather of all other kinds, and on skins dressed and finished, of all kinds not herein otherwise provided for, twenty per cent *ad valorem*. On all skins for morocco, tanned but unfinished, ten per cent *ad valorem*.

"SECT. 2. On and after the first day of August, 1872, in lieu of the duties imposed by law on the articles in this section enumerated, there shall be levied, collected, and paid on the goods, wares, and merchandise in this section enumerated and provided for, imported from foreign countries, ninety per cent of the several duties and rates of duty now imposed by law upon said articles severally, it being the intent of this section to reduce existing duties on said articles ten per cent of such duties; that is to say, . . . on all leather not herein otherwise provided for, and on all manufactures of skin, bone, ivory, horn, and leather, except gloves and mittens, and of which either of said articles is the component part of chief value."

The plaintiff in error contends that the words "skins dressed and finished, of all kinds not herein otherwise provided for," in the act of 1872, repeals the provision imposing duties on "japanned, patent, or enamelled leather or skins," in the acts of 1861 and 1862. The collector of the port of New York held otherwise, and compelled him to pay duties according to the provisions of the latter acts. He made such payment under protest, and in this action seeks to recover from the collector the sums thus required to be paid.

It is a general rule, in the construction of revenue statutes, that specific provisions for duties on a particular article are not repealed or affected by the general words of a subsequent statute, although the language is sufficiently broad to cover the article first mentioned.

Thus, an act of 1861, which exempted from duty singing-

birds, land and water fowls, was held not to be repealed by an act imposing a duty of twenty per cent "on all horses, sheep, and other live animals." *Reiche* v. *Smythe*, 13 Wall. 162.

So, in *Homer* v. *The Collector*, 1 id. 486, where a specific duty was imposed upon almonds, *eo nomine*, it was held that almonds were not included within the general terms of a subsequent statute providing a duty on dried fruit, although, in popular language, almonds came within the description.

Patent leather, no doubt, is finished skin; but every finished skin is not patent leather. When a calf-skin is tanned and dressed, that is, softened by the application of some lubricating substance, shaven or cleaned, and then blacked, it is said to be finished. To make it patent leather, it requires another process; to wit, that of varnishing. While all patent leathers are finished skins, it is quite clear that all finished skins are not patent leather. This was no doubt well known to the Congress passing the laws we have quoted, and we can hardly suppose that they meant to include the particular subjects under the general designation.

The expression "not herein otherwise provided for," in the act of 1872, means provided for by the act in which the words occur, and not by some previous act. *Smythe* v. *Fiske*, 23 id. 374.

We find, in examining the statutes imposing duties on foreign importations, that, generally, the highest duty is imposed on the most expensive articles of the same class, and that articles of luxury are taxed higher than those of necessity. In regard to the particular article of japanned leather, strictly an article of luxury, used by the rich only, we find that Congress has usually imposed upon it a higher duty than it has imposed on ordinary leather, an article of strict necessity for the purpose of clothing, and of almost equal necessity in the mechanic arts. It was only during the years of the war, 1861 and 1862, that, for some temporary purpose, this rule was suspended. The following is an illustration: —

Act of 1857, 11 Stat. 192.

Sole leather	15 per cent,	p. 192.
Upper leather	15 „ „	„
Patent leather (japanned)	19 „ „	pp. 192, 193.

Calf-skins still included in upper leather.

Act of 1861, 12 id. 179.

Sole leather	30 per cent,	p. 189.
Upper leather	20 „ „	„
Calf-skin	25 „ „	„
Patent leather	30 „ „	p. 192.

Act of 1861, id. 292.

Sole leather	30 per cent,	p. 293.
Upper leather	20 „ „	p. 189.
Calf-skins	25 „ „	„
Patent leather	30 „ „	p. 192.

Act of 1862, id. 543.

Sole leather	35 per cent,	p. 556.
Upper leather	25 „ „	„
Calf-skins	30 „ „	„
Patent leather	35 „ „	„

The act of 1872 under consideration. As construed by the collector and by the court below.

Sole leather	15 per cent.
Upper leather	20 „ „
Calf-skins	25 „ „
Patent leather	31½ „ „

Revised Statutes, p. 481.

Sole leather	15 per cent.
Upper leather	20 „ „
Calf-skins	25 „ „
Patent leather	35 „ „

The course of legislation is in harmony with the construction of the collector, while it is quite at variance with that of the plaintiff. The plaintiff's construction imposes a duty of twenty-five per cent on calf-skins simply, and only twenty per cent on the more elaborate and expensive article of patent leather, while that of the collector taxes calf-skins twenty-five per cent, and patent leather thirty-one and a half per cent.

The plaintiff insists further, that all finished skins are dutiable under the act of 1872, and that, as patent leathers are not there named specifically, they are dutiable as "finished skins." This is the question already examined, and we are of the opinion that, as patent leather had been previously specifically

provided for, such duty was not intended to be altered by the general words of the act of 1872. The ruling of the circuit judge upon this principle was sound, and the judgment rendered in conformity therewith must be affirmed; and it is

So ordered.

KNOTE *v.* UNITED STATES.

1. The general pardon and amnesty granted by President Johnson, by proclamation, on the 25th of December, 1868, do not entitle one receiving their benefits to the proceeds of his property, previously condemned and sold under the confiscation act of July 17, 1862 (12 Stat. 589), after such proceeds have been paid into the treasury of the United States.
2. Whilst a full pardon releases the offender from all disabilities imposed by the offence pardoned, and restores to him all his civil rights, it does not affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force. And if the proceeds of the property of the offender sold under the judgment have been paid into the treasury, the right to them has so far become vested in the United States that they can only be recovered by him through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law.
3. To constitute an implied contract with the United States for the payment of money upon which an action will lie in the Court of Claims, there must have been some consideration moving to the United States, or they must have received the money charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake. No such implied contract with the United States arises with respect to moneys received into the treasury as the proceeds of property forfeited and sold under that act.

APPEAL from the Court of Claims.

The petition of the claimant alleged that he was the owner of certain described personal property in West Virginia, which was seized and libelled by the authorities of the United States on the alleged ground of his treason and rebellion; that, by a decree of the District Court for that district, the property was condemned and forfeited to the United States, and sold; and the net proceeds of the sale, amounting to the sum of $11,000, were paid into the treasury of the United States, the proceedings for its condemnation and sale having been taken under the confiscation act of July 17, 1862; that subsequently, by

virtue of the amnesty proclamation of the President, of Dec. 25, 1868, the claimant was pardoned and relieved of all disabilities and penalties attaching to the offence of treason and rebellion, for which his property was confiscated, and was restored to all his rights, privileges, and immunities under the Constitution and the laws made in pursuance thereof, and thus became entitled to receive the said proceeds of sale; but that the United States, disregarding his rights in the premises, had refused to pay them over to him, and therefore he prayed judgment against them. Upon demurrer for insufficiency of the facts thus alleged to constitute a cause of action the petition was dismissed, and hence the present appeal.

The proclamation of President Johnson relied upon is in the following words: —

"Whereas the President of the United States has heretofore set forth several proclamations offering amnesty and pardon to persons who had been or were concerned in the late rebellion against the lawful authority of the government, which proclamations were severally issued on the eighth day of December, 1863, on the twenty-sixth day of March, 1864, on the twenty-ninth day of March, 1865, on the seventh day of September, 1867, and on the fourth day of July, in the present year.

"And whereas the authority of the Federal government having been re-established in all the States and Territories within the jurisdiction of the United States, it is believed that such prudential reservations and exceptions, as at the dates of said several proclamations, were deemed necessary and proper, may now be wisely and justly relinquished, and that a universal amnesty and pardon for participation in said rebellion, extended to all who have borne any part therein, will tend to secure permanent peace, order, and prosperity throughout the land, and to renew and fully secure confidence and fraternal feeling among the whole people, and their respect for and attachment to the national government designed by its patriotic founders for the general good.

"Now, therefore, be it known that I, Andrew Johnson, President of the United States, by virtue of the power and authority in me vested by the Constitution, and in the name of the sovereign people of the United States, do hereby proclaim and declare unconditionally, and without reservation, to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full

pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof." 15 Stat. 711.

Mr. Thomas Jesup Miller, and *Mr. Linden Kent*, for the appellant.

As to offences against the United States, the pardoning power of the President is unlimited, except in cases of impeachment. Const. U. S., art. 2, sect. 2; *Ex parte Wells*, 18 How. 307; *Ex parte Garland*, 4 Wall. 333.

The pardon relied on here is in general terms, and its meaning and intent are clear beyond cavil. Even if it were ambiguous, it is to be construed most beneficially to the parties who claim its benefits. 4 Bl. Com. 401; *Wywill's Case*, 5 Co. 49; *United States* v. *Klein*, 13 Wall. 128.

In England, a restoration of forfeited estates, if they have not inured to the benefit of some third person, is inherently incident to a full and complete pardon. 3 Coke, Inst. 233; 4 Bl. Com. 402; 1 Russell, Crimes, 175; 3 id. 621; Bac. Abr., tit. Pardon; *Cole's Case*, Plow. 401; *Brown* v. *Brashaw*, 1 Bulst. 154; *Toomb's Adm'r* v. *Ethrington*, 1 Sand. 353; *Ludlam* v. *Lopez*, 1 Stra. 529; *Biggin's Case*, 5 Co. 50; *Burgess* v. *Wheat*, 1 Eden, 201; *Brown* v. *Waite*, 2 Mod. 133.

The same rule prevails in this country. Such a pardon, therefore, wipes out an offence and its consequences. *Cathcart* v. *Robinson*, 5 Pet. 264; *United States* v. *Wilson*, 7 id. 160; *Ex parte Wells*, 18 How. 307; *Ex parte Flavel*, 8 Watts & S. (Pa.) 197; *Ex parte Garland*, 4 Wall. 380; *Perkins* v. *Stevens*, 24 Pick. (Mass.) 280; *Armstrong's Foundry*, 6 Wall. 766; *United States* v. *Padelford*, 9 id. 531; *United States* v. *Klein*, 13 id. 128; *Armstrong* v. *United States*, id. 154; *Pargoud* v. *United States*, id. 156; *Carlisle* v. *United States*, 16 id. 147; *Osborn* v. *United States*, 91 U. S. 474; 2 Op. Att.-Gen. 329; 3 id. 317; 4 id. 458; 6 id. 488; 8 id. 281; 10 id. 452.

The proceeds of the sale of the claimant's property are held by the government, and no third party is interested in them. His right to them under the pardon imposes legal obligations on the government, and may be judicially enforced. *Brown* v.

United States, 1 McCahon, 229; *Osborn* v. *United States*, *supra*; *United States* v. *Klein*, *supra*.

The Solicitor-General, *contra*.

1. At common law, a simple charter of pardon did not restore forfeited property which had already vested in the crown. A special clause of restitution in the charter was required for that purpose. Chitty on Prerogative, 102.

2. The clause of restitution in the present case being limited to rights, &c., under the Constitution, does not include rights of property. *Slaughter-House Cases*, 16 Wall. 36; *United States* v. *Cruikshank et al.*, 92 U. S. 542.

3. At all events, without authorization by Congress, the President has no power, whether by a clause in a charter of pardon or otherwise, to render to the claimant the moneys derived from the sale of his property, under a decree of forfeiture, which have been paid into the treasury of the United States.

MR. JUSTICE FIELD delivered the opinion of the court.

The question presented for determination in this case is, whether the general pardon and amnesty granted by President Johnson, by proclamation, on the 25th of December, 1868, will entitle one receiving their benefits to the proceeds of his property, previously condemned and sold under the confiscation act of 1862, after such proceeds have been paid into the treasury.

The proclamation of the President extended unconditionally and without reservation a full pardon and amnesty for the offence of treason against the United States, or of giving aid and comfort to their enemies, to all persons who had directly or indirectly participated in the rebellion, with a restoration of all rights, privileges, and immunities under the Constitution and the laws made in pursuance thereof. Some distinction has been made, or attempted to be made, between pardon and amnesty. It is sometimes said that the latter operates as an extinction of the offence of which it is the object, causing it to be forgotten, so far as the public interests are concerned, whilst the former only operates to remove the penalties of the offence. This distinction is not, however, recognized in our law. The Constitution does not use the word "amnesty;" and,

except that the term is generally employed where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance. At all events, nothing can be gained in the consideration of the question before us by showing that there is any difference in their operation. All the benefits which can result to the claimant from both pardon and amnesty would equally have accrued to him if the term "pardon" alone had been used in the proclamation of the President. In Klein's case, this court said that pardon included amnesty. 13 Wall. 128.

The rights, privileges, and immunities under the Constitution and laws which the proclamation restored to parties embraced by its terms, are such as all citizens possess and enjoy. That instrument does not declare that any subjects of property are restored with reference to which such rights, privileges, and immunities might be invoked; nor can its language be thus construed without a manifest perversion of its sense.

The effect of a pardon upon the condition and rights of its recipient have been the subject of frequent consideration by this court; and principles have been settled which will solve the question presented for our determination in the case at bar. *Ex parte Garland*, 4 Wall. 333; *Armstrong's Foundry*, 6 id. 766; *United States* v. *Padelford*, 9 id. 531; *United States* v. *Klein*, 13 id. 128; *Armstrong* v. *United States*, id. 155; *Pargoud* v. *United States*, id. 156; *Carlisle* v. *United States*, 16 id. 147; *Osborn* v. *United States*, 91 U. S. 474. A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it

does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force. If, for example, by the judgment a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way. So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law. However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers, — it cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power.

Where, however, property condemned, or its proceeds, have not thus vested, but remain under control of the Executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner, upon his full pardon. The property and the proceeds are not considered as so absolutely vesting in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the officer or tribunal. The proceeds have thus passed when paid over to the individual entitled to them, in the one case, or are covered into the treasury, in the other.

The views here expressed have been applied in practice, it

is believed, by the executive departments of the government. In 1856, the question was submitted by the Secretary of the Treasury to the Attorney-General, whether, under a pardon of the President remitting a forfeiture to the United States, imposed by a judgment of a United States district court, the proceeds of the forfeiture deposited by the marshal in one of the public depositories to the credit of the United States, but not brought into the treasury by a covering warrant, could be refunded to the marshal, and through him to the party entitled, in execution of the remission granted by the President; and the Attorney-General replied, that the pardoning power was completely vested in the President, and did not require in its exercise any aid from Congress, nor could it be curtailed by Congress, but that, if the money had actually passed into the treasury, it could not be refunded without an act of Congress; for the Constitution itself, in the provision that "no money shall be drawn from the treasury but in consequence of appropriations made by law," opposed an insuperable obstacle to such a proceeding, and that this provision was of equal efficiency with the pardoning power, and operated as a restriction upon it. But the Attorney-General held, and so advised the Secretary, that, if the money had only gone into the hands of some officer of the government, and the right of third parties had not attached, it might be refunded. 8 Op. Att.-Gen., p. 281. As an instance where property acquired by a third party, whilst the judgment against the offender is in force, cannot be affected by a subsequent pardon, he cited the case of the disposition of a convict's property during the time of his civil incapacity. The pardon does not restore the property. And, as an instance where a right, other than of property, acquired during the same period, is also unaffected, he cited the case where, by the law of the country, a conviction of felony operates to dissolve a marriage, and the innocent party contracts new bonds of matrimony. The subsequent pardon does not dissolve the new bonds. *Matter of Deming*, 10 Johns. 232.

The same views were, to some extent, applied in the recent case of *Osborn* v. *United States*, *supra*, where proceeds of property, confiscated under the act of July 17, 1862, for the alleged treason of the claimant, remaining in the registry, were

ordered by the Circuit Court to be delivered to the claimant who had been pardoned, Mr. Justice Miller, presiding in the Circuit Court, holding that, until an order of distribution of the proceeds was made, or the proceeds were actually paid into the hands of the party entitled, as informer, to receive them, or into the treasury of the United States, they were within the control of the court, and that no vested right to the proceeds had accrued so as to prevent the pardon from restoring them to the claimant, and impliedly holding, that, had they been thus paid, either to the informer or into the treasury, the right to them would have passed beyond the control of the court. On appeal, this court affirmed the decision, observing, that it was of the essence of a pardon that it relieved the offender from the consequences of his offence; and as in that case the forfeiture of his property was one of those consequences, it restored the property to him, unless the rights of other parties had vested, and the power of restoration was thus gone.

An attempt is made by counsel to give some expressions used in the opinion of the court a wider meaning, so as to support the claim here presented; but the language will not sustain the conclusion sought. There was no consideration of the effect of the pardon upon the proceeds of the forfeited property when paid into the treasury, but only of its effect upon those proceeds whilst under the control of the court in its registry. Any language which seemingly admits of a broader interpretation must be restricted to the facts of the case. There was no intention of expressing any opinion that a pardon could do away with the constitutional requirement as to money in the treasury; whilst there, it is the property of the United States.

There is another view of this case, which must lead to an affirmance of the judgment of the Court of Claims. The jurisdiction of that court is limited to claims founded upon a law of Congress, or upon a regulation of an executive department, or upon a contract, express or implied, with the government. The claim here presented rests upon a supposed implied contract to pay to the claimant the money received as the proceeds of the forfeited property. To constitute such a contract, there must have been some consideration moving to the United States; or they must have received the money, charged with a duty to

pay it over; or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake. But here there was no consideration moving to the United States; they were charged with no duty in respect to the money; there was no legal claim by any one to it when received into the treasury; and no law since has required it to be paid to the claimant. There can be, therefore, no implied contract in the case. *Judgment affirmed.*

BROWN v. COUNTY OF BUENA VISTA.

1. A court of equity will not relieve against a judgment at law where the party seeking its aid has been guilty of laches or fault.
2. Whether the time which has elapsed since the discovery of the fraud, set up as the ground of relief, be sufficient to bar the remedy, is a question to be determined by the sound discretion of the court.

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

The facts are stated in the opinion of the court.

Mr. George G. Wright for the appellant.

Mr. Galusha Parsons, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an appeal in equity. The appellee filed the bill. The decree of the court below was against the appellant.

In this court, the grounds relied upon to sustain the decree are, —

That the judgment sought to be enjoined was procured by the fraud and conspiracy of the appellants, Jamison the county clerk, and Moore the county treasurer;

That the judgment was founded in a large part upon warrants of the county, issued pursuant to a fraudulent conspiracy of the same parties, and in part upon warrants which were forged;

And that the payments upon the judgment were procured to be made by the fraudulent misrepresentations of Langdon and Brown, through their attorney.

On the 6th of September, 1865, Jamison acknowledged service of mesne process in the case in which the judgment was recovered. It is not denied that the acknowledgment rendered the service sufficient in point of law, and warranted the court in giving the judgment, if the fraud and conspiracy charged had no existence. The allegations of the bill casting the imputation are explicitly met and denied by the answers. This put the burden of establishing them upon the complainant. There is no proof whatever in the record upon the subject.

The judgment was rendered by default in the Circuit Court of the United States for the District of Iowa, on the 25th of October, 1865, in favor of Langdon, against the county, for $6,259.32. It was founded upon county warrants. Five of them were for the sum of $1,000 each. The residue were for smaller sums, amounting in the aggregate to less than $500. There is proof tending to show such warrants had been issued fraudulently to a very large amount, and there is some proof that the name of William S. Lee upon some of the smaller warrants included in the judgment is not in his handwriting. By whom it was written is not shown.

It appears, also, that warrant No. 86, for $1,000, embraced in the judgment, was subsequently abstracted from the clerk's office. When the testimony was taken, it was in the hands of a person in Vermont. As it was clearly thus put in circulation when overdue, the county can sustain no injury from it. A transcript of the judgment, pursuant to the law of Iowa, was filed in the clerk's office of the District Court for the county on the 29th of January, 1866. Moore and Jamison left the county in October, 1866. After their departure, the sheriff, with process, made search for the record of the proceedings of the supervisors, and for the county seal. Neither was found. When last heard from, Jamison was reported to have died in Texas. Moore was said to be living somewhere in the interior of New York. His testimony was not taken by either party.

That fraud was perpetrated as to the issuing of warrants by Jamison is very probable, and it may be that it extended to the warrants here in question.

But however this may be, there is no proof of any thing wrong on the part of Brown or Langdon. Brown was exam-

ined, cross-examined, and re-examined, as a witness. He testifies, that, having sent the transcript of the judgment to the county to be filed, and getting no answer, he went there to see that it was done. This brought him into contact with Jamison, and he thinks he saw a man of the name of Moore. He says he never saw them at any other time, and never had any other communication with either of them. There is no other evidence upon the subject.

The counsel of Brown appeared before the supervisors on the 5th of September, 1870, and asked that action be taken for the payment of the judgment, and stated that it was rendered upon warrants of the county.

The supervisors thereupon imposed a tax, accordingly, for the year 1870. A like tax was imposed on the 5th of September, 1871, for that year. Under these assessments there was paid upon the judgment, on the 20th of June, 1871, the sum of $1,603.01, and on the 15th of May, 1872, $1,282.60. There is still in the hands of the county treasurer, arising from these assessments, the further sum of $1,892.45, applicable in the same way. In this connection, also, we find nothing in the case affording the slightest ground for any imputation upon the counsel who appeared before the supervisors in behalf of Brown, or upon Brown himself.

The power of a court of equity to relieve against a judgment, upon the ground of fraud in a proceeding had directly for that purpose, is well settled.

The power extends also to cases of accident and mistake. But such relief is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in the proceeding at law. In all such cases he must be without fault or negligence. If he be not within this category, the power invoked will refuse to interfere, and will leave the parties where it finds them. Laches, as well as positive fault, is a bar to such relief. *Duncan* v. *Lyon*, 3 Johns. (N. Y.) Ch. 351; *Marine Insurance Co.* v. *Hodgson*, 7 Cranch, 332; Story, Eq. Jur., sects. 894–896; Bigelow on Estoppel, 151; Freeman on Judgments, sects. 486, 489, 490, 495.

Passing by without remark the filing of the transcript in the office of the county clerk, it is clear that on the 5th of Septem-

ber, 1871, the supervisors were expressly notified of the existence of the judgment, and for what it was recovered. Notwithstanding the large amount of spurious warrants known to have been issued, it does not appear that those officers thereupon inquired, retained counsel, or did any thing else to procure information touching the warrants upon which the judgment was founded.

On the contrary, upon the same day, they imposed a tax for the payment of the judgment; and on the same day, one year later, the second levy was ordered for the same purpose. It appears they retained counsel at their session, in June, 1871, and, that upon searching in the proper clerk's office at Des Moines, the warrants in question could not be found. The search was made several times, with the same result. The counsel apprised the supervisors of the fact, and advised them that nothing could be done without the warrants. When this announcement was made does not appear; but the evidence shows that in the same month of June in which he was retained the first payment was made upon the judgment. The second payment was made a year later. The warrants were found in the proper office in the fall of 1872, partly through the efforts of the counsel of Brown, who thereupon notified the counsel of the supervisors, and the warrants were placed in the hands of the latter. The bill was not filed until at least half a year later.

The Statute of Limitations of Iowa of five years, perhaps, does not apply, because the fraud, if it existed, was not known sufficiently early. The statute could run only from the time of the discovery. But a court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the court. *Sullivan* v. *Portland & Kennebec Railroad Co.*, 94 U. S. 806.

The facts in this connection to which we have adverted are entitled to grave consideration.

"Nothing can call forth" — a court of equity — "into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing.

Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction there was always a limitation of suits in this court." *Smith* v. *Clay*, Amb. 645. See also Story, Eq. Jur., sect. 1520 *a*; 94 U. S., *supra*; *Sample* v. *Barnes*, 14 How. 70; *Walker et al.* v. *Robbins et al.*, id. 584; *Creath's Administrator* v. *Simms*, 5 id. 192; *Bateman* v. *Willoe*, 1 Sch. & Lef. 201; *Murray* v. *Graham*, 6 Paige (N. Y.), Ch. 622; *Callaway* v. *Alexander*, 8 Leigh (Va.), 114; *Powell* v. *Stewart*, 17 Ala. 719; *Riddle* v. *Barker*, 13 Cal. 295.

The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded.

Upon the whole case, we are of the opinion that the county is not entitled to the relief sought.

Decree reversed and cause remanded, with directions to dismiss the bill.

CONTINENTAL IMPROVEMENT COMPANY *v.* STEAD.

1. Travellers upon a common highway which crosses a railroad upon the same level, and the railroad company running a train, have mutual and reciprocal duties and obligations; and, although the train has the right of way, the same degree of care and diligence in avoiding a collision is required from each of them.
2. That right does not, therefore, impose upon such a traveller the whole duty of avoiding a collision, but is accompanied with and conditioned upon the duty of the train to give due and timely warning of its approach.
3. The degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty.
4. It belongs to the judge to exercise discretion as to the style and form in which he expounds the law and comments upon the facts. His duty is discharged if his instructions to the jury correctly state, although not in the *ipsissima verba* of counsel, the whole law applicable to the case.

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

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Messrs. Hughes, O'Brien, & Smiley* for the plaintiff in error, and by *Mr. J. J. Coombs, contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a case of collision near the village of Lima, in La Grange County, Indiana, between a train of passenger cars of the plaintiff in error and the wagon of the defendant in error. The latter brought the action below to recover the damages done to himself and his wagon, and recovered a verdict. The present writ of error is brought to review the instructions given by the court to the jury on the trial. The case, as appears by the bill of exceptions, was substantially as follows: The collision occurred in a cut about five feet in depth, in which the wagon-road crossed the railroad on a level therewith nearly at right angles, descending to it on each side by an excavation. The train was a special one, coming from the north, and did not stop at the station, which was four hundred or five hundred feet north of the crossing, and none of the regular trains were due at that time, although special trains were occasionally run over the road. The plaintiff was going east, away from the village, following another wagon, and in approaching the railroad track could not see a train coming from the north, by reason of the cut and intervening obstructions. There was evidence tending to show that the plaintiff, though he looked to the southward (from which direction the next regular train was to come), did not look northwardly; that his wagon produced much noise as it moved over the frozen ground; that his hearing was somewhat impaired; and that he did not stop before attempting to cross the track; also, evidence tending to show that the engineer in charge of the train used all efforts in his power to stop it after he saw the plaintiff's wagon on the track. The evidence was conflicting as to whether the customary and proper signals were given by those in charge of the locomotive, and as to the rate of speed the train was running at the time, some witnesses testifying that it was at an unusual and improper rate, and others the contrary.

The counsel for the railroad company requested the court to

adopt certain specific instructions, to the general effect that the plaintiff should have looked out for the train, and was chargeable with negligence in not having done so; that there was nothing peculiar in the crossing to forbid as high a rate of speed as would be proper in the case of other important highways; that an engineer is not bound to look to the right or left, but only ahead on the line of the railway, and has a right to expect that persons and teams will keep out of the way of the locomotive; and that it is the duty of those crossing the railroad to listen and look both ways along the railroad before going on it, and to ascertain whether a train is approaching or not.

The judge refused to adopt the instructions framed by counsel, but charged, in effect, as follows: that both parties were bound to exercise such care as, under ordinary circumstances, would avoid danger; such care as men of common prudence and intelligence would ordinarily use under like circumstances; that the amount of care required depended on the risk of danger; that, where the view was obstructed so that parties crossing the railroad could not see an approaching train, the exercise of greater care and caution was required on both sides; as well on the part of those having the management of the train as of those crossing the railroad; that the former should approach the crossing at a less rate of speed, and use increased diligence to give warning of their approach; and, if the train was a special one, it was still more incumbent upon them in going through such a place to slacken their speed and sound the whistle and ring the bell, than if the train were running on regular time; and, on the other hand, that the party crossing with a team should proceed with more caution and circumspection than if the crossing were in an open country, and not venture upon the track without ascertaining that no train was approaching, or at least without using the means that common prudence would dictate to ascertain such fact; but that, if a train were not a regular one, no train being due at the time, the same degree of caution would not be expected on his part as if it were a regular train and on usual time. In short, the judge charged that the obligations, rights, and duties of railroads and travellers upon highways crossing them are mutual and reciprocal, and no greater degree of care is required of the one

than of the other. He further charged, that the plaintiff could not have a verdict unless the persons in charge of the train were guilty of negligence or want of due care, and unless the plaintiff himself were free from any negligence or carelessness which contributed to the injury. The evidence of the case was fairly submitted to the jury in the light of the principles thus announced.

This is the general scope of the charge; and we think it is in accordance with well-settled law and with good sense. If a railroad crosses a common road on the same level, those travelling on either have a legal right to pass over the point of crossing, and to require due care on the part of those travelling on the other, to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first: it is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It cannot be such, if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot; but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing.

On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger

if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case. But notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them, — such, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault. They are the authors of their own misfortune. These propositions are so indisputable, that they need no reference to authorities to support them. We think the judge was perfectly right, therefore, in holding that the obligations, rights, and duties of railroads and travellers upon intersecting highways are mutual and reciprocal, and that no greater degree of care is required of the one than of the other. For, conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty. The charge of the judge was in substantial accordance with these views.

The mistake of the defendant's counsel consists in seeking to impose upon the wagon too exclusively the duty of avoiding collision, and to relieve the train too entirely from responsibility in the matter. Railway companies cannot expect this immunity so long as their tracks cross the highways of the country upon the same level. The people have the same right to travel on the ordinary highways as the railway companies have to run trains on the railroads.

Perhaps some of the abstract propositions of the defendant's counsel contained in the instructions asked for, based on the

facts assumed therein, if such facts were conceded, or found in a special verdict, would be technically correct. But a judge is not bound to charge upon assumed facts in the *ipsissima verba* of counsel, nor to give categorical answers to a juridical catechism based on such assumption. Such a course would often mislead the jury instead of enlightening them, and is calculated rather to involve the case in the meshes of technicality, than to promote the ends of law and justice. It belongs to the judicial office to exercise discretion as to the style and form in which to expound the law and comment upon the facts. If a judge states the law incorrectly, or refuses to state it at all, on a point material to the issue, the party aggrieved will be entitled to a new trial. But when he explains the whole law applicable to the case in hand, as we think was done in this case, he cannot be called upon to express it in the categorical form, based upon assumed facts, which counsel choose to present to him. See *Mills* v. *Smith*, 8 Wall. 27; *Nudd* v. *Burrows*, 91 U. S. 426.

An examination of some of the principal instructions asked for by the defendant's counsel will furnish an illustration of the propriety of these views. The court was asked to instruct the jury as follows: —

"The uncontradicted testimony in this case shows that the plaintiff was acquainted with the character of this crossing; that he had frequently travelled it, and on some previous occasions had stopped to look and listen before going upon the track; that upon this occasion he went with his team and wagon upon the track without taking any precaution to ascertain whether a train was coming from the north or not; that he did not even turn his face northward along the track in the direction from which the train was coming until it was too late for him to stop or turn back; that his wagon was making considerable noise as it moved over the frozen ground; that his hearing was to some extent impaired, but he did not stop to listen before going upon the track.

"Upon this state of facts the plaintiff is chargeable with such negligence contributing to the accident as deprives him of any right of action."

Now, although the case may have been so clear of other evidence than that stated in the proposed instruction, as that the judge (had he seen fit) might have adopted it as a statement

of the ultimate facts, yet he was not bound to do so, but was entirely justifiable in stating the law, as he did, in a more general form, namely: —

"It is left as a question of fact for you [the jury] to say whether he [the plaintiff] was guilty of carelessness from the evidence. He was required to exercise that degree of prudence, care, and caution incumbent upon a person possessing ordinary reason and intelligence under the special circumstances of the case, having regard to the particular character of the crossing and the difficulty of seeing a train approaching from the north. The fact that his hearing was somewhat impaired would not exempt him from the necessity of using the care required of persons in possession of their ordinary senses or faculties. A person suffering under such an infirmity should use more diligently his other faculties. If the place was dangerous and the approach to it by a train obscured, he should have proceeded with more caution and circumspection than if the crossing were in an open country; and not ventured upon the track without ascertaining that no train was approaching, or at least without the use of the means that common prudence would dictate to ascertain such fact. But as this was not a regular train, or on usual time, the same degree of caution would not be required on his part or such as if it were a regular train and on usual time."

And further on: —

"It is shown by the evidence, and not disputed, that plaintiff was accustomed to pass this crossing, and may be presumed to know and be acquainted with the usual rate of speed with which the trains passed this crossing, and, if this train was not moving at a greater rate, he should be held as bound to exercise such care and caution as to avoid collision with such trains moving at usual rates and times; so that, unless you find that the train was moving at an unusual and unreasonable rate of speed, you would be warranted in finding the plaintiff was guilty of negligence which contributed to the injury, and hence not entitled to recover."

The facts assumed in the instruction proposed depended on the evidence, and did not by any means comprise all the facts bearing upon the question; and, aside from the discretion which, as we have stated, may be exercised by the judge, we think he did quite right in this instance, after stating the law to the jury, in submitting the evidence to their consideration.

Another instruction asked for was as follows: —

"It is the duty of every one approaching with his wagon and team along a highway to the crossing of a steam railroad to listen and to look both ways along the railroad before going upon it. If by reason of the character of the ground or other obstructions, or if by reason of a defect in his sense of sight or of hearing, he cannot determine with certainty whether or not a train of cars is approaching without stopping, and, if necessary, going in advance of his team to examine, it is his duty to do so. If in such case he goes upon the track without taking such precaution, he does so at his own peril, and cannot recover if injury results."

Here is no assumption of facts as in the previous instruction; but it states the duty of persons approaching a railroad with wagons and teams in a more absolute and unqualified form than we think admissible. It states such duty with the rigidity of a statute, making no allowance for modifying circumstances or for accidental diversion of the attention, to which the most prudent and careful are sometimes subject; and assuming, in effect, that the duty of avoiding collision lies wholly, or nearly so, on one side. We think that the qualified form in which the duty of travellers, on highways in approaching a railroad was stated by the judge in his charge, as applicable to the evidence and circumstances of this case, was all that could be justly required by the defendants. *Judgment affirmed.*

RAILROAD COMPANY *v.* HECHT.

1. A statute which prescribes a mode of serving process upon railroad companies different from that provided for in a charter previously granted to a particular company, does not impair the obligation of the contract between such company and the State.
2. The power of a State to regulate the forms of administering justice is an incident of sovereignty, and its surrender is never to be presumed.
3. As against the government, the word "shall," when used in statutes, is to be construed as "may," unless a contrary intention is manifest.

ERROR to the Supreme Court of the State of Arkansas.

The Cairo and Fulton Railroad Company having been sued in the Circuit Court of Clay County, Arkansas, service was had

on the tenth day of September, 1873, by leaving a copy of the summons with a clerk of the company.

Judgment was rendered by default. A motion was subsequently made to set the default aside, on the ground that there had been neither legal service upon nor appearance by the company. This motion having been overruled, the company appealed to the Supreme Court of the State, where the judgment below was affirmed. The company then brought the case here.

The company was incorporated by an act of the legislature of Arkansas, approved Jan. 12, 1853.

The thirteenth section of that act provides as follows: —

"This act shall be deemed a public act, and shall be favorably construed for all the purposes therein expressed and declared in all courts and places whatever, and shall be in force from and after its passage: *Provided*, that all the rights, privileges, immunities, and franchises contained in the charter granted at this session of the legislature of this State to the Mississippi Valley Railroad Company, not restricting or inconsistent with this act, are hereby extended to and shall form a part of this incorporation as fully as if the same were inserted herein."

The charter of the Mississippi Valley Railroad Company was granted by an act approved Jan. 12, 1853, the twenty-fourth section of which provides that "process on said company shall be served on the president by leaving a copy to his address, at the principal office of the corporation, in the hands of any of its officers."

An act passed in 1868 provides that "where the defendant is a corporation, created by the laws of this State, the service of the summons may be upon the president, mayor, chairman of the board of trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent."

It will be seen that service in this case was made pursuant to the latter act, and not to the provisions of the charter.

The company here assigns for error that its charter constitutes a contract between it and the State, and that the subsequent act under which the process was served impairs the obligation of the contract, and is therefore in violation of sect. 10, art. 1, of the Constitution of the United States.

Mr. U. M. Rose for the plaintiff in error cited *Oliver* v. *Memphis Railroad Co.*, 30 Ark. 129; *St. Louis Railroad Co.* v. *Loftin*, id. 693; *Bronson* v. *Kinzie*, 1 How. 311; *Commonwealth* v. *United States Bank*, 2 Ashm. (Pa.) 349; *Aurora Turnpike Co.* v. *Holthouse*, 7 Ind. 59; *Powell* v. *Sammons*, 31 Ala. N. S. 552; *Cairo & Fulton Railroad Co.* v. *Turner*, 31 Ark. 494.

No counsel appeared for the defendants in error.

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

The single question presented by this record is whether a statute which prescribes a mode of service of judicial process upon the Cairo and Fulton Railroad Company, different from that provided for in its charter, is void because it impairs the obligation of a contract. The regulation of the forms of administering justice by the courts is an incident of sovereignty. The surrender of this power is never to be presumed. Unless, therefore, it clearly appears to have been the intention of the legislature to limit its power of bringing this corporation before its judicial tribunals to the particular mode mentioned in the charter, the subsequent legislation upon that subject was not invalid. The provision of the charter relied upon is in these words: "Process on said company shall be served on the president by leaving a copy to his address, at the principal office of the corporation, in the hands of any of its officers. The said corporation shall have power to establish a principal office at such place as they may see fit, and the same to change at pleasure." As against the government, the word "shall," when used in statutes, is to be construed as "may," unless a contrary intention is manifest. Here no such intention appears. The largest latitude is given the company in respect to the location of its principal office; and it can hardly be supposed that the legislature meant to deprive itself of the power of providing another mode of service, if that specified was found to be inconvenient or unwise. The provision is one which evidently belongs to remedies against the corporation, and not to the grant of rights. As to remedies, it has always been held that the legislative power of change may be exercised when it does not affect injuriously rights which have been secured. *Sturgess* v. *Crowninshield*, 4 Wheat. 122.

Judgment affirmed.

INSURANCE COMPANY *v.* LANIER.

1. A bill of exceptions, allowed and signed or sealed by the judge, is the only mode by which his rulings during the progress of a trial, or his charge to the jury, can be rendered a part of the record.
2. The provisions of the Code of Georgia are in harmony with this rule.

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

The facts are stated in the opinion of the court.

Mr. Philip Phillips and *Mr. William H. Phillips* for the plaintiff in error.

Mr. Julian Hartridge and *Mr. Rufus E. Lester*, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

After careful consideration, we are all of opinion that the record contains nothing upon which the assignments of error can be based. The plaintiff in error complains that certain evidence was improperly admitted, and that incorrect instruction was given to the jury; but the record does not show that any exception was saved to the admission of evidence or to the charge of the court. No bill of exceptions appears to have been made up or signed. It is true that in the transcript sent up to us it is stated that at the trial objection was made to the reception of certain testimony of witnesses, that the objection was overruled, and that the defendant then and there excepted to such ruling of the court, and assigned error thereon. So the transcript states that the judge gave substantially certain instruction to the jury, and adds, "to which portion of said charge said defendant then and there excepted, and assigned the same as error." But, even if the facts occurred as certified by the clerk, his statement that they occurred does not bring them upon the record so as to make them the subject of review. There is but one mode of bringing upon the record and making a part of it the rulings of a judge during the progress of a trial, or his charge to the jury, and that is by a bill of exceptions allowed and sealed or signed by the judge. It is true that in the hurry of the trial the bill is not often reduced to form and sealed or signed. Generally an exception is only noted by the

judge at the time claimed, and it is subsequently drawn up; but it is not a bill of exceptions until it has been sealed, or, as is now sufficient, signed. The sealing or signature of the judge is essential for its authentication; and it has been ruled that the judge's notes do not constitute a bill of exceptions. They are but memoranda from which a formal bill may afterwards be drawn up and sealed. *Pomeroy* v. *The Bank of Indiana*, 1 Wall. 592. There it was said, "When exceptions are taken to the ruling of the court, in the course of a trial, to the jury, such an entry is frequently made in the minutes of the case, or of the presiding justice, as evidence of the fact, and as a means of preserving the rights of the party in case the verdict should be against him, and he should desire to have the case re-examined in the appellate tribunal; but it was never supposed that such an entry could be of any benefit to the party unless he seasonably availed himself of the right to reduce the same to writing, and took proper measures to have the bill of exceptions sealed by the judge presiding at the trial, or, in other words, such an entry in the minutes can only be regarded as evidence of the right of the party seasonably to demand a bill of exceptions; but it is not the same thing, and it has never been so considered in the Federal courts. And again: "Unless an exception is reduced to writing and sealed by the judge, it is not a bill of exceptions, within the meaning of the statute authorizing it, and it does not become part of the record." No such bill is found in the present case. Where the memoranda of exceptions appearing in the transcript came from does not appear. They are not even stated to be on the minutes or the judge's notes.

The verdict was returned, and the judgment was signed on the 14th of November, 1874. The transcript exhibits a paper dated Nov. 19, 1874, called an assignment of error, signed by the attorney of the insurance company, and filed on that day, setting forth that in the foregoing record and proceedings various errors appeared, and describing them. The paper appears to have been served on the plaintiffs' attorney, and on the same day it was indorsed "exceptions overruled. John Erskine, judge." For what purpose the paper was prepared does not clearly appear. Perhaps it was in aid of a motion

for a new trial, or it was intended as preparation for a writ of error, probably the latter. But it is impossible to regard it as a bill of exceptions taken or noted at the trial. It refers to no exceptions then taken. On the contrary, while it refers to objections alleged to have been made at the trial, and assigns overruling them as error, it states that the defendant now (Nov. 19) assigns the same as error, and excepts thereto.

We find nothing in the code of Georgia that aids the plaintiffs in error. The only provision that is of any importance as bearing upon the subject is the following: "At any stage of the cause either party may file his exception, and, if the same be certified or allowed, it shall be entered of record in the cause; and should the case, at its final determination, be carried by writ of error to the Supreme Court, error may be assigned upon such bill of exceptions." This does not differ substantially from the provisions of the Statute of Westminster, 13 Edw. I. c. 31. The exception must be certified or allowed as well as filed, and it is the signature or seal of the judge that certifies or allows it.

We are, therefore, reluctantly brought to the conclusion that the record of this case exhibits nothing that justifies the assignments of error.

Judgment affirmed.

BLOUNT v. WINDLEY.

1. When no rights of third parties interfere, the extent to which mutual obligations may be set off against each other, and the mode of doing it, are wholly subject to legislative control.
2. A statute, therefore, as that of North Carolina, passed after the bank or its commissioner had obtained a judgment, which authorizes the defendant to set off against it the circulating notes of the bank which he procured after the judgment, is, as between him and the bank or its commissioner, valid, and does not impair the obligation of the contract sued on, or of the judgment.
3. But if the rights of either creditors of the bank, or other parties interested in the judgment, were such that they could exact payment of the judgment in lawful money, the case would be different.

ERROR to the Supreme Court of the State of North Carolina.

The facts are stated in the opinion of the court.

Mr. Joseph J. Davis for the plaintiff in error.
Mr. Samuel F. Phillips, *contra*.

MR. JUSTICE MILLER delivered the opinion of the court.

Under a statute of North Carolina, passed March 12, 1866, to enable the banks of the State to close their business, the plaintiff in error was, by a decree of the proper State court, in the fall of that year, appointed commissioner of the Bank of Washington; and all the real and personal property and choses in action of the bank were by the decree vested in said commissioner for the benefit of those creditors of the bank who should prove their debts within twelve months. As such commissioner, Blount sued and recovered against the defendant in error a judgment on a note given to the bank for borrowed money, on which he was surety. This was in November, 1867. The defendant subsequently procured the circulating notes of the bank, and tendered them in payment of the judgment to plaintiff, who refused to accept them. He then deposited them with the clerk of the court in which the judgment was rendered, who received them, not in payment, but subject to the order of the court.

A motion for new trial in the original suit remained undecided until the spring term, 1872. At the next term of the court after this, the defendant, on due notice, moved the court to have these notes applied in payment of the judgment, and satisfaction of that judgment entered on the record; which motion was granted, and the order made. From this order plaintiff appealed to the Supreme Court of the State, which affirmed the judgment of the court below; and he thereupon sued out the present writ of error.

Two grounds are relied upon in this court to reverse that judgment: —

1. That plaintiff had a right, under the Constitution and laws of the United States, to have his judgment paid in coin or legal-tender notes, and nothing else.

2. That certain statutes of North Carolina under which the defendant was allowed to set off the notes of the bank in satisfaction of the judgment are void, because they impair the obligation of his contract.

We will consider the last ground first, because, if these statutes are valid and authorized the judgment of the court, then the other objection is also answered; for, if the defendant had the right to pay or set off these notes in satisfaction of the judgment, the plaintiff did not have the right to exact payment exclusively in legal-tender money of the United States.

The following acts and parts of acts are those relied on to justify the order of the court in this case.

Act of Aug. 22, 1868:—

"The General Assembly of North Carolina do enact, that where any note or bond has been, or may hereafter be, given as a renewal of any debt or demand due or payable to any bank in this State, whose charter bears date prior to the twentieth day of May, 1861, the bills of said bank shall be a legal set-off to such note or bond, without regard to whether such note or bond be made payable to said bank or to some other party; and the bills of such bank may be offered, and shall be received, to sustain the plea of set-off to any suit brought upon such note or bond in any court of this State, whether such note or bond be made payable to such bank or to any other party."

Sects. 1 and 4 of an act approved March 17, 1869:—

"SECT. 1. The General Assembly of North Carolina do enact, that an act entitled 'An Act to make bank-bills a set-off,' ratified the twenty-second day of August, A.D. 1868, be so amended as to apply to judgments and executions which may have been obtained on any debt due any of the banks mentioned in the aforesaid act."

"SECT. 4. The remedy under this act may be by plea of set-off, or by injunction, as the case may require."

By a statute passed in December of the same year, it was made "the duty of every court in the State, upon proof that such bills have been delivered or tendered and refused in satisfaction of such judgments to the nominal amounts thereof, to cause an entry of satisfaction of such judgments to be entered of record in the court wherein the same were recovered."

The proposition of plaintiff in error is, that, when he recovered the judgment against the defendant, he had a right to exact and receive in payment of that judgment gold or silver coin, or

the legal-tender treasury notes of the United States, and that defendant had no right to pay him in any thing else; that the judgment was a contract, and the obligation of it is impaired by the statute which authorizes payment in something else. It is undoubtedly true, in some sense and for some purposes, that a judgment has been treated and considered as a contract; and we are not disposed to deny that the judgment in this case is evidence of a contract. But the judgment is only a contract because it is evidence of a debt or obligation on the part of defendant due to plaintiff. The judgment itself presupposes, and is founded on, some antecedent obligation or contract, and is only a higher evidence of that contract, because it now has the sanction of the judicial determination of its validity and amount by a court of law. The essential nature and character of the contract remains unchanged; and, in deciding how far it may be affected by legislation, we must look mainly to the original contract.

It may be assumed that all debts not solvable by their terms in something else are *prima facie* payable in legal-tender money, as ascertained by the acts of Congress. And this is true whether the contract be express or implied, and whether it exist in parol, or in a promissory note, or in a judgment. Notwithstanding this general rule, it is a principle of long standing in all systems of jurisprudence that one debt or obligation may be set off or counterbalanced against another, so that while the obligation of both is recognized, both are satisfied in law and discharged without the payment of any money on either; and this is done by the courts without the consent of the party and against his will. This doctrine of set-off in the English law originally could only be called into operation by a defendant who, when sued on an obligation of his own, should by a distinct plea claim a set-off of some demand which he had against the plaintiff of a similar character. But this original statutory doctrine of the right of set-off has been modified, enlarged, and extended in many ways.

1. The courts of common law have long established the principle of set-off as applicable to mutual judgments in the same court. And it is said that this power of setting off judgments not only in the same court, but in different courts, did not

depend upon the statutes of set-off, but upon the general jurisdiction of the court over its suitors. See *Barker* v. *Braham*, 2 Bl. R. 869; *Mitchell* v. *Oldfield*, 4 T. R. 123; 3 Caines's Cases, 190. In *Simpson* v. *Hart*, 1 Johns. (N. Y.) Ch. 91, Chancellor Kent refused to set off one judgment against another although the case was otherwise made out, because the jurisdiction was ample at law, and the application had been first made there and denied. See also *Simpson* v. *Huston*, 14 Tex. 481.

2. This remedy has been very much extended in equity where the insolvency of the judgment plaintiff, his non-residence within the jurisdiction of the court, the fact that the mutual obligations have grown out of the same transaction, and many other purely equitable considerations, have been held to authorize the setting off of many classes of obligations held by the defendant, against a judgment duly recovered against him in a court of law. *Merrill* v. *Souther*, 6 Dana (Ky.), 305; *Simpson* v. *Hart*, 1 Johns. (N. Y.) Ch. 91; *Palmateer* v. *Meredith*, 4 Mar. J. J. (Ky.) 74; *Davis* v. *Milburn*, 3 Clarke (Iowa), 163; 7 How. 279.

It will be thus seen that, independent of statutes, the courts have long exercised the power of extinguishing judgments by compelling the plaintiff to receive something else than money in satisfaction thereof. It is true that, where this power has been exercised under the statutory or equity power of the court, it has been generally, perhaps universally, limited to cases where the defendant held the claim which he presents for set-off at the time the suit was brought in which he proposes the set-off. But undoubtedly there may be cases in which a claim coming to the ownership of the judgment debtor, even after the judgment has been rendered against him, presents a strong equity to have it set off against that judgment. In such cases it must be within the competency of the legislative body so to extend the remedy by set-off as to embrace them.

Such is the law of the State of Louisiana under their civil-code system of jurisprudence. In the case of *Pattison* v. *Edmonston*, 4 La. Ann. 157, Carter & Co. obtained a judgment against Pattison. After an execution was issued, and after an injunction against it had been dissolved, the defendant purchased of a third party a judgment against Carter & Co.; and

the Supreme Court, reversing the judgment of the inferior court, held that, from the date of the notice of this purchase, the parties became mutually indebted, and their respective claims were liquidated and due, and compensation took place within the meaning of sect. 2203 of the Civil Code, the effect of which was to extinguish the judgment of Carter & Co.

This provision of the Code of Louisiana, and the construction given to it by her highest court, is identical with the Roman law, which is, indeed, the foundation on which that code is built. That law went much further than any of our statutes have gone, and further than our courts of equity have gone. The doctrine of the civil law was that mutual debts extinguished each other by operation of law, and that in such case no discovery could be had except for a balance due on the larger debt. And this extended to cases in which the debtor had procured an assignment or cession of the debt of a third person against his creditor. So that from the moment the creditor had notice of the transfer, compensation, as it is called in the civil law, took place; that is, the debts were extinguished so far as the amount due on the smaller debt could rightfully compensate the larger. This matter is well set forth by Justice Story in his Equity Jurisprudence, sects. 1438 to 1444 inclusive. His closing remarks are very pertinent to the case in hand. "The general equity and reasonableness," says he, "of the principles upon which the Roman superstructure is founded make it a matter of regret that they have not been transferred to their full extent to our system of equity jurisprudence. Why, indeed, in cases of mutual debts, independently of any notion of mutual credit, courts of equity should not have at once supported and enforced the doctrine of the universal right of set-off as a matter of natural equity, it is not easy to see."

The legislation of North Carolina, which we have already cited, is of this character.

The act of Aug. 22, 1868, made the bills of a bank a legal set-off in the hands of any person sued by the bank, but left the right subject to the usual rule, that it must be pleaded in the action. The act of March 17, 1869, declared that this right should extend to judgments already rendered, and that it might be asserted by a plea of set-off in the court at law or by

an injunction in chancery; and the act of December, 1869, authorized the same relief by motion in the court where the judgment was rendered. Are the acts of the North Carolina legislature so wholly outside of the general doctrine of set-off as to be void? The idea of set-off is not the same as payment. It is the doctrine of bringing into the presence of each other the obligations of A. to B. and of B. to A., and by the judicial action of the court make each obligation extinguish the other. And this process is applicable to any class of obligations which the legislative power of the State chooses to bring within its operation.

That it is exercised in aid of justice when a bank of circulation is compelled to receive that circulation in satisfaction of debts due to it, whether they be in judgment or in any other form, can hardly be questioned, if the rights of no one but the bank are affected by the act.

In what we have here said, we do not mean to be understood that, where the creditors of the bank have a right to have such a debt paid in lawful money, the legislature can deprive them of that right; nor that in any other case, where the judgment creditor represents an interest in the contract, which has a right to demand its payment in lawful money, the State can authorize its payment in any thing else.

In the case before us, if it appeared by the agreed facts on which the case was tried that there existed any creditors of the bank who had proved their debts as the law required, the case might have been different. But there is no evidence in this record that there was any other creditor of the bank in existence besides the defendant, when he made this motion for set-off.

And though it may be held that the bank had ceased to exist, it is clear that the stockholders, whose interest in that case would be represented by the commissioner, have no equity superior to that of the defendant, or which could be interposed to prevent the exercise of the right of set-off under the statute. That the right to set-off is by the statute extended to obligations of the bank, bought by defendant after the judgment was rendered against him, does not necessarily make it unconstitutional. The debt of the bank is a just debt. To compel the defendant first to pay his debt in money, and then take the chances of collecting of the bank, is unjust.

The act of the North Carolina legislature is but an enlargement of the principle of set-off to meet this class of cases. Though the statute uses the word "payment," it is obvious that payment in the technical sense is not meant. The whole proceeding is one of set-off. The defendant is compelled to make his application to the court, produce his bank-bills, and deposit them there. The order or judgment of the court is that the obligation of the bills and the obligation of the judgment are set off against each other, and both are extinguished. They are both satisfied.

It may be said that this legislation is retroactive; and, as applied to the case before us, it is so. But there is no constitutional inhibition against retrospective laws. Though generally distrusted, they are often beneficial, and sometimes necessary. Where they violate no provision of the Constitution of the United States, there exists no power in this court to declare them void. *Judgment affirmed.*

WEST PHILADELPHIA BANK *v.* DICKSON.

Money paid to his creditors, by a person who they have reasonable cause to believe is insolvent, or obtained by them on an attachment issued against his property, within four months next preceding the commencement of the bankruptcy proceedings, may be recovered by his assignee in bankruptcy.

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

The facts are stated in the opinion of the court.

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

Mr. Samuel Dickson, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

In the present action, the assignees in bankruptcy of Tryon Reakirt seek to recover from the West Philadelphia Bank two different sums of money. The first is a sum of $5,000 paid by Reakirt on the sixth day of February, 1871; the second is the sum of $4,559.76 collected by B. K. Jamieson on behalf of and for the benefit of the bank, through certain attachment

proceedings in the courts of the State of New York. The case was tried before a jury in the Circuit Court of the United States, and a verdict and judgment rendered in favor of the assignees for the amount demanded.

The sum first mentioned is claimed to belong to the assignees, on the ground that it was the payment of a debt, or the transfer of money or goods, with a view to give a fraudulent preference by an insolvent, and where the party receiving the money had reasonable cause to believe that the party paying the money was insolvent. The provisions of the thirty-fifth section of the Bankrupt Act control this branch of the case. There is no doubt expressed by any party as to the insolvency of Reakirt, the debtor. His career as a speculator had terminated in forgery. His forgeries had been discovered, his money was gone, and his trust in his rich relatives unavailing. The agent and director of the bank heard of the forgery, and was the first upon his track, demanding security or payment, and refused to give him even a part of a day to apply to his relatives for aid, but insisted upon an immediate transfer of his funds in bank. With the greatest pressure, only one-half of the debt could be obtained. Upon general principles, the case seems to fall clearly within the provisions of the act.

The knowledge of the agent was that of the principal, and there was not only reasonable cause to believe, but clear knowledge of, the insolvency of Reakirt.

The remaining sum falls under the fourteenth section of the Bankrupt Act, which is as follows, viz.: "As soon as the assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignees all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process, as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings."

After obtaining from the bankrupt his funds in Philadelphia, the agent of the bank, Mr. Jamieson, who was also one of its directors, went to New York, and there commenced an action in his own name, but for the benefit of the bank, against the bankrupt, and obtained an attachment against Randolph & Co., and Evans, Wharton, & Co., bankers, with whom Reakirt, the bankrupt, had a credit of about $11,000. He obtained a judgment against Reakirt for $5,176.82, and issued an execution, which was paid through the means of the attachment referred to. The statute declares this attachment, if made within four months preceding the commencement of the bankruptcy proceedings, as was this one, to be dissolved by the assignment in bankruptcy. It is avoided and made of no effect, and the proceedings under it are held for naught. The money obtained by color of it is money held for the assignee, and is recoverable by him.

But it is contended on behalf of the bank that the money thus obtained in each instance was the money of the bank, that it was a case of the reclamation of its own property. If the $5,000 obtained in Philadelphia on checks had been the identical money received from the bank, or the fruits of that money, or if in any manner the money could be traced or separated, this question might be raised. But, in fact, the debt had accrued to the bank, and the money had been received from it nearly two months before the occurrences of Feb. 6, This money had been deposited in various banks, mixed with the other funds of Reakirt, and all used by him at his convenience. There is not a pretence that the money obtained on the checks was the result of the particular transactions with the Philadelphia bank. Reakirt was a druggist, a manufacturer, a stock speculator, and, as has occurred in other like cases, a forger. In the last capacity he had realized the sum of $100,000. There is no evidence where this particular money came from, and certainly no presumption exists that it came from the West Philadelphia Bank. The money obtained upon the New York attachment was a part of a balance of $11,000 standing to Reakirt's credit, with no evidence of the source whence any part of it was derived. There is literally no evidence on which to base the theory of reclamation.

Much is said in argument on the subject of the rescission of the contract. The contract of loan was upon the note or notes of Reakirt, and in form was that of an ordinary loan of money. He gave forged securities as collateral. Whether this justified a rescission on the part of the bank of the entire contract, or whether the bank did rescind, we do not consider of any importance. If it could have identified and followed its money, this question might have become practical. But, as there is an entire failure of proof in that respect, the question does not arise. *Judgment affirmed.*

INSURANCE COMPANY *v.* PECHNER.

1. A person not a citizen of the State, in a court whereof he is sued, cannot, under the twelfth section of the Judiciary Act of 1789, remove the suit to the Circuit Court of the United States, by reason of the citizenship of the parties, unless his petition for removal affirmatively shows that the plaintiff was, at the time of the commencement of the suit, a citizen of such State.
2. The right of removal is statutory; and, before a party can avail himself of it to oust the jurisdiction of a State court, he must show upon the record that his case is one which comes within the provisions of the statute.

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

On the 1st of June, 1867, Pechner sued the Phœnix Insurance Company, a Connecticut corporation, in the Supreme Court of Chemung County, in the State of New York, upon a policy of insurance. On the 8th of the following month, and at the time of entering its appearance, the company presented to the court a petition, accompanied by the necessary security, for the removal of the cause to the Circuit Court of the United States. The petition, when taken in connection with the pleadings, set forth sufficiently the citizenship of the defendant in the State of Connecticut; but as to the citizenship of the plaintiff, the statement was, that, "as your petitioner is informed and believes, Isidor Pechner, the plaintiff in said action, is a citizen of the State of New York." The petition bears date June 11, 1867, and was sworn to the next day. Upon its presentation the court approved the security, but denied the application for removal.

On the 5th of June, 1869, the plaintiff filed an amended complaint, to which the defendant answered June 21, 1869. On the 2d of February, 1872, the cause coming on for trial, the defendant again presented its original petition for removal, which remained upon the files, and requested the court to proceed no further with the trial; but this request was denied, for the reason that the petition did not state facts sufficient to remove the cause. A jury was thereupon called, which returned a verdict in favor of the plaintiff, and judgment was in due form entered thereon against the defendant. The case was then taken to the Court of Appeals, where the judgment was affirmed, and the petition for removal held to be insufficient in law to effect a transfer of the cause, for the reason that it did not state affirmatively that Pechner was a citizen of the State of New York when the suit was commenced.

To reverse this judgment the present writ of error has been brought by the company, and the only error assigned is grounded upon this decision.

Mr. W. F. Cogswell for the plaintiff in error.

The plaintiff in error having taken the necessary steps to remove the action from the State to the Federal court, and the former having refused its application in that behalf, the judgment subsequently rendered is reviewable in this court, notwithstanding a defence of the action on the merits. *Gordon* v. *Longest*, 16 Pet. 97; *Kanouse* v. *Martin*, 15 How. 198.

The compliance with the conditions of the act of Congress ousted the Supreme Court of New York of its jurisdiction, and all further proceedings therein were void. 1 Stat. 79, sect. 12; *Stevens* v. *Phœnix Insurance Co.*, 41 N. Y. 149; *Gordon* v. *Longest*, *supra*; *Kanouse* v. *Martin*, *supra*.

Nor can the decision below be sustained by the verbal criticism of the Court of Appeals. *Ladd* v. *Tudor*, 3 Woodb. & M. 325; *People* v. *City of Chicago*, 34 Ill. 356; *Sweeney* v. *Coffin*, 1 Dill. 73; *Shepard* v. *Graves*, 14 How. 505.

The petition following the language of the act of Congress is sufficient, and this is shown especially by the uniform practice in the Federal courts under the next preceding section of the same statute. *Bingham* v. *Cabot et al.*, 3 Dall. 382; *Aber-*

crombie v. *Dupuis*, 1 Cranch, 342; *Piquignot* v. *Pennsylvania Railroad Co.*, 16 How. 104.

Although, in nearly all the States of the Union, for many years the only method by which a suit could be commenced was by some process the service and return of which preceded the filing of the declaration, the language of the declaration has been uniformly in the present tense. *Mollan* v. *Torrence*, 9 Wheat. 537; *Marshall* v. *Baltimore & Ohio Railroad Co.*, 16 How. 314; *Lafayette Insurance Co.* v. *French et al.*, 18 id. 404.

Mr. J. Hubley Ashton, and *Mr. Nathaniel Wilson*, *contra*.

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

The application for removal in this case was made under sect. 12 of the Judiciary Act of 1789. 1 Stat. 79. That section, so far as it is important for the determination of this case, reads as follows: —

"If a suit be commenced in any State court . . . by a citizen of the State in which the suit is brought against a citizen of another State, . . . and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the cause for trial into the next Circuit Court, . . . it shall then be the duty of the State court to . . . proceed no further in the cause."

Clearly this has reference to the citizenship of the parties when the suit is begun; for the language is, "If a suit be *commenced* by a citizen of the State in which the suit is brought against a citizen of another State, the defendant may, *when he enters his appearance*, petition for its removal." The phraseology employed in the acts of 1866, 14 Stat. 307, 1867, id. 558, and 1875, 18 id. 470, and in the Revised Statutes, sect. 639, is somewhat different, and we are not now called upon to give a construction to the language there used. As to the act of 1789, we entertain no doubt in this particular.

This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record in the

cause. It should state facts, which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot "proceed further with the cause." Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended.

It remains only to apply this rule to the facts as they appear in this record. The suit was commenced June 1, 1867. At that time there was nothing in the pleadings or process to indicate the citizenship of the plaintiff. The defendant, in its petition for removal, bearing date June 11, simply stated that the plaintiff is — that is to say, was at that date — a citizen of New York. This certainly is not stating affirmatively that such was his citizenship when the suit was commenced. The court had the right to take the case as made by the party himself, and not inquire further. If that was not sufficient to oust the jurisdiction, there was no reason why the court might not proceed with the cause. We think, therefore, that the Court of Appeals did not err in its decision.

Judgment affirmed.

AMORY *v.* AMORY.

SAME *v.* SAME.

1. A petition for the removal from a State court of a suit brought by the plaintiffs in their representative capacity as executors is insufficient, under the act of March 2, 1867 (14 Stat. 558), where the defendant, who is not a citizen of the State where the suit is brought, alleges, so far as the citizenship of the plaintiffs is concerned, that they, "as such executors," are citizens of that State.
2. Where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, it has reference to their personal citizenship.
3. *Insurance Company* v. *Pechner*, *supra*, p. 183, cited and approved.

ERROR to the Superior Court of the city of New York.

The facts are stated in the opinion of the court.

Mr. W. T. Birdsall and *Mr. W. R. Beebe* for the plaintiff in error.

The court declined to hear *Mr. Matt. H. Carpenter* for the defendants in error.

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

These cases are substantially disposed of by the decision in *Insurance Company* v. *Pechner*, *supra*, p. 183. They each present the question of the sufficiency of a petition for removal under the act of March 2, 1867, 14 Stat. 558. The suits were in New York by the defendants in error as executors, against the plaintiff in error, a citizen of New Jersey. The petitions for removal set forth sufficiently the citizenship of the plaintiff in error, but as to the defendants in error the allegations are "that said plaintiffs, as such executors, are citizens of the State of New York." Clearly this is not sufficient. Where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, it has reference to the parties as persons. A petition for removal must, therefore, state the personal citizenship of the parties, and not their official citizenship, if there can be such a thing. From the language here employed, the court may properly infer that, as persons, the plaintiffs in error were not citizens of New York. For all that appears, they may have been citizens of New Jersey, as was the defendant. Holding, as we do, that a State court is not bound to surrender its jurisdiction upon a petition for removal until at least a petition is filed, which, upon its face, shows the right of the petitioner to the transfer, it was not error for the court to retain these causes. We need not, therefore, consider whether the act of 1867 limits the right of removal to the citizenship of the parties at the time of the commencement of the suit, or whether the State court had the right to call upon the defendants in error to show cause against the application.

Judgments affirmed.

KERR *v.* CLAMPITT.

1. This court has no jurisdiction to revise the action of an inferior court upon the question of either granting or refusing a new trial, and the final judgment of such court cannot be examined through its rulings upon that question. If, when the final judgment is brought here for review by writ of error, no other documents are presented for consideration than such as were before the inferior court upon the application for a new trial, this court cannot look into them; and, if error is not otherwise disclosed by the record, the judgment will be affirmed.
2. This court must have before it a bill of exceptions, or what is equivalent thereto, upon which the final judgment of the court below was reviewed, or it will not examine into any alleged errors, except such as are otherwise apparent on the face of the record.

ERROR to the Supreme Court of the Territory of Utah.

The record in this case shows that several issues of fact regularly made up were tried by a jury in the third judicial district court of the Territory of Utah, that a verdict was returned in favor of the defendants in error for $3,583, and a judgment rendered thereon, Nov. 11, 1874; but it does not show that any exceptions were taken to the rulings of the court, either admitting or rejecting evidence, or to instructions given or to those refused, nor does it contain any thing purporting to be a bill of exceptions.

It shows, however, that a motion for a new trial was made on that day, and that a "statement or motion for a new trial" was also filed on the 20th of March, 1875. At the foot of the statement is the following agreement, signed by attorneys for both parties: "It is hereby agreed that the foregoing shall constitute the statement on motion for a new trial in the above-entitled cause, and is correct." Indorsed on the statement is the following: "Settled statement on new trial, filed March 20, 1875."

This statement purports to give certain rulings of the court upon the admission and rejection of evidence and upon instructions to the jury given and refused, and exceptions which, it is said, were taken; but, by express agreement of the parties by their attorneys, the use of the statement is limited to the hearing of the motion for a new trial.

The record also shows that defendants below gave notice of

an appeal to the Supreme Court of the Territory from the judgment entered on the verdict, as well as from that of the 1st of May, 1875, overruling the motion for new trial; and the bond recites an appeal from both judgments.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson* for the plaintiff in error.

Mr. S. S. Henkle, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

By the system of procedure in civil cases adopted in Utah, an appeal lies to its Supreme Court from an order of its District Courts granting or refusing a new trial, as well as from a final judgment. The statute enumerates the grounds upon which the verdict of a jury, or the finding of a court or a referee, may be set aside, and a new trial had upon the application of the party aggrieved, and provides the mode in which such grounds shall be presented to the court. If the new trial be asked for irregularity in the proceedings of the court, jury, or adverse party, or for abuse of discretion by which either party was prevented from having a fair trial, or for misconduct of the jury, or accident or surprise which ordinary prudence could not have guarded against, or for newly discovered evidence, the application must be made upon affidavits. If the new trial be asked for excessive damages, or insufficiency of the evidence to justify the verdict or other decision, or that it is against law, or for errors occurring at the trial, the application must be made upon a statement of the case, setting forth so much of the proceedings had, evidence given or offered, and rulings of the court, as will distinctly present the grounds urged in its support. But whether the application be made upon affidavits, or a statement thus prepared, the rulings thereon, whether of the District Court originally, or of the Supreme Court of the Territory on appeal, are not subject to review by this tribunal. We have no jurisdiction to revise the action of an inferior court upon the question of granting or refusing a new trial, however meritorious the grounds presented for its consideration or erroneous its decision. The final judgment cannot be examined through the rulings of the lower court upon that question. If, therefore, when the final judgment is brought before

us for review by writ of error, no other documents are presented for our consideration than such as were before the inferior court upon the application for a new trial, we cannot look into them; and, if error is not otherwise disclosed by the record, the judgment must be affirmed. And such is the condition of the case at bar. No question was before the District Court or the Supreme Court of the Territory, except such as arose on the application for a new trial.

The statute of Utah also provides the mode in which the final judgments of its district courts may be reviewed. It requires a statement of the errors alleged upon which the appellant relies, with so much of the evidence as may be necessary to explain them. Compiled Laws of Utah of 1876, sects. 1413, 1550, and 1555. This statement is only another name for a bill of exceptions, and is subject to similar rules. It will often embody substantially the same matters which are presented on a motion for a new trial, and it is not uncommon for counsel to stipulate that the statement on the motion shall be treated as a statement or bill of exceptions on appeal from the judgment. But, unless it is so stipulated, the statement intended for the motion cannot be used on appeal from the judgment, or considered here. We must have before us a bill of exceptions, or what is equivalent to such bill, upon which the final judgment below was reviewed by the Supreme Court of the Territory, or we cannot examine into any alleged errors except such as are otherwise apparent on the face of the record. The statement in the present case not being one into which we can look, there is no error presented upon which we can pass. *Sparrow* v. *Strong*, 4 Wall. 584; *Casgrave* v. *Howland*, 24 Cal. 457; *Carpenter* v. *Williamson*, 25 id. 154.

Judgment affirmed.

FABBRI *v.* MURPHY.

Certain goods were imported in November, 1869, and stored in a bonded warehouse until March 20, 1871, when they were withdrawn for consumption. *Held*, that, having so remained in such warehouse, they were, under the act of March 14, 1866 (14 Stat. 8), subject to the additional duty of ten per cent thereby imposed.

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

In November, 1869, Fabbri & Chauncey imported from Manilla into New York certain sugar, which, on the seventeenth day of that month, was stored in a United States bonded warehouse, where it remained until March 20, 1871, when it was withdrawn for consumption. The duty at the latter date amounted to $34,360.50, gold, to which ten per cent was added by the defendant Murphy, then collector of New York, as the sugar had remained in the bonded warehouse more than one year. The additional ten per cent was paid under protest, and an appeal taken from the collector's liquidation and decision. The Secretary of the Treasury having affirmed that decision, this suit was seasonably brought by the plaintiffs to recover the ten per cent, with interest thereon from the time of its payment. At the trial, they requested the court to charge, in substance, that the additional ten per cent was illegally imposed. This request was denied, and the jury told that, upon the uncontradicted evidence, the defendant was entitled to a verdict, which was rendered accordingly. To the instruction given and to those refused the plaintiffs duly excepted, and sued out this writ.

Mr. Grosvenor P. Lowrey for the plaintiffs in error.
Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Goods imported here from a foreign country may be entered for consumption or for warehousing; but, when entered for consumption, the requirement is that the duties shall be paid, or be secured to be paid, before a permit for landing the goods is granted. 1 Stat., sect. 62, p. 673.

Importations of the kind are required to be landed in open day; and the collection act provides that the goods shall not be landed or delivered from the ship without a permit from the collector. Examination of the entry is usually made by the entry-clerk; and, if found correct, the collector then proceeds to estimate the duties, as shown by the invoice value and quantity, and if the estimated amount of the duties is paid, or secured to be paid, as required by law, the collector is then authorized to grant a permit for the discharge and landing of the cargo. *Kimball* v. *Collector*, 10 Wall. 436.

Merchandise, if duly imported, with certain exceptions not necessary to be noticed, may be entered for warehousing without paying the duties at the time of the entry, in which event the goods are delivered into the possession of the collector, and are deposited, at the option of the owner, importer, consignee, or agent, at his expense, in any public warehouse or other place provided by law for the storage of such property.

Both the duties and expenses are required to be ascertained at the time of the entry of the goods for warehousing, and the duties and charges are to be secured by the bond of the owner, importer, or consignee, with surety or sureties to the satisfaction of the collector, the goods being at all times subject to the orders of the depositor, upon the payment of the proper duties and expenses. *United States* v. *Benson*, 2 Cliff. 520.

By the record, it appears that the plaintiffs, in the month of November, 1869, imported from Manilla one million nine hundred and sixty-three thousand four hundred and fifty pounds of sugar; that on the 17th of the same month they made entry of the whole amount for warehouse, and that the same were duly stored in a public bonded warehouse, situated in the city of New York, as appears from the warehouse entry and the return of the weigher; that the sugars were classified on the warehouse entry by the appraiser as not above No. 12, Dutch standard, in color; and that the duties, on the 17th of January following, were assessed at three cents a pound, under the then existing tariff. On the 20th of January, 1871, the plaintiffs made a withdrawal entry of the sugars for consumption, which throughout the whole period, from the time they were stored to the date of the withdrawal entry, had remained in the public

bonded warehouse. Prior to that time, to wit, on the 16th of the same month, the sugars were re-classified by the appraiser, under the act of Dec. 22, 1870, as appears by a memorandum on the withdrawal entry for consumption, as not above No. 7, Dutch standard, in color, and the rate of entry was noted by the appraiser on the entry at $1\frac{3}{4}$ cents per pound.

Apart from that, it also appears that, on the 20th of March in the same year, the duties on the sugars were liquidated by the collector at the reduced rate noted on the withdrawal entry, making the amount $34,360.50, with an additional duty of ten per cent on the previous duty imposed under the act of the 14th of March, 1866, the goods imported having remained in the public bonded warehouse for a longer period than one year.

By that act, all goods, wares, and merchandise remaining in warehouse under bond on the first day of May of that year might be withdrawn for consumption within one year from the date of original importation, on payment of the duties and charges to which they were subject by law at the time of such withdrawal. 14 Stat. 8.

Ten per cent on the original duty amounts to $3,436.05, and the two sums amount to $37,796.55.

Payment of the original duty was made without objection; but the record shows that the plaintiffs paid the additional duty of ten per cent under protest, and instituted the present suit to recover back the amount. Proper notice in writing was given by the plaintiffs to the collector, that they were dissatisfied with his decision in the final liquidation of the duties; and on the day the payment was made they appealed from his decision to the Secretary of the Treasury, who subsequently affirmed the decision of the collector.

Interest at six per cent on the amount of the additional duty is $593.27, making the additional duty, adding the interest to the date of the judgment, $4,029.30.

All of these facts were proved by the plaintiffs, the defendant offering no testimony, and the court directed a verdict for the defendant. Exceptions were filed by the plaintiffs; and they sued out a writ of error, and removed the cause into this court.

Errors are assigned as follows: 1. That the court erred in

refusing to charge the jury that, if they found that the sugars were not above No. 7, Dutch standard, in color, and were in public warehouse on Dec. 31, 1870, and so continued until March 20, 1871, and were on that day entered to be withdrawn for consumption, the sugars were not subject to any other duty than at the rate of $1\frac{3}{4}$ cents per pound. 2. That the court erred in refusing to instruct the jury that, if they found the facts to be as stated in the preceding assignment of error, the collector illegally exacted the additional duty of ten per cent. 3. That the court erred in refusing to instruct the jury that the plaintiffs were entitled to recover the amount of the additional duty of ten per cent exacted by the collector, with interest.

Import duties upon the sugars at the rate of $1\frac{3}{4}$ cents per pound, it is conceded, were properly exacted by the collector; and the record shows that the duties were finally liquidated at that rate before the sugars were withdrawn from the public bonded warehouse for consumption, and that the plaintiffs paid the whole of that amount without protest. Both parties agree that goods deposited in a public warehouse, and being there on the first day of May, 1866, might be withdrawn for consumption within one year from the date of the original importation, on payment of the duties and charges to which they were subject by law at the time of such withdrawal.

Imported, as the sugars in question were, on the 17th of November, 1869, it is clear that the plaintiffs might have withdrawn the same for consumption on payment of the duties to which they were subject by law, if withdrawn within one year from the time the importation was made; but they did not make any such entry until the 20th of the following March, more than four months after the year allowed for the purpose had expired.

Such depositors of imported goods might withdraw the same for consumption within one year from the date of importation without paying any thing beyond the duties and charges; but the privilege extended to depositors did not stop there, as appears by what follows in the same section. Instead of that, the provision is, that, after the expiration of one year from the date of original importation, and until the expiration of three years from said date, any goods, wares, or merchandise in bond

as aforesaid may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per cent of the amount of such duties and charges.

Pursuant to that provision in the act of the 14th of March, 1866, the collector exacted the additional duty which is the subject of contest under the present writ of error.

Certain intimations are made by the parties respectively that the computation of the collector is erroneous ; but the court is of the opinion that it is exactly correct, and that it does not lie with the plaintiffs to call it in question, as they allege in their declaration that the additional duty exacted by the collector is ten per cent of the duties properly assessed on the merchandise.

Responsive to that theory of the defence, the plaintiffs insist that the first clause of the twenty-sixth section of the act of the 14th of July, 1870, 16 Stat. 269, supersedes the provision invoked by the defendant, and that it gave to them the right to withdraw the sugars for consumption without paying any thing except the original duties and charges, as finally liquidated and noted in the withdrawal entry.

Imported goods, wares, and merchandise, the section provides, which may be in the public stores or bonded warehouses on the day and year the act shall take effect, shall be subjected to no other duty upon the entry thereof for consumption than if the same were imported after that day. When that act was passed, the sugars imported by the plaintiffs had been in the public warehouse nearly eight months, and the sugars could remain there something more than four months longer before the year would have expired during which the owner, importer, or consignee might withdraw the same for consumption under the prior act, on payment of the liquidated duties and charges.

Suppose the new act applies to the case before the court, which is not admitted, still it is clear that it would not supersede the defence arising under the prior act, as four months remained during which the plaintiff might have withdrawn the goods for consumption without being subjected to any additional duty under the prior act, and for the further reason, that the

prior act is not repealed by the new act under which the plaintiffs claim, nor is the provision of the new act repugnant to that of the prior act. Nothing like inconsistency appears in the provisions of the two acts at the passage of the latter, as applied to the case before the court, as the plaintiffs might under either act have withdrawn their goods deposited in the public warehouse at any time within four months subsequent to the passage of the new act, on payment of the duties and charges finally liquidated by the collector, and noted by the appraiser on the withdrawal entry.

Authorities to show that there must be a positive repugnancy between the provisions of the new law and the old, to work a repeal of the old law by implication, and that even then the old law is only repealed to the extent of the repugnancy, are very numerous and decisive. *Wood* v. *United States*, 16 Pet. 342.

Repeal by implication, upon the ground that the subsequent provision upon the same subject is repugnant to the prior law, is not favored in any case, and must always meet with disfavor where the attempt is made to apply the principle in the construction of the revenue laws of the United States.

Acts of Congress of the kind are often very complex in their provisions, in order to enable those charged with their execution to protect the treasury against the constant attempts of importers to evade the payment of new duties or increased taxation. New regulations often become necessary to enable the officers of the customs to defeat such designs; and the rule is, that in such cases there ought to be a manifest and irreconcilable repugnancy to warrant the conclusion that the old law is abrogated, or that the new law was intended to supersede the antecedent provision. *Aldridge* v. *Williams*, 3 How. 9; *The Distilled Spirits*, 11 Wall. 356.

Concede the theory of the plaintiffs to be correct, and it would follow that the sugars imported by the plaintiffs might remain in the public warehouse for an indefinite period without paying the liquidated duties, and without subjecting the importer, owner, or consignee to any additional charge when he should withdraw the same for consumption. Congress, it is believed, never intended that any such result should follow,

as it would be contrary to the policy of the government, as shown in all the acts of Congress establishing and regulating the warehousing system.

Authority to warehouse certain imported goods was granted by Congress at a very early period in our history. 1 Stat. 673. Option was given to the importers of teas, by the sixty-second section of the original collection act, either to secure the duties, as in case of other importations, or to give bond to the collector of the district where the teas were landed in double the amount of the duties, with condition for the payment of the same in two years from the date of the bond. Whenever the importer elected to give the bond, the requirement was that the goods should be deposited, at the expense of the importer, in one or more storehouses therein described. Regulations to the same effect were subsequently enacted in respect to the importation of wines and distilled spirits. 2 id. 469. Duties under that act were to be paid in twelve calendar months from the date of the bond, and the collector was required to accept the bond without surety.

Corresponding regulations were made at a later period in respect to wool and the manufactures of wool, or manufactures of which wool was a component part. 4 Id. 591. Imported goods of the kind might be placed in public stores under bond, subject to the payment of customary storage and charges, and to the payment of interest at the rate of six per cent per annum while so stored; and the provision was, that the duties on the articles so stored should be paid, one-half in three months and the other half in six months from the date of importation.

Duties of import were required by the subsequent tariff act to be paid in cash; and it was provided, in case of failure to pay the duties as required, that the collector should take possession of the same, and that the goods should be deposited in the public stores, there to be kept with due and reasonable care, at the charge and risk of the owner, importer, consignee, or agent. Goods of the kind might remain in public store for sixty days; but, if they remained beyond that period without payment of the duties, they were required to be appraised and sold by the collector. 5 id. 562. Throughout those provisions, the plain inference is that Congress did not regard the importation as

complete while the goods remained in the custody of the proper officers of the customs.

At a still later period, Congress passed the act to establish a warehousing system, in which it is provided that, in case any goods, wares, or merchandise deposited in public stores shall remain in the same beyond one year without payment of the duties and charges thereon, the same shall be appraised . . . and sold by the collector at public auction, under the regulations therein prescribed. 9 id. 53, 399.

Alterations were made in the warehousing system by a subsequent act, which provided that goods remaining in warehouse, and goods subsequently entered for warehousing under bond, may continue in warehouse, without the payment of the duties, for a period of three years from the date of the importation, and that the same may be withdrawn for consumption on payment of the duties and charges. 10 id. 271.

Increased revenue being required, Congress passed the act of the 5th of August, 1861, the fifth section of which enacted that goods actually on shipboard and bound to the United States, and all goods on deposit in warehouses and public stores at the passage of that act, shall be subject to pay such duties as were provided by law before and at the time of the passage of the act. 12 id. 293.

Provision was also made by the same section that goods deposited in public store or bonded warehouse after the act should take effect and go into operation, if designed for consumption here, must be withdrawn therefrom, or the duties thereon be paid, in three months after the same are deposited; and that goods designed for exportation and consumption in foreign countries may be withdrawn by the owner at any time before the expiration of three years after the same are deposited, — such goods, if not withdrawn in three years, to be regarded as abandoned to the government, and to be disposed of as therein provided.

Three months were allowed to owners within which to withdraw their goods from the public store or warehouse, or to pay the liquidated duties; but the further provision was, that, if they neglect to improve that privilege within three months from the time of the deposit, the goods may be withdrawn and entered

for consumption at any time within two years of the time of their deposit, upon the payment of the legal duties, with an addition of twenty-five per cent thereon.

Events beyond control made it necessary in that period that taxes should follow taxes in rapid succession; but it cannot be admitted that the taxes were any the less obligatory because the exactions were more frequent and at higher rates than in former years. None of these regulations amounted to a contract between the government and the importer, and of course they were at all times subject to modification, alteration, or repeal; but they show to a demonstration that it never was the policy of Congress to allow the owner, importer, or consignee to deposit imported goods in the public stores or warehouses without the payment of duties for an indefinite period of time, or for any great length of time, without requiring the depositor, when he withdrew the same for consumption, to pay an additional duty for the privilege.

Four months, less three days, of the year allowed by the prior act remained in which the goods might be withdrawn for consumption on payment of the liquidated duties and charges, without being subjected to any additional exaction, which gave full scope and opportunity for the corresponding privilege conferred by the twenty-sixth section of the subsequent act. 14 id. 8; 16 id. 269.

Examined, as the question should be, in the light of these suggestions and the antecedent legislation of Congress, it is clear that the new law supposed to be applicable to the case is not repugnant to the prior law, and that there is no error in the record.

Judgment affirmed.

PRESTON *v.* PRESTON.

1. A contract for the conveyance of lands, which a court of equity will specifically enforce, must be certain in its terms, and the certainty required has reference both to the description of the property and the estate to be conveyed. Accordingly, where the property could not be identified, specific performance was denied.
2. Where one having such a contract permitted the other party to execute a deed of trust of the lands to a trustee to secure certain indebtedness, with a power to sell them, if necessary, for the payment of such indebtedness, — *Held*, that he had waived his right to the conveyance, or, at least, had subordinated it to the interest of the trustee and the purchasers under him.
3. The delay of a party in taking proceedings to enforce such a contract for a period which would bar an action at law for the property is, except under special circumstances, such laches as disentitle him to the aid of a court of equity.

APPEAL from the Circuit Court of the United States for the Western District of Virginia.

This is a suit brought in the court below, Jan. 8, 1873, by John Preston, Jr., against Thomas L. Preston, James C. Campbell, Arthur C. Cummings, William Alex. Stuart, and George W. Palmer, for the specific performance of an agreement made Aug. 30, 1847, for the conveyance of certain lands.

The court below dismissed the bill, whereupon the complainant appealed here.

The facts in the case are fully stated in the opinion of the court.

Mr. William L. Royall for the appellant.

Mr. Thomas J. Kirkpatrick, *contra.*

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit to enforce the specific performance of an agreement for the conveyance of certain lands in Virginia. It appears from the record that in 1846 one Sarah B. Preston, of Abingdon, in that State, died possessed of a large amount of real property, embracing the premises in controversy. By her last will and testament, which was duly probated, she made the following devise: —

"I give and devise to my three sons, William C. Preston, John S. Preston, and Thomas L. Preston, and to their several heirs for ever, my salt-works estate, embracing and including therein as well

the original and principal tract containing the wells, as all the additions subsequently acquired, and all my lands of every description, whether cleared or woodland, either adjacent to or in the vicinity of the salt-works estate, in the counties of Smyth and Washington."

Upon the property thus devised the testator charged the payment of certain legacies to the amount of $80,000. She also made her three sons her residuary devisees. In August of the following year, John S. Preston, one of the devisees, by an agreement in writing sold to his brother, Thomas L. Preston, all the interest which he had acquired under the will in the salt-works estate and adjoining lands and as residuary devisee.

It would appear from the recitals in the deed of trust made to secure the purchase-money, as hereafter mentioned, that a conveyance of the property was on the same day executed and delivered to Thomas L. Preston in conformity with this agreement, though it was never placed on record. In consideration of this sale, and of the transfer of certain partnership claims and other personal property, Thomas L. Preston agreed to pay John S. Preston $50,000 on or before the first day of January, 1860, with interest, and to secure the same by a mortgage or deed of trust of the property; to assume the payment of the legacies charged upon the salt-works estate; to indemnify his brother against liability for the debts of sundry partnerships of which he was a member, and to convey to him a tract of land described as "adjoining the salt-works estate, containing about three hundred and fifty acres, and known as the Campbellsville tract, and also a sufficient quantity of other lands adjoining the said tract, to make up the quantity of five hundred acres of land." In compliance with this agreement, and on the same day, Thomas L. Preston executed a deed of trust of the real property to a trustee to secure the payment of the $50,000 and interest. But no conveyance of the Campbellsville tract and adjoining lands was ever made by him to his brother; and it is to compel such conveyance that the present suit is brought. The complainant acquired whatever interest he possesses in the land by purchase from John S. Preston in 1870.

To the maintenance of this suit there are insuperable objections. In the first place, the property of which a conveyance

is sought has not been identified; and it would seem that at this day it is incapable of identification. Numerous witnesses were called to testify as to the locality and bounds of the Campbellsville tract; but no one of them could speak with knowledge on the subject. Most of them could give only impressions. Old residents in the neighborhood had never heard of the tract, and no deed or record could be found which referred to any property by that name. The bill, it is true, alleges that the tract was well known and distinguished from other parts of the saltworks estate, and could be easily marked out by metes and bounds; but no proof supported the allegation. The two Prestons, between whom the agreement was made, were examined in the case; and, though they stated that the tract could be easily identified, they both failed to show with any certainty what and where it was, further than that it was a part of the estate lying north of Holston River. But north of that river lay between seven and eight hundred acres, equally a portion of that estate, and no separation of the part sold from the rest was shown. Until the Campbellsville tract could be identified, adjoining lands could not be selected to make up the stipulated five hundred acres. It may be doubted whether, even in a controversy between the original parties, a court of equity would compel the execution of a conveyance with the vague description of the agreement. But as here the whole property, of which the land sold constitutes only a portion, had passed for a valuable consideration to third parties, it was essential that the complainant, seeking to enforce a conveyance from them, should be able to point out with distinctness the property which he claimed. It is a familiar rule in this branch of the law that a contract, which a court of equity will specifically enforce, must be certain as well as fair in its terms; and the certainty required has reference both to the description of the property and the estate to be conveyed. Uncertainty as to either, not capable of being removed by extrinsic evidence, is fatal to any suit for a specific performance.

In the second place, John S. Preston virtually consented to a sale of the premises in controversy. Although his brother upon his purchase had agreed to convey back to him this portion of the estate, he at once transferred the whole property to

a trustee to secure the purchase-money. To this transfer John made no objection, either to the form of the deed of trust or to its contents. Executed as it was for his security, it will be presumed to have been executed with his knowledge. If he had any objection to the use made of the property, it was his duty to declare it at the time. Silence then was acquiescence.

Subsequently, in April, 1848, the other brother, William C. Preston, for the consideration of $25,000, also conveyed his interest in the estate to Thomas L. Preston; and in January, 1850, the latter executed to the same trustee a deed of trust of the interest thus acquired and his previous interest to secure the purchase-money. In July, 1859, having become embarrassed, he made a general deed of trust, by which he conveyed the entire salt-works estate, and adjoining lands and other property, to a new trustee, in trust, among other things, to secure the payment of incumbrances and liens upon the property held by John S. Preston, amounting to about $110,000, and by William C. Preston, amounting to about $25,000. In June, 1862, this new trustee sold the property, with other interests, to Stuart, Palmer, and Parker for the consideration of $425,000, and soon afterwards they went into its possession. Neither to this deed of trust did John S. Preston make any objection in respect either to its form or contents; and for years afterwards he received from the trustee large sums of money. Under these circumstances, he must be held to have waived any right to a conveyance of the Campbellsville tract, whatever that might have been, and adjoining lands, or at least to have subordinated it to that of the trustees named in the deeds of trust and of purchasers under them.

In the third place, the present suit is brought too late. By the law of Virginia, the limitation to real actions for land lying west of the Alleghany Mountains is ten years. By analogy with that law, a court of equity will, under circumstances like the present, treat as barred within the same period a suit for the conveyance of lands situated as these are in that part of the State. That period had elapsed after the purchase of the defendants before this suit was instituted, and more than a quarter of a century had passed since the contract was made

the enforcement of which is sought. The delay of one to this extent in prosecuting his rights under a contract is, except under special circumstances not existing here, such laches as disentitle him to the aid of a court of equity.

Decree affirmed.

BATES *v.* CLARK.

1. In the absence of any different provision by treaty or by act of Congress, all the country described by the first section of the act of June 30, 1834 (4 Stat. 729), as Indian country, remains such only as long as the Indians retain their title to the soil.
2. Whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians for wrongs committed in time of peace under orders emanating from a source which is itself without authority in the premises. Hence a military officer, seizing liquors supposed to be in Indian country when they are not, is liable to an action as a trespasser.
3. The difference between the value of the goods so seized, at the place where they were taken and the place where they were returned to the owners, is the proper measure of damages.

ERROR to the Supreme Court of the Territory of Dakota.

The facts are stated in the opinion of the court.

Mr. Assistant Attorney-General Smith for the plaintiffs in error.

Mr. John B. Sanborn, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The plaintiff in error, Bates, was a captain in the army of the United States, in command at Fort Seward, in the Territory of Dakota, near the crossing of the James River by the North Pacific Railroad; and Yeckley, the other plaintiff in error, was a lieutenant under him at the time of the commission of the trespass for which the judgment in this case was recovered against them. The defendants in error, plaintiffs below, were doing a general mercantile business on the James River, also near said crossing, when a lot of whiskey, part of their stock of goods, was seized by defendants. They brought this action to recover damages for the trespass. The defendants pleaded their official character, that the place where the

seizure was made was Indian country, and it was, therefore, their duty to seize the whiskey which was kept there for purpose of sale, and that, in accordance with the acts of Congress on that subject, they had delivered the whiskey to the marshal of the United States, under a writ from the proper court, on a proceeding instituted by the United States attorney for that district. They further pleaded, that before the commencement of this action the goods had been delivered to plaintiffs by the marshal, and that plaintiffs had suffered no damage. They also set up an order of the commanding officer of the department of Dakota.

The act of June 30, 1834, entitled "An Act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontier," which is a very long and important act, begins by describing in its first section the country or territory in which that act shall be operative. It is in these words: —

"Be it enacted, that all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and also that part of the United States east of the Mississippi River, and not within any State to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed Indian country." 4 Stat. 729.

The twentieth section of that act forbids the introduction of wines or spirituous liquors within this Territory. By the act of 1864, amending this section, it is made lawful for any Indian agent or commanding officer of a military post, who has reason to suspect that spirituous liquors or wines have been, or are about to be, introduced into Indian country in violation of law, to search for and seize the same, to be delivered over to the proper officer, and proceeded against by libel in the proper court, and forfeited, one half to the informer and the other half to the use of the United States. 13 id. 29.

If this whiskey was seized in Indian country, within the meaning of the act of 1834 and the amendment of 1864, the plea which set up that the defendants acted in good faith under that statute ought to be sustained. This, the principal question in the case, is raised by the action of the court below in striking out the plea which set up these defences as sham and frivolous,

and because the *locus in quo* was not Indian country. This mode of disposing of a plea which fairly raises a most important issue of law seems to be growing in favor in the territorial courts. It is an unscientific and unprofessional mode of raising and deciding a pure issue of law. This should always be done, when it can, by a demurrer, which is the recognized and appropriate mode in the common law; or by exception, which amounts to the same thing in the civil law, as it is applied to answers in chancery practice. A motion to strike out a plea is properly made when it has been filed irregularly, is not sworn to, if that is required, or wants signature of counsel, or any defect of that character; but if a real and important issue of law is to be made, that issue should be raised by demurrer.

In the present case, this is unimportant, as the same question is presented by the prayer for instructions and by the charge of the court.

What, then, is Indian country, within the meaning of the acts of Congress regulating intercourse with the Indians?

The first act of Congress on the subject is that of March 30, 1802. 2 Stat. 139. The first section of that act describes a boundary, the description occupying over a page of the statute-book, and declares that this shall be distinctly marked under orders of the President, and considered as the line of the Indian territory, or Indian country as it is called indifferently in several sections of the act. The country west of the Mississippi then belonged to France or Spain. The boundary above mentioned, commencing at the mouth of the Cayahoga River, on Lake Erie, now Cleveland, runs in a wonderfully tortuous course through the country north-west of the Ohio River to the falls of that river, now Louisville, then down that river to a point between the mouths of the Cumberland and Tennessee Rivers, and thence through Kentucky, Tennessee, and Georgia, to the St. Mary's River, pursuing all the way the lines represented by treaties with various Indian tribes.

Though many statutes concerning intercourse with the Indians and prescribing offences within the Indian country were passed, no other attempt to define what was Indian country was made by Congress until the act of 1834, the first section of which we have given *verbatim*. In the mean time, we had

purchased the country west of the Mississippi, and had organized two States and a Territory there, and most of the Indians with whom we had to deal lived there. The country east of the Mississippi, and not within any State, was the region north of Illinois and Indiana, and north-west of Ohio, now constituting the States of Michigan and Wisconsin, and then under the government of the Michigan Territory.

Notwithstanding the immense changes which have since taken place in the vast region covered by the act of 1834, by the extinguishment of Indian titles, the creation of States and the formation of territorial governments, Congress has not thought it necessary to make any new definition of Indian country. Yet during all this time a large body of laws has been in existence, whose operation was confined to the Indian country, whatever that may be. And men have been punished by death, by fine, and by imprisonment, of which the courts who so punished them had no jurisdiction, if the offences were not committed in the Indian country as established by law. These facts afford the strongest presumption that the Congress of the United States, and the judges who administered those laws, must have found in the definition of Indian country, in the act of 1834, such an adaptability to the altered circumstances of what was then Indian country as to enable them to ascertain what it was at any time since then.

If the section which we have given *verbatim* be read with a comma or semicolon inserted after the word "State," or if, without the insertion of any point there, we read it so as to apply the words, "to which the Indian title has not been extinguished," to all the region mentioned in the section, we have a criterion which will always distinguish what is Indian country from what is not, so long as the existing system governing our relations with Indians is continued. Read hastily, it might appear that these words were limited in their application to that part of the United States east of the Mississippi River. But a strict reading in that sense is that it is the *State* to which the Indian title has not been extinguished that governs the matter. "And not within any State to which the Indian title has not been extinguished," implies that Indians had title to some State then in existence, and that there were other States

to which their title had been extinguished. This meaning is too absurd to be considered.

On the other hand, if the section be read as describing lands west of the Mississippi, outside of the States of Louisiana and Missouri, and of the Territory of Arkansas, and lands east of the Mississippi not included in any State, but lands alone to which the Indian title has not been extinguished, we have a description of the Indian country which was good then, and which is good now, and which is capable of easy application at any time.

The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

In the case of *The American Fur Company* v. *The United States*, 2 Pet. 358, decided in 1829, the goods of the company had been seized for violating the laws by their introduction into the Indian country under the act of 1802. This court held that if, by treaties made with the Indians after the passage of that act, their title to the region where the offence was committed had been extinguished, it had thereby ceased to be Indian country, and the statute did not apply to it.

So in the case of *United States* v. *Forty-three Gallons of Whiskey*, decided at the last term, 93 U. S. 188, where this act of 1834 was fully considered; while the court holds that by a certain clause in the treaty by which the *locus in quo* was ceded by the Indians, it remained Indian country until they removed from it, the whole opinion goes upon the hypothesis that when the Indian title is extinguished it ceases to be Indian country, unless some such reservation takes it out of the rule. When this treaty was made, in 1864, the land ceded was within the territorial limits of the State of Minnesota. The opinion holds that it was Indian country before the treaty, and did not cease to be so when the treaty was made, by reason of the special

clause to the contrary in the treaty, though within the boundaries of a State.

It follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress.

The plaintiffs below violated no law in having the whiskey for sale at the place where it was seized; and the twentieth section of the act of 1834, as amended by the act of 1864, conferred no authority whatever on the defendants to seize the property.

It is a sufficient answer to the plea, that the defendants were subordinate officers acting under orders of a superior, to say that whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians in time of peace by orders emanating from a source which is itself without authority. The authority of the commandant of the post in the case was precisely the same as the Indian agent or sub-agent, or superintendent; and it will hardly be maintained that if either of them, wholly mistaking their powers, had seized the goods, he would have incurred no liability.

So the plea that they had good reason to believe that this was Indian country, and that they acted in good faith, while it might excuse these officers from punitory damages, is no defence to the action. If it had been Indian country, and it had turned out that the plaintiffs had a license, or did not intend to sell or introduce the goods, the fact that defendants acted on reasonable ground would have exempted them from liability.

But the objection fatal to all this class of defences is that in that locality they were utterly without any authority in the premises; and their honest belief that they had is no defence in their case more than in any other, where a party mistaking his rights commits a trespass by forcibly seizing and taking away another man's property.

There was here no process from a competent court, nor any order from any source having authority, and there is, therefore, no defence.

As the damages found in the verdict are measured by the

difference in value of the property at the time and place where seized, and the time and place where returned to the possession of the plaintiffs, we see no error in the rule by which they were ascertained. *Judgment affirmed.*

RADICH *v.* HUTCHINS.

1. *Carlisle* v. *United States*, 16 Wall. 147, cited and approved.
2. A foreigner, domiciled during the year 1864 in Texas, who, in order to obtain permission of the rebel government to export his cotton, sold at a nominal price, and delivered to its agents or officers for its use, an equal amount of other cotton, which he subsequently redeemed by paying a stipulated sum therefor, directly contributed to the support of the enemy, and gave him aid and comfort. Out of such a transaction, no demand against such agents or officers can arise which will be enforced in the courts of the United States.
3. The coercion or duress which will render a payment involuntary must consist of some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means of immediate relief than by making payment.

ERROR to the Circuit Court of the United States for the Eastern District of Texas.

This was an action brought by Radich against Hutchins and Wells. He alleges in his petition that he is a subject of the Emperor of Russia, and that he was, in 1864, the owner of four hundred and fifty bales of cotton, of the value of $50,000, which he designed to export from Texas, where he then resided, to Mexico, and which were then in transit on their way to Matamoras; that the defendant Hutchins, claiming to be a lieutenant-colonel in the army of the Confederate States, and chief of the cotton office at Houston in that State, combining with the defendant Wells and others, had, without warrant of law, by a public notice, prohibited the exportation of cotton from the State, except upon written permits from his office; that such permits would not be issued, except upon condition that the person desiring to export cotton should sell to them an equal amount, at a nominal and arbitrary price, for the benefit of the Confederate States; that, being desirous to export and sell his cotton, because of the risk incurred of its destruction or loss during the war, and knowing that if he should attempt to send it beyond

the frontier of the State into Mexico the armed forces of the Confederate States, provided to carry out the illegal exactions of the defendants and their confederates, would capture and confiscate it, he was compelled to submit, and did submit, to the condition imposed, and accordingly delivered to the defendants one-half of his cotton, namely, two hundred and twenty-five bales, at a nominal and arbitrary price, as a consideration for a permit to export the other half, but upon a stipulation, however, insisted upon by himself, that he should have the privilege of redeeming the bales sold, and exporting them upon the payment of such sum as the defendants might demand; and that afterwards he paid them $13,357 in specie, and in goods, wares, and merchandise at specie values, in redemption of the bales and for a permit to export them. He alleges that the amount thus paid was illegally and oppressively exacted, and that he submitted to the wrong because of the armed forces to support and enforce it.

The defendants demurred. The demurrer was sustained and the petition dismissed. Radich thereupon sued out this writ of error.

The case was argued for the plaintiff in error by *Mr. Thomas J. Durant*, who cited *Cutner* v. *United States*, 17 Wall. 517; *The Santissima Trinidad*, 7 Wheat. 283; *United States* v. *Guillem*, 11 How. 47; *Sprott* v. *United States*, 20 Wall. 459; *Hickman* v. *Jones*, 9 id. 197; *The Venice*, 2 id. 258.

Mr. Philip Phillips, *contra.*

MR. JUSTICE FIELD delivered the opinion of the court.

If at the time the transaction took place, which has given rise to the present action, the plaintiff was a subject of the Emperor of Russia, as he alleges, that fact cannot affect the decision of the case, or any question presented for our consideration. He was then a resident of the State of Texas, and engaged in business there. As a foreigner domiciled in the country, he was bound to obey all the laws of the United States not immediately relating to citizenship, and was equally amenable with citizens to the penalties prescribed for their infraction. He owed allegiance to the government of the country so long as he resided within its limits, and can claim

no exemption from the statutes passed to punish treason, or the giving of aid and comfort to the insurgent States. The law on this subject is well settled and universally recognized. *Carlisle* v. *United States*, 16 Wall. 147.

The case presented by the petition is without merit.

The substance of the complaint is that the defendants, as officers of the Confederate government, by a public notice, had prohibited the exportation of cotton from the State of Texas to Mexico, except upon condition that the exporter should sell to them an equal amount for the benefit of the Confederate government; and that the plaintiff, being the owner of cotton which he desired to export, and fearing that if he attempted to export it without such permit it would be seized and confiscated by the armed forces of that government, complied with the condition, and obtained a permit from the officers to export two hundred and twenty-five bales, and sold to them an equal amount for the Confederate government, obtaining at the same time the privilege of redeeming the cotton sold, and receiving a permit to export it, upon payment of such sum as they might demand; that he took advantage of this privilege and redeemed the cotton, paying in money and goods the sum mentioned in the petition.

There is nothing in these allegations showing that the defendants subjected the plaintiff to any coercion or duress, which would justify an action against them, either for the return of the money paid or for the value of the goods delivered in place of the money, or for damages of any kind. There is no averment that either of the defendants ever made, or attempted to make, any seizure of the cotton, or that either of them was an impressing or other officer, exercising or claiming to exercise any power for its seizure, or had any thing to do with the command or operations of the armed forces of the insurgents in the State of Texas. All that is directly charged against them is the publication of a notice that the exportation of cotton was forbidden, except on permits from the cotton office. The armed force is not stated to have been under the direction of that office. The whole proceeding set forth in the petition was a voluntary one by the plaintiff. He applied to the cotton office, and sold the cotton subsequently redeemed. It is not

pretended that either of the defendants made any application for its purchase.

To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, — treating now the redemption of the cotton as made in money, goods being taken as equivalent for a part of the amount, — there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the Court of Appeals of Maryland, the doctrine established by the authorities is, that "a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid." *Mayor and City Council of Baltimore* v. *Lefferman*, 4 Gill (Md.), 425; *Brumagim* v. *Tillinghast*, 18 Cal. 265; *Mays* v. *Cincinnati*, 1 Ohio St. 268.

Tested by these cases, the allegation of coercion or duress becomes frivolous. It is plain that the plaintiff entered voluntarily upon the negotiation with the defendants, and subsequently paid the redemption money without any constraint which would in law change the voluntary character of the payment. Such being the case, the transaction is one which is fatally tainted. The sale of the cotton was to the Confederate States; the money paid and goods delivered for its redemption were for the benefit of those States, to assist them in their war against the government and authority of the United States. The money paid and the goods delivered constituted, therefore, nothing less than a direct contribution to the support of the insurgents: they gave aid and comfort to the enemy. No demand arising out of such a transaction can have any standing in the courts of the Union.

At this time, also, it was the declared policy of the United States to prevent all intercourse between the insurgent States and the loyal States, and also between them and foreign countries, and thus to cut off from the insurgents the means of prolonging the existing war. In pursuance of this policy, the ports and coasts of those States were blockaded, commerce

with their inhabitants was prohibited, except as specially authorized under regulations of the Treasury Department, and property which eluded the blockade was subject to seizure and condemnation. The attention of the authorities was specially directed to prevent the exportation of cotton, upon which the insurgents chiefly relied to obtain the means for the continuance of their struggle. The plaintiff alleges that he paid money and delivered goods to the defendants for the use of the Confederate government, in order to obtain permission to violate this policy and legislation, and now he modestly asks that he should be allowed in the courts of the United States to recover damages from them because they took what he offered for the permission.

The demurrer was properly sustained.

Judgment affirmed.

ROEMER *v.* SIMON.

1. Letters-patent No. 56,801, issued July 31, 1866, to William Roemer, for an improvement in travelling-bags, cannot be sustained, as the thing patented was, before his alleged invention, known and extensively used by others in this country.
2. Where, after setting up the defence of prior knowledge and use of the thing patented, and giving the names and residences of witnesses intended to be called to prove the defence, the answer to a bill for the infringement of letters-patent alleges that the names and residences of certain other witnesses are unknown to the defendant, and prays leave to insert and set forth in the answer such names and residences when they shall be discovered, it is competent for the court to allow, upon such discovery, the amendment to be made *nunc pro tunc*.

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

This is a suit by William Roemer against the appellee for the infringement of letters-patent No. 56,801, granted to him July 31, 1866, for an improvement in travelling-bags.

The answer set up among the defences the want of novelty of the improvement, and the knowledge and use of it prior to the alleged invention of the complainant.

Upon the final hearing, the court below dismissed the bill; whereupon the complainant appealed here.

The other facts are set forth in the opinion of the court.

Mr. Arthur v. Briesen for the appellant.
Mr. Frederic H. Betts, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Patentees or assignees in a suit for infringement, where the patent described in the bill of complaint is introduced in evidence, are presumed to be the original and first inventors of the described improvement; and, if they have proved the alleged infringement, the burden of proof is cast upon the respondents to show that the patent is invalid, unless the patent is materially defective in form.

Parties defendants sued as infringers are not allowed, in an action at law, to set up the defence of a prior invention, knowledge, or use of the thing patented, unless they have given notice of such defence in writing thirty days before the trial, and have stated in that notice "the names of the patentees and the dates of their patents alleged to have been invented, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used." 16 Stat. 208; Rev. Stat., sect. 4920; *Seymour* v. *Osborne*, 11 Wall. 516; *Blanchard* v. *Putnam*, 8 id. 420.

Since the passage of the act of the 8th of July, 1870, the regulation in equity suits is that defences such as are described in sect. 61 of that act "may be pleaded in any equity suit for relief against an alleged infringement, and that proof of the same may be given upon like notice in the answer of the respondent, and with like effect." 16 Stat. 208.

Service was made; and the respondents appeared and filed an answer, in which they deny that they have ever in any way infringed the letters-patent described in the bill of complaint; and they also set up several other defences, as follows: 1. That the specification filed in the Patent Office contains less than the whole truth relative to the invention, or more than is necessary to produce the described effect. 2. That the patent was surreptitiously and unjustly obtained for that which was in fact invented by another. 3. That the alleged invention had been patented prior to the supposed invention by the complainant. 4. That the alleged invention had been described in

a certain publication prior to the alleged invention by the patentee. 5. That the complainant was not the original and first inventor of the supposed improvement; that the same had been previously invented and known and used by the persons named in the answer, and by many other persons whose names are unknown to the respondents, which, when discovered, the respondents pray leave to insert and set forth in the answer.

Proofs were taken on both sides; and the parties went to hearing upon bill, answer, replication, and the proofs exhibited in the record. Both parties were fully heard; and the court entered a decree in favor of the respondents, dismissing the bill of complaint; and the complainant appealed to this court.

Three errors are assigned, in substance and effect as follows: 1. That the court did not give due effect to the agreement between the parties which was introduced in evidence by the complainant. 2. That the evidence introduced by the respondents to prove use and knowledge of the thing patented prior to the patent granted to the complainant was insufficient to establish that defence. 3. That the court erred in admitting evidence to prove such prior use and knowledge, of which no notice had been given in the answer.

Questions not involved in the assignment of errors will be passed over without examination.

1. By the articles of agreement, the respondents agree that "they will not manufacture or use the clasp or catch manufactured by a certain firm therein mentioned without the consent of the complainant, his executors, administrators, or assigns." They did not agree not to manufacture or use the thing patented in the complainant's patent. Instead of that, the charge in the bill of complaint is that the respondents have manufactured and sold to others large quantities of travelling-bags in violation of the complainant's rights and privileges under his letters-patent. Attempt is made to show that the clasp or catch manufactured by the firm referred to in the agreement is the same as that of the complainant; but that is a question of fact open to controversy, which is sufficient to show that the agreement does not work an estoppel, as supposed by the respondents. Curtis on Patents (4th ed.), sect. 217.

Much reference to the specification is unnecessary, as the

defence, that the respondents have not infringed the supposed invention, is not pressed in the argument for the appellee. My invention, says the patentee, consists in the application of two staples or clamps, one at or near each end, to the frame of a travelling-bag in such a manner that when the bag is packed full the staples or clamps shall fasten the ends or corners together. In the same connection he also describes a mode of fastening the staples or clamps to the frame of the bag by a strap which passes over the centre of each staple; and he adds, that the staple or clamp "is made of strong iron turned down at each end." Sufficient description is given of the staple or clamp; but the strap is not described, except by being exhibited in the drawings.

Clamps, the patentee admits, have before been applied to small and fancy bags instead of a lock at or near the centre of the frame, and therefore he does not claim the application of clamps or staples broadly; but, says the patentee, what I claim as my invention and desire to secure by letters-patent is a frame for travelling-bags having staples and straps, meaning the described staple and strap adjusted at the top thereof, relieving the lock from strain, as combined, arranged, and described.

Suffice it to say, that it is obvious from an inspection of the specification that the real invention, if any, is in the staples or clamps, and perhaps in the arrangement of two of them at the top of the frame. Doubtless one method of arrangement may be better than another; but the particular method of attachment to the frame cannot be very material, as any mechanic, if furnished with the clamps, could affix the device in various equivalent ways.

Five witnesses admitted to be credible were examined by the respondents, whose testimony clearly shows that the thing patented had been previously known and used very extensively in this country by the persons named in the answer and by many others.

Exclusive rights of the kind are granted only to inventors or discoverers of some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof; and the law is well settled that nothing short of inven-

tion or discovery will support a patent for any such alleged new and useful improvement. Certain other important conditions are also annexed to the exercise of the right to obtain such a muniment of title for such an invention or discovery; as, for example, the improvement must not only be new and useful, but it must be one not known or used by others in this country and not patented, or described before the invention or discovery in any printed publication in this or any foreign country, and must not have been in public use or on sale more than two years prior to the application for a patent. 16 Stat. 201; Rev. Stat. sect. 4886; *Collar Company* v. *Van Dusen*, 23 Wall. 531; *Dunbar* v. *Myers*, 94 U. S. 196.

Antecedent patents here or elsewhere are not set up in the answer; and it is clear that proof of prior use in a foreign country will not supersede a patent granted here, unless the alleged invention was patented in some foreign country. Proof of such foreign manufacture and use, if known to the applicant for a patent, may be evidence tending to show that he is not the inventor of the alleged new improvement; but it is not sufficient to supersede the patent if he did not borrow his supposed invention from that source, unless the foreign inventor obtained a patent for his improvement, or the same was described in some printed publication.

Doubt upon that subject cannot be entertained; but it is equally clear, that if the alleged improvement had been previously patented here or in a foreign country, or if it had been previously known or used by others in this country, or if it had been in public use or on sale for more than two years prior to his application for a patent, the letters-patent cannot be sustained. 16 Stat. 201.

Competent proof of a prior patent anywhere is entirely wanting, nor is there any satisfactory evidence that the invention was previously described in any printed publication; but the evidence shows beyond any reasonable doubt that the thing patented was known and used extensively by others in this country before the invention or discovery made by the patentee, as set forth and described in the bill of complaint. Such was the finding of the court below; and the evidence is so full to the point, and is so fully set forth in the record and in the opin-

ion delivered in the Circuit Court, that it is not necessary to reproduce it in the present opinion.

Suppose that is so, still it is insisted by the complainant that the testimony of two of the witnesses should have been excluded, because their names and residences were not set forth in the answer as persons alleged to have had a prior knowledge of the thing patented.

Written notice of the names of the witnesses intended to be called by the defendant or respondent to prove such a defence is not required by the act of Congress. Instead of that, the requirement is that the defendant party shall state the names of the patentees, and the dates of their patents and when granted, and "the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used." 16 Stat. 208.

Notice of the kind is required, in order to guard the moving party from being surprised at the trial by a defence of a nature which he could not be presumed to know or be prepared to meet; and, to prevent such consequences, the defendant or respondent is required to state "the names and residences of the persons alleged to have previously invented the improvement, or to have the prior knowledge of the thing patented, and where and by whom it had been used." *Teese et al.* v. *Huntington et al.*, 23 How. 2.

Prior use and knowledge of the thing patented may be pleaded as a defence to a suit for infringement; but the respondent cannot be allowed to give evidence to support such defence, if seasonable objection be made, unless it appears that he gave notice in his answer of the names and residences of the persons alleged to have had such prior knowledge of the thing patented. *Blanchard* v. *Putnam*, 8 Wall. 420.

Seasonable objection was made in that case by the plaintiff, the suit being an action at law, and the court held that the evidence was not admissible without an antecedent compliance with the conditions of the patent act; but the case before the court is clearly distinguished from that in several particulars. Due notice was given in the answer that the invention and every material and substantial part thereof had been previously

invented and used by and was known to certain persons therein named, twelve in all; and the respondents in due form stated the names and residences of the persons alleged to have had such prior knowledge, and where and by whom the invention had been used. Superadded to that, they also alleged that the supposed invention had previously been known to and used by many other persons to the respondents unknown; and they prayed leave, as before remarked, that, when discovered, they might be permitted to insert and set forth their names in the answer. Pursuant to that reservation, two witnesses were examined upon that subject by the respondents without objection; nor does the record, irrespective of the opinion of the court, show that any objection to the admissibility of the evidence was ever made.

Previous notice of the examination of those two witnesses, it seems, was not given; but the presiding justice states that, if seasonable objection had been made, the evidence would have been excluded. None such was made; and it is well-settled law that the failure to interpose any such objection before the final hearing is a waiver of the required notice in an equity suit. *Brown* v. *Hall*, 6 Blatch. 405.

Explicit notice was given in the answer that such a defence would be made, and that leave to amend the answer would be asked in case the names and residences of other persons having like knowledge in that regard should be discovered; and, when such a discovery was made, the respondents in due form applied to the court for leave to insert their names and residences in the answer. Viewed in the light of these circumstances, we are all of the opinion, that it was clearly competent to allow the proposed amendment. *Teese et al.* v. *Huntington et al.*, *supra*.

Authority to grant the amendment being established, it follows that the court might properly allow it to be entered *nunc pro tunc*, as originally prayed in the answer. Due notice was there given that such defence would be made, and that the respondents would move to insert the names and residences of other persons when discovered. Such notice prevented surprise, and fully justified the court in allowing the amendment and making the order in the form exhibited in the record.

Suppose the rule were otherwise, still a new hearing would not benefit the complainant, as the testimony of the other three witnesses is abundantly sufficient to establish the defence of prior knowledge and use. *Decree affirmed.*

EX PARTE RAILROAD COMPANY.

1. Where the final decree of the Circuit Court is inconsistent with an interlocutory decree granting affirmative relief upon a cross-bill in the same suit, a party adversely affected by such final decree, where the matter in dispute is sufficient, has a right to appeal to this court, which, if withheld, may be enforced by *mandamus*.
2. An assignment by a defendant of his interest in the subject-matter of a pending suit does not necessarily defeat the suit. The assignee is bound by what is done against the assignor; and may either come in and assume the burden of the litigation in his own name, or act in the name of his assignor.

PETITION for a writ of *mandamus* to the Circuit Court of the United States for the Middle District of Alabama.

The facts important to the determination of this case are as follows: —

The Montgomery and Eufaula Railroad Company, in 1860, borrowed $30,000 from the State of Alabama, and executed a mortgage upon its property and franchises to secure the payment. Afterwards, the State indorsed bonds of the company to the amount of $1,280,000, and a statutory lien was created upon the same property and franchises as further security for the bonds. In 1870, the company issued a series of bonds to the amount of $500,000, and secured the payment of them by a deed of trust upon the same property.

Default having been made in the payment of the interest upon the last-named bonds, Samuel A. Strang, claiming to be the holder of some of them, filed May 10, 1872, a bill for the foreclosure of the mortgage, in the District Court of the United States for the Middle District of Alabama, then possessing circuit court powers. To this bill, the trustees named in the mortgage, the railroad company, and one of its judgment creditors, were alone made parties. No mention was made of the

first mortgage to the State. On the 17th January, 1874, the South and North Alabama Railroad Company was, upon its own petition, admitted as a defendant in the suit, with leave to answer and file a cross-bill. In its answer it set forth its ownership of the $30,000 mortgage to the State, and insisted upon the priority of its security; and, in the cross-bill, prayed a sale of the mortgaged property, for the purpose of paying the debt.

On the 1st of April, 1875, Mason Young and others, claiming to be the owners of certain of the bonds secured by the statutory lien, filed a bill in the Circuit Court of the United States for the Middle District of Alabama to enforce that lien. To this bill the Montgomery and Eufaula Railroad Company, the South and North Alabama Railroad Company, and the trustees under the Strang mortgage, were made parties. The South and North Alabama Railroad Company answered, setting up its lien, and asking that it might be enforced as superior to that of any other claimants. In the answer, it was stated that, on the 20th April, 1876, the company had transferred its claim to the Louisville and Nashville Railroad Company. In June, 1876, the Strang suit was, by operation of law, transferred to the Circuit Court of the United States for the Middle District of Alabama.

After this transfer, the Strang and Young suits, with the cross-bill, were submitted to the court upon the pleadings, proof, and admissions of the solicitors for the determination of the question, whether the mortgage claim of the South and North Alabama Railroad Company was paramount and superior to the other claims and liens asserted and disclosed in the pleadings of the other parties to the several causes; and, upon this submission, the court decided in favor of that company, finding the amount due to be $61,212, and entered an interlocutory decree to that effect, reserving all further questions. At a subsequent term, on the 6th of June, 1877, each of the several causes came on to be heard upon the prayer of the cross-bill of the South and North Alabama Company, for an order to sell the mortgaged property, and pay its debt out of the proceeds, and upon the motion of the several complainants in the original bills for a reference to ascertain the amount due for costs, solicitors' fees, and outstanding unpaid receiver's certificates. Upon

this hearing, a decree was entered in each of the suits directing the sale, as asked for, and the application of the proceeds to the payment of the claim of the Alabama Company in preference to that of the other mortgage creditors. From these decrees Young and his co-complainants appealed, and filed the necessary bond for a *supersedeas;* but at the same term, and the next day after the appeal was taken, the court again considered the cause, upon the motion of those holding claims adverse to that company for a decree settling their equities as between themselves, and directing a sale of the property subject to the claim or lien of that company, "to the end that this litigation, except in so far as it concerns the South and North Alabama Railroad Company, may be terminated;" and it appearing to the court that the parties to such motion were entitled to a decree as to their several equities as between each other, the two suits of Strang and Young were consolidated, and a decree was rendered, July 3, 1877, settling the equities of the parties, exclusive of the Alabama Company, ordering a sale of the property, subject to the lien of that company, and directing that the purchaser take title subject to such lien, as the same might finally be adjudicated and determined. It was also adjudged that all the rights and equities of that company should remain the same in all respects as if that decree had not been rendered, such company "not being a party to the submission, and, in the opinion of the court, as a matter of law, not a party to the decree, although appearing and claiming to be a party, and insisting upon the right as a party to object thereto."

On the same day with the rendition of this decree, the South and North Alabama Company prayed an appeal to this court to operate as a *supersedeas* upon the filing of the necessary bond; but the court refused to grant the appeal or accept a bond, being of the opinion that the company had no right to appeal, or to supersede the execution of the decree.

The South and North Alabama Railroad Company now petitions for a *mandamus* requiring the Circuit Court to grant the appeal and accept a good and sufficient *supersedeas* bond.

Mr. Thomas G. Jones for the petitioner.

The decree of July 3, 1877, is final, and the petitioner, as a party to the suit, had the right to an appeal to this court. *Stovall*

v. *Banks*, 10 Wall. 583; *Railroad Company* v. *Bradleys*, 7 id. 575; *The Douro*, 3 id. 564; *United States* v. *Adams*, 6 id. 101; *Ex parte Jordan*, 94 U. S. 248; Phillips's Practice, 76–81.

The assignment of the debt by the petitioner to the Louisville and Nashville Railroad Company did not take away that right. *Partridge* v. *Partridge*, 38 Pa. St. 78; *Adams* v. *Parker*, 12 Gray (Mass.), 53; *Warden* v. *Adams*, 15 Mass. 233; *Smith* v. *Kelley*, 27 Me. 237; *Lyford* v. *Ross*, 33 id. 197; *Crinion* v. *Nelson*, 7 Mo. 466; *Davies* v. *Austin*, 1 Ves. 247; Thomas on Mortgages, 104; Story, Eq. Pl., sects. 156, 351.

The appeal having been improperly denied, *mandamus* is the proper remedy. *United States* v. *Gomez*, 3 Wall. 752; *Ex parte Jordan*, *supra*; *Life and Fire Insurance Company of New York* v. *Adams*, 9 Pet. 571.

Mr. D. S. Troy, *contra*.

The appeal was properly denied. *Simpson* v. *Greeley*, 20 Wall. 152; *Stratton* v. *Jarvis & Brown*, 8 Pet. 4; *Neal* v. *Singleton*, 26 Ark. 491; *Combs* v. *Jefferson Pond Draining Co.*, 3 Metc. (Ky.) 72; *Strong* v. *Winslow*, 3 Chand. (Wis.) 21; *Amery* v. *Amery*, 26 Wis. 152; High, Extraordinary Remedies, sects. 8–10.

The petitioner having assigned its debt, and thus transferred its interest in the subject-matter in controversy, lost any right it might otherwise have had to an appeal. Story, Eq. Pl., sects. 156, 349, 351, 352; Mitford & Tyler, Eq. Pl., p. 164; *Mills* v. *Hoag*, 7 Paige (N. Y.), Ch. 18; *Card* v. *Bird*, 10 id. 427; *People* v. *Wilson*, 26 Cal. 127; *Griggs* v. *Detroit*, 10 Mich. 117; *Solomon* v. *Solomon*, 13 Sim. 516; *Johnson* v. *Thomas*, 11 Beav. 502.

Moreover, its lien, whatever it might be, was expressly saved from the operation of the decree.

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

This petition for a *mandamus* is resisted, upon the general ground that the South and North Alabama Railroad Company cannot appeal, because its rights are not injuriously affected by the decree. That company was a party to each of the suits consolidated for the purposes of the decree. It was, therefore, a

party to the consolidated suit, and entitled to be heard upon the pleadings as they stood before the consolidation, since no change in that particular was ordered or deemed necessary by the court. Among the pleadings in the Strang suit, thus brought into the consolidated suit, was the cross-bill of this company praying affirmative relief in the final determination of the cause. It matters not that at a former day in the term a special decree had been rendered upon the subject-matter of the cross-bill, and that an appeal from that decree had been taken; for "a cross-bill is a mere auxiliary suit and a dependency of the original." *Cross* v. *De Valle*, 1 Wall. 5. As we have said in *Ayres et al.* v. *Carver et al.*, 17 How. 591, "both the original and cross-bill constitute one suit," and ought to be heard at the same time. Consequently, "any decision or decree in the proceedings upon the cross-bill is not a final decree in the suit, and . . . not the subject of an appeal to this court. . . . The decree, whether maintaining or dismissing the bill, disposes of a proceeding simply incidental to the principal matter in litigation, and can only be reviewed on an appeal from the final decree disposing of the whole case. That appeal brings up all the proceedings for re-examination, when the party aggrieved by any determination in respect to the cross-bill has the opportunity to review it, as in the case of any other interlocutory proceeding in the case." A cross-bill must grow out of the matters alleged in the original bill, and is used to bring the whole dispute before the court, so that there may be a complete decree touching the subject-matter of the action. 2 Daniell, Ch. 1548. The South and North Alabama Company deemed it necessary, for the protection of its rights in the mortgaged property, that in any sale which might be ordered provision should be made for the payment of its claim out of the proceeds, insisting, for that purpose, that its lien was prior in time to that of either of the other mortgage creditors. To accomplish this, a cross-bill was necessary, and it was accordingly filed. The decree upon this bill being, under the ruling in *Ayres* v. *Carver*, interlocutory only, was superseded by that of July 3, which finally disposed of the cause in a manner entirely inconsistent with its provisions. It is clear, therefore, that the decree as rendered did, in effect, deny the company

the relief it asked, and that, if there were nothing more in the case, redress might be had by an appeal.

But it is claimed that, as in the answer of the South and North Alabama Company to the bill of Young, it was stated that pending that suit, and consequently pending that of Strang and the cross-bill, the company had assigned its debt, it had now no right to insist upon affirmative relief in the action, and, therefore, could not appeal. In both the suits it was a defendant against whom relief was asked. It defended against the claims of the several complainants, and, as an incident to that defence, sought to obtain protection for its own rights. It is well settled that an assignment by a defendant of his interest in a litigation does not necessarily defeat a suit. His assignee taking *pendente lite* is bound by what is done against him. The assignee may, at his own election, come in by an appropriate application, and make himself a party, so as to assume the burden of the litigation in his own name, or he may act in the name of his assignor. A *pendente lite* assignment carries with it an implied license by the assignor for the use of his name in the cause by the assignee to protect the rights assigned. Of this, the plaintiffs in the action cannot complain, because the assignee is bound by all that is done, whether a party by name or not. Acting upon this principle, notwithstanding the statement in the answer, the company has all the time, in the whole course of the subsequent proceedings, been treated as the representative of the interest of its assignee. Subsequent to the answer, and during the May Term, 1876, the cause was submitted by consent of all parties for decision and decree upon the question whether the mortgage claim or lien asserted and disclosed in the answer and cross-bill in the Strang suit and in the answer in the Young suit was, and still continued to be, paramount and superior to the claims and liens of the other parties. Upon this submission, the court found that the lien was paramount, and entered an interlocutory decree to that effect. In addition to this, on the 6th June, 1877, the parties stipulated, for the purposes of evidence in the cause, that the South and North Alabama Company was the owner of the bonds and the mortgage to secure them. It is thus apparent that, for the purposes of the suit, by the understanding of all the parties,

that company represented the claim which was being enforced in its name, and was entitled to take such steps as might be deemed necessary for the protection of those in whose behalf it was acting.

A writ of *mandamus* may issue directing the circuit judge, or the Circuit Court of the United States for the Middle District of Alabama, to allow the appeal prayed for as of July 3, 1877, and, upon the allowance of the appeal, to accept as of the same date good and sufficient security for a *supersedeas* if offered; and it is *So ordered.*

INSURANCE COMPANY *v.* EXPRESS COMPANY.

A policy, issued to an express company, insuring goods and merchandise in its care for transportation while on board cars or other conveyances, contained the following provision: "It is a further condition of this insurance, that no loss is to be paid in case of collision, except fire ensue, and then only for the loss and damage by fire. And that no loss is to be paid arising from petroleum or other explosive oils." Certain goods in the possession of the company, and in the course of transportation by it, were in an express freight-car, forming part of a railway train, which collided with another train composed mainly of oil-cars loaded with petroleum. Immediately upon the collision, the petroleum burst into flames, which enveloped and destroyed the freight-car and the goods. *Held,* that the loss thereby sustained by the express company was not covered by the policy.

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

The facts are stated in the opinion of the court.

Mr. N. B. Hoxie for the plaintiff in error.
Mr. S. P. Nash, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

This was an action upon two policies of insurance against fire, issued by the defendants to the plaintiffs below, an express company, and covering goods, wares, and merchandise in their care for transportation while on board cars or other conveyances, including water and stage routes, embracing the entire routes of the company designated on a map specified. The policies, though differing in the sums insured, were alike in all

other particulars. To the action two defences were set up, both founded upon certain provisions of the policies. The material parts out of which the first of these defences is thought to arise are the following: —

"It is a further condition of this insurance, that no loss is to be paid in case of collision, except fire ensue, and then only for the loss and damage by fire. And that no loss is to be paid arising from petroleum or other explosive oils."

"Petroleum, rock, earth, coal, kerosene, or carbon oils of any description, whether crude or refined; benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, phosgene, or any other inflammable liquid, are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight, otherwise this policy shall be null and void."

"If any property covered by this insurance be damaged by lightning, or the bursting of a boiler, or by explosion from any cause, this company shall not be liable therefor, unless fire ensues, and then for the loss by fire only, which shall be determined by the value of the damaged property after the casualty by explosion or lightning."

It is claimed that by force of these provisions the loss which occurred was excepted from the risk undertaken by the insurers, or, in other words, that the loss was not covered by the policies. This is one of the defences set up against any recovery by the plaintiffs.

The other defence is, that the suit was not brought within the term of twelve months next after the loss or damage occurred, and was, therefore, barred by an express stipulation contained in the policies. Both these defences were overruled in the Circuit Court, and the jury was instructed to return a verdict for the plaintiffs. It is obvious that, if either of the defences was maintainable, — if the loss was not covered by the policies, or if the suit was barred by any stipulation contained in them, — the instruction given to the jury was erroneous. And, as we think the loss was excepted from the risk assumed by the insurance company, it will be unnecessary to consider whether the action was brought too late.

There is no controversy about the facts. They were agreed upon and admitted at the trial. During the years 1870 and 1871, the New York Central and Hudson River Railroad was one of the routes of the plaintiff denoted on the map referred to in the policies of insurance.

On Feb. 6, 1871, an oil freight-train of said railroad was on its way from the city of Albany to the city of New York, on the westerly track of the railroad. The train was composed mainly of oil-cars, so called, the same being trucks or platforms, having upon them, respectively, two large wooden tanks, with iron hoops; one of the tanks at each end of the trucks or platforms, and each tank containing several thousand gallons of petroleum.

By the breaking of an axle, one of the oil-cars was thrown from or left the westerly track, and so left and situated that it stood across the easterly track of the railroad, upon the bridge next south of the tunnel at New Hamburgh.

While the oil-car was so situated, an express passenger-train of the railroad company, composed of locomotive and tender, baggage-car, express freight-car, five sleeping-cars, and one ordinary passenger-car, connected in the order stated, was on its way from the city of New York to the city of Albany, upon the easterly track of the railroad. In the express freight-car was a large quantity of merchandise in the possession of the plaintiffs, and in the course of transportation by them.

The express passenger-train was proceeding at a high rate of speed, and while so proceeding, at or about the hour of ten o'clock in the evening of the said sixth day of February, 1871, struck one of the oil-tanks upon the oil-car standing across the easterly track of the railroad upon the bridge, as before mentioned.

Immediately upon the collision, the petroleum in said tank so struck was in some way ignited and burst into flames, which surrounded and enveloped the locomotive and tender, baggage-car, express freight-car, and first, second, and third sleeping-cars of the express passenger-train, and consumed the bridge, the baggage-car and its contents, the express freight-car and most of its contents, and the first, second, and third sleeping-cars, with many of the passengers therein.

There was no petroleum or other explosive oil in or upon either of said trains in the possession or under the control of the plaintiffs.

In view of the facts thus stated, it is an inevitable inference that the destruction of the express-car and its contents arose from the burning petroleum, or was caused by it; and it makes no difference to this case how the petroleum was ignited, whether by burning coals from the locomotive, or by heat generated in the collision.

The policies insured only against fire, and the excepting clause we have quoted was plainly intended to exclude from the risk taken certain possible fires. It stated, as a condition of the insurance, that no loss should be paid in case of collision, except fire ensued, and then only for the loss and damage by fire, and that no loss should be paid arising from petroleum or other explosive oils. This plainly implies that, in contemplation of the parties, a loss by fire might arise or be caused by petroleum. That would be impossible, unless the petroleum were ignited in some way. It must, therefore, have been understood that burning petroleum, distinguished from the match, coals, or collision that ignited it, might originate a fire, and that a loss might arise from it. Such a loss, therefore, must have been the one intended to be excepted, as truly as the excepting a loss from gunpowder would mean from ignited gunpowder, not merely from the loss caused by the match which ignited it. Keeping in mind the general intent of the contract, which was insurance against fire, we may, perhaps, arrive at the understanding of the parties by following the succession of provisions the policy contains. After having acknowledged the receipt of the premium for insurance of the property against fire generally, the thought seems to have occurred that railroad collisions might take place, causing damage and resulting in fire. The policy, therefore, stipulated that in such cases only the damage caused by fire, as distinguished from that caused by the collision, should be covered by the policies. Then it seems to have been considered that collisions might result in setting fire to petroleum, a known dangerous substance, which, when ignited, produces uncontrollable fires; and, therefore, it was stipulated that no loss arising from petroleum

should be paid for, even though its ignition should ensue as a consequence of collision. Looking at the position in the contract of these excepting provisions, being in juxtaposition, as they are, and in one policy parts of the same sentence, it is evident that such must have been the process of thought of the parties. The meaning of the language used by the insurers, then, is this: We will insure you against fire; and, if fire ensues from a collision, we will pay the damages caused by the fire, though not that caused by the collision; but if a fire ensuing a collision arise from petroleum or other explosive oils, we do not undertake to pay the loss. All other losses caused by fire resulting from collision we will pay. Such, we think, is the most natural construction of the excepting clause.

The circuit judge was of opinion that what the parties contemplated was exemption from liability for loss occasioned by explosion. This he inferred from the expression, "no loss is to be paid arising from petroleum *or other explosive oils*" (severing it from the sentence of which it is really a part). Hence, he concluded that the parties treated petroleum as an explosive substance; and that when, as generally, in case of fire, if an explosion occur which is caused by the fire, the insurers might be liable for the whole damage caused by the explosion, in this case they were exempted by the exception from all loss except that immediately communicated by fire. To us this appears to be a strained and unnatural construction, and it is decisive against it that the parties have clearly and expressly stipulated for the case of loss by explosion in another part of the policy. It is a fair and necessary inference from this that the parties had in mind, when they inserted the clause, other causes of loss and other limitations of liability.

The defendants in error have argued that the exempting clause may fairly be construed so as to read, "No loss is to be paid arising from petroleum or other explosive oils carried by the parties insured," or "carried upon the same train of cars or other conveyance used by the parties insured." But such a construction would be making a contract, instead of interpreting one already made. Another section of the policies contains a condition that petroleum, rock, earth, coal, kerosene, or carbon oils of any description, whether crude or refined, benzine,

benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, phosgene, or any other inflammable liquid, shall not be stored, used, kept, or allowed on the premises insured (that is, in the cars or conveyances employed), either permanently or temporarily, for sale or otherwise. The petroleum referred to in the excepting clause must, therefore, have been some other than such as might be carried by the assured, or on the conveyances used by them. Collisions of express trains with petroleum-oil trains, and the consequent frightful destruction of property and life by fire, had occurred before these policies were issued, and manifestly the contracting parties intended to take out of the risk assured the damages which might result from such a possible catastrophe.

We are, therefore, led to the conclusion that the loss sustained by the plaintiff was not covered by the policies, and that the Circuit Court erred in charging the jury to return a verdict against the defendants.

Judgment reversed.

INSURANCE COMPANY *v.* RODEL.

1. By a policy upon the life of A., for the benefit of his wife, an insurance company promised to pay her a certain sum, "for her sole and separate use and benefit, ninety days after due notice and satisfactory evidence of the death of the said A., and of the just claim of the assured (or proof of interest, if assigned or held as security), under this policy, has been received and approved by the company." *Held*, that the words "just claim of the assured" have reference to her claim or title to the policy, and not to the justness of her cause of action thereon.
2. A fact, disclosed by the proofs of the death of the insured furnished to the company, which might be set up as a defence to a suit on the policy, does not derogate from their sufficiency, nor bar the bringing of such suit.
3. Where a policy provides that it shall be void if the insured shall "die by his own hand," the court should not take from the jury, as insufficient to sustain a recovery, evidence tending to show that he was insane when he committed the act which caused his death. The weight of the evidence is for the jury to pass upon, although the court may, in its discretion, express its opinion thereon.
4. The testimony of ordinary persons as to the conduct, manner, and appearance of the insured, and to the impressions thereby made upon them, is competent to go to the jury upon the question of his insanity.
5. The charge of the court below upon that question, being in the language sanctioned and approved in *Life Insurance Company* v. *Terry*, 15 Wall. 580, was not erroneous.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This was an action on a policy, issued by the Charter Oak Life Insurance Company, upon the life of Emil G. Rodel, for the benefit of his wife, the plaintiff below. The policy was dated June 25, 1873, and contained a promise to pay to the plaintiff, "for her sole and separate use and benefit, ninety days after due notice and satisfactory evidence of the death of the said Emil G. Rodel and of the just claim of the assured (or proof of interest, if assigned or held as security), under this policy, has been received and approved by the company." It further contained, among other conditions, the following: that, in case the said Emil G. Rodel should "die by his own hand," the policy should be void. It was conceded that he died on the fifth day of December, 1873, from the effects of poison administered by his own hand; and this fact was set up in the answer, by way of defence: but the plaintiff in her replication averred that he was insane at the time, and not in possession of his mental faculties, and not responsible, in consequence, for his act; and denied that he committed suicide or died by his own hand, within the meaning and intention of the policy. Whether the deceased was insane or not when he took the poison was the principal issue in the cause. The company, however, in its answer, made another issue, by denying that it had ever received due notice and satisfactory evidence of the death of Rodel and of the just claim of the plaintiff under the policy; averring that the only proof and notice it had received from the plaintiff of Rodel's death, and of her claim under the policy, had been and was to the effect that "said Emil G. Rodel committed suicide at about 6.35 o'clock, P.M., Friday, Dec. 5, 1873, in a saloon on north-east corner of Eleventh and Market Streets, in the city and county of St. Louis., Mo., by taking poison," as appeared from the certificate of the coroner accompanying and making part of said notice and proof received by the company, without any other proof of the death or of the circumstances thereof. The plaintiff in her replication averred, as she had done in her petition, that due notice and proof of his death and of her claim had been given, according to the terms of the policy.

On the trial, the plaintiff first put in evidence the policy, and the proofs of death which had been served on the company. The latter were in the usual form, but accompanied by the coroner's certificate, stating the cause of death as alleged in the answer. They were objected to as insufficient, the company contending that, by the policy itself, satisfactory notice and proof of death and of the just claim of the assured was a condition precedent to the right of demanding payment, and, consequently, to the right of bringing suit on the policy.

The court overruled the objection and admitted the evidence, and the company excepted.

There was a verdict and judgment for the plaintiff for $5,130; whereupon the company brought the case here.

The other facts in the case, and the instruction given and those refused, are set forth in the opinion of the court.

Mr. Samuel Knox for the plaintiff in error.

The proofs of death and of the claim of the plaintiff below, furnished the company, are wholly insufficient to charge it in this action. The requirements of the policy in that respect are a condition precedent, and must be strictly complied with. Bliss, Life Ins. (2d ed.), sect. 257; May, Ins., sect. 465; *O'Reilly* v. *Guardian Mut. Life Insurance Co.*, 60 N. Y. 169; *Taylor* v. *Ætna Life Insurance Co.*, 13 Gray (Mass.), 434; *Woodfin* v. *Asheville Mut. Life Insurance Co.*, 6 Jones (N. C.), L. 558; *Columbia Insurance Co.* v. *Lawrence*, 2 Pet. 25; *Campbell* v. *Charter Oak Fire and Marine Insurance Co.*, 10 Allen (Mass.), 213; *Edgerly* v. *Farmers' Insurance Co.*, 43 Iowa, 587; *Johnson* v. *Phœnix Insurance Co.*, 112 Mass. 49.

The plaintiff herself notified the defendant that the insured died by his own hand; yet she failed to furnish with the preliminary proofs, as to her just claim under the policy, the slightest evidence that at the time of the suicide he was so far insane as to relieve his act from the consequences provided in the policy.

The company was therefore justified in refusing to pay, upon evidence neither satisfactory nor sufficient to show any thing except that the company was not liable upon the policy, and that the suit could not be maintained. *Insurance Company* v. *Newton*, 22 Wall. 32; *Campbell* v. *Charter Oak Fire and Marine*

Insurance Co., supra; Braunstein v. *Accidental Death Insurance Co.*, 1 B. & S. 782; 1 Greenl. Evid., sect. 2.

The court erred in refusing to direct a verdict for the defendant at the close of the plaintiff's case. 2 Greenl. Evid., sects. 372, 373; Bliss, Life Ins. (2d ed.), sect. 367; 2 Bishop, Cr. Proc. (2d ed.), sects. 669–673; *Coffey* v. *Home Life Insurance Co.*, 35 N. Y. Sup. Ct. 314; *Weed* v. *Mutual Benefit Life Insurance Co.*, id. 386; *Knickerbocker Life Insurance Co.* v. *Peters*, 42 Md. 414; *Merritt* v. *Cotton States Life Insurance Co.*, 55 Ga. 103; *McClure* v. *Mut. Life Insurance Co.*, 55 N. Y. 651; Ray, Med. Jur. of Ins. (5th ed.), sect. 488; 2 Taylor, Med. Jur. (2d ed.) 637; *Phadenhauer* v. *Germania Life Insurance Co.*, 7 Heisk. (Tenn.) 567; *Fowler* v. *Mut. Life Insurance Co.*, 4 Lans. (N. Y.) 202; *Moore* v. *Connecticut Mut. Life Insurance Co.*, 4 Bigl. L. Ins. R. 138; *Coverston* v. *Connecticut Mut. Life Insurance Co.*, id. 169; *American Life Insurance Co.* v. *Isett's Adm'r*, 74 Pa. St. 167; *Borradaile* v. *Hunter*, 5 Sco. N. R. 418; *Dufaur* v. *Professional Life Assurance Co.*, 25 Beav. 599; *State* v. *Stickley*, 41 Iowa, 232; *State* v. *Felter*, 25 id. 67; *Dean* v. *American Mut. Life Insurance Co.*, 4 Allen (Mass.), 96; *De Gogorza* v. *Knickerbocker Life Insurance Co.*, 65 N. Y. 232; *Gay* v. *Union Mut. Life Insurance Co.*, 9 Blatchf. 142; *Hathaway* v. *National Life Insurance Co.*, 48 Vt. 335; *Equitable Life Assurance Society* v. *Paterson*, 41 Ga. 338; *Commonwealth* v. *Mosler*, 4 Pa. St. 264; *Cooper* v. *Massachusetts Mut. Life Insurance Co.*, 102 Mass. 227; *Terry* v. *Life Insurance Company*, 1 Dill. 403; *Van Zandt* v. *Mutual Benefit Life Insurance Company*, 55 N. Y. 169; *St. Louis Life Insurance Co.* v. *Graves*, 6 Bush (Ky.), 268; *Insurance Company* v. *Terry*, 15 Wall. 580; *Breasted* v. *Farmers' Loan and Trust Co.*, 4 Hill (N. Y.), 73; *Easterbrook* v. *Union Mutual Life Co.*, 54 Me. 224.

Whether there is any evidence, or, if there is, whether it is sufficient to sustain the burden of proof on any issue, is always a question of law for the court. *Pleasants* v. *Fant*, 22 Wall. 116; *Improvement Company* v. *Munson*, 14 id. 442; *Schuchardt* v. *Allens*, 1 id. 359; *Commissioners, &c.* v. *Clark*, 94 U. S. 284.

The judgment should be reversed, because of the manifest error committed by the court in refusing the several instructions to the jury requested by the defendant. 1 Greenl. Evid.,

sect. 2; *Insurance Company* v. *Newton*, 22 Wall. 32; *Campbell* v. *Charter Oak Fire and Marine Insurance Co.*, 10 Allen (Mass.), 213; *Braunstein* v. *Accidental Death Insurance Co.*, 1 B. & S. 782; *Van Zandt* v. *Mut. Benefit Life Insurance Co.*, 55 N. Y. 169; *McClure* v. *Mut. Life Insurance Co.*, id. 651; *Fowler* v. *Same*, 4 Lans. (N. Y.) 202; *Merritt* v. *Cotton States Life Insurance Co.*, 55 Ga. 103.

The charge of Mr. Justice Miller, in *Terry* v. *Life Insurance Co.*, 1 Dill. 1, was sustained in 15 Wall. 580, on the ground that it was applicable to the case made by the evidence. But it will not be contended that this court held that such a charge would be proper in every case, or provide the full and complete test of the effect of suicide under all the changing circumstances of each particular case, on policies of life insurance, where, perhaps for the double purpose of rescuing the memory of the dead from obloquy, and of abstracting from the coffers of a corporation a part of its wealth, it is claimed that the deceased came to his death through insanity.

A charge, giving statements of law, however unexceptionable as abstract propositions, is erroneous, if they are not applicable to the case, as they tend to mislead the jury. *Clarke* v. *Dutcher*, 9 Cow. (N. Y.) 674; *Wardell* v. *Hughes*, 3 Wend. (N. Y.) 418; *Beaver* v. *Taylor*, 1 Wall. 637; *United States* v. *Brietling*, 20 How. 252; *Goodman* v. *Simonds*, id. 343; *Dubois* v. *Lord*, 5 Watts (Pa.), 49; *Haines* v. *Stouffer*, 10 Pa. St. 363.

Mr. John D. S. Dryden, *contra*.

The court below did not err in overruling the objection of the defendant to the proofs of death. The court was, in effect, asked to decide, as matter of law, that suicide absolutely avoided the liability of the company, thus determining the whole issue without evidence of the condition of the insured as to sanity or insanity at the time of his death. The court was also asked to decide that it rested with the defendant alone to determine its responsibility, by saying what was or what was not satisfactory proof of death.

No objection was made to the proofs of death other than that they showed that the insured had committed suicide.

The court did not err in overruling the defendant's request to take from the jury the evidence on the question of the insanity

of the insured. If there is any evidence, it must go to the jury. *Brown* v. *Lozalere*, 44 Mo. 383; *Routsong* v. *Pacific Railroad Company*, 45 id. 236; *McFarland* v. *Bellows*, 49 id. 311.

Nor was there error in the refusal of the court to charge as requested by the defendant, or in the charge as given. *Life Insurance Company* v. *Terry*, 15 Wall. 580.

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

We think there was no error in the ruling of the court below admitting evidence of the proofs of death, which had been served on the defendant. Of course, the company could not justly contend that it might arbitrarily object to the sufficiency of the proofs; but it had an undoubted right to demand and insist upon such proofs as the law would adjudge to be reasonable and satisfactory. The objection to those furnished was, that, whilst otherwise sufficient as proofs of the death of the insured, they disclosed at the same time a cause of death which exempted the company from liability; and hence could not be said to be sufficient proof of "the just claim of the assured" as well as of the death of Rodel. It requires but a moment's inspection of the policy to perceive that the clause in question, so far as it requires notice "of the just claim of the assured," had reference to her claim or title to the policy, and not to the justness of her cause of action thereon. This is the fair and natural interpretation of the words; but it is placed beyond question by the superadded words which follow in parenthesis. The entire clause is, "due notice and satisfactory evidence of the death of the said Emil G. Rodel, and of the just claim of the assured (or proof of interest, if assigned or held as security)." As the question of interest in the policy is not now at issue, it only remains to inquire whether the proofs were sufficient in regard to the death of the insured. Of this, it seems to us, there can be no doubt. Proof of death was all that was required. This was given, and does not appear to have been objected to. If the proofs also disclosed facts of which the defendant could avail itself as a defence to an action on the policy, this would not derogate from the sufficiency of the proofs as proofs of death. But whilst the disclosure of such

facts might well suggest to the company the propriety of refusing payment and standing suit, it would be no bar to the bringing of a suit; otherwise, no suit could ever be brought until the parties had gone through an extra-judicial investigation resulting favorably to the assured.

The plaintiff next proceeded to examine witnesses respecting the condition of the deceased's mind at the time of his death; and the evidence is all spread upon the record. When the plaintiff rested, the defendant moved that the jury be instructed to render a verdict for the defendant on the ground that the evidence of the plaintiff was insufficient to sustain a recovery. This motion was also overruled, and an exception was taken. It is hardly necessary to say, that, if there was any evidence tending to prove that the deceased was insane when he took the poison which caused his death, the judge was not bound to, and indeed could not properly, take the evidence from the jury. The weight of the evidence is for them, and not for the judge, to pass upon. The judge may express his opinion on the subject, and in cases where the jury are likely to be influenced by their prejudices, it is well for him to do so; but it is entirely in his discretion. *Drakely* v. *Gregg*, 8 Wall. 242; *Hickman* v. *Jones*, 9 id. 197; *Barney* v. *Schmeider*, id. 248; *Brown* v. *Lozalere*, 44 Mo. 383; *Roustong* v. *Railroad Company*, 45 id. 236; *McFarland* v. *Bellows*, 49 id. 311; *Consequa's Case*, Pet. C. C. 225; *M'Lanahan* v. *Universal Insurance Co.*, 1 Pet. 170; *Tracy* v. *Swartwout*, 10 id. 80; *Gaines* v. *Dunn*, 14 id. 322; *Mitchell* v. *Harmony*, 13 How. 131; 9 Pet. 541; 2 id. 137.

Whatever may be our opinion as to the weight of the evidence given by the plaintiff in this case, it cannot be disputed that there was at least some evidence of Rodel's insanity. Besides the tedious and painful details of his conduct, manner, and looks given by his wife and others, evincing great strangeness and total change in his manner, there is this positive testimony of his sister-in-law, Emma Millentz. To the question put to her by the court, "How did he look and act the last week?" she answered, "Well, I thought he looked like he was insane." The court asked her what she meant by that, why she thought so; to which she replied, "Because he used always to be so kind; when a person came he would get up; he was

always gallant and polite, and toward the last he looked straight before him, — staring straight before him; before, he was very pleasant and polite, but towards the last he would not notice anybody when they came in at all; also, he walked entirely different. He looked as if confused in his mind. He did not seem to know what to answer if any person asked him a question." And on cross-examination she said: "I mean by insane that he was crazy, and that he always looked straight before him, staring, and before that he had always been happy and joyful. I do not know what to say that I mean by 'crazy.' The other symptoms of being insane or crazy which he manifested were that his whole appearance seemed to be changed, and in his personal habits he seemed to neglect himself. His hair was unkempt, standing on end, and in his attire he was untidy, whereas before he was very accurate in every thing. These are the only reasons I have for supposing that he was not in his right mind, and because he always looked so straight before him, staring."

Lewis Baum, another witness, a notary public, who saw Rodel almost every day, testifies that he came into his office about two o'clock of the day on which he died; and he adds: "The very moment he stepped in I was surprised in seeing him, having known him long before, and knowing that he had always been a very jovial and lively young man; good associate in company. He came in like he was in a great state of excitement. I did not know what it was, though. He had a little business with me, and then he left. Well, he looked to me a different man altogether; he was in a great state of excitement. His eyes looked — well, I cannot describe it now exactly, but he looked like a man who is out of his mind altogether." And on a rigid cross-examination he adhered to this view: "the impression he made on me was such that I said to myself, — the impression on me was that that man was not in his right mind."

Although such testimony from ordinary witnesses may not have great weight with experts, yet it was competent testimony, and expressed in an inartificial way the impressions which are usually made by insane persons upon people of ordinary understanding.

We think there was no error in the refusal of the judge to give the instruction requested.

When the evidence was closed, the defendant's counsel proposed various instructions to the jury. We will pass over those which relate to the alleged insufficiency of notice and proof of death, which have been already considered, and those which were substantially adopted by the judge, or on which no errors have been assigned. The following request and another of substantially the same purport were refused; namely, that the plaintiff could not recover if the assured knew that the act which he committed would result in death, and deliberately did it for that purpose. An additional request was made to charge that a certain letter, written evidently under great excitement by Rodel to his wife on the day of his death, apprising her of his intention to destroy himself, and his reasons for so doing, based upon his pecuniary troubles and anticipated exposures, bore evidence of coolness and deliberation, and, of itself, afforded presumptive evidence of sanity at the time when it was written. This request was also refused.

The judge, after stating that the burden of proving the insanity of the deceased was on the plaintiff, charged the jury as follows: —

"It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable; to do this, the act of self-destruction must have been the consequence of insanity, and the mind of the deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act which he was about to do, the company is liable. On the other hand, there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity; and you will remember a great many jurors were excused from the panel because they thought the law was otherwise; therefore, you will bear in mind that there is no presumption, *prima facie* or otherwise, that self-destruction arises from insanity; and if you believe from the evidence that the deceased, although excited or angry or disturbed in mind, formed a

determination to take his own life, because in the exercise of his usual reasoning faculties he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy.

"If the insured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery; that is, he did die by his own act. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, and when his reasoning faculties are so far impaired that he shall not be able to understand the moral character or the general nature, consequence, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not in the contemplation of the parties to the contract, and the insurer is liable."

The defendant's counsel excepted to the charge thus given.

This charge is in the very words of the charge sanctioned and approved by this court in the case of *Life Insurance Company* v. *Terry*, 15 Wall. 580, including an explanatory clause of the opinion of the court in that case. We see no reason to modify the views expressed by us on that occasion. We think, therefore, that there was no error in the charge as given. It follows that the judge properly refused the request to charge that the plaintiff could not recover if the insured knew that the act which he committed would result in death, and deliberately did it for that purpose. Such knowledge and deliberation are entirely consistent with his being, in the language of the charge, "impelled by an insane impulse, which the reason that was left him did not enable him to resist;" and are, therefore, not conclusive as to his responsibility or power to control his actions.

The omission to charge as requested, with regard to the letter written by Rodel, is subject to the same considerations, and may be dismissed with only this further remark: that persons of most decided insanity often exhibit consistency of purpose, coolness, and even great ingenuity in the pursuit of some insane object to which they are impelled by the diseased condition of mind with which they are afflicted. An inspection of the letter, however, shows that it is pervaded by a very abnormal degree of excitement; and we think the judge did quite right,

even on this ground, to decline the unqualified instruction which was requested in relation to it.

This disposes of all the errors assigned by the plaintiffs in error, and our conclusion, therefore, is, that the judgment of the Circuit Court must be affirmed; and it is *So ordered.*

INSURANCE COMPANY *v.* HAVEN.

The owner in fee of land and of the buildings thereon, to whom has been issued a policy of fire insurance, which provides that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the buildings insured stand on leased ground, it must be so represented to the company, and so expressed in the written part of the policy, otherwise the policy shall be void," is entitled, upon their destruction by fire, to recover on his policy, although, at the time it was issued, there was an outstanding lease for years of the land to a third party, which fact was neither so represented to the company nor expressed in the written part of the policy.

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. Lawrence Proudfoot for the plaintiff in error.
Mr. Robert Hervey, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Policies of fire insurance are contracts whereby the insurers undertake for a stipulated sum to indemnify the insured against loss or damage by fire, in respect to the property covered by the policy, during the prescribed period of time, to an amount not exceeding the sum specified in the written contract. Angell, Fire and Life Ins. 43.

Insurance was effected by the plaintiffs, on the 9th of May, 1870, in the company of the corporation defendant for the term of one year, against loss or damage by fire, to the amount of $3,000, covering the ten buildings therein described, each of which being insured in the sum of $300.

It appears by the bill of exceptions that the policy was in the usual form of policies issued by the defendant, and that it provided that "if the interest of the assured in the property

be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the buildings insured stand on leased ground, it must be so represented to the company, and be so expressed in the written part of the policy, otherwise the policy shall be void."

Two other stipulations are contained in the policy, which it is important to notice: 1. That "the use of general terms, or any thing less than a distinct specific agreement clearly expressed and indorsed on the policy, shall not be construed as a waiver of any printed or written condition or restriction therein." 2. That the policy is made and accepted in reference to the foregoing terms and conditions, which are declared to be a part of the contract, and may be used and resorted to in order to determine the rights and obligations of the parties to the policy.

Nothing was expressed in the written part of the policy indicating or tending to indicate that the interest of the insured in the property purporting to be insured was any other than the entire, unconditional, and sole ownership of such property for the use and benefit of the insured, or indicating or tending to indicate that the buildings insured stood on leased ground.

Payment of the alleged loss being refused, the plaintiffs instituted the present suit in the State court, which was subsequently removed into the Circuit Court of the same district, the parties agreeing that the plaintiffs might prove any claim they have under the common counts as if they should add special counts, and that the defendants might prove any defence they have to the action under the general issue the same as if it was set up in a special plea.

Pursuant to that stipulation, the parties went to trial; and the verdict and judgment were for the plaintiffs in the sum of $3,730 damages, with costs of suit. Exceptions were taken by the defendants to the charge of the court; and they sued out a writ of error, and removed the cause into this court.

Neither title-deeds nor evidence of the same was introduced by the plaintiffs; but the defendant admitted at the trial that "the plaintiffs were owners in fee of the land on which the buildings insured stood" at the time of the fire, as appears by the bill of exceptions. Proofs were introduced by the plaintiffs, admitted by the defendant to be in due form, which showed

that the buildings described in the policy were, on Dec. 31, 1870, destroyed by fire, and that the property insured belonged to the plaintiffs, subject to the lease mentioned in the proofs so introduced, to which more particular reference will presently be made. Other evidence was introduced by the plaintiffs, but the defendant offered no evidence; and the court directed the jury to return a verdict in favor of the plaintiffs for the amount of the policy, with interest from the expiration of sixty days subsequent to the time the proof of loss was exhibited.

Seasonable exceptions were filed to the charge of the court, upon the ground that the lease mentioned in the proofs of loss show that the plaintiffs were not at the time of the loss the entire, unconditional, and sole owners of the property for their own use and benefit.

Sufficient appears to show that the fee-simple title of the land was in the plaintiffs, and that they were the entire owners of the property destroyed, subject to the lease mentioned in the proofs of loss; and it was admitted by the defendant that the fire caused a total loss of the property, and that the value of the buildings exceeded the amount of the insurance.

By the terms of the lease, referred to in the proofs of loss, it appears that the instrument was for a term of ten years, from May 1, 1868, to May 1, 1878, and that it covered the land on which the insured buildings stood, and the buildings and improvements to be built thereon, having been executed before the buildings were erected, at a rental of $3,500 per annum for the first five years, and $5,976 per annum for the second five years.

Ten buildings were to be erected, to cost not less than $24,000; and the lessor was to pay one-half the amount in instalments, each instalment to be $1,000, and to be paid when the lessee had expended twice that amount in the prosecution of the work. Arrangements of a contingent character are also prescribed in case the lease is continued or determined, and for the basis of adjustment in either event and for payment or repayment as the case may be, which it is not necessary to reproduce in the present case.

Errors assigned material to be noticed are as follows: 1. That the court erred in directing the jury to return a verdict in

favor of the plaintiffs for the amount of the policy and interest. 2. That the court should have directed the jury to return a verdict the other way, as the law of the case was with the defendant. 3. That the court erred in not submitting the questions of fact to the jury whether the plaintiffs were so far the sole, entire, and unconditional owners of the property insured as to be entitled to recover in view of the evidence.

Authorities to prove that a fee-simple estate is the highest tenure known to the law are quite unnecessary, as the principle is elementary and needs no support; nor is any argument necessary to show that the title of the plaintiffs to the land where the buildings stood was of that character, as that is admitted in the bill of exceptions, which constitutes a part of the record.

Concede that, and it follows that the plaintiffs were, within the meaning of the policy, the entire, unconditional, and sole owners of the land where the buildings stood, for their own use and benefit, at the time of the fire; and, if so, the *prima facie* presumption must be that they held the title of the buildings by the same fee-simple title, in the absence of any evidence in the case to controvert that conclusion. None certainly was introduced by the defendant, and it is not pretended that there is any thing in the proofs introduced by the plaintiffs to support any different theory, except the lease referred to in the evidence offered to prove the loss.

Land-owners under a fee-simple title, in the absence of any proof to the contrary, are certainly presumed to be the owners of the buildings erected and standing on the premises; the rule being that the buildings and the lands together are known as real estate, and the buildings, where nothing is shown to the contrary, are presumed to be held by the fee-simple owner of the land by the same title as the land on which the buildings are situated, from which it follows that the plaintiffs, being the owners in fee of the same, are also the owners in fee of the buildings, unless there is something in the terms of the lease to disprove that theory; and it is equally clear, that, if they are the entire, unconditional, and sole owners of the buildings as well as of the land, the assignment of error must be overruled.

Nor is any thing contained in the lease to support any different theory. Instead of that, the lease shows that the plaintiffs were the owners of the land, and that the contractor agreed to erect the ten buildings on the land for the owners; nor does it make any difference that the owners of the land contracted with the builder that they, when the buildings were erected, would lease the same to him for the term of ten years.

Buildings of every kind are frequently erected by land-owners to be rented; nor is it any thing uncommon that the contract for lease should be made before the buildings are erected, or that the contract for a lease should be blended with the contract for erecting the building, as in this case. Leases of the kind are not uncommon; nor is there any thing in the terms of the instrument to countenance the theory that the title of the plaintiffs did not remain as before, — a fee-simple title, as described in the admission of the defendant.

In the words of the contract, the lessee agreed to proceed at once to erect ten buildings on the land therein described, to cost not less than $24,000 for the other party to the instrument, and "to receive payment for the same at the times and in the manner therein described," which of itself shows to a demonstration that the buildings when erected became the property of the plaintiffs, as the terms of the instrument called a lease show that the buildings were erected for the plaintiffs on their land, and that they paid the agreed price for their erection. Decided support to that theory is also derived from another clause of the lease, by which the lessee bound himself to insure the buildings during the time employed in their erection, in the name and for the benefit of the plaintiffs, and to deposit the policies in their keeping and possession. Policies were to be taken out and kept in force in the sum of $13,000, in the name and for the benefit of the lessors, during the continuance of the lease, in companies to be approved by the plaintiffs; and the stipulation was that the policies should be deposited with lessors of the property. Other evidence to support the theory of the defendant is entirely wanting, the record showing that they offered no evidence at the trial; and inasmuch as the terms of the lease show that the plaintiffs owned the land in fee-simple, and that they contracted to have the buildings erected and

paid for their erection, and caused them to be insured in their own name and for their own benefit, it is clear that the supposed defence that the plaintiffs were not the entire, unconditional, and sole owners of the buildings utterly fails, and that the charge of the court directing a verdict for the plaintiffs is correct.

Attempt is made in this case to maintain the theory that the plaintiffs are not the entire owners of the property, because it was under lease both when the policy was issued and at the time of the loss, but it is clear that the theory has no foundation in law or justice. Nor can the theory be sustained which attempts to separate the ownership of the buildings from the land, which, it is admitted, is vested in the plaintiffs by a fee-simple title. Such an assumption is contrary to the facts exhibited in the record, and can no more be supported than that the lessees of stores, tenement-houses, or other buildings in our large cities own the same by mere possession or occupancy of the particular store, tenement, or building included in the lease they hold from the owner.

Thousands of cases arise where dwelling-houses, stores, and other buildings of every kind are leased to occupants, for longer or shorter periods of time, and upon still more varying conditions and stipulations, and yet the owners procure insurance upon the same without mentioning the names of the lessees in the policies, or ever suspecting that they have omitted any duty, or been guilty of any concealment or neglect. Insurance companies set up no such pretence; and, if they should do so, they would find no support to such a theory in the courts of justice.

Stores and other buildings are sometimes erected upon leased lands by parties who have no title other than what is derived from their lease, which is a very different thing from the case where the owner, both of the land and the building, leases the estate to the occupant for a term of years, without parting with the fee-simple title to the land or the building. Fee-simple ownership in such a case is matter of importance to the insurer, especially if the company is a mutual one, as such companies usually have a lien on the premises for the payment of the premium; nor is the ownership of the land an immaterial

matter, even if no such lien arises, as it furnishes an important element to enable the company to determine whether it is expedient to take the risk.

Considerations of the kind, it may be presumed, induced the defendant to insert the condition in the policy of the plaintiffs, "that, if the buildings stand on leased ground, it must be so represented to the company, and must be so expressed in the written part of the policy, otherwise the policy shall be void." Nothing of the kind is pretended in this case; and, if it were, it could not be sustained for a moment, as it is admitted in the record that the plaintiffs were the owners in fee of the land where the buildings stood at the time of the fire.

Adjudged cases are invoked to sustain the theory of the defence; but none of those cited support the proposition involved in the theory. Examples of the kind are *Gahagan* v. *Mutual Insurance Co.*, 43 N. H. 176, and *Warner* v. *Middlesex Insurance Co.*, 21 Conn. 444, both of which are cases where the insured represented that the property covered by the policy was free and unincumbered, when, in fact, it was incumbered by mortgage. May, Ins., sect. 290; *Towne* v. *Mutual Insurance Co.*, 7 Allen (Mass.), 51.

Cases are also cited where the insured had only a bond for a deed, or only a leasehold interest, and where the insured procured a policy as the absolute owner of the property in the face of those facts. *Atlantic Insurance Co.* v. *Wright*, 22 Ill. 474; *Smith* v. *Mutual Insurance Co.*, 6 Cush. (Mass.) 448; *Brown* v. *Williams*, 28 Me. 252; *Hinman* v. *Hartford Insurance Co.*, 36 Wis. 167.

Much discussion of such authorities is not required, as it is clear they do not favor the theory of the defendants. Nor does the case of *Smith* v. *Colombia Insurance Co.*, 17 Pa. St. 253, aid the defendants, as it is clear that, if a mortgagee insures his interest in the premises, he is bound, under a provision calling for incumbrances affecting his interest, to state prior mortgages on the same premises. May, Ins., sect. 293.

Misrepresentations of material facts, of course, avoid a policy; but there were none such in the case before the court. *Colombia Insurance Co.* v. *Lawrence*, 10 Pet. 507, cited by the defendant.

Where the policy contained the provision that if the property to be insured is held in trust, or on commission, or is a leasehold interest, or an equity of redemption, or if the interest of the insured in the property is any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the insured, it must be so represented to the company, and be so expressed in the written part of the policy, otherwise the policy shall be void, the Supreme Court of Illinois held, in a case where it appeared that the property had been sold under judgment and execution against the insured, that the non-disclosure of the sale and purchase avoided the policy, though the period allowed for redemption had not expired. *Reaper City Insurance Co.* v. *Brennan*, 58 Ill. 158.

By the sale and purchase in that case, nothing was left in the insured but the right of redemption, which would expire in one year from the sale; and it was well held by the court that, the paramount title being in a third person, it could not be truthfully said that the insured had, at the date of the insurance, "the entire, unconditional, and sole ownership of the property."

Beyond all doubt, the property in the case under consideration vested in the lessors; and, if so, the two cases cited by the defendant of *Mayor* v. *Hamilton Insurance Co.*, 10 Bosw. (N. Y.) 537, and *Mayor* v. *Insurance Company*, 9 id. 366, are authorities in favor of the plaintiffs, as the facts in this case show that the property, in the true sense of insurance law, belonged to the insured at the date of the policy. *Washington & Atlantic Insurance Co.* v. *Kelly*, 32 Md. 438; *Hubbard* v. *Hartford Insurance Co.*, 33 Iowa, 333.

Unless the true ownership or interest in the property is required by the conditions of the policy to be specifically and with particularity and accuracy set forth, it will in general be sufficient if the insured has an insurable interest under any *status* of ownership or possession, in cases where no inquiries are made at the time the application is presented or the policy executed. May, Ins., sect. 284.

No inquiry was made in this case, although it appears that the agent of the company who took the insurance resided in Chicago, where the buildings were situated; nor did the de-

fendant offer any evidence at the trial to show that the unincumbered fee-simple title was not in the plaintiffs at the time the buildings were destroyed by the fire; nor did the defendant request the court at the trial to give the jury any instructions upon the subject. On the contrary, it admitted at the trial that the plaintiffs were the owners in fee of the land on which the buildings insured stood, leaving it to be inferred by the jury that the plaintiffs were also the owners in fee of the buildings.

Enough appears in the terms of the instrument called the lease to show that both the lessee and lessors treated the buildings "during the process of erection" as the property of the plaintiffs, and to show beyond controversy that the buildings when completed vested in the plaintiffs as their absolute property, subject only to the right of the builder to occupy and use the same, just as in the ordinary case where the owners of property agree to lease the same to be used by the lessee for a stipulated rent.

Lessees holding under an ordinary parol lease do not acquire such an interest in real estate so leased as to avoid a policy issued to the lessor, even though the insured failed to represent the matter to the company in a case where no inquiries were made of the applicant, at the time the policy was issued, as to the true character of the title or occupancy of the insured premises, and where no pretence is shown that the insured has been guilty of any fraud or misrepresentation.

Such a lease is a mere chattel interest, being reckoned as part of the personal estate of the lessee, and in case of the death of the lessee goes to his executors, and not to the heirs-at-law, as appears by all the authorities. 2 Bl. Com. (Cooley's ed.) 143; *Ex parte Gay*, 5 Mass. 419; *Brewster* v. *Hill*, 1 N. H. 351; *Bisbee* v. *Hall*, 3 Ohio, 463; *Dillingham* v. *Jenkins*, 7 Smed. & M. (Miss.) Ch. 487; *Spangler* v. *Stanler*, 1 Md. Ch. 36.

Leases for years, says Taylor, are considered chattel interests arising out of a contract between the parties, and pass only a transient interest in the land, which is not a freehold, and might originally be made at common law by parol for any certain period. Taylor, L. & T. (6th ed.) 22; *Moshier* v.

Reding, 12 Me. 482; *Maverick* v. *Lewis*, 3 McCord (S. C.), 211; *Carwell* v. *Dietrich*, 15 Wend. (N. Y.) 379; *Chapman* v. *Bluck*, 5 Scott, 533; *Waller* v. *Morgan*, 18 B. Mon. (Ky.) 141.

Two requisites, says Blackstone, were necessary to make a fief or feud, — 1. Duration as to time; 2. Immobility as to place: and he adds, that whatever was not a feud was accounted a chattel.

Chattels real, says the same commentator, are such as concern or savor of the realty, including terms for years, and are called real chattels, as being interests arising out of or being annexed to real estate, of which they have one quality, to wit, immobility, but want the quality of indeterminate duration, the want of which constitutes them chattels. 2 Bl. Com. 386; 2 Kent, Com. (12th ed.) 342; 5 Bac. Abr. (Bouvier ed.) 434; 2 Com. Dig., *Biens*, *a*; 1 Chitt. Gen. Pr. 244; Co. Litt. 46, 118 *b*.

Terms of years belonging to a testator or intestate vest in his executor or administrator without any entry, for the reason that in contemplation of law such interests are chattels. Woodfall, L. & T. (9th ed.) 239; *Wollaston* v. *Hakewell*, 3 Man. & G. 297; *Atkinson* v. *Humphrey*, 2 C. B. 654; *Insurance Company* v. *Kelly*, 32 Md. 421.

Insurers, if they desire to object to such a risk, should make inquiries of the applicant, and should not admit at the trial, without qualification, that the insured was the owner in fee of the land, in a case where they offer no evidence in defence.

Judgment affirmed.

MILNER *v.* MEEK.

1. An appeal, where the amount in controversy is sufficient, lies to this court from a decree rendered by the Circuit Court, in the exercise of its appellate jurisdiction, in a suit wherein a bill in equity against the creditors of a bankrupt was filed and prosecuted to a final decree in the District Court by his assignees, who prayed for a sale of his land, and an adjustment of the liens thereon arising from judgment, mortgage, or otherwise.
2. The supervisory and the appellate jurisdiction of the Circuit Court, in cases arising under the bankrupt acts, distinguished.
3. Where the decree determined the amount and priority of the respective liens, an appeal therefrom will not be dismissed on the ground that it was taken by one lien creditor, if it brings up so much of the case and such of the parties as are necessary for the determination of his rights.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The case presented by this record is in substance as follows:

On the 17th of November, 1870, Abram A. Moore conveyed certain lands in Clinton County, Ohio, to John Milner, Jr. This conveyance, it is claimed, was made to hinder and delay creditors, and is therefore, as to them, void. Dec. 20, 1870, C. M. Walker commenced suit against Moore in the Court of Common Pleas of Clinton County, upon a contract made June 28, 1870; and at the same time caused an order of attachment to be issued under the laws of Ohio, by virtue of which he claimed to have attached as the property of Moore the lands conveyed to Milner. On the 2d of January, 1871, Thomas H. Long sued Moore in the same court, and claimed also to have attached the lands on the 10th of the same month. Jan. 19, 1872, Milner reconveyed the lands to Moore, who thereupon mortgaged them to Milner to secure the payment of a note for $8,295.89, payable, with interest, Dec. 25, 1872, and also to save him harmless against certain specified liabilities which he, as surety for Moore, had incurred. This mortgage was recorded in Clinton County Jan. 22, 1872. Subsequently to this time, sundry judgments were rendered against Moore which are liens upon his equity of redemption in the lands, and, July 13, 1870, he executed a mortgage on them to one Shepherd.

Nov. 23, 1872, Moore was adjudged a bankrupt in the District Court of the United States for the Southern District of

Ohio, and, Dec. 23, 1872, William M. Meek was duly appointed his assignee. On the 7th of December, 1872, leave was granted by the bankrupt court to Walker and Long, to proceed to judgment in their suits in the State court, for the purpose of ascertaining the amount which might be proven against the estate. Dec. 31, 1872, the assignee was, on his own application, made a party defendant to each of these suits; and, after trials, judgments were rendered against Moore in both actions.

March 10, 1873, Meek, the assignee, filed in the District Court of the United States for the Southern District of Ohio a petition, as follows: —

"*In the District Court of the United States for the Southern District of Ohio.*

"In the Matter of ABRAM A. MOORE, Bankrupt. } In Bankruptcy.

"William M. Meek, assignee of the estate of Abram A. Moore, a bankrupt, respectfully represents that the said Abram A. Moore was declared a bankrupt Nov. 23, 1872; . . . that the assets of said estate consist of the following described real estate:" (here follows a description of the lands conveyed by the bankrupt to Milner and reconveyed by Milner); "that upon certain parcels of the land [describing them] the following liens are claimed to exist."

The liens as claimed are then set out specifically, as follows:

"1. Taxes.
"2. Walker's attachment and judgment.
"3. Shepherd's mortgage.
"4. Long's attachment and judgment.
"5. Milner's mortgage.
"6. Judgment in favor of Silas Routh.
"7. Judgment in favor of Samuel J. Moore.
"8. Judgment in favor of William W. Moore, Jr.
"9. An agreement in favor of William Moore, Sen.
"10. Judgment in favor of Thomas C. Moore.
"11. Judgment in favor of James Patton."

A statement is then given of the general creditors who have proven their claims, and the whole concludes with a prayer, as follows: —

"Your petitioner, therefore, prays that C. M. Walker, H. A. Shepherd, T. H. Long, John Milner, Jr., J. Silas Routh, Samuel J.

Moore, William W. Moore, Jr., William Moore, Sen., Thomas C. Moore, James Patton, . . . [and all the general creditors, naming them], may be made defendants hereto, and that the defendants may be called upon to answer, and that your Honor will order proper steps to be taken for the adjustment of the liens, and that your petitioner may be ordered to sell real estate upon such terms as in the judgment of your Honor seem best for all creditors, and such other relief as may be proper."

Process in the form of a subpœna was thereupon issued, and served upon all the parties named as defendants; and, April 8, 1873, the court ordered that the petition be referred to one of the registers of the court, with instructions, among other things, "to hear the testimony adduced by the parties and arguments of counsel, and to determine the priority of liens among the creditors of said bankrupt, and to make a full report to the court of all his findings, together with the evidence produced by the parties on the hearing, and of all such matters transpiring in the premises as might seem to him proper for the investigation of the court."

April 21, 1873, Walker filed his answer, setting up his claim, and praying that his lien might be established and his judgment paid out of the proceeds of the sale when made. To this answer Meek replied, in substance, denying the lien. On the same 21st April, 1873, Long filed his answer, setting up his claim and judgment, and asserting his lien. He also prayed that his lien might be established and his judgment paid. To this answer Meek replied, denying the lien. Milner also filed an answer and cross-petition in the cause, in which he denied the liens of Long and Walker, set up his mortgage as the first lien, and asked that he might be paid from the proceeds of the sale in preference to any other creditor. To this answer and cross-petition Meek answered, setting forth the conveyance from Moore to Milner Nov. 17, 1870, and averring that it was made upon no consideration, and was void as to creditors. He then set forth the reconveyance and the mortgage, but alleged that there was nothing due upon the mortgage, and that it, too, was fraudulent as against creditors. Walker, Long, and other lien creditors filed answers to the answer and cross-petition of Milner, setting forth substantially the same defences that were

contained in that of Meek. To these answers Milner replied. Other lien creditors filed answers to the original petition of the assignee, setting up their respective claims, and asking appropriate relief.

Testimony was taken before the register, who, on the 26th of February, 1874, made his report to the court, transmitting all the testimony taken. He reported against the mortgage of Milner, on the ground that it was fraudulent and void as to creditors. He also reported against the liens of Walker and Long, on the ground that both the attachments and levies were void. He then reported the amounts due the other lien creditors, with their respective priorities, and recommended that the property be sold by the assignee, and the proceeds distributed in the order of precedence as stated by him.

Exceptions were taken to this report by Milner and Long and Walker; and thereupon the cause came on to be heard before the court "on the petition of the assignee, filed in this court, and the answers and pleadings of all the defendants, filed before James H. Thompson, register, acting as master commissioner, under an order of reference made to him . . . the eighth day of April, 1873, . . . and also upon all the evidence and exhibits produced by all the parties upon the hearing . . . before the register, acting as master commissioner, . . . and also upon the written report . . . of said register acting as said master commissioner; and thereupon all parties interested in the cause appeared, . . . and waived all objections to all informality and irregularity of pleadings and proceedings before said register, except John Milner, Jr., who, in waiving said objections, expressly reserved whatever rights he might have to take additional testimony in his behalf in the event of the register's report, being not confirmed by the court on account of any such informality or irregularity." Upon this hearing the court decided adversely to the exceptions of Long, Walker, and Milner, and entered a decree, substantially confirming the report. Long, Walker, and Milner were thereupon allowed an appeal to the Circuit Court; and they each in due time perfected their appeals by executing the necessary bond.

Nov. 18, 1874, the following entry in the cause appears upon the journal of the Circuit Court: —

"Now come the several parties in interest, . . . and, waiving any irregularity which might exist in this proceeding by reason of not having been brought on a petition for review instead of by appeal, hereby consent that the transcript of the record of the District Court herein filed be treated as such bill of review, in case it should be held to be necessary."

The cause was thereupon heard in the Circuit Court, and, Nov. 19, 1874, a decree was entered in that court, as follows: —

"This day this cause came on to be heard on the transcript of the record of the District Court of the United States for the Southern District of Ohio, which was brought into the Circuit Court of the United States for said district upon an appeal from the findings and decrees of the District Court, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged, and decreed that the decree of the said District Court in this cause be, and the same is, in all respects hereby affirmed. And it is further ordered that this cause be, and the same is hereby, remanded to the said District Court for further proceedings to be had therein, in conformity with the opinion of this court. And thereupon the said John Milner, Jr., . . . prays an appeal to the Supreme Court of the United States, which is allowed by the court."

The case is now here upon this appeal, and the assignee moves to dismiss —

1. Because no appeal lies to this court from the decrees and orders of the Circuit Court while exercising its supervisory jurisdiction under the bankrupt law; and,

2. Because the other lien creditors who were parties to the proceeding below are not parties to the appeal.

Mr. Stanley Matthews and *Mr. J. B. Foraker* for the appellant.

Mr. Henry L. Dickey, *contra.*

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

The validity of the first objection to this appeal depends upon whether the proceeding in the District Court is to be treated as a suit in equity or as part of the suit in bankruptcy. If the former, the appeal lies; but if the latter, it does not.

The pleading filed by the assignee was appropriate in form for a petition in the bankrupt suit, but it was equally good in substance as a bill in equity. It contained a complete statement of a cause of action cognizable in equity, and a sufficient prayer for relief. There was no formal prayer for a subpœna, but process was issued and served. All the parties interested appeared, and presented their respective claims by answers, or answers and cross-petitions, with appropriate prayers for relief.

In *Stickney* v. *Wilt*, 23 Wall. 150, the petition was in all its essential features like the one in this case. It was filed by an assignee in bankruptcy against lien creditors, entitled as of the bankrupt suit, and addressed to the district judge. Like that in the present case, it contained no formal prayer for subpœna; but there was a prayer for relief, much like the one here.

The several lien claimants appeared, and presented their respective claims by answer. The District Court having directed a sale of the property free of an incumbrance set up by Wilt, he filed in the Circuit Court a petition for review under its supervisory jurisdiction. The Circuit Court reversed the order of the District Court, and sent the case back, with instructions to allow the claim of Wilt, and proceed accordingly. From this action of the Circuit Court the assignee took an appeal to this court, where it was decided that, notwithstanding the form of the petition filed in the District Court, it contained all the essential ingredients of a bill in equity; and, as the subject-matter of the action was one cognizable by the District Court, under that provision of the bankrupt law which gives it jurisdiction of suits at law and in equity in respect to the property of the bankrupt, that court must be presumed, in the absence of any thing appearing to the contrary, to have acted under that jurisdiction when it granted the relief complained of. For this reason, we held that the remedy of Wilt was by appeal to the Circuit Court, and not by petition for review under the supervisory jurisdiction; and that the action of the Circuit Court was irregular and of no effect, because of a want of power to proceed in that way in such a case. As, however, what the court did do was under an assumed supervisory jurisdiction, we did not dismiss the appeal, but sent the case back, with instructions to the Circuit Court to dismiss the petition for

review for want of jurisdiction, and suggesting to the District Court the propriety of entertaining a bill of review in equity to correct the errors in the original decree, if any were found to exist.

That case seems to us to be decisive of this, which is clearly one of equitable jurisdiction. The parties expressly waived all errors of form, and asked the court to proceed to a final hearing of all the questions in which they were interested. The court did proceed, and did enter a decree, from which an appeal was allowed and taken to the Circuit Court. In the Circuit Court the parties again stipulated that the court might proceed as upon an appeal, with the understanding, however, that the appeal should be turned into a petition for review in case it appeared to be necessary. It is evident, therefore, that the case in the courts below was not only in substance a suit in equity, but that both the parties and the court treated it as such, and acted accordingly. The proceeding is full of irregularities; but these have all been waived, and both courts below were asked to hear and decide the case upon its merits, without regard to mere form.

We are clearly of the opinion that, under the practice as finally established in this court in furtherance of justice, the case was properly brought here by the appeal.

As to the second objection, it is sufficient to say that the appeal was allowed in open court during the term at which the decree was rendered. No citation was, therefore, necessary. *Brockett* v. *Brockett*, 2 How. 241. Milner alone appealed; but his appeal brings up so much of the case and such of the parties as are necessary for the determination of his rights.

The motion to dismiss the appeal is, therefore, denied, and we are brought to a consideration of the case upon its merits. This presents only questions of fact. It is unnecessary to recapitulate the testimony; but, after a careful examination of the whole record, we are satisfied that the conveyance executed by the bankrupt to Milner, Nov. 17, 1870, was void as against creditors, but that the mortgage of the 19th of January, 1872, was executed for a good and valuable consideration, and without fraud, and that it constitutes a valid and subsisting lien upon the property mortgaged as of the date of its record, to

secure the payment of such an amount as may appear to be due upon the indebtedness and liability secured thereby.

The decree of the Circuit Court, in so far as it affirms the decree of the District Court declaring the mortgage in favor of Milner fraudulent and void, will be reversed, and the cause remanded to the Circuit Court, with instructions to reverse the decree of the District Court rejecting the lien of that mortgage, and to remand the cause to the District Court with instructions to establish that lien, and to proceed further with the cause as law and justice may seem to require; and it is

So ordered.

COLORADO COMPANY *v.* COMMISSIONERS.

Where an act of Congress confirms a Mexican grant of five hundred thousand acres to the extent of eleven square leagues, to be selected within the limits of the claim, according to the lines of the public surveys which the Commissioner of the General Land-Office is directed to cause to be run for the proper location of the quantity confirmed, and provides that the confirmation shall not be legally effective until payment by the confirmee of the expense of so much of the surveys as inure to his benefit, — *Held*, 1. That, until such payment, the confirmee has no title to the eleven square leagues selected pursuant to the act, nor a perfect equitable right to such title, and they are not subject to taxation. 2. That Congress, after the surveys and plats shall have been perfected, may enforce such payment by a sale of the lands, a resumption of the grant, or other appropriate mode.

ERROR to the Supreme Court of the Territory of Colorado.

This suit was brought by the plaintiff in error in the District Court within and for the county of Pueblo, to recover taxes paid by it under protest, July 1, 1874, which had been assessed for the year 1873, on certain lands situate in that county. The judgment rendered in its favor by that court having been reversed by the Supreme Court of the Territory, the cause was removed here by writ of error.

Manuel Armijo, governor of New Mexico, granted, Dec. 1, 1843, to Gervacio Nolan, lands in a part of that province, now constituting Pueblo County, Colorado, which cover by estimate five hundred thousand acres, bounded by mountains and natural objects.

Congress passed an act, approved July 1, 1870, 16 Stat. 646,

entitled "An Act to confirm the title of the heirs of Gervacio Nolan, deceased, to certain lands in the Territory of Colorado." The first section confirmed the grant to the extent of eleven square leagues. The remaining sections are as follows: —

"SECT. 2. That the exterior lines of said claim of eleven leagues, as confirmed by this act, shall be adjusted according to the lines of the public surveys as near as practicable, but in a compact form, and the claims of all actual settlers falling within the limits of the located claim above referred to shall be adjusted to the extent which will embrace their several settlements upon their several claims being established either as pre-emptions or homesteads according to law, and for the aggregate of the *arears* [areas] of claims so established under the pre-emption or homestead acts, the heirs of said Nolan, or their legal representatives, shall be entitled to locate a like quantity of public lands, not mineral, according to the lines of the public surveys, and not to exceed one hundred and sixty acres in one section: *Provided*, that such location shall be made within the bounds of the original grant by the order of Cornelio Vigil to Gervacio Nolan.

"SECT. 3. That it shall be the duty of the Commissioner of the General Land-Office to cause the lines of the public surveys to be run in the regions where a proper location would place the said Nolan claim, and the expense of the same shall be paid out of any moneys in the treasury not otherwise appropriated; but, before the confirmation provided for by this act shall become legally effective, the heirs of the said Gervacio Nolan, or their legal representatives, shall pay the cost of so much of said surveys as inures to their benefit respectively, and that all actual settlers whose claims may be adjusted as valid shall have a right to enter their improvements by a strict compliance with the pre-emption or homestead laws.

"SECT. 4. That upon the adjustment of said claim of the heirs of Gervacio Nolan, according to the provision of this act, it shall be the duty of the surveyor-general of the district to furnish properly approved plats to said claimants, or their legal representatives, which shall be evidence of title, the same to be done according to such instructions as may be given by the Commissioner of the General Land-Office: *Provided, however*, that when said lands are so confirmed, surveyed, and patented, they shall be held and taken to be in full satisfaction of all further claims or demands against the United States.

"SECT. 5. That, immediately upon running the lines provided for in the second section of this act, the surveyor-general of the district

shall notify the said heirs of Gervacio Nolan, or their legal representatives, of the fact of such survey being made; and said claimants shall, within three months after notice of such survey, select and locate their said claims according to the provisions of this act, and shall, within said time, furnish the surveyor-general with a description of such location, specifying the lines of the same; and the party failing to make such selection and location, in such manner and within such time, shall be deemed and held to have abandoned their claim, and their rights and equities under this act shall cease and terminate."

The plaintiff in error acquired all the rights and title of the confirmees to the lands, and, a survey of them having been made pursuant to the act, selected them within the required time and in due form, to the extent, as was then believed, of eleven square leagues. A plat and descriptive list, subject to the revision of the Land Department at Washington, were prepared, and on April 27, 1872, delivered to the surveyor-general of the Territory. Entries of portions of the selected lands by claimants under the homestead and the pre-emption laws, amounting to six thousand five hundred and sixty-five acres, were subsequently approved by the Secretary of the Interior; and the plaintiff was allowed by the Commissioner of the General Land-Office to select, by way of indemnity, other lands within the limits of the original grant. An error was also committed by including nine hundred and twenty acres in excess of eleven square leagues, as, owing to the fact that at the time the plat and list were made the meander line had not been run along the south bank of the Arkansas River, where a portion of the lands were situate, it was impossible to ascertain the exact area of the selected tract. The nine hundred and twenty acres were withdrawn March 9, 1874. On the 30th of January of that year, other lands were selected in lieu of those taken by homestead and pre-emption claimants, and a descriptive list of them delivered to the surveyor-general; but that officer has not furnished either a statement of the cost of the survey or the approved plats required by the act, and the plaintiff in error has not paid any part of such cost.

The taxes in question were duly assessed, if the lands embraced within the preliminary selection of eleven square leagues,

after deducting therefrom the nine hundred and twenty acres so withdrawn, and the six thousand five hundred and sixty-five acres so entered, were on the first day of May, 1873, subject to taxation.

Mr. John D. McPherson for the plaintiff in error.

1. The act of Governor Armijo was *ultra vires*. He had no authority, under the act of the Mexican Congress of 1824 and the regulations of 1828, to grant to one person more than eleven square leagues of public land. *United States* v. *Hartnell's Executors*, 22 How. 286; *United States* v. *Vigil*, 13 Wall. 450; *United States* v. *Vallejo*, 1 Black, 451. The grant of a tract with ascertained boundaries which contains more than ten times that quantity was therefore a nullity, and the title of the plaintiff must be derived from the United States.

2. But the grant, if in any aspect of the case valid *pro tanto*, did not vest a title to any specific tract of eleven square leagues. Some further official act, severing that quantity of land from the public domain, and subjecting it to the operation of the grant, was indispensable. This was not done by Mexico; and the grantee had, under the treaty or the law of nations, nothing beyond an equitable claim upon our government that eleven square leagues should be set apart to him within the limits of a larger tract. The United States might annex certain conditions precedent to the passing of the title to the lands. In this view, it is perhaps immaterial whether the act be construed as making a grant *de novo*, or as giving a partial confirmation to an existing but void grant.

3. Payment by the heirs of Nolan or by their representatives of a proportionate part of the expenses of the survey was imposed as a previous and indispensable condition to the enjoyment of the benefits conferred by Congress. Until it was performed, the title to the lands abided in the United States, and they were not subject to taxation by Colorado. *Railway Company* v. *Prescott*, 16 Wall. 608; *Same* v. *McShane et al.*, 22 id. 444.

4. The "approved plats" have never been tendered to the plaintiff by the surveyor-general, and the act declares that they shall be "evidence of title."

5. The organic law of the Territory, 12 Stat. 172, declares

that no tax shall be imposed on the property of the United States. The tax in question was assessed, not upon the interest or claim of the plaintiff, but upon the lands themselves. If they were subject to the taxing power of the Territory, they might have been offered to satisfy the tax; and the purchaser at a public sale, held in strict pursuance of law, would have acquired a valid title to them, free from all pre-existing claims of the United States.

Mr. Allen A. Bradford, contra.

1. Congress acted upon the assumption that the grant to Nolan was good for eleven square leagues, to be located within the boundaries of the original claim. The act of 1870 is a distinct recognition of his vested interest in that quantity of lands under an older and paramount title, although they were not specifically described. When the plaintiff made the authorized location, and gave the surveyor-general the requisite descriptive list, the lands were identified as the subject of the grant, and his title relates back to the date of the grant. *United States* v. *Percheman*, 7 Pet. 51; *Same* v. *Arredondo*, 6 id. 691; *Garcia* v. *Lee*, 12 id. 511.

2. The right and title of Nolan were secured and protected by the treaty of Guadalupe Hidalgo. *Henshaw* v. *Bissell*, 18 Wall. 255. The grant of Amijo for more than eleven square leagues being void as to the excess, the United States became the owner of part of the lands within it, claiming, as Nolan did, under Mexico. By the selection in the mode prescribed by the act, his representative and the United States were mutually bound and respectively estopped. That selection was perfected before the assessment complained of was made.

3. The fact that some of the selected lands were withdrawn, and others entered by pre-emption and homestead claimants, cannot affect this case. The tax in question was only assessed upon the remainder, reserved with the approval of the Commissioner of the General Land-Office to the plaintiff, which thenceforth ceased to be public land. *Wilcox* v. *Jackson*, 13 Pet. 498.

4. The approved plats, which the surveyor-general is required to make out, are only evidence of a prior title. Even a patent, when issued upon the claim of a previously existing title, is only documentary evidence of the existence of that title, or

of such equities respecting the claim as justify its confirmation. *Langdeau* v. *Hanes*, 21 Wall. 529. A confirmatory act of Congress makes a good title without a patent, *Grignom's Lessee* v. *Astor*, 2 How. 319; but, were it otherwise, the laws of Colorado subject to taxation lands entered at private sale or otherwise, "whether a patent has been issued or not."

5. The surveyor-general has not transmitted a statement of the expenses of the survey nor "approved plats." His laches cannot work a forfeiture of the plaintiff's title, nor arrest the operation of the revenue laws of the Territory. According to the argument on the other side, if payment of those expenses be never exacted, the lands would be perpetually exempt from taxation, although the plaintiff should remain in possession and exercise acts of ownership over them.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of the Territory of Colorado, to bring up a judgment holding a large body of real estate owned by plaintiffs liable to taxation under the laws of that Territory.

The ground on which the exemption from taxation is asserted is that the United States retains such an interest in the land that it cannot be taxed under the authority of that Territory; and we are of opinion that the claim is well founded.

In the year 1843, Governor Armijo, of New Mexico, made a grant of land to Gervacio Nolan, bounded by monuments and natural objects, containing about five hundred thousand acres.

Upon a report made to Congress after the United States acquired the country in which this land was situated, that body was of opinion that the grant was good only to the extent of Governor Armijo's power under the laws of Mexico, namely, eleven square leagues; and it passed the act of July 1, 1870, 16 Stat. 646, confirming the grant to that extent.

But as there was no particular designation of these eleven leagues by which to determine their precise location, and as many persons had settled on lands within the boundary of the original grant, Congress declared in that act that the eleven leagues should be adjusted in a compact form, as near as possible within said boundary, and according to the lines of the

public surveys. That the claims of all actual settlers falling within the eleven leagues so selected should be allowed, and that for the deficiency thus made in the eleven leagues the grantees might select other lands within the bounds of the original grant.

It was made the duty of the Commissioner of the General Land-Office to have all the necessary surveys to carry these provisions into effect made at the expense of the government in the first instance; "but," it is added, "before the confirmation provided for by this act shall become legally effective, the heirs of said Gervacio Nolan, or their legal representatives, shall pay the cost of such surveys as inure to their benefit respectively."

And, by the next section, it is provided that, when all this is done, the surveyor-general shall furnish approved plats to the claimants, which shall be their evidence of title. The plats had not been made nor the expenses paid when this tax was assessed.

We are of opinion that the clause above quoted suspends the vesting of title in the claimants, or of any perfect equitable right to the title, until the expenses of the surveys are paid; and that this was done intentionally, to secure that payment. If not paid after a reasonable time subsequent to the perfecting of the surveys and plats, there remains in Congress the power to enforce that payment by a sale of the lands, a resumption of the grant, or any other appropriate mode.

A sale of the land under territorial authority, held by this court to be a sale on a valid tax, might very seriously embarrass the assertion of the rights of the government in the premises. If the tax had been levied on the equitable claim of these holders under Nolan, whatever that is, the case might be different. But this case shows that it is the land which is taxed, and the sale would convey the title, or nothing.

We are of opinion that *Railway Company* v. *Prescott*, 16 Wall. 603, and *Railway Company* v. *McShane et al.*, 22 id. 444, govern this case, and that the learned judge who delivered the opinion in the Supreme Court of the Territory, in holding otherwise, overlooked the express provision in the act of Congress, *supra*, that the confirmation was not to be effective until these expenses should be paid.

We agree with what he has said, that the title when perfected relates back to and is founded on the grant by Mexico; but since it was imperfect, and no particular land passed under the grant until selections were made under that act, Congress had a right to annex to the confirmation the condition above recited.

Judgment reversed, with directions to the Supreme Court of the State of Colorado, to whose jurisdiction the case is now remitted, to affirm the judgment of the District Court for the county of Pueblo.

NIMICK *v.* COLEMAN.

An appeal does not lie to this court from the decree of a circuit court dismissing, in the exercise of its supervisory jurisdiction under the bankrupt law, an appeal from a district court, and affirming the order appealed from.

MOTION to dismiss an appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Zug & Co., a partnership firm composed of Christopher Zug and Charles H. Zug, were adjudicated bankrupts by the District Court of the United States for the Western District of Pennsylvania, March 13, 1876. The creditors determined that it was for the interest of the general body of the creditors that the estate should be settled and distributed by trustees under the inspection and direction of a committee, as provided by sect. 43 of the Bankrupt Act. Rev. Stat., sect. 5103. The District Court confirmed this action of the creditors; and accordingly the estate was conveyed to trustees, to be dealt with in the manner contemplated by that section. The trustees, having converted both the partnership property and that of the individual partners into money, filed their accounts with the committee for settlement, and an order for distribution. The committee approved the accounts, and declared what seemed to them to be a proper dividend of the assets among the partnership and individual creditors.

The court granted the bankrupts their discharge Oct. 14, 1876.

Notice of the dividend declared having been served upon the creditors, William Coleman and others, individual creditors of Christopher Zug, filed their petition in the bankrupt court, Jan. 5, 1877, excepting to the account as settled by the committee, and asking the court to resume jurisdiction of the bankruptcy proceedings, and order the trustees to file their accounts in court, to the end that the same might be duly audited and the estate of the bankrupts marshalled and distributed according to law. To this petition the trustees appeared and answered, setting forth the action of the committee, and claiming that the court had no jurisdiction to control their proceedings. Jan. 20, 1877, the creditors amended their petition so as to bring in the committee. This committee having answered, the court made an order, April 2, 1877, directing both the committee and the trustees to file in court "an account of the estate, joint and several, of the bankrupts, also setting forth the different properties of the bankrupts and the moneys derived therefrom, respectively, with the report of distribution."

The trustees and committee thereupon filed a petition in the Circuit Court for a review of this order; and, May 23, that court affirmed the action of the District Court, except so far as it related to the committee, as to whom it was reversed and the petition dismissed. The direction to report distribution was also stricken out as premature. May 28, the trustees filed their accounts, with a statement of the action of the committee thereon. May 29, certain individual creditors of Christopher Zug, and also certain individual creditors of Charles H. Zug, filed exceptions to the account, upon the ground that individual property had been, as they claimed, improperly included in the partnership assets. Testimony was taken in support of and in opposition to these exceptions; and, July 13, the exceptions were sustained and the accounts modified. From this order certain of the partnership creditors took an appeal to the Circuit Court, July 21, which the individual creditors moved in that court, Aug. 4, to dismiss. Certain other of the partnership creditors filed in the Circuit Court, July 20, a petition for review under the supervisory jurisdiction of that court. Sept. 22, the Circuit Court made an order dismissing the appeal, for the reason that the case was one for review and not appeal,

and at the same time, under the petition for review, affirmed the order of the District Court complained of.

Sept. 29, Nimick and the other partnership creditors took an appeal to this court from the order of the Circuit Court dismissing their appeal. The cause having been docketed upon this appeal, the individual creditors now move to dismiss, for the reason that the order appealed from is not reviewable in this court.

Mr. George Shiras, Jr., in support of the motion.

Mr. J. F. Slagle and *Mr. John Dalzell* in opposition thereto.

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

We think the motion to dismiss in this case must be granted. The record shows affirmatively that the Circuit Court refused to take jurisdiction upon the appeal, and did proceed under its supervisory jurisdiction alone. The case is thus brought directly within our decision in *Stickney* v. *Wilt*, 23 Wall. 150; and, as the order of the District Court has been affirmed, we are not called upon to determine whether we should set aside the action of the Circuit Court for want of jurisdiction, as we did in that case, because there was a reversal. If, as is claimed, the District Court acted without jurisdiction, or in a manner not to bind the parties, its decree as made was void; and the aggrieved partnership creditors may very properly consider whether they cannot proceed in equity to call the trustees to a proper accounting and distribution. Upon that question, however, we express no opinion. We are clear that no appeal lies to this court from the action of the Circuit Court in respect to what has been done; and the suit is accordingly *Dismissed.*

INSURANCE COMPANY *v.* DUTCHER.

The court holds that the assured, having elected to discontinue the payment of premiums, is entitled to a paid-up policy *pro tanto*, without paying her note to the company for part premiums, but that the note will be a lien on such policy, and, with interest, less the accruing dividends of profits, must, when the policy becomes payable, be deducted from the amount thereof.

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

This was a bill in equity filed by Clinton O. Dutcher and wife against the Brooklyn Insurance Company of New York, claiming that Mrs. Dutcher, under her contract with the company, and by reason of her payment of certain annual premiums, was entitled to a paid-up policy of insurance upon the life of her husband for $4,000, and praying for a specific performance. A decree was rendered for the complainants, and the company appealed here.

The facts are stated in the opinion of the court.

Submitted by *Mr. J. O. Broadhead*, for the appellant.

There was no opposing counsel.

MR. JUSTICE SWAYNE delivered the opinion of the court.

In order to reach the proper solution of the question to be decided, it is necessary at the outset carefully to analyze so much of the policy as bears upon the subject.

It was there stipulated, that, in consideration of the payment of the sum of $615.40, and the payment of that sum annually thereafter on the twenty-eighth day of February, until ten years' premiums should be paid, the life of Clinton O. Dutcher was assured for the term of his natural life in the sum of $10,000, with participation in the profits of the company.

The insurance money, upon his death, was to be paid to Annie C. Dutcher, his wife, or her legal representatives, the balance of the year's premium, if any, and all indebtedness to the company, to be first deducted.

If the stipulated premium should not be paid on the day fixed upon for its payment, or any note given to the company in part payment of any premium should not be paid on the

day when the same became due, then the company was not to be liable for any part of the sum assured, and the policy was to become void.

The dividends of profits declared were to be applied towards the payment of the note taken for "part premiums."

If the policy should become void, Annie C. Dutcher or her legal representatives were to be liable to pay to the company the amount of all notes taken for premiums which should remain unpaid, except the balance remaining unpaid on the note taken for part premium, and made payable twelve months from date, and the last-mentioned note was to be cancelled upon the surrender of the policy.

After two annual payments, should it be desired to discontinue the policy, the company was to issue "a paid-up policy for as many tenths of the amount originally assured as there had been annual premiums paid in cash."

Such being the policy, we are next to consider the admitted facts, as shown by the agreement of the parties.

At the time of the execution and delivery of the policy, the parties agreed that the annual premium of $615.40 should be paid each year, as follows: $369.24 in money, and $246.16 in the promissory note of Annie C. Dutcher, payable twelve months from date, with interest at the rate of seven per cent.

On the payment of the money and the delivery of the note a receipt for $615.40, the amount of the premium for a year, was to be delivered to Annie C. Dutcher, the amount of the note to be a permanent loan to her, bearing interest at the rate of seven per cent per annum, until paid by dividends of profits.

At the maturity of the note, a new note, bearing the same rate of interest and covering the amount of the prior note (except as reduced by dividends), and the amount of $246.40 of premium for the current year, was to be given; and so on from year to year during the existence of the original policy.

Annie C. Dutcher did, accordingly, on the 29th of February, 1868, pay the company $369.24 in money, and $246.16 in her promissory note drawn as aforesaid.

The company thereupon gave her a receipt, specifying the payment of $615.40, in full of the premium for the ensuing year, and that $246.16 of the premium had been loaned to her.

This arrangement was carried out also with reference to the premiums due Feb. 28, 1869, Feb. 28, 1870, and Feb. 28, 1871. This continued the original policy in force until Feb. 28, 1872. The amount due to the company after the adjustment of the premium of 1871 was, including the amount due upon the prior notes so given, $793.64.

Annie C. Dutcher thereupon, after due notice, demanded a paid-up policy. The company refused to issue it unless she would first pay the $793.64 so due from her, which was a lien against the existing policy. She declined to comply with this demand.

It is further agreed, that from the time the company began business to the 20th of January, 1871, it was the course of business of the company to issue paid-up policies to policy-holders on demand, without reference to their indebtedness to the company, arising as before stated, and to hold such indebtedness in each case as a lien against the paid-up policy, but that on and after that date the company refused to give a paid-up policy to any policy-holder, without the payment first by the policy-holder of the amount owing to the company.

In this condition of things the appellees instituted this suit to compel the delivery of a paid-up policy. The court below decreed in their favor. The decree was conditioned that the sum of $793.64, and interest at the rate of seven per cent, owing to the company, less the accruing dividends of profits, should be a lien against the new policy, and that the amount due to the company at the death of Clinton O. Dutcher should be deducted from the sum then to be paid to the assured upon the policy. The company removed the case to this court by appeal. It is thus brought before us for consideration.

We think the decree is right.

The agreement set out in the admitted facts supplemented the policy. It had all the elements of validity. It was made by parties competent to contract. There was the requisite meeting and assent of minds. No canon of the law was violated. It stipulated expressly that the amount of the note given for the designated part of the annual premium was to be "a permanent loan from the company to Annie C. Dutcher, bearing interest at the rate of seven per cent, until paid by

dividends." The receipt was for "six hundred and fifteen $\frac{40}{100}$ dollars, which continues in force the policy," &c. The part of the premium for which the note was given each year was described as "amount of premium loaned this year." The policy provides that the amount of the note unpaid, if any, when the sum secured by the policy became payable, was to be deducted from the amount of the insurance money to be paid. This was the stipulation upon the subject. Beyond this there was no condition or qualification touching the note. The rights of the parties are thus clearly defined. Nothing is said in this connection as to any payment or discharge of the note in any other way than those thus prescribed. The note was to be renewed every year for the proper amount, and credited regularly with the accruing dividends during the life of the policy.

But it is said the policy declares that the amount of the paid-up policy should be determined by the sum of the premiums "paid in cash."

To this there is an obvious, and, we think, a conclusive answer. The part of the annual premium for which a note was to be given was in substance and effect a loan of so much money by the company to the assured. It was so described in the receipt of the company for the premium, and in the contract of the parties. If the money had been actually paid to the company, and the next moment loaned back, and the note then taken, there would not have been room even for a quibble upon the subject. Why go through such a ceremony? Why not go directly, as was done, to the end in view? The intent which animated the conduct of the parties determines its character. The receipt and contract both show that the transaction was regarded by both parties as a payment of money to one and a loan back to the other, for which the note was taken. The receipt was for the full amount of the premium. The note and loan were mentioned by way of memorandum, as a distinct matter. The law never requires an idle thing to be done. It would clearly have been this, and nothing else, if the assured had actually handed over the money and note with one hand, and *eo instanti*, with the other taken back the money. The company had the power to waive the actual production and payment of the money, and to receive a note bearing

interest as the same thing. It has exercised this power, and is estopped to deny the consequence. Where a surety, by giving his note, extinguishes the liability of his co-surety, he can maintain an action against the co-surety for money paid; because the effect is the same that would have been wrought by the actual payment of the money.

The agreed fact must not be overlooked, that the company, from the time it commenced business, until the year 1871, — more than two years after entering into the contract with the assured, — always issued paid-up policies upon the basis of the full amount of premiums paid as they were paid by the assured appellee, making no distinction between the notes and money received by the company for the premiums.

The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as any thing else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case.

It was competent for the company, under proper circumstances, at any time to change its rule with respect to the future; but it could not affect vested rights acquired in the past, while a different rule prevailed.

Prior contracts must be carried out as they were when they were entered into. Neither party, *in invitum* as respects the other, can make any change. When it was proposed by the assurer to apply the new rule and practice in this case, the assured might well say, "*non in hæc fœdera veni*," and insist upon the interpretation which prevailed in other like cases when the parties became bound to each other, and continuously, for two years later. The proper way to make the change was to employ such language for that purpose as would create certainty and exclude doubt. It appears from a passage in the opinion of one of the learned judges below that this was done in sub-

sequent cases by expressly excluding the notes from the basis of the computation, and confining it to the cash payments.

But, irrespective of this, we entertain no doubt upon the point in question.

The conclusion to which we have come will involve neither hardship nor hazard to the appellant. The note bears seven per cent interest. The debt will be a lien against the new policy, and nothing can be collected upon it until the entire amount due to the company shall have been first deducted. The security will, therefore, be perfect.

Decree affirmed.

MR. JUSTICE BRADLEY dissented.

KEYSTONE BRIDGE COMPANY *v.* PHŒNIX IRON COMPANY.

1. The manufacture of round or cylindrical bars flattened and drilled at the eye, for use in the lower chords of iron truss bridges, is not an infringement of letters-patent for an improvement in such bridges where the claim in the specification describes the patented invention as consisting in the use of wide and thin drilled eye-bars applied on edge.
2. Although one of the patents under consideration in this suit embraced the use of wide and thin bars, upset and widened at the ends by compression to give additional strength, it does not claim that process. Therefore, the use of round or cylindrical bars strengthened in a similar manner is not an infringement of the patent. *Quære*, Would such a process have been patentable?
3. A patentee, in a suit upon his patent, is bound by the claim therein set forth, and cannot go beyond it.

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

The facts are stated in the opinion of the court.

The case was argued by *Mr. Henry Baldwin, Jr.*, for the appellant, and by *Mr. George Harding* for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The appeal in this case is brought to review the decree of the Circuit Court dismissing the bill of complaint, which charges an infringement of two certain patents belonging to the Keystone Bridge Company. These patents were for improvements in iron truss bridges. The first was granted to J. H. Linville and his assignee J. I. Piper, Jan. 14, 1862; the second, to the

same parties, Oct. 31, 1865. The particular claims upon which the contest arises before us are the first claim in the former patent, and the third in the latter. Both of these claims relate to the lower chords of the truss, the primary office of which is to hold the lower parts of the structure together, and keep them from spreading; but which are also employed in the construction of the patentees, to sustain the cross-sills which support the railroad.

We do not think we ought to disturb the decree of the Circuit Court in this case. We regard the construction of the claims in question insisted upon by the appellee as substantially correct. Those claims are the first in the patent of 1862, and the third in that of 1865. It is manifest that, in the former, the form of the chords is deemed material, or, at least, it is made so by the terms of the specification and claim. They are flat bars placed on edge so as to sustain superincumbent weight, as well as perform the office of tension braces. They are made in this form in order that the floor beams of the railroad may be directly laid on them. This is apparent from the whole tenor of the specification. The patentee, in describing his invention, commences by saying: "My invention, consists, 1st, in a novel construction of the lower chords, and mode of applying the same, in combination with the posts and other parts of the truss." Again: "The bottom chords are each composed of a series of wide, thin eye-bars, of wrought iron, of a length corresponding with the distances between the posts on one side of the truss, placed on edge to enable them to give vertical support to the roadway," &c. Then, after showing that these eye-bars or chords are made wider at the ends where the eye-holes are made for inserting the connecting pins or bolts, which connect the different sections together, and explaining the general construction of the bridge and its different parts, he concludes with the following claim: "I do not claim the use of eye-bars or links as chains of suspension bridges; but what I claim as my invention, and desire to secure by letters-patent, is, 1st, the construction of the lower chords of truss bridges of series of *wide and thin* drilled eye-bars, C, C, *applied on edge* between ribs, S, S, on the bottoms of the posts, and connected by pins, P, P, supported in the diagonal tension braces, D and

E, all substantially as herein described." Words cannot show more plainly that the claim of the inventor does not extend to any other eye-bars or chords than such as are made wide and thin, and applied on edge. As those constructed by the defendant are cylindrical in form, only flattened at the eye for insertion between the ribs or projections of the posts, it is plain that no infringement of this claim of the patent has been committed.

The other claim in question, namely, the third claim of the patent of 1865, is for the employment in truss bridges of just such wide and thin chords as above described, whose ends are enlarged or widened by being upset (when heated) by compression into moulds in the manner described in the specification of the patent. The mode of upsetting, widening, and shaping the ends of the bars is by placing the ends, after the bars have been rolled into proper shape and size, and the ends heated, into a die-box of the regular form, and then firmly locking them in place, and with great power pressing them up endwise with a movable head-die until the hot iron fills the die-box. By this pressure the ends are upset, widened, and compressed into the desired shape. It is claimed that by this process the ends are made stronger and better able to sustain the great strain to which they are subjected when in place in the truss. The defendant upsets the ends of the chords made by it before putting them into the die-box, then places them in the box, and flattens them into shape in much the same way that is described in the patent. The process is not in all respects the same, but perhaps sufficiently alike to constitute an infringement if the claim of the patent were only for the process of forming the widened ends. But it is not so, and probably the patent could not be sustained if it were; for spike-heads, nail-heads, bolt-heads, and many other things of that sort, are formed by upsetting and compressing hot iron in the same way. It is only the use in truss bridges of flat bars or chords, with the ends upset and widened in this manner, which the patentees claim as their invention. Their claim is for a particular product, made by a particular process and applied to a particular use. The patent of 1865 refers to that of 1862, and the invention sought to be patented is claimed as an improvement

on the prior one. The patentees say: "Our invention consists of certain improvements in the construction of the wrought-iron truss bridge for which letters-patent of the United States were granted to us on the 14th of January, 1862. In the truss bridge shown in the accompanying drawings the general arrangement of the parts is similar to that shown in our previous patent just referred to, — the improvements forming the subject-matter of this invention relating to the following particulars:" [then, after specifying certain improvements in the posts and in the upper chords of the truss, the patentees proceed as follows:] "2. The use of bottom chords of thin wrought-iron plates, the eye of which at each end, instead of being cut out of a rolled plate and drilled or forged into shape, is upset under strong compression, so as to give at the eye of the bar a degree of strength equal or superior to that of the bar at any point between the eyes." Then, describing the various parts of the truss in its improved construction, in speaking of the bottom chords (which are those in question) the patentees say: "The bases of the posts, A, are connected at their bases longitudinally by the lower chords, D, of which four may be placed parallel to each other, on each side of each panel. They are made of *thin bars of rolled iron*, of sufficient depth, and *placed on edge*, so as to support the roadway, and are attached to the bases of the posts by the connecting pins, N, which pass through the hole or eye near the end of these bars." Again, in summing up, the patentees say: "The lower chords, D, consist of *wide*, *thin* rolled iron bars, with enlarged ends, which are made by upsetting the rolled bars by compressing them into the desired shape in moulds into which the heated iron is forced under immense pressure," &c. And then, in order to exclude the idea that they claim the mode of compressing the ends, they add: "We do not claim the upsetting of iron bars in the manner described, nor any peculiar mode of performing the operation, but merely the use of chord-bars for bridges, the eyes of which are thus formed so as to give additional strength to the bar where it is so much needed." The claims are then set forth categorically in the usual manner, the third claim (the one in question) being in these words: "3d, The use for the lower chords of truss frames of *wide and thin* rolled bars with

enlarged ends, formed by upsetting the iron, when heated, by compression into moulds of the required shape, for the purpose of increasing the density, toughness, and strength of the eye of the rod, and enlarging the eye, without diminishing its transverse section, substantially as hereinbefore described."

Here, again, the patentees clearly confine themselves to "*wide and thin*" bars. They claim the use in truss bridges of such bars when the ends are upset and widened in the manner described. It is plain, therefore, that the defendant company, which does not make said bars at all, but round or cylindrical bars, does not infringe this claim of the patent. When a claim is so explicit, the courts cannot alter or enlarge it. If the patentees have not claimed the whole of their invention, and the omission has been the result of inadvertence, they should have sought to correct the error by a surrender of their patent and an application for a reissue. They cannot expect the courts to wade through the history of the art, and spell out what they might have claimed, but have not claimed. Since the act of 1836, the patent laws require that an applicant for a patent shall not only, by a specification in writing, fully explain his invention, but that he "shall particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery." This provision was inserted in the law for the purpose of relieving the courts from the duty of ascertaining the exact invention of the patentee by inference and conjecture, derived from a laborious examination of previous inventions, and a comparison thereof with that claimed by him. This duty is now cast upon the Patent Office. There his claim is, or is supposed to be, examined, scrutinized, limited, and made to conform to what he is entitled to. If the office refuses to allow him all that he asks, he has an appeal. But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office, or the appellate tribunal to which contested applications are referred. When the terms of a claim in a patent are clear and distinct (as they always should be), the patentee, in a suit brought upon the patent, is bound by it. *Merrill* v. *Yeomans*, 94 U. S. 568. He can claim nothing beyond it. But the defendant may at all times, under proper pleadings, resort to prior use and the

general history of the art to assail the validity of a patent or to restrain its construction. The door is then opened to the plaintiff to resort to the same kind of evidence in rebuttal; but he can never go beyond his claim. As patents are procured *ex parte*, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public.

The construction which we have felt bound to give to the patent obviates the necessity of expressing any opinion upon the other point made by the court below, namely, that the patents only covered the use of the chords in question in truss bridges, and not the making of such chords, which latter is all that the defendant company is shown to have done.

Decree affirmed.

RAILWAY COMPANY *v.* STEWART.

1. The court, in construing the contract between the parties to this suit, holds that the company is not bound to deliver the stipulated new bonds until all the construction bonds which are still outstanding shall be surrendered to it, or due proof made of the loss of such as cannot be produced, and adequate security offered to indemnify the company against liability to any adverse claimant.
2. The parties in interest will then be entitled to a performance of the contract by the company, notwithstanding a decree by consent and in part performance of the contract has been rendered by the District Court of the first judicial district of the State of Kansas, sitting within and for the county of Leavenworth, directing a cancellation of the construction bonds and a discharge of the mortgage securing them.
3. The court calls attention to the irrelevant matter and useless repetitions with which the record in this case is incumbered; and, while reversing the decree below, adjudges that the parties pay their respective costs in this court, and refers to rule 52 in admiralty as containing suggestions which may serve as an appropriate guide in making up the record in a case at law or in equity.

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

The case was argued by *Mr. John P. Usher* for the appellant, and submitted on printed arguments by *Mr. Matt. H. Carpenter* and *Mr. Joseph B. Stewart* for the appellee.

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

This is a bill in equity filed by Stewart as complainant, Aug. 20, 1868, against the Union Pacific Railroad Company, Eastern Division (now known as the Kansas Pacific Railway Company), the National Mechanics' Bank of Baltimore, the National Union Bank of Maryland, and the National Exchange Bank of Baltimore, but dismissed by the complainant as against the several banks made defendants, Nov. 28, 1871. The case, as stated in the bill, is substantially as follows: —

On the 6th of January, 1866, there were outstanding four hundred and fifty land-grant bonds and six hundred and forty construction bonds of the railroad company, upon which it claimed that it was not liable. All the land-grant bonds and three hundred and ninety of the construction bonds were owned or controlled by Thomas C. Durant. Stewart owned or represented the remaining two hundred and fifty construction bonds. A suit had been commenced by the company, and was then pending, in one of the State courts of Kansas, against Durant, Stewart, and others, the object of which was to obtain a cancellation of the construction bonds, and the mortgage executed to secure their payment. There were also other matters in dispute between Durant and the company, and between him and John D. Perry, its president. In this state of affairs, Stewart, on the 6th of January, 1866, proposed in writing to the company, through its attorney, to surrender all the land-grant and the construction bonds held or represented by Durant or himself, and procure a release by Durant of all actions and rights of action which he had or might have against John D. Perry or the company, or any of its officers, so that its mortgages might be cancelled, if it would in exchange therefor execute and deliver to him, for the parties interested, five hundred of its bonds of $1,000 each, secured by a first lien on the first one hundred and fifty miles of the lands west of Fort Riley, granted by Congress to aid in the construction of its road. It is then alleged that, in the early part of February following, this proposition was accepted, with some slight modifications, and that the company agreed to take up the old bonds and deliver the proposed new ones in exchange; that Durant, in pursuance of

this agreement, executed the proper release, surrendered his bonds, and received in exchange his stipulated portion of the new securities; that certain persons owning some of the bonds represented by Stewart at the time of the contract accepted the terms of the settlement, and made the contemplated exchange; that he, Stewart, was the owner of one hundred and fifty-four of the construction bonds, for which there still remained in the hands of the company one hundred and twenty-six of the new issue, to be exchanged upon surrender in accordance with the terms of the settlement, but that he was unable to produce his bonds, as they were in the possession of the banks that were made defendants, and they refused to give them up. He insisted, however, that the bonds were his, and that they were no longer binding upon the company. He accordingly prayed that the company might be required to deliver to him the bonds which were held for exchange under the terms of the agreement of settlement.

The company answered, denying substantially all the material allegations in the bill.

From the testimony, it appears that Stewart made the proposition set forth in his bill, and that it led to an interview between Durant and the officers of the company, at Philadelphia, early in February, 1866, at which Stewart was present, representing his own interests. Durant objected to the terms proposed by Stewart; and, after some negotiation, a settlement was finally agreed upon, by which the bonds held by all the parties were to be surrendered, and in consideration thereof the company was to pay Durant $100,000 in cash and notes, and execute and deliver four hundred new bonds of $1,000 each, secured by mortgage on the lands of the company lying on the first one hundred miles of its road west of Fort Riley. As part of the settlement, also, the company was authorized to enter in the suit pending in the State court of Kansas a decree directing the cancellation of the construction bonds and the discharge of the mortgage securing them.

Pursuant to this arrangement, the company executed its new bonds and mortgage; and, during the latter part of April, 1866, Durant surrendered his old bonds, and received the part of the new issue which, as between him and the holders of the other

construction bonds, it was stipulated he should have. Alexander Hay, also, who owned seventy-six of the bonds represented by Stewart in the settlement, made his exchanges; and since the commencement of this suit twenty more have been taken up by the company. This leaves outstanding one hundred and fifty-four bonds, claimed by Stewart, which were not exchanged at the same time with the others, because of his inability to control them for that purpose. The parties actually holding them did present them, but on account of his objections the exchange was not made.

In accordance with the terms of the settlement, a decree, cancelling the construction bonds and discharging the mortgage, was entered in the suit pending in the State court.

None of the one hundred and fifty-four bonds have been surrendered to the company, but deliveries of new bonds held for exchange have in some cases been made upon the order of Stewart without a corresponding surrender.

Fifty of the old bonds were lost, and cannot be produced. Hamilton G. Fant, claiming to be the owner of them, filed with the master in this cause the evidence of his title, and of their loss, and asks that their distributive share of the new bonds may be given to him. Of the remainder there were presented to the master by W. A. Coit, five; H. G. Fant, four; R. F. Baldwin, sixty; George E. Jarvis, five. The other thirty are claimed by William E. Edmonds, and they have never been presented to the master.

Each of the persons presenting the bonds claims them either as owner or as pledgee; and Fant claims to have an assignment of the whole, as security for moneys loaned to Stewart, or for obligations incurred on his account. Stewart disputes the claims of all the different holders, including Fant, and insists that he is entitled to a decree awarding to him all the new bonds now remaining with the company, to carry out the settlement as finally concluded.

None of the persons filing the bonds with the master, or asking an order of distribution in their favor, are parties to the suit, to such an extent or in such a manner that their title can be litigated and determined here. They come in only for the purpose of surrendering their bonds and receiving in exchange

their respective shares of the fund produced by the settlement. Stewart may resist their recovery; but he cannot by their presentation of the bonds secure the possession and control of them, and then upon the surrender claim for himself the stipulated equivalent in exchange.

The company is not bound to make the exchange until the surrender is perfected. It is not required to litigate titles for Stewart, — that he must do for himself. When that is done, if he secures the control of the bonds, he may be entitled to call upon the company to carry out its contract of exchange. But until then, he is in no condition to insist upon performance. The contract on the part of the company was to make the exchange upon the surrender of all the old bonds. It is not required to deal with the individual owners separately, but only to accept the surrender of all, and give the new bonds in exchange. So far as it has gone, however, it is bound by what it has done; but it is not under obligations to go further in that direction. Until, therefore, Stewart surrenders all the remaining outstanding bonds, or makes satisfactory proof of their loss, and furnishes security against the further liability of the company to any other holder, he cannot require it to give him the balance of the new bonds which it still holds for exchange.

The decree of the State court having been entered by consent, and in part performance of the agreement of settlement, is not a bar to a suit for an appropriation of the fruits of the settlement. The outstanding bonds are still binding upon the company to the extent that may be necessary to enable the owners of them to secure the benefit of the consideration agreed to be paid for their cancellation. The present holders, though not parties to the suit in which the decree was entered, are at liberty to treat the settlement as made for their benefit, and to act accordingly.

The view we have taken of the case makes it unnecessary to inquire whether the contract stated in the bill is the same as that which has been proven. The evidence as it stands is not sufficient to entitle Stewart to recover upon either. Both that averred and that proved require him to surrender his bonds for cancellation before he can demand the new ones in exchange. That he is unable to do; and, consequently, at this time he is not

entitled to the decree he asks. It is unnecessary to determine what would be his rights if all the adverse claimants were in court, so that a decree could be entered which would settle their conflicting claims as between each other, and protect the company against further liability. They are not here, and any decree rendered against them in favor of Stewart would not be binding upon them without their consent.

This disposes of the case; but we feel it our duty to call attention to the very unsatisfactory manner in which the record has been made up and sent here for the purposes of this appeal. It contains nearly twelve hundred printed pages, and is full of irrelevant matter and useless repetitions. All that is material for the proper presentation of the cause might easily have been put into one-fourth the space. It opens with a copy of the bill, occupying seventeen pages; and immediately following this is a certified copy of the same bill, attached to the return of the service of a subpœna upon one of the corporation defendants, as to which the suit was subsequently dismissed. The proposition made by Stewart on the 6th of January, 1866, and which is claimed to have been the basis of the contract sued upon, is copied no less than ten times, and an affidavit of his, which occupies seventeen pages, is copied three times within a space of seventy pages. These are but specimens of the gross irregularities with which the record abounds. In addition to this, the matter is not well arranged, and the index is almost useless. We have long suffered from the want of attention of parties, or their counsel, and the incapacity, not to say dishonesty, of clerks below in matters of this kind, and deem this a proper occasion for applying the remedy for such neglect or abuse. We are at a loss to determine whether the complainant or defendant is most to blame for the irrelevant matter which has been introduced into this case; but it is clearly the duty of the party who takes an appeal to see to it that the record is properly presented here. Care should be taken that costs are not unnecessarily increased by incorporating useless papers, and that the case is presented fairly and intelligently. While, therefore, the decree in this case will be reversed, each party will be required to pay his own costs in this court. We shall not hesitate to apply the same remedy hereafter in cases where the circumstances are

such as to require it. Under rule 24, par. 3, the court below will be required, when the mandate goes down, to tax the costs of the transcript of the record below as part of the costs in the case. That court will then have an opportunity, if it sees fit, of making an order in respect to the amount its clerk shall be permitted to charge.

It is not easy to prescribe by rule what a record in all cases shall contain or what shall be excluded; but rule 52 in admiralty contains suggestions which may serve as an appropriate guide in cases at law or in equity.

The decree of the Circuit Court will be reversed, and the cause remanded with instructions to enter a decree dismissing the bill without prejudice of the right of the complainant or the holders of the construction bonds, which are the subject of the action, to commence another suit to enforce the alleged contract of settlement, whenever they shall be in a condition so to do. Each party to these appeals is required to pay his own costs in this court; and it is *So ordered.*

CAMBUSTON *v.* UNITED STATES.

The District Court, in the exercise of its jurisdiction, under an act entitled "An Act to ascertain and settle the private land claims in the State of California," approved March 3, 1857 (9 Stat. 631), rendered a decree Nov. 12, 1859, rejecting the claim of A. He died Jan. 22, 1869, and his executrix was, by an order of the court entered April 3, 1875, permitted to become the party claimant of the land. She thereupon moved for a new trial and the reversal of the decree. The motion was overruled; and, on the same day, an appeal was allowed her from the decree and from the order refusing a new trial. *Held*, 1. That the appeal from the decree was not taken in time. 2. That no appeal lies from the order refusing a new trial.

MOTION by the United States to dismiss an appeal from the District Court of the United States for the District of California.

The facts are stated in the opinion of the court.

The motion was submitted on printed arguments by the *Solicitor-General* for the United States, and by *Mr. Edmond L. Goold* for the appellant.

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

This is an appeal from the District Court of the United States for the District of California, in a proceeding under the "Act to ascertain and settle the private land claims in the State of California," passed March 3, 1851. 9 Stat. 631. The case was here at the December Term, 1857, when a former decree of the District Court was reversed, and the cause sent back for further hearing. *United States* v. *Cambuston*, 20 How. 59. The mandate was filed in the court below, May 5, 1859, and the further hearing resulted in a decree, Nov. 12, 1859, rejecting the claim. The court adjourned for the term on the first Monday in December, 1859, previous to which time no motion for a new trial or petition for rehearing had been filed.

On the 24th of February, 1860, Lansing B. Mizner, as "a party in interest," filed with the clerk of the court a petition for rehearing. What his interest actually was nowhere appears in the record. A copy of this petition was served on the district attorney of the United States the same day the original was filed in the clerk's office; and, March 13, 1860, the district attorney and the attorney for the claimant entered into the following stipulation: —

"It is hereby stipulated that Tully R. Wise, acting United States district attorney, waived written notice to him of a motion to be made for a new trial during the term of the United States District Court, ending the first Monday in December last, and that he considered a verbal notice of intention to move as sufficient to him, and then given to him, the said Wise. It is further stipulated, that, if the said Henry Cambuston now has the right to have the said motion heard, it shall not be prejudiced by delay until the return of the Hon. Ogden Hoffman."

Nothing further was done until April 2, 1875, when the widow of Cambuston — he having died Jan. 22, 1869 — appeared in court and asked to "be permitted to become the party claimant of the land," as executrix of the will of her deceased husband, which had been admitted to probate May 3, 1869. An order to this effect was made April 3, 1875, and on the same day the claimant asked that a new trial be granted, and that the decree rejecting the claim might be reversed. The

parties thereupon appeared, and, after hearing, the court denied the motion. On the same day, April 3, 1875, this appeal was allowed, both from the final decree and the order refusing a new trial. The United States now move to dismiss the appeal, because taken too late.

The statute in force when the decree was rendered provided that writs of error and appeals should not be brought to this court except within five years after passing or rendering the decree or judgment complained of. 1 Stat. 85, sect. 22. As this decree was rendered Nov. 12, 1859, and the appeal not taken until April 3, 1875, it is clear that the motion to dismiss should be granted, unless the petition for rehearing or motion for a new trial suspended the operation of this statute.

In *Brockett* v. *Brockett*, 2 How. 238, it was held that a petition for rehearing filed during the term, and actually entertained by the court, suspended the operation of a decree in equity until the petition was disposed of. Neither the petition for a rehearing nor the motion for a new trial in this case was filed, or the attention of the court in any manner called to such a proceeding, during the term at which the decree was rendered. The proceeding before the District Court was statutory, and not at common law or in equity. It was, however, a suit, and must be governed by the rules of law applicable to that class of judicial proceedings. Consequently, when the term closed at which the decree was rendered, the parties were out of court, and the jurisdiction ended so far as that court was concerned, no steps having been taken to keep it alive. The decree was then in full force and operative for all purposes.

According to the practice in suits at common law and in equity, no step has since been taken which can have the effect of suspending the decree for the purpose of an appeal. By sect. 726 of the Revised Statutes, the courts of the United States are empowered to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law; and by sect. 987, when a Circuit Court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, execution may, on motion of either party, at the discretion of

the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of the court a petition for a new trial. If such petition is filed within such term of forty-two days, with a certificate thereon of any judge of the court that he allows it to be filed, execution shall, of course, be further stayed until the next session of the court. From this legislation it is apparent that it was not the policy of Congress to suspend the operation of a judgment so as to allow an application for a new trial in any case beyond a period of forty-two days from the time of its rendition. Here judgment was rendered Nov. 12, 1859, and the petition for rehearing was not filed until one hundred and twenty-five days thereafter. The stipulation between counsel, under date of March 13, 1860, was not that a motion for new trial had been filed, but that notice of an intention to make such a motion had been given; and that, if a hearing could then be had, it should not be prejudiced by further delay until the return of the district judge. This application seems never to have been brought to the attention of the court. It is unnecessary to decide whether such a motion can be filed after the term has closed, if no application is made during the term for stay of execution under the statute or for an extension of time to prepare the motion.

In suits in equity the practice is even more strict. Equity rule 88 provides that, in cases where an appeal lies to this court, no rehearing shall be granted after the term at which the final decree shall have been entered and recorded.

We are clearly of the opinion, therefore, that the appeal from the decree of Nov. 12, 1859, was not taken in time, and as no appeal lies from the order refusing the new trial, — *Warner v. Norton et al.*, 20 How. 448, — it follows that the motion to dismiss must be granted; and it is *So ordered.*

BECKWITH *v.* TALBOT.

1. It is not an absolute rule that collateral papers, made by a party, which are adduced in evidence against him to supply the want of his signature to a written agreement, required by the Statute of Frauds to be "subscribed by the party chargeable therewith," should, on their face, and without the aid of parol proof, sufficiently demonstrate their reference to such agreement.
2. If the interest and cause of action of the promisees under an agreement be several, each may maintain an action against the promisor.

ERROR to the Supreme Court of the Territory of Colorado.

The facts are stated in the opinion of the court.

Mr. William H. Phillips for the plaintiff in error.

No counsel appeared for the defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an action brought by Talbot against George C. Beckwith in the District Court of Colorado for the County of Fremont, to recover damages for the breach of a contract alleged to have been made on the 7th of October, 1870, between the plaintiff and two others on the one part, and the defendant on the other, whereby they were to herd and care for a large herd of cattle for the defendant, from that time until the fifth day of December, 1872, for which he was to give them one-half of what the cattle and their increase should then bring over, $36,681.60; that is, to each one-third of such half. The declaration alleged that the plaintiff and the two persons who entered into the contract together with him (who were the sons of the defendant) performed their part of it, but that the defendant refused to sell the cattle, or to pay the plaintiff his share of their value above the said sum.

On the trial, two defences were relied on which are made the subject of assignments of error here: First, that the alleged contract was void by the Statute of Frauds, because, though not to be performed within a year, it was not in writing signed by the defendant; secondly, that it was a joint contract on which the plaintiff could not maintain a separate action.

The territorial Statute of Frauds declares that "every agreement which by its terms is not to be performed within a year,

unless some note or memorandum thereof be in writing and subscribed by the party chargeable therewith, shall be void." The verbal difference between this statute and that of Charles II. is not material in this case.

It appeared on the trial that the agreement made by the parties was committed to writing at the defendant's instance, and was in the following words, to wit: —

"WET MOUNTAIN VALLEY, Oct. 7, 1870.

"This is to certify that the undersigned have taken two thousand two hundred and five head of cattle, valued at $36,681.60 on shares from George C. Beckwith; time to expire on the fifth day of December, 1872; then George C. Beckwith to sell the cattle and retain the amount the cattle are valued at above. Of the amount the cattle sell at over and above the said valuation, George C. Beckwith to retain one half, and the other half to be equally divided between C. W. Talbot, and Elton T. Beckwith, and Edwin F. Beckwith.

(Signed) "C. W. TALBOT.
"ELTON T. BECKWITH.
"EDWIN F. BECKWITH."

This agreement was signed by the plaintiff and the two young Beckwiths, but was not signed by the defendant. It was delivered to him, however, and was kept by him until he produced and proved it on the trial. It was conceded by both parties that this was the agreement under which the services of the plaintiff were performed.

Two letters written by the defendant to the plaintiff on the subject-matter of the contract, and whilst he had the said agreement in his possession, and whilst it was being executed by the plaintiff, namely, one on the 21st of September, 1872, and the other on the 10th of November, 1872, were also produced in evidence; from which the following are extracts: —

"DENVER, Sept. 21, 1872.

"MR. TALBOT, SIR, — On my arrival from the mountains, I received your letter. As I have wrote you before, every day I see parties here that is offering their cattle very low. . . . I have used every exertion for the last three months to sell. . . .

"You suggest giving you a part of the cattle. That is entirely outside of the agreement. Also, where would be the interest on the amount put in the cattle coming from? And also Elton and

Edwin would be glad to do the same; but at that rate I would not get my money back I put into the cattle.

"The cattle must be sold and settled up according to the agreement. I will do every thing I can to sell at the best advantage, and you shall have every chance to get a purchaser for the cattle so as to make the most out of them. . . .

"You shall have no chance to complain in my keeping up to the agreement, as I shall strictly, although I have heard you have made complaints to parties, which I think is very unfair, and the parties you told so said so too. . .

"Yours respectfully, GEORGE C. BECKWITH."

"DENVER, Nov. 10, 1872.

"MR. TALBOT, SIR, — At first I thought it useless to answer your letter, as I am bound by the agreement to sell the cattle in a very short time. . . I notified you to get a purchaser for the cattle months ago; and what have I received from you in return and for my pay? I must say I have never been treated so meanly by a man in my life. My rights was to sell the cattle. Does the agreement say that I was to say any thing to you or any one else?

"But what next? You quarrelled with me because I would not break the agreement and give you the cattle to sell at figures less than I had kept them in Denver for sale. Now, I have been offered $31,000 for the cattle. I have written to Edwin, and he will state to you what I wrote him to say to you.

"Yours, in haste, GEORGE C. BECKWITH."

We agree with the Supreme Court of Colorado that, in the face of this evidence, produced by the defendant himself, he cannot deny the validity of the agreement. His letters are a clear recognition of it. In them he refers to "the agreement" again and again. He declares his intention to adhere to it, and to hold the plaintiff to it. What agreement could he possibly refer to but the only one which, so far as appears, was ever made: the one which he took into his possession, and then had in his possession; the one under which it was conceded the parties were then acting? The defendant, being examined as a witness on his own behalf, and testifying with regard to the contract between the parties, said, "The matter was all talked over, and, I thought, understood. I said to my son Elton, 'You understand the matter. Will you take a pen and paper and

write the contract?' He wrote it. Talbot read it and signed it, and then my sons signed it." On cross-examination, he said, "The contract was delivered to me after it was signed, and has remained in my possession ever since until this trial."

It is undoubtedly a general rule that collateral papers, adduced to supply the defect of signature of a written agreement under the Statute of Frauds, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute. *Johnson* v. *Dodgson*, 2 Mee. & W. 653; *Salmon Falls Co.* v. *Goddard*, 14 How. 446. There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. But where there is no ground for doubt, its enforcement would aid, instead of discouraging, fraud. Suppose an agreement be made out and signed by one of the parties, the other being absent. On the following day, the latter writes to the party who signed it as follows: "My son informs me that you yesterday executed our proposed agreement, as prepared by J. S. I write this to let you know that I recognize and adopt it." Would not this be a sufficient recognition, especially if the parties should act under the agreement? And yet parol proof would be required to show what agreement was meant. The present case is as strong as that would be. In our judgment, the defendant, unless he could show the existence of some other agreement, was estopped from denying that the agreement referred to by him in his letters was that which he induced the plaintiff to sign, and which he put in his pocket and kept, and sought to enforce against the plaintiff for two whole years.

On this point, therefore, we are clearly of opinion that no error was committed by the court below.

The allegation that the plaintiff was interested jointly with the defendant's two sons, and, therefore, could not maintain a separate action for his equal share of the profits, is equally untenable. Their interests were separate. They were all employed and hired by the defendant to herd his cattle. The evidence shows that each supported himself, found his own assistance, and paid his own expenses. Each was to have as his compen-

sation one-third of half the increased value of the cattle at the end of the employment. Neither was interested in the compensation due to the other. Sergeant Williams, in his note to *Eccleston* v. *Clipsham*, 1 Saund. 154, says, "Though a man covenant with two or more jointly, yet if the interest and cause of action of the covenants be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint." In the present case, the cause of action was the service performed under the contract; and each performed his own distinct service, and was entitled to distinct and separate compensation therefor. The case is precisely within the category stated by the learned annotator. It is very similar also to that of *Servante and Others* v. *James*, 10 B. & C. 410, where the master of a vessel covenanted with the several part-owners to pay to them severally in certain proportions the moneys which he should receive from the government for carrying the mails; and it was held that the covenant inured to them severally and not jointly, because their interests were several. The case is also quite similar to that of an engagement with seamen for a whaling voyage, where each is to receive for his compensation a certain percentage of the profits of the voyage. Though they work together and in co-operation, they do not become partners, nor does either acquire any interest in the compensation of the others. The interest of each is separate.

In the present case, the material fact is that the plaintiff and his associates were employés, and not proprietors. They were in the service of the defendant, and employed in and about his property and business, and not their own. Hence they were not partners, either with each other or with him. They were not liable for any losses. The entire responsibility for these was on him. They were only interested in the losses as they might affect the amount of their ultimate compensation.

These considerations dispose of another point made by the plaintiff in error, though not distinctly assigned for error; namely, that the contract created a partnership between the defendant and the other parties to it. No such result was intended, nor does it follow from any fair construction of the contract. There was no community of interest in the capital

employed, nor in the profits and losses. The cattle remained the entire property of the defendant. If the whole herd had perished by distemper, it would have been his loss alone, and the other parties would only have been interested in the loss of compensation for their services.

Judgment affirmed.

PEARSON v. YEWDALL.

1. Where a writ of error is defective in the statement of the parties thereto, the right to amend is not absolute, under sect. 1005, Rev. Stat.; but the court, in its discretion, may allow the requisite amendment to be made upon such terms as it may deem just.
2. As both parties severally claim compensation for land taken by the city of Philadelphia for public use, the city, the only adverse party to them in the proceedings below, is an indispensable party to the writ.
3. The court declines to allow an amendment making the city such party, inasmuch as the questions made by the assignment of error have been settled by repeated decisions, and are no longer open to discussion here.
4. The seventh amendment to the Constitution, touching the right of trial by jury, applies only to the courts of the United States.
5. The act of the General Assembly of the State of Pennsylvania, entitled "An Act relating to roads, highways, and bridges," approved July 13, 1836, makes ample provision for judicial inquiry in the matters therein mentioned, and is due process of law, within the meaning of the Federal Constitution.

MOTION by the defendant to dismiss the writ of error to the Supreme Court of Pennsylvania, and by the plaintiff to amend the writ, by making the city of Philadelphia a party thereto.

The facts are stated in the opinion of the court.

The motions were argued by *Mr. F. Carroll Brewster* for the plaintiff in error, and by *Mr. William W. Wiltbank* for the defendant in error.

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

It having been suggested to us at the last term that the city of Philadelphia was a party to this cause in the court below, and adverse in interest to the plaintiffs in error, leave was granted the defendants in error to move to dismiss this suit, because the city is not named in the writ; and for the city to appear by counsel, to be heard in support of the motion. That

motion has now been made; and the plaintiffs in error, while resisting it, ask leave, under sect. 1005 Rev. Stat., to amend their writ by naming the city as a defendant, in case it shall appear to be necessary.

The city councils, by ordinance, ordered that Paschall Street should be opened to public use. Thereupon the present defendants in error, owning property which would be taken by the opening, petitioned the Court of Quarter Sessions, conformably to the act of the General Assembly of Pennsylvania regulating such proceedings, to appoint proper persons to view the premises and assess their damages. In accordance with this petition, the court appointed a jury of six men to view the premises, and assess the damages which had been sustained. Notice of their appointment and of the time and place they would meet to perform their duties was served upon all the owners of property through which the street would run. Availing themselves of this notice, the plaintiffs in error appeared among others and presented their claims.

Notice of the meeting was also served, in accordance with the further provisions of the statute, upon the law department of the city; and the solicitor, who was charged by law with the duty of representing and protecting the interests of the city in all such matters, appeared before the jury in his official capacity. The viewers, after a hearing, made a report to the court of their allowances to the several claimants. The plaintiffs in error excepted to the report, for the reason, among others, that the amount awarded to them was too small; and the city also excepted, because it was too large. The Court of Quarter Sessions overruled the exceptions of both parties, and confirmed the report. The plaintiffs in error then appealed to the Supreme Court; and the report being there again confirmed, they now seek to bring the case here for review upon this writ.

There can be no doubt but that the city is an indispensable party to this suit. The viewers were appointed at the instance of the defendants in error; but they were appointed in a proceeding by the city, in its nature adverse to all the property owners affected, for an appropriation of private property to public use. It nowhere appears that the interests of the plaintiffs in error are adverse to those of the defendants in

error. They were both property owners, and both seeking compensation for their property before it should be opened to the use of the public. The city alone represented the public, and was, therefore, the only party to the proceeding adverse to the claimants. Under such circumstances, we cannot properly review the judgment below in its absence.

The question now arises, whether the plaintiffs in error shall have leave to amend. Sect. 1005 of the Revised Statutes authorizes this court in its discretion, and upon such terms as it may deem just, to allow an amendment of a writ of error when the statement of the parties thereto is defective. The right of a party to amend is not absolute, but it is to be granted by the court in its discretion. Whether it should be granted in a particular case must depend upon the attending circumstances.

In this case, we think the amendment ought not to be allowed. We have looked carefully through the record, and cannot find that any question is presented which has not been many times decided. We have held over and over again that art. 7 of the amendments to the Constitution of the United States relating to trials by jury applies only to the courts of the United States, *Edwards* v. *Elliott*, 21 Wall. 557; and in the act of the General Assembly of Pennsylvania, now under consideration, ample provision is made for an inquiry as to damages before a competent court, and for a review of the proceedings of the court of original jurisdiction, upon appeal to the highest court of the State. This is due process of law, within the meaning of that term as used in the Federal Constitution. To grant the amendment would, in our opinion, lead only to unnecessary delay and expense.

Writ dismissed.

TRANSPORTATION LINE *v.* HOPE.

1. The testimony of experts is admissible in determining an issue involving a question of nautical skill.
2. Although a transportation company, engaged in towing a barge from one point to another, does not occupy the position of a common carrier, nor have that exclusive control of her which that relation would imply, it does have control of her to such extent as is necessary to enable it to fulfil its contract, and is, therefore, bound to exercise such degree of diligence and care as a skilful performance of the stipulated service requires.
3. A mere expression of opinion by a judge upon a question of fact is not a ground of error.
4. The action of the court below, in refusing to charge the jury as requested by the defendant, and the charge as given, considered, and held not to be erroneous.

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

This was an action on the case by Hope, the plaintiff below, to recover damages for the loss of the canal barge or vessel "Mary E. Loughney," her cargo, and for freight thereon. The plaintiff alleges, in substance, that he delivered the barge, valued at $3,000, to the defendant, to be towed, for a certain sum to be paid therefor, from Jersey City to New Haven; and that, by reason of gross and culpable negligence, and the want of ordinary care and skill of the defendant in towing and conducting the barge, she became totally lost. The defendant pleaded the general issue. The jury found for the plaintiff for $2,125.30; and, judgment having been rendered thereon, the defendant brought the case here.

The remaining facts, the charge as given and that refused, as well as the assignment of errors, are set forth in the opinion of the court.

Mr. J. C. Gray for the plaintiff in error.

No counsel appeared for the defendant in error.

MR. JUSTICE HUNT delivered the opinion of the court.

Hope, the plaintiff in the Circuit Court, sought to recover damages for the loss of his barge, which the defendants undertook to tow from Jersey City to New Haven, through Long Island Sound.

The barge was lost before reaching her destination; and

the jury to which the case was submitted found a verdict for the plaintiff for $2,125.30 damages. This was based upon the theory of the negligence of the defendants in the performance of their duty.

With the general question of negligence we have nothing to do. The finding of the jury is conclusive upon that subject. It is only the specific allegations of error in the rulings or charges of the judge at the trial that we are called upon to consider.

These allegations are as follows: It is said that the court erred, first, in overruling the objection of defendant's counsel to the following question, asked of Patrick McCarty, a witness, by the counsel for the plaintiff: "With your experience, would it be safe or prudent for a tug-boat on Chesapeake Bay, or any other wide water, to tug three boats abreast, with a high wind?"

The witness had testified that for many years he had been the captain of a tug-boat, and was familiar with the making up of tows; that he was a pilot, and had towed vessels on Long Island Sound, although he was not familiar with the Sound, but that he was familiar with the waters of the Chesapeake Bay.

The witness was an expert, and was called and testified as such. His knowledge and experience fairly entitled him to that position. It is permitted to ask questions of a witness of this class which cannot be put to ordinary witnesses. It is not an objection, as is assumed, that he was asked a question involving the point to be decided by the jury. As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects on which the jury are not as well able to judge for themselves as is the witness that an expert as such is expected to testify. Evidence of this character is often given upon subjects requiring medical knowledge and science, but it is by no means limited to that class of cases. It is competent upon the question of the value of land, *Clark* v. *Baird*, 9 N. Y. 183; *Bearss* v. *Copely*, 10 id. 93; or as to the value of a particular breed of horses, *Harris* v. *Panama Railroad Co.*, 36 N. Y. Superior Ct. 373; or upon the value of the professional services of a lawyer, *Jackson* v. *New York Central Rail-*

road Co., 2 Thomp. & C. (N. Y.) 653; or on the question of negligence in moving a vessel, *Moore* v. *Westervelt*, 9 Bosw. (N. Y.) 558; or on the necessity of a jettison, *Price* v. *Hartshorn*, 44 N. Y. 94. In *Walsh* v. *Washington Marine Insurance Co.*, 32 id. 427, it was decided that the testimony of experienced navigators on questions involving nautical skill was admissible. The witness in that case was asked to what cause the loss of the vessel was attributable, which was the point to be decided by the jury. The court sustained the admission of the evidence, using this language: "We entertain no doubt that those who are accustomed to the responsibility of command, and whose lives are spent on the ocean, are qualified as experts to prove the practical effect of cross-seas and heavy swells, shifting winds and sudden squalls." The books give a great variety of cases in which evidence of this character is admissible, and we have no doubt of the competency of the evidence to which this objection is made.

Second, The defendants requested the court to charge the jury "that the plaintiff's barge, the 'Mary E. Loughney,' was within the possession and the exclusive care and control of her owner; and the defendants, the Eastern Transportation Line, were not bailees of the boat, nor was the barge placed within their exclusive custody and control, and they were only liable for failure to use ordinary care and diligence."

To which the court answered: "By the contract between the parties, the defendants undertook to tow the plaintiff's barge from Jersey City to New Haven. As a necessary incident of this engagement, the defendants were entitled and were bound to assume supreme control and direction of the plaintiff's boat, and of the persons in charge of her, so far as was necessary to enable them to fulfil their engagement, and they were bound to exercise such degree of diligence and care as a prudent and skilful performance of the service for which they stipulated would require."

The answer of the court properly defined the position of the parties. While it was very well to ask a charge that the transporter of the boat was not a bailee, and perhaps that the boat was not within his exclusive control, and that only ordinary care and diligence were required on his part, it was

quite incorrect to ask a charge that the boat was within the possession and the exclusive care and control of her owner.

The transportation company did not occupy the position of a common carrier, and did not have that exclusive control of the barge which that relation would imply. It did not employ or pay the master and the men in charge of her, nor did it exercise that internal control of her cargo, its storage, its protection, and the like, which belonged to a bailee, and it was not bound to the extraordinary duties and liabilities of a common carrier. *Alexander* v. *Greene*, 3 Hill (N. Y.), 9.

It is, however, impossible to admit the proposition that the barge remained in the exclusive possession, care, and control of her owner; that is, that the transporter had not and could not take any, the slightest, care of her, and was not permitted to exercise the slightest control over her, and had no possession of her of any sort or character.

She could not be towed except by being taken in charge by the tug; that is, under its care and control and management. When the master of a tug undertakes to transport a barge, he must apply the means for that purpose. He must furnish motive power not only, but he must direct her location, whether on the port or the starboard side, whether she shall be the inside boat or the outside one, when and how she shall be lashed to other boats, with what fastenings she shall be secured as she is dragged through the water, whether she shall go fast or slow, when, if at all, she shall drop astern, when she shall go to harbor, how long remain there, and what shall be her course of navigation. These tows consist at times of thirty or forty boats; and they must all be under one head, and subject to one judgment, which is that of the transporter. Whether this judgment was carefully and skilfully exercised in this case formed the question which was passed upon by the jury. It is extremely inaccurate to say that one who does, and who must do, all these things is not while doing them in the exercise of the slightest possession or care or control over such vessel. The charge of the judge, on the contrary, that the transporter had the supreme control of the barge, so far as it was necessary to enable it to fulfil its contract to tow the barge, was correct.

If a request to charge contains one unsound proposition, it is not error to refuse to make the charge, although it contains many sound propositions. *Beaver* v. *Taylor et al.*, 93 U. S. 46.

Third, The two objections following may be considered together. They are as follows: —

1. The court below erred, it is said, in allowing the following request to charge of plaintiff below: "If the plaintiff was placed in peril by the negligence of the master of defendant's tug, and jumped from his boat, reasonably supposing it was going to sink, the plaintiff may recover in this action, although the fact of plaintiff's leaving his boat increased its peril." This was allowed and given by the court.

2. The court below erred in its answer to the sixth request of the defendant below.

The request was: "If the jury believe that the conduct of the plaintiff was such as to leave his boat for any time without being under the care or control of any one, the result of which was to contribute to her loss, then the jury should find for the defendants."

The court answered: "As an abstract proposition, this is true. But if the plaintiff's boat was left in the condition stated, under circumstances which involved imminent peril to the lives of those who remained on board of her, or warranted a reasonable apprehension of such peril, they were justified in abandoning her, and by so doing were not guilty of contributory negligence."

The boat of the plaintiff was in danger of sinking; he believed the danger to be imminent, and to save his own life jumped from his boat to the tug, leaving his boat without the care or control of any one on board of his boat.

The counsel for the transportation company does not seriously argue that the plaintiff was bound to remain on his boat when it was probable that she would immediately sink, or that a reasonable apprehension of imminent peril to his own life did not justify his abandonment so as to avoid the charge of contributory negligence. He argues that the peril was not imminent in fact, and again that the peril was due to the plaintiff's previous misconduct or negligence, and that there

is a failure to define the connection between the peril and any previous negligence.

None of these points are embraced within the requests made or the charge given. There was evidence to sustain the plaintiff's theory of imminent peril, and the judge submitted to the jury the reasonableness of his apprehension. The previous negligence of the party, if any, its connection with the peril, and the law upon that subject, are not alluded to either in the requests we are considering or in the answer given to them. The charges are fairly as well as correctly given in response to the requests made. If the defendant desired additional or more specific instructions, he should have asked for them.

The last objection is, that the judge charged the jury as follows, viz.: "If you conclude, after careful consideration of all the evidence, after the instructions we have given you, that the plaintiff is entitled to recover, you will find a verdict in his favor for the value of the barge, as it has been shown by the proofs, and for the net amount of the freights; that is, I believe, $1,800, as shown, aside from the testimony of the plaintiff himself, to have been the value of the barge at the time, and $90, the net amount of the freight, so that these two amounts are the sums which the plaintiff is entitled to recover, if you are satisfied that he is to recover at all."

This objection is not a serious one. 1. It may be doubted whether the judge undertakes to interfere with the province of the jury by charging them that the value of the vessel was $1,800, and that of the freight $90, as is assumed in the argument. He simply expresses his belief or his opinion that such is the value proven. He says, "That is, I believe, $1,800, as shown, aside from the testimony of the plaintiff himself." So when he adds, "These two sums are the amounts which the plaintiff is entitled to recover, if you are satisfied that he is entitled to recover at all," it is a part of the same expression of opinion. An expression of an opinion simply by a judge upon a question of fact is not a ground of error. *Durkee* v. *Marshal*, 7 Wend. (N. Y.) 312; *Dow* v. *Rush*, 28 Barb. (N. Y.) 157; *Powell* v. *Jones*, id. 24.

2. When the attention of the judge was called to the matter by the defendant's exception, the record adds these words:

"The judge did not undertake to fix the value of the barge, but merely referred to the proof relating to it, and said the jury would be justified in finding accordingly." There could be no misunderstanding by the jury after this explanation.

3. If there was an error in this respect, it was quite harmless. It fixed for the jury, upon the assumption claimed, the sum required by the testimony to be found. There was no conflicting evidence on the subject. There are no circumstances which would justify any finding for a less sum than that indicated by the judge. It was the absolute duty of the jury, upon the evidence, to find not less than that named sum if they found for the plaintiff, and a different verdict might have been set aside as against the evidence. A verdict, under these circumstances, will not be disturbed by an error of this character. *Corning* v. *Troy Iron and Nail Factory*, 44 N. Y. 577.

Upon the whole case, we are of the opinion that the record shows no error. *Judgment affirmed.*

OULD *v.* WASHINGTON HOSPITAL FOR FOUNDLINGS.

1. A., by his last will and testament, admitted to probate June 22, 1864, devised certain lots of ground in the District of Columbia to two trustees, "and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, in trust, nevertheless, and to and for and upon the uses, intents, and purposes following, that is to say: In trust to hold the said lots of ground, with the appurtenances, as and for a site for the erection of a hospital for foundlings, to be built and erected by any association, society, or institution that may hereafter be incorporated by an act of Congress as and for such hospital, and upon such incorporation, upon further trust to grant and convey the said lots of ground and trust estate to the corporation or institution so incorporated for said purpose of the erection of a hospital, which conveyance shall be absolute and in fee. *Provided, nevertheless,* that such corporation shall be approved by my said trustees, or the survivor of them, or their successors in the trust; and, if not so approved, then upon further trust to hold the said lots and trust estate for the same purpose, until a corporation shall be so created by act of Congress which shall meet the approval of the said trustees or the survivor or successors of them, to whom full discretion is given in this behalf, and, upon such approval, in trust to convey as aforesaid; and I recommend to my said trustees to select an institution which shall not be under the control of any one religious sect or persuasion; and, until such conveyance, I direct the taxes, charges, and assessments, and all necessary expenses of, for, and upon said lots, and every

one of them, to be paid by my executors, as they shall from time to time accrue and become due and payable, out of the residue of my estate." The Washington Hospital for Foundlings was incorporated by an act of Congress, approved April 22, 1870 (16 Stat. 92); and, on the 4th of April, 1872, the trustees under the will conveyed said lots to that corporation in fee. *Held*, 1. That the devise is not invalid for uncertainty, or because it creates a perpetuity. 2. That the provision touching a conveyance by the trustees whenever Congress should create a corporation for foundlings which they approved was only a conditional limitation of the estate vested in them. 3. That the duty with which they were charged was an executory trust, and their conveyance was necessary to and did pass the title.

2. The statute of 43 Eliz., c. 4, was purely remedial and ancillary. It was never in force in the District of Columbia; and the validity of charitable endowments, and the jurisdiction of courts of equity over them, does not depend upon it.

3. The doctrine of charitable uses and trusts discussed, and the authorities bearing upon it cited and approved.

ERROR to the Supreme Court of the District of Columbia.

This is an action of ejectment by the plaintiffs in error, who were plaintiffs below, to recover fourteen lots of ground, being part of square numbered two hundred and seven in the city of Washington. The defendant pleaded not guilty. The case was tried upon the following agreed statement of facts: —

The defendant, the Washington Hospital for Foundlings, admits, —

First, That Joshua Peirce, late of the District of Columbia, died on the eleventh day of April, 1869.

Second, That he died seised of the real estate set forth and described in the plaintiffs' declaration.

Third, That the plaintiffs, Elizabeth C. Ould, Elizabeth C. Beardsley, Samuel Simonton, Abner P. Simonton, David S. Simonton, John E. Simonton, Hannah P. Jackson, Eliza F. Tibbetts, Abner C. P. Shoemaker, and Peirce Shoemaker, are the heirs-at-law, and the only heirs-at-law, of said Peirce.

The plaintiffs admit, —

First, That said Peirce, on the fifteenth day of October, 1867, duly executed his last will and testament, commencing as follows: —

"I, Joshua Peirce, of the county of Washington, in the District of Columbia, do make this my last will and testament in manner and form following."

That following this is a revocation of other wills, then a provision for the payment of debts, then several specific devises, and then the fourteenth item, in the following words: —

"Fourteenth, I give, devise, and bequeath all those fourteen certain lots or pieces of ground, part of square numbered two hundred and seven, situate between R and S Streets north and Fourteenth and Fifteenth Streets west, in the said city of Washington, in the District of Columbia; which lots are numbered from number twenty-four to number thirty-seven, inclusive, on a certain plan of subdivision of the said square, registered and recorded in the surveyor's office for the said city, in liber W F, folio 211, and are situate on the east side of the said Fifteenth Street, at the distance of one hundred and sixty feet northward from the north side of the said R Street north, containing together in front on the said Fifteenth Street west one hundred and thirty feet, and in depth eastward between parallel lines two hundred and ninety-four feet and a half inch, more or less, to Johnson Avenue (including in the said depth a twenty-feet-wide alley, laid out through the middle of the said lots), to my friends, William M. Shuster and William H. Clagett, both of the said city of Washington, and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, in trust, nevertheless, and to, for, and upon the uses, intents, and purposes following, that is to say: In trust to hold the said fourteen lots of ground with the appurtenances as and for a site for the erection of a hospital for foundlings, to be built and erected by any association, society, or institution that may hereafter be incorporated by an act of Congress as and for such hospital, and upon such incorporation upon further trust to grant and convey the said lots of ground and trust-estate to the corporation or institution so incorporated for the said purpose of the erection of a hospital, which conveyance shall be absolute and in fee: *Provided, nevertheless*, that such corporation shall be approved by my said trustees, or the survivor of them, or their successors in the trust; and, if not so approved, then upon further trust to hold the said lots and trust-estate for the same purpose, until a corporation shall be so created by act of Congress, which shall meet the approval of the said trustees, or the survivor or successors of them, to whom full discretion is given in this behalf; and, upon such approval, in trust to convey as aforesaid; and I recommend to my said trustees to select an institution which shall not be under the control of any one religious sect or persuasion; and, until such conveyance, I direct the taxes, charges, and assess-

ments, and all necessary expenses of, for, and upon the said lots, and every one of them, to be paid by my executors, as they shall from time to time accrue and become due and payable, out of the residue of my estate."

That following this is a devise of the "rest, residue, and remainder" of the testator's estate, "real and personal, including his estate called Linnaean Hill," in trust to trustees for the use of the testator's wife's nephew in tail with a devise over.

Second, That on the twenty-second day of June, 1869, the said will was duly proved and admitted to probate in the Orphans' Court of the District of Columbia.

Third, That on the twenty-second day of April, 1870, Congress passed an "Act for incorporating a hospital for foundlings in the city of Washington," 16 Stat. 92; and that on the fourth day of April, 1872, said Shuster and Clagett, trustees, conveyed the property described in the declaration and the above fourteenth item of the will to the defendant, so incorporated in conformity with the directions of the testator.

The court below found for the defendant, whereupon the plaintiffs brought the case here.

Mr. Benjamin F. Butler and *Mr. O. D. Barrett*, for the plaintiffs in error.

The devise was not an immediate gift to a charity, but an executory devise for charitable purposes. 3 Greenl. Cruise on Real Prop. 444, sects. 1, 2; 2 Redfield on Wills, c. 2, sect. 17; Williams on Real Prop. 290, 291; Powell on Devises, 250, 287; *Nightingale* v. *Burrell*, 15 Pick. (Mass.) 104.

It is therefore governed by the same rules as to perpetuities as are executory devises for any other purpose, and is void, as at the death of the testator a possibility existed that it might not vest in the prescribed corporation within twenty-one years, or, at furthest, a life or lives in being and twenty-one years. 1 Jarman on Wills, 233; 2 Redfield on Wills, 571, sect. 14; Williams on Real Prop. 294, 301; 3 Greenl. Cruise on Real Prop. 454, sect. 23; *Everitt* v. *Everitt*, 29 Barb. (N. Y.) 118; *Stephens et al.* v. *Evans, Adm'x*, 30 Ind. 51; *Sears* v. *Russell*, 8 Gray (Mass.), 98; *Phelps* v. *Pond*,

23 N. Y. 69; *Sinnett* v. *Herbert*, L. R. 7 Ch. 240; *Barnes* v. *Barnes*, 3 Cranch, 269; *Brattle Square Church* v. *Grant*, 3 Gray (Mass.), 142; 4 Kent, Com. 267; 1 Jarman on Wills, 221; 4 Cruise, Dig., tit. 32, c. 24, sect. 18; *Nightingale* v. *Burrell*, *supra*; *Cadell* v. *Palmer*, 1 Ho. of L. Cas. 372; 2 Atkinson on Conveyancing (2d ed.), 264; *Bacon* v. *Proctor*, 1 Turn. & R. 31; *Mackworth* v. *Hinxman*, 2 Keen, 659; *Ker* v. *Lord Dungannon*, 1 Dr. & War. 509; *Commissioners of Charitable Donations* v. *Baroness De Clifford*, id. 245; Lewis on Perpetuities, 169; *Duke of Norfolk* v. *Howard*, 1 Vern. 163; *Welsh* v. *Foster*, 12 Mass. 97.

The devise is void on account of the uncertainty of its object. *Baptist Association* v. *Hart's Ex.*, 4 Wheat. 1; *Coltman et al.* v. *Moore et al.*, 1 McArthur, 197; *Lingan* v. *Carroll*, 3 Har. & M. (Md.) 333; *Dashiell et al.* v. *The Attorney-General*, 5 Har. & J. (Md.) 898; *Dashiell* v. *The Attorney-General ex rel.*, 6 id. 1; *Wilderman* v. *Baltimore*, 8 Md. 551; *Board of Missions of the Presbyterian Church* v. *White's Adm'rs*, 4 Am. Law Reg. 531; *Wheeler* v. *Smith et al.*, 9 How. 76.

A foundling hospital is not a charity. Since the first foundation at Milan, in 787, such institutions have rapidly multiplied in every part of Europe. The waste of human life which they have occasioned, and the injury they have done to public morals, render it probable that they will at no distant period be everywhere suppressed. The statistics of France show that they have produced frightful immorality and mortality, and that it is "not poverty, but luxury, which produces exposures." In England, the entire system of the foundling hospital has been altered. Brande's Dict., vol. i. 925.

Mr. Walter S. Cox and *Mr. James M. Johnston*, *contra*.

Mr. Justice Swayne delivered the opinion of the court.

This case was submitted to the court below, upon an agreed statement of facts.

The court found for the defendant, and gave judgment accordingly. The plaintiffs thereupon sued out this writ of error. The questions presented for our consideration are questions of law arising upon the will of Joshua Pierce, deceased. The will declares: —

"I give, devise, and bequeath all those fourteen certain lots" (describing fully the premises in controversy) "to my friends, William M. Shuster and William H. Clagett, of the said city of Washington, and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, in trust, nevertheless, and to and for and upon the uses, intents, and purposes following, that is to say: In trust to hold the said fourteen lots of ground, with the appurtenances, as and for a site for the erection of a hospital for foundlings, to be built and erected by any association, society, or institution that may hereafter be incorporated by an act of Congress as and for such hospital, and upon such incorporation, upon further trust to grant and convey the said lots of ground and trust-estate to the corporation or institution so incorporated for said purpose of the erection of a hospital, which conveyance shall be absolute and in fee: *Provided, nevertheless*, that such corporation shall be approved by my said trustees, or the survivor of them, or their successors in the trust; and, if not so approved, then upon further trust to hold the said lots and trust-estate for the same purpose, until a corporation shall be so created by act of Congress which shall meet the approval of the said trustees or the survivor or successors of them, to whom full discretion is given in this behalf; and, upon such approval, in trust to convey as aforesaid; and I recommend to my said trustees to select an institution which shall not be under the control of any one religious sect or persuasion; and, until such conveyance, I direct the taxes, charges, and assessments, and all necessary expenses of, for, and upon said lots, and every one of them, to be paid by my executors, as they shall from time to time accrue and become due and payable, out of the residue of my estate."

The will was duly proved and admitted to probate in the proper court in the District of Columbia, on the 22d of June, 1864. On the 22d of April, 1870, Congress passed "An Act for incorporating a hospital for foundlings in the city of Washington." 16 Stat. 92. On the 4th of April, 1872, Shuster and Clagett, the trustees, conveyed the property to the defendant in error, the Washington Hospital for Foundlings, so incorporated, pursuant to the directions of the will.

The Statute of Wills of Maryland of 1798, which is still in force in the District of Columbia, provides that "no will, testament, or codicil shall be effectual to create any interest or perpetuity, or make any limitation or appoint to any uses not now

permitted by the Constitution or laws of the State." 2 Kilty's Laws of Md., c. 101.

Our attention has been called in this connection to nothing in the Constitution, and to nothing else in the laws of the State, as requiring consideration. No statute of mortmain or statute like that of 9 Geo. II., c. 36, is an element in the case.

The statute of 43 Eliz., c. 4, was never in force in Maryland. *Dashiell* v. *Attorney-General*, 5 Har. & J. (Md.) 392. It is not, therefore, operative in the District of Columbia.

The opinion prevailed extensively in this country for a considerable period that the validity of charitable endowments and the jurisdiction of courts of equity in such cases depended upon that statute. These views were assailed with very great learning and ability in 1833, by Mr. Justice Baldwin, in *McGill* v. *Brown*. Bright. (Pa.) 346. An eminent counsel of New York was the pioneer of the bar in 1835 in a like attack. His argument in *Burr's Executors* v. *Smith*, 7 Vt. 241, was elaborate and brilliant, and, as the authorities then were, exhaustive. He was followed in support of the same view, in 1844, by another counsel no less eminent, in *Vidal* v. *Philadelphia*, 2 How. 128. The publication, then recent, of the Reports of the British Records Commission enabled the latter gentleman to throw much additional and valuable light into the discussion. The argument was conclusive.

In delivering the opinion of the court, Mr. Justice Story, referring to the doctrine thus combated, said, "Whatever doubts might, therefore, properly be entertained upon the subject when the case of the Trustees of the Philadelphia Baptist Association was before the court (1819), those doubts are entirely removed by the later and more satisfactory sources of information to which we have alluded."

The former idea was exploded, and has since nearly disappeared from the jurisprudence of the country.

Upon reading the statute carefully, one cannot but feel surprised that the doubts thus indicated ever existed. The statute is purely remedial and ancillary. It provided for a commission to examine into the abuses of charities already existing, and to correct such abuses. An appeal lay to the Lord Chancellor. The statute was silent as to the creation or inhibition of any

new charity, and it neither increased nor diminished the pre-existing jurisdiction in equity touching the subject. The object of the statute was to create a cheaper and a speedier remedy for existing abuses. *The Morpeth Corporation*, Duke on Charitable Uses, 242. In the course of time, the new remedy fell into entire disuse, and the control of the chancellor became again practically sole and exclusive. The power of the king as *parens patriæ*, acting through the chancellor, and the powers of the latter independently of the king, are subjects that need not here be considered. *Fountain* v. *Ravennel*, 17 How. 379 ; 2 Story, Eq. Jur., sect. 1190.

The learning developed in the three cases mentioned shows clearly that the law as to such uses, and the jurisdiction of the chancellor, and the extent to which it was exercised, before and after the enactment of the statute, were just the same.

It is, therefore, quite immaterial in the present case whether the statute was or was not a part of the law of Maryland. The controversy must be determined upon the general principles of jurisprudence, and the presence or absence of the statute cannot affect the result.

Two objections were urged upon our attention in the argument at bar.

1. That there is no specification of the foundlings to be provided for, and that therefore the devise is void for uncertainty.

In this connection, it was suggested by one of the learned counsel for the plaintiffs in error that a hospital for foundlings tends to evil, and ought not to be supported.

2. That the devise is void because it creates a perpetuity.

The Statute of Elizabeth, before referred to, names twenty-one distinct charities. They are —

1. For relief of aged, impotent, and poor people. 2. For maintenance of sick and maimed soldiers. 3. Schools of learning. 4. Free schools. 5. Scholars in universities. 6. Houses of correction. 7. For repair of bridges ; 8, of ports and havens ; 9, of causeways ; 10, of churches ; 11, of sea-banks ; 12, of highways. 13. For education and preferment of orphans. 14. For marriage of poor maids. 15. For support and help

of young tradesmen; 16, of handicraftsmen; 17, of persons decayed. 18. For redemption or relief of prisoners or captives. 19. For ease and aid of poor inhabitants concerning payment of fifteens. 20. Setting out of soldiers; 21, and other taxes.

Upon examining the early English statutes and the early decisions of the courts of law and equity, Mr. Justice Baldwin found forty-six specifications of pious and charitable uses recognized as within the protection of the law, in which were embraced all that were enumerated in the statute of Elizabeth. *McGill* v. *Brown*, *supra*. It is deemed unnecessary to extend the enumeration beyond those already named.

A charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man. Perry on Trusts, sect. 687.

In the Girard Will Case, the leading counsel for the will thus defined charity: "Whatever is given for the love of God, or the love of your neighbor, in the catholic and universal sense, —given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish." Mr. Binney's Argument, p. 41.

The objection of uncertainty in this case as to the particular foundlings to be received is without force. The endowment of hospitals for the afflicted and destitute of particular classes, or without any specification of class, is one of the commonest forms of such uses. The hospital being incorporated, nothing beyond its designation as the donee is necessary. Who shall be received, with all other details of management, may well be committed to those to whom its administration is intrusted. This point is so clear, that discussion or the citation of authorities is unnecessary. Cases illustrating the subject in this view are largely referred to in Perry on Trusts, sect. 699, and in the note to sect. 1164, Story, Eq. Jur. See also id., sects. 1164, 1190, and notes.

Hospitals for foundlings existed in the Roman Empire. They increased when Christianity triumphed. They exist in all countries of Europe, and they exist in this country. There are no beneficiaries more needing protection, care, and kind-

ness, none more blameless, and there are none who have stronger claims than these waifs, helpless and abandoned upon the sea of life.

A perpetuity is a limitation of property which renders it inalienable beyond the period allowed by law. That period is a life or lives in being and twenty-one years more, with a fraction of a year added for the term of gestation, in cases of posthumous birth.

In this case, the devise was in fee to two trustees and to the survivor of them. They were directed to convey the premises to an eleemosynary corporation for foundlings, whenever Congress should create one which the trustees approved. If the will had been so drawn as itself to work the devolution of the title upon the happening of the event named, the clause would have been an executory devise. If the same thing had been provided for in a deed *inter vivos*, a springing use would have been involved; and such use would have been executed by the transfer of the legal title, whenever that occurred. The testator chose to reach the end in view by the intervention of trustees, and directing them to convey at the proper time. This provision in the will was, therefore, a conditional limitation of the estate vested in the trustees, and nothing more. Their conveyance was made necessary to pass the title. The duty with which they were charged was an executory trust. Amb. 552. The same rules generally apply to legal and to equitable estates. They are alike descendible, devisable, and alienable. *Croxall* v. *Sherrerd*, 5 Wall. 268. When such uses are consummated and no longer *in fieri*, the law of perpetuity has no application. *Franklin* v. *Armfield*, 2 Sneed (Ky.), 305; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Perrin* v. *Carey*, 24 How. 465. It is intended that what is given shall be perpetually devoted to the purpose of the giver.

In the case last named, the will expressly forbade for ever the sale of any part of the devised property. This court held the inhibition valid. Of course, the legislature, or a court of equity under proper circumstances, could authorize or require a sale to be made. *Stanley* v. *Colt*, 5 Wall. 119.

There may be such an interval of time possible between the gift and the consummation of the use as will be fatal to the

former. The rule of perpetuity applies as well to trust as to legal estates. The objection is as effectual in one case as in the other. If the fatal period may elapse before what is to be done can be done, the consequence is the same as if such must inevitably be the result. Possibility and certainty have the same effect. Such is the law upon the subject.

A devise to a corporation to be created by the legislature is good as an executory devise. A distinction is taken between a devise *in præsenti* to one incapable, and a devise *in futuro* to an artificial being, to be created and enabled to take. Angell & Ames on Corp., sect. 184; *Porter's Case*, 1 Co. 24; *Attorney-General* v. *Bonyer*, 3 Ves. 714; *Inglis* v. *The Trustees of the Sailor's Snug Harbor*, 3 Pet. 99; *Sanderson* v. *White*, 18 Pick. (Mass.) 328.

At common law, lands may be granted to pious uses before there is a grantee competent to take. In the mean time, the fee will lie in abeyance. It will vest when the grantee exists. *Town of Pawlet* v. *Clark*, 9 Cranch, 292. See also *Beatty* v. *Kurtz*, 2 Pet. 566, and *Vincennes University* v. *Indiana*, 14 How. 268.

Charitable uses are favorites with courts of equity. The construction of all instruments where they are concerned is liberal in their behalf. *Mills* v. *Farmer*, 19 Ves. 487; *McGill* v. *Brown*, *supra;* Perry on Trusts, sect. 709. Even the stern rule against perpetuities is relaxed for their benefit.

"But a gift may be made to a charity not *in esse* at the time, — to come into existence at some uncertain time in the future, — provided there is no gift of the property in the first instance, or perpetuity in a prior taker." Perry on Trusts, sect. 736.

Archbishop Secker, by his will, gave £1,000 to trustees for the purpose of establishing a bishop in the British possessions in America. Mansfield, of counsel, insisted that, "there being no bishop in America, or the least likelihood of there ever being one," the legacy was void, and must fall into the residue. Lord Chancellor Thurlow said, "The money must remain in court till it shall be seen whether any such appointment shall take place." *Attorney-General* v. *The Bishop of Chester*, 1 Bro. C. C. 444.

A testator devised his real estate to trustees, in trust, with

the rents and profits to purchase ground in Cambridge, proper for a college, and to build all such structures as should be necessary for that purpose (the college to be called "Downing College"), and to obtain a royal charter for founding such college and incorporating it by that name, in the University of Cambridge. The trustees were to hold the premises devised to them "in trust for the said collegiate body and their successors for ever." The devise was held to be valid. *Attorney-General* v. *Downing*, Amb. 550.

A sum of money was bequeathed to erect a blue-coat school and establish a blind asylum, with direction that land should not be purchased, and the expression of an expectation that lands would be given for the charities. In answer to the suggestion at the bar that the application of the fund might be indefinitely postponed, it was said, on the other side, that the court would fix a time within which the gift must take effect; and 2 Ves. 547, and 3 Atk. 806, were cited in support of the proposition.

The Vice-Chancellor said the cases of Downing College and the *Attorney-General* v. *The Bishop of Chester* seemed to be authorities against the objection, but that the point did not arise in the case before him. It was obviated by a codicil to the will, which appears to have been overlooked by the counsel on both sides. *Henshaw* v. *Atkins*, 3 Madd. 167. See also *Philpot* v. *St. George's Hospital*, 6 Ho. of L. Cas. 359. In this case, as in the one we are considering, the trustee was required to approve the designated charity before paying over the money.

A testator left a sum of money to build and endow a future church. The question was raised, but not decided, whether the court would hold the fund for an indefinite time. The Lord Chancellor said: "A gift to a charitable purpose, if lawful, is good, although no object may be in existence at the time. This was expressly decided in *Attorney-General* v. *Bishop of Chester*, where the gift was for establishing a bishop in his Majesty's dominions in America," &c. *Sennet* v. *Herbert*, Law Rep. 7 Ch. 237.

A testatrix, by her will, directed, among other things, that when and as soon as land should be given for the purpose as

thereinafter mentioned, almshouses should be built in three specified places. She further directed that the surplus remaining, after building the almshouses, should be appropriated for making allowances to the inmates. It was held that the fund was well given, for that the gift to charity was not conditional and contingent, but that there was an absolute immediate gift to charity, the mode of execution only being made dependent on future events. *Chamberlain* v. *Brocket*, 8 Law Rep. Ch. 1872–73, p. 206. The bearing of this authority upon the case in hand needs no remark. See also *McIntyre Poor School* v. *Zanesville Canal Co.*, 9 Ohio, 203, and *Miller* v. *Chittenden*, 2 Iowa, 315; s. c. 4 id. 252. These were controversies relating to real estate. The same point as here was involved. Both gifts were sustained. The judgments are learned and able.

The last of this series of cases to which we shall refer is an adjudication by this court. The testator gave the residue of his estate, embracing a large amount of real property, to the Chancellor of the State of New York, the mayor and recorder of the city of New York, and others, designating them only by their official titles, and to their respective successors in office for ever, in trust to establish and maintain an asylum for aged, decrepit, and worn-out sailors, the asylum to be called "The Sailors' Snug Harbor." If the trustees so designated could not execute the will, they were to procure from the legislature an act of incorporation, giving them the requisite authority. Such an act was passed, and the institution was established. The heir-at-law sued for the property. This court held that the official designations were *descriptio personarum*, and that the trustees took personally. See Bac. Abr., Grant C; *Owen* v. *Bean*, Duke on Char. 486; *Wellbeloved* v. *Jones*, 1 Sim. & St. 40. Nothing was said as to the capacity of the successors to take. A special act of incorporation was deemed necessary. There being no particular estate to support the final disposition, the latter was held to be an executory devise. This court decided that the gift was valid. That upon the creation of the corporation the title to the property became vested in it, or that the naked legal title was held by the heir-at-law in trust for the corporation.

The points of analogy between that case and this are obvi-

ous. There, as here, a future corporation was necessary to give the devise effect. There, as here, there was a possibility that such a corporation might never be created. In both cases the corporation was created, and the intention of the testator was carried into full effect. It is a cardinal rule in the law of wills that courts shall do this whenever it can be done. Here we find no impediment in the way. The gift was immediate and absolute, and it is clear beyond doubt that the testator meant that no part of the property so given should ever go to his heirs-at-law, or be applied to any other object than that to which he had devoted it by the devise here in question.

There are numerous other authorities to the same effect with those last cited. The latter are abundantly sufficient to dispose of this case. It is, therefore, unnecessary to extend this opinion by pursuing the subject further.

Judgment affirmed.

HART v. UNITED STATES.

1. The ruling in *Osborne* v. *United States*, 19 Wall. 577, reaffirmed, and applied to this case.
2. The United States is not responsible for the laches or the wrongful acts of its officers; and, where it takes an official bond, the obligors are conclusively presumed to execute it with a full knowledge of that principle of law, and to consent to be dealt with accordingly.
3. Where a defence is by way of traverse, it is not error to strike out so much thereof as is not responsive to the allegations of the petition.

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

This suit was brought by the United States, May 29, 1872, against Hosmer, Hart, and Stahl, on a distiller's bond, executed by them May 29, 1871, in the sum of $5,000, and conditioned to be void if said Hosmer should faithfully comply with all the provisions of law relating to the duties and business of distillers, and pay all penalties incurred or fines imposed on him for a violation of any of said provisions, and should not suffer the tract or lot of land on which the distillery stood, or any part thereof, to be incumbered by mortgage, judgment, or other lien during the time in which he should carry on said business.

The breach alleged was the non-payment by said Hosmer of $3,000, demanded of him, being the amount of tax on six thousand gallons of spirits, which he had distilled after the first day of June, 1871. He made no defence. The other defendants filed three pleas: 1. That the bond was never delivered to the plaintiff; that the assessor had no authority of law to approve it; and that neither the collector nor any other officer of the plaintiff had authority to receive it. 2. That the bond was a common distiller's bond, and that they signed it merely as sureties for Hosmer, without consideration, and for his accommodation; that, six days before its execution, Hosmer, without their knowledge, incumbered the ground upon which the distillery stood, by his mortgage of the same to one Dempsey, which was duly recorded May 25, 1871; that the plaintiff did not require, nor did Hosmer file with the assessor, the written consent of Dempsey that the lien of the United States for taxes and penalties should have priority to the mortgage, and that the title should, in case of forfeiture, vest in the United States, discharged of said mortgage; nor was Hosmer required to, nor did he, execute an indemnity bond against said mortgage, as required by the act of Congress approved April 10, 1869, but that the bond sued on was approved without the filing of such consent or the taking of such indemnity bond; that, by reason of the non-payment by Hosmer of the taxes on distilled spirits which were chargeable, and a lien upon said ground, a part of it was distrained and sold for $6,100, which sum, if the amount of Dempsey's mortgage had not been deducted therefrom, would have been sufficient to pay Hosmer's indebtedness to the United States. 3. That the taxes charged and sued for were assessed against Hosmer on spirits he had distilled, and were a first and paramount lien thereon; but that the collector of internal revenue for the district, without the knowledge or assent of the defendants, and without first requiring the payment of the taxes thereon, permitted him to remove from the bonded warehouse a quantity of said spirits, — more than sufficient to pay any just claim of the plaintiff.

On motion of the plaintiff, all of the first plea, except so much as averred the non-delivery of the bond sued on, was

stricken out. Demurrers to the second and third were sustained, whereupon the defendants excepted.

The court found that the bond in suit was signed May 29, 1871; that it was, on the first day of June, handed by Hosmer to the deputy-assessor of internal revenue, to be transmitted to the assessor, by whom it was approved June 5, and then duly transmitted by mail to the collector of the district.

There was a judgment for $3,048.40, and costs.

Hart and Stahl then sued out this writ of error.

Mr. James A. Garfield and *Mr. A. G. Riddle* for the plaintiffs in error.

Mr. Assistant Attorney-General Smith, contra.

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

The second defence relied upon in this case is disposed of by *Osborne* v. *United States*, 19 Wall. 577, which we are not inclined to reconsider.

The third defence is equally bad. Under the law as it stood when this suit was commenced, no distilled spirits could be removed from a distillery warehouse before payment of the tax, 15 Stat. 130, sect. 15, without subjecting all those engaged in such a removal to heavy penalties, id. 140, sect. 36. An officer of the United States had no authority to dispense with this requirement of the law. If in violation of his duty he permitted such a removal, he subjected himself to punishment, but did not bind the government by his acts. The government is not responsible for the laches or the wrongful acts of its officers. *Gibbons* v. *United States*, 8 Wall. 269; *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Vanzandt*, 11 id. 184; *United States* v. *Nicholl*, 12 id. 505; *Jones et al.* v. *United States*, 18 Wall. 662. Every surety upon an official bond to the government is presumed to enter into his contract with a full knowledge of this principle of law, and to consent to be dealt with accordingly. The government enters into no contract with him that its officers shall perform their duties. A government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect. Here

the surety was aware of the lien which the law gave as security for the payment of the tax. He also knew that, in order to retain this lien, the government must rely upon the diligence and honesty of its agents. If they performed their duties and preserved the security, it inured to his benefit as well as that of the government; but if by neglect or misconduct they lost it, the government did not come under obligations to make good the loss to him, or, what is the same thing, release him *pro tanto* from the obligation of his bond. As between himself and the government, he took the risk of the effect of official negligence upon the security which the law provided for his protection against loss by reason of the liability he assumed.

There was no error in striking out that portion of the first defence which was objected to. It was not responsive to any allegation in the petition. *Judgment affirmed.*

SHIELDS *v.* OHIO.

1. The consolidation, pursuant to the statute of Ohio of April 10, 1856 (4 Curwen, 2791), of two or more railway companies works their dissolution. All the powers and franchises of the new company which is thereby formed are derived from that statute, and are subject to "be altered, revoked, or repealed by the General Assembly," under sect. 2, art. 1, of the Constitution of that State, which took effect Sept. 1, 1851.
2. The General Assembly does not, therefore, impair the obligation of a contract by prescribing the rates for the transportation of passengers by the new company, although one of the original companies was, prior to the adoption of that Constitution, organized under a charter which imposed no limitation as to such rates.

ERROR to the Supreme Court of the State of Ohio.

The facts are stated in the opinion of the court.

The case was argued by *Mr. James Mason* for the plaintiff in error, and by *Mr. Samuel Shellabarger* for the defendant in error.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The plaintiff in error was the conductor of a train of cars upon the Lake Shore and Michigan Southern Railway, between Elyria and Cleveland. Ulrich was a passenger, intending to

go from the former to the latter place. The intermediate distance was twenty-five miles. The fare fixed by the company was ninety cents. Ulrich offered to pay seventy-five cents, which was at the rate of three cents per mile, and refused to pay more. The conductor ejected him from the train, and was thereupon indicted in the proper local court for assault and battery. The court instructed the jury that Ulrich had tendered the proper sum, and that Shields had no legal right to demand more. The case turned upon this point. It was not claimed that the defendant was guilty, if Ulrich was in the wrong. A verdict and judgment were given against Shields. The case was removed by a writ of error to the Supreme Court of the State. The judgment of the court below was affirmed. Shields sued out this writ of error, and brought the case here for review. The only question presented for our determination is his legal right to demand more than Ulrich offered to pay.

A brief chronological statement with respect to the provisions of the Constitution, and those of the laws of the State bearing upon the subject, is necessary to a clear presentation of the point to be decided.

1. An act passed March 2, 1846, incorporated the Junction Railroad Company, and authorized it to build a railroad from Cleveland to Elyria, and thence west. The eleventh section empowered the company to charge such tolls for the transportation of freight and passengers as it might deem "reasonable." The twenty-second section declared that after the lapse of ten years from the completion of the road the State might reduce the tolls "should they be unreasonably high," and might "exercise the same power at intervals of every ten years thereafter." It was upon the road built under this act that the present controversy arose.

2. The act of March 7, 1850, incorporated the Toledo, Norwalk, and Cleveland Company, and the charter was amended by an act of Jan. 20, 1851.

The twelfth section of the latter act declared that, in case the Junction Company should become consolidated with the Toledo, Norwalk, and Cleveland Company, the consolidated company might assume the name of the Cleveland and Toledo

Railroad Company, and in that event should be governed by sects. 9, 10, 11, 15, and 17 of the act incorporating the Junction Company, and in other respects by the act incorporating the Toledo, Norwalk, and Cleveland Company, and the acts amendatory thereof. The twenty-second section of the act first named, which allowed the State, after the lapse of ten years, to regulate the tolls of the Junction Company in the event specified, is not one of the sections enumerated.

3. The act of March 3, 1851, was a general act, authorizing the consolidation of railroad companies coming within its provisions. The process was prescribed with great fulness of details. Sect. 3 declared: "And such new corporation shall possess all the powers, rights, and franchises conferred upon such two or more corporations by the several acts incorporating the same, or relating thereto respectively, and shall be subject to all the duties imposed by such acts, so far as the same may be consistent with the provisions of this act."

4. The Constitution of Ohio of 1851 took effect on the 1st of September in that year. It declared that "no special privileges shall ever be granted that may not be altered, revoked, or repealed by the General Assembly." Art. 1, sect. 2. "The General Assembly shall pass no special act conferring corporate powers." Art. 13, sect. 1. "Corporations may be formed under general laws, but such general laws may from time to time be altered or repealed." Art. 13, sect. 2.

5. On the 15th of June, 1853, the Junction Company became consolidated with the Toledo, Norwalk, and Cleveland Company, pursuant to the provisions before mentioned of the acts of Jan. 20, 1851, and March 3, 1851.

6. The act of April 10, 1856, 4 Curwen, 2791, authorizes railroad companies of Ohio to consolidate with such companies of other States. The third section declares that such consolidated companies respectively "shall be deemed and taken to be one corporation, possessing within the State all the rights, privileges, and franchises, and subject to all the restrictions, liabilities, and duties, of such corporations of this State so consolidated." It was provided that the old stock should be extinguished, that a board of directors of the consolidated company should be elected, and that new stock should be cre-

ated and issued to the parties entitled to it. Those refusing to receive it were to be paid the highest market price for their old stock.

The seventh section enacts "that suits may be brought and maintained against such new corporation in the courts of this State for all causes of action, in the same manner as against other railroad companies of this State."

7. On the 11th of February, 1869, by an agreement of that date, the Cleveland and Toledo and the Lake Shore *Railroad* Company became consolidated under the name of the Lake Shore *Railway* Company.

On the 6th of April, 1869, the Lake Shore and the Michigan Southern and Northern Indiana Railroad Companies were duly consolidated under the name of the Lake Shore and Michigan Southern Railway Company.

Shields, the plaintiff in error, was an employé of this company when he ejected Ulrich.

8. The act of April 25, 1873, provides that "any corporation operating a railroad in whole or in part in this State may demand and receive for the transportation of passengers over said road not exceeding three cents per mile for a distance of more than eight miles."

The defendant in error insists that the power of the company in the case in hand was fixed and limited by this act. The plaintiff in error denies this, and maintains that the eleventh section of the first-named act of 1846 is the governing authority.

In support of this view, it is further maintained that this section was a contract, and that it was simply transferred to each successive consolidated corporation, including, finally, the Lake Shore and Michigan Southern Railway Company, and that at the time of the occurrence here in question it was in full force.

This renders it necessary to consider the legal *status* and character of the new corporation. In the present state of the law, a few remarks upon the subject will be sufficient.

The legislature had provided for the consolidation. In each case, before it took place, the original companies existed and were independent of each other. It could not occur without

their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All — the old and the new — could not coexist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution. That being done, *eo instanti* the new corporation came into existence. But the franchise alone to be a corporation would have been unavailing for the purposes in view.

There is a material difference between such an artificial creation and a natural person. The latter can do any thing not forbidden by law. The former can do only what is authorized by its charter. *Railroad Company* v. *Harris*, 12 Wall. 65. It was, therefore, indispensable that other powers and franchises should be given. This was carefully provided for. The new organization took the powers and faculties designated in advance in the acts authorizing the consolidation, — no more and no less. It did not acquire any thing by mere transmission. It took every thing by creation and grant. The language was brief, and it was made operative by reference. But this did not affect the legal result. A deed *inter partes* may be made as effectual by referring to a description elsewhere as by reciting it in full in the present instrument. The consequence is the same in both cases.

If the argument of the learned counsel for the plaintiff in error be correct, the constitutional restrictions can be readily evaded. Laws may be passed at any time, enacting that all the valuable franchises of designated corporations antedating the Constitution shall, upon their dissolution, voluntary or otherwise, pass to and vest in certain newly created institutions of the like kind. The claim of the inviolability of such franchises would rest on the same foundation as the affirmation in the present case. The language of the Constitution is broad and clear, and forbids a construction which would permit such a result.

When the consolidation was completed, the old corporations were destroyed, a new one was created, and its powers were "granted" to it, in all respects, in the view of the law, as if the old companies had never existed, and neither of them had

ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. It did one as much as the other. In this respect, there is no ground for any distinction.

These views are sustained by several well-considered cases exactly in point. One of them embodies the unanimous judgment of this court. *Clearwater* v. *Meredith*, 1 Wall. 25; *McMahan* v. *Morrison*, 16 Ind. 172; *The State of Ohio* v. *Sherman*, 22 Ohio St. 411; *Shields* v. *The State of Ohio*, 26 id. 86.

The constitutional provision that "no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the General Assembly," entered into the acts under which the consolidations were made, and rendered the corporations created and the franchises conferred subject to repeal and alteration, just as if they had been expressly declared to be so by the act. The act of 1873, in the particular in question, was a legitimate exercise of the reserved power of alteration, and was, therefore, valid. *Parker* v. *The Metropolitan Railroad Co.*, 109 Mass. 506.

Another branch of the argument of the counsel for the plaintiff in error calls for some further remarks.

It is urged that the franchise here in question was property held by a vested right, and that its sanctity, as such, could not be thus invaded. The answer is *consensus facit jus*. It was according to the agreement of the parties. The company took the franchise subject expressly to the power of alteration or repeal by the General Assembly. There is, therefore, no ground for just complaint against the State.

Where an act of incorporation is repealed, few questions of difficulty can arise. Equity takes charge of all the property and effects which survive the dissolution, and administers them as a trust fund, primarily for the benefit of the creditors. If any thing is left, it goes to the stockholders. Even the executory contracts of the defunct corporation are not extinguished. *Curran* v. *State of Arkansas*, 15 How. 304.

The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be

inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases. Two authoritative adjudications throw a strong light from opposite directions upon this subject. We cite them only for the purpose of illustration. In *Miller* v. *N. Y. & E. Railroad Co.*, 21 Barb. (N. Y.) 513, the legislature, under the reserved power of alteration, required the company which had been previously incorporated to construct a highway across their road. The work was expensive, and of no benefit to the company. The act imposing the burden was held to be void.

In *Mayor & Aldermen of Worcester* v. *Norwich & Worcester R. R. Co. and Others*, 109 Mass. 103, the legislature had passed an act requiring the railroad companies therein named to unite in a passenger station in the city of Worcester (the place to be fixed as provided), to extend their tracks in the city to the Union station, and, after the extension, to discontinue parts of their existing locations. The act was held to be constitutional and valid, being a reasonable exercise of the right reserved to the legislature to amend, alter, or repeal the charters of those companies. See also *The Commonwealth* v. *Essex Company*, 13 Gray (Mass.), 239, and *Crease* v. *Babcock*, 23 Pick. (Mass.) 334.

It is unnecessary to pursue the subject further in this case.

Judgment affirmed.

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented.

MR. JUSTICE STRONG. I dissent from the judgment in this case.

I agree that, by the consolidation effected under the statutes, a new corporation was created, with the powers and restrictions of the constituent corporations. I agree, therefore, that the legislature reserved the power to repeal, alter, or amend the charter. But I deny that under this reserved power it was competent for the legislature to take away the right given to the company to charge such freight and tolls as the directors might deem reasonable, while at the same time continuing the

company in existence, subject to all the duties imposed upon it. Such an alteration is taking away the property of the company without compensation, as much as would be taking away its lands.

MR. CHIEF JUSTICE WAITE did not sit in this case, nor take any part in deciding it.

INSURANCE COMPANY *v.* WOLFF.

1. A. took out a policy of insurance upon the life of her husband. The premium was payable annually on the first day of November. The policy stipulated for the payment of the amount of the insurance within sixty days after due notice and proof of the death of the insured, subject, however, to certain express conditions. One of these conditions provided, that, if the premiums were not paid on or before the days mentioned for their payment, the company should not be liable for the sum insured, or any part of it, and that the policy should cease and determine. Another condition provided, that, if the insured resided in any part of the United States south of the 33d degree of north latitude, except in California, between the 1st of July and the 1st of November, without the consent of the company previously given in writing, the policy should be null and void. The policy declared that agents of the company were not authorized to make, alter, or discharge contracts, or waive forfeitures; but the company, notwithstanding this provision, sent renewal receipts signed by its secretary; and their use, when countersigned by its local manager and cashier, was subject entirely to the judgment of its local agent. It was his habit to give such receipts whenever the premiums were paid after the time stipulated. His mode of dealing with persons taking out policies at the local office, his use of renewal receipts, his acceptance of premiums after the day on which they were payable, were all known to the home company, and it retained the premiums thus received. The insured died at the city of New Orleans on the 11th of November, 1872. Between the 1st of July and the 1st of November of that year he had resided at that city, which is south of the 33d degree of north latitude, without the knowledge or the previous consent in writing of the company; and the annual premium due at the latter date was not paid until ten days thereafter. A friend then paid it to the agent, and took from him a renewal receipt, but made no mention of the residence of the insured, who died the same day from yellow fever contracted in that district. The agent, on learning the fact, at once informed the company, and was immediately instructed by telegraph to tender the premium to the party paying, and demand the receipt. He did so; but the tender was not accepted, nor the receipt surrendered. *Held*, 1. That the company, by the agent's receipt of the premium, waived the forfeiture for non-payment at the stipulated time, but not the forfeiture incurred by the residence of

the insured within the prohibited district. 2. That the company, having promptly tendered the return of the premium and demanded the surrender of its receipt, was not liable on its policy.

2. A waiver can only be justly claimed by the assured where the course of dealing by the company has been such as to induce his action; and the company should be apprised of the facts which create the forfeiture, and of those which will necessarily influence its judgment in consenting to waive it.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The Globe Mutual Life Insurance Company of New York, on the 5th of November, 1869, issued to Eliza Garber a policy of insurance for $5,000 upon the life of her husband, commencing on the 1st of that month. The premium was payable annually on the 1st of November. The policy stipulated for the payment of the amount of the insurance within sixty days after due notice and proof of the death of the insured, subject, however, to certain express conditions. One of these conditions provided, that, if the premiums were not paid on or before the days mentioned for their payment, the company should not be liable for the sum insured, or any part of it, and that the policy should cease and determine. Another condition provided, that, if the insured resided in any part of the United States south of the 33d degree of north latitude, except in California, between the 1st of July and the 1st of November, without the consent of the company previously given in writing, the policy should be null and void. And the policy declared that agents of the company were not authorized to make, alter, or discharge contracts, or waive forfeitures.

The insured died at the city of New Orleans on the 11th of November, 1872. Between the 1st of July and the 1st of November of that year he had resided at that city, which is south of the 33d degree of north latitude, without the previous consent in writing of the company; and the annual premium due on the first of that month was not paid on or before that day. Due notice and proof of his death having been given to the company, and payment by it refused, suit was brought by Mrs. Garber in the Circuit Court of St. Louis County, whence it was removed, on the petition of the company, to the Circuit Court of the United States for the Eastern District of Missouri. Judgment was rendered for the plaintiff, and the cause removed here by

writ of error. Mrs. Garber died, and Wolff, her executor, was made the defendant in error.

The other facts are stated in the opinion of the court.

Mr. John W. Noble for the plaintiff in error.
Mr. Montgomery Blair, *contra.*

MR. JUSTICE FIELD delivered the opinion of the court.

By the residence of the insured within the prohibited district of country during the period designated in the policy without the previous consent of the company, and the failure of the assured to pay the annual premium when it became due, the policy, by its express terms, was forfeited, and the company released from liability, unless the forfeiture was waived by the action of the company, or of its agents authorized to represent it in that respect.

The waiver of the forfeiture for the non-payment of the premium due on the 1st of November, 1872, is alleged on the ground that the premium was subsequently paid to an agent of the company, he delivering its receipt for the same, signed by its secretary, and countersigned by the manager and cashier of the local office, the plaintiff contending that the company, by its previous general course of dealing with its agents, and its practice with respect to the policy in suit, had authorized the premiums to be paid and the agent to receive the same after they became due, and thus had waived any right to a strict compliance with the terms of the policy as to the payment of premiums.

The waiver of the forfeiture arising from the residence within the prohibited district between the 1st of July and November, without the previous consent of the company, is also alleged from the subsequent payment of the premium and its receipt by the local agent, the plaintiff contending that the premium was received with knowledge by the agent of the previous residence of the insured within the prohibited district.

It appears from the record that the deceased was taken sick with the yellow fever at New Orleans, on the 6th or 7th of November, 1872, and died on the 11th of the month, between the hours of eleven and twelve in the forenoon. On the previous day a telegram was sent by Mrs. Garber from New Orleans to

a gentleman in St. Louis, directing the latter to go to the agency of the company in that city, at which the policy was issued, and pay the premium due on the first of the month. Accordingly, on the following morning, at about nine o'clock, the premium was paid by this gentleman, and a renewal receipt was thereupon delivered to him. This renewal receipt was dated in New York, and signed by the secretary of the company. It not only acknowledged the receipt of the premium, but it continued the policy in force for another year. The practice of the company was to send to its agents in St. Louis receipts in this form, signed by its secretary, to be countersigned by the local manager and cashier before being used. The receipt given was thus countersigned. The payment was made in the present case to a boy in the office of the agent, and by him the renewal receipt was delivered. It was his habit to receive premiums and deliver the proper renewal receipt in the absence of the agent. In this case the money was given by him on the latter's coming to the office the same morning. The agent credited the amount to the company in his semi-monthly account transmitted to the home office. The gentleman who paid the premium was not aware at the time that the insured was sick, and no inquiries were made by the boy or the agent as to his health. It is conceded that they had no information on the subject. A few days afterwards, the agent learned of the death of the insured, and of the sickness which was the immediate cause of it, and informed the home office. The company at once telegraphed the agent to return the premium and demand a surrender of the renewal receipt. The money was accordingly tendered to the gentleman who paid it, and a surrender of the renewal receipt demanded; but the tender was not received, nor the receipt returned.

The conditions mentioned in the policy could, of course, be waived by the company, either before or after they were broken; they were inserted for its benefit, and it depended upon its pleasure whether they should be enforced. The difficulty in this case, and in nearly all cases where a waiver is alleged in the absence of written proof of the fact, arises from a consideration of the effect to be given to the acts of agents of the company in their dealings with the assured. Of course,

such agents, if they bind the company, must have authority to waive a compliance with the conditions upon a breach of which the forfeiture is claimed, or to waive the forfeiture when incurred, or their acts waiving such compliance or forfeiture must be subsequently approved by the company. The law of agency is the same, whether it be applied to the act of an agent undertaking to continue a policy of insurance, or to any other act for which his principal is sought to be held responsible.

The principle that no one shall be permitted to deny that he intended the natural consequences of his acts when he has induced others to rely upon them, is as applicable to insurance companies as it is to individuals, and will serve to solve the difficulty mentioned. This principle is one of sound morals as well as of sound law, and its enforcement tends to uphold good faith and fair dealing. If, therefore, the conduct of the company in its dealings with the assured in this case, and with others similarly situated, has been such as to induce a belief that so much of the contract as provides for a forfeiture if the premium be not paid on the day it is due, would not be enforced if payment were made within a reasonable period afterwards, the company ought not, in common justice, to be permitted to allege such forfeiture against one who has acted upon the belief, and subsequently made the payment. And if the acts creating such belief were done by the agent and were subsequently approved by the company, either expressly or by receiving and retaining the premiums, the same consequences should follow.

This principle applied to the case at bar will render the question presented one of easy solution. The company, notwithstanding the provision in the policy that its agents were not authorized to waive forfeitures, sent to them renewal receipts signed by its secretary, to be used when countersigned by its local manager and cashier, leaving their use subject entirely to the judgment of the local agent. The propriety of their use, in the absence of any fraud in the matter, could not afterwards be questioned by the company. Accompanying these receipts was a notice, printed on the same paper, that policies which became null for non-payment might be renewed at the home office, within a reasonable time, upon furnishing

satisfactory evidence of good health, such satisfactory evidence being left to the judgment of the local agent, and the renewal by the home office consisting of a receipt signed by its secretary, transmitted to such agent, to be used when countersigned by the local manager and cashier. It was the habit of the agent to give such renewal receipts whenever the premiums were paid after the time stipulated; and his accounts to the home office showed such subsequent payment. His action in this respect was not questioned by the company; and the premiums were retained by it without any pretence that the policies had ceased to be obligatory for want of punctuality in their payment. The mode of dealing by the agent with persons taking out policies at the local office, his use of renewal receipts, his acceptance of premiums after the day on which they were payable, were all known to the home company, and its retention of the premiums thus received was an approval of his acts. So far, then, as the waiver of the forfeiture incurred for non-payment of the premiums is concerned, it is clear that the company, by its course of dealing, had, notwithstanding the provision of the policy, left the matter to be determined by its local agent, to whom the renewal receipts were intrusted.

But, so far as the forfeiture arose from the residence of the insured within the prohibited district, the case is different. There is nothing in the acts of the company which goes to show that it ever authorized its agents to waive a forfeiture thus incurred, or that it ever knew of any residence of the insured within the prohibited district until informed of his death there. In every case where premiums were received after the day they were payable, the fact that a forfeiture had been incurred was made known to the company from the date of the payment, and the retention of the money constituted a waiver of the forfeiture; but no information of a forfeiture on any other ground was imparted by the date of such payment. The agent receiving the premium, in the case at bar, testified that he knew nothing of the residence of the insured within the prohibited district during the excepted period, and the evidence in conflict with his testimony was slight. He knew that the insured had a place of business there, and that he was permitted to make occasional visits there within that period, and

to reside there at other times. Every thing produced as evidence of knowledge of residence within the prescribed district is consistent with these occasional visits and residence at other times than during the excepted period. But, even if the agent knew the fact of residence within the excepted period, he could not waive the forfeiture thus incurred, without authority from the company. The policy declared that he was not authorized to waive forfeitures; and to the provision effect must be given, except so far as the subsequent acts of the company permitted it to be disregarded. There is no evidence that the company in any way, directly or indirectly, sanctioned a disregard of the provision with reference to any forfeitures, except such as occurred from non-payment of premiums. As soon as it was informed of the residence of the insured within the prohibited district, it directed a return of the premium subsequently paid. It would be against reason to give to the receipt of the premium by the agent, under the circumstances stated, the efficacy claimed. The court, in its instructions, treated the receipt of the premium by the agent, with knowledge of the previous residence of the insured within the prohibited district, if the agent had such knowledge, as itself a sufficient waiver of the forfeiture incurred, without any evidence of the action of the company when informed of such residence; and in this respect we think the court erred. It is essential that the company should have had some knowledge of the forfeiture, before it can be held to have waived it.

It is true, that, where an agent is charged with the collection of premiums upon policies, it will be presumed that he informs the company of any circumstances coming to his knowledge affecting its liability; and, if subsequently the premiums are received by the company without objection, any forfeiture incurred will be presumed to be waived. But here there was no ground for any inference of this kind from the subsequent action or silence of the company. There was no evidence of a disregard of the condition as to the residence of the insured in any previous year, and, consequently, there could be no inference of a waiver of its breach from a subsequent retention of the premium paid. This is a case where immediate enforcement of the forfeiture incurred was directed when information

was received that the condition of the policy in that respect had been broken.

Not only should the company have been informed of the forfeiture before it could be held by its action to have waived it, but it should also have been informed of the condition of the health of the insured at the time the premium was tendered, upon the payment of which the waiver is claimed. The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the company sought to be estopped from denying the waiver claimed should be apprised of all the facts: of those which create the forfeiture, and of those which will necessarily influence its judgment in consenting to waive it. The holder of the policy cannot be permitted to conceal from the company an important fact, like that of the insured being *in extremis*, and then to claim a waiver of the forfeiture created by the act which brought the insured to that condition. To permit such concealment, and yet to give to the action of the company the same effect as though no concealment were made, would tend to sanction a fraud on the part of the policy-holder, instead of protecting him against the commission of one by the company.

It follows that the judgment must be reversed, and the cause remanded for a new trial; and it is *So ordered.*

UNITED STATES v. BABBITT.

1. Where, under the acts of Feb. 11, 1847 (9 Stat. 125), Sept. 28, 1850 (id. 520), March 22, 1852 (10 id. 3), and March 3, 1855 (10 id. 635), military bounty-land warrants were located on public land, subject to private entry by them, it was the duty of the register of the land-office where the locations were made to receive the register's fees therefor.
2. Where the register received them, his refusal to pay over to the United States the surplus beyond the maximum compensation of $3,000 per annum, to which he was entitled by law for all his services of every description, is a breach of his official bond, both as respects himself and his sureties; and the United States is under no necessity to proceed against him by an action on the case for money had and received.

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

This is an action of debt upon a bond given by Lysander W. Babbitt and the other defendants to the United States, on the ninth day of May, 1853, to recover the sum of $10,000 alleged to have been charged and received by him, during his term of office, as fees for the location of military bounty-land warrants under the provisions of the acts of Congress approved the 11th of February, 1847, the 28th of September, 1850, the 22d of March, 1852, and the 3d of March, 1855, over and above the maximum compensation of $3,000 which he, as such register, was authorized to retain. The bond was conditioned as follows: —

"Whereas the President of the United States hath, pursuant to law, appointed the said Lysander W. Babbitt register of the land-office for the district of land subject to sell at Kanesville, in the State of Iowa, for the term of four years from the sixth day of April, 1853, by commission dated the eighth day of April, 1853: Now, therefore, if the said Lysander W. Babbitt has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of the said office, according to law, then the above obligation to be void and of none effect; otherwise it shall abide and remain in full force and virtue."

The defendants, Hall and Burnett, as the sureties on the bond, among other pleas, pleaded separately for themselves that it was no part of the official duties of Babbitt, as such register, to receive the said fees, and that he was not required,

by the obligations of said bond, to pay the same to the United States.

Babbitt, for himself alone, among other pleas, pleaded the same defence.

To each of these several pleas the United States demurred.

The court overruled the demurrers, and rendered final judgment in favor of all the defendants.

On the hearing of the demurrers and in the rendition of said judgment, the judges were opposed in opinion upon two questions, which are set forth in the opinion of the court. The United States sued out this writ of error.

Mr. Assistant Attorney-General Smith for the plaintiff in error.

No counsel appeared for the defendants in error.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This case comes before us upon a certificate of a division of opinion of the judges by whom the case was tried in the Circuit Court.

The questions certified are: —

1. Whether it was the duty of the defendant Babbitt, as register of the land-office, to receive the register's fees from the locators of military bounty-land warrants, upon their being located on the public lands, subject to private entry by such warrants, under the acts of Feb. 11, 1847, Sept. 28, 1850, March 22, 1852, and March 3, 1855.

2. Whether, if such fees were charged and received by Babbitt, as such register, his neglect and refusal to account for and pay over to the United States the surplus, over and above the maximum compensation authorized to be by him received, as determined in this case by the Supreme Court of the United States, in *United States* v. *Babbit*, 1 Black, 55, constitutes a breach of the conditions of the official bond of Babbitt, as register, as respects himself alone, and also as respects the sureties in the bond, and whether in such case the remedy is not by an action against Babbitt for money had and received.

The reported case, to which reference is made, contains a careful analysis of the acts of Congress mentioned in the first question, and of several others relating to the subject. It is

unnecessary to go over the same ground again, or to reproduce any thing there said.

It was held in that case that $3,000 per annum was the maximum compensation allowed to the register by law, and that he was not entitled to hold in addition the fees in question in his own right.

The act of March 3, 1853, requires that "the surplus which shall remain" of such fees, beyond the compensation to which the register is entitled, "shall be paid into the Treasury of the United States as other moneys."

There could be no paying without previous receiving. The latter duty is explicitly declared. The prior one is as clearly to be inferred. Both would be alike implied in the absence of the provision as to paying over.

What is implied in a statute, will, deed, or contract is as much a part of it as what is expressed. *United States* v. *Babbit*, *supra*.

The first question certified must, therefore, be answered in the affirmative.

To the second it must be answered, that, if the register received such fees, the neglect and refusal to pay over to the United States the surplus beyond the compensation to which he was entitled by law was a breach of the condition of his official bond, both as respects himself and the sureties in the bond, and that the United States is under no necessity to proceed against the principal in the bond by an action on the case for money had and received.

The judgment will be reversed, and the cause remanded for further proceedings in conformity to this opinion; and it is

So ordered.

BERGDOLL *v.* POLLOCK.

1. A manufacturer of fermented liquors, from whom taxes had been collected under a second assessment, was, in order to recover them, required by the act of July 13, 1866 (14 Stat. 111, Rev. Stat., sect. 3225), to show that his return did not contain any understatements; and he should, therefore, prove that it agreed with the quantity of liquor actually drawn from the fermenting vessels.
2. For that purpose, although not, under all circumstances, necessarily conclusive for or against the government, his books, if kept as the law requires, ought to be the best evidence; and, until it is shown that they cannot be produced, or do not contain the desired information, resort cannot be had to the recollection or knowledge of witnesses as to circumstances bearing upon the ultimate fact in issue.
3. *Quære*, Does the act entitled "An Act to define the tax on fermented or malt liquors," approved May 13, 1876 (19 Stat. 53), change any rule of evidence theretofore established.

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

On the 22d of January, 1874, the Commissioner of Internal Revenue, acting under the authority of sect. 2 of "An Act for the reduction of officers and expenses of the internal revenue," approved Dec. 24, 1872, 17 Stat. 402, Rev. Stat. 3182, assessed a tax of $1,350 on Bergdoll & Psotta, the plaintiffs, for "one thousand three hundred and fifty barrels of beer sold and removed, &c., without proper stamps, to Oct. 1, 1873." This assessment having been duly certified to the collector, the tax was paid upon compulsion and under protest. An appeal was then made to the commissioner, under the act of 1864, sect. 44, 13 Stat. 239, as amended in 1866, 14 Stat. 111, Rev. Stat., sect. 3226, to refund the amount paid, which being denied, this action was brought against Pollock, the collector, to recover back the money.

Upon the trial, the plaintiffs offered to prove by witnesses on the stand that, from the date at which the internal revenue act of 1866 went into effect, until the assessment complained of was made, "no beer was sold or removed from their brewery for consumption or sale except in barrels or parts of barrels, which were all duly stamped with an internal revenue stamp, . . . as required by the act of Congress;" that they "had made their monthly returns to the collector regularly until and

including the month of December, 1873; that there was no understatement or undervaluation in either of said returns of the quantity of beer brewed, or of beer sold or removed from their brewery for consumption or sale, and that neither of the returns was false or fraudulent." This testimony was excluded by the court, and exceptions taken. Judgment having been rendered against the plaintiffs, they sued out this writ of error.

The errors relied upon are: 1. That the assessment is insufficient in law, because too indefinite and uncertain; and, 2. That the testimony offered was improperly rejected.

Mr. William S. Price for the plaintiffs in error.
Mr. Assistant Attorney-General Smith, contra.

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

The record presents only the exceptions to the exclusion of the testimony. The objection that the assessment is insufficient in law, because too indefinite and uncertain, cannot be considered here, as it does not appear to have been taken below.

The acts under which the tax was assessed — 17 Stat. 402, sect. 2; 14 Stat. 104, sect. 9, amending sect. 20 of act of 1864; Rev. Stat., sect. 3182 — make it the duty of the Commissioner of Internal Revenue, in any case where upon inquiry it shall be ascertained that any list which has been delivered to a collector is imperfect or incomplete, in consequence of any omission or understatement or undervaluation or false or fraudulent statement contained in any return or returns made by any persons or parties liable to tax, to enter upon any monthly or special list, at any time within fifteen months after the delivery of such incomplete list, the names of the persons or parties in respect to whose returns there have been any omission, &c., together with the amounts for which such persons or parties may be liable over and above the amount assessed upon the return, and to certify the list to the collector, to be proceeded with according to law. By sect. 44 of the act of 1864, 13 Stat. 239, as amended in 1866, 14 Stat. 111, Rev. Stat., sect. 3225, it is provided that, where a second assessment has been made pursuant to this authority, such assessment shall not be remitted, nor shall taxes collected under such assessment be recovered, refunded, or paid

back, unless it is proved that the list, statement, or return was not false or fraudulent, and did not contain any understatement or undervaluation. This is a case of second assessment, and the question presented is as to the manner in which a manufacturer of fermented liquors may be permitted to prove that his returns did not contain an understatement.

The "Act to reduce duties on imports and to reduce internal taxes, and for other purposes," passed June 6, 1872, 17 Stat. 245, as amended Dec. 24, 1872, 17 Stat. 401, sect. 1, provides in sect. 19, Rev. Stat., sect. 3337, that every manufacturer of fermented liquors shall from day to day enter or cause to be entered, in a book to be kept by him for that purpose, the estimated quantity produced, in barrels, and the actual quantity sold or removed for consumption or sale, in barrels, or fractional parts of barrels; and shall also from day to day enter or cause to be entered, in a separate book to be kept by him for that purpose an account of all materials by him purchased for the purpose, of producing such fermented liquors, including grain and malt, and render to the collector of internal revenue for the district, on or before the tenth day of each month, a true statement, in writing, taken from his books, of the estimated quantity, in barrels, of such liquors brewed and the actual quantity sold; and verify or cause to be verified such statement and the facts therein set forth, by oath or affirmation. These books are to be open at all times for the inspection of the collector, deputy-collector, inspector, or revenue agent, who may take memorandums and transcripts therefrom. Sect. 20 requires the verification of the entries made upon these books by the oaths of the party making them and of the manufacturer, on or before the 10th of each month.

The taxes are to be paid by stamps purchased from the collector of the district and affixed to the packages. Sect. 23. In this way, by a comparison of the returns with the account for stamps sold, a collector can always tell whether the taxes upon the reported production have been paid, and, by a comparison of the estimated production with the actual production as returned and with the quantity of material purchased, he can judge as to the probable honesty of the returns. The entries in the books are intended to be for the mutual protec-

tion of the government and the manufacturer. As was said in *Dandelet* v. *Smith*, 18 Wall. 647, "The exact truth always lies in the knowledge of the manufacturer. His books show, or ought to show, every thing that he has produced; and, in an investigation of this kind, if he shows that his returns or stamps fully equal the amount of his production, the burden will then be on the government to show a deficiency." An honest manufacturer who has kept accurate books has always at hand the ready means of establishing the fact of his compliance with the law.

His return is to be "a true statement, in writing, taken from his books." To prove, therefore, the accuracy of his returns, he has but to refer to his books. Parol testimony is only required for the identification of the books. That being done, the books and the returns speak for themselves. Nothing more is required, except to institute the necessary comparison. So, too, of the payment of the tax. The law specifies the amount of the tax upon each package, and the books show, or ought to show, the number of packages. The books also show, or ought to show, the quantity of material purchased for use. Experience has demonstrated what the ordinary production from a given quantity of material is. If the production as shown by the books differed from that which ordinarily would be the yield of the material purchased, the burden, as the law then stood, was cast upon the manufacturer after a reassessment to account for the discrepancy. It is unnecessary now to decide whether this rule of evidence has been changed by the "Act to define the tax on fermented or malt liquors," passed May 13, 1876. 19 Stat. 53. The proper mode of overcoming this burden is not by showing that no packages have been removed without the requisite stamp, but by proof of what was actually drawn from the fermenting vessels. The reasonable presumption is that the production of one brewer will not vary materially from the average of production of others operating under similar circumstances and manufacturing a similar article. If it does, an experienced manufacturer ought to be able to account for the difference. For this purpose, his books, which the law makes it his duty to keep, will, if kept as the law requires, furnish the evidence of his daily transactions, and enable him at once, when a deficiency appears,

to secure the evidence with which to make the necessary explanation, should one be called for. If he produces a better article by the use of a larger quantity of material, or has sustained special losses in the process of manufacture, or afterwards and before removal, or has sold a part of his material without use, by having his attention called through his daily entries to an apparent deficiency in his production, he can prepare himself for defence against any charge which may grow out of it. His books are not necessarily conclusive for or against the government under all circumstances; but if properly kept, as they must be to avoid the penalties of the law, they ought, so to speak, to furnish the base from which his evidence must spring. If they do not, it is his own fault, and he must suffer the consequences. Certainly, the law does not contemplate that he may relieve himself from the effect of insufficient or improper entries by a resort primarily to the uncertain recollection or knowledge of witnesses as to circumstances which in any event can have only a remote bearing upon the ultimate fact to be established. We do not say that, in the progress of a trial and under some circumstances, such proof as was offered as to removals may not be competent; but we are clearly of the opinion that no foundation was laid in this case for its introduction. The books, with proper explanations in respect to entries which appear in them, ought to constitute the best evidence in the case; and, until it is shown that they cannot be produced, or that they do not contain the information required, no evidence of such remote circumstances is admissible. In this case, there was no attempt to account for the absence of the books, or any claim of defective entries, and we think the court did not err in excluding the testimony.

The other questions presented in the brief filed for the government were not raised in the court below, and need not be considered here. *Judgment affirmed.*

MERCHANTS' NATIONAL BANK *v.* COOK.

1. The court, upon consideration of the facts in this case, holds that it appears that an insolvent debtor transferred certain securities to his creditor with a view to give him a fraudulent preference, and that the latter received and appropriated them, having reasonable cause to believe that the debtor was insolvent.
2. The creditor is, therefore, liable to the assignee in bankruptcy of the debtor for the securities or for their value.
3. *Toof* v. *Martin*, 13 Wall. 40, *Buchanan* v. *Smith*, 16 id. 277, and *Wager* v. *Hall*, id. 584, cited and approved.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The facts are stated in the opinion of the court.

Mr. Stanley Matthews for the appellant.

Mr. Edgar M. Johnson, *contra*.

MR. JUSTICE HUNT delivered the opinion of the court.

This action is brought by the assignees of B. Homans, Jr., to recover from the Merchants' Bank certain securities, or their value, received by the bank from Homans. The securities are alleged to have been received in violation of the thirty-fifth section of the Bankrupt Act. That Homans was insolvent when the securities were delivered is not denied, but the bank insists that it had no reasonable cause to believe that such was his condition.

On the morning of Aug. 25, 1869, the bank advanced to Homans, upon his check on New York, the sum of $10,000, less the usual charge of one-eighth of one per cent. In the afternoon of the same day, Homans became satisfied that his failure could no longer be averted, and that his check thus given would not be paid. He therefore placed in an envelope addressed to the bank the securities in question, with the following note: —

"HOMANS & CO., BANKERS, No. 23 W. THIRD ST.,
CINCINNATI, Aug. 25, 1869.

"D. I. FALLIS, Esq., *Pr.*

"DEAR SIR, — A disappointment gives us reason to fear that our check of this date may not be paid. I leave with you the enclosed as security. B. HOMANS, Jr."

On the morning of the 26th, his banking-house was opened for business as usual, Homans himself being present. At nine o'clock A.M. he left his office for Covington, where he lived, instructing Mr. Wood, one of his clerks, that if he did not return at ten o'clock to deliver the envelope addressed to the Merchants' Bank, and another of a like character to another bank. Homans did not return that day; but at ten or half-past ten o'clock, Mr. Albert, another clerk, received directions from him to close the doors, take no more deposits, and pay no more checks. Mr. Albert immediately locked the doors, and, receiving the package from Mr. Wood, at once delivered it to the bank. Upon these facts, with one exception as to time, the parties are agreed.

The president of the Merchants' Bank testifies that he found the envelope on his desk in the bank when he came to the bank at about eight o'clock in the morning, and is quite confident that it could not have been later than half-past eight when he became aware of its contents. On the point of time he may easily have fallen into an error; and, we think, there can be no doubt of his mistake. Mr. Homans testifies that he left the banking-house at nine A.M. to go to Covington, and then gave instructions to Mr. Wood, a clerk, to deliver the envelope, if he did not return by ten o'clock. Mr. Albert also testifies that the banking-office of Homans was opened at nine o'clock, and continued open for about an hour; that he then received orders from Mr. Homans to close the doors; that he did so, and, in pursuance of directions then received from Mr. Wood, proceeded to deliver this envelope, with a similar one to another bank; and that this delivery was made at ten or half-past ten o'clock.

Mr. Yergason, the cashier of the Merchants' Bank, presented at Homans's office a clearing-house check, and payment thereof was refused. Mr. Albert testifies that this check was presented and payment demanded by the cashier after the doors were closed and after the envelope had been delivered at the bank. Mr. Fallis testifies to the same purport, and that this demand and refusal was made between nine and ten o'clock in the morning.

That Homans intended to give the bank a preference over other creditors, — that is, that he expected and intended by

means of the enclosures sent that the bank should receive the full amount of its $10,000 check, while other creditors would receive but a portion of their debts, — is too evident to require discussion. Mr. Homans states in explicit terms that he was at that time aware of his inability to pay his creditors in full then or in the future.

The important question remains, Had the Merchants' Bank, when it received the packages, reasonable cause to believe that Homans was insolvent? If it had, the thirty-fifth section of the Bankrupt Act declares the transaction to be void. If it had not, it may lawfully hold the securities or their avails.

The president of the bank testifies that there was nothing in the note sent with the securities, or in the transaction itself, that led him to suspect the insolvency of Homans. While it is impossible certainly to indicate the operation of the human mind, we cannot but think the witness is again at fault in his recollection, and that his idea at the time of testifying was not the one that controlled his action when the occurrence took place.

1. The transaction, on the theory of the solvency of Homans, is quite inexplicable. It was the general practice of these parties, as of all bankers in their city, to deal in exchange on New York. The practice was thus: The Merchants' Bank wanted $10,000 to be used in the city of New York. Mr. Homans had the money there, which he did not need for his own purposes. The bank gives him $10,000 in currency, less the difference in exchange, and takes his check on his banker in New York for the sum named. This is the theory of the transaction. In fact, Homans had no funds in New York, but gave his check that he might obtain the currency to be used to meet pressing demands at home. The theory of the bank, however, was as is above stated.

That a banker in Cincinnati, having sold a sight-draft on New York, should the next day, without agreement or solicitation, send to the holder collaterals to secure the payment of the draft, would be an extraordinary transaction, and, in the language of Mr. Cook, president of the Fourth National Bank of Cincinnati, it would be a taint upon the standing of the drawer, and would at once impress one with the idea that the drawer

was insolvent, or in great financial difficulty. Such is the evidence also of Mr. Griffiths and Mr. Espy, bankers of the same place. The giving of security under such circumstances is in repugnance to the idea of the whole transaction, which is that of a quick and simple commercial exchange of funds. One who lends money on bond or time notes may well expect and take security for their payment. It is in harmony with the transaction. But if a check is taken in payment of an account presented, no one would expect to receive collateral security for its payment. It would not, however, be more incongruous, or more inharmonious, than the giving of collateral security for the payment of the draft in question. The giving and acceptance of the collateral could have but one significance to the mind of a banker.

2. The letter accompanying the collaterals, we think, gave a notice which a business man could not misunderstand, especially in connection with the fact, known to the bank, that a short time prior thereto there were evidences that Homans was in need of money, and that there were clearing-house checks to a large amount outstanding against him. The letter enclosed said: "A disappointment gives us reason to fear that our check of this date may not be paid. I leave with you the enclosed as security." Its language is expressive to a business man. It means, not that we fear our check may not be paid, but that it will not be paid. We are disappointed in obtaining the funds to pay it.

This disappointment is not the result of an accident or of a misunderstanding, for that apology would have been given if it existed; nor is the disappointment a temporary one, for that would have been stated if true. We do not expect to be able to pay it, and we enclose you securities, which will not indeed give the money to which you are entitled, but will protect you from ultimate loss. This is what the letter means. It is a statement of inability from want of funds to meet a current and most pressing debt, either in New York or in Cincinnati, the non-payment of which involved public suspension and bankruptcy. Practically it was so understood, for we find —

3. That immediately upon its receipt the Merchants' Bank sent for payment its clearing-house check, previously unpre-

sented. The testimony of Mr. Albert shows that the Merchants' Bank was not in the habit itself of presenting clearing-house checks, but that, in about fifteen minutes after he had left the envelope and securities at the bank, Mr. Yergason, the cashier, in person presented the clearing-house check and requested its payment. The relation of cause and effect is a more rational explanation of this speedy demand than to suppose it to be a mere coincidence.

It is scarcely necessary to discuss the authorities as to the meaning of the words "having reasonable cause to believe the party to be insolvent." When the condition of a debtor's affairs are known to be such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business, there is reasonable cause to believe him to be insolvent. Knowledge is not necessary, nor even a belief, but simply reasonable cause to believe. *Toof* v. *Martin*, 13 Wall. 40; *Buchanan* v. *Smith*, 16 id. 277; *Wager* v. *Hall*, id. 584.

There is nothing in the subsequent decisions of this court to vary these principles, and it is not worth while to go through the English cases founded upon a statute containing different language from our own.

Upon the whole case, we are all of the opinion that the court below decided correctly in holding that Homans was insolvent; that the securities were transferred with a view to give a fraudulent preference; and that the bank had reasonable cause to believe that Homans was insolvent when it received and appropriated the securities presented to it.

Decree affirmed.

SESSIONS *v.* JOHNSON.

On April 5, 1870, A., in order to secure B. as his indorser, made a mortgage of certain property. This mortgage the latter, on the thirteenth of that month, assigned to C., to secure a debt due him. Oct. 4, A. made a second mortgage of the same and additional property to D. for $4,000, which sum D. paid to B. as the agent of A.; whereupon B. paid certain notes of A. upon which he as well as D. was liable as indorser. On the 12th of October, A. sold the entire property covered by both mortgages to E. for $6,000, and received the latter's notes in payment. Of them, $2,444.40 was delivered to C., and $3,555.60 to D., who thereupon released their respective mortgages. Proceedings in bankruptcy were commenced against A. Nov. 2, 1870, and he was duly adjudicated a bankrupt. His assignees then sued D. for the value of the property covered by his mortgage, and obtained, by a compromise, a judgment for $4,000, which he satisfied. They subsequently sued him for the amount paid on the said notes whereon he was liable as indorser. This suit was compromised by his paying $2,000. The assignees thereupon released all claims and demands against him, and brought the present action to recover from C., who was not a creditor of A., the $2,444.40, on the ground that it was, in fraud of the Bankrupt Act, and within six months before the filing of the petition in bankruptcy, paid to him to secure him as indorser for B., he having reasonable cause for believing A. to be insolvent, and that he thereby prevented the property from coming to the assignees for distribution, and sought to impede the operation and evade the provisions of that act. *Held*, 1. That it was incumbent upon C. to show that B. took up the notes to secure the payment of which the mortgage to the latter had been executed. 2. That, in the absence of such proof, the amount received by C. was clearly a preference by way of indemnity. 3. That the action was not barred by the satisfaction of the judgment against D. 4. That the court having charged that, if the assignees had received from D. full satisfaction for the proceeds of the sale, there could be no recovery in this action, the verdict in favor of the assignees is upon that point conclusive against C. 5. That the inquiry whether C. had paid any thing for A. was properly submitted to the jury.

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

The facts are fully stated, and the assignment of errors is set forth in the opinion of the court.

Mr. Benjamin F. Butler for the plaintiff in error.

Mr. George W. Morse and *Mr. R. M. Morse, Jr.*, *contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Even without satisfaction, a judgment against one of two joint contractors is a bar to an action against the other, within the maxim *transit in rem judicatam;* the cause of action being

changed into matter of record, which has the effect to merge the inferior remedy in the higher. *King* v. *Hoare*, 13 Mee. & W. 504.

Judgment in such a case is a bar to a subsequent action against the other joint contractor, because, the contract being merely joint, there can be but one recovery; and consequently the plaintiff, if he proceeds against one only of two joint promisors, loses his security against the other, the rule being that by the recovery of the judgment the contract is merged and a higher security substituted for the debt. *Robertson* v. *Smith*, 18 Johns. (N. Y.) 477; *Ward* v. *Johnson*, 13 Mass. 149; *Cowley* v. *Patch*, 120 id. 138; *Mason* v. *Eldred et al.*, 6 Wall. 231.

But the rule is otherwise where the contract or obligation is joint and several, to the extent that the promisee or obligee may elect to sue the promisors or obligors jointly or severally: but even in that case the rule is subject to the limitation, that, if the plaintiff obtains a joint judgment, he cannot afterwards sue them separately, for the reason that the contract or bond is merged in the judgment; nor can he maintain a joint action after he has recovered judgment against one of the parties in a separate action, as the prior judgment is a waiver of his right to pursue a joint remedy.

Different modifications of the rule also arise where the controversy grows out of the tortious acts of the defendants. Where a trespass is committed by several persons, the party injured may sue any or all of the wrong-doers, but he can have but one satisfaction for the same injury, any more than in an action of assumpsit for a breach of contract.

Courts everywhere in this country agree that the injured party in such a case may proceed against all the wrong-doers jointly, or he may sue them all or any one of them separately; but if he sues them all jointly, and has judgment, he cannot afterwards sue any one of them separately; or, if he sues any one of them separately, and has judgment, he cannot afterwards seek his remedy in a joint action, because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy.

Where the injury is tortious, the remedy may be joint or several; but the rule in this country is that a judgment against

one without satisfaction is no bar to an action against any one of the other wrong-doers. *Lovejoy* v. *Murray*, 3 Wall. 1; s. c. 2 Cliff. 196; *Livingston* v. *Bishop*, 1 Johns. (N. Y.) 290; *Drake* v. *Mitchel*, 3 East. 258.

Sufficient appears to show that the bankrupts, Kane, Sprague, & Co., on April 5, 1870, mortgaged their stock, tools, fixtures, and machinery to W. W. Sprague, to secure him as their indorser; that the mortgagee, on the 13th of the same month, assigned the mortgage to the defendant below as security for a debt due from the mortgagee to the assignee of the mortgage. On the 4th of October following, the bankrupts made a second mortgage, including the property described in the first mortgage, together with other property, to E. A. Goodnow, for $4,000, which sum the mortgagee paid to the mortgagee of the first mortgage, as the agent of the bankrupts, and which he, the agent, used in part to pay three notes given by the bankrupts, upon which the mortgagees in both mortgages were indorsers. Eight days later, the bankrupts sold to Nichols and Johnson the whole property covered by the mortgages, and received in payment their notes and those of Henry W. Snow, to the amount of $6,000, which they divided as follows: $2,444.40 to the assignee of the first mortgagee, and $3,555.60 to the second mortgagee, who thereupon released their respective mortgages.

Bankruptcy proceedings against the mortgagors in the two mortgages were commenced on the 2d of November in the same year, and the plaintiffs were duly appointed assignees of the bankrupts' estate. Subsequently they sued the mortgagee in the second mortgage to recover the value of the property covered by his mortgage; and judgment was, by agreement, entered in their favor for $4,000, interest and costs, and the evidence shows that the judgment was satisfied by the judgment debtor. They, the assignees, also brought another suit against the same party to recover for the preference he obtained when the agent of the bankrupts paid three of their notes upon which the defendant in the last-named suit was indorser, which suit was settled by the payment of $2,000 and a release given by the assignees of all their claims against the defendant in that suit.

Beyond doubt, the first mortgage was valid, but it was given to secure the mortgagee as indorser for the mortgagors, and

inasmuch as the defendant failed to prove that the mortgagee had taken up any paper on which he was so liable, it is evident that the defendant derived no right to the proceeds of the property paid to him by virtue of that mortgage. Nothing having been paid by the defendant as indorser for the bankrupts, the money paid him for the release of his mortgage was plainly a preference by the way of indemnity. Proceedings in bankruptcy were commenced within four months thereafter; and the assignees brought the present suit in the District Court against the defendant to recover back the proceeds of so much of these notes given to the defendant for the release of his mortgage from the bankrupt debtors, the claim being that the amount was paid to secure the defendant for his indorsements for the insolvent debtors, he having reasonable cause to believe that they were insolvent, and that the payment was made to prevent the property from coming to the assignees for distribution, and to impede and evade the provisions of the Bankrupt Act.

Service was made; and the defendants appeared and pleaded the general issue, and that the plaintiffs previously recovered judgment against E. A. Goodnow for the value of the same property, and that the said judgment has been fully paid and satisfied.

Issue being thus raised, the parties went to trial; and the verdict and judgment were for the plaintiffs in the sum of $2,786.56 and costs of suit. Exceptions were filed by the defendant; and he removed the cause into the Circuit Court, where the parties were again heard, and the Circuit Court affirmed the judgment, and the defendant removed the cause into this court.

Five errors are assigned, to the effect following: 1. Because the District Court did not instruct the jury that the action is not maintainable, the assignees having disaffirmed the sale of the goods and received the value of the property. 2. Because the District Court did not instruct the jury that the plaintiffs were estopped by their previous proceedings from maintaining the suit. 3. Because the District Court did not instruct the jury that the plaintiffs could only have judgment for the value of the property, deducting the amount previously

recovered. 4. Because the District Court did not instruct the jury that the plaintiffs could not recover the proceeds of the property in the hands of the mortgagee so long as any contingent liability remained. 5. Because the issue submitted to the jury, whether the defendant had paid any thing for the bankrupts, was an immaterial one, if there was any outstanding and undischarged indorsement of the defendant for which he was liable.

Separate mortgages were held by the defendant and the other mortgagee, of different dates, and it appears that they were given for entirely different considerations. Of course, the respective mortgagees held the property subject to an equity of redemption in the mortgagors; and the case shows that the mortgagors sold the respective equities of redemption, and distributed the proceeds of the sale between the respective mortgagees. Throughout, the relations of the mortgagees to the insolvent debtors were entirely separate. They never held any joint claim against the insolvent mortgagors, nor did the mortgagees ever receive any joint security from the insolvent debtors for their separate claims. Instead of that, the respective equities of redemption remained in the mortgagors, and the conceded facts show that they sold the equities and distributed the proceeds between the respective mortgagees, showing to a demonstration that there never was any joint contract relation between the mortgagees and the insolvent debtors.

Even the proceeds of the sale of the equities of redemption, as distributed between the respective mortgagees, were entirely separate; nor would it make any difference if the mortgagees, in receiving their respective portions of those proceeds, had acted jointly, as it is well-settled law that where the tort is joint the injured party may have a joint or several remedy, the rule being that a judgment against one wrong-doer without satisfaction is no bar to an action against any one of the other joint tort-feasors. *Lovejoy* v. *Murray*, *supra*.

Joint wrong-doers may be sued separately; and the plaintiff may prosecute the same until the amount of the damages is ascertained by verdict, but the injured party can have only one satisfaction, the rule being that he may make his election *de melioribus damnis*, which, when made, is conclusive in all sub-

sequent proceedings. *Heydon's Case*, 11 Co. 50; *White* v. *Philbrick*, 5 Greenl. 147; *Knickerbocker* v. *Colver*, 8 Cow. (N. Y.) 111; *O'Shea* v. *Kirker*, 4 Bosw. (N. Y.) 120.

Without more, these remarks are sufficient to show that the theory of estoppel cannot be maintained, and that the first two errors assigned must be overruled, for two reasons: 1. Because the relation of joint contractors never subsisted between the insolvent debtors and the mortgagees, to whom the proceeds of the equities of redemption were distributed by the insolvent mortgagors. 2. Because the mortgagees, acted separately in accepting certain portions of the proceeds of that sale; nor would it have made any difference if they had acted jointly, as it is settled by all the authorities that when several persons have been jointly concerned in the commission of a wrongful act they may all be charged jointly as principals, or the plaintiff may sue any one of the parties separately, torts being in their nature several, even when the wrongful act was jointly committed. Ad. Torts (3d ed.), 939.

Suppose that is so, still it is insisted by the defendant that the plaintiff cannot, in any proper view of the facts, recover more than the difference between the amount paid by the other mortgagee and the value of the property distributed. What the plaintiffs claim is the amount the defendant received from the insolvent debtors as part of the proceeds of the sale of the equities of redemption. Abundant proof is exhibited that he received $2,444.40, and it is conceded that the whole of that amount remains in the hands of the defendant.

Two sums, amounting in the whole to $6,000, were received by the plaintiffs of the second mortgagee before the present suit was instituted. $4,000 of the amount was recovered by judgment in favor of the plaintiffs. They also instituted a second suit against the same party, to recover the amount received by him in payment of the notes upon which he was liable as indorser; which action was compromised by the payment to the assignees of $2,000, as appears by the agreed statement of facts. Such payment being made, the assignees executed a release to the defendant in that suit of all claims and demands which they, as such assignees, had against him on that account.

Judgments bind parties and privies, but they do not bind strangers; and it is clear that the present defendant was neither a party nor privy to the action in the first suit, nor had he any thing to do with the compromise of the second suit between those parties.

Enough appears in the evidence to establish that theory; but if any possible doubt could otherwise arise in respect to the conclusion, the matter is set entirely at rest by the verdict of the jury. They were told by the court that if the plaintiffs had once received full satisfaction for the proceeds of the sale from the other mortgagee, "then they can recover nothing from the defendant;" and it follows from the verdict that they did not recover in the suits against the other mortgagee any thing for the portion of notes taken for the sale of the equities which was distributed to the defendant in the present suit. All that he received remains in his hands; and inasmuch as the assignees are not estopped by the proceedings against the second mortgagee from prosecuting their claim against the defendant for the portion of the proceeds of the equities of redemption which was distributed to him by the insolvent debtors, it follows that the assignee may recover the whole amount of that portion without regard to the antecedent proceedings against the second mortgagee, which is all that need be said in response to the third assignment of error.

Both parties agree that the first mortgagee was not a creditor of the mortgagors, and that the mortgage was given merely to secure future advances or future liabilities to be incurred by indorsing the paper of the mortgagors. Nothing had been paid by the mortgagee; but the defendant insists that the portion of the notes distributed to him cannot be recovered back if any outstanding undischarged contingent liability of the kind remains.

Grave doubts arise whether that proposition is well founded in law, for two reasons: 1. Because it was the equities of redemption which the mortgagors sold, and the notes distributed represented the proceeds of that sale. 2. Because it does not distinctly appear that any such contingent liability remained at the time of the trial.

But it is unnecessary to decide that question, because the

bill of exceptions does not show that the district judge gave any instruction contrary to that construction of the mortgage to the defendant, nor does the record show what, if any, instructions he gave in that regard. Unsustained by the record, as the fourth assignment of error is, it must be overruled as inapplicable to the questions presented for decision.

Evidence to show that the defendant had paid any paper which he had indorsed for the insolvent debtors, so far as appears, was entirely wanting; nor does the transcript show that any was introduced to prove that any indorsement made by the defendant was outstanding and undischarged. Assume the facts to be so, and it would be clear that the mortgage could not avail the defendant as a defence to the claim of the assignees; and it is equally clear, that, if there were no such outstanding indorsements, then it was important for the defendant to prove that he had advanced moneys to discharge such liability.

Viewed in that light, it is impossible to sustain the fifth assignment of error, for the reason that it is shown that the inquiry whether the defendant had made any payment for the insolvent debtors was an important inquiry, and one that was properly submitted to the jury. Proper instructions, it must be assumed, were given to the jury in respect to all the issues in the case not made the subject of complaint in the bill of exceptions, and that all questions involved in the pleadings, except those presented by the assignment of errors, are correctly settled by the verdict, from which it follows that there is no error in the record. *Judgment affirmed.*

COCHRANE *v.* DEENER.

The court declines to vacate its decree rendered at the last term in *Cochrane* v. *Deener*, 94 U. S. 780, but holds that third parties, whose interests are opposed to the Cochrane patents which were in controversy in that suit, should not be concluded from having a further hearing upon them whenever a future case may be presented here for consideration.

MOTION to set aside the decree rendered at the last term in *Cochrane* v. *Deener*, 94 U. S. 780, and to dismiss the appeal.

Mr. George Harding in support of the motion.
Mr. Matt. H. Carpenter, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

After a careful examination of the evidence adduced on the motion to vacate the decree in this case, we see no ground to believe that the appellants are chargeable with any collusion with the appellees in reference to the argument of the appeal. On the contrary, the weight of the evidence is, that they repelled any arrangement or proposition which might look to that end. Whilst we would not hesitate to set aside a decree collusively obtained, the proof ought to be very clear to induce us to do this at the instance of strangers to the suit, though incidentally affected by the decision of the questions involved.

At the same time, as the decision in this case is made the basis of applications for injunctions against third parties in the Circuit Court, it is right that we should say, that, in the argument of the appeal before us, the case on the part of the appellees was, as it seemed to us, very imperfectly presented; and the evidence laid before us on this motion demonstrates the fact that the appellees, in consequence of the conditional arrangement with the appellants, which they secured before the argument was had, or for some other cause, omitted to prosecute their defence with that degree of zeal and efficiency which the importance of the case would otherwise have demanded. The result was, that the labor of the court, and its liability to overlook points of weight and importance, were greatly increased. As the case was presented to us, we see no cause for changing

our views. But, under the circumstances, we think that third parties, who had no opportunity of being heard, and whose interests as opposed to the Cochrane patents are very important, should not be concluded from having a further hearing upon them whenever a future case may be presented for our consideration. *Motion denied.*

ALVORD v. UNITED STATES.

1. The presentation of a claim for compensation for carrying the mails, to the Second Assistant Postmaster-General, with whom all the business in relation to the claim had been previously transacted, is, in contemplation of law, the presentation of it to the Postmaster-General.
2. The facts in this case considered, and held to entitle the claimant to $35,100 for his services, under contracts with the Post-Office Department, for carrying the mails.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

Mr. Thomas Wilson and *Mr. Jeremiah M. Wilson* for the appellant.

The Solicitor-General, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

It appears by the findings of the Court of Claims, from whose judgment this case is appealed, that, by five different written contracts made in 1858, appellant agreed with the Postmaster-General to carry the mail over as many different routes between Iowa City, in the State of Iowa, and Fort Kearney, in Nebraska. On the 25th of July, 1861, it was agreed between him and the Postmaster-General, that, for an improved service on part of this route, namely, between Omaha on the Missouri River, and Fort Kearney, plaintiff should receive $14,000 per annum additional, from its commencement on the 5th of August, 1861. The second and third of the series of facts found by the court we give verbatim, as follows: —

"2. On the 16th of September, 1861, in consequence of the route established by Congress for the through California mail having been broken by the burning of bridges, the Postmaster-General ordered

the California mail to be sent over claimant's routes; and the claimant transported it under and in pursuance of such order from the 16th of September to the 25th of December, 1861. It greatly exceeded in bulk the other mail matter which the claimant transported under his contracts, and on some of his routes required for its conveyance at times as many as five coaches per day in addition to the one coach which he would otherwise have run, and it at all times and on all of his routes required one or more additional coaches, which were used exclusively for it; and the fair and reasonable value of the service for the period named was the sum of $35,100.

"3. Immediately after the claimant's services for carrying the California mail, as set forth in the second finding, had terminated, he presented his account therefor to the Postmaster-General, and requested that it be liquidated and paid, but the Postmaster-General refused to allow or pay the same, and directed the Second Assistant Postmaster-General to reply, 'that, when he made the arrangement to give him the $14,000 per annum additional for improved service between Columbus and Fort Kearney, it was in view of his conveying the overland mails over that route and through Iowa free of additional expense, should circumstances make it necessary temporarily so to send them; and that if the claim for additional compensation for such service is to be pressed, he would feel compelled at once to annul that arrangement.' The Second Assistant Postmaster-General reduced such instructions to writing, in the form of a letter from himself to the claimant, and caused it to be mailed to the claimant at his residence in Indianapolis, Indiana. Subsequent to the mailing of such letter, and while the additional mail service at $14,000 per annum was still being rendered, the claimant presented documents to prove the justice of his claim for conveying the California mail, and otherwise pressed his demand by personal interviews with the Second Assistant Postmaster-General, with whom all of the business relating to this claim had previously been transacted. He did not otherwise notify the Postmaster-General that his claim for the California mail service would be pressed. The Second Assistant Postmaster-General did not inform the Postmaster-General that the claimant thus pressed his demand for the California mail service. The claimant continued to run a daily mail between Omaha and Fort Kearney, and to receive the consideration at the rate of $14,000 per annum, from the 12th of February, 1862, when the Postmaster-General's decision was made, up to the termination of the original contract on the 30th of June, 1862."

On the facts thus found, the court was of opinion that the law was for defendants, and dismissed appellant's bill.

The ground assumed by the majority of the Court of Claims is, that by continuing to perform the services for which the $14,000 extra was allowed, and receiving the pay for it, after receipt of the Postmaster-General's letter, he waived his right to insist on the $35,100 which that court find was otherwise justly his due.

The Solicitor-General takes another view of the matter, and insists that Alvord did not press his claim after the receipt of that letter; and for that reason, and by continuing the $14,000 contract, must be held to have waived his claim to the $35,100.

Neither of these views seem to us to be sound. The court below distinctly states that after the date of the letter from the Second Assistant Postmaster-General, in which it was stated that the arrangement for additional compensation under the $14,000 contract would be annulled if the other claim was pressed, "the claimant presented documents to prove the justice of his claim for carrying the California mails, and otherwise pressed his demand by personal interviews with the Second Assistant Postmaster-General, with whom all the business relating to this claim had previously been transacted."

It is difficult to see how he could more actively have pressed his claim in that department; and it cannot be admitted that it was not pressed, because the evidence and the arguments were presented to the assistant instead of the head of the department. We suppose that the assistant postmasters-general were appointed for precisely such functions as this one discharged in the matter, and it would be a dangerous principle to hold that the department is bound alone by what is transacted by the Postmaster-General in person; for the same rule would free parties dealing with the department from obligations not assumed directly with its head.

Considering, then, that Alvord did press this claim, how can he be said to have waived it? The Postmaster-General's statement was, that if you press this claim, I shall be compelled to abrogate the other. If he had abrogated the other, the correspondence might have been a sufficient justification for so doing. If this suit had been brought to recover under the $14,000

contract, what took place might have shown some reason against a recovery. But it is clear, from all the facts found, that the department, although Alvord did press his claim for carrying the California mail earnestly and without remission, did not choose to exercise its option or execute its threat to discontinue the other arrangement, but permitted it to stand, probably because the good of the service required it. Instead of that, it concluded to resist the present claim.

The correspondence with the Postmaster-General, therefore, does not affect the merits of this claim; and as the findings of the court show a case in which the fair and reasonable value of the additional service rendered under the peremptory order of the Postmaster-General by the claimant was $35,100, we see no reason why he should not have recovered it. At the time he made his original contracts they were for a certain number and character of coaches for so many days in the week. The California mail was then carried by sea. Later, it was carried to St. Joseph, on the Missouri River, two hundred miles south of claimant's route, by rail, and then overland by another contractor. This mail exceeded all the other mail matter which he was expected to carry, and did carry, under his original contract; and it was only in consequence of the destruction of the railroad bridges in Missouri by the guerilla warfare of the early days of the insurrection that the whole of that mail was ordered to be carried temporarily over claimant's lines through the State of Iowa.

If this mail could have been carried by the same number and character of coaches run for the same number of days in the week, which were stipulated in his contracts, perhaps no additional compensation would have been due. But the court distinctly finds that under the order, which he had no right to resist, he was compelled to put on five additional coaches per day on some of his routes, and at all times and on all his routes one or more additional coaches were used exclusively for the increased mail. For this service, altogether beyond what his contract required of him, he is entitled to compensation on every principle of law and justice.

Judgment reversed and cause remanded, with directions to render a judgment for the plaintiff for $35,100, *the value of his services, as already found by the Court of Claims.*

COUNTY OF CASS *v.* JOHNSTON.

1. The provisions of the act of the General Assembly of Missouri, entitled "An Act to facilitate the construction of railroads in the State of Missouri," approved March 23, 1868, commonly known as the "Township Aid Act," which authorize a subscription to the capital stock of railway companies by a township, whenever it appears, by the returns of an election duly called for that purpose, "that not less than two-thirds of the qualified voters of the township voting at such election are in favor of such subscription," are not repugnant to sect. 14, art. 11, of the Constitution of that State, adopted in 1865, which ordains 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.
2. *Harshman* v. *Bates County*, 92 U. S. 569, so far as it conflicts herewith, is overruled.
3. All qualified voters who absent themselves from an election held on public notice duly given are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares.
4. It is not an objection to the validity of the bonds issued under that act that the railroad company, to the capital stock of which the subscription was made by the county court on behalf of the township, was not incorporated until the day when the election took place.
5. On the bonds in question in this suit the judgment was properly rendered by the court below against the county, to be enforced, if necessary, by *mandamus* against the county court or the judges thereof, to compel the levy and collection of a tax in accordance with the provisions of that act.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

Johnston, a citizen of Iowa, brought this action Sept. 3, 1874, against the "County of Cass, trustee for Camp Branch Township in said county, State of Missouri," to recover the amount of certain overdue coupons attached to bonds whereof he alleged that he was the lawful holder. A copy of one of the bonds and of a coupon annexed thereto is as follows: —

"UNITED STATES OF AMERICA,

"*State of Missouri.*

"CASS COUNTY BOND.

"No. 53.] Interest ten per cent per annum. [$500.

"Know all men by these presents, that the County of Cass, in the State of Missouri, acknowledges itself indebted and firmly

bound to the St. Louis and Santa Fé Railroad Company, Missouri division, in the sum of $500, which the said county of Cass, for and on account of Camp Branch Township, for value received, hereby promises to pay said company, or bearer, at the banking-house of Northrup & Chick, in the city of New York, and State of New York, ten years after date, with interest thereon from the date hereof at the rate of ten per cent per annum, payable semiannually on the eleventh days of January and July of each year, on the presentation and delivery at said banking-house of Northrup & Chick, in said city of New York, State of New York, of the coupons of interest hereto attached.

"This bond is issued pursuant to an order of the county court of said County of Cass, made by authority of an act of the General Assembly of the State of Missouri, entitled 'An Act to facilitate the construction of railroads in the State of Missouri,' and approved on the twenty-third day of March, A.D. 1868, and authorized by a vote of more than two-thirds of the voters of said township.

"In testimony whereof, the said County of Cass has executed this bond by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing hereto the seal of said court.

"This done at the office of the clerk of said court, this eleventh day of July, A.D. 1870.

[SEAL.] "JEHIEL C. STEVENSON,

"*Presiding Justice of the County Court of Cass County, Mo.*

"C. H. DORE,

"*Clerk County Court Cass County, Mo.*"

"HARRISONVILLE, CASS COUNTY, July 11, 1870.

"The County of Cass promises to pay the sum of $25 on the eleventh day of January, 1873, being interest on bond No. 53, for $500, payable at the banking-house of Northrup & Chick, in the city of New York, State of New York.

"C. H. DORE,

"*Clerk of the County Court of Cass County, Mo.*"

The act referred to in the bond is generally known as "The Township Aid Act." The first, second, third, and fifth sections are as follows: —

"SECTION 1. Whenever twenty-five persons, tax-payers and residents, in any municipal township, for election purposes, in any county in this State, shall petition the county court of such county, setting forth their desire, as a township, to subscribe to the capital

stock of any railroad company in this State, building or proposing to build a railroad into, through, or near such township, and stating the amount of such subscription, and the terms and conditions on which they desire such subscription shall be made, it shall be the duty of the county court, as soon as may be thereafter, to order an election to be held in such township, to determine if such subscription shall be made; which election shall be conducted and returns made in accordance with the law controlling general and special elections; and if it shall appear, from the returns of such election, that not less than two-thirds of the qualified voters of such township voting at such election are in favor of such subscription, it shall be the duty of the county court to make such subscription in behalf of such township, according to the terms and conditions thereof, and if such conditions provide for the issue of bonds in payment of such subscription, the county court shall issue such bonds, in the name of the county, with coupons for interest attached, but the rate of interest shall not exceed ten per cent per annum; and the same shall be delivered to the railroad company.

"SECT. 2. In order to meet the payments on account of the subscription to the stock, according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription, the county court shall, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax, which shall be levied on all the real estate lying within the township making the subscription, in accordance with the valuation then last made by the county assessor for county purposes.

"SECT. 3. The county treasurer shall be authorized and required to receive and collect, of the sheriff of the county, the income from the tax provided in the previous section, and to apply the same to the payment of the stock subscription according to its terms, or to the payments of interest and principal on the bonds, should any be issued in payment of such subscription; he shall pay all interest on such bonds, out of any money in the treasury collected for this purpose, by the tax so levied, as the same becomes due, and also the bonds as they mature, which shall be cancelled by the county court; and this service shall be considered a part of his duty as county treasurer."

"SECT. 5. In all cases hereafter, where a railroad or branch railroad in this State shall be built, in whole or in part, by subscriptions to its stock, by counties, cities, or townships, the proceeds of all State and county taxes, levied upon such railroad company or branch so built, or the property thereof, shall be paid into the treasury of

the counties where collected, and the county treasurers shall apportion the same, according to their several subscriptions, to such counties, cities, or townships so subscribing stock, until the whole amount of such subscription is refunded to them; and such sums so apportioned shall be paid over to the county or city treasurer, and applied to the payment of the interest and principal of the bonds issued by such county or city on account of their subscription stock as aforesaid, if any are outstanding, and, if not, it shall by them be placed to the credit of the school fund in such county, city, or township."

The remaining sections do not affect any question here involved. They declare when the act shall take effect, and provide for granting to tax-payers certificates convertible into railway stock.

The Constitution of Missouri took effect July 4, 1865; and sect. 14, art. 11, is as follows: —

"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."

In 1871, the legislature of Missouri so amended sect. 2 of the Township Aid Act of 1868 as to make the tax therein provided for a tax upon all the real estate and personal property within the township. The county answered, that said bonds were issued in payment of a pretended subscription by said county in behalf of said Camp Branch Township, to the St. Louis and Santa Fé Railroad Company, under the authority of the act of March 23, 1868, and that prior to the date of them the township had no authority to subscribe for stock in said company or issue bonds therefor, or to have the same done for it by the county court; that prior to April 20, 1869, said company had not been organized, that on March 13, 1869, twenty-five voters of said township filed a petition, setting forth the desire of said township to subscribe —— dollars to the capital stock of the St. Louis and Santa Fé Railroad Company, proposed to be organized, to build a railroad through said township, said subscription to be paid in bonds to be issued by said county court for and on account of the township; that on that day the court ordered an election

in said township to be held on April 20, 1869; that on April 20, 1869, articles of incorporation were filed in the office of the secretary of state as provided by law, and thereby said company in said State became incorporated; that at the election so held two-thirds of the qualified voters of the township did not vote in favor of the subscription, although more than two-thirds of them voted at such election; and that by reason of the premises said bonds were null and void.

The plaintiff demurred to the answer; and, the demurrer having been sustained, judgment was rendered that the plaintiff recover of "said county, trustee for said township," the amount of said coupons, with interest thereon and costs, and that said county do pay the same "out and from taxes levied on the taxable property of said township."

The county thereupon sued out this writ of error.

The case was argued by *Mr. Willard P. Hall* and *Mr. John C. Gage* for the plaintiff in error, and by *Mr. John B. Henderson* for the defendant in error.

The plaintiff in error submitted the following propositions:

1. The Township Aid Act of 1868, under which the bonds in suit were issued, is repugnant to the Constitution of Missouri of 1865. It authorizes a municipal subscription to the capital stock of railroad companies, if two-thirds of the qualified voters voting at an election held under its provisions are in favor of it, whereas the Constitution requires the assent of two-thirds of all the qualified voters to render such subscription valid. Sufficient notice of this objection appears in the recitals of the bonds to put the holder on inquiry. *State* v. *Winkelmeier*, 35 Mo. 103; *State* v. *Sutterfield*, 54 id. 391; *Harshman* v. *Bates County*, 92 U. S. 569.

2. The record shows that the bonds were issued in payment of a subscription, by the township, to the capital stock of a railroad company which had no existence when the tax-payers petitioned for an election to take the sense of the people upon the question of the subscription, and when the election was ordered. They are, therefore, invalid, even in the hands of an innocent holder. *Rubey* v. *Shain et al.*, 54 Mo. 207; *The People* v. *Franklin*, 5 Lans. (N. Y.) 129.

3. The bonds are to all intents and purposes township, not

county, bonds. The county has incurred no liability to pay them. They are to be paid out of a special fund, derived from a tax upon the real and personal property within the township. The levy of that tax is imposed on the county court. A *mandamus* to compel the requisite levy is the appropriate and exclusive remedy of the bond-holder. An action on them will not lie against the county, and the judgment rendered in this case is evidently erroneous. *The State* v. *Linn County*, 44 Mo. 504; *State* v. *Justices of Bollinger County*, 48 id. 475.

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

The first question presented for our determination in this case is, whether the "Township Aid Act" of Missouri is repugnant to art. 11, sect. 14, of the Constitution of that State, inasmuch as it authorizes subscriptions by townships to the capital stock of railroad companies whenever two-thirds of the qualified voters of the township, voting at an election called for that purpose, shall vote in favor of the subscription, while the Constitution prohibits such a subscription, "unless two-thirds of the qualified voters of the . . . town, at a regular or special election to be held therein, shall assent thereto."

In *Harshman* v. *Bates County*, 92 U. S. 569, we incidentally decided the act to be unconstitutional; but the point then specially in controversy was as to the applicability of this constitutional prohibition to township organizations. It was impliedly conceded upon the argument that, if the Constitution did apply, the law could not be sustained; and we accepted this concession as truly stating the law of Missouri. Now, however, the question is directly presented, whether the provisions of the Constitution and the statute are not substantially the same. On the one hand, it is contended that the Constitution requires the actual vote of two-thirds of the qualified voters of the township in favor of the subscription; and, on the other, that the requisite assent is obtained if two-thirds of those voting at the prescribed election shall vote to that effect.

The Supreme Court of Missouri has often been called upon to construe and give effect to this statute, and has never in a single instance expressed a doubt as to its validity. The first

case was that of *The State* v. *Linn County*, 44 Mo. 504, decided in 1869, the year after the law was passed. That was an application for a *mandamus* to compel the county court to issue bonds upon a subscription made pursuant to a vote under the law; and it was contended that the act was repugnant to art. 11, sect. 14, of the Constitution, because the bonds to be issued were the bonds of the county and not of the township, and the voters of the county had not given their assent; but the court held that they were the bonds of the township, and granted the writ. Following this are the cases of *Ranney* v. *Baeder*, 50 Mo. 600; *McPike* v. *Pen*, 51 id. 63, decided in 1872; *State* v. *Cunningham*, 51 id. 479; *Rubey* v. *Shain*, 54 id. 207, decided in 1873; *State* v. *Bates County*, 57 id. 70, decided in 1874; *State* v. *Clarkson*, 59 id. 149, decided in 1875; *State* v. *Daviess County*, 64 id. 31; and *State* v. *Cooper County*, id. 170, decided in 1876, — in all of which the act was in some form brought under consideration, and in no one was there a suggestion of its unconstitutionality by either court or counsel.

It is true that the objection now made to the law was in no case presented or considered; but this is sufficiently explained by the fact that in other cases a construction adverse to such a position had been given to language similar to that employed in the constitutional prohibition. In *State* v. *Winkelmeier*, 35 id. 103, decided in 1864, just previous to the adoption of the Constitution, under a law which empowered the city authorities of St. Louis to grant permission for the opening of establishments for the sale of refreshments on any day in the week, "whenever a majority of the legal voters of the city" authorized them to do so, it was held that there must be a majority of the voters participating in the election at which the vote was taken, and not merely a majority of those voting upon that particular question. The judge who delivered the opinion of the court did, indeed, say, "The act expressly requires a majority of the legal voters; that is, of all the legal voters of the city, and not merely of all those who at a particular time choose to vote upon the question." But this must be read in connection with what follows, where it is said that "it appeared that more than thirteen thousand voters participated in that election, and that only five thousand and thirty-five persons

voted in favor of giving to the city authority, . . . and two thousand and one persons voted against it. . . . It is evident that the vote of five thousand out of thirteen thousand is not the vote of a majority." Taking the opinion as a whole, it is apparent that there was no intention of deciding that resort must be had elsewhere than to the records of the election at which the vote was taken to ascertain whether the requisite majority had been obtained. But, however this may be, in 1866 a similar question was presented to the same court in *State* v. *Mayor of St. Joseph*, 37 id. 270. There it was provided that the mayor and council of St. Joseph should cause all propositions "to create a debt by borrowing money," to be submitted "to a vote of the qualified voters of the city," and that in all such cases it should require "two-thirds of such qualified voters to sanction the same." A proposition to borrow money for the improvement of streets was submitted to a vote of the voters at an election called for that purpose, and resulted in a majority in favor of the measure. The mayor declined signing the necessary bonds, because "he was in doubt whether the matter was to be determined by two-thirds of all the votes polled at the special election, or by two-thirds of all the voters resident in the city, absolutely, whether voting or not." Thereupon a suit was instituted to settle this question, and to compel the mayor, by *mandamus*, to issue the bonds. In giving its decision, the court said: "We think it was sufficient that two-thirds of all the qualified voters who voted at the special election, authorized for the express purpose of determining that question, on public notice duly given, voted in favor of the proposition. This was the mode provided by law for ascertaining the sense of the qualified voters of the city upon that question. There would appear to be no other practicable way in which the matter could be determined." The writ of *mandamus* was accordingly issued. The same year the question came up again in *State* v. *Binder*, 38 id. 450. In that case the point arose under the refreshment act of St. Louis, which was considered in *State* v. *Winkelmeier*. It appeared that the authority to grant the permission in question was given at a special election called for that purpose, and that out of a vote of seven thousand and eighty-five, five thousand and fifty-one

were in favor of the grant, and two thousand and thirty-four against it. The cases of *State* v. *Winkelmeier* and *State* v. *St. Joseph* were both referred to; and, after quoting from the opinion in the latter case, it was said: "We think the case made here comes within the reasoning and the principles of that decision, namely, that an election of this kind, authorized for the very purpose of determining that question, on public notice duly given, was the mode contemplated by the legislature, as well as by the law, for ascertaining the sense of the legal voters upon the question submitted, and that there could not well be any other practicable way in which such a matter could be determined." These decisions had all been made, and had never been questioned, when the act of 1868, now under consideration, was passed. They were also in force, as evidence of the law of the State, when the bonds in controversy were issued; and, so far as we are advised, there has been no disposition since on the part of the courts of the State to modify them. In *State* v. *Sutterfield*, 54 id. 391, the question was as to the construction of another clause in the Constitution; and the decision was placed expressly on the ground of a difference between the two provisions. That court has in the strongest language intimated its unwillingness to interfere with its previous adjudications when property has been acquired or money invested under them. *Smith* v. *Clark County*, id. 58; *State* v. *Sutterfield*, *supra*.

In *St. Joseph Township* v. *Rogers*, 16 Wall. 644, this court gave the same construction to the phrase, "a majority of the legal voters of a township," as used in an Illinois municipal aid statute; and Mr. Justice Clifford, in delivering the opinion, uses this language: "It is insisted by the plaintiff that the legislature, in adopting the phrase, 'a majority of the legal voters of the township,' intended to require only a majority of the legal voters of the township voting at an election notified and held to ascertain whether the proposition to subscribe for the stock of the company should be accepted or rejected; and the court is of the opinion that such is the true meaning of the enactment, as the question would necessarily be ascertained by a count of the ballot." Among other authorities cited in support of this proposition is the case of *State* v. *Mayor of St.*

Joseph, *supra*. This we understand to be the established rule as to the effect of elections, in the absence of any statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed. *Louisville & Nashville Railroad Co.* v. *The County Court of Davidson et al.*, 1 Sneed (Tenn.), 638; *Taylor* v. *Taylor*, 10 Minn. 107; *People* v. *Warfield*, 20 Ill. 159; *People* v. *Garner*, 47 id. 246; *People* v. *Wiant*, 48 id. 263. We conclude, therefore, that the Supreme Court of Missouri, when it decided the case of *The State* v. *Linn County*, and held the law in question to be constitutional, did not overlook the objection which is now made, but considered it settled by previous adjudications. That case is, therefore, to be considered as conclusive upon this question, as well as upon that which was directly considered and decided, and, as a rule of State statutory and constitutional construction, is binding upon us. It follows that our decision in *Harshman* v. *Bates County*, in so far as it declares the law to be unconstitutional, must be overruled.

It is further insisted that the bonds sued upon are invalid, because the railroad company to which the subscription was voted was not incorporated until the day of the election; and *Rubey v. Shain*, 54 Mo. 207, is cited in support of this objection. That case only decides, if it is to be regarded as authority, that a subscription cannot be made by a township until the company is incorporated, or, rather, that township subscriptions cannot be used to bring the company into existence. They are, to use the language of the judge in his opinion, not to be made the "nucleus around which aid is to be gathered." Here the company had been incorporated when the subscription was made. The decision relied upon, therefore, does not apply, and we are not inclined to extend its operation. This makes it unnecessary to inquire whether this defence could be maintained as against an innocent holder.

It is finally objected, that, as the bonds are in fact the bonds of

the township, no action can be maintained upon them against the county. Without undertaking to decide what would be the appropriate form of proceeding to enforce the obligation in the State courts, it is sufficient to say that in the courts of the United States we are entirely satisfied with the conclusions reached by the court below, and that a judgment may be rendered against the county, to be enforced, if necessary, by *mandamus* against the county court or the judges thereof, to compel the levy and collection of a tax in accordance with the provisions of the law under which the bonds were issued. The reasoning of the learned circuit judge in *Jordan* v. *Cass County*, 3 Dill. 185, is to our minds perfectly conclusive upon this subject, and we content ourselves with a simple reference to that case as authority upon this point.

Judgment affirmed.

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

I feel obliged to adhere to the opinion given in *Harshman* v. *Bates County*, 92 U. S. 569. If the Missouri convention which framed the Constitution of 1865 desired to prevent municipal subscriptions to railroad and other enterprises, except by the consent of a majority of the people qualified to vote in the district to be affected, I do not see what language could have been adopted more apt for the purpose than that which is actually used in the fourteenth section of art. 11: "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." The literal meaning of this clause seems to me unmistakably to require two-thirds of the qualified voters, whether they vote or not. The language is just as strong as that of the twenty-fourth section of art. 4, which declares that "no bill shall be passed unless by the assent of a majority of all the members elected to each branch of the General Assembly." This clause has always been construed to mean that no law can be passed unless a majority of the members vote for it, whether all are

present or not. And the reason of the requirement in the former case is as strong as in the latter. The people who are to pay the taxes for raising a subscription to a railroad ought not to be subjected to that burden, unless the requisite majority of the class named, that is, the qualified voters, can be induced to give their assent to it. In the one case, as in the other, absence and failure to vote is equivalent to a dissent. I concede that if the Supreme Court of Missouri has given a contrary construction to the clause, which has become the settled law of the State, we should be governed by it. But I do not understand that this has been done. In *State* v. *Winkelmeier*, 35 Mo. 103, which was decided just before the adoption of the Constitution, the question arose upon the act of 1857, which declared that "the corporate authorities of the different cities in the county of St. Louis shall have the power, whenever a majority of the legal voters of the respective cities in said county authorize them to do so, to grant permission for the opening of any establishment within the corporate limits of said cities for the sale of refreshments on any day in the week." At an election in St. Louis, five thousand persons voted in favor of giving to the city authority to grant permission to open establishments for the sale of refreshments on Sunday, and two thousand voted against it. The court held, that, in order to confer the requisite authority under the act, it required "a majority of the legal voters, that is, of all the legal voters, of the city, and not merely of all those who might, at a particular time, choose to vote upon the question." This was the express language of the court; and as at that election more than thirteen thousand voters participated in voting for the officers to be elected, it was apparent from the election returns themselves, without looking further, that a majority of the legal voters of the city had not voted for the authority; and hence it was decided that no authority had been given. It is evident that the court would have come to the same conclusion had it been shown in any other way that less than a majority of the legal voters voted for the authority. The mode of ascertaining the whole number of legal voters was not prescribed by the law. In that case, it sufficiently appeared from the election returns themselves. There is no valid reason why the same conclusion should not

be deduced from a registry of the legal voters. The objection that some persons not entitled to vote may be registered has no force to my mind. If any one choose to raise that issue, it might be open for him to do so; but the registry would certainly furnish *prima facie* evidence of the number of legal or qualified voters.

After the Constitution was adopted, a case arose on that clause of the Constitution which declares, art. 4, sect. 30, "that the General Assembly shall have no power to remove the county seat of any county, unless two-thirds of the qualified voters of the county, at a general election, shall vote in favor of such removal. This was the case of *State* v. *Sutterfield*, 54 id. 391; and the court, in an elaborate argument, again held that these terms require a positive vote in the affirmative of two-thirds of the qualified voters of the county; and the court expressly says, "There is no difficulty in ascertaining what that number is, since the same Constitution provides for a registration, and points out who the qualified voters are."

In the cases relied on by the defendant in error, the precise question now under consideration was not presented to the Supreme Court of Missouri. They mostly related to forms of phraseology different from that under consideration, and are distinguishable therefrom in several particulars, which it is unnecessary now to examine. The leading case of *The State* v. *Linn County*, 44 id. 504, was cursorily examined in *Harshman* v. *Bates County*. But, not desiring to prolong this opinion by entering into a critical examination of those cases, I will simply remark, that, taking them all together, the weight of authority in Missouri is, in my judgment, on the side of the interpretation which I still feel constrained to give to the constitutional clause in question.

COUNTY OF CASS *v.* JORDAN.

The court adheres to its rulings in *County of Cass* v. *Johnston*, *supra*, p. 360.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

The coupons sued on by Jordan are from bonds issued by Cass County on behalf of Mount Pleasant Township, which recite that they are issued "pursuant to an order of the county court of said county, made by authority of an act of the General Assembly of the State of Missouri, entitled 'An Act to facilitate the construction of railroads in the State of Missouri,' approved on the twenty-third day of March, 1868, and authorized by a vote of more than two-thirds of the voters of said township, to aid in the construction of the Pleasant Hill and Lawrence Branch of the Pacific Railroad of Missouri." The bonds bear date Aug. 24, 1869.

A petition of the requisite number of the tax-payers and residents of the township having been presented May 11, 1869, praying the county court to submit to a vote of the qualified voters of the township, the question of subscribing "$25,000 to the capital stock of the Pacific Railroad Company, which proposes to build a railroad through said township, to be known as the Pleasant Hill and Lawrence Branch of the Pacific Railroad," the requisite order was made, and the sheriff directed to give notice of the election. It was duly held July 13, 1869, and more than two-thirds of the qualified voters of said township voting thereat voted in favor of the subscription. The court thereupon ordered the subscription to be made to the capital stock of that company, and the bonds to be issued.

The Pacific Railroad Company was incorporated March 12, 1849, by an act of the General Assembly of Missouri, and was, by its charter, authorized to build branch roads. Its board of directors adopted and, June 15, 1869, filed in the office of the secretary of state a resolution declaring said branch to be a branch of the Pacific Railroad, under an act of the General Assembly, entitled "An Act to aid the building of

branch railroads in the State of Missouri," approved March 21, 1868.

Before the subscription was made, the company, July 24, 1869, submitted a proposition to the county court, that the stock to be issued should be stock in said branch, and none other, as provided by said act of March 21, 1868.

The county court, in compliance with the petition of two-thirds of the voters voting at said election, accepted the proposition, Aug. 14, 1869, and, conformably to its terms, entered into a contract with the company. The bonds were accordingly issued, and the certificates of stock in the branch road delivered. The road was constructed as a branch road under the act of March 21, 1868.

The court below rendered judgment against the county for the amount of the coupons and interest, and the county sued out this writ of error.

Submitted on printed arguments by *Mr. Willard P. Hall* for the plaintiff in error, and by *Mr. John B. Henderson* and *Mr. T. K. Skinner* for the defendant in error.

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

The only question presented in this case not disposed of by the judgment in *County of Cass* v. *Johnston*, *supra*, p. 360, is that which relates to the identity of the company to whose stock the subscription was made with that to which the subscription was authorized, the claim being that the vote was for a subscription to the stock of the Pacific Railroad, while the subscription was actually made to that of the Pleasant Hill and Lawrence Branch of the Pacific Railroad. It appears, with reasonable certainty, that the vote of the township was for a subscription to aid in the construction of the branch road, and was intended to authorize the taking of the stock in the Pacific Railroad set apart under the "Act to aid in the building of branch railroads in the State of Missouri," approved March 21, 1868, to the Pleasant Hill and Lawrence branch. This renders it unnecessary to consider whether the plaintiff below was an innocent holder of the bonds sued upon, and what her rights would be as such.

The effect of the filing of the certificate for the construction of the branch after the call for the election, but before the vote was taken, has been sufficiently considered in the case above cited. *Judgment affirmed.*

MR. JUSTICE MILLER and MR. JUSTICE BRADLEY dissented.

COUNTY OF CASS *v.* SHORES.

The order of the county court of Cass County, Mo., entered upon its records Oct. 20, 1871 (*infra*, p. 377), authorized the execution of the bonds sued on, and they are, in the hands of an innocent holder for value, binding upon the county.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

This was an action brought by Shores against the county of Cass to recover the amount of certain bonds and coupons. A copy of one of the bonds and of a coupon thereunto attached is as follows: —

"No. 38.] THE STATE OF MISSOURI. [$500.

"*Cass County Funding Bond. Ten per cent, semiannually.*

"Issued by the order of the county court, under and by virtue of the power and authority conferred by an act of the General Assembly of the State of Missouri, entitled 'An Act to enable counties, cities, and incorporated towns to fund their respective debts,' passed and approved March 24, 1868.

"Know all men by these presents, that the county of Cass, in the State of Missouri, acknowledges itself indebted to, and hereby promises to pay, the bearer hereof, for value received, at the banking-house of Northrup & Chick, in the city and State of New York, $500, three years after the date hereof, with interest thereon from date at the rate of ten per cent per annum, payable semiannually, on the second days of April and October of each year, on the presentation and delivery at said banking-house of the coupons hereto attached.

"In testimony whereof, the said county of Cass has executed this

bond by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same, and affixing hereto the seal of said court. Done at the court-house in the city of Harrisonville, in said county, on the first day of October, 1871.

[SEAL.] "JEHIEL C. STEVENSON,
"Presiding Justice of the County Court of Cass County, Mo.

"C. H. DORE,
"Clerk of the County Court of Cass County, Mo.
"By S. J. JONES, *D. C.*"

"$25.] HARRISONVILLE, CASS CO., MO.,
"Oct. 1, 1871.

"The County of Cass, State of Missouri, acknowledges itself to owe, and promises to pay to the bearer, $25 on the second day of October, 1874, at the banking-house of Northrup & Chick, in the city and State of New York, being the interest on funding bond No. 38. C. H. DORE, *Clerk*,
"By S. J. JONES, *D. C.*"

The act of the General Assembly mentioned in the bond is in these words: —

"SECTION 1. That the various counties of this State be, and they are hereby, authorized to fund any and all debts they may owe, and for that purpose may issue bonds, bearing interest at not more than ten per cent per annum, payable semiannually, with interest coupons attached; and all counties, cities, or towns in this State which have or shall hereafter subscribe for the capital stock of any railroad company, may, in payments of such subscriptions, issue bonds bearing interest at not more than ten per cent per annum, payable semiannually, with interest coupons attached. The bonds authorized by this act shall be payable not more than twenty years from date thereof."

This act to take effect from and after its passage.

Pursuant to an act of the General Assembly, approved March 23, 1868, which will be found *supra*, p. 361, the county court of said county issued bonds, with interest coupons attached, in the name of the county, on behalf of the township of Camp Branch, to aid in the construction of a railroad through said township. Certain of said coupons remaining unpaid Oct. 20, 1871, said court, having, under the laws of

the State, the management of the business and property of the county, entered at that date upon its records the following order: —

"Ordered by the court, that whereas coupons for interest upon certain bonds of Cass County, issued for the benefit of the townships of Camp Branch and Grand River, to aid in the construction of the St. Louis, Holden, and Santa Fé Railroad, have matured and remain unpaid; and whereas the court has been prevented from making any provisions therefor until since the last annual levy of taxes; and whereas the credit of the county has suffered, and is likely to suffer, on account thereof; and whereas, in the opinion of the court, good faith and honor require that counties, as well as individuals, should meet their obligations in good faith: Therefore, for the purpose of paying said coupons, keeping the faith of the county, protecting and preserving her credit, and also that the next levy of taxes upon said townships may not prove burdensome, it is ordered by the court that, for the benefit of Camp Branch Township, in the county of Cass, there be issued county funding-bonds of the denomination of $500 each, to the amount of $8,000, with coupons for the payment of interest semiannually, at the rate of ten per cent, thereto attached; said bonds to bear date Oct. 1, 1871; said coupons for interest to be payable on the second day of April and October of each year, at the banking-house of Northrup & Chick, in the city and State of New York, at which place said bonds shall be payable three years after the date thereof; said bonds to be signed by the presiding justice of this court, and attested by the clerk under the seal thereof, and numbered from 1 to 16 inclusive; said coupons to be signed by the clerk. It is also ordered that, for the benefit of the township of Grand River, in said county, there be issued funding bonds of the county of Cass, of the denomination of $500 each, to the amount of $15,000, with coupons for the payment of interest semiannually, at the rate of ten per cent per annum, thereto attached; said bonds to bear date Oct. 1, 1871; said coupons for interest to be payable on the second day of April and October of each year, at the banking-house of Northrup & Chick, in the city and State of New York, at which place said bonds shall be payable three years after the date thereof; said bonds to be signed by the presiding justice of this court, and attested by the clerk under the seal thereof, and numbered from 17 to 44 inclusive; said coupons to be signed by the clerk. It is further ordered, that, inasmuch as C. H. Dore, the

clerk of this court, is in person absent from the county and State, said bonds be attested and signed by S. J. Jones, his duly appointed and authorized deputy. It is further ordered, that said bonds, when issued, be delivered to William H. Allen, who is hereby appointed financial agent of the county, for the purpose of disposing of a sufficient number of said bonds, and paying the coupons of interest which have matured on the bonds of Cass County, issued for the benefit of said townships to aid in the construction of the St. Louis, Holden, and Santa Fé Railroad; and that said agent hold the balance of said bonds subject to the order of this court."

The bonds with the interest coupons attached for the recovery of which the suit was brought were, it was claimed, issued by virtue of that order.

The county set up by way of defence that the debt so funded was a township debt, for the payment of which the court could not bind the county; and, furthermore, that the persons who executed the bonds and coupons were special agents of the county, with limited power, derived solely from an order which did not confer upon them the requisite authority. The plaintiff replied that the county did execute them, and cause them to be sold in open market, where he purchased them for value, in good faith and without knowledge of any fact or circumstances which would impair their validity.

The court below, to which the trial of the issue was by a stipulation of the parties submitted, found that the foregoing order was made by the county court, and that by virtue thereof the bonds and coupons in suit were executed, and that Allen, the agent appointed for the purpose, sold them to Shores, who paid full value for them, in good faith and with no knowledge of any circumstance connected with their issue other than what appears upon the face of them, and what the law would, upon the foregoing facts, impute to him; and that the moneys arising from the sale were applied to the payment of said overdue and unpaid coupons.

The court further found that said bonds and coupons were, in the hands of Shores, the valid obligations of said county, and that he was, as an innocent holder of them for value, entitled to recover against it the amount of them and interest thereon.

Judgment was rendered accordingly. The county sued out this writ of error.

The case was argued for the plaintiff in error by *Mr. Willard P. Hall* and *Mr. John C. Gage*, and for the defendant in error by *Mr. John D. Stevenson.*

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

It was conceded upon the argument, that, under the decisions of this court, the county was estopped from denying its liability upon the bonds in question, being, as they are, in the hands of an innocent holder, if the presiding justice of the county court and the clerk were, by the terms of the order of Oct. 20, 1871, authorized to execute bonds which would bind the county for their payment. The question of the power of the county court under the law to bind the county for the payment of a debt of a township, or to issue bonds on behalf of a township to fund township debts, is not involved. The only inquiry is as to the authority conferred upon the presiding justice and the clerk by the terms of the order. On the one hand, it is contended that they were only empowered to issue the bonds of the county in behalf of the township, and thus bind the township alone for payment under the township aid act; and, on the other, that they were authorized to charge the county with the indebtedness to be incurred.

The latter, we think, is the true construction of the order. It recited that coupons for interest upon the bonds of the county issued for the benefit of the township had matured and remained unpaid; that the court had been prevented from making provision therefor until after the last annual levy of taxes; that the credit of the county had suffered, and was likely to suffer, on account thereof; and that honor required counties as well as individuals to meet their obligations in good faith. It then directed that, for the benefit of the township, county funding-bonds be issued "for the purpose of paying said coupons, keeping the faith of the county, protecting and preserving her credit, and also that the next levy of taxes upon said township may not prove burdensome." For the purposes of construction, language is to be given, if possible,

its ordinary and natural meaning. Applying this elementary rule in the present case, there seems hardly room for doubt as to what was intended. "County funding-bonds" were to be issued to protect the faith and preserve the credit of the county. The law under which the action was taken was one authorizing counties "to fund any and all debts they may owe." The county court may have been mistaken in supposing that the interest in arrears was a county debt; but, however that may be, they clearly assumed that it was, and acted accordingly. *Judgment affirmed.*

INSURANCE COMPANY *v.* HIGGINBOTHAM.

1. A policy of life insurance, dated July 16, 1869, stipulated for the payment of the annual premium on or before twelve o'clock on the sixteenth day of July in every year; and provided that, in case it should not be paid on or before the day mentioned, at the home office of the company, or to agents when they produced receipts signed by the president or the treasurer, then, and in every such case, the company should not be liable to the payment of the sum insured, or any part thereof, and that the policy should cease and determine. The premium due July 16, 1870, was not paid when due. On the 1st of October following, the insured made application for the reinstatement of the policy to the company, paid the premium, received the agent's receipt therefor, and gave the latter his certificate of health and his certificate of examination, signed by the physician of the company, which were forwarded to it at its home office. The renewal receipt, bearing date July 16, 1870, was, Oct. 12, sent by the company to the agent, who delivered it on the 14th to the insured, without inquiry or information as to his health. *Held*, that the representations of the insured as to the condition of his health on the 1st of October, when he applied for the reinstatement of his policy, and paid the premium, were not continuous until the 14th of that month; and that the contract was consummated on the day when the premium was paid.
2. The ruling in *Insurance Company* v. *Newton*, 22 Wall. 32, touching the effect, as admissions for or against an insurance company, of facts set forth in the preliminary proofs of death, reaffirmed.

ERROR to the Supreme Court of the District of Columbia.

The facts in the case are fully set forth in the opinion of the court.

Mr. Frederick T. Frelinghuysen and *Mr. J. Hubley Ashton* for the plaintiff in error.

Mr. A. G. Riddle and *Mr. Francis Miller*, *contra.*

MR. JUSTICE HUNT delivered the opinion of the court.

This was an action by Mrs. Martha J. Day against the Mutual Benefit Life Insurance Company, incorporated by the State of New Jersey, to recover the amount of a policy of insurance issued to her upon the life of her husband, the late Dr. Richard H. B. Day, of Washington, in which judgment was rendered against the company for the amount insured, $5,000 and interest. Mrs. Day having died *pendente lite*, her administrator was substituted here in her stead.

The policy, dated the 16th of July, 1869, was for life, and stipulated for the payment of the annual premium of $137.50 on or before twelve o'clock on the sixteenth day of July in every year; and provided that, "in case the said premium shall not be paid on or before the several days hereinbefore mentioned for the payment thereof, at the office of the company, in the city of Newark, or to agents, when they produce receipts signed by the president or the treasurer, then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine."

The first premium was duly paid; but when the next premium became due, on the 16th of July, 1870, it was not paid.

In the following October, Dr. Day made application to the company for the reinstatement of the policy; and the company consented to reinstate it, upon the conditions and in the manner following: —

On the 1st of October, 1870, Dr. Day paid the premium to the agent of the company at Washington, and received a receipt for the same. At the same time, he gave to the agent his certificate of health, and the physician of the company signed his certificate of examination, which were forwarded to the company at Newark, N. J.

The policy was renewed, and the renewal receipt was sent by the company to its agent, Oct. 12, 1870. This receipt was dated July 16, 1870, and was given to Day on the 14th of October.

On the twenty-second day of January following, Dr. Day died.

Eleven special pleas are interposed, to which it is not necessary particularly to refer, as the questions to be decided arise upon the rulings of the judge at the trial, made upon points not connected with the pleadings.

The chief subject of contention arises upon the refusal of the judge to charge as requested by the defendant in the following prayers: —

1. If the jury find from the evidence that the certificate of health in evidence was made by Dr. Day, the insured, on or about the 1st of October, 1870, and by him delivered to the agent of the defendant, at Washington City, and by such agent sent to the principal office of the defendant, at Newark, N. J., and that the receipt in evidence, dated July 16, 1870, was thereupon forwarded from the main office of the defendant to its agent at Washington City, and by him delivered to the insured on or about the fourteenth day of October, 1870, and that between the time when said certificate was made and the time of the delivery of said receipt to the insured, Dr. Day had had any derangement of health, and did not disclose that fact to the agent of the defendant when the receipt was handed to him by the agent, or before, they will render a verdict for the defendant upon the sixth plea.

2. On refusing to instruct the jury as prayed by defendant, as follows: If the jury find from the evidence that when the certificate in evidence, dated Oct. 1, 1870, was given to the agent of the defendant at Washington City, the latter was not authorized to and did not assume to reinstate the policy in suit, but accepted the premium and forwarded the certificate to his principal, and that the receipt in evidence, dated July 16, 1870, was then in the home office of the defendant, in New Jersey, and that said receipt was forwarded to the agent of the defendant on or about the twelfth day of October, 1870, and by him delivered to the insured on or about the fourteenth day of the same month; and if the jury further find, that, after the date of said certificate, and before the delivery of said receipt to the insured, the insured had had any derangement of health, or that at the time of the delivery of said receipt to him he was not in sound health, — they would render a verdict for the defendant.

The state of Dr. Day's health during the summer and autumn of 1870 was the subject of contradictory testimony. The defendant gave evidence tending to prove that he was compelled by ill-health to give up his business as a teacher on the eighteenth day of October, 1870; that for several weeks prior to that time he was much debilitated, and was conscious of that fact; that in November he had the consumption, of which he died in January following; and that he was in feeble and disordered health from the spring of 1869 until his death. The plaintiff, on the other hand, gave evidence tending to show that he was in sound health till the latter part of October, 1870, and that he did not have the consumption until the month of November, 1870.

The exceptions we are to consider assume that on the first day of October, 1870, when he presented his certificate of health to the agent at Washington, Dr. Day was in a condition of health that made him a satisfactory subject for the reinstatement or continuance of his policy of insurance.

It is contended that between the time of thus making and presenting his certificate to the agent and the date (fourteen days later) on which the agent delivered to him the receipt by which his insurance policy was continued in force until July 16, 1871, there had been a change in his health which would have caused the rejection of his application to continue the policy had such change been made known to the company, and that the failure to make known such change was a fraud, which invalidated the policy thus renewed or continued.

It is not contended that there were any false representations made on the 14th of October, or any devices or contrivances to deceive the company. No affirmative action on that occasion is complained of. The contention is that the representation made on the 14th of October was a continuing one, from the time it was made till the delivery of the renewal receipt on the 14th, and that, if not true at the latter date, the contract was avoided.

In reaching a conclusion on this point, we may notice, 1st, that no inquiry was made of Day or demand for information as to his condition between the 1st and the 14th of October. The company was particular and specific in its inquiries as to

his condition on the 1st of the month, and required prescribed forms of evidence as to that condition. There it stopped, and neither by expression nor by implication intimated a desire for later information.

It is to be observed, secondly, that the issuance made to him on the 14th of October relates back to the 16th of July in the same year. The certificate reads: "Policy No. 59,687, on the life of Richard H. B. Day, is hereby continued in force for one year from date, July 16, 1870, settlement of the premium having been made as per margin." The settlement in the margin showed the payment of $137.50, being the amount of the premium of insurance for one year on the sum of $5,000, as stated in the original policy of insurance.

It will be observed, thirdly, that the distance between Washington and Newark is about two hundred miles only, and that the certificates of Dr. Day's health and the application which were forwarded by the agent to the company at Newark would, in the ordinary course of the mails, reach the office at Newark on the morning or during the day of the 2d; that all the forms of the company to authorize a renewal were complied with, and that the risk was such as the company would accept as a desirable one, and that the receipt for the renewal was received in Washington on or about the 14th of October, and was on that day delivered to Dr. Day.

The prayer of the insurance company did not include a request that the jury should determine as a matter of fact whether, upon the evidence submitted, the representation was or was not a continuous one, whether the contract was consummated on the 14th of October, or by relation on the 1st of October; but the judge was requested to charge, as a matter of law, that the representation was a continuing one.

The facts referred to, we think, show that, although actually completed on the 14th of October, the jury would have been warranted in finding that the contract was understood and intended by the parties to take effect by relation as of the 1st of that month. The money was paid to the agent at Washington on that day. The insurance was post-dated so as to include that day. The full amount of the premium for one year was paid by the applicant, viz., $137.50. The company cut off the

insured from two and a half months of his policy when they issued it on the 1st of October, and dated it as of July 16, although taking payment of the premium for a year. We think that they did not necessarily intend to cut off an additional fourteen days, but may have meant it to be as of the date when the insured paid his money and presented a risk that they were willing to take, and of the time that it would have taken effect if they had responded without a delay of two weeks. Had it been otherwise, we cannot conceive how the sagacious business men who control this company would have assented to the delivery of the policy without inquiry as to the intermediate time. More than three months elapsed before Day's death, monthly returns being made by the agent; and the company must have known and assented to the delivery of the renewal receipt not only, but to the fact that there had been no inquiry or information as to Day's health after Oct. 1. The jury might account for it on the theory that the whole contract was intended to be and was as of Oct. 1, and that it spoke from that date.

There is every indication that Day thus relied upon that contract, nor is there any reason to believe that he intended to deceive or to conceal. The company made inquiries to its own satisfaction, so far, in such direction, upon such points, and within such periods, as it thought proper. It was not for him to advise the company of what it should do, or to volunteer information which it did not seek. He paid his money, delivered his certificate, received the renewal when the company chose to give it, found upon examination that it covered the whole period from the July preceding. He lived in the same town with the agent, and received no suggestion from him that any thing further was expected, and was warranted in assuming that his contract was intended to take effect from an earlier period than its actual delivery. He probably died in the honest belief that he had thus provided for his widow. It would be far from good faith to his representatives should it now be held otherwise.

In *Colt* v. *Phœnix Fire Insurance Co.*, 54 N. Y. 595, it is said: "The defendant must not be made liable, where by the terms of the contract it is fairly exempted, however harsh the

result may appear; nor can it be excused where the exemption is claimed upon a strict and rigid interpretation of words, without regard to the circumstances surrounding the transaction, and the apparent intent of the parties." See also *Tipton* v. *Feitner*, 20 id. 423.

In May on Ins., sect. 190, it is laid down: "Where renewals are made upon the statements in the original application, whether the truth of the statements is to be tried by the circumstances existing at the time of the renewal or at the time when the original application was made, is a question upon which the authorities do not agree; some taking the view that a renewal makes a new contract, and others that it merely continues the old one. Special circumstances, however, seem to control the decision, according as these circumstances indicate the intent of the parties."

If we assume it to be true, as a general proposition, that the policy speaks from the date of its issue, and that the obligation of the applicant to make a full disclosure continues down to the completion of the contract, and that the occurrence of a material change before the contract is consummated must be communicated to the company, we do not advance essentially in the case before us. The question recurs, When was the contract of Dr. Day consummated? If on the 14th of October, when the renewal receipt was delivered, as the company contends, then the rule mentioned bars the plaintiff's right to recover. If, as the plaintiff contends, the contract, by the intention and understanding of the parties, relates to the 1st of October, when the premium was paid by the applicant and the certificates of health presented and transmitted, or to a point of time within a few days thereafter, within which the company ought to have examined and to have accepted a risk in all respects suitable to be accepted within its own rules, then the general rule quoted is not applicable. The case is governed by different principles. It is not necessary, therefore, to question the principle assumed in the authority quoted, or to examine the cases cited to sustain it.

We are of the opinion that the exceptions to the charge of the judge, upon the theory that the representations by Dr. Day were made on the fourteenth day of October, or that conceal-

ment was then practised by him, on the ground that the previous representations, necessarily and as a matter of law, were continuous, and that the contract was consummated on that day, cannot be sustained. It was a question proper under all the circumstances for the consideration of the jury. If they had found for the plaintiff, we are of the opinion that the verdict would not have been vacated as being without or against the evidence.

In many English companies a formal acceptance of the proposal for insurance is issued. In some companies this acceptance is unconditional, so that the premium be paid within the month, the letter of acceptance running to the effect that the proposal has been accepted, and that a receipt is ready at the office for the premium, upon the payment of which the assurance will commence; but that, if the same be not paid within thirty days, a reappearance and fresh certificate will be required. In other companies the acceptance is qualified by the condition, not only that the insurance shall not commence till the payment of the premium, but that no material change shall have occurred prior thereto. Bunyon, 58, cited Bliss, sect. 99.

The practice is not uniform, and there is nothing remarkable in allowing a certificate of health to stand good for thirty days, no reappearance or examination for that interval being required.

Among the cases relating to this subject, the following may be referred to as showing the effect of the contract by relation, and that the consummation of the contract does not necessarily depend upon the delivery of the policy.

In *Lightbody* v. *The North American Insurance Co.*, 23 Wend. (N. Y.) 18, it was held that a policy bearing date on the day the premium is paid takes effect by relation from that day, although the policy be not delivered for several days afterwards. In this case, the buildings were burned on the day after the premium was paid and before the policy was delivered.

In *Perkins* v. *Washington Insurance Co.*, 4 Cow. (N. Y.) 645, the rule was applied in a case where the agent was authorized to make insurances, "provided the office shall recognize the rate of premium, and be otherwise satisfied with the risk." It was

held that the company was bound to issue a policy where the insurance was a proper one and the premium was paid or tendered, although before the premium was received at the home office the property was consumed by fire.

In *Chase* v. *The Hamilton Insurance Co.*, 22 Barb. (N. Y.) 527, the agent forwarded a proposition for insurance, which was altered by the company, and the alteration communicated to and accepted by the applicant, and the premium paid to the agent. Held, that the company was bound to issue its policy, and was liable for the loss.

In *Insurance Company* v. *Webster*, 6 Wall. 129, the party having received his policy, it was held that he was not affected by afterwards signing a memorandum that the insurance was to "take effect when approved by E. D. P., general agent." See also *Cooper* v. *The Pacific Mutual Life Insurance Co.*, 3 Big. Ins. 656; 7 Nev. 116; *Carpenter* v. *Mutual Safety Insurance Co.*, 4 Sandf. (N. Y.) Ch. 408; *American Horse Insurance Co.* v. *Patterson*, 28 Ind. 17; Bliss, sect. 172; *The City of Davenport* v. *Peoria Marine and Fire Insurance Co.*, 17 Iowa, 276; *Lefavour* v. *Insurance Company*, 2 Big. Ins. 158.

At the close of his charge, the judge instructed the jury as follows: "That the plaintiff is not responsible for or in any way affected by any of the statements in Dr. White's affidavit, unless the jury find that before and at the time of filing it with the agent of the company she had actual knowledge of its contents, and adopted and used them as her own declarations. That affidavit is her declaration or no, as she knew and was advised of it and procured and approved it." To which instruction the counsel for the insurance company then and there excepted.

In establishing her case at the trial, the plaintiff was bound to prove that notice of the death of her husband, Dr. Day, had been given to the company, and that a demand of payment of the amount claimed had been made. For that purpose only she offered in evidence the proofs of loss which had been furnished to the company, except the affidavit of Dr. White, forming a part of the same, which she did not offer in evidence. Those proofs contained the sworn statement of Mrs. Day herself, the sworn statement of Dr. Isaac White, certificates of

the clergyman and undertaker, and proof of identity by J. F. Patterson.

These affidavits were all on one paper, and the court required that the proofs of loss should be put in as an entirety; that is, that all the papers containing the preliminary proofs should be put in evidence; and the same were thereupon put in evidence by the plaintiff, including the affidavit of Dr. White. In Dr. White's affidavit thus introduced occurred the following questions and answers: "'How long have you known the deceased?'—'I have known Dr. R. H. B. Day seventeen years.'—'How long was deceased sick?'—'About five months.'—'Date of your first visit?'—'Nov. 28, 1870.'—'Date of your last?'—'Jan. 22, 1871.'—'Of what disease did he die?'—'Pulmonary consumption.'" It appeared further that Dr. White was not a resident of Washington, but left that city immediately after making the affidavit mentioned, on the 28th of January, 1871.

Mrs. Day testified that Dr. White had not seen her husband at any time between September, 1869, and the latter part of November, 1870.

The struggle as to Dr. White's affidavit and the ruling upon it are quite immaterial. He stated in answer to one of the questions that Dr. Day had been ill about five months, and, as he died on the 22d of January, 1871, this would carry his illness back to the 22d of August, 1870, of course, including all the month of October of that year. The insurance company apparently sought the benefit of this evidence on the contest in regard to Day's health.

It is, however, manifest that White's statement was not one of personal knowledge, but was upon rumor, or made without sufficient reflection. This is evident from the testimony of Mrs. Day, which is entirely unimpeached and uncontradicted, that Dr. White did not see her husband during all of the year 1870 until the latter part of November. Upon this subject she could not well be in error. It was equally evident, from the statement of White himself, that his first visit to Day was on the 28th of November, 1870.

Day's bodily health on the first day of October, 1870, was satisfactory to the company, and the attempt was to show an

unfavorable alteration between that date and the 14th of the same month. But White had not seen him during those fourteen days, nor for months before, nor for more than six weeks afterwards.

Whether the presentation of the affidavit of White by Mrs. Day made its contents evidence, whether she knew its contents or not, whether she did or did not adopt or procure it, was not of the slightest consequence. The paper contained nothing that was legal evidence upon the point in issue, and a verdict founded upon it could not have been sustained. The disposition of the subject by the judge was one that could not possibly work legal injury to the insurance company. There was, therefore, no error. *Starbird* v. *Barrons*, 43 N. Y. 200; *Pepin* v. *Lachenmeyer*, 45 id. 27; *The People* v. *Brandreth*, 36 id. 191; *Porter* v. *Ruckman*, 38 id. 210; *Corning* v. *Troy Iron and Nail Factory*, 44 id. 577.

The effect of facts set forth in preliminary proof as admissions is discussed in *Insurance Company* v. *Newton*, 22 Wall. 32. Where an agent of the insurance company stated that the proofs were sufficient to show the death of the insured, but that they showed that he committed suicide, it was held that the whole admission must be taken together. Where the party or her agent stated in the preliminary proofs that the deceased had committed suicide, furnishing the verdict of a coroner's jury to that effect, and where the narration of the manner of the death of the deceased was so interwoven with the death of the deceased that the two things were inseparable, it was held that the whole was competent to go before the jury.

We see no occasion to question the positions of that case.

Upon the whole case, we are all of the opinion that the judgment must be affirmed; and it is *So ordered.*

THOMPSON *v.* MAXWELL.

1. None but parties and privies can have a bill of review; and it will not lie where the decree in question was passed by consent.
2. A decree for carrying out a settlement and compromise of a suit, if obtained without fraud, cannot be impeached.
3. *Buffington* v. *Harvey*, *supra*, p. 99, cited and approved.
4. As the bill in this case, before it was by amendment converted into a bill of review, approximated to the character of a bill to carry the original decree more effectually into execution, which was the appropriate remedy of the complainants, the court, while reversing the decree, does not direct that the bill be absolutely dismissed, but that the complainants be allowed to amend it, with leave to defendants to answer any new matter therein introduced, and that the proofs taken in the cause shall stand as proofs at any future hearing thereof, with liberty to either party to take additional proof upon any new matter that may be put in issue by the amended pleadings.

APPEAL from the Supreme Court of the Territory of New Mexico.

The facts are stated in the opinion of the court.

Mr. Matt. H. Carpenter and *Mr. Joseph B. Stewart* for the appellants.

Mr. W. W. MacFarland, *contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

In 1859, Alfred Bent and his two sisters, Estefana and Teresina, with their husbands, filed a bill in chancery in the District Court of the Territory of New Mexico for the County of Taos, against Charles Beaubien, Guadalupe Miranda, Lucien B. Maxwell, and José Pley, claiming and alleging that Charles Bent, deceased, the father of Alfred and his sisters, at the time of his death, was jointly interested with said Beaubien and Miranda, to the extent of one-third part, in a certain specified tract of land in said territory, amounting to two millions of acres, which had been granted to said Beaubien and Miranda by the New Mexican government in 1841, and stood in their names; and that as to said third part they were trustees for said Charles up to the time of his death, and from thenceforward trustees for the said Alfred and his sisters as heirs-at-law of said Charles. The bill further stated that Maxwell and Pley pretended to have become interested in said land; and

prayed as against all the defendants that the title of said Charles Bent to the third part thereof might be established, and for a partition. Such proceedings were had in that suit, that, on the 29th of May, 1865, a decree was made, establishing Bent's title to one undivided fourth part of the land, the right of succession of the complainants, and adjudging that a partition be made according to the prayer of the bill. Commissioners for making partition were appointed by the decree, and ordered to report at the next term, the court reserving its decree as to the partition and the costs of the cause.

After this decree was made, certain negotiations took place between Maxwell (who had acquired the principal interest in the property) and the complainants, looking to a settlement of the controversy, and a purchase by Maxwell of the complainants' interest. Whether these negotiations were concluded in Alfred Bent's lifetime, or not until after his death, subsequently became a matter of controversy between the parties. He was accidentally killed on the 15th of December, 1865, leaving a widow, Guadalupe Bent (who afterwards married George W. Thompson), and three infant children, Charles, Julian, and Alberto, his heirs-at-law.

The commissioners for making partition never reported; and the next proceeding in the cause, so far as appears by the record, was an order made in April, 1866, making the infant children and heirs of Alfred parties complainant, and continuing the cause. A few days afterwards, in the same term, the following order was entered in the cause: —

"By agreement of the parties, the continuance of this cause, made on a former day of this term of this court, is set aside; and, on motion of solicitors for the complainants, Guadalupe Bent is hereby appointed guardian *ad litem* and commissioner in chancery for the minors of Alfred Bent in this cause, with full power to execute deeds or carry into execution all sales or transfers made of her [their?] interests in and to the real estate therein described to Lucien B. Maxwell, one of the defendants in said cause, and that this cause stand continued until the next term of this court."

On the third day of May, 1866, Guadalupe Bent, as guardian *ad litem* of Charles, Julian, and Alberto, and commissioner under the foregoing order, executed a deed of conveyance in

fee to the said Maxwell for the one undivided twelfth part of the property in question, belonging to the said Charles, Julian, and Alberto, as heirs of their father. The sisters of Alfred, with their husbands, executed deeds for their interest in the lands about the same time.

In September Term, 1866, another decree (probably intended as a substitute for the order made in April) was made in the said cause, in the words following, to wit: —

"Whereas an interlocutory decree was rendered at a former term of this court in the above cause, decreeing one-fourth of the land mentioned in the petition herein to the complainants in this cause, and appointing commissioners to divide and set apart the portion so decreed; and whereas said interlocutory decree was never carried into effect; and whereas, since the time of the rendition of said decree, a mutual agreement has been made between the parties to this cause, settling and determining all the equities in the same:

"It is, therefore, hereby ordered, adjudged, and decreed, by the mutual consent and agreement of the said complainants as well as of the said defendants in this cause, that the interlocutory decree above mentioned, together with all orders made under and by virtue of the same, be set aside; and, by the mutual consent and agreement of the said parties, it is hereby further ordered, adjudged, and decreed that the said Lucien B. Maxwell, one of the defendants in this cause, pay to the said complainants the sum of $18,000, to be divided among them *per stirpes;* that is, to the said Aloys Scheurick and Teresina Bent, his wife, one-third part, and to Alexander Hicklin and Estefana Bent, his wife, another third part, and to Charles Bent, Julian Bent, and Alberto Silas Bent, the children and heirs of Alfred Bent, deceased, the remaining third part, to be equally divided among the said last named, and to be paid into the hands of Guadalupe Bent, widow of the [said] Alfred Bent, deceased, and guardian *ad litem* for said children, for the purposes of the said division.

"And, upon the further consent and agreement of the said parties, it is hereby further ordered, adjudged, and decreed that the said Alexander Hicklin and Estefana Bent, his wife, the said Aloys Scheurick and Teresina Bent, his wife, and the said Guadalupe Bent, guardian *ad litem* for Charles Bent, Julian Bent, and Alberto Silas Bent, children and minor heirs of the said Alfred Bent, deceased, within ten days from the date of this decree, make, execute, and deliver to the said Lucien B. Maxwell good and sufficient

deeds of conveyance of all their right, title, interest, estate, claim, and demand of, in, and to the lands in controversy in this cause, the said Guadalupe Bent, guardian *ad litem* as aforesaid, in the name of Charles Bent, Julian Bent, and Alberto Silas Bent, minor heirs as aforesaid, and the said Alexander Hicklin and Estefana Bent, his wife, and the said Aloys Scheurick and Teresina Bent, his wife, in their own names. And, by further consent and agreement between the said parties, it is hereby further ordered, adjudged, and decreed that the costs of this suit shall be paid, each of the said parties to pay the separate costs in the same made by themselves."

This last decree seems to have been the termination of proceedings in the cause. No further conveyances were executed, and nothing else was done to carry the decree into effect.

On the first day of August, 1870, nearly four years after the entry of the last decree, the proceedings were instituted which are now brought here on this appeal. On that day, the present appellees, The Maxwell Land-Grant and Railway Company (to whom by mesne conveyances a large portion of the land had, in the mean time, been assigned), together with Lucien B. Maxwell and his wife, filed in the same court a bill against Guadalupe Thompson, administratrix of Alfred Bent's estate, her husband, George Thompson, and the said infant children and heirs of Alfred Bent, in which bill, after setting forth the grant to Beaubien and Miranda, and the derivative title of the complainants in the land, and the substance of the proceedings which had taken place in the previous suit, the complainants proceeded to state at large the terms of the compromise agreement which had been made, and which had resulted in the final decree made in that suit. They alleged that this compromise was agreed upon in the lifetime of Alfred Bent, though not carried out until after his death, and that its terms were that Lucien B. Maxwell should pay to the complainants in the original suit $18,000, or $6,000 apiece; and that, in consideration thereof, Alfred Bent and his two sisters should release and discharge the premises and every part thereof; and the said Maxwell and wife, from the said trust or equitable claim, and, in confirmation thereof, should convey to Maxwell all their right, title, and interest in and to the premises. The bill further alleged that the said $18,000 was duly paid (the sum

of $6,000 due to Alfred being paid to his wife as administratrix of her husband's estate, and not as guardian of his children); and that the sisters of Alfred, with their husbands, executed conveyances in accordance with the compromise agreement, in May, 1866, and that Guadalupe Bent, by a deed of conveyance executed by her as guardian aforesaid, undertook to convey the interest of the children as before stated; and that by said compromise and conveyances the said trust became extinguished, and the title of Maxwell became freed and discharged therefrom. The bill then set forth certain errors, which it was alleged had been committed in the original proceedings, and which cast a cloud upon the title of the complainants, namely: *First*, that it did not appear therein (as the fact was) that an agreement for the sale of the equitable interest of Alfred Bent was made by him, in his lifetime, with said Maxwell; *secondly*, that the interlocutory decree (of May, 1865) should not have been set aside, but should have been modified; *thirdly*, that the money paid by Maxwell for the interest of Alfred Bent should have been directed to be paid to his personal representative, and not to the guardian *ad litem* of his children; and, *fourthly*, that, upon such payment being made, the court should have decreed and adjudged the said trust and equitable claim or interest to be extinguished, and that the premises should be held free and discharged of said trust. The bill then prayed for a decree that the trust be terminated and extinguished; that the defendants have no interest or title in the premises, equitable or otherwise; that the plaintiffs hold them free and discharged of all trusts in favor of the defendants and all claiming under them; and for other and further relief. This bill being demurred to, the complainants were allowed to amend it by adding a prayer in the following words: "That for the aforesaid errors of law, apparent on the face of the said decree of 10th September, 1866, the same may be reviewed and reversed in the points herein complained of."

It is manifest that the object of this bill, especially after being amended, was to set aside the decree made in the original cause, and to substitute therefor a new decree supposed to be more advantageous to the complainants, upon the same matters

which were before the court and under its consideration in the said cause. Under the guise of a bill for quieting title it was in reality a bill of review.

The defendants, after the appointment of a guardian *ad litem* for the infants, answered the bill. Guadalupe Thompson and her husband denied that an agreement for a compromise was ever made by Alfred Bent in his lifetime; but they substantially admitted the other facts stated in the bill; alleging, however, that Guadalupe, although she executed the deed of May, 1866, in good faith, was wholly ignorant of the rights of her children. The guardian *ad litem* for the infants simply referred their rights to the court.

Upon these pleadings the parties took proofs; and, without going into the details thereof, it is sufficient to say, that, in our judgment, the complainants entirely failed to substantiate the main fact relied upon by them, namely; that the agreement for a compromise was concluded with Alfred Bent in his lifetime. The effect of the evidence appears to be, that, although negotiations were commenced before his death, no agreement was concluded until after that event, when it was concluded by his brother-in-law, Scheurick, and was acquiesced in by the other parties, including the widow of Alfred, acting in behalf of her children.

Upon the case as thus made, the court, in September Term, 1873, made a decree to the following effect; namely, —

First, That the decree of Sept. 10, 1866, was erroneous, and should be reversed, in so far as it set aside the provisions of the interlocutory decree of May 29, 1865, determining Charles Bent's interest in the land, and the right of his children to succeed thereto, and directing Guadalupe Bent, the widow of Alfred, as guardian *ad litem* for his minor children, to make a deed of conveyance of all their right, title, and interest in the said land.

Secondly, The court found and declared, that, after the death of Alfred Bent, and pending the original suit, an agreement by way of compromise was made by the adult parties thereto, for settlement of the same, and that the terms thereof were considered advantageous to the infants, and were accepted by the court on their behalf, as evinced by the decree attempting

to carry it out; also, that Maxwell had paid the money stipulated for in the compromise, and that the infants' share had been received by their mother for their benefit, whereby their right to the land became extinguished, and the land became discharged from the trust: therefore, it was decreed that the Maxwell Land-Grant and Railway Company held the land free and discharged of said trust.

The defendants appealed from this decree to the Supreme Court of the Territory, where it was affirmed; and from thence it was appealed to this court, and the question before us is as to the validity of these proceedings in the last suit.

If the bill is to be regarded as a bill of review (and in its ultimate aspect, at least, it seems impossible to regard it otherwise), the proceedings are clearly objectionable, on the following grounds: —

First, The decree sought to be set aside and reversed was a consent decree. It is a general rule that against such a decree a bill of review will not lie. *Webb* v. *Webb*, 3 Swanst. 658; 2 Smith Ch. Pr. 50; 2 Dan. Ch. Pr. 1629 (3d Am. ed.).

Secondly, The bill is filed by and on behalf of an assignee of the original defendant, namely, The Maxwell Land-Grant and Railway Company; whilst another rule, relating to bills of review, is, that none but parties and privies can have a bill of review. It does not lie for assignees. Gilbert, For. Rom. 186; 2 Smith Ch. Pr. 49; 2 Dan. Ch. Pr. 1627. The fact that Lucien B. Maxwell and his wife are joined as complainants does not obviate the difficulty.

Thirdly, The bill seeks a reversal and modification of the decree upon an alleged matter of fact not appearing upon the record; namely, that the compromise agreement was made with Alfred Bent in his lifetime, without alleging any newly discovered evidence unknown to the parties before the decree. We decided, in the case of *Buffington* v. *Harvey*, *supra*, p. 99 (what was well settled before), that the only questions open in a bill of review (except when filed on the ground of newly discovered evidence) are such as arise upon the face of the record, without reference to the evidence in the cause. *Whiting* v. *Bank of the United States*, 13 Pet. 6; *Putnam* v. *Day*, 22 Wall. 60.

The case, it is true, is somewhat anomalous. The decree sought to be set aside by the bill of review was not made in pursuance of the relief sought by the bill in the original cause, and was not based upon the pleadings and evidence therein. It was a decree for confirming and carrying out a settlement of the controversy, which had produced a change of interest. The original suit was instituted by the heirs of Charles Bent, to establish an equitable interest in an undivided share of the lands, and for a partition thereof. A decree was made establishing the right, ordering the partition, and appointing commissioners to make it. This was as far as the suit progressed. It was then settled, and the decree in question was entered by consent, setting aside the decree for partition, and carrying out the settlement. The bill of review alleges the fact to have been that the settlement was made by Alfred Bent in his lifetime, and that the decree ought not to have set aside the former decree establishing his rights, and ought not to have directed the guardian of his infant heirs to execute a conveyance; but ought to have declared the land discharged from the trust, upon payment by Maxwell of the agreed consideration to Alfred's personal representatives. In other words, the bill of review insists that the decree was misconceived and erroneous, in view of the state of facts out of which it grew, and which did not appear in the record of the cause.

We do not think that the peculiarity of the case, however, takes it out of the ordinary rules that apply to a bill of review. A decree for carrying out a settlement and compromise of a suit is certainly not, of itself, erroneous. When made by consent, it is presumed to be made in view of the existing facts, and that these were in the knowledge of the parties. In the absence of fraud in obtaining it, such a decree cannot be impeached.

We have looked into the laws of New Mexico, to see whether there is any thing peculiar in the modes of proceeding there which would sustain the bill in its present form; but we have failed to find any thing of the kind. In civil cases, those laws adopt the civil-law mode of practice, subject to the regulation of the Supreme Court of the Territory. Compiled Laws, pp. 195, 196. That court has made separate regulations for

common-law and equity practice. The rules in relation to the latter are not materially different from those adopted by this court for equity cases in the circuit courts. The civil procedure as pursued in the Spanish courts has no proceeding analogous to a bill of review, except the allegation of nullity, which must be made within sixty days from the time of pronouncing the decree; after which period, if no appeal be taken, the sentence or decree becomes *res adjudicata*, and cannot be revoked unless obtained by means of false or forged proofs. 1 White's Recopilacion, 305, 306, from Aso & Manuel's Institutes, lib. 3, tit. 8, c. 1; Escriche's Diccion, tit. Sentencia Nula.

Tested, therefore, by any law of procedure which may be invoked in its support, the bill in this case, considered as a bill of review, seeking to reverse, modify, and reconstruct the decree of September, 1866, cannot be sustained. Nevertheless, the general purpose which it evidently had in view — the quieting of the title to the land in question — is one towards which a court of equity is always liberally disposed, as tending to promote the peace of society and the security of property. And if, instead of seeking to reverse the decree of September, 1866 (which, for like reasons of public policy, as applicable to the security of judgments that have passed into *rem adjudicatam*, is not allowable), the bill had sought to carry that decree more effectually into execution, it would have been free from legal objections, and equally conducive to the object in view. Bills for the purpose named are well known in equity proceedings. Lord Redesdale says: —

"Sometimes, from the neglect of parties, or some other cause, it becomes impossible to carry a decree into execution without the further decree of the court. This happens, generally, in cases where parties having neglected to proceed upon the decree, their rights under it become so embarrassed by a variety of subsequent events that it is necessary to have the decree of the court to settle and ascertain them. Sometimes such a bill is exhibited by a person who was not a party to the original decree, but claims a similar interest, or is unable to obtain the determination of his own right till the decree is carried into execution. Or it may be brought by or against a person claiming as assignee of a party to the decree. The court

in these cases in general only enforces, and does not vary, the decree; but on circumstances it has sometimes considered the directions, and varied them in case of mistake; and it has even on circumstances refused to enforce the decree; though in other cases the court, and the House of Lords upon an appeal, seem to have considered that the law of the decree ought not to be examined on a bill to carry it into execution." Redesdale's Treatise, 95, 96.

It seems to us that the remedy here described by such high authority is applicable to the case at bar. The decree of September, 1866, has never been carried into effect by any act done since it was made. It directed that Maxwell should pay the money stipulated for by the compromise, and that the defendant should execute deeds of conveyance. But the parties seem to have assumed that their previous acts performed in May, 1866, were a sufficient compliance with the directions of the decree. Yet the decree does not take notice of this fact.

Now, in order to execute this decree, or to determine whether it has or has not been substantially executed, and to determine and declare the effect of such execution upon the rights of all concerned, and thus remove any cloud from the title arising from the imperfection of the proceedings, it was perfectly competent for the parties to file a bill conceived and constructed to that end. The bill in this case, as originally filed, before it was converted by amendment into a bill of review, and abating the allegations of error in the original decree, approximated to the character of such a bill as might have been sustained. The proofs show a case which, in our judgment, supports the conclusions of the decree, to the effect that the terms of compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants, and were so considered and accepted by the court in their behalf. But, so far as the present decree undertook to reverse and modify the decree of September, 1866, we think it is clearly erroneous. Still, although we feel obliged to reverse the present decree, we do not think that the bill should be absolutely dismissed. And, as the whole question between the parties has been fully litigated on the proofs, it would be unreasonable to require that these should be taken over again.

Our conclusion is, that the present decree must be reversed with costs, and that the cause be remanded to the court below, with directions to allow the complainants to amend their bill as they shall be advised, and with liberty to the defendants to answer any new matter introduced therein; and that all the proofs in the cause shall stand as proofs upon any future hearing thereof, with liberty to either party to take additional proofs upon any new matter that may be put in issue by the amended pleadings; and it is *So ordered.*

BRIGES *v.* SPERRY.

1. Where the record shows that a suit brought in a State court was, on the petition of the defendant, and by reason of the character of the parties, duly removed to the proper Circuit Court of the United States, the jurisdiction of the latter court is not lost for want of an averment of citizenship in the bill of complaint originally filed, or in the amendments thereto, which were made in the Circuit Court.
2. The bill in this case prayed for a dissolution of the partnership between the parties, and a sale of certain lands by them held as tenants in common, which, it was alleged, were not susceptible of division without prejudice to them. There was no demurrer to the bill, nor did the answer raise any objection to the jurisdiction. *Held*, 1. That, as the allegations of the bill touching the lands conform to the provision of the Code of California, and are sustained by the proofs, the decree below awarding partition was proper. 2. That, if there is any thing in the allegations which concern the partnership, which introduces another matter, the objection should have been taken by demurrer for multifariousness.

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

This action was commenced by the complainant, who is a citizen of California, in the District Court of the Fifth Judicial District for the county of San Joaquin in that State; but, upon the petition of the defendants, who are citizens of France, the cause was removed to the Circuit Court of the United States for the District of California. After such removal, the complainant filed an amended bill, wherein he charged that, about July, 1874, he and the defendants entered into a copartnership for carrying on a hotel business on the land known as the Calaveras Big Trees, which consisted of two tracts, one

containing about eight hundred, and the other about seven hundred and twenty acres; that the hotel was on one of the tracts; that at the time of the formation of the partnership, and during its continuance, he and the defendants owned the land as tenants in common, he having one undivided half, one of the defendants three-eighths, and the other one-eighth thereof; that it was agreed to use, as capital stock in said business, said land, hotel, &c.; that he was to have the sole and exclusive management of the business; that he performed his agreement, but that the defendants so conducted themselves in and about the management of the business as to cause great loss to him, and lessen the value of said land and hotel. He further alleged that the situation of the land and its connection with the hotel were such that it could not be divided without great prejudice to the owners.

The bill did not allege that the partnership was for any specified time, or that there were debts, profits, or claims to adjust or accounts to settle. It prayed for the appointment of a receiver, the dissolution of the partnership, the winding-up of its affairs, and a sale of the property.

The answer admitted the partnership, and the ownership of the land as charged, but denied that the complainant was to have exclusive management of the business; and that he performed his agreement. It also denied that they in any way misconducted themselves, and that the land could not be divided without prejudice.

The land in question is that upon which grow the mammoth trees of California. It consists of two different tracts, about six miles apart. One, called the "Calaveras Big Tree Grove," is also known as the "Mammoth Grove," and the other as the "South Park Grove." The hotel is on the former tract; and the neighborhood is resorted to for the purpose of seeing the trees, and enjoying the climate and the hunting and fishing.

The evidence chiefly related to the situation and character of the property and the purposes for which it could be used, and to the question as to whether the place would support two hotels.

Upon the hearing, the court decreed the dissolution of the partnership, the sale of the property, and the division of

the proceeds between the parties, in proportion to their respective interests.

The defendants thereupon appealed to this court, and assign for error, —

1. That the bill shows no equity, and should be dismissed.

2. That the sale of the real property should not have been ordered, because it was not partnership property, and, as there were no debts to pay or claims to adjust, no useful purpose could be subserved by a sale.

3. That the amended bill filed in the Circuit Court did not show jurisdiction in that court.

Mr. Edward J. Pringle and *Mr. Edmond L. Goold* for the appellants.

Mr. Milton Andros, *contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

The appellee, Sperry, brought suit in the State court for the county of San Joaquin against the appellants, who duly appeared and caused the suit to be removed into the Circuit Court of the United States for the District of California. In that court Sperry filed an amended or new complaint.

One of the errors alleged as grounds for reversing the decree in favor of Sperry is, that this amended bill shows no jurisdiction in the Circuit Court. If nothing else be looked at but the bill, there is no jurisdiction shown. But the proceedings in the State court, which are properly here as part of the record of the case, show that it was removed from the State court to the Federal court, on account of the citizenship of the parties; and this of itself must have given jurisdiction to the United States Court before the amended bill was filed. That jurisdiction is not lost, because the facts on which it arose are not set out in the old or the new complaint. *Railway Company* v. *Ramsey*, 22 Wall. 322.

The appellants treat the bill as one for a dissolution of a partnership, a settlement of the partnership affairs, a sale of the partnership property, and a distribution of its proceeds. They, therefore, insist that the decree of the court ordering a sale of real estate of the estimated value of $40,000, which the parties held as tenants in common, and which, they insist,

was not partnership property, was erroneous, and should be reversed. On the other side, it is said that the real estate was partnership property, and by the rules of chancery practice ought to be sold on a decree for the dissolution of the partnership, and the proceeds divided, as in case of personalty; and it is argued further, that, if they are mistaken in this view of the matter, the complaint may be treated as a bill for partition; and that as a partition *in specie* could not be made without loss or injury to the value of the property, it was rightfully decreed to be sold and the money divided.

As we are clearly of opinion that the decree of the Circuit Court can be sustained on this latter view, we need not inquire whether, under all the circumstances, the real estate was subject to the rules which in equity govern that kind of property when it is bought and used for partnership purposes.

Supposing a bill to wind up a partnership and a bill to partition real estate to be so distinct in character that a court must hold it to be one or the other, we think the complaint before us has all the necessary elements of the latter, and is as much entitled to be called a suit for partition as for the dissolution and winding up of a partnership.

It begins by describing the real estate, and declaring that plaintiff and defendants are now, and have been, tenants in common of the lands since the month of July, 1874. It then alleges the plaintiff to be the owner of an undivided half, the defendant, the Marquis de Briges, of three-eighths, and the Marquise de Briges, the other defendant, who, it seems, is his mother, of one-eighth. It shows that the land consists of two separate parcels, which, by the congressional subdivisions of which they consist, must be five or six miles apart, and that one of them is a large tract, used as a summer resort for visitors, and that the whole property is of the value of about $40,000. It is also alleged, that, by reason of the connection of the hotel with the lands, — the latter constituting the Big Tree Groves of Calaveras, — a partition cannot be had without seriously impairing the value of the property. Amongst other relief prayed for is a sale of this property, and a distribution of the proceeds amongst the owners. Here seems to be every thing requisite for a suit in partition.

There is, however, in addition to this, an allegation that the parties had been engaged in keeping this hotel in partnership, and that a difference had arisen by the fault of the defendants, which made a dissolution of that partnership necessary, and this dissolution is prayed for, and a settlement of the accounts; and another prayer of the bill is for a sale of the partnership property, and proper distribution.

The bill is inartificially drawn as a bill in chancery, but is after the model of the Code of Procedure of California, which justifies such a complaint in the courts of that State.

The stating part of it is accordingly divided into seven paragraphs, and they are so numbered. If we are at liberty to disregard the fifth and sixth paragraphs, which alone set out the partnership and the grounds of dissolution, we have no difficulty in finding a bill for partition, with prayer for a sale as a mode of partition, because it would be an injury to the interest of the owners to divide it up.

As there was no demurrer to the bill, as the answer sets up no objection to the jurisdiction, but denies that there is any thing in the condition of the land to forbid actual partition, we see no reason why the bill may not be treated as sufficient for a partition suit. If there is any thing in the allegations which concern the partnership, which introduces another matter, the objection should have been taken by demurrer for multifariousness. It is not fatal to the bill on appeal.

The only question contested in the case on the evidence was, whether the land could be partitioned in kind without serious detriment to the owners.

We are of opinion that the Circuit Court held properly that it could not.

It consisted of about two thousand acres in two distinct parcels, of unequal value, five or six miles apart. These two parcels included all the now well-known big trees of Calaveras, except a few of that species too small to excite admiration or attract attention.

These trees are ranked among the curiosities of the world, and justly so. One of them, as the evidence shows, was twenty-five feet in diameter when it was cut down, and took five men twenty-two days to cut it down. Others still standing are thirty

feet in diameter. The place is visited by people from all parts of the world to see these trees, and the hotel did a profitable business for this reason. It is apparent that the joint ownership of this property must make it far more valuable than it would be if split up into small pieces held by persons who would become rivals for the profits arising from visitors. Such, also, is the weight of the testimony on that subject. It is argued that the two groves, being five miles apart, a division with owelty to make it equal might have been made into two parts. But these would still have been rival and conflicting interests, each injuring the other.

Again, the inequality of the shares into which the property must have been divided was a serious difficulty in the way of actual partition. The three shares must have been an eighth, three-eighths, and a half. And though this might have been overcome by an offer of the mother and son to take their two shares as one, no such offer was made, and the court had no power to compel them to do so.

The owner of the one-eighth, if it had a pleasant site for a hotel, would have been as well off, in regard to the most valuable use of the property, as the owner of the one-half, unless the latter had adopted means for excluding the guests of the former, which is, at least, of doubtful practicability, unless at enormous expense.

Sect. 763 of the Code of Civil Procedure of California, c. 4, tit. 10, concerning partition of real property, enacts: "If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that partition cannot be made without great prejudice to the owners, the court may order a sale thereof." Sect. 752 embodies the same principle.

The complainant in this case makes the necessary allegation, and we think it is sustained by the proof.

Decree affirmed.

UNITED STATES *v.* GILLIS.

1. The act entitled "An Act to prevent frauds upon the treasury of the United States," approved Feb. 26, 1853 (10 Stat. 170), embraces every claim against the government, however arising, of whatever nature, and wherever and whenever presented.
2. So far from giving new potency to assignments of rights of action, and from changing the rule of the common law touching such rights, that act denies any effect to powers of attorney, orders, transfers, and assignments which before were good in equity, and which a debtor, when they were brought to his notice, was bound to regard.
3. The act of Feb. 24, 1855 (10 Stat. 612), establishing the Court of Claims, is not an enabling act, nor does it expressly or by necessary implication repeal any of the provisions of the act of Feb. 26, 1853, or make claims assignable which, before its enactment, were incapable of assignment.
4. Congress has given a legislative construction of the act of 1853, by including and re-enacting it in sect. 3477 of the Revised Statutes.
5. The court, therefore, upon consideration of the above statutes, *holds*, 1. That claims against the United States cannot be assigned, so as to enable the assignee to bring suit in his own name in the Court of Claims. 2. That, in cases arising under the act of March 3, 1863 (12 Stat. 820), the ownership claimed and required to be proved is that which existed at the time when the property in question was captured, and that the assignee of the claim for the proceeds of such property is not entitled to sue for them in said court.

APPEAL from the Court of Claims.

This suit was brought June 11, 1867, in the court below, by Thomas H. Gillis, in his own name, to recover the proceeds of one hundred and eight bales of cotton seized under the Abandoned and Captured Property Act of March 12, 1863, as the property of John H. Ryan, at Charleston, S. C., in March, 1865, by the military forces of the United States.

The Court of Claims found the following facts: —

1. In March, 1865, one John H. Ryan, of Charleston, S. C., was the owner of one hundred and three bales of upland cotton and five bales of sea-island cotton, which were during that month seized at said Charleston by military officers of the United States, turned over to the agents of the Treasury Department, transported to New York, and there sold, and the net proceeds thereof covered into the United States treasury, amounting to the sum of $130.33 per bale for the upland cotton, and $231.61 per bale for the sea-island cotton.

2. Some time in October or November, 1866, said Ryan transferred the legal title to his claim against the United States for the proceeds of said cotton so covered into the treasury to Thomas H. Gillis, of New York, and assented to the bringing this action thereon in the name of said Gillis.

3. After the institution of this action, said Thomas H. died; and Catherine I. Gillis was duly appointed administratrix of his estate by the Surrogate Court of the county and State of New York, on the sixteenth day of July, 1868, and has since been admitted by the court to prosecute this suit as such administratrix.

4. The transfer of the claim, as set forth in the second finding, was made through one Van Ness, at New York, under a power of attorney from said Ryan, and contract, the full terms of which have not been proved. But it appears that said Ryan (since deceased) assented to and affirmed said transfer. Subsequently a controversy arose between the present claimant and the administrator of said Ryan as to an equitable interest set up by said administrator in some portion of the money which might be recovered. Since this action was instituted, a compromise has been made between said claimant and said Ryan's administrator, by which it is agreed that a certain part (but how much it does not appear) of the amount recovered shall be paid over to said administrator by the claimant's attorneys of record.

The court thereupon found as a conclusion of law that the claimant was entitled to recover $13,423.99, as the proceeds of one hundred and three bales of upland cotton, and $1,158.05, as the proceeds of five bales of sea-island cotton, in all, the sum of $14,582.04, and rendered judgment accordingly. The United States brought the case here.

Mr. Assistant Attorney-General Smith for the appellant.

The Court of Claims possesses no equity powers, and cannot pass upon equitable claims. *Alire's Case*, 6 Ct. of Cl. 575; *Harvey's Case*, 8 id. 512. If it could, an assignee of an unliquidated claim against the United States would have no standing in that court, as the act of Feb. 26, 1853, 10 Stat. 170, renders void the assignment of such a claim. *Sine's Case*, 1 Ct. of Cl. 12; *Cooper's Case*, id. 87; *Pierce's Case*, id. 288; *Cote's*

Case, 3 id. 65; *Adam's Case*, id. 332; *Stowe's Case*, 5 id. 371; *Atocha's Case*, 6 id. 69; *Becker* v. *Sweetzer*, 15 Minn. 427.

Such a claim was not assignable at common law; and this court, in *United States* v. *Robeson*, 9 Pet. 319, held that there was no act of Congress establishing a different rule.

A claim to personal property, or to its proceeds, in the adverse possession of another, cannot be sold so as to invest the purchaser with a right of action in his own name. *Gardner* v. *Adams*, 12 Wend. (N. Y.) 297; *Stogdell* v. *Fugate*, 2 A. K. Mar. (Ky.) 61; *Young* v. *Ferguson*, 1 Litt. (Ky.) 298; *Com.* v. *Fuqua*, 3 id. 41; *Brown* v. *Lipscomb*, 9 Port. (Ala.) 472; *Goodwyn* v. *Lloyd*, 8 id. 237; *McGoon* v. *Aukeny*, 11 Ill. 558; *Davis* v. *Herndon*, 39 Miss. 484.

Nor has an assignment of a part of a claim ever been recognized as operative to give such a right. *Mandeville* v. *Welch*, 5 Wheat. 277; *Robbins* v. *Bacon*, 3 Me. 346; *Gibson* v. *Cooke*, 20 Pick. (Mass.) 5; *Fairgrieves* v. *Lehigh Navigation Co.*, 2 Phil. (Pa.) 182; *Boyd* v. *Rumsey*, 2 Mar. J. J. (Ky.) 42; *White* v. *Buck*, 7 B. Mon. (Ky.) 547; *Raines* v. *United States*, 11 Ct. of Cl. 648.

The prohibition in the act of 1853 against the assignment of claims was not repealed, so far as the Court of Claims is concerned, by the act of Feb. 24, 1855, 10 Stat. 612, nor by that of March 3, 1863, 12 id. 820, giving it jurisdiction over such a claim as this case involves.

Congress expressly re-enacted the act of 1853 by sect. 3477 Rev. Stat. The Revised Statutes are entitled "An Act to revise and consolidate the statutes of the United States in force on the first day of December, A.D. 1873," and do not purport to embrace any new legislation. The act having been thus regarded as in force at that date, this court will not declare that it was repealed by implication. Dwarris on Stat. 154; *Wood* v. *United States*, 16 Pet. 362; *McCoal* v. *Smith*, 1 Black, 470; *Beals* v. *Hale*, 4 How. 53; *Pratt* v. *Atlantic & St. Lawrence Railroad Co.*, 42 Me. 587; *Ingalls* v. *Cole*, 47 id. 540; *Bowen* v. *Lease*, 5 Hill (N. Y.), 225; *Wallace* v. *Bassett*, 41 Barb. (N. Y.) 96; *Bank* v. *Commonwealth*, 10 Pa. St. 448; *Attorney-General* v. *Brown*, 1 Wis. 525; *Lee* v. *Forman*, 3 Metc. (Ky.) 116.

But even if the act of 1853 is not in force, the judgment must be reversed. The act of March 3, 1863, *supra*, limits a recovery to the owner of the property, at the time of its abandonment or capture. The privilege of invoking the jurisdiction of the court below, in cases for which that act provides, is a personal one, and attaches upon the concurrence of the loyalty of the claimant, his former ownership of the property, and his present right to the proceeds. *Carroll* v. *United States*, 13 Wall. 151; *Haycraft* v. *United States*, 22 id. 81.

Mr. Halbert E. Paine and *Mr. Benjamin F. Grafton*, *contra*.

The rule of construction applicable to this case was laid down in *United States* v. *Palmer*, 3 Wheat. 610. The act of 1853 was designed only to meet the necessities of the Treasury Department. If its first section could have been construed to apply to cases in the Court of Claims, when it was subsequently organized, the acts establishing and regulating that court are so repugnant to that section, that they would have worked its repeal as to such cases. They entirely satisfy the rule in *Wood* v. *United States*, 16 Pet. 342, that there must be a positive repugnancy between the provisions of the new and those of the old statute, and even then the latter is repealed only *pro tanto*, to the extent of the repugnancy; and they unmistakably recognize that claims of which that court has jurisdiction may be assigned. 10 Stat. 612, sect. 1; 12 id. 767, sect. 12; 15 id. 75, 79, sects. 4, 8.

The cases are in harmony with this view. *Lawrence* v. *United States*, 8 Ct. of Cl. 254; *Cavender* v. *United States*, id. 285; *The Floyd Acceptances*, 7 Wall. 666; *United States* v. *Anderson*, 9 id. 67; *United States* v. *Burns*, 12 id. 253.

The question whether an assignee of a chose in action can sue in his own name does not, however, arise. The legal effect of the transfer was to pass the title to the property, or its proceeds held by the United States as trustees.

The United States insists that Congress used the word "owner" in the act of 1863 as designating the original owner, but not his assignee. The scope, intent, and reason of the act justify the construction that executors, administrators, or assignees, as well as owners, are embraced by its provisions.

The entire legal title to the whole of the property having been transferred (and it only can be set up in the Court of Claims), we submit that the findings of fact conclusively establish the right of the defendant in error to recover.

MR. JUSTICE STRONG delivered the opinion of the court.

The plaintiff seeks to recover in this action the proceeds of the sale of one hundred and eight bales of cotton, which, in March, 1865, were the property of John H. Ryan, of Charleston, S. C. During that month the cotton was there taken by the military officers of the United States, as directed by the Captured and Abandoned Property Act, transported to New York and sold, and the net proceeds of the sale have been covered into the treasury. The plaintiff, as administratrix of Thomas H. Gillis, now asserts a right to recover the proceeds by virtue of an alleged assignment of the claim made by Ryan, the former owner of the cotton, to her intestate.

It is obvious that, if no such assignment was made, or if, when made, it was inoperative to transmit the legal right to the claim, the suit cannot be maintained in the name of the plaintiff. Then there is no privity between her and the United States, and she is not the "owner," who alone is permitted to sue in the Court of Claims. That court found as facts that some time in October or November, 1866, Ryan transferred the legal title to his claim against the United States for the proceeds of the cotton to the plaintiff's intestate, and assented to the bringing this action thereon in the name of Gillis. The transfer was made through one Van Ness, under a power of attorney from Ryan, and a contract, the full terms of which have not been proved, though the transfer was subsequently assented to and confirmed by Ryan. Subsequently a controversy arose between the present claimant and the administrator of Ryan, who had deceased, respecting an equitable interest claimed by said administrator in some portion of the money which might be recovered, and since the present action was brought a compromise has been made by which it is agreed that a part of the amount recovered shall be paid to the said administrator by the claimant's attorneys of record. Such, in substance, are the findings, so far as they relate to the transfer

of the claim by Ryan to the claimant's intestate. What the Court of Claims intended by finding that the legal title to the claim for the proceeds of the cotton was transferred to Gillis is not clear. And how that could be found, when the alleged transfer was under a power of attorney and contract, the full terms of which, the court finds, had not been fully proved, it is equally hard to understand. It seems probable all that the finding means is that Ryan's power of attorney and contract sought to empower Gillis to bring suit in the latter's name for the recovery from the United States of the net proceeds of sale of the cotton then in the treasury, and to retain the whole or a part of what might be recovered. However this may be, a transfer of the claim, sufficient to vest in the transferee the legal ownership thereof and give him a standing in the Court of Claims, was impossible, unless aided by some statute. At best, the claim, before its attempted transfer, was a mere right in action and a demand for an unliquidated sum of money. This is true whether the avails of the cotton sold are to be regarded as money had and received for the use of Ryan, or as held in trust for him, or promised to him by the provisions of the Captured and Abandoned Property Act. But choses in action, which are not commercial instruments, though assignable in equity in some cases, are not generally assignable at common law. And certainly the holder of a mere equitable right can have no standing as a plaintiff in the Court of Claims. Apart from the fact that there is no privity between the United States and an equitable holder of a claim against the government, obtained by him through an assignment, the Court of Claims is without power to adjudicate upon merely equitable rights. *Bonner* v. *United States*, 9 Wall. 156.

If, therefore, Ryan's assignment to Gillis operated as a transfer of the legal ownership of his claim against the United States, so as to enable the assignee to sue in his own right in the Court of Claims, it must be because there is some statute that has changed the rule of the common law, and given to an assignment the effect which, prior to the statute, it did not have. In *United States* v. *Robeson*, 9 Pet. 319, decided in 1835, it was said by this court: "There is no law of Congress which authorizes the assignment of claims against the United

States, and it is presumed, if such an assignment is sanctioned by the Treasury Department, it is only viewed as an authority to receive the money, and not as vesting in the assignee a legal right. But whatever may be the usage of the Treasury Department on this subject, it is clear that such an assignment, as between individuals, on common-law principles, cannot be regarded as transferring to the assignee a right to bring an action at law on the account in his own name, or to plead it by way of set-off to an action brought against him, either by an individual or the government." No act of Congress since 1835 has given negotiability to claims against the government, or given new effect to attempted transfers. On the contrary, an act, approved Feb. 26, 1853, entitled "An Act to prevent frauds upon the treasury of the United States," 10 Stat. 170, sect. 1, enacted "that all transfers and assignments" thereafter "made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." The seventh section enacts that "the provisions of this act," as also those of the prior act of July 29, 1846, entitled "An Act in relation to the payment of claims," "shall apply and extend to all claims against the United States, whether allowed by special acts of Congress or arising under general laws or treaties, or in any other manner whatever." No language could be broader or more emphatic than these enactments. The words embrace every claim against the United States, however arising, of whatever nature it may be, and wherever and whenever presented.

So far are they from giving new potency to assignments and transfers of rights in action, so far from changing the common-law rule that such rights are not assignable, the statute strikes down and denies any effect to powers of attorney, orders, transfers, and assignments which before were good in equity, and

which a debtor was bound to regard when brought to his notice.

It has been argued on behalf of the claimant in this case that this act, the act of 1853, is applicable only to claims asserted before the Treasury Department. This is inferred from the title of the act, and from the fact that at the time when it was passed there was no Court of Claims in existence, and claims were settled in the Treasury Department, without opportunity to cross-examine witnesses. The frauds made possible by this mode of settlement, it is said, Congress had solely in view. But it is an unwarrantable assumption to assert that Congress had in mind only claims presented to the Treasury Department. When the act was passed, many claims were presented to Congress, and a vast number were set up by way of defalcation, in suits brought by the government, where there was a full opportunity to cross-examine the witnesses called in their support. That Congress had all such claims in view, and intended to prevent their assignment, and debar any assignee from setting them up, is, we think, altogether probable. If it be said the danger the act sought to provide a guard against was that fraudulent assignments of just claims might be imposed upon the accounting officers, so that the government, after one payment to a pretended assignee, might find itself confronted by the real creditor and be called upon to pay again, the answer is that the same danger would attend the payment or allowance to an assignee, after a trial in court, or after a private act passed by Congress. We discover nothing in reason, nothing in the mischief the act was plainly intended to remedy, and nothing in the language employed tending to warrant the admission of any exceptions from the comprehensive provisions made; nothing that can justify our holding that, when Congress said all transfers or assignments, partial or entire, absolute or conditional, of claims against the United States shall be null and void, they meant they should be in operation only when presented to the accounting officers of the treasury, but effective when presented everywhere else. Such was not the construction given to the act by the Supreme Court of Minnesota in the case of *Becker* v. *Sweetzer*, 15 Minn. 427, where the validity of an assignment

of such a claim came in question. And we are not informed that any court held such to be the meaning of the act, until the Court of Claims, in 1872, adopted it. *Lawrence's Case* and *Cavender's Case*, 8 Ct. of Cl. 252 and 281. Even in that court its earlier decisions were different. In *Sine's Case*, 1 id. 12, in *Cooper's Case*, id. 87, and in the *Cote Case*, 3 id. 64–71, it was decided that all transfers and assignments of claims against the United States were made void by the statute, not only when the assignees set up the claims in the Treasury Department, but also when they attempted to sue in the Court of Claims, and very convincing reasons were given for the decision. It was said with great force, "The act operates directly on the claims themselves, and not as limitations on or definitions of the powers of those who are to adjust them or adjudicate upon them." And it might have been added, the act makes no reference to the accounting officers. The departure from this ruling made in the two cases reported in the eighth volume of Court of Claims reports seems to have been made with a view to reconcile, if possible, the enactment with some expressions made in the subsequent act of 1855 establishing the Court of Claims. But the latter is not an enabling act. It gives to the court jurisdiction of all claims of a specified description, and only incidentally speaks of assignments. It requires the petition to set out all assignments of the claim, or any part thereof. It requires the record to show the allegiance of the claimant, and the original and every prior owner thereof, where the claim has been assigned. It must be admitted the act contemplates the possibility of an effective assignment of some claims. What those are, it is not necessary now to determine. Even the act of 1853 excepted from its sweeping provisions certain claims, which were liquidated, and for which warrants are drawn. It is enough, however, that a later statute, not declaratory in its character, cannot be relied upon for the purpose of giving a construction to a former act plain in its terms. *Ingalls* v. *Cole*, 47 Me. 530.

That the act creating the Court of Claims did not work a repeal of any provisions of the act of 1853, nor itself make claims assignable that were incapable of assignment before its enactment, is beyond reasonable doubt. It certainly contains

no words expressly repealing any former statute, either in whole or in part. And there is no necessary implication of intentional repeal. Implied repeals are not favored. 2 Dwarris on Statutes, 638, 673. The rule is that an ancient statute will be impliedly repealed by a later one only when the later is couched in negative terms, or when the matter is so clearly repugnant that it necessarily implies a negative. Where both acts are affirmative, and the substance such that both may stand together, both are held to be in force. *Foster's Case*, 11 Rep. 57. Now, the act of 1855 does not declare that any claim against the United States shall be assignable. At most, it suggests that claims which are assignable may be sued in the Court of Claims in the name of the assignee, without undertaking to declare what claims may be assigned. That there may be such claims is clearly stated in the act of 1853, and there are devolutions of title by force of law, without any act of parties, or involuntary assignments, compelled by law, which may have been in view. There is, therefore, no necessary inconsistency between the two acts. Besides, they relate to different subjects, and it may be doubted whether a statute relating to one subject can be construed to repeal by implication a prior statute relating entirely to another subject.

We think, therefore, the act of 1853 is of universal application, and covers all claims against the United States in every tribunal in which they may be asserted. And such, we think, was the understanding of Congress when the Revised Statutes were enacted. In the revision, the act of 1853 was included and re-enacted. Sect. 3477. In 1873 and 1874, therefore, it was not thought that the act establishing the Court of Claims had repealed any of the provisions of the act of 1853; for, if it had been, the repealed parts would not have been included in the revision. The Revised Statutes were passed June 22, 1874. The decisions of the Court of Claims, that the act of 1853 did apply to claims made in that court, had been made years before, and reported, and they may be presumed to have been within the knowledge of Congress. The later decisions in *Lawrence's Case* and *Cavender's Case* were not reported until 1874, and were probably not known, or not as well known. By re-enacting the statute of 1853, without change, it is a

reasonable presumption Congress intended what it was known the court had adopted as its true construction.

If we are right in the opinion we have expressed, that claims against the United States cannot be assigned so as to enable the assignee to bring suit in his own name in the Court of Claims, it is enough for the present case. But there is another reason why claims for the proceeds of captured and abandoned property cannot be assigned so as to give the assignee a standing in that court. It is found in the act giving the court jurisdiction of such claims. Not every person is permitted to sue for such proceeds. The act declares that "any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims, and on proof to the satisfaction of the court of his ownership of said property, &c., receive the residue of such proceeds. It is thus plain that only he who can claim as an owner of the property captured or abandoned, and who can prove such ownership, is permitted to sue and recover. The assignee of a claim for the proceeds is not such an owner of the property captured. That the ownership claimed and required to be proved is that which existed at the time of the capture, is quite plain. *Carroll* v. *United States*, 13 Wall. 151. The owner of that into which the property has been converted is not necessarily the one who was the owner of the property itself. It is thus evident that Congress did not intend to give any assignee of the proceeds a right to sue for them. And there were very substantial reasons for withholding such a privilege.

Judgment reversed, and the record remitted with instructions to dismiss the claimant's petition.

MR. JUSTICE BRADLEY delivered the following opinion, in which MR. JUSTICE FIELD concurred.

I dissent from so much of the opinion in this case as holds that an assignment of a claim against the United States could not transfer the legal title thereto without the aid of some statute. I know of nothing in the Constitution or laws of the United States which adopts the common-law rule on this sub-

ject. There is no such rule in the civil law, nor in the laws of many of the States. So far as the opinion places the judgment upon the statute of 1853, which prohibits the assignment of claims against the United States, I concur in it.

TURNBULL *v.* PAYSON.

1. The court again decides that, where a corporation is adjudged a bankrupt, the proper District Court of the United States, in order to provide means for the payment of the debts of the corporation, may direct an assessment upon the unpaid balance due on stock held by the several stockholders.
2. A person is presumed to be the owner of stock when his name appears on the books of a company as a stockholder; and, when he is sued as such, the burden of disproving that presumption is cast upon him.
3. The record of a district court of the United States is not within the act of Congress approved May 29, 1790 (1 Stat. 122), prescribing the mode in which the records and judicial proceedings of the State courts shall be authenticated, but is, when duly certified by the clerk under its seal, admissible as evidence in every other court of the United States.

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

The facts are stated in the opinion of the court.

Mr. Edward Otis Hinckley for the plaintiff in error.
Mr. D. K. Tenney, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Stockholders in the bankrupt company were made liable by the act of incorporation "in all cases of losses exceeding the means of the corporation," each to the amount of the stock which he held; and the record shows that the defendant, at the time of the alleged loss, held fifty shares of the stock, eighty per cent of which was unpaid.

Sufficient also appears to show that the insurance company, on the 9th of October, 1871, met with losses by fire which exhausted all their funds and effects; and that the corporation, on the 14th of November of the next year, was duly adjudged bankrupt by the District Court for the Northern District of Illinois, the insurance company having its principal place of business at Chicago, in that district.

Due notice was given of the adjudication; and the creditors, at their first meeting, chose the plaintiff below the assignee of the estate and effects of the bankrupt company. No opposing interest appearing, the register, by an instrument under his hand, assigned and conveyed to the assignee all the estate, real and personal, of the bankrupt company.

Regular proceedings followed; and the bankrupt court, on the 4th of February, 1873, entered a decree that a call or assessment of sixty per cent upon the stock of the stockholders was necessary for the purpose of raising funds to pay losses incurred by the bankrupt company in its insurance business, and ordered and directed the assignee to proceed to make the assessment.

Pursuant to that decree, the assignee made the assessment, and filed in the bankrupt court due proof that he had given the notices prescribed in the decree. Payment being refused by the defendant, the plaintiff instituted the present suit in the District Court for the District of Maryland, to recover the amount of the assessment on the fifty shares held by the defendant. Service was made, and the defendant appeared and pleaded that he never promised. Other proceedings took place, which it is not necessary to notice; and at the next term the parties went to trial, and the verdict and judgment were in favor of the plaintiff. Exceptions were duly taken by the defendant; and he sued out a writ of error, and removed the cause into the Circuit Court, where the parties were again heard, and the Circuit Court affirmed the decree of the District Court.

Cases of the kind may be re-examined here as well as in the Circuit Court upon the bill of exceptions filed in the District Court; and the defendant accordingly sued out a writ of error, and removed the cause here for re-examination.

Nine bills of exception are set forth in the transcript, covering forty-eight pages of the same, all of which were allowed in the District Court. Bills of exceptions are required, in order that the matters to which they relate may be made a part of the record, and that it may appear that the questions involved were raised in the subordinate court. Such a proceeding constitutes a proper foundation for a writ of error, but

it does not remove the cause into the appellate court without a writ of error; and, whenever a cause is removed into this court, the requirement is that there shall be an assignment of errors, setting "out separately and specifically each error asserted and intended to be urged," and "when the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be the instruction given or instruction refused." Argument to show that the assignment of errors in this cause is not a compliance with that rule is unnecessary, as it is obvious that it is materially defective both in form and substance.

Three errors are set forth in a single assignment: 1. That the court erred by admitting in evidence the several matters set forth in exceptions Nos. 1 to 8. 2. That the court erred in rejecting the prayers for instruction presented by the plaintiff, Nos. 1 to 9. 3. That the court erred in the instruction given to the jury, which covered the whole case.

Assignments of error are required to be more specific and definite; but, inasmuch as the defendant has reduced the several exceptions to a summary statement, the material questions will be re-examined.

Two principal allegations were required to be proved by the plaintiff in order to maintain the action, which was assumpsit to recover the assessment made by the order of the bankrupt court: 1. That the defendant was a stockholder in the company, and that he owned fifty shares of the capital stock. 2. That the assessment had been made by the assignee, as alleged in the declaration.

During the trial, the plaintiff offered evidence to prove that the defendant was a stockholder, as follows: 1. He offered the books of the corporation, in which the name of the defendant was entered as the owner of fifty shares. 2. He offered the stock-book of the company, with a duplicate of the stock certificate issued to the defendant, showing that he was the owner of the same number of the shares of the capital stock. 3. He introduced testimony to prove that the certificate was sent to the agents of the company, to be delivered to the defendant when he paid twenty per cent of the shares; and that he made the required payment. 4. He also introduced a receipt signed

by the defendant, showing that the company paid the defendant a dividend upon his stock.

Separate objection was made by the defendant to each of the offers of proof, which were admitted by the court, and the defendant excepted.

Taken as a whole, it is clear that the evidence offered was amply sufficient to warrant the jury in finding that the defendant was a stockholder, as alleged. Where the name of an individual appears on the stock-book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock, in a case where there is nothing to rebut that presumption; and, in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant. *Hoagland* v. *Bell*, 36 Barb. (N. Y.) 57; *Plank Road* v. *Rice*, 7 id. 162; *Turnpike Road* v. *Van Ness*, 2 Cranch, C. C. 451; *Mudgett* v. *Horrell*, 33 Cal. 25; *Coffin* v. *Collins*, 17 Me. 440; *Merrill* v. *Walker*, 24 id. 237.

Specific objection was also made to the admissibility of the act of incorporation of the company, on account of a verbal variance between the name of the company as given in the act from that set forth in the declaration; but the objection is without merit, as it presents no obstacle to a right understanding of the matter. *Dodge* v. *Barnes*, 31 Me. 290; *Chadsey* v. *McCreery*, 27 Ill. 253; *Ken. Seminary* v. *Wallace*, 15 B. Mon. (Ky.) 35.

Satisfactory proof having been exhibited that the company was duly incorporated and organized, it follows that the receipt of a dividend upon the shares standing upon the book of the company in the name of the defendant, when taken in connection with the other evidence introduced by the plaintiff, is conclusive to show that the assignment of error in that regard should be overruled. *Upton* v. *Hansbrough*, 10 N. B. R. 369; *In re Bank*, 12 N. Y. 17; *Alder* v. *Bank*, 13 Wis. 61; *Ward* v. *Manuf. Co.*, 16 Conn. 593.

Suppose that is so, still it is insisted by the defendant that the court below erred in admitting the record of the bankrupt proceedings in the bankrupt court for the northern district of Illinois. Several objections were taken to the admissibility of

that record, the principal one of which was that the copy of the record was not properly authenticated.

Proceedings in bankruptcy are deemed to be matters of record, but they are not required to be recorded at large. Instead of that, the requirement is that they shall be filed, kept, and numbered in the office of the clerk of the court, a short memorandum thereof being kept in books provided for the purpose; and the express provision of the act of Congress is that "copies of such records, duly certified under the seal of the court, shall in all cases be *prima facie* evidence of the facts therein stated." 14 Stat. 535; Rev. Stat., sect. 4992.

Records and the judicial proceedings of the courts of any State, the act of Congress provides, shall be proved or admitted in evidence in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. 1 Stat. 122; *Mills* v. *Duryee*, 7 Cranch, 481; *Christmas* v. *Russell*, 5 Wall. 290.

Both the Constitution and the act of Congress are limited in terms to the records and judicial proceedings of the State courts. Much discussion of that proposition is unnecessary, as it has long since been established by judicial decisions of high authority. *Adams* v. *May*, 33 Conn. 419; Conk. Treat. (5th ed.) 393; *Pepoon* v. *Jenkins*, 2 Johns. (N. Y.) Cas. 119; *Williams* v. *Wilkes*, 14 Pa. St. 228.

Beyond all doubt, the certificate of the clerk and the seal of the court is a sufficient authentication of the record of a judgment rendered in a State court, when offered in evidence in the Circuit Court sitting within the same State where the judgment was rendered. *Mewster* v. *Spalding*, 6 McLean, 24. Held, also, that such an authentication would be sufficient in the State court; and, if so, that it would also be good in the Circuit Court.

Art. 4, sect. 1, of the Constitution provides that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and that Congress may, by general laws, prescribe the manner in which such records shall be proved, and the effect thereof. Congress

has exercised that power, and provided in effect that they shall be authenticated by the attestation of the clerk under the seal of the court, with the certificate of the judge that the attestation is in due form. *Bissell* v. *Briggs*, 9 Mass. 461; *Bank of the United States* v. *Merchants' Bank of Baltimore*, 7 Gill (Md.), 415.

Records of State courts, in order that they may be admissible in the courts of other States, must be authenticated as required in that provision; but the act of Congress does not apply to the courts of the United States, nor to the public acts, records, or judicial proceedings of a State court to be used as evidence in another court of the same State. Conclusive support to that proposition is found in many decided cases in addition to those to which reference has already been made. *Jenkins* v. *Kinsley*, 3 Johns. (N. Y.) Cas. 474; *Adams* v. *Lesher*, 3 Blackf. (Ind.) 241; *Murray* v. *Marsh*, 2 Hayw. (N. C.) 290.

Circuit and district courts of the United States certainly cannot be considered as foreign in any sense of the term, either in respect to the State courts in which they sit, or as respects the Circuit or District Court of another circuit or district. On the contrary, they are domestic tribunals, whose proceedings all other courts of the country are bound to respect, when authenticated by the certificate of the clerk under the seal of the court, the rule being that the Circuit Court of one circuit or the District Court of one district is presumed to know the seal of the Circuit or District Court of another circuit or district, in the same manner as each court within a State is presumed to know and recognize the seal of any other court within the same State. *Womack* v. *Dearman*, 7 Port. (Ala.) 513.

Attempt was made in the Supreme Court of Massachusetts to exclude the record of a conviction in the criminal court, upon the ground that it was not duly authenticated, it appearing that it was certified by the clerk under the seal of the court without the certificate of the Chief Justice; but the Supreme Court held, Shaw, C. J., giving the opinion, that the copy of the proceedings of any court of record in that State, certified to be a true copy of the record of such court by the clerk of such court, under the seal thereof, is competent evidence of the existence of such record in every other judicial tribunal

in the Commonwealth. *Commonwealth* v. *Phillips*, 11 Pick. (Mass.) 30. Since that time, it has been held by that court that it is not necessary, in order to render a copy of a record of a court in that State competent evidence in another court of the State, that it should be an exemplified copy under the seal of the court, if it is duly certified by the clerk as a true copy of the record. *Chamberlin* v. *Ball*, 15 Gray (Mass.), 352; *Ladd* v. *Blunt*, 4 Mass. 402.

Three-quarters of a century ago, it was decided by the Supreme Court of New York that a record of a judgment rendered in the Circuit Court of the United States for the District of Massachusetts was admissible in evidence, it appearing that it was authenticated in the ordinary method practised in the courts of that Commonwealth; and they placed their decision upon two grounds: 1. That the record was the record of a Federal court. 2. That the act of Congress requiring exemplification did not apply in such a case. *Jenkins* v. *Kinsley*, Col. & C. (N. Y.) Cas. 136.

Viewed in the light of these authorities, to which many more might be added, we are all of the opinion with the Supreme Court of Connecticut, that it is not absolutely necessary that the record of a judgment should be authenticated in the mode prescribed by the act of Congress referred to, to render the same admissible in the courts of the United States; that the District Court of the United States, even out of the State composing the district, is to be regarded as a domestic and not a foreign court, and that the records of such a court may be proved by the certificate of the clerk under the seal of the court, without the certificate of the judge that the attestation is in due form. *Adams* v. *Way*, 33 Conn. 419; *Michener* v. *Payson*, 13 N. B. R. 50; *Mason* v. *Lawrason*, 1 Cranch, C. C. 190.

Bankruptcy proceedings are in all cases deemed matters of record, and are to be carefully filed and numbered; but they are not required to be recorded at large. Short memoranda of the same shall be made in books provided for the purpose, and kept in the office of the clerk; and the provision is that the books shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases

be *prima facie* evidence of the facts therein stated. 14 Stat. 536.

Suffice it to say, that the records of the bankruptcy proceedings admitted in evidence by the court below were authenticated in exact conformity with the directions of the Bankrupt Act, and were, in the judgment of the court, properly admitted in evidence; which is all that need be said in response to the fifth exception.

Exceptions were also taken to the rulings of the court in refusing to instruct the jury as requested by the defendant, and to the instruction given to the jury; but it is not necessary to give those exceptions a separate examination, for the reasons that the material questions involved are substantially the same as those presented in the exceptions to the rulings of the court, already sufficiently considered. Even suppose the assignment of errors presents all the questions involved in the exceptions, still it is clear that there is no error in the record.

Judgment affirmed.

INSURANCE COMPANY *v.* DAVIS.

1. *New York Life Insurance Company* v. *Statham et al.*, 93 U. S. 24, reaffirmed.
2. Where, as in this case, the legal effect of a policy of insurance is that the premiums shall be paid to the company at its domicile, the indorsement on the margin of the instrument, that "all receipts for premiums paid at agencies are to be signed by the president or actuary" of the company, is not an agreement on its part to vary the condition of the contract, and to make any particular agency the legal place of payment, but is merely a notice to the assured that he must not pay to an agent, or at an agency, without getting a receipt signed by the president or actuary.
3. A resident of Virginia, who had been before the war a local agent of a Northern insurance company, refused to receive the renewal premium, due Dec. 28, 1861, tendered him upon a policy of insurance upon the life of a resident of that State. His refusal was based upon the ground that he had received no renewal receipts from the company, without which he could not receive the premium, and that the money, if received, would be liable to confiscation by the Confederate government. The evidence further failed to show that the company had consented to his continuing to act as such agent during the war, or that he did so continue. *Held*, that, waiving the consideration of any question in regard to the validity of an insurance upon the life of an alien enemy, such tender of payment did not bind the company.
4. The effect of a state of war upon the question of agency discussed.

ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

This was an action on a policy of life insurance issued by the New York Life Insurance Company, a New York corporation, before the war, upon the life of Sloman Davis, a citizen and resident of the State of Virginia. The policy contained the usual condition, to be void if the renewal premiums were not promptly paid. They were regularly paid until the beginning of the war. The last payment was made Dec. 28, 1860. The company, previous to the war, had an agent, A. B. Garland, residing in Petersburg, Va., where the assured also resided; and premiums on this policy were paid to him in the usual way, he giving receipts therefor, signed by the president and actuary, as provided on the margin of the policy, which were usually sent to the agent about thirty days in advance of the maturity of the premium. About a year after the war broke out, the agent entered the Confederate service as a major, and remained in that service until the close of the war.

Offer of payment of the premium next due was made to the agent in December, 1861, which he declined, alleging that he had received no receipts from the company, and that the money, if he did receive it, would be confiscated by the Confederate government. A similar offer was made to him after the close of the war, which he also declined. He testified that he refused to receive any premiums, had no communication with the company during the war, and after it terminated did not resume his agency.

Sloman Davis died in September, 1867.

The plaintiff below was assignee of the policy, and claimed to recover the amount thereof, $10,000, upon the ground that he was guilty of no laches, and that at the close of the war the policy revived.

It is unnecessary to state, in detail, the proceedings at the trial. The plaintiff contended, and the judge instructed the jury, in substance, that they might infer from the evidence that the place of payment intended by the parties was at the residence of the plaintiff, and that, if the company did not furnish receipts to its agent, so that the premiums could be paid according to the terms of the policy, it was not the fault of the plaintiff; and, if he was ready and offered to pay his

premium to the agent, there could be no forfeiture of the policy, if within reasonable time after the war he endeavored to pay his premiums, and the company refused to receive them. On the other hand, the defendant contended that the war put an end to the agency of Garland, and the offer to pay the premium to him was of no validity, and the failure to pay rendered the policy void. This view was rejected by the court, and a verdict was rendered for the amount of the policy, less the amount of certain premium notes which had been given by the assured.

Judgment was rendered upon the verdict, and the company then brought the case here.

Mr. Matt. H. Carpenter for the plaintiff in error.

This case falls exactly within the principles declared in *New York Life Insurance Co.* v. *Statham et al.*, 93 U. S. 24, and the judgment below must be reversed. The outbreak of the war dissolved all executory contracts between citizens of one belligerent and those of the other, and put an end to all intercourse or dealings. *Matthews* v. *McStea*, 91 U. S. 7. The policy was, therefore, absolutely annulled, and no subsequent agreement between the assured and the company during the war could revive it. It follows that every agency of the company in any State declared to be in rebellion was terminated. The company could not authorize its agent to do what it was expressly forbidden to do by the President's proclamation of Aug. 16, 1861, issued in pursuance of the act of Congress of July 13 of that year.

But if the law were otherwise, there was no evidence from which the jury could find that the party to whom the renewal premium was tendered in December, 1861, was authorized by the company to act in its behalf after the commencement of the war. He refused the money, upon the ground that he had no authority to accept it.

Mr. Samuel B. Paul, contra.

Garland was duly appointed agent of the company, and acted as such. This authority was not revoked by the company after hostilities commenced. The presumption is, that the same relations continued between him and the company which had previously existed, and a payment or a tender of payment to him was as valid as it had been made to the com-

pany. His agency was not revoked by the war. *Fretz* v. *Storer*, 22 Wall. 198.

MR. JUSTICE BRADLEY delivered the opinion of the court.

It is obvious that this case is nearly on all-fours with that of *New York Life Insurance Co.* v. *Statham et al.*, 93 U. S. 24, decided by this court at the last term. As we still adhere to the views there expressed, we do not deem it necessary to reiterate them. But the questions which received special discussion on that occasion were, whether a failure to pay the stipulated premiums involved a forfeiture of the policy, although such failure was caused by the existence of the war; and what were the mutual rights of the parties consequent upon forfeiture under such circumstances. The point which is now most strenuously relied on, namely, the supposed power of the agent of a Northern company to receive premiums in a Southern State in insurrection after the war broke out, and the supposed right of a policy-holder to tender them to such agent, although involved in the case, was not specially adverted to in the opinion of the court. We propose to add some observations on this branch of the subject.

First, however, a few words with regard to the position that there was competent evidence for the jury to infer that the place of payment intended by the parties was the place of residence of the assured. This, we think, is entirely untenable. The legal effect of the policy itself was, that payment should be made to the company at its domicile. The indorsement on the margin, which is much relied on by the plaintiff's counsel, has no such effect as he attributes to it. It is in these words: "All receipts for premiums paid at agencies are to be signed by the president or actuary." This is simply a notice to the assured, that, if he shall pay his annual premium to an agent, or at an agency, he must not do so without getting a receipt signed by the president or actuary of the company. How this caution can possibly be construed into an agreement on the part of the company to make any particular agency the legal place of payment of premium it is difficult to see. The circumstances show nothing but the common case of the establishment of an agency for the mutual convenience of the parties,

and do not present the slightest ground for varying the legal effect of their written contract. We think, therefore, that the charge was erroneous on this point. Of course, we do not mean to be understood as holding, that, as long as an agency is continued, a tender to the agent would not be valid and binding on the company.

But we deem it proper to consider more particularly the question of agency, and the alleged right of tendering premiums to an agent, during the war.

That war suspends all commercial intercourse between the citizens of two belligerent countries or States, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years, that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition, it must follow that no active business can be maintained, either personally or by correspondence, or through an agent, by the citizens of one belligerent with the citizens of the other. The only exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment of debts to an agent of an alien enemy, where such agent resides in the same State with the debtor. But this indulgence is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war; though, if so transmitted without the debtor's connivance, he will not be responsible for it. Washington, J., in *Conn* v. *Penn*, Pet. C. Ct. 496; *Buchanan* v. *Curry*, 19 Johns. (N. Y.) 141. In the next place, in order to the subsistence of the agency during the war, it must have the assent of the parties thereto, — the principal and the agent. As war suspends all intercourse between them, preventing any instructions, supervision, or knowledge of what takes place, on the one part, and any report or application for advice on the other, this relation necessarily ceases on the breaking out of hostilities, even for the limited purpose before mentioned, unless continued by the mutual assent of the parties. It is not compulsory; nor can it be made so, on either side, to subserve the ends of third parties. If the agent continues to act as such, and his so acting is

subsequently ratified by the principal, or if the principal's assent is evinced by any other circumstances, then third parties may safely pay money, for the use of the principal, into the agent's hands; but not otherwise. It is not enough that there was an agency prior to the war. It would be contrary to reason that a man, without his consent, should continue to be bound by the acts of one whose relations to him have undergone such a fundamental alteration as that produced by a war between the two countries to which they respectively belong; with whom he can have no correspondence, to whom he can communicate no instructions, and over whom he can exercise no control. It would be equally unreasonable that the agent should be compelled to continue in the service of one whom the law of nations declares to be his public enemy. If the agent has property of the principal in his possession or control, good faith and fidelity to his trust will require him to keep it safely during the war, and to restore it faithfully at its close. This is all. The injustice of holding a principal bound by what an agent, acting without his assent, may do in such cases, is forcibly illustrated by Mr. Justice Davis, in delivering the opinion of this court in *Fretz* v. *Stover*, 22 Wall. 198. In that case, the agent had collected in Confederate funds the amount due on a bond. Having asserted that the agent had no authority to do this, the learned Justice adds: "If it were otherwise, then, as long as the war lasted, every Northern creditor of Southern men was at the mercy of the agent he had employed before the war commenced. And his condition was a hard one. Directed by his government to hold no intercourse with his agent, and therefore unable to change instructions which were not applicable to a state of war, yet he was bound by the acts of his agent in the collection of his debts, the same as if peace prevailed. It would be a reproach to the law, if creditors, without fault of their own, could be subjected to such ruinous consequences." These observations have a strong bearing upon the point now under consideration.

What particular circumstances will be sufficient to show the consent of one person that another shall act as his agent to receive payment of debts in an enemy's country during war, may sometimes be difficult to determine. Emerigon says, that

if a foreigner is forced to depart from one country in consequence of a declaration of war with his own, he may leave a power of attorney to a friend to collect his debts, and even to sue for them. Traité des Assurances, vol. i. 567. But though a power of attorney to collect debts, given under such circumstances, might be valid, it is generally conceded that a power of attorney cannot be given, during the existence of war, by a citizen of one of the belligerent countries resident therein, to a citizen or resident of the other; for that would be holding intercourse with the enemy, which is forbidden. Perhaps it may be assumed that an agent *ante bellum*, who continues to act as such during the war, in the receipt of money or property on behalf of his principal, where it is the manifest interest of the latter that he should do so, as in the collection of rents and other debts, the assent of the principal will be presumed, unless the contrary be shown; but that, where it is against his interest, or would impose upon him some new obligation or burden, his assent will not be presumed, but must be proved, either by his subsequent ratification, or in some other manner.

In some way, however it must appear, that the alleged agent assumed to act as such, and that the alleged principal consented to his so acting. It is believed that no well-considered case can be found anterior to these life-insurance cases which have arisen out of the late civil war, in which the existence or continuance of an agency, under the circumstances above referred to, have been established contrary to the assent of the alleged parties to that relation. *Conn* v. *Penn*, *supra*, is the leading authority on this subject in this country. The question in that case was whether the claimants of land in Pennsylvania, under contracts of purchase from the proprietaries (the Penns) before the revolutionary war, were entitled to an abatement of interest during the war; and Justice Washington held that this depended on the question whether, during the war, the proprietaries, being alien enemies, "had in the United States a known agent, or agents, authorized to receive the purchase-money and quit-rents due to them from the complainants," the vendees. To enable the parties to adduce proof on this point, the court allowed further evidence to be taken. The same thing was held, at the same term, in the

case of *Dennison et al.* v. *Imbrie*, 3 Wash. 396, where Justice Washington says: "We think that if the alien enemy has an agent in the United States, or if the plaintiff himself was in the United States, and either of these facts known to the debtor, interest ought not to abate." It is obvious that, in these cases, the judge assumed that the relation of agency, if it existed, did so with the mutual consent of the parties thereto. And the same observation, it is believed, may be made with regard to all other cases on the subject, except some that have been very recently decided.

The same inference may be deduced from the cases decided in this court when the subject of payment to agents in an enemy's country has been discussed. Amongst others we may refer to the following: *Ward* v. *Smith*, 7 Wall. 447; *Brown* v. *Hiatts*, 15 id. 177; *Montgomery* v. *United States*, id. 395; *Fretz* v. *Stover*, 22 id. 198.

In some recent cases in certain of the State courts of last resort, for whose decisions we always entertain the highest respect, a different view has been taken; but we are unable to concur therein. In our judgment, the unqualified assumption on which those decisions are based — namely, "once an agent always an agent;" or, in other words, that an agency continues to exist notwithstanding the occurrence of war between the countries in which the principal and the agent respectively reside — is not correct, and that the continuance of the agency is subject to the qualifications which we have stated above.

Now, in the present case, except at the very commencement of the troubles, before the President's proclamation of non-intervention had been issued, and when it was yet uncertain what the differences between the two sections would amount to, there is not the slightest evidence that the company authorized Garland to act for it at all; and the latter expressly refused to do so when requested, both on the ground of having received no receipts from the company (which were his only authority for receiving payments), and of the liability of the funds to be confiscated in his hands. The war suspended his agency for all active purposes, and it could not be continued even for the collection of premiums without the defendant's consent; and

this, so far as appears, was never given, either expressly or by subsequent ratification. Under these circumstances, it cannot be affirmed that the plaintiff could bind the defendant by a tender of payment to the supposed agent. However valid a payment may be, if made to an agent in time of war, where he consents to act as such, and has the assent of his principal in so acting, an offer of payment cannot have any force or effect if neither of these circumstances exist.

Waiving, therefore, the consideration of any question that may be made with regard to the validity of an insurance on the life of an alien enemy, we think that in the present case there was not the slightest foundation for the court to charge, as it did in effect, that a tender of the premium to Garland in Petersburg was a good tender, and binding on the company.

We do not mean to say, that if the defendant had continued its authority to the agent to act in the receipt of premiums during the war, and he had done so, a payment or tender to him in lawful money of the United States would not have been valid; nor that a stipulation to continue such authority in case of war, made before its occurrence, would not have been a valid stipulation; nor that a policy of life insurance on which no premiums were to be paid, though suspended during the war, might not have revived after its close. We place our decision simply on the ground that the agency of Garland was terminated by the breaking out of the war, and that, although by the consent of the parties it might have been continued for the purpose of receiving payments of premiums during the war, there is no proof that such assent was given, either by the defendant or by Garland; but that, on the contrary, the proof is positive and uncontradicted, that Garland declined to act as agent.

Judgment reversed, with directions to award a venire facias de novo.

MR. JUSTICE CLIFFORD dissented.

BEARD *v.* BURTS.

1. The acts of Congress, respectively approved March 3, 1863 (12 Stat. 756), and May 11, 1866 (14 id. 46), extend protection to all persons for acts they committed in subordination to the military authorities engaged in conducting the war, and confer upon them the same exemption from liability to suit which belonged to the President, the Secretary of War, and the department commanders.
2. Where a bill was filed in 1865 for an injunction against cutting wood on the complainant's land in Tennessee, and for an account of what had been already cut, and the defendant, answering, set up that he had cut the wood "as an authorized agent of the government of the United States, and for military purposes, under the direction and authority of the military authorities," and, in further answering, pleaded that he had a right to do so, as appeared by an order or authority from one D. V. Brown, wood agent of the United States military railroads, authorizing him to cut wood on said land, as follows: —

"KNOXVILLE, TENN., May 9, 1865.

"James S. Beard is hereby authorized to cut wood for the U. S. M. R. on the lands of Joseph Burts, John Lyle, Dillard Love, by order of the superintendent.

"D. V. BROWN, *Wood Agent.*"

— and the court, after finding that the defendant's answer was sustained by the proofs, entered a decree dismissing the bill, — *Held*, 1. That the facts so found were conclusive upon a bill of review alleging errors apparent on the face of the decree. 2. That it cannot be properly assumed that the paper signed D. V. Brown was all the evidence from which the court concluded that the defendant acted under the warrant of the military authorities of the government. 3. That as the wood was received by them and used for the military railroads, before operations for the suppression of the rebellion had ceased, the paper, although in form permissive only, was a sufficient justification and defence.

ERROR to the Supreme Court of the State of Tennessee.

Mr. A. G. Riddle for the plaintiff in error.

Mr. Robert G. Ingersoll, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

This was a bill of review, to which a demurrer was interposed by the defendant in the Chancery Court where it was filed; and, after hearing, the bill was dismissed. The decree of the Chancellor was then reversed by the Supreme Court of the State, the demurrer was disallowed, and, without any permission given to the defendant to answer, the decree in the original suit, which the bill sought to have reviewed, was vacated and annulled. The court then proceeded to decree against the

defendant Beard on the original cause of action, and remanded the case to the Chancery Court for an account. An account was accordingly ordered in that court, and a final decree was entered against the defendant, and subsequently affirmed by the Supreme Court. It is to this action that the present writ of error has been sued out.

We have not before us the record of the original suit, which was instituted in 1865, and in which a final decree against the plaintiff was made Nov. 27, 1868. All we can know of it is what we learn from the bill of review. From that it appears to have been a bill for an injunction against trespass and cutting wood upon the plaintiff's land, and for an account of what had already been cut. The defendant answered, admitting that he had cut one hundred and fifty-five and one-third cords of wood, and setting up in justification "that he cut it as an authorized agent of the government of the United States, and for military purposes, and under the direction and authority of the military authorities." In further answer, he averred "that he was protected by the order of the Secretary of War and the commanding general of Tennessee."

In still further answer, he pleaded that he had a right to cut wood on the land, as appeared by an order or authority from one D. V. Brown, wood agent of the United States military railroads, and directed to him, authorizing him to cut wood on said land, as follows: —

"KNOXVILLE, TENN., May 9, 1865.

"James S. Beard is hereby authorized to cut wood for the U. S. M. R. on the lands of Joseph Burts, John Lyle, Dillard Love, by order of the superintendent.

"D. V. BROWN, *Wood Agent.*"

To this answer no replication appears to have been filed; but evidence was submitted, and, after hearing, the Chancellor found that Beard's plea of justification under the laws of the United States, and by military authority exercised thereunder, was sustained, and that he had acted in pursuance to such military authority. The plaintiff's bill was, therefore, dismissed, and no appeal was perfected.

So much is set forth in the bill of review, in which it is also alleged that there was error in the original decree. That

assigned, and the only one that requires notice, is that the pretended authority from D. V. Brown, wood agent, was void, and gave the defendant no authority to cut the wood, as there was no order from the commanding general of the department or Secretary of War authorizing the same, nor any act of Congress authorizing the trespass at the time and place when and where committed.

Such was the case as presented to the Chancellor by the demurrer to the bill, and such was the case submitted to the Supreme Court on the appeal taken from the Chancellor's decree dismissing it.

It is obvious the only important inquiry respects the validity of the authority under which the defendant had acted. It claimed to be a privilege or immunity under the laws of the United States. It was found to be authentic by the Chancellor in his original decree, and its authenticity is not denied in the bill of review. That, therefore, is not open to debate. To sustain a bill of review, there must be errors of law apparent on the face of the decree, or some new matters of fact material in themselves, and discovered after the rendition of the decree. This is the general rule in equity, and it is the rule in Tennessee, declared to be such in the present case. The facts are not open for a re-trial, unless the bill asserts that new evidence has been discovered, not obtainable before the first trial by the exercise of reasonable diligence. The conclusions of fact of the court or Chancellor are conclusive. In view of what the Chancellor found in the original case, it would seem, therefore, his conclusion, that the defendant in cutting the wood was acting under authority from the military authorities, could not be reviewed and set aside. It was a conclusion of fact deduced from evidence he had before him. But the Supreme Court, while admitting that the original decree could not be said to contain error of law upon its face, took the position that the pleadings in the original cause might be looked to; and, if the conclusions drawn from admitted facts showed error in law, a bill of review would lie. Accordingly, the court assumed that the paper signed "D. V. Brown, wood agent," was all the evidence from which the Chancery Court concluded that the defendant acted under the authority or warrant of the military authorities

of the government provided for by the act of Congress, and held that evidence insufficient and not a justification. For this reason the decree of the Chancery Court dismissing the bill of review was reversed, and so, also, was the decree dismissing the original bill.

We think this was an error. The act of Congress of May 11, 1866, 14 Stat 46, enacted that any acts done or omitted to be done during the rebellion by any person under and by virtue of any order, written or verbal, general or special, issued by the President, or Secretary of War, or by any military officer of the United States holding the command of the department, district, or place where such acts are done or omitted, shall, for the purposes of defence, come within the purview of the act of March 3, 1863. 12 id. 756. The fourth section of the latter act made the order of the President, or under his authority, a defence in all courts to any action for acts done or omitted to be done under or by virtue of such order, or under color of any law of Congress. And the second section of the act of 1866 enacted that, when the order is in writing, it shall be sufficient to produce in evidence the original, with proof of its authenticity, or a certified copy thereof, or, if sent by telegraph, the production of the telegram purporting to emanate from such military officer shall be *prima facie* evidence of its authenticity, or, if the original of such order or telegram is lost, or cannot be produced, secondary evidence thereof shall be admissible, as in other cases.

Now, that the defendant's cutting the wood was under such an order, was, as we have seen, distinctly found as a fact by the Chancellor, and nothing in his decree shows that he found it on the evidence of the paper signed "D. V. Brown, wood agent," alone. No assumption that he did can be justified; and, if it could be, the order, we think, was *prima facie* sufficient. It purported to have been issued by a wood agent for military uses, namely, for the use of the military railroads; and the wood cut was received by the military authorities. It is a legitimate presumption that agents who act for and on behalf of an army in the field are acting under the authority of its commander; and it is but just to the learned court to say that it made no attempt to review the finding of the authenticity of the Brown

paper. They confined their review very properly to inquiring what was the meaning of the order, and they held it no justification of the defendant because its terms were not compulsory, but only permissive. Their language was, "There can be no pretence, upon the facts set forth in the pleadings, that any such thing as military compulsion existed in the case, for the paper only imports on its face a permission to do the act complained of;" adding, "and even this is not license to do it emanating from any recognized military authority." Hence, said the court, "we conclude that there is error of law in the conclusion of the Chancellor upon the facts."

If in saying the order or permission or license did not emanate from any recognized military authority, the court meant to be understood as itself finding a fact, the determination is a finding without evidence, and in opposition to a finding made on evidence confessedly conclusive. But probably the court did not intend to be so understood.

The real question involved, and the only one the court could consider in the case, therefore, was whether the paper was ineffective as a defence merely because it was in form permissive only. And upon this question we are unable to concur in opinion with the Supreme Court of the State. While it may be conceded that permission to do an act is not compulsion, and that the acts of March 3, 1863, and May 11, 1866, afford no protection to those acting voluntarily and for their own benefit, the pleadings show this to have been no such case. The wood was cut for the military railroads, under military authority, and it was received by the military authorities before military operations in suppression of the rebellion had ceased. The form of the order we regard as immaterial. The plain purpose of the acts of Congress was to extend protection to all persons who might act in subordination to the military authorities engaged in conducting the war. Congress purposed, we think, to confer upon them the same exemption from liability to suit which belonged to the President, the Secretary of War, and the department commanders. The orders of which the acts speak are military orders, and a large proportion of such orders, it is well known, are merely permissive in form. They necessarily leave much to the discretion of those to whom they

are addressed. We cannot doubt that Congress had such orders in view, and that its action was intended to protect against civil suits those who might do acts either commanded or authorized by them.

The decree of the Supreme Court of Tennessee must, therefore, be reversed, and the record remitted with instructions to reverse the last decree of the Chancellor, and direct him to dismiss the bill of review; and it is *So ordered.*

RAILROAD COMPANY *v.* JONES.

1. Negligence may consist in either failing to do what, under the circumstances, a reasonable and prudent man would ordinarily have done, or in doing what he would not have done.
2. A. was one of a party of men employed by a railroad company in constructing and repairing its roadway. They were usually conveyed by the company to and from the place where their services were required, and a box-car was assigned to their use. Although on several occasions forbidden to do so, and warned of the danger, A., on returning from work one evening, rode on the pilot or bumper of the locomotive, when the train, in passing through a tunnel, collided with cars standing on the track, and he was injured. There was ample room for him in the box-car. All in it were unhurt. *Held*, 1. That, as A. would not have been injured had he used ordinary care and caution, he is not entitled to recover against the company. 2. That the knowledge, assent, or direction of the agents of the company as to what he did at the time in question is immaterial. The company, although bound to a high degree of care, did not insure his safety.

ERROR to the Supreme Court of the District of Columbia.

This was an action by Jones against the Baltimore and Potomac Railroad Company, to recover damages for an injury received on the road of the company. Judgment was rendered in his favor, and the company brought the case here.

The facts are fully stated in the opinion of the court.

Mr. Enoch Totten for the plaintiff in error.

Mr. Edward C. Carrington and *Mr. Campbell Carrington*, *contra.*

MR. JUSTICE SWAYNE delivered the opinion of the court.

The defendant in error was the plaintiff in the court below. Upon the trial there, he gave evidence to the following effect:

For several months prior to the 12th of November, 1872, he was in the service of the company as a day-laborer. He was one of a party of men employed in constructing and keeping in repair the roadway of the defendant. It was usual for the defendant to convey them to and from their place of work. Sometimes a car was used for this purpose; at others, only a locomotive and tender were provided. It was common, whether a car was provided or not, for some of the men to ride on the pilot or bumper in front of the locomotive. This was done with the approval of Van Ness, who was in charge of the laborers when at work, and the conductor of the train which carried them both ways. The plaintiff had no connection with the train. On the 12th of November before mentioned, the party of laborers, including the plaintiff, under the direction of Van Ness, were employed on the west side of the eastern branch of the Potomac, near where the defendant's road crosses that stream, in filling flat cars with dirt and unloading them at an adjacent point. The train that evening consisted of a locomotive, tender, and box-car. When the party was about to leave on their return that evening, the plaintiff was told by Van Ness to jump on anywhere; that they were behind time, and must hurry.

The plaintiff was riding on the pilot of the locomotive, and while there the train ran into certain cars belonging to the defendant and loaded with ties. These cars had become detached from another train of cars, and were standing on the track in the Virginia avenue tunnel. The accident was the result of negligence on the part of the defendant. Thereby one of the plaintiff's legs was severed from his body, and the other one severely injured. Nobody else was hurt, except two other persons, one riding on the pilot with the plaintiff, and the other one on the cars standing in the tunnel.

The defendant then gave evidence tending to prove as follows: About six weeks or two months before the accident, a box-car had been assigned to the construction train with which the plaintiff was employed. The car was used thereafter every day. About the time it was first used, and on several occasions before the accident, Van Ness notified the laborers that they must ride in the car and not on the engine; and the plaintiff in

particular, on several occasions not long before the disaster, was forbidden to ride on the pilot, both by Van Ness and the engineer in charge of the locomotive. The plaintiff was on the pilot at the time of the accident, without the knowledge of any agent of the defendant. There was plenty of room for the plaintiff in the box-car, which was open. If he had been anywhere but on the pilot, he would not have been injured. The collision was not brought about by any negligence of the defendant's agents, but was unavoidable. The defendant's agents in charge of the two trains, and the watchman in the tunnel, were competent men.

The plaintiff, in rebuttal, gave evidence tending to show that sometimes the box-car was locked when there was no other car attached to the train, and that the men were allowed by the conductor and engineer to ride on the engine, and that on the evening of the accident the engineer in charge of the locomotive knew that the plaintiff was on the pilot.

The evidence being closed, the defendant's counsel asked the court to instruct the jury as follows: "If the jury find from the evidence that the plaintiff knew the box-car was the proper place for him, and if he knew his position on the pilot of the engine was a dangerous one, then they will render a verdict for the defendant, whether they find that its agents allowed the plaintiff to ride on the pilot or not."

This instruction was refused, and the defendant's counsel excepted.

Three questions arise upon the record: —

1. The exception touching the admission of evidence.

2. As to the application of the rule relative to injuries received by one servant by reason of the negligence of another servant, both being at the time engaged in the same service of a common superior.

3. As to contributory negligence on the part of the plaintiff.

We pass by the first two without remark. We have not found it necessary to consider them. In our view, the point presented by the third is sufficient to dispose of the case.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under

the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. See Wharton on Negligence, sect. 1, and notes.

One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: 1. Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or, 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened.

In the former case, the plaintiff is entitled to recover. In the latter, he is not. *Tuff* v. *Warman*, 5 C. B. N. S. 573; *Butterfield* v. *Forrester*, 11 East, 58; *Bridge* v. *Grand Junction Railroad Co.*, 3 M. & W. 244; *Davis* v. *Mann*, 10 id. 546; *Clayards* v. *Dethick*, 12 Q. B. 439; *Van Lien* v. *Scoville Manufacturing Co.*, 14 Abb. (N. Y.) Pr. N. S. 74; *Ince* v. *East Boston Ferry Co.*, 106 Mass. 149.

It remains to apply these tests to the case before us. The facts with respect to the cars left in the tunnel are not fully disclosed in the record. It is not shown when they were left there, how long they had been there, when it was intended to remove them, nor why they had not been removed before. It does appear that there was a watchman at the tunnel, and that he and the conductor of the train from which they were left, and the conductor of the train which carried the plaintiff, were all well selected, and competent for their places. For the purposes of this case, we assume that the defendant was guilty of negligence.

The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-car. He should have taken his place there. He could have gone into the box-car in as little,

if not less, time than it took to climb to the pilot. The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box-car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as any thing short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down. *Hickey* v. *Boston & Lowell Railroad Co.*, 14 Allen (Mass.), 429; *Todd* v. *Old Colony Railroad Co.*, 3 id. 18; S. C. 7 id. 207; *Gavett* v. *M. & L. Railroad Co.*, 16 Gray (Mass.), 501; *Lucas* v. *N. B. & T. Railroad Co.*, 6 id. 64; *Ward* v. *Railroad Company*, 2 Abb. (N. Y.) Pr. N. S. 411; *Galena & Chicago Union Railroad Co.* v. *Yarwood*, 15 Ill. 468; *Dogget* v. *Illinois Central Railroad Co.*, 34 Iowa, 284.

The plaintiff was not entitled to recover. It follows that the court erred in refusing the instruction asked upon this subject. If the company had prayed the court to direct the jury to return a verdict for the defendant, it would have been the duty of the court to give such direction, and error to refuse. *Gavett* v. *M. & L. Railroad Co.*, *supra*; *Merchants' Bank* v. *State Bank*, 10 Wall. 604; *Pleasants* v. *Fant*, 22 id. 121.

Judgment reversed, and the cause remanded with directions to issue a venire de novo, and to proceed in conformity with this opinion.

WILLIAMS *v.* MORRIS.

1. Under the laws of Maryland prevailing in the District of Columbia, an interest in lands made by livery and seisin only, or by parol, except leases not exceeding the term of three years, has only the force and effect of an estate at will.
2. The court applies to this case the doctrines announced in *Barry* v. *Coombe*, 1 Pet. 640, and *Purcell* v. *Miner*, 4 Wall. 513, as to what must be set forth in a written contract for the sale of lands, and what is sufficient part performance of a parol contract for such sale to take it out of the Statute of Frauds.
3. There is nothing in this case to bring it by analogy within the Statute of Limitations which govern courts of law.

APPEAL from the Supreme Court of the District of Columbia.

In February, 1856, James Williams leased by parol certain land in the city of Washington, the legal title to which stood in his name, to Thomas B. Florence, with the privilege by the latter of purchasing it for $6,000. In the following month, Florence entered into possession as tenant of said James, and made certain improvements. In October, 1856, Florence, having learned that the heirs of John Williams were entitled to an undivided moiety of the land, entered, with the consent of James, into a written contract with them for the purchase of their interest, which by decree was conveyed to him in 1864.

In April, 1853, and April, 1854, the property was sold for taxes. One Ingle purchased it, and, after the period allowed by law for redemption had expired, received deeds therefor from the corporation of Washington, dated June 11, 1857. Florence, after consultation with said James, paid Ingle the amount of the taxes and accrued expenses Dec. 29, 1859, and some months thereafter took from him a quitclaim for the property, which, with the corporation deeds to Ingle, he caused to be recorded. From March 1, 1856, to June, 1861, he remained in the personal occupation of the property. He then rented it to the United States for $175 per month, which rent he received until the commencement of this suit, Aug. 24, 1867, by the complainants, some of whom are minors. They are the heirs-at-law of James Williams, who died intestate Aug. 15, 1862.

The bill, after setting up the lease by James Williams to Florence, alleged, *inter alia*, that the defendant during his tenancy under the lease suffered by his default the property to be sold for taxes, and, having acquired the tax title, disclaimed his tenancy, and set up an adverse title in himself. It therefore prayed that Florence be decreed to convey to the complainants said tax title, and to account for a moiety of the rents and profits.

The defendant answered, setting up his parol contract with James to purchase, his subsequent discovery of the interest of the heirs of John in a moiety of the property, the fact of his purchase with the consent of James of that moiety, and its conveyance to him, and denied that thereafter he stood in the relation of tenant or paid rent; but, on the contrary, he paid all taxes and charges, and, with the full knowledge and consent of said James, acted generally as owner, and made repairs. He also alleged that said James had, by certain deeds of trust executed in 1843 and 1851, incumbered his moiety; and by another, executed in 1853, the whole property, in a sum beyond the amount of purchase-money and more than double the share of James for his moiety. That, notwithstanding said incumbrances, the defendant made various payments to said James, amounting from $1,500 to $2,000, on account of said purchase, but was unable to procure a settlement. The defendant filed with his answer the following receipts: —

"Received of Thomas B. Florence forty dollars, to be accounted for in the settlement for the purchase of the property at the corner of Pennsylvania Avenue and 17th Street, now in his occupancy, and sold by me to him.

"JAS. WILLIAMS.

"WASHINGTON, Jan. 1, 1857."

"WASHINGTON, May 1, 1857.

"Received of Thomas B. Florence one hundred dollars, on account of purchase of building 17th St. & Pa. Av. $100.

"JAS. WILLIAMS."

He also denied that he had suffered the property to be sold for taxes, but that said sales were for taxes due for the eight years preceding his entry.

On the 11th of March, 1873, the complainants were allowed

to amend their bill by alleging that Florence, in October, 1856, purchased the undivided moiety of the heirs of John Williams, and thereby became tenant in common with James Williams; that, after said relation of tenants in common thus began, Florence purchased from Ingle the outstanding tax title, which was in all respects regular and according to law, and obtained from him a conveyance of the premises and of the full title thereof, which conveyance and title said Florence claimed to hold as his own, to the exclusion of the complainants.

The answer to the amended bill admitted the purchase in October, 1856, of the claim of the heirs of John Williams under the circumstances set forth in the answer to the original bill; denied that such purchase created, or was intended to create, a tenancy in common with James Williams; and averred that after the same the defendant held and enjoyed the premises as the exclusive and absolute owner. It further denied the validity of the tax title; averred it to be void on its face, and that it was bought, with the knowledge and approval of James Williams, to relieve the property from the outstanding charge for taxes; and that a deed was taken from Ingle, because one to him had been entered on the books of the city; and that the complainants' allegation of the validity of the tax title was simply a pretext whereby to gain some color for the asserted jurisdiction of a court of equity.

At the final hearing in special term, April 8, 1873, the court decreed that the tax title purchased by Florence from Ingle was taken by him in trust for the complainants to the extent of one undivided moiety thereof; that the parol purchase set up by him was void under the Statute of Frauds; and that, as there was no part performance to take it out of the statute, he should convey to the complainants said tax title to said moiety, and account for rents and profits.

Florence then appealed to the general term, where the decree of the special term was reversed and the bill dismissed. The complainants then brought the case here.

Florence having died *pendente lite*, Morris, his executor, was substituted in his stead.

The assignment of errors and other facts in the case are set forth in the opinion of the court.

Mr. Richard T. Merrick and *Mr. William A. Meloy* for the appellants.

The original lease in March, 1856, being merely by parol, was inoperative after three years. When, therefore, Florence terminated his personal occupancy of the premises in June, 1861, and with it the relation of landlord and tenant, he became as to one undivided moiety of them the bailiff of James Williams, and liable to account under the statute of 4th Anne, c. 16, sect. 27. This alone would have established the jurisdiction of a court of equity over the case. But, in addition to that, Florence, by taking the conveyance in his own name from Ingle, committed a breach of trust and a fraud upon his co-tenant.

The tax title can afford no defence. The defendant's admission of the irregularity of the sale is conclusive, in the absence of proof by the complainants to the contrary. 3 Bl. Com. 451.

But even if the tax sale was valid, Florence, so far as one undivided moiety of the land was concerned, took the title in trust for James Williams. *Rothwell* v. *Dewees*, 2 Black, 613; *Van Horne* v. *Fonda*, 5 Johns. (N. Y.) Ch. 388; *Lewis* v. *Robinson*, 10 Watts (Pa.), 354; 1 Story, Eq., sect. 466; 1 Washburn, Real Prop. 430.

The memorandum set up by the defendant to take his alleged contract of purchase out of the operation of the Statute of Frauds is fatally defective. *Boydell* v. *Drummond*, 11 East, 157; *Huddlestone* v. *Briscoe*, 11 Ves. 591. The price to be paid, and a definite description of the property, are material parts, and cannot be proved by parol. *Elmore* v. *Kingscote*, 5 Barn. & Cress. 583; *Taney* v. *Batchell*, 9 Gill (Md.), 205; *Tallman* v. *Franklin*, 14 N. Y. 584; 1 Greenl. Evid., sect. 268; 2 Story, Eq. Jur., sects. 765–767. Whether it be set up as a defence, or as a ground for specific performance, the rules are the same. Browne, Frauds, sects. 122, 122 *a*, 131; *Carrington* v. *Roots*, 2 Mee. & W. 248; *Reede* v. *Lamb*, 6 Exch. 130. And a court of equity will not give relief, unless all the essential terms of the parol agreement are established by satisfactory proof, and the part performance has been of such a kind that to refuse relief would unavoidably operate as a fraud upon

the party. *Clinan* v. *Cooke*, 1 Sch. & Lef. 41; *Galbreath* v. *Galbreath*, 5 Watts (Pa.), 150; *Purcell* v. *Miner*, 4 Wall. 513; *Caldwell* v. *Carrington*, 9 Pet. 86; 3 Phil. Evid. 351; *Small* v. *Owings*, 1 Md. Ch. 364; *Beard* v. *Linthicum*, id. 345; *Elmore* v. *Kingscote*, 5 Barn. & Cress. 583; 1 Greenl. Evid., sect. 268; *Owings* v. *Baldwin*, 1 Md. Ch. 123; 2 Story, Eq., sects. 764–767; *Phillips* v. *Thompson*, 1 Johns. (N. Y.) Ch. 131; *Taney* v. *Batchell*, *supra*. The part performance which takes the case out of the statute does not consist in the payment of money, but in the delivery of the possession in pursuance of the contract, with a view to the performance of it. *Caldwell* v. *Carrington*, 9 Pet. 103; *Christy* v. *Barnhart*, 14 Pa. 260; *Brawdy* v. *Brawdy*, 7 id. 157; *Phillips* v. *Thompson*, 1 Johns. (N. Y.) Ch. 149; *Parkhurst* v. *Van Cortlandt*, id. 273. Possession by a tenant is not sufficient, 1 Sugden, Frauds, 149, 162; nor is that by a tenant in common, however exclusive and notorious. *Galbreath* v. *Galbreath*, 5 Watts (Pa.), 146.

The expenditures for permanent improvements must have been made solely on the faith of the contract of sale, and the possession taken with exclusive reference to it. *Owings* v. *Baldwin*, *supra;* 2 Story, Eq. Jur., sects. 763, 764; *Moale* v. *Buchanan*, 11 Gill & J. (Md.) 314; *Caldwell* v. *Carrington*, *supra*.

The rulings in regard to laches, staleness, or lapse of time have no application to this case. *Badger* v. *Badger*, 2 Wall. 87.

Mr. Walter D. Davidge, *contra*.

The bill of the complainants should have been dismissed. It was not filed until nearly ten years after the purchase complained of, and nearly five years after the death of James Williams. There is no allegation of fraud, and no attempt to explain the delay. *Marsh* v. *Whitmore*, 21 Wall. 178; *Badger* v. *Badger*, 2 id. 87; *Harwood* v. *Railroad Company*, 17 id. 78; *The Key City*, 14 id. 653; *Twin-Lick Oil Company* v. *Marbury*, 91 U. S. 587.

Whilst a tenant cannot dispute the title of his landlord, he may show that it has expired or become extinguished. Taylor, Land. and Ten., sect. 629, and cases cited. When the reversion is sold under execution, he may buy it, and set up against the landlord the title so acquired. *Nellis* v. *Lathrop*, 22 Wend.

(N. Y.) 121; *Jackson* v. *Rowland*, 6 id. 666; *Depard* v. *Walbridge*, 15 N. Y. 374. When not under obligation to pay taxes, he may even buy at a tax sale. Cooley on Taxation, 345, 346. And the title so acquired, if the proceedings conformed to the statute, extinguishes his former relation to the landlord. *Kirkpatrick* v. *Mathiot*, 4 Watts & S. (Pa.) 251; *Lewis* v. *Robinson*, 10 Watts (Pa.), 354; *Watkins* v. *Eaton*, 30 Me. 529; *Reinboth* v. *The Zerbe Run Improvement Co.*, 29 Pa. 139.

The averment of the validity of the tax title is binding on the complainants. They can recover only *secundum allegata et probata;* and, if that title be invalid, there is no ground for the exercise of equitable jurisdiction. *Ewing* v. *St. Louis*, 5 Wall. 413; *Dows* v. *Chicago*, 11 id. 108; *Hannewinkle* v. *Georgetown*, 15 id. 547; *Scott* v. *Onderdonk*, 14 N. Y. 9; *Cox* v. *Clift*, 2 id. 118; *Heywood* v. *The City of Buffalo*, 14 id. 534; *Ward* v. *Dewey*, 16 id. 519; *Piersoll* v. *Elliott*, 6 Pet. 95.

The two receipts signed by James Williams contain all the requisites of the note or memorandum under the Statute of Frauds, except that of price, and are *prima facie* evidence of a sale legally made. *Slatterie* v. *Pooley*, 6 Mee. & W. 663; 1 Phil. Evid. (4th Am. ed. 1859), pp. 422–424, where the authorities are collected; 1 Taylor, Evid., p. 413, sect. 381; Best, Evid., sects. 525, 526.

The English rule has been followed in America. *Smith* v. *Palmer*, 6 Cush. (Mass.) 513; *Loomis* v. *Wadhams*, 8 Gray (Mass.), 557; *Taylor* v. *Peck*, 21 Gratt. (Va.) 11.

The particulars of the contract are not involved in this suit. The controlling question is whether Florence bought at all, not upon what terms. The *factum probandum* is the fact of purchase, and the contract is wholly collateral. *Rex* v. *Inhabitants of Holy Trinity*, 7 Barn. & Cress. 611; *Doe* v. *Harvey*, 8 Bing. 239, 241; *Spiers* v. *Willson*, 4 Cranch, 398; 1 Greenl. Evid., sects. 96, 97; 1 Taylor, Evid., sect. 376; *Taylor* v. *Peck*, 21 Gratt. (Va.) 11.

Parol contracts do not involve any violation of law. Courts of equity refuse to extend their aid to rescind them merely because they are not in writing. Browne, Frauds, sect. 123, and cases cited; id., sects. 129–131; *Abbott* v. *Draper*, 4 Den. (N. Y.) 51; *Cope* v. *Williams*, 4 Ala. 362.

The court is asked to decree that a vendee acquiring in good faith a title necessary to protect the interests of himself and his vendor, is a trustee for the heirs-at-law, who, after the lapse of eleven years, undertake to repudiate the agreement of their ancestor.

Had he attempted by means of the tax title to escape his obligations as vendee, he could properly be held a trustee as to the unpaid purchase-money. The purchase-money, however, deducting the mortgages, has been paid, and he offers to account; and, besides, the bill is in repudiation and not affirmance of the contract.

The question is, then, whether, after such a vendee has obtained a perfect title which he holds in subordination to the parol contract, he can, without any imputation of fraud, be held a trustee, except as to his obligations under that contract. That he cannot be so held is plain, in principle and upon authority.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Sufficient appears to show that the complainants are the heirs-at-law of James Williams, who died intestate Aug. 16, 1862, seised in fee of an undivided moiety of lot 1 in square 160 on the plan of the city of Washington, bounded as described in the bill of complaint: and they allege that their intestate, six years before his decease, acting for himself and for the heirs of his brother previously deceased, who in his lifetime owned the other moiety of the premises, rented the whole lot to the first-named respondent for the yearly sum of $600; that the rent was subsequently increased, and that the lessee has ever since remained in the possession of the undivided moiety which belonged to the intestate, and that a large amount of the rent is in arrear, the respondent having paid only an inconsiderable amount of the same to the lessor during his lifetime, and nothing to the complainants since his decease.

Superadded to that, the charge of the complainants is that the respondent, while so in possession of the premises as tenant, did by his own default suffer the taxes assessed on the lot to remain unpaid, that the premises were sold at a tax sale, and that he claims to hold the same by virtue of that sale: but

they allege that the title, if any, acquired to the moiety in question inured to their benefit; and they further show that the respondent has recently, in violation of his duty as tenant, repudiated his tenancy, and claims title to the premises under some pretended contract with the lessor in his lifetime for the purchase of the same, all of which claim the complainants aver is unfounded.

Based upon these allegations, the complainants allege that the respondent has terminated his tenancy; and they charge that he has ever since held the property, and received from the United States large rents for the same, for which he is justly accountable; and they pray for an account of all moneys due for such rent to them and to the widow of the deceased lessor, and that he be decreed to convey to the complainants all title to the moiety of the premises he acquired by the tax sale, and for general relief.

Service was made, and the first-named respondent appeared and filed an answer, setting up several defences. Proofs were taken on both sides, and the court at special term entered a decree in favor of the complainants. Due appeal was taken by the respondent to the general term; when both parties were again heard, and the Appellate Court reversed the decree entered at the special term, and dismissed the bill of complaint.

From that decree the complainants appealed to this court, and now assign the following errors: 1. That the court erred in finding, as matter of fact, that there was any contract made by the intestate in his lifetime for the sale of his moiety of the premises. 2. That the court erred in giving effect to the alleged contract, as it was within the Statute of Frauds. 3. That the court erred in refusing to allow the complainants to contribute to the payment of the tax debt to relieve their title from the cloud of the tax sale. 4. That the court erred in not requiring the respondent to account for the rents and profits.

Prior to the origin of the present controversy, the premises, with the building thereon standing, had been the partnership property of the two brothers named in the bill of complaint. Possession of the premises was taken by the respondent, and he proceeded to repair the building, and expended several hundred dollars in fitting up the lower story of the same as an office for

the insurance company of which he was president. Six months later or more, the respondent entered into a formal written contract with the heirs of the other deceased owner; whereby they agreed to sell and convey to him the other moiety of the premises, and he agreed to purchase the same for the sum of $3,000, to be paid $1,000 in cash and the rest in notes.

Corporation taxes for two years — to wit, for the years 1853 and 1854 — not having been paid, the proper authorities sold the premises for the payment of the same; and the record shows that one John P. Ingle became the purchaser at each of the sales, and that the right of redeeming the property had expired before the respondent went into possession. Deeds of the premises were subsequently executed, and delivered to the respondent; but he did not at the time put them on record, probably for the reason that the sales were irregular and that the deeds conveyed no valid title.

Negotiations subsequently ensued between the respondent and the purchaser of the premises at the tax sales, which resulted, with the approval of the lessor, in an arrangement that the respondent should pay the amount of the taxes and expenses and take up the tax deeds; and the evidence shows that the arrangement was carried into effect.

Nothing remained in that regard for substantial controversy; but the respondent six months thereafter induced the purchaser at the tax sales to give him a quitclaim deed of the whole lot, and at a still later period put all three deeds on record, showing the title to the entire premises in himself. Throughout the whole period, the respondent continued to occupy the premises, until June, 1861, when he rented the same to the United States at $175 per month; which rental he has since received.

Viewed in the light of these suggestions, much discussion of the title of the complainants, irrespective of the defences set up in the answer, is unnecessary; as it is obvious that they are entitled to a decree in their favor, unless the defences or some one of them can be sustained.

Three of the defences set up in the answer will be separately considered: 1. That the respondent was lawfully in possession of the lot with the tenement thereon, under a parol contract with

the complainants' intestate for the purchase and conveyance of his moiety of the premises. 2. That the pretended claim set up by the complainants is stale, and ought not to receive the countenance of the court of equity as the ground for the relief prayed. 3. That the cause of action set up in respect to the matters alleged, if any, occurred more than three years before the filing of the bill of complaint or the service of process; and that the respondent did not, at any time within three years next before the filing of the bill or the service of process, agree to come to any account or pay any sum of money to the complainants by reason of the matters therein charged.

Briefly stated, the matters alleged in the answer in support of the first defence are, that the respondent, in the month of February, 1856, entered into a contract with James Williams, under which he rented the premises at the rate of $650 a year, with the right thereafter to purchase the same for the sum of $6,000, the lessor representing at the time that he was the sole owner of the same; and that he, the respondent, entered into the possession of the lot and tenement, and proceeded to make extensive improvements and alterations in the tenement; that six months later he learned, to his great surprise, that the heirs of John Williams, deceased, were entitled to a moiety of the estate; and that he, the respondent, in order to confirm his title, and at the instance and with the approval of his lessor, entered into a contract with the heirs of the deceased owner, whereby one-half of the purchase-money was agreed to be paid to them as such owners of the moiety which belonged to their intestate in his lifetime; and he also alleges that, on the 22d of October, 1856, he delivered to their attorney two checks (each for $500), and four promissory notes (each for the sum of $500), in payment for the moiety of the property to which those parties were entitled.

Apart from that, the respondent alleges in his answer that the premises were heavily incumbered by mortgages; and that at the time or before the date of the contract for the purchase of the other moiety it was further agreed, between him and the owner of the moiety now in question, that he, the respondent, should purchase the same, in pursuance of the original contract,

for the sum of $6,000, and that the grantor should be entitled to a moiety only of the purchase-money.

Two contracts are, therefore, alleged for the sale and purchase of the premises; and it is obvious that they are widely different in form and substance. As alleged, the first is for the purchase of the entire lot and tenement; and the second is for the purchase of the moiety only which belonged to the complainants' intestate. Under the first contract, the entire consideration was to be paid to the party contracting to make the conveyance; but by the terms of the second, one-half only of the consideration was to be paid to that party for his benefit, the clear inference being that the purchaser had previously purchased or contracted to purchase the other moiety of the heirs of the deceased owner.

Evidence to show that the first contract, if made, was ever fulfilled, is entirely wanting; nor is there a particle of evidence that any such contract as the one secondly alleged was ever made or proposed between the parties. Suppose it were otherwise, and that the parol evidence introduced was sufficient to show that one or both of the alleged contracts were actually made in adequate terms and free of ambiguity, still the evidence would not constitute a defence to the suit, for the reason that the alleged contracts would be within the Statute of Frauds.

Interests in lands, except leases not exceeding the term of three years, made or created by livery and seisin only, or by parol and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only; and shall not, either at law or in equity, be deemed or taken to have any other or greater force or effect. 1 Kilty's Laws, Md. 242.

No action shall be brought . . . upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized. Browne, Frauds, 503.

Argument to show that the respondent did not derive any valid title to the premises under the tax deeds is unnecessary, as the amended answer admits that the tax deeds did not convey any title whatever, and the respondent testified to the same effect. Even if the deeds had been regular, they would not benefit the respondent; as in that event the legal conclusion would be that the respondent, as the tenant of the lessor, held the title in trust for his landlord. *Rothwell* v. *Dewees*, 2 Black, 613; *Van Horne* v. *Fonda*, 5 Johns. (N. Y.) Ch. 388; 2 Story, Eq. Jur., sect. 1211 *a*.

Tenants are never allowed to deny the title of their landlord, nor set up a title against him, acquired by the tenant during the tenancy, which is hostile in its character to that which he acknowledged in accepting the demise; the rule being that whenever the possession is acquired under any species of tenancy, whether the action be assumpsit, debt, covenant, or ejectment, the tenant is estopped from denying the title of the landlord. Taylor, Land. and Ten., sects. 629, 705; *Jackson* v. *Harper*, 5 Wend. (N. Y.) 246; *Sharp* v. *Kelley*, 5 Den. (N. Y.) 431; *Doe* v. *Smythe*, 4 M. & S. 347.

Attempt is made to take the case out of the protection of the Statute of Frauds by the receipts given in evidence; but it is clear that they fall far short of what is required to accomplish that object. 3 Phil. Evid. (4th Am. ed.) 351; *Tallman* v. *Franklin*, 14 N. Y. 584; *Elmore* v. *Kingscote*, 5 B. & C. 583.

Decided cases everywhere require that the memorandum should mention the price. Nothing is contained in either receipt to fulfil that requirement, nor do the receipts contain any thing of an unambiguous character to enable the court to determine what real estate is the subject of the purchase. Part of the property lying west of the tenement, the evidence shows, was never occupied by the respondent; and the second receipt, in terms, limits the purchase to the tenement which the respondent occupied and repaired. None of the terms, says Mr. Phillips, can be left to be supplied by parol; and, if not, it is clear that the receipts are not sufficient to support the theory of the defence. *Baptist Church* v. *Bigelow*, 16 Wend. (N. Y.) 28; *Morton* v. *Dean*, 13 Metc. (Mass.) 385.

Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and, if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent. 2 Kent, Com. (12th ed.) 511; *Norris* v. *Lain*, 16 Johns. (N. Y.) 151; *Dung* v. *Perkins*, 52 N. Y. 494; *Baltzen* v. *Nicolay*, 53 id. 467; *Wright* v. *Weeks*, 25 id. 153; *Parkhurst* v. *Van Cortlandt*, 1 Johns. (N. Y.) Ch. 273; s. c. 14 id. 15.

Any note or memorandum in writing which furnishes evidence of a complete and practicable agreement is sufficient under the statute, and parol evidence is admissible to explain latent ambiguities, and to apply the instrument to the subject-matter. *Barry* v. *Coombe*, 1 Pet. 640; *Clark* v. *Burnham*, 2 Story, 131; Story, Sales, sect. 257.

Diversity of decision undoubtedly exists; but this court decided, in the case of *Purcell* v. *Miner*, 4 Wall. 513, that the proof as to the terms of the contract must be clear, definite, and conclusive, and must show a contract, leaving no *jus deliberandi* or *locus penitentiæ;* that it cannot be made out by mere hearsay or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witnesses have no reason to recollect from interest in the subject-matter, and which may have been imperfectly heard or inaccurately remembered, perverted, or altogether fabricated; that the proof must also show that the consideration has been paid or tendered, or that there has been such part performance of the contract that its rescission would be a fraud on the other party, which could not be compensated by the recovery of damages; or that the delivery of possession has been made in pursuance of the contract, and has been acquiesced in by the other party.

Tested by these considerations, it is clear that the attempt to prove a written contract utterly fails, and that there is no satisfactory evidence to prove any such part performance of the supposed contract as will take the case out of the operation of the statute.

Where the attempt is to take the case out of the statute

upon the ground of part performance, the party making the attempt must show by clear and satisfactory proof the existence of the contract as laid in his pleading, and the act of part performance must be of the identical contract which he has in that manner set up and alleged. It is not enough that the act of part performance is evidence of some agreement; but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill or answer. *Phillips* v. *Thompson*, 1 Johns. (N. Y.) Ch. 131; Browne, Frauds, sect. 452.

Specific performance in such a case will not be decreed, unless the terms of the contract are clearly proved or admitted; and a sufficient part performance is made out to show that fraud and injustice would be done if the contract was held to be inoperative; and all the authorities agree that the acts of part performance must be such as are referable to the contract as alleged, and consistent with it. Woodfall, Land. and Ten. (9th ed.) 942; *Price* v. *Salusbury*, 32 Beav. 446; *Tompkinson* v. *Straight*, 17 C. B. 697.

Nothing is part performance for this purpose which is only ancillary or preparatory: it must be a direct act which is intended to be a substantial part performance of an obligation created by the contract as proved; and it must be an act which would not have been done but for the contract; and it must be directly in prejudice of the party doing the act, who must himself be the party calling for the completion of the contract. *Jones* v. *Peterman*, 3 Serg. & R. (Pa.) 543; *Morphett* v. *Jones*, 1 Swans. 172; *Ex parte Hooper*, 19 Ves. 477; *Frame* v. *Dawson*, 14 id. 385; *Buckmaster* v. *Harrop*, 7 id. 341; 3 Pars. Contr. (6th ed.) 60.

Where one of the two contracting parties has been induced or allowed to alter his position on the faith of such contract, to such an extent that it would be fraud on the part of the other party to set up its invalidity, courts of equity hold that the clear proof of the contract and of the acts of part performance will take the case out of the operation of the statute, if the acts of part performance were clearly such as to show that they are properly referable to the parol agreement. Chitty, Contr. (10th ed.) 66, 278; 2 Story, Eq. Jur., sect. 761.

Courts of equity sometimes, in cases of concurrent jurisdiction, follow by analogy the statute of limitations which govern courts of law in like cases; but there is nothing in the facts of the case before the court to bring it within the operation of that rule.

Beyond all question, the fee-simple title of the property was in the original lessor; and it is equally clear that the respondent entered into the possession of the premises as the tenant of the lessor, under an agreement to pay a stipulated rent, and the record shows that he continued to hold possession of the same until the time of his decease, or until he rented the same to the United States; nor does the fact that he, subsequently to the entry, denied the title of his landlord, have any just influence to support the defence of limitation or laches, inasmuch as the case shows that he did so without any just cause or legal excuse. Authorities to support that proposition are quite unnecessary, as to hold otherwise would be to sanction injustice and encourage fraud.

From these suggestions it follows that the decree in the court of original jurisdiction was correct; but inasmuch as the account was not taken, *Nellis* v. *Lathrop*, 22 Wend. (N. Y.) 121, the decree rendered at the general term will be reversed and the cause remanded, with directions to enter a decree for the complainants for further proceedings in conformity to the opinion of this court; and it is *So ordered.*

MR. JUSTICE FIELD and MR. JUSTICE BRADLEY dissented.

POUND *v.* TURCK.

1. In the absence of legislation by Congress bearing on the case, a statute of a State which authorizes the erection of a dam across a navigable river which is wholly within her limits is not unconstitutional.
2. A party is not liable for obstructing the navigation of the river by means of a dam which he has erected under the authority and pursuant to the requirements of such a statute.

ERROR to the Circuit Court of the United States for the Western District of Wisconsin.

The facts are stated in the opinion of the court.

Mr. Matt. H. Carpenter for the plaintiffs in error.

Mr. William F. Vilas, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This suit, brought by Turck and Borland, assignees in bankruptcy of French, Leonard, & Co., is founded upon allegations that the bankrupts, being lumbermen engaged in that business on the Chippewa River, in Wisconsin, were seriously damaged by the delay of a raft of lumber, shingles, and pickets, in said river, and by the breaking of the raft; all of which was attributable to obstructions placed in said river by Pound, Halbert, & Co., the plaintiffs in error, who were defendants below. The defendants pleaded the general issue, and a verdict was rendered against them, on which the judgment was founded to which this writ of error is taken.

The bill of exceptions is a very imperfect one; and two exceptions in regard to the admission of evidence are so unimportant that we do not think it necessary to notice them further than to say that we see no error in them.

The bill of exceptions shows, however, that there was evidence tending to prove that the dam and boom which constituted the principal obstruction in the river, to which the loss of plaintiffs' assignees was due, were built under authority of an act of the Wisconsin legislature; to wit, c. 235, Session Laws of 1857, approved March 5 of that year.

This statute is by its last section declared to be a public act, which shall be favorably construed in all courts.

Sect. 7 of the act authorizes "the erection of one or more dams at a given point across said river, and the building and maintaining of a boom or booms, with sufficient piers, and in such manner and form, and with such strength, as will stop and hold all logs and other things which may float in said river, which boom or booms shall be so arranged as to permit the passage of boats at all times; and at times of running lumber, a sufficient space shall be kept open in some convenient place for the passage of rafts, and the said dam or dams shall be built with suitable slides for the running of lumber in rafts over the same, and the said dam or dams and boom or booms shall be so constructed as not to obstruct the running of lumber rafts in said river." Private Laws of Wisconsin of 1857, p. 538.

The counsel for defendants seem to have made an attempt to secure from the court an instruction, that, if the injury to plaintiffs' raft was caused by the boom or dam built under this statute, they were not liable if they constructed it in compliance with its demands; but the language of the prayer alone is too vague to predicate error of its refusal. But the bill of exceptions proceeds to say, that, having refused these prayers, the court instructed the jury upon those points as follows: —

1. That the defendants are not liable to private action for injury to navigation while acting under legislative authority, provided that they have kept within the authority granted, and have been guilty of no negligence, unless their works materially obstruct the navigation of the river.

2. If the defendants, in erecting the piers and booms mentioned in the plaintiffs' complaint, did so under authority given by the legislature of the State of Wisconsin, in which State the Chippewa River lies, and put therein in the manner provided by the act giving them authority, they are not liable in damages to the plaintiffs for any injury caused by reason of their doing the thing authorized.

3. If you find the stream navigable within the rules I have laid down for determining that question, you will next proceed to determine whether the piers alleged and conceded to have been placed on the river at Chippewa Falls were a material

obstruction to the navigation thereof. If they were, the defendants had no right to place them there, nor could the legislature confer authority upon them to do so.

If there were no other objection to these three propositions in the charge of the court, it appears to us that they must have been confusing to the minds of the jury. The first and the third propositions distinctly enough declare that, if the piers and booms materially obstructed the navigation of the river, the act of the legislature was no protection; while the second as distinctly affirms that if they were built in the manner provided by the act giving them authority, they are not liable for any injury arising from them when so built. As they appear to us, these propositions, given each as an independent one on that subject, are necessarily contradictory, and we cannot tell which of them the jury accepted as the foundation of their verdict. If the second proposition alone had been given, the only inquiry of the jury on that branch of the case would have been as to the conformity of the structures to the directions of the statute. If the other two were to govern, then the jury must inquire whether those structures were a material obstruction to the general navigation of the river. That these inquiries were not the same is very clear, for no one can read the statute without perceiving that it did authorize a material obstruction to the general navigation of the river.

It authorized the construction of dams entirely across the stream, and it authorized booms, with sufficient piers, across the stream to stop and hold all logs and other things which may float in said river. It is a waste of words to attempt to prove that this would create a material obstruction to the navigation of the river by every species of water-craft. The fact that directions are given to facilitate the passage of these dams and piers by boats and rafts only shows that the evil caused by the obstructions was to be mitigated as far as possible consistently with their erection, and not that they were so to be built as to present no material obstruction to navigation.

Taking all the instructions together, and in connection with the prayer of the defendants refused by the court, we are of

opinion that the jury must have understood that if the structures of defendants were a material obstruction to the general navigation of the river, the statute of the State afforded him no defence, though they were built in strict conformity to its provisions. We are confirmed in the belief that we have correctly construed the language of the court by the argument of counsel in support of the charge, which asserts the want of power in the State to pass the act here relied on. This was unquestionably the opinion of the court as given to the jury, and its soundness is the principal matter to be considered by us.

This want of power is supposed to rest on the repugnance of the statute to that provision of the Constitution which confers upon Congress the authority "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The proposition is not a new one in this court, and cannot be sustained as applicable to the case before us without overruling many well-considered decisions, no one of which has ever been overturned, though the doctrine announced has been occasionally questioned.

The Chippewa River is a small stream lying wholly within the State of Wisconsin, but emptying its waters into the Mississippi.

Without the aid of the Constitution of Wisconsin, or the decision of its Supreme Court, or the third section of the enabling act of 1846, by which Congress authorized the formation of a State government, we may concede that the stream, though small, is a navigable river of the United States, and protected by all the acts of Congress and provisions of the Constitution applicable to such waters.

The principle established by the decisions to which we have referred is, that, in regard to the powers conferred by the commerce clause of the Constitution, there are some which by their essential nature are exclusive in Congress, and which the States can exercise under no circumstances; while there are others which from their nature may be exercised by the States until Congress shall see proper to cover the same ground by such legislation as that body may deem appropriate to the subject. Of this class are pilotage and other port regulations, *Cooly* v.

Board of Wardens, 12 How. 299; bridges across navigable streams, *Gilman* v. *Philadelphia;* and, as specially applicable to the case before us, to erect dams across navigable streams, *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245. This general doctrine was very fully examined and sustained in *Gilman* v. *Philadelphia*, 3 Wall. 713, and again in *Crandall* v. *State of Nevada*, 6 id. 35.

As we have already said, the *Blackbird Creek Case* is directly applicable to the one before us; and as it has never been overruled, but, on the contrary, though much criticised, has always been sustained, it is alone sufficient to control this one. In that case, the legislature of the State of Delaware authorized the construction of a dam across the creek for the purpose of reclaiming some marsh land, and improving the health of its inhabitants.

"But the measure authorized by the statute," said Chief Justice Marshall, "stops a navigable creek, and must be supposed to abridge the rights of those accustomed to use it." He then says that if Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control State legislation over the small navigable streams into which the tide flows, the State law would be void; but that as no such action had been taken by Congress, the act of the State was not repugnant to the power to regulate commerce in its dormant state.

In the case of *Gilman* v. *Philadelphia*, the plaintiff was owner of a wharf on the Schuylkill River in the city of Philadelphia, at a point where that river had been navigable for time immemorial by a large class of vessels. The State of Pennsylvania passed a law in 1857 authorizing the city to build a bridge across that stream just below plaintiff's wharf, and between it and the mouth of the river. There was no question that this bridge would wholly exclude a large part of the vessels which had theretofore navigated the Schuylkill up to plaintiff's wharf. He applied to the Circuit Court of the United States for an injunction, and that court dismissed his bill. On appeal to this court, the decree was affirmed, on the express ground that in the absence of legislation by Congress the act

of the Pennsylvania legislature was not repugnant to the commerce clause of the Constitution.

The present case falls directly within the principle established by these cases, and aptly illustrates its wisdom. There are within the State of Wisconsin, and perhaps other States, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water-carriage is as outlets to saw-logs, sawed lumber, coal, salt, &c. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, &c., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the State may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislatures.

It is obvious from these remarks that the court, in its charge to the jury and in refusing the prayer of plaintiff, did not give to the act of the legislature of Wisconsin the effect to which it was entitled as a defence in the action.

It is argued by counsel that there is no evidence connecting the defendants with the authority conferred by that statute. But as the record does not purport to contain all the evidence, and as the charge of the court is based upon the idea that there was evidence to go to the jury on that subject, so much so that the most important part of the charge relates to that matter, we must presume there was such evidence.

It is also insisted that the record shows no exception to the charge of the court. But the objection is hypercritical. A close examination of the bill of exceptions satisfies us that the plaintiffs in error did except both to the refusal to grant the instruction prayed for and to those given by the court on the same points.

For the error in the charge of the court in that matter the judgment will be reversed and a new trial awarded.

So ordered.

MR. JUSTICE CLIFFORD concurred in the judgment of the court, but adhered to the views expressed in his dissenting opinion in *Gilman* v. *Philadelphia*, 3 Wall. 732.

RAILROAD COMPANY *v.* HUSEN.

1. The statute of Missouri which prohibits driving or conveying any Texas, Mexican, or Indian cattle into the State, between the first day of March and the first day of November in each year, is in conflict with the clause of the Constitution that ordains "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."
2. Such a statute is more than a quarantine regulation, and not a legitimate exercise of the police power of the State.
3. That power cannot be exercised over the inter-state transportation of subjects of commerce.
4. While a State may enact sanitary laws, and, for the purpose of self-protection, establish quarantine and reasonable inspection regulations, and prevent persons and animals having contagious or infectious diseases from entering the State, it cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory.
5. Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers conferred by the Constitution upon Congress.
6. Since the range of a State's police power comes very near to the field committed by the Constitution to Congress, it is the duty of courts to guard vigilantly against any needless intrusion.

ERROR to the Supreme Court of the State of Missouri.

An act of the legislature of Missouri, approved Jan. 23, 1872, 1 Wagner's Stat. 251, provides as follows: —

"SECTION 1. No Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this State, between the first day of March and the first day of November in each year, by any person or persons whatsoever: *Provided*, that nothing in this section shall apply to any cattle which have been kept the entire previous winter in this State: *Provided further*, that when such cattle shall come across the line of this State, loaded

upon a railroad car or steamboat, and shall pass through this State without being unloaded, such shall not be construed as prohibited by this act; but the railroad company or owners of a steamboat performing such transportation, shall be responsible for all damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line of such transportation; and the existence of such disease along such route shall be *prima facie* evidence that such disease has been communicated by such transportation."

"SECT. 9. If any person or persons shall bring into this State any Texas, Mexican, or Indian cattle, in violation of the first section of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by said cattle."

Husen brought this action against the Hannibal and St. Joseph Railroad Company for damages alleged to have been done him by means of the company's violation of the foregoing act.

On the trial in the Circuit Court for Grundy County it was, among other things, objected by the company that the act was in violation of that part of sect. 8 of art. 1 of the Constitution of the United States which provides that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." This objection having been overruled, there was a judgment for the plaintiff; which the Supreme Court on appeal affirmed, holding that the act was "not contrary in any wise, in regard to this case, to the Constitution of the United States."

The company then brought the case here.

Mr. James Carr for the plaintiff in error.

That portion of the eighth section and first article of the Constitution of the United States, which provides that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," confers exclusive power on Congress. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283; *Ex parte McNiel*, 13 Wall. 236; *Case of the State Freight Tax*, 15 id. 232; *Railroad Company* v. *Fuller*, 17 id. 560; *Henderson et al.* v. *Mayor of New York et al.*, 92 U. S. 259; *Chy Lung* v. *Freeman et al.*, id. 275; *In the Matter of Ah Fang*, 1 Cent. Law Jour. 516.

The act in question discriminates against certain property which may be brought from Texas into Missouri, and absolutely prohibits bringing it into the State between the first day of March and the first day of November in each year. This is no police regulation. If it required an inspection of the cattle at the State line by some competent person, to ascertain their condition, and permitted them, if found free from disease, to be carried into the State, it would not be obnoxious to the objection of regulating inter-state commerce, or of discriminating against a certain species of property coming from a particular section. In its present shape, it is a regulation of inter-state commerce as much as is the statute of California, which, *inter alia*, prohibits vessels from landing "a lewd or debauched woman," without first giving the required bond. *Chy Lung* v. *Freeman et al.*, 92 U. S. 275.

Mr. M. A. Low, *contra.*

The act, although it may affect, does not in any proper sense regulate, commerce. "Not every thing which affects commerce is a regulation of it, within the meaning of the Constitution." *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Munn* v. *Illinois*, 94 U. S. 113; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283; *Slaughter-House Cases*, 16 Wall. 36.

Whilst the power to regulate commerce is granted to Congress, that of establishing interior police regulations belongs to the States. The latter, in conferring the power over inter-state commerce, never delegated to Congress that of making police regulations; yet, in exercising the granted power, Congress may incidentally affect or even abrogate those regulations. On the other hand, in establishing them, a State may incidentally affect commerce; but they, when not in conflict with any act of Congress, are valid. These powers are distinct and separate; but it is no objection to a regulation made in pursuance of one of them that it would be appropriate to the exercise of the other. *Gibbons* v. *Ogden*, 9 Wheat. 1; *City of New York* v. *Miln*, 11 Pet. 102; *Slaughter-House Cases*, 16 Wall. 36; *Foster* v. *Master and Wardens of the Port of New Orleans*, 94 U. S. 246; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Ex parte McNiel*, 13 id. 236; Story, Const., sect. 1070.

"The legislature may, no doubt, prohibit railways from carrying freight which is regarded as detrimental to public health or morals, or the public safety generally." *Thorpe* v. *Rutland & Burlington Railway*, 27 Vt. 140. The power of the States to pass quarantine and inspection laws has never been questioned, and it includes that of prescribing the necessary regulations, as well as the subjects to which they may be applied. The right to impose restraints upon the use and disposal of articles found by experience or upon inspection to be injurious to the health, morals, or general welfare of her citizens belongs to the State. The act is in the nature of a quarantine regulation, and, as such, is valid. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *Maryland*, 12 id. 419; *Willson* v. *The Blackbird Creek Marsh Co.*, 2 Pet. 245; *City of New York* v. *Miln*, 11 id. 102; *Holmes* v. *Jennison*, 14 id. 615; *License Cases*, 5 How. 577; *Passenger Cases*, 7 id. 283; *Cooley* v. *Board of Wardens*, 12 id. 319; *License Tax Cases*, 5 Wall. 462; *Pervear* v. *Commonwealth*, id. 475; *United States* v. *Dewitt*, 9 id. 41; *Ex parte McNiel*, 13 id. 236; *Case of the State Freight Tax*, 15 id. 279; *Slaughter-House Cases*, 16 id. 36; *Railroad Company* v. *Fuller*, 17 id. 560; *Munn* v. *Illinois*, 94 U. S. 113; *Foster* v. *Master and Wardens*, id. 246; *City of St. Louis* v. *Boffinger*, 19 Mo. 13; *Yeazel* v. *Alexander*, 58 Ill. 254; Cooley, Const. Lim. 584; Potter's Dwarris, 457.

MR. JUSTICE STRONG delivered the opinion of the court.

Five assignments of error appear in this record; but they raise only a single question. It is, whether the statute of Missouri, upon which the action in the State court was founded, is in conflict with the clause of the Constitution of the United States that ordains "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The statute, approved Jan. 23, 1872, by its first section, enacted as follows: "No Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into, or remain, in any county in this State, between the first day of March and the first day of November in each year, by any person or persons whatsoever." A later section is in these words: "If any person or persons shall bring into

this State any Texas, Mexican, or Indian cattle, in violation of the first section of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by said cattle." Other sections make such bringing of cattle into the State a criminal offence, and provide penalties for it. It was, however, upon the provisions we have quoted that this action was brought against the railroad company that had conveyed the cattle into the county. It is noticeable that the statute interposes a direct prohibition against the introduction into the State of all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not. It is true a proviso to the first section enacts that " when such cattle shall come across the line of the State, loaded upon a railroad car or steamboat, and shall pass through the State without being unloaded, such shall not be construed as prohibited by the act; but the railroad company or owners of a steamboat performing such transportation shall be responsible for all damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line of transportation; and the existence of such disease along the line of such route shall be *prima facie* evidence that such disease has been communicated by such transportation." This proviso imposes burdens and liabilities for transportation through the State, though the cattle be not unloaded, while the body of the section absolutely prohibits the introduction of any such cattle into the State, with the single exception mentioned.

It seems hardly necessary to argue at length, that, unless the statute can be justified as a legitimate exercise of the police power of the State, it is a usurpation of the power vested exclusively in Congress. It is a plain regulation of inter-state commerce, a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is inter-state than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one State to another is a

branch of inter-state commerce is undeniable, and no attempt has been made in this case to deny it.

The Missouri statute is a plain interference with such transportation, an attempted exercise over it of the highest possible power, — that of destruction. It meets at the borders of the State a large and common subject of commerce, and prohibits its crossing the State line during two-thirds of each year, with a proviso, however, that such cattle may come across the line loaded upon a railroad car or steamboat, and pass through the State without being unloaded. But even the right of steamboat owners and railroad companies to transport such property through the State is loaded by the law with onerous liabilities, because of their agency in the transportation. The object and effect of the statute are, therefore, to obstruct inter-state commerce, and to discriminate between the property of citizens of one State and that of citizens of other States. This court has heretofore said that inter-state transportation of passengers is beyond the reach of a State legislature. And if, as we have held, State taxation of persons passing from one State to another, or a State tax upon inter-state transportation of passengers, is prohibited by the Constitution because a burden upon it, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State. Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it by legislative authority, is regulation. *Case of the State Freight Tax*, 15 Wall. 232; *Ward* v. *Maryland*, 12 id. 418; *Welton* v. *The State of Missouri*, 91 U. S. 275; *Henderson et al.* v. *Mayor of the City of New York et al.*, 92 id. 259; *Chy Lung* v. *Freeman et al.*, id. 275. The two latter of these cases refer to obstructions against the admission of persons into a State, but the principles asserted are equally applicable to all subjects of commerce.

We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the State. We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations

promotive of domestic order, morals, health, and safety. As was said in *Thorp* v. *The Rutland & Burlington Railroad Co.*, 27 Vt. 149, "it extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim, *sic utere tuo ut alienum non lædas*, which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." It was further said, that, by the general police power of a State, "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned." It may also be admitted that the police powers of a State justifies the adoption of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in *The Passenger Cases*, 7 How. 283, by Mr. Justice Greer, in the sacred law of self-defence. *Vide* 3 Sawyer, 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive.

But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national government. It was said in *Henderson et al.* v. *Mayor of the City of New York et al.*, *supra*, to "be 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 it may be to powers conceded to belong to the States." Substantially the same thing was said by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1. Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. Many acts of a State may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule for conduct. There is no such difficulty in the present case. While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or inter-state commerce. Upon this subject the cases in 92 U. S. to which we have referred are very instructive. In *Henderson* v. *The Mayor, &c.*, the statute of New York was defended as a police regulation to protect the State against the influx of foreign paupers; but it was held to be unconstitutional, because its practical result was to impose a burden upon all passengers from foreign countries. And it was laid down that, "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." The reach of the statute was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of Congress. So in the case of *Chy Lung* v. *Freeman*, where the pretence was the exclusion of lewd women; but as the statute was more far-reaching, and affected other immigrants, not of any class which the State could lawfully exclude, we held it unconstitutional.

Neither of these cases denied the right of a State to protect herself against paupers, convicted criminals, or lewd women, by necessary and proper laws, in the absence of legislation by Congress, but it was ruled that the right could only arise from vital necessity, and that it could not be carried beyond the scope of that necessity. These cases, it is true, speak only of laws affecting the entrance of persons into a State ; but the constitutional doctrines they maintain are equally applicable to inter-state transportation of property. They deny validity to any State legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the Federal government.

Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, "You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and Dec. 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not ; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities." Such a statute, we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure.

In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us have been sustained. *Yeazel* v. *Alexander*, 58 Ill. 254. Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce or inter-state commerce

beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion.

Judgment reversed, and the record remanded with instructions to reverse the judgment of the Circuit Court of Grundy County, and to direct that court to award a new trial.

BROWN *v.* SPOFFORD.

1. Where, at the time of making and indorsing a promissory note, a written contract in relation thereto is entered into by the parties, parol testimony varying or contradicting its terms is not admissible.
2. The court reaffirms the doctrine that a *bona fide* purchaser for value before maturity of a negotiable instrument, is not, unless they are brought to his notice, affected by any equities between the original parties.
3. A party who seeks to avail himself of the conditions of a compromise binding him to the performance of certain acts, in order to discharge the original demand, must first show performance on his part.
4. The court condemns as irregular, proceedings whereby the defendant in two separate suits, in the former of which judgment had been rendered before the latter had gone to trial, was permitted to file bills of exception purporting to be applicable to each case, and, without consolidating them, remove them to this court by one writ of error.

ERROR to the Supreme Court of the District of Columbia.

This action was brought by Spofford & Clark, against Samuel P. Brown and Austin P. Brown, on five promissory notes, for $2,267.33 each, made by the defendants Jan. 8, 1872, by their firm name of S. P. Brown & Son, and payable to the order of Austin P. Brown in one, two, three, four, and five months after date. The declaration alleged that the notes were, on the date thereof, severally indorsed by the said Austin P. Brown, and came before maturity, in due and regular course of commercial dealing, and for a full, fair, and valuable consideration, into the possession and ownership of the plaintiffs, but were protested for non-payment, whereof due notice was given the indorser.

The defendants, in addition to the general issue, pleaded two special pleas; but as the matters therein set forth could have been offered under the general issue, they are omitted here.

On Aug. 2, 1872, the plaintiffs sued the defendants on another note of the same series as the preceding five, but which was payable in six months after date.

The same defence was made as in the former suit.

At the trial, the plaintiffs having proved the signatures and indorsements on the notes, and that the defendants composed the firm of S. P. Brown & Son, rested.

The defendants then introduced evidence tending to show that for several years before the making of the notes they had had large dealings with the Philadelphia Coal Company, and that a controversy arose as to the amount of their indebtedness to the company; that on the said 8th of January, 1872, the notes in suit were executed by them and delivered to Henry L. Cake, president of said company, who thereupon delivered to them a paper, of which the following is a copy: —

"WASHINGTON, D. C., Jan. 8, 1872.

"Received from S. P. Brown & Son the following notes, in full settlement of their indebtedness to the Philadelphia Coal Company: —

One note dated Jan. 8, 1872, at one month . . .	$2,267.33
" " " " " two " . . .	2,267.33
" " " " " three " . . .	2,267.33
" " " " " four " . . .	2,267.33
" " " " " five " . . .	2,267.33
" " " " " six " . . .	2,267.33
Amounting to	$13,603.98

"And in settlement of these notes I have agreed, upon behalf of the Philadelphia Coal Company, to receive an order on Edwin Stewart, paymaster of the United States Navy, and accepted by him, for five thousand five hundred dollars ($5,500), with interest from date, said order to be liquidated as follows: $2,000 at three months from Dec. 20, 1871; $2,000 at four months from Dec. 20, 1871; and $1,500 at five months from Dec. 20, 1871, — the whole amount, with interest, from Dec. 20, 1871; also, Z. Jones's indorsement on four notes, as follows: S. P. Brown & Son's notes to order

of Z. Jones, dated Jan. 8, 1872, for $1,250, respectively at six, eight, ten, and twelve months, amounting to $5,000; this sum of ten thousand five hundred dollars ($10,500) being in effect a compromise of the said indebtedness of $13,603.96, to be conclusive upon the payments being made at the times stated.

"And I further stipulate on behalf of the Philadelphia Coal Company, that, upon payment of the $5,500, with interest, by the paymaster within the time stated, the first, second, and third notes given by S. P. Brown & Son for the sum of $2,267.33, amounting to $6,801.99, shall be returned to S. P. Brown & Son as settled; and, upon payment of the four notes at maturity indorsed by Z. Jones, the remaining three notes of S. P. Brown & Son, amounting to $,6,801.99, shall be handed back to S. P. Brown & Son, being settled in full by the payment of said four notes indorsed by Z. Jones. H. L. CAKE,

"*President Philadelphia Coal Co*

"Witness: A. B. WOLFE."

The defendants then offered testimony tending to prove that the company, when it transferred the notes sued on to the plaintiffs, who acted as its agents in selling coal on commission, and who also occasionally bought and sold on their own account, received as the sole consideration therefor the promissory notes of the latter for the same amount; that, at the time of said transfer, Cake assured the plaintiffs that they should incur no loss in respect to said transaction, but that he would indemnify and protect them; that, at the time of the execution of said agreement between the defendants and Cake, it was agreed that as the notes in suit should respectively mature they should be paid and taken up by the company. The court excluded this testimony, and the defendants excepted. They thereupon asked the court to charge, that if the jury believed that the plaintiffs came into possession of the notes sued on without paying an actual valuable consideration, or by paying only a nominal one, or under circumstances which would have put a prudent man on inquiry concerning any agreement between the defendants and the Philadelphia Coal Company with respect to said notes, then the jury must consider the plaintiffs to be bound by such agreement. That, under the agreement of Jan. 8. 1872, the Philadelphia Coal Company was bound, among other things, to take up and hold the two notes sued on

which first became due; and that if the jury found from the evidence that the company did not do so, but allowed them to go to protest, then the verdict should be for the defendants.

The court refused so to charge; but charged, that if the jury found from the evidence that the notes in suit were made by the defendants in liquidation of an antecedent indebtedness due to the Philadelphia Coal Company, and were, before maturity, indorsed for a valuable consideration by it to the plaintiffs, then the plaintiffs are entitled to recover from the defendants the full amount of said notes, and that any agreement between the company and the defendants in relation to said notes would not affect the rights of the plaintiffs, unless they, before the purchase of said notes, had actual notice of said agreement; that if the plaintiffs had actual notice before said purchase that the company had made the agreement of compromise, and that said agreement was not carried out by the defendants in the manner agreed upon, then the plaintiffs might recover on the original notes, and that so far as that question was involved the plaintiffs were entitled to a verdict; that the agreement to receive $10,500 as a compromise in discharge of the notes could be made available to the defendants only by proving that the sums were paid as therein stipulated, or tendered by the defendants, or by one of them; that if the defendants had failed to show that the compromise was accepted by them by payment of the stipulated sums, their original indebtedness on the notes remained, and the plaintiffs were entitled to recover; that if the notes were indorsed and delivered to plaintiffs before maturity, and in the course of business, they were entitled to recover, and were not affected by any transactions between the original parties of which they had no notice when they received the paper.

The defendants excepted to the refusal of the court to charge as requested, and also to the charge as given.

There was a verdict in each case in favor of the plaintiffs; and the judgments thereon having been affirmed in general term, the defendants sued out this writ.

The assignment of errors is set forth in the opinion of the court.

Mr. Nathaniel Wilson for the plaintiffs in error.

Mr. Joseph Casey, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Promissory notes payable to order may be transferred by indorsement, or when indorsed in blank or made payable to bearer they are transferable by mere delivery, and the possession of such an instrument indorsed in blank or made payable to bearer is *prima facie* evidence that the holder is the proper owner and lawful possessor of the same; and nothing short of fraud, not even gross negligence, if unattended with *mala fides*, is sufficient to overcome the effect of that evidence, or to invalidate the title of the holder, supported by that evidence. *Goodman* v. *Harvey*, 4 Ad. & E. 70; *Goodman* v. *Simonds*, 20 How. 343; *Collins* v. *Gilbert*, 94 U. S. 753; *Noxon* v. *De-Wolf*, 10 Gray (Mass.), 346; *Magee* v. *Badger*, 34 N. Y. 247.

Sufficient appears to show that the plaintiffs claim to recover of the defendants the amount of five promissory notes, set forth in the record, each dated Jan. 8, 1872, payable to the order of Austin P. Brown in one, two, three, four, and five months from date, amounting in the aggregate to the sum of $11,336.64. Due indorsement of the notes was made by the payee, and the plaintiffs also claim to recover the costs and fees of protest and notice to the makers for non-payment.

Service was made; and the defendants appeared and pleaded the general issue, and two special pleas, which are fully set forth in the record.

Issue was joined by the plaintiffs upon the first plea of the defendants; and to the second plea the plaintiffs replied, and denied the same in fact and in substance, and all and singular the matters therein set forth, and alleged in further reply that they became the holders of the notes in the regular course of mercantile dealings, for a full, fair, and valuable consideration, before the maturity of the notes and without any notice or knowledge of the matters set forth and alleged in the defendants' second plea. They also deny and traverse all the allegations and averments contained in the defendants' third plea.

Special pleas in such a case are unnecessary, as every such defence, where the action is assumpsit upon promissory notes, is admissible under the general issue.

Delay ensued, and at a subsequent term the parties went to trial, and the verdict and judgment were in favor of the

plaintiffs, in the sum of $11,300.47, with costs and interest. Exceptions were taken by the defendants, as appears by the record.

Six notes, it seems, were given by the defendants, all of the same date, one of which was not due when the suit was instituted to recover the amount of the first five. On the 2d of August, 1872, the plaintiffs sued the other note, which was signed and indorsed like the other five, and was for the sum of $2,267.32 for value received. Service was made, and the defendants appeared and filed three pleas, of the same legal effect as those filed in the preceding case. Replications were also filed by the plaintiffs, of the same legal import as those which they filed in the suit to enforce payment of the first five notes. Proper issues being joined, the parties went to trial; and the verdict and judgment were for the plaintiffs, in the sum of $2,269.85, with costs and interest, as therein provided.

Separate judgments were rendered in the two cases; but the defendants were allowed to file eight bills of exceptions to the rulings of the court in each of the cases, which were subsequently signed and sealed by the presiding judge, each of the bills of exceptions having respect to the trial in the respective suits as if the same had been previously consolidated and the verdicts had been rendered at the same time by the same jury. Both judgments were removed into this court by one writ of error.

Certain errors are assigned here as applicable to the judgment in each of the respective cases, in substance and effect as follows: 1. Evidence was offered by the defendants to prove the alleged agreement between them and the company, which was excluded by the court, and they assign for error that the court erred in excluding that evidence. 2. That the court erred in holding that the agreement between the company and the defendants offered in evidence would not affect the right of the plaintiffs to recover in the suits. 3. That the court erred in holding that if the plaintiffs received the notes before maturity, without notice of the alleged agreement, the defendants were liable in the action, even though the plaintiffs paid their own notes with money borrowed from the company, whose agents they were in the transaction. 4. That the court erred

in instructing the jury that if they find from the evidence that the plaintiffs did have notice of the alleged agreement between the company and the defendants, still they may recover in the actions if the jury further find that the defendants neglected and failed to comply with the terms of the agreement. 5. That the court erred in instructing the jury that the agreement to receive as a compromise in discharge of the notes a sum less than the amount of the same could only be made available as a defence, by proving that the sum agreed was paid or tendered by the defendants as therein stipulated.

Exceptions not assigned for error will not be separately examined. Two of the errors assigned, to wit, the first and the second, are so nearly alike that they may be examined together.

Negotiable notes are written instruments, and as such they cannot be contradicted, nor can their terms be varied by parol evidence; and that proposition is universally true where the promissory note is in the hands of an innocent holder. Where a bill of exchange was drawn in the usual form, and was protested for non-payment, the court held twenty years ago that parol evidence of an understanding between the drawer and the party in whose favor the bill was drawn was inadmissible to vary the terms of the instrument. *Brown* v. *Wiley*, 20 How. 442.

In that case, the defendant offered to prove to the jury, pursuant to the defence set up in a special plea, a parol agreement between him and the plaintiffs, that the bill should not be presented for acceptance until funds were furnished and placed in the hands of the drawees, to provide for a certain other draft, who had agreed to accept the second bill when funds were received to meet their liability for accepting the first bill; but the court below excluded the evidence, and the defendant excepted; and this court decided that the ruling was correct, and affirmed the judgment, holding that the evidence offered, that the bill should not be presented until a distant, uncertain, or undefined period, tended in a very material degree to alter and vary the operation and effect of the instrument. *Shankland* v. *Washington*, 5 Pet. 394; 1 Greenl. Evid. (12th ed.) 318; *Stackpole* v. *Arnold*, 11 Mass. 27; *Hunt* v. *Adams*, 7 id. 518; *Myrick* v. *Dame*, 9 Cush. (Mass.) 248; *Thompson* v. *Ketchum*, 8 Johns. 192.

Certain fixed principles govern the liability of parties to a bill of exchange or promissory note which are essential to the credit and circulation of such paper, of which the most important is that whatever may have occurred between other parties to the instrument, if not fraudulent in its inception, the holder of the same, if he acquired it for value in the usual course of business before maturity, cannot be affected by any such transactions, unless it be first shown that he had knowledge of such transactions at the time the transfer was made. Nothing less than knowledge of such transactions can meet the exigencies of such a defence, the rule being that the *bona fide* holder of a negotiable instrument for value, if acquired before maturity and without notice of any facts which impeach its validity between the antecedent parties, has a good title to the instrument, unaffected by any such prior transaction, and may recover the amount, even though the instrument, as between the antecedent parties, is without any legal validity. *Goodman* v. *Simonds*, 20 How. 343; *Swift* v. *Tyson*, 16 Pet. 1.

Attempt was made in a leading case to prove that the payee agreed with the indorser that if he would indorse the note he should incur no responsibility, as the payment was secured by collaterals, and when offered in the Circuit Court the evidence was admitted; but the court, when the case was brought here on writ of error, reversed the judgment, holding that the evidence should have been excluded. *Banks* v. *Dunn*, 6 Pet. 51.

Decided cases of the most authoritative character have determined that parol evidence of an oral agreement, alleged to have been made at the time of the drawing, making, or indorsement of a bill or note, cannot be admitted to vary, qualify, contradict, add to, or subtract from the absolute terms of a written contract. *Specht* v. *Howard et al.*, 16 Wall. 564.

In the absence of fraud, accident, or mistake the rule is the same in equity as at law, that parol evidence of an oral agreement alleged to have been made at the time of drawing, making, or indorsing a bill or note cannot be permitted to vary, qualify, or contradict, or to add to or subtract from, the absolute terms of the written contract. *Forsyth* v. *Kimball*, 91 U. S. 291.

Parol evidence of an agreement, made contemporaneously with a promissory note which contains an absolute promise to pay at a specified time, is not admissible in order to extend the time for payment, or to provide for the payment out of any particular fund, or in any other way than that specified in the instrument, or to make the payment depend upon condition. Chitty, Contr. (10th ed.) 99; *Abrey* v. *Crux*, Law Rep. 5 C. P. 41; *Allan* v. *Furbish*, 4 Gray, 514; 2 Pars. Bills and Notes, 501.

Apply these rules to the case before the court, and it is clear that the first and second assignments of error must be overruled, as it is clear that the evidence offered was inadmissible, and that the ruling of the court was correct.

Due execution of the notes is admitted, nor is it questioned that they were indorsed in blank, as set up by the plaintiffs. Beyond all doubt, the plaintiffs became the holders of the notes before maturity and for value; but the defendants insist that the plaintiffs did not become the holders of the same in good faith, nor in the regular course of business; and they requested the court to instruct the jury that if they believed that the plaintiffs came into the possession of the notes without paying value, or under circumstances which would have put a prudent man upon inquiry concerning the alleged agreement, then the jury must consider the plaintiffs bound by the agreement, and that their verdict should be for the defendants.

Three objections arise to that prayer for instruction, any one of which is sufficient to show that it was properly rejected: 1. Because the uncontradicted evidence showed that the plaintiffs did pay value for the notes. 2. Because the settled rule of law is that the plaintiffs, as the holders of the notes for value, and having acquired the same before maturity and in the usual course of business, or without notice of any prior equities, have a good title to the same irrespective of what may have transpired between the defendants and prior holders of the notes. 3. Because there is no evidence in the case that the plaintiffs had knowledge of any equities between the defendants and such prior parties, the settled commercial rule being that nothing less than prior knowledge of such facts and circumstances as impeach the title can meet the exigencies of

such a defence, unless it be shown that the instrument or instruments were fraudulent in their inception.

Where the supposed defect or infirmity in the title of the instrument appears on the face at the time of the transfer, the question whether the party who took it had notice or not is in general a question of construction, and must be determined by the court as matter of law, as has been held by this court in several cases. *Andrews* v. *Pond*, 13 Pet. 65; *Fowler* v. *Brantly*, 14 id. 318. But it is a very different thing when it is proposed to impeach the title of a holder for value by proof of any facts and circumstances outside of the instrument itself. 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. *Goodman* v. *Simonds*, 20 How. 343; *Collins* v. *Gilbert*, 94 U. S. 753.

Tested by these authorities, it follows that the third assignment of error must be overruled.

Both the fourth and the fifth assignments of error have respect to the supposed compromise which it is alleged was proposed and adopted; and, inasmuch as they relate to the same state of facts, they will be examined together.

Parties may, doubtless, adjust their controversies; and, where they do so in good faith and understandingly, courts of justice will uphold the adjustment, unless it violates the rules of law applicable to the transaction. Suppose that is so, still it is clear the alleged compromise was never carried into effect. What was proposed is that the notes were to be delivered up upon the payment of a prescribed amount at the time and in the manner set forth in the agreement; but nothing was ever paid or tendered, nor was any thing ever done in fulfilment of the agreement. Instead of that, the evidence shows that the defendants never made any attempt to make the payments; and the court instructed the jury, that, if they found that the agreement of compromise was never carried out by the defendants, it constitutes no defence to the action; that such a compromise can only be made available to the defendants as a defence by proving that the sums agreed to be paid in discharge

were paid or tendered as stipulated. Formal exceptions were taken to those instructions, and they are the basis of the errors alleged in the fourth and fifth assignments.

Sufficient appears to show that the indebtedness of the defendants amounted to the sum of $13,603.96, and that the plaintiffs agreed to accept $10,000 as a compromise, "upon the payments being made at the times stated," from which it is evident that nothing short of the fulfilment of that agreement would discharge the original demand, and that such a compromise to be available must be performed. 2 Pars. Contr. (6th ed.) 685; 2 Story, Contr. (5th ed.) 537; Chitty, Contr. (10th ed.) 693.

Agreements unperformed cannot be pleaded as accord and satisfaction. *United States* v. *Clark*, Hempst. 317.

Where a creditor agreed to satisfy a judgment for a less sum than the amount recovered, if paid by a day certain, and the debtor failed to make the payment, it was held that the creditor might enforce the judgment for the full amount. *Early* v. *Rogers*, 16 How. 599.

Performance of the agreement by the judgment debtor, it was held in that case, was a condition precedent to the proposed reduction of the judgment; and the court said, we think the district judge interpreted the agreement of the parties and the judgment correctly, as the parties made the reduction dependent on a condition which has not been fulfilled.

Where an arrangement was made for the discharge of certain notes, but the arrangement failed because one of the debtors disagreed to the terms of the composition, the court decided that the debt stood revived, and that judgment was properly rendered for the whole amount. *Clark et al.* v. *Brown*, 22 id. 270; Addison, Contr. (6th ed.) 996.

Two other exceptions were taken at the trial, in respect to which it is only necessary to say that they have not been assigned for error, and, if they had been, it would not have benefited the defendant, as the questions presented fall within the rules already sufficiently explained.

Nothing remains for remark except to advert very briefly to certain irregularities which appear in the proceedings. Judgment was rendered in the first suit before the parties went to

trial in the second, and yet the defendants were allowed to file eight bills of exceptions, which purport to be applicable to each of the two cases; and the judgment in each case is removed here by one writ of error, though the transcript does not show that the two cases were ever consolidated. Such proceedings are palpably irregular; but inasmuch as they are not the subject of objection by either party, the court has decided to exercise jurisdiction and dispose of the controversy. Separate judgments having been entered in the court of original jurisdiction, the judgment rendered here must be separately applied in the court below. *Judgment affirmed.*

HALL v. DECUIR.

The Supreme Court of Louisiana having decided that an act of the General Assembly, approved Feb. 23, 1869, entitled "An Act to enforce the thirteenth article of the Constitution of this State, and to regulate the licenses mentioned in said thirteenth article," requires those engaged in the transportation of passengers among the States to give all persons travelling within that State, upon vessels employed in such business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color; and subjects to an action for damages the owner of such a vessel who excludes colored passengers, on account of their color, from the cabin set apart by him for the use of whites during the passage: this court, accepting as conclusive this construction of the act by the highest court of the State, holds that the act, so far as it has such operation, is a regulation of inter-state commerce, and therefore, to that extent, unconstitutional and void.

ERROR to the Supreme Court of the State of Louisiana.

By the thirteenth article of the Constitution of Louisiana it is provided that "all persons shall enjoy equal rights and privileges upon any conveyance of a public character." By an act of the General Assembly, entitled "An Act to enforce the thirteenth article of the Constitution of this State, and to regulate the licenses mentioned in said thirteenth article," approved Feb. 23, 1869, it was enacted as follows: —

"SECTION 1. All persons engaged within this State, in the business of common carriers of passengers, shall have the right to refuse to admit any person to their railroad cars, street cars, steamboats, or other water-crafts, stage-coaches, omnibuses, or other vehicles, or

to expel any person therefrom after admission, when such person shall, on demand, refuse or neglect to pay the customary fare, or when such person shall be of infamous character, or shall be guilty, after admission to the conveyance of the carrier, of gross, vulgar, or disorderly conduct, or who shall commit any act tending to injure the business of the carrier, prescribed for the management of his business, after such rules and regulations shall have been made known: *Provided*, said rules and regulations make no discrimination on account of race or color; and shall have the right to refuse any person admission to such conveyance where there is not room or suitable accommodations; and, except in cases above enumerated, all persons engaged in the business of common carriers of passengers are forbidden to refuse admission to their conveyance, or to expel therefrom any person whomsoever."

"SECT. 4. For a violation of any of the provisions of the first and second sections of this act, the party injured shall have a right of action to recover any damage, exemplary as well as actual, which he may sustain, before any court of competent jurisdiction." Acts of 1869, p. 37; Rev. Stat. 1870, p. 93.

Benson, the defendant below, was the master and owner of the "Governor Allen," a steamboat enrolled and licensed under the laws of the United States for the coasting trade, and plying as a regular packet for the transportation of freight and passengers between New Orleans, in the State of Louisiana, and Vicksburg, in the State of Mississippi, touching at the intermediate landings both within and without Louisiana, as occasion required. The defendant in error, plaintiff below, a person of color, took passage upon the boat, on her trip up the river from New Orleans, for Hermitage, a landing-place within Louisiana, and being refused accommodations, on account of her color, in the cabin specially set apart for white persons, brought this action in the Eighth District Court for the Parish of New Orleans, under the provisions of the act above recited, to recover damages for her mental and physical suffering on that account. Benson, by way of defence, insisted, among other things, that the statute was inoperative and void as to him, in respect to the matter complained of, because, as to his business, it was an attempt to "regulate commerce among the States," and, therefore, in conflict with art. 1, sect. 8, par. 3, of the Constitution of the United States. The District Court of the par-

ish held that the statute made it imperative upon Benson to admit Mrs. DeCuir to the privileges of the cabin for white persons, and that it was not a regulation of commerce among the States, and, therefore, not void. After trial, judgment was given against Benson for $1,000; from which he appealed to the Supreme Court of the State, where the rulings of the District Court were sustained.

This decision of the Supreme Court is here for re-examination under sect. 709 of the Revised Statutes.

Benson having died, Hall, his administratrix, was substituted in this court.

Mr. R. H. Marr for the plaintiff in error.

Mr. E. K. Washington, contra.

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

For the purposes of this case, we must treat the act of Louisiana of Feb. 23, 1869, as requiring those engaged in inter-state commerce to give all persons travelling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that act in the courts below, and it is conclusive upon us as the construction of a State law by the State courts. It is with this provision of the statute alone that we have to deal. We have nothing whatever to do with it as a regulation of internal commerce, or as affecting any thing else than commerce among the States.

There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has been often said, "legislation may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution." *Sherlock* v. *Alling*, 93 U. S. 103; *State Tax on Railway Gross Receipts*, 15 Wall. 284. Thus, in *Munn* v. *Illinois*, 94 U. S. 113, it was decided that a State might regulate the charges of public warehouses,

and in *Chicago, Burlington, & Quincy Railroad Co.* v. *Iowa*, id. 155, of railroads situate entirely within the State, even though those engaged in commerce among the States might sometimes use the warehouses or the railroads in the prosecution of their business. So, too, it has been held that States may authorize the construction of dams and bridges across navigable streams situate entirely within their respective jurisdictions. *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Pound* v. *Turck*, *supra*, p. 459; *Gilman* v. *Philadelphia*, 3 Wall. 713. The same is true of turnpikes and ferries. By such statutes the States regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions, and over which they have exclusive governmental control, except when employed in foreign or inter-state commerce. As they can only be used in the State, their regulation for all purposes may properly be assumed by the State, until Congress acts in reference to their foreign or inter-state relations. When Congress does act, the State laws are superseded only to the extent that they affect commerce outside the State as it comes within the State. It has also been held that health and inspection laws may be passed by the States, *Gibbons* v. *Ogden*, 9 Wheat. 1; and that Congress may permit the States to regulate pilots and pilotage until it shall itself legislate upon the subject, *Cooley* v. *Board of Wardens, &c.*, 12 How. 299. The line which separates the powers of the States from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved.

But we think it may safely be said that State legislation which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed

after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regu-

lations shall be. If this statute can be enforced against those engaged in inter-state commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, "exemplary as well as actual," by any one who felt himself aggrieved because he had been excluded on account of his color.

This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice Field, speaking for the court in *Welton* v. *The State of Missouri*, 91 U. S. 282, "inaction [by Congress] . . . is equivalent to a declaration that inter-state commerce shall remain free and untrammelled." Applying that principle to the circumstances of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the State court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the States to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from Congress and not from the States.

We confine our decision to the statute in its effect upon

foreign and inter-state commerce, expressing no opinion as to its validity in any other respect.

Judgment will be reversed and the cause remanded, with instructions to reverse the judgment of the District Court, and direct such further proceedings in conformity with this opinion as may appear to be necessary; and it is

So ordered.

MR. JUSTICE CLIFFORD concurred in the judgment, and delivered the following opinion: —

Power to regulate commerce is, by the Constitution, vested in Congress; and it is well-settled law that the word "commerce" as used in the Constitution comprehends navigation, which extends to every species of commercial intercourse between the United States and foreign nations, and to all commerce in the several States, except such as is completely internal, and which does not extend to or affect the other States. *Tonnage Cases*, 12 Wall. 204.

Beyond all doubt, the power as conferred includes navigation as well as traffic, and it is equally well settled that it extends to ships and vessels exclusively employed in conveying passengers as well as to those engaged in transporting goods and merchandise. *Gibbons* v. *Ogden*, 9 Wheat. 1.

Equality of right and privilege is guaranteed by the thirteenth article of the State Constitution to every person in the State transported in the vehicles or water-craft of a common carrier of passengers, in the words following, to wit: "All persons shall enjoy equal rights and privileges upon any conveyance of a public character." Rules and regulations to enforce that provision have been enacted by the State legislature, as fully set forth in the transcript. Sess. Laws La. (1869), 37.

Common carriers of the kind, it is conceded, may adopt rules and regulations for the management of their business, not inconsistent with the State Constitution and the enactment of the State legislature. By the terms of that enactment they may refuse to admit persons to such conveyance when the vehicle or water-craft does not contain room or suitable accommodations for the purpose, and they may refuse to admit an applicant, or expel him or her after admission, if the applicant

refuses to pay fare, or is of infamous character, or is guilty, in the conveyance, of gross, vulgar, or disorderly conduct, or shall commit any act in violation of the known rules and regulations of such carrier tending to injure his business, provided such rules and regulations make no discrimination on account of race or color. Such rules and regulations as are there authorized must be duly made known to the public in order to be operative, and they must not deny to the applicant any right or privilege on account of race, color, or previous condition of servitude.

Sufficient appears to show that the plaintiff is a person of color, and that the defendant is the master and owner of the steamer, which is a packet vessel duly enrolled and licensed for the coasting trade, and that the vessel was engaged in carrying passengers and cargo between the port of New Orleans in the State of Louisiana and the port of Vicksburg in the State of Mississippi; that the steamer has two cabins for the accommodation of passengers, conveniently arranged one above the other; that the upper is assigned to white persons and that the lower is assigned to persons of color, both being constructed with state-rooms, cabin, and a hall used as a dining-room where meals are furnished; that the plaintiff, being at the time in New Orleans and desiring to visit her plantation in another parish of the same State, went on board the steamer to secure her passage to the proper landing near her plantation; that the clerk of the steamer, to whom she applied for a passage in the upper cabin, having previously informed her agent that he could not give her a passage in that cabin, refused her request, telling her at the same time that he would give her a passage in the lower cabin; that the plaintiff declined to accept a berth in the lower cabin, and that she passed the night during which she remained on board sitting in a chair in what is known as the recess back of the upper cabin.

Both parties concede that the steamer was engaged in one of her regular trips from New Orleans to Vicksburg, and it appears that the plaintiff took passage for the landing called the Hermitage, and that on arriving there she paid five dollars fare, which is the regular fare to that landing for persons whose passage is in the lower cabin, and that it was two

dollars less than the regular fare for persons whose passage is in the upper cabin.

Proof of a decisive character is exhibited that the plaintiff applied for a berth in the upper cabin, which was refused, and that she declined to accept one in the lower cabin, which by the rules and regulations of the steamer is assigned for persons of color. Based upon these undisputed facts, the charge of the declaration is that the plaintiff was denied the equal rights and privileges guaranteed and secured to all persons by the State Constitution and the aforesaid act of the State legislature. Superadded to that is also the charge that such equal rights and privileges were denied to her on account of her race and color, for which she claims actual and exemplary damages in the sum of $75,000.

Service was made, and the defendant appeared and set up, among others, the defences following: 1. That the steamer, being enrolled and licensed according to the act of Congress to pursue the coasting trade, is governed by the laws of the United States, and may make all reasonable rules and regulations for the prosecution of her business. 2. That the State Constitution and law set up are in violation of the provision of the Federal Constitution which authorizes Congress to regulate commerce among the several States. 3. That the steamer at the time alleged was engaged in prosecuting commerce between the port of New Orleans in the State of Louisiana, and the port of Vicksburg in the State of Mississippi, and consequently was not subject to the State regulations set up in the declaration.

Under the State practice these defences were pleaded as an exception to the alleged cause of action. Hearing was had, and the exception was overruled, the court giving leave to the defendant to plead the same in his answer.

Pursuant to that leave, the defendant set up the same defences in the answer, adding thereto the following: 1. That he as owner had by law the right to prescribe rules and regulations for the accommodation of passengers in his steamer. 2. That all such steamers engaged in commerce and navigation in those waters have a well-known regulation that persons of color are not placed in the same cabin with white persons. 3. That the

regulation is reasonable, usual, and customary, and was made for the protection of their business, and had been well known to the plaintiff for many years.

Evidence was subsequently taken, the cause submitted to the court without a jury, the parties heard, and judgment entered for the plaintiff in the sum of $1,000 with interest and cost; and the defendant appealed to the Supreme Court of the State, where the parties were again heard, and the judgment of the District Court was affirmed.

Provision is made by the fourth section of the State statute in question, that the plaintiff in such a case may recover exemplary as well as actual damages for a violation of the equal rights and privileges guaranteed to all persons in the State by the State Constitution. Suppose this is so, still the defendant insists that errors were committed by the court in the trial of the case, for which the judgment should be reversed; and the transcript shows that he sued out a writ of error, and removed the case into this court.

Three of the errors assigned are still the subject of complaint: 1. That the court erred in holding that the State Constitution and statute in question are valid. 2. That the court erred in deciding that those two provisions are not regulations of commerce. 3. That the court erred in deciding that those provisions are not in conflict with the Federal Constitution.

Congress, it is conceded, possesses the exclusive power to regulate commerce; and it is everywhere admitted that both traffic and navigation are included in its ordinary signification, and that it embraces ships and vessels as the instruments of intercourse and trade as well as the officers and seamen employed in their navigation. *People* v. *Brooks*, 4 Den. (N. Y.) 469.

Steamboats as well as sailing ships and vessels are required to be enrolled and licensed; and the record shows that the steamer in question had conformed in all respects to the regulations of Congress in that regard, and that she was duly enrolled and licensed for the coasting trade, and that she was then and there engaged in the transportation of passengers and freight between the port of New Orleans and the port of Vicksburg.

None, it is supposed, will deny the power of Congress to enroll and license ships and vessels to sail from a port of one State to the ports of another; and it is equally clear that such ships and vessels are deemed ships and vessels of the United States, and that they are entitled as such to all the privileges of ships and vessels employed in the coasting trade. 1 Stat. 287, 305; 3 Kent, Com. (12th ed.) 145.

Ships and vessels enrolled and licensed as required by that act are fully authorized to carry on that trade, the act of Congress in direct terms providing that such ships and vessels and no others shall be deemed ships and vessels of the United States, entitled to the privileges of ships and vessels employed in the coasting trade or fisheries. *Gibbons* v. *Ogden*, *supra;* 1 Stat. 288; *White's Bank* v. *Smith*, 7 Wall. 646.

Language more explicit could not well be chosen to express the intention of Congress, and in my judgment it fully warrants the conclusion reached by Marshall, C. J., in that case, that the section contains a positive enactment that the ships and vessels it describes shall be entitled to the privileges of ships and vessels employed in the coasting trade.

Undisputed proof is exhibited in the record that the steamer was duly enrolled and licensed, and that she was engaged in one of her regular trips between the port of New Orleans and the port of Vicksburg, transporting passengers and freight. Grant that, and it follows that she must be deemed to have been a ship or vessel of the United States entitled to all the privileges of ships and vessels engaged in the coasting trade, pursuant to the act of Congress providing for the enrolment and license of such ships and vessels and the regulation of such trade.

Attempt was made in the leading case to maintain that the license gave no right to trade, that its sole purpose was to confer the American character on the ship or vessel; but the court promptly rejected the proposition, and held that, where the legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right; and the court remarked, that it would be contrary to all reason and to the course of human affairs to say that a State is unable to strip a vessel of the particular privileges attendant on the exercise of

a right, and yet may annul the right itself. Instead of that, it is the enrolment that proves the national character of the ship or vessel; and the court decided in that case that the license could only be granted to vessels of twenty or more tons burden which had already been enrolled, and that the license to do a particular thing is a permission or authority to do that thing, and, if granted by a person having authority to grant it, transfers to the grantee whatever it purports to authorize.

Packets which ply along the coast, say the court, as well as those making foreign voyages, consider the transportation of passengers as an important part of their business; and the court adjudged directly that a coasting vessel employed in that business is as much a portion of the national marine as one employed in the transportation of cargo, and that no reason exists for holding that such a vessel is withdrawn from the regulating power of the national government.

Without more, these references to the opinion in that great case are sufficient to show that the court there decided that the enrolment act is of itself a sufficient regulation of the navigation of all the public navigable rivers of the United States to secure to ships and vessels of the United States sailing under a coasting license the free navigation of all such public highways.

Confirmation of that proposition, even more decisive than the opinion of the court, is found in the decree rendered in the case, where the court adjudge that the licenses set up by the appellant gave full authority to those vessels to navigate the waters of the United States for the purpose of carrying on the coasting trade, any law of the State to the contrary notwithstanding, and that so much of the law of the State as prohibited vessels so licensed from navigating the waters of the State by means of fire or steam is repugnant to the Constitution of the United States, and void.

Cases have arisen in which it is held that the States may rightfully adopt certain regulations touching the subject, which are local in their operation, where none have been ordained by Congress; but it will not be necessary to enter that field of inquiry, or to attempt to reconcile those decisions with the conclusion in this case, as it is clear from the remarks already

made that Congress has prescribed the conditions which entitle ships and vessels belonging to the national marine to pursue the coasting trade without being subjected to burdensome and inconsistent State regulations. *Welton* v. *The State of Missouri*, 91 U. S. 275.

Repeated decisions of this court have determined that the power to regulate commerce embraces all the instruments by which such commerce may be conducted; and it is settled law that where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority. Whatever subjects of this power, says Mr. Justice Curtis, are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. *Cooley* v. *Board of Wardens*, 12 How. 299.

Difficulty may attend the effort to prescribe any definition which will guide to a correct result in every case; but it is clear that a regulation which imposes burdensome or impossible conditions on those engaged in commerce, whether with foreign nations or among the several States, must of necessity be national in its character. *Henderson et al.* v. *Mayor of New York*, 92 U. S. 259.

Apply that rule to the case, and it is clear, even if there be a class of State regulations which may be valid until the same ground is occupied by an act of Congress or by a treaty, that the State regulation in question is not one of that class.

Such a subject is in its nature national, and admits of only one uniform system or plan of regulation. Unless the system or plan of regulation is uniform, it is impossible of fulfilment. Mississippi may require the steamer carrying passengers to provide two cabins and tables for passengers, and may make it a penal offence for white and colored persons to be mixed in the same cabin or at the same table. If Louisiana may pass a law forbidding such steamer from having two cabins and two tables, — one for white and the other for colored persons, — it must be admitted that Mississippi may pass a law requiring all passenger steamers entering her ports to have separate cabins

and tables, and make it penal for white and colored persons to be accommodated in the same cabin or to be furnished with meals at the same table. Should State legislation in that regard conflict, then the steamer must cease to navigate between ports of the States having such conflicting legislation, or must be exposed to penalties at every trip.

Those who framed the Constitution never intended that navigation, whether foreign or among the States, should be exposed to such conflicting legislation; and it was to save those who follow that pursuit from such exposure and embarrassment that the power to regulate such commerce was vested exclusively in Congress.

Few or none will deny that the power to regulate commerce among the several States is vested exclusively in Congress; and it is equally well settled that Congress has, in many instances and to a wide extent, legislated upon the subject. *Sherlock* v. *Alling*, 93 U. S. 99; Rev. Stat., sect. 4311.

Support to that proposition, of the most persuasive and convincing character, is found in the act of Congress entitled "An Act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes," the forty-first section of which provides that all steamers navigating the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States, when such waters are common highways of commerce or open to general or competitive navigation, shall be subject to the provisions of that act. 16 Stat. 453; Rev. Stat., sect. 4400.

Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be on that account withdrawn from the control or protection of Congress. *Gibbons* v. *Ogden*, *supra*.

Differences of opinion may exist as to the extent and operation of the national law regulating commerce among the several States, but none, it is presumed, will venture to deny that it is regulated very largely by congressional legislation. Admit that, and it follows that the legislation of Congress, if constitutional, must supersede all State legislation upon the same, and, by necessary implication, prohibit it, except in cases where the legislation of Congress manifests an intention to leave

some particular matter to be regulated by the several States. *Cooley* v. *Board of Wardens*, *supra*.

Decisive authority for that proposition is found in the unquestioned decisions of this court. Such were the views of Judge Story more than thirty-five years ago, when he said, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the State legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations and what they may deem auxiliary provisions for the same purpose. *The Chusan*, 2 Story, 466; *Sinnot* v. *Davenport*, 22 How. 227.

In such a case, the legislation of Congress in what it does prescribe manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it. *Prigg* v. *Pennsylvania*, 16 Pet. 539; *Gibbons* v. *Ogden*, *supra*; *White's Bank* v. *Smith*, *supra*.

Whenever the terms in which a power is granted to Congress, or the nature of the power, requires that it should be exercised exclusively by Congress, the subject is as completely taken from the State legislatures as if they had been expressly forbidden to exercise the power. *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Brown* v. *Maryland*, 12 id. 419.

Irrespective of the decisions of the State court, it might well be doubted whether the State statute in question does prohibit a steamer carrying passengers from having and maintaining separate cabins and eating-saloons for white and colored passengers, and whether the denial to a colored female of a passage in the cabin assigned to white female passengers is a denial of equal rights and privileges, within the meaning of the State Constitution or the first section of the State statute in question, provided the applicant was offered a passage in the lower cabin, with equally convenient accommodation. Much discussion of that topic, however, is unnecessary, as two decisions of the State court conclusively determine the point that the State statute does contain such a prohibition, and that the

facts of the case do bring the conduct of the defendant within that prohibition. *DeCuir* v. *Benson*, 27 La. Ann. 1; *Hart* v. *Hoss & Elder*, 22 id. 517; *Sauvinet* v. *Walker*, 27 id. 14.

Even suppose the meaning of the statute is doubtful, still the rule of construction adopted by the highest court of a State, in construing their own Constitution and one of their own statutes, in a case not involving any question re-examinable in this court under the twenty-fifth section of the Judiciary Act, must be regarded as conclusive in this court. *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Randall* v. *Brigham*, 7 id. 523; *Gut* v. *The State*, 9 id. 35.

Where a State court gives such a construction to a State statute as to make it conflict with the Constitution or laws of the United States, and sustains its validity after giving it such construction, and thereby deprives a party of his rights under the said Constitution or law, it is settled law that a Federal question does arise in such a case, and that this court can review the decision of the State court as to the validity of such a statute. *Insurance Company* v. *Treasurer*, 11 id. 204. Were it not so, it is clear that the constitutional provision could always be evaded by the State courts giving such a construction to the contract or the statute as to render the appellate power of this court of no avail in such cases to uphold the contract against unfriendly State legislation. *Delmas* v. *Insurance Company*, 14 id. 661.

State courts certainly have a right to expound the statutes of the State; and, having done so, those statutes, with the interpretation given to them by the highest court of the State, become the rule of decision in the Federal courts. *Richmond* v. *Smith*, 15 id. 429; *Jones & Co.* v. *The City of Richmond*, 18 Gratt. (Va.) 517; *Leffingwell* v. *Warren*, 2 Black, 599.

Argument to show that the question whether or not the State court erred in the construction of their own Constitution and statute is not re-examinable in this court under the twenty-fifth section of the Judiciary Act is unnecessary, as the negative of the proposition is self-evident.

Governed by the laws of Congress, it is clear that a steamer carrying passengers may have separate cabins and dining-saloons for white persons and persons of color, for the plain

reason that the laws of Congress contain nothing to prohibit such an arrangement. Steamers carrying passengers for hire are bound, if they have suitable accommodation, to take all who apply, unless there is objection to the character or conduct of the applicant. Applicants to whom there is no such valid objection have a right to a passage, but it is not an unlimited right. On the contrary, it is subject to such reasonable regulations as the proprietors may prescribe for the due accommodation of passengers and the due arrangement of the business of the carrier.

Such proprietors have not only that right, but the farther right to consult and provide for their own interests in the management of the vessel as a common incident to their right of property. They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the vessel, or who are guilty of gross and vulgar habits of conduct, or who make disturbances on board, or whose characters are doubtful, dissolute, suspicious, or unequivocally bad. Nor are they bound to admit passengers on board whose object it is to interfere with the interests of the patronage of the proprietors, so as to make their business less lucrative or their management less acceptable to the public. *Jencks* v. *Coleman*, 2 Sumn. 221.

Corresponding views are expressed by the Supreme Court of Michigan in an analogous case, in which the distinction between the right of an applicant to be admitted on board, and his claim to dictate what part of the vessel he shall occupy, is clearly pointed out. Referring to that subject, the court say the right to be carried is one thing, and the privilege of a passenger on board as to what part of the vessel may be occupied by him is another and a very different thing; and they add, that it is the latter and not the former which is subject to reasonable rules and regulations, and is, where such rules and regulations exist, to be determined by the proprietors. Damages were claimed in that case for refusing the plaintiff the privilege of the cabin; but the court held that the refusal was nothing more or less than denying him certain accommodations from which he was excluded by the rules and regulations of the steamer. *Day* v. *Owen*, 5 Mich. 520.

Proprietors of the kind may make rules and regulations, but they must be reasonable; and the court held in that case that to be so they should have for their object the accommodation of the passengers, including every thing to render the transportation most comfortable and least annoying, not to one or two or any given number carried at any particular time, but to the great majority ordinarily transported; and they also held that such rules and regulations should be of a permanent nature, and not be made for a particular occasion or emergency.

Special and important duties indubitably are imposed upon carriers of passengers for the benefit of the travelling public; but it must not be forgotten that the vehicles and vessels which such carriers use do not belong to the public. They are private property, the use and enjoyment of which belong to the proprietors. Angell, Carriers (5th ed.), sect. 525.

Concede what is undoubtedly true, that the use and employment of such vehicles and vessels, during the time they are allowed the privileges of common carriers, may be subjected to such conditions and obligations as the nature of their employment requires for the comfort, security, and safety of passengers, still the settled rules of constitutional law forbid that a State legislature may invade the dominion of private right by arbitrary restrictions, requirements, or limitations, by which the property of the owners or possessors would be virtually stripped of all utility or value if bound to comply with the regulations. *Jencks* v. *Coleman*, *supra*.

Both steamboats and railways are modern modes of conveyance; but Shaw, C. J., decided that the rules of the common law were applicable to them, as they take the place of other modes of carrying passengers, and he held that they have authority to make reasonable and suitable regulations as regards passengers intending to pass and repass in their vehicles or vessels. *Commonwealth* v. *Power*, 7 Metc. (Mass.) 601; *Hibbard* v. *New York & Erie Railroad Co.*, 15 N. Y. 455; *Illinois Central Railroad Co.* v. *Whittemore*, 43 Ill. 420. They are, said the Chief Justice in that case, in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered to make such proper arrangements as will pro-

mote his own interests, but he is bound to regulate his house so as to preserve order, and, if practicable, prevent breaches of the peace. *Vinton* v. *Middlesex Railroad Co.*, 11 Allen (Mass.), 304.

Cases of like import are quite numerous, and the Supreme Court of Pennsylvania decided directly that a public carrier may separate passengers in his conveyance; and they deduce his power to do so from his right of private property in the means of conveyance, and the necessity which arises for such a regulation to promote the public interest. Speaking to that point, they say that the private means the carrier uses belong wholly to himself; and they held the right of control in that regard as necessary to enable the carrier to protect his own interests, and to perform his duty to the travelling public. His authority in that regard, as that court holds, arises from his ownership of the property, and his public duty to promote the comfort and enjoyment of those travelling in his conveyance. Guided by those views, the court held that it is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well-known customary repugnancies which are likely to breed disturbances, where white and colored persons are huddled together without their consent. *The West Chester & Philadelphia Railroad Co.* v. *Miles*, 55 Pa. St. 209.

Where the passenger embarks without making any special contract, and without knowledge as to what accommodations will be afforded, the law implies a contract which obliges the carrier to furnish suitable accommodations according to the room at his disposal; but the passenger in such a case is not entitled to any particular apartments or special accommodations. Substantial equality of right is the law of the State and of the United States; but equality does not mean identity, as in the nature of things identity in the accommodation afforded to passengers, whether colored or white, is impossible, unless our commercial marine shall undergo an entire change. Adult male passengers are never allowed a passage in the ladies' cabin, nor can all be accommodated, if the company is large, in the state-rooms. Passengers are entitled to proper diet and lodging; but the laws of the United States do not require the master of

a steamer to put persons in the same apartment who would be repulsive or disagreeable to each other.

Steamers carrying passengers as a material part of their employment are common carriers, and as such enjoy the rights and are subject to the duties and obligations of such carriers; but there was and is not any law of Congress which forbids such a carrier from providing separate apartments for his passengers. What the passenger has a right to require is such accommodation as he has contracted for, or, in the absence of any special contract, such suitable accommodations as the room and means at the disposal of the carrier enable him to supply; and in locating his passengers in apartments and at their meals it is not only the right of the master, but his duty, to exercise such reasonable discretion and control as will promote, as far as practicable, the comfort and convenience of his whole company.

Questions of a kindred character have arisen in several of the States, which support these views in a course of reasoning entirely satisfactory and conclusive. Boards of education were created by a law of the State of Ohio, and they were authorized to establish within their respective jurisdictions one or more separate schools for colored children when the whole number by enumeration exceeds twenty, and when such schools will afford them, as far as practicable, the advantages and privileges of a common-school education. Under that law, colored children were not admitted as a matter of right into the schools for white children, which gave rise to contest, in which the attempt was made to set aside the law as unconstitutional: but the Supreme Court of the State held that it worked no substantial inequality of school privileges between the children of the two classes in the locality of the parties; that equality of rights does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school; and that any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either. *State* v. *McCann et al.*, 21 Ohio St. 198.

Separate primary schools for colored and for white children were maintained in the city of Boston. Children in the State who are unlawfully excluded from public-school instruction may recover damages therefor against the city or town by which such public instruction is supported. It appears that the plaintiff was denied admission to the primary school for white children, and she by her next friend claimed damages for the exclusion; but the Supreme Court, Shaw, C. J., giving the opinion, held that the law vested the power in the committee to regulate the system of distribution and classification, and that when the power was reasonably exercised their decision must be deemed conclusive. Distinguished counsel insisted that the separation tended to deepen and perpetuate the odious distinction of caste; but the court responded, that they were not able to say that the decision was not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment. *Roberts* v. *City of Boston*, 5 Cush. (Mass.) 198.

Age and sex have always been marks of classification in public schools throughout the history of our country, and the Supreme Court of Nevada well held that the trustees of the public schools in that State might send colored children to one school and white children to another, or they might make any such classification as they should deem best, whether based on age, sex, race, or any other reasonable existent condition. *State* v. *Duffy*, 7 Nev. 342.

Directors of schools in Iowa have no discretion under the existing law of the State to deny a youth of proper age admission to any particular school on account of nationality, color, or religion. Former statutes of the State invested the directors with such discretion, and it is impliedly conceded that it would be competent for the legislature again to confer that authority. *Clark* v. *The Board of Directors*, 24 Iowa, 266.

School privileges are usually conferred by statute, and, as such, are subject to such regulations as the legislature may prescribe. Such statutes generally provide for equal school advantages for all children, classifying the scholars as the legislature in its wisdom may direct or authorize; and the Supreme Court of New York decided that the legislature of the State

may from time to time make such limitations and alterations in that regard as they may see fit. *Dallas* v. *Fosdick*, 40 How. (N. Y.) Pr. 249.

Public instruction of the kind is regulated in that State by official boards created for the purpose; and it is settled law there that the board may assign a particular school for colored children, and exclude them from schools assigned for white children, and that such a regulation is not in violation of the Fourteenth Amendment. *People* v. *Gaston*, 13 Abb. (N. Y.) Pr. N. S. 160.

Ships and vessels duly enrolled and licensed for the coasting trade may lawfully touch at intermediate ports, to receive or discharge passengers or cargo; but the fact that they do so does not in the least change or alter the character of the trip, or diminish the right of the vessel to enjoy all the privileges of a vessel engaged in commerce between ports in different States; nor does the fact that the plaintiff expected to leave the steamer at a landing in the same State enlarge her right of accommodation, or augment in any respect the obligations of the steamer as a public carrier, for the reason that the steamer sailed throughout the whole trip under her coasting license, and her rights and privileges, duties and obligations, must be ascertained and defined by the regulations prescribed by the acts of Congress.

Commercial regulations of the kind cannot be effectual to accomplish the object for which they were required and designed to effect, unless it be held that they extend to the entire voyage, as well that portion of it which is in the State where the voyage began as that which extends into another State, as the whole is performed under the coasting license founded in the acts of Congress passed to regulate such commerce and navigation.

Throughout our history the acts of Congress have regulated the enrolment and license of vessels to be engaged in the coasting trade, and this court expressly determined that a State law which imposed another and an additional condition to the privilege of carrying on that trade within her waters is inoperative and void. *Sinnot* v. *Davenport*, 22 How. 227; *Foster* v. *Davenport*, 22 id. 244; *Wheeling Bridge Company* v. *Pennsylvania*, 18 id. 432.

Alabama passed an act to the effect that vessels engaged in foreign commerce, or in the coasting trade, shall not navigate her waters without complying with a condition not prescribed by the act of Congress. By the State law, they are required, before leaving the described port, to file in the office of the judge of probate a statement in writing, setting forth as follows: 1. The name of the vessel. 2. The name of the owner or owners. 3. His or their place or places of residence. 4. The interest each has in the vessel.

Speaking of that condition, the court say, if the interpretation of the court as to the force and effect of the privileges afforded to the vessel by the enrolment and license act in the leading case are to be maintained, it can require no argument to show a direct conflict between this act and the act of Congress regulating the coasting trade. *Sinnot* v. *Davenport*, *supra*.

Nor does it require any argument to show that the State law before the court is exactly analogous in principle to the State law declared void in that case. Like the former, the latter imposes an additional condition to the privilege of carrying on the coasting trade within the waters of the State, not prescribed by any act of Congress. Enrolled and licensed vessels have the constitutional right to pursue the coasting trade on the terms and conditions which Congress has seen fit to prescribe, and no State legislature can interfere with that right, either to abridge or enlarge it, or to subject it to any terms and conditions whatsoever.

Commerce among the several States as well as commerce with foreign nations requires uniformity of regulation; and that power is by the Constitution vested exclusively in Congress, as appears by the Constitution itself, and by an unbroken course of the decisions of this court, covering a period of more than half a century.

Judicial authority to support the theory of the court below is entirely wanting, except what may be derived from the case of *Coger* v. *Packet Company*, 37 Iowa, 145, decided by the Supreme Court of the State. Special damage was claimed by the plaintiff in that case, of the master of a steamer navigating the Mississippi River, for removing her, she being a colored

woman, from the dining-room of the steamer without just cause. Regulations had previously been adopted by the steamer excluding colored persons from the state-rooms and other first-class privileges and accommodations. Service was made, and the defendant appeared and pleaded those regulations as a defence. Hearing was had, and the court decided that persons of color were entitled to the same rights and privileges, when travelling, as white persons, and that they cannot be required by any rule or custom based on distinction of color or race to accept other or different accommodations than those furnished to white persons.

Abundant reasons exist to show that the decision in that case is not an authority in the case before the court, a few of which will be stated: 1. Because the report of the case does not show that the steamer was navigating under a coasting license. 2. Because the constitutional question involved in the case before the court was neither involved, presented, nor considered in that case, either by the bar or the court. 3. Because the decision was rested entirely upon other and different grounds. 4. Because the facts of the two cases are widely and substantially different.

Colored persons, it is admitted, are citizens, and that citizens, without distinction of race or color or previous condition of servitude, have the same right to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of personal property, as is enjoyed by white citizens. 14 Stat. 27. States are also forbidden to 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. Enforcement Act, 16 id. 140; Fourteenth Amendment to the Constitution.

Vague reference is made to the Civil Rights Act and to the preceding amendment to the Constitution, as if that act or the said amendment may supersede the operation and legal effect of the coasting license as applied to the case before the

court; but it is clear that neither of those provisions, nor both combined, were intended to accomplish any such purpose. Enough appears in the language employed in those provisions to show that their principal object was to confer citizenship, and the rights which belong to citizens as such, upon the colored people, and in that manner to abrogate the rule previously adopted by this court in the Dred Scott Case. By the Civil Rights Act, the rule adopted in that case is entirely superseded, and all the substantial rights of citizens are conferred upon the colored people, as more fully appears by the enumeration contained in the first section of the act. Under no view, therefore, that can properly be taken of that act can it be held to supersede, repeal, modify, or affect the act of Congress, providing for the enrolment and licensing of ships and vessels for the coasting trade. *Dallas* v. *Fosdick*, *supra*.

Certain phases of the question were also presented to the District Court of Philadelphia, in the case of *Goines* v. *M'Candless*, 4 Phila. C. P. 255, in which the court admitted that a corporation created for the carriage of passengers cannot arbitrarily refuse to carry any man or class of men without laying itself open to an action for damages; but the court held in the same case that such a corporation may establish reasonable rules for the comfort and convenience of those whom it is bound to carry, even though the effect may be to exclude particular individuals falling within those rules.

Evidence of a decisive character that Congress has regulated inter-state commerce is also found in the act supplemental to the act providing for the enrolment and licensing of ships and vessels for the coasting trade, the first section of which divides the sea-coasts and navigable rivers into three great districts, and provides as follows: 1. That the first shall include all the collection districts on the sea-coast and navigable rivers between the limits of the United States and the southern limits of Georgia. 2. That the second shall include all the collection districts and navigable rivers between the river Perdido and the Rio Grande. 3. That the third shall include all the collection districts on the sea-coast and navigable rivers between the southern limits of Georgia and the river Perdido. Rev. Stat., sect. 4348; 3 Stat. 493.

Congress having legislated upon the subject, it cannot be that the State legislatures have a right to interfere and prescribe additional regulations, as the legislation of Congress clearly indicates that the national law-makers never intended to leave any thing open upon the subject to the discretion of the State legislatures.

Two opposing theories, sometimes advanced in such controversies, deserve some brief comments before concluding the examination of the case. They are in substance and effect as follows: 1. That the effect of the coasting license issued under the enrolment act is merely to evidence the national character of the vessel; that the acts of Congress requiring the register and enrolment of vessels was never intended as the exercise of the power of Congress to regulate commerce among the States, and that the States still possess the concurrent power to prescribe such regulations until Congress shall ordain express provisions to control and restrict the regulations enacted by the States. 2. That the Supreme Court, by a decision made subsequent to the decree in the great leading case in which it is held that the power to regulate commerce is vested exclusively in Congress, qualified, if they did not positively overrule, that generally acknowledged rule upon the subject.

1. Enough, it would seem, has already been remarked to refute the first opposing theory; but, if more be needed, it will be found in the fact that it is the exact theory maintained by the courts of the State where the controversy arose, and whose final decree was removed into this court for re-examination. None will attempt to deny that proposition who ever read the opinions delivered in the subordinate courts. *Ogden* v. *Gibbons*, 4 Johns. (N. Y.) Ch. 150; s. c. 17 Johns. 488; 1 Kent Com. (12th ed.) 435.

Explanations respecting that historical controversy, of a more satisfactory character, are given by Chancellor Kent than by any other legal writer who has undertaken to state the constitutional questions which it involved, and which were finally determined by the unanimous judgment of this court. His statement of the case is as follows: That the respondent set up, by way of right and title to navigate the waters of the State in opposition to the grant of the complainant, that his

steamboats were duly enrolled and licensed under the enrolment act, to be employed in carrying on the coasting trade; that the question in the case was whether such a coasting license conferred the power to interfere with the grant of the State under which the complainant claimed the exclusive right to navigate the waters of the State which made the grant.

Eminent counsel represented both sides of the question, and we are informed by the learned commentator that the courts of the State in the two cases referred to decided against the defence set up in the answer of the respondent, and held that the coasting license merely gave to the steamboats of the respondent the character of American vessels; that the license was not intended to decide a question of property, or to confer a right of property or a right of navigation or commerce; that the courts of that State during that period never regarded the act regulating the coasting trade as intended to assert any supremacy over State regulations in respect to internal waters or commerce, for the reason that those courts did not consider that act as the exercise of the power vested in Congress to regulate commerce among the States.

Competent evidence to show that the courts of that State in those two cases took the exact same ground as that involved in the theory in question is very abundant and conclusive, without looking elsewhere than to the lecture of the Chancellor under consideration. Decisive support to that conclusion is also found in what follows in the same connection in the same lecture, in which he says that the courts of the State did not, either in the case of *Ogden* v. *Gibbons* or in any of the cases which preceded it, deny to Congress the power to regulate commerce among the States by express and direct provision, so as to control and restrict the exercise of the State grant; that they only insisted that without some such explicit provision the State jurisdiction over the subject was in full force, which is exactly what is claimed by those who seek to undermine the doctrines of the great leading case.

Beyond all question, the views of the Chancellor as to what was decided by the courts of the State in that great controversy are correct, and it will be equally instructing to ascertain what his views are as to what followed in this court. Speaking

upon that subject, he says the cause was afterwards carried up by appeal to the Supreme Court of the United States, where the decree was reversed on the ground that the grant to the complainant was repugnant to the rights and privileges conferred upon the steamboats of the respondent navigating under a coasting license; that in the construction of the power to regulate commerce the Supreme Court held that the term meant not only traffic but intercourse, and that it included navigation, and that the power to regulate commerce was a power to regulate navigation; that commerce among the several States meant commerce intermingled with the States, and which might pass the external boundary line of each State, and be introduced into the interior; that the power conferred comprehended navigation within the limits of every State, and that it may pass the jurisdictional line of a State and be exercised within its territory, so far as the navigation is connected with foreign commerce or with commerce among the several States; and that the power, like all the other powers of Congress, is plenary and absolute within its acknowledged limits.

Three limitations or restrictions, as the Chancellor states, were admitted by the Supreme Court in that case to exist to the limits of that power as conferred: 1. That the power does not extend to that commerce which is completely internal, and is carried on between different parts of the same State, not extending to or affecting other States. 2. That the power is restricted to that commerce which concerns more States than one, the completely internal commerce of a State being reserved for the State itself. 3. That the power conferred does not prohibit the States from passing inspection laws or quarantine or health laws and laws for regulating highways and ferries, nor does it include the power to regulate the purely internal commerce of a State, or to act directly on its system of police. 1 Kent Com. (12th ed.) 437.

Many efforts have been made to analyze and expound the opinion delivered by the great magistrate in that case, but none, it is believed, were ever attended with such complete success as that of the commentator to which reference is made. He was the chancellor of the State court, and gave the original opinion; and, when he found that his decree was reversed by

the Supreme Court, he was influenced by the highest motive to ascertain the true grounds assumed in the judgment of the Appellate Court.

Judge Story says, in his Commentaries on the Constitution, that it has been settled, upon the most solemn deliberation, that the power to regulate commerce is exclusive in the government of the United States; and he adds in another section of the Commentaries, that the reasoning by which the power given to Congress to regulate commerce is maintained to be exclusive has not of late been seriously controverted, and that it seems to have the cheerful acquiescence of the learned tribunals of a particular State, one of whose acts brought it first under judicial examination. 2 Story, Const. (3d ed.), sects. 1067, 1071; *Steamboat Company* v. *Livingston*, 3 Cow. (N. Y.) 13; *The People* v. *Brooks*, 4 Denio (N. Y.), 469; Pomeroy, Const. (3d ed.), sect. 371; Sergeant, Const. (2d ed.) 308; Rawle, Const. (2d ed.) 82; *Railroad Company* v. *Husen*, *supra*, p. 465.

Repeated decisions of this court, including the one at the present term, have established that rule as the settled law of the court; nor is there any case in the reported decisions of the court, when properly understood, which gives any countenance or support to the theory under examination, unless it be the case of *Gilman* v. *Philadelphia*, 3 Wall. 713, which it is not admitted, when taken as a whole, falls within that category.

Certain admissions are contained in the opinion in that case which are certainly in conflict with the theory which it is the purpose of these observations to refute. Mr. Justice Swayne very properly admits that the enrolment act authorizes vessels enrolled and licensed according to its provisions to engage in the coasting trade; that commerce includes navigation; and that the power to regulate commerce comprehends the control, for that purpose and to the extent necessary, of the navigable waters of the United States which are accessible from a State other than those in which they lie. For that purpose, says the same learned judge, they are the public property of the nation, and subject to all the requisite legislation by Congress. *Gibbons* v. *Ogden*, *supra*; *Corfield* v. *Coryell*, 4 Wash. 371.

These are the authorities cited to support the proposition; and the learned Justice adds, that this necessarily includes the

power to keep such waters open and free from any obstruction to their navigation interposed by the States or otherwise, to remove such obstructions when they exist, and to provide by such sanctions as they, the Congress, may deem proper against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress, says the judge, possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always been vested in the Parliament of England: and he further added, that commerce among the States does not stop at a State line; that, coming from abroad, it penetrates wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable. Wherever commerce among the States goes, the power of the nation goes with it, to protect and enforce its rights. Nothing more surely can be needed to show that the theory under discussion is erroneous and fallacious.

2. Whatever support exists to the second theory mentioned is found in a single case, which has sometimes been strangely misunderstood at the bar. *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245. Proper attention to the facts of the case will show that the creek in question was one of those many creeks passing through a deep level marsh adjoining the river Delaware, up which the tide flows for some distance; that the property on the bank of the creek was of little or no value unless it was reclaimed by excluding the water from the marsh; and that the health of the residents of the neighborhood required that such improvement should be made. Measures calculated to effect those objects had been adopted; and the court held that the State legislature might lawfully authorize the necessary erections to accomplish those important objects.

Judgment was rendered by the same court which gave the judgment in the case of *Gibbons* v. *Ogden;* and no one has ever been able to assign any reason to conclude that the constitutional views of the court had at that time undergone any change. Instead of overruling that great case, it will be seen that the Chief Justice who gave the opinion did not even allude to it; though, as a sound exposition of the Federal Constitution, it is not second in point of importance to any one

that great magistrate ever delivered. Evidently he had no occasion to refer to it or to any of its doctrines, as he properly described the creek over which the dam was erected as a low, sluggish water, of little or no importance, and treated the erection of the dam as one adapted to reclaim the adjacent marshes, and as essential to the preservation of the public health, and sustained the constitutionality of the law authorizing the erection, upon the ground that it was within the reserved police powers of the State.

Congressional regulations, as embodied in the enrolment act and other acts of Congress, apply to all public navigable waters of the United States; but every navigator employed in the coasting trade knows that there are many small creeks, channels, and indentations along our Atlantic coast, especially in the marshes, which are never classed in the category of public navigable waters, though they are capable of being navigated by small vessels when the tide is full. Hundreds of such creeks, said Mr. Justice McLean, are similarly situated. In such cases, involving doubt whether the jurisdiction may not be exclusively exercised by the State, it is politic and proper in the judicial tribunals of the nation to follow the action of Congress.

Over the navigable waters of a State Congress can exercise no commercial power, except as regards the intercourse with other States or foreign countries; and he adds, that doubtless there are many creeks made navigable by the flowing of the tide or by the back water from large rivers which the general phraseology of an act to regulate commerce may not embrace; that in all such cases, and many others that may be found to exist, this court could not safely exercise a jurisdiction not expressly sanctioned by Congress.

When the language of the court in that case is applied to the facts of the case, said Justice McLean, no such principle as that assumed in argument is sanctioned; that the construction of the dam was not complained of as a regulation of commerce, but as an obstruction to commerce; that the court held, that, inasmuch as Congress had not assumed to control State legislation over those small navigable creeks into which the tide flows, the judicial power could not do so; that the act of

the State was an internal and a police power to guard the health of its citizens, and that nothing more was found in the case than a forbearance to exercise power over a doubtful object, which should ever characterize the judicial branch of the government. *Passenger Cases*, 7 How. 283.

Mr. Hamilton, in the thirty-first number of the Federalist, says that there is an exclusive delegation or alienation of State sovereignty in three cases: first, where the exclusive power is in terms given to Congress; second, where an authority is granted to the Union, and the States are prohibited from exercising a like authority; third, where an authority is granted to the Union, to which a similar authority in the States would be absolutely and wholly contradictory and repugnant.

Even suppose that the power to regulate commerce falls within the third designation, still it is believed that sufficient has already been remarked to show that the nature of the power is such that it shows that the power should be exclusively exercised by Congress. *Cooley* v. *Board of Wardens*, 12 How. 299; *State* v. *The Wheeling Bridge Company*, 13 How. 518; s. c. 18 id. 421.

Both of the decisions in the Wheeling Bridge case are subsequent in point of time to the case of *Willson* v. *The Blackbird Creek Marsh Co.*, and so are the Commentaries of Judge Story upon the Constitution; and yet not an intimation is found in either that the doctrines of the great case referred to were ever modified or questioned. That such an intimation is not to be found anywhere is clearly demonstrated by a recent commentator, who has carefully reviewed every opinion given by this court upon that subject. Pomeroy, Const. (3d ed.), pp. 207–248.

Waters lying wholly within a single State may be such as to be regarded as public navigable waters of the United States, because they are properly denominated as arms of the sea. Examples of the kind are numerous, of which it will be sufficient to mention the Hudson, from Albany to the sound; the Penobscot, from Bangor to the bay; the Kennebec, from the capital of the State to its mouth; and the Saco, from below the falls to the ocean; and many others, equally well known even to the pupils in the common schools. All such public

navigable waters, being arms of the sea, are within the acts of Congress passed to regulate commerce. *The Propeller Commerce*, 1 Black, 574; *The Belfast*, 7 Wall. 624; *Gilman* v. *Philadelphia*, 3 id. 713.

BEECHER *v.* WETHERBY.

1. It was an unalterable condition of the admission of Wisconsin into the Union, that, of the public lands in the State, section 16 in every township, which had not been sold or otherwise disposed of, should be granted to her for the use of schools.
2. Whether the compact with the State constituted only a pledge of a grant *in futuro*, or operated to transfer to her the sections as soon as they could be identified by the public surveys, the lands embraced within them were set apart from the public domain, and could not be subsequently diverted from their appropriation to the State. If any further assurance of title was required, the United States was bound to provide for the execution of proper instruments transferring to the State the naked fee, or to adopt such other legislation as would secure that result.
3. The right of the Menomonee Indians to their lands in Wisconsin was only that of occupancy; and, subject to that right, the State was entitled to every section 16 within the limits of those lands.
4. The act of Congress approved Feb. 6, 1871 (16 Stat. 404), authorizing a sale of the townships set apart for the use of the Stockbridge and Munsee Indians, and originally forming a part of the lands of the Menomonees, does not apply to sections 16.

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

This was replevin by Beecher to recover from Wetherby, James, and Stille, saw-logs, cut and taken by them during the winter of 1872 and 1873, from section 16, township 28, range 14 east, in Wisconsin. The plaintiff asserts title to the land under patents from the United States bearing date Oct. 10, 1872; and the defendants, under patents from that State of Dec. 15, 1865, and Sept. 26, 1870.

Under the eighth article of the treaty of Aug. 19, 1825, 7 Stat. 272, the Menomonee lands were declared to be "bounded on the north by the Chippewa country, on the East by Green Bay and Lake Michigan, extending as far south as Milwaukee River, and on the West they claim to Black River." The lands in question are embraced in this tract.

A treaty concluded with the Menomonees Feb. 8, 1831, id. 342, confirming those boundaries, was ratified by the Senate, with a proviso that two townships on the east side of Winnebago Lake should be ceded for the use of the Stockbridge and Munsee Indians.

By a treaty concluded Oct. 18, 1848, and ratified Jan. 23, 1849, 9 id. 952, the Menomonees agreed to cede to the United States all their lands in Wisconsin. The eighth article stipulated that they should be permitted to remain on the ceded lands for the period of two years, and until the President should notify them that the same were wanted.

The act to enable the people of Wisconsin Territory to form a Constitution and State government, and for the admission of such State into the Union, approved Aug. 6, 1846, id. 56, provides "that section numbered 16 in every township of the public lands in said State, and, when such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools."

The convention called to form a constitution, on the first day of February, 1849, accepted the proposition contained in the organic act. Rev. Stat. Wis. 1849, p. 45. By an act entitled "An Act for the admission of the State of Wisconsin into the Union," approved May 29, 1848, id. 233, such acceptance was assented to by Congress.

A joint resolution of the legislature of Wisconsin, approved Feb. 1, 1853, Gen. Laws of Wis. 1853, p. 110, gives the assent of that State "to the Menomonee nation of Indians to remain on the tract of land set apart for them by the President of the United States, on the Wolf and Oconto Rivers, and upon which they now reside, the same being within the State of Wisconsin aforesaid, and described as follows, to wit: Commencing at the south-east corner of town 28 north, range 19, running thence west thirty miles, thence north eighteen miles, thence east thirty miles, thence south eighteen miles to the place of beginning."

On the 12th of May, 1854, 10 Stat. 1064, a treaty was made with the Menomonees, "supplementary and amendatory" to that ratified Jan. 23, 1849, wherein it is recited that, "upon mani-

festation of great unwillingness on the part of said Indians to remove to the country west of the Mississippi River, &c., which had been assigned to them, and a desire to remain in the State of Wisconsin, the President consented to their locating temporarily upon the Wolf and Oconto Rivers;" and, "to render practicable the stipulated payments therein recited, and to make exchange of the lands given west of the Mississippi for those desired by the tribe, and for the purpose of giving them the same for a permanent home, these articles are entered into." By the second article of said treaty, the following-described tract lying on Wolf River in the State of Wisconsin was ceded to the Indians to be held as Indian lands are held: "Commencing at the south-east corner of town 28 N., R. 16 E., 4th principal meridian, running west twenty-four miles, thence north eighteen miles, thence east twenty-four miles, thence south eighteen miles to the place of beginning, the same being townships 28, 29, and 30 of ranges 13, 14, 15, and 16, according to public survey."

Under an act of Congress approved Feb. 6, 1871, 16 Stat. 404, entitled "An Act for the relief of the Stockbridge and Munsee tribe of Indians in the State of Wisconsin," the two townships set apart for their use, including the section upon which the logs were cut, and forming a part of the Menomonee lands, were sold by the United States, and the plaintiff deraigns title under its patents.

The exterior lines of the township in which the land in question is situate were run in October, 1852, and the section lines in May and June, 1854.

There was a judgment for the defendants. The plaintiff then brought the case here.

Mr. Charles W. Felker for the plaintiff in error.

The act was in the nature of an executory agreement, and by its terms no title to sections numbered 16 could vest in the State until they were surveyed and designated on the plats filed in the surveyor-general's office. The sectional or subdividing lines of the township in question were not run prior to the treaty of May 12, 1854. The proviso to the act implies a reserved power in the government to sell or dispose of sections 16 while they remained a part of the public domain, and that

treaty did not reserve any section, but appropriated the entire tract as a reservation, and vested the title thereto in the Indians. *Meade* v. *United States*, 2 Ct. of Cl. 224; *United States v. Brooks*, 10 How. 442. The State took title to none but public land. Land like that in question, continuously and rightfully in the occupation of an Indian tribe under authority of the government, is not "public" within the meaning of the grant. Mr. Justice Davis, in *Newhall* v. *Sanger*, 92 U. S. 761, justly remarked, that the words "public lands" "are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." The treaty ratified Jan. 23, 1849, allowed the Indians to remain upon the lands for two years, and until the President should give notice that they were wanted. His subsequent act setting them apart as a reservation was a specific appropriation of them. Not having then been surveyed, no right of the State to sections 16 within the reservation vested, and they have never since become "public lands." *Wilcox* v. *Jackson*, 13 Pet. 498; *Cooper* v. *Roberts*, 18 How. 173; *Leavenworth, &c. Railroad Co.* v. *United States*, 92 U. S. 733; *Spaulding et al.* v. *Martin*, 11 Wis. 262.

The cession to the United States of two townships in the reservation does not affect the principle contended for: they were in fact ceded for a reservation for the Stockbridge and Munsee Indians, and did not become a part of the public lands. Neither is it material that they were, by the act of Feb. 6, 1871, directed to be sold for the benefit of those Indians. The relation of the United States to the property is the same. 16 Stat. 404; *Leavenworth, &c. Railroad Co.* v. *United States*, *supra*.

Cooper v. *Roberts*, 18 How. 173, is not in conflict with these views. There the lands had not been legally appropriated by the government before the title of the State vested.

The position that the title did not vest in the State until the lands were surveyed and the townships subdivided is not affected by the fact that the subdivision was made in June, 1854, before the treaty of May 12 was ratified by the Senate Aug. 2 of that year. The rights of no innocent third parties intervening, the treaty took effect by relation from the day of its date. *United States* v. *Arredondo*, 6 Pet. 691.

It cannot be claimed that the defendants are innocent purchasers. The patents under which they claim were issued, the one over eleven, and the other over sixteen years, after that treaty was made, and they bought with knowledge of it.

If it should be held, however, that the survey was made before that treaty was concluded, the eighth article of the treaty of Oct. 18, 1848, and the acts of the President subsequent thereto, were a legal impediment to the vesting of any title in the State.

But if the State ever had any interest, contingent or otherwise, in section 16 in each township of this Indian reservation, such interest was waived by the resolution of the legislature of Feb. 1, 1853. An estoppel is available against the State. Bigelow, Estoppel, 276, 277, and cases cited.

Mr. W. P. Lynde and *Mr. Charles Barber*, *contra.*

The act of Congress of Aug. 6, 1846, did not constitute a present grant, but was in the nature of an executory agreement. *Rutherford* v. *Greene's Heirs*, 2 Wheat. 196; *Cooper* v. *Roberts*, 18 How. 173; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Leavenworth, &c. Railroad Co.* v. *United States*, 92 U. S. 733; *Sherman* v. *Buick*, 93 id. 209; *Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, id. 634; 8 Opin. Atty.-Gen. 260; *Houghton* v. *Higgins*, 25 Cal. 255.

At the time of the survey in October, 1852, and the subdivision in May and June, 1854, no legal impediment existed to the complete investiture of the title of the State. *Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, *supra.*

The fee to the land was in the United States, subject, in respect to a part, to the right of occupancy by the Menomonees when Congress passed the enabling act of 1846. It was the obvious intention that the grant should be executed from time to time, as that right was extinguished and the surveys designated the sections.

From the origin of the government it had been settled that the United States might make a valid grant of lands to which the Indian right had not been extinguished, and that such a grant passed the title subject to that right. *Fletcher* v. *Peck*, 6 Cranch, 87; *Clark* v. *Smith*, 13 Pet. 195; *The Cherokee Nation* v. *Georgia*, 5 Pet. 1; *Johnson* v. *McIntosh*, 8 Wheat.

543; 8 Opin. Atty.-Gen. 262; *Veeder et al.* v. *Guppy*, 3 Wis. 502.

The argument of the plaintiff, that the joint resolution of 1853 operated as a grant of the sixteenth section, is based upon the assumed fact that the title was then in the State. Even if this were correct, the joint resolution is for the following, among other, reasons unconstitutional and void: First, because in Wisconsin such a resolution is simply an expression of opinion binding on no one, and without the force of law. Const. of Wis., art. 4, sect. 1; Cooley, Const. Lim. 130, 131. Second, because it does not contain the enacting clause required by the Constitution of the State, and is not a bill. Const. of Wis., art. 4, sect. 17; Rev. Stat. Wis. 1858, p. 30.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action of replevin brought by the plaintiff to recover two million feet of pine saw-logs of the estimated value of $25,000, alleged to be his property, and to have been wrongfully detained from him by the defendants. The complaint was in the usual form in such cases, and the answer consisted of a general denial of its averments. The logs were cut by the defendants from the tract of land in Wisconsin which constitutes section sixteen (16), in township twenty-eight (28), range fourteen (14), in the county of Shawano, in that State. The plaintiff claimed to be the owner of the logs by virtue of sundry patents of the land from which they were cut, issued to him by the United States in October, 1872. The defendants asserted property in the logs under patents of the land issued to them by the State of Wisconsin in 1870. The question for determination, therefore, is, which of these two classes of patents, those of the United States or those of the State, transferred the title. The logs were cut in the winter of 1872 and 1873; they were, therefore, standing timber on the land when all the patents were issued, and as such constituted a portion of the realty. Although when severed from the soil the timber became personalty, the title to it remained unaffected. The owner of the land could equally, as before, claim its possession, and pursue it wherever it was carried.

The State asserted title to the land under the compact upon

which she was admitted into the Union. The act of Congress of Aug. 6, 1846, authorizing the people of the Territory of Wisconsin to organize a State government, contained various propositions respecting grants of land to the new State, to be submitted for acceptance or rejection to the convention which was to assemble for the purpose of framing its constitution. Some of the proposed grants were to be for the use of schools, some for the establishment and support of a university, some for the erection of public buildings, and some were to be of lands containing salt springs. They were promised on condition that the convention should provide by a clause in the Constitution, or by an ordinance irrevocable without the consent of the United States, that the State would never interfere with the primary disposal of the soil within it by the United States, nor with any regulations Congress might find necessary for securing the title in such soil to *bona fide* purchasers; that no tax should be imposed on lands the property of the United States; and that in no case should non-resident proprietors be taxed higher than residents. And the act provided that if the propositions were accepted by the convention, and ratified by an article in the Constitution, they should be obligatory on the United States. The first of these propositions was "that section numbered sixteen (16) in every township of the public lands in said State, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools."

The convention which subsequently assembled accepted the propositions, and ratified them by an article in the Constitution, embodying therein the provisions required by the act of Congress as a condition of the grants. With that Constitution the State was admitted into the Union in May, 1848. 9 Stat. 233. It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant

in future, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the State.

In *Cooper* v. *Roberts*, 18 How. 173, this court gave construction to a similar clause in the compact upon which the State of Michigan was admitted into the Union, and held, after full consideration, that by it the State acquired such an interest in every section 16 that her title became perfect so soon as the section in any township was designated by the survey. "We agree," said the court, "that, until the survey of the township and the designation of the specific section, the right of the State rests in compact, — binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But, when the political authorities have performed this duty, the compact has an object upon which it can attach, and, if there is no legal impediment, the title of the State becomes a legal title. The *jus ad rem*, by the performance of that executive act, becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others." In this case, the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. With this identification of the section the title of the State, upon the authority cited, became complete, unless there had been a sale or other disposition of the property by the

United States previous to the compact with the State. No subsequent sale or other disposition, as already stated, could defeat the appropriation. The plaintiff contends that there had been a prior reservation of the land to the use of the Menomonee tribe of Indians.

It is true that, for many years before Wisconsin became a State, that tribe occupied various portions of her territory, and roamed over nearly the whole of it. In 1825, the United States undertook to settle by treaty the boundaries of lands claimed by different tribes of Indians, as between themselves, and agreed to recognize the boundaries thus established, the tribes acknowledging the general controlling power of the United States, and disclaiming all dependence upon and connection with any other power. The land thus recognized as belonging to the Menomonee tribe embraced the section in controversy in this case. Subsequently, in 1831, the same boundaries were again recognized. But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government. It was so ruled in *Johnson* v. *McIntosh*, 8 Wheat. 543, in 1823; and in *United States* v. *Cook*, 19 Wall. 591, in 1873. Other cases between those periods have affirmed the same doctrine. *Clark* v. *Smith*, 13 Pet. 195. See also *Jackson* v. *Hudson*, 3 Johns. (N. Y.) 375; *Veeder et al.* v. *Guppy*, 3 Wis. 502; and 8 Opin. Atty.-Gen., pp. 262–264. In *United States* v. *Cook*, the United

States maintained replevin for timber cut and sold by Indians on land reserved to them, the court observing that the fee was in the United States, and only a right of occupancy in the Indians; that this was the title by which other Indians held their land, and that the authority of *Johnson* v. *McIntosh* on this point had never been doubted. But, added the court, "the right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession, when abandoned by the Indians, attaches itself to the fee without further grant."

In the construction of grants supposed to embrace lands in the occupation of Indians, questions have arisen whether Congress intended to transfer the fee, or otherwise; but the power of the United States to make such transfer has in no instance been denied. In the present case, there can hardly be a doubt that Congress intended to vest in the State the fee to section 16 in every township, subject, it is true, as in all other cases of grants of public lands, to the existing occupancy of the Indians so long as that occupancy should continue. The greater part of the State was, at the date of the compact, occupied by different tribes, and the grant of sections in other portions would have been comparatively of little value. Congress undoubtedly expected that at no distant day the State would be settled by white people, and the semi-barbarous condition of the Indian tribes would give place to the higher civilization of our race; and it contemplated by its benefactions to carry out in that State, as in other States, "its ancient and honored policy" of devoting the central section in every township for the education of the people. Accordingly, soon after the admission of the State into the Union, means were taken for the extinguishment of the Indian title. In less than eight months afterwards the principal tribe, the Menomonees, by treaty, ceded to the United States all their lands in Wisconsin, though permitted to remain on them for the period of two years, and until the President should give notice that they were wanted. 9 Stat. 952.

It is true that subsequently, the Indians being unwilling to leave the State, the President permitted their temporary occupation of lands upon Wolf and Oconto Rivers, and in 1853 the

State gave its assent to the occupation; and in May, 1854, the United States, by treaty, ceded to them certain lands for a permanent home, the treaty taking effect upon its ratification in August of that year; and afterwards a portion of these lands was, by another treaty, ceded to the Stockbridge and Munsee tribes. But when the logs in suit were cut, those tribes had removed from the land in controversy, and other sections had been set apart for their occupation.

The act of Congress of Feb. 6, 1871, authorizing a sale of the townships occupied by the Stockbridge and Munsee tribes, must, therefore, be held to apply only to those portions which were outside of sections 16. It will not be supposed that Congress intended to authorize a sale of land which it had previously disposed of. The appropriation of the sections to the State, as already stated, set them apart from the mass of public property which could be subjected to sale by its direction.

It follows that the plaintiff acquired no title by his patents to the land in question, and, of course, no property in the timber cut from it. *Judgment affirmed.*

UNITED STATES v. THE "GRACE LOTHROP."

The agreement, in writing or in print, which, with certain exceptions, the master of a vessel, bound from a port in the United States to any foreign port, is required, before proceeding on his voyage, to make with every seaman whom he carries to sea as one of his crew, need not be signed in the presence of a shipping commissioner, when such voyage is to a port in the West India Islands.

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

This is an information against the brig "Grace Lothrop" for a violation of the act of June 7, 1872, 17 Stat. (262), as amended by the act of Jan. 15, 1873, id. 410.

The grounds of the information are, that on the 18th of December, 1873, at Boston, one Atwood, while master of that vessel, did knowingly receive and accept, to be entered on

board, five seamen who had been theretofore engaged for a voyage from Boston to a port in the West Indies, by agreements in writing that had not been signed in the presence of a shipping commissioner, &c.

The answer of Atwood, the claimant, admits the facts as alleged, but denies that engagements for voyages to the West Indies are within the statutes referred to.

The court having dismissed the information, the United States appealed here.

The Solicitor-General for the appellant.
Mr. Seth J. Thomas, *contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Persons other than a shipping commissioner are in certain cases forbidden to perform or attempt to perform the duties usually required of such an officer, as prescribed by the acts of Congress.

Atwood, the respondent, as the information charges, was the master of the brig "Grace Lothrop;" that he, on the 18th of December, 1873, as such master, did knowingly receive and accept to be shipped on board of the brig five seamen engaged and supplied for the purpose contrary to the act authorizing the appointment of shipping commissioners to superintend the shipping and discharge of seamen, and that the seamen were so engaged and accepted by an agreement in writing not signed by them in the presence of a shipping commissioner.

Due monition was issued and served by seizing the vessel, and the master appeared and filed an answer. Among other things, he admitted that the brig when arrested was bound on a voyage to a port in the West Indies, that he shipped the five seamen for that voyage, and that the shipping agreement was not signed by the seamen in the presence of such a commissioner; but he denies that he has incurred any penalty by shipping the seamen named in the libel without the presence of such an officer. Hearing was had in the Circuit Court where the libel was filed, and the decree of the Circuit Court was in favor of the respondent, dismissing the libel, and from that decree the United States appealed to this court.

Errors assigned are as follows: 1. That the court erred in

holding that the act of Congress providing for the appointment of such commissioners does not require that the agreement to be signed by seamen in voyages between the ports of the United States and the West Indies shall be signed in the presence of a shipping commissioner. 2. That the court erred in holding that the information is defective in not negativing the suggestion that the master of the brig himself acted as shipping commissioner. 3. That the court erred in dismissing the information.

Before proceeding to examine the errors assigned, it should be observed that the appellants contend that the wrongful act charged, if punishable at all, is punishable under the Revised Statutes, which, as they insist, went into operation eighteen days before the alleged wrongful act was perpetrated. Rev. Stat., sect. 5601.

Masters of every vessel bound from a port in the United States to any foreign port, other than such as are therein excepted, are required by those statutes, before they proceed on such a voyage, to make an agreement in writing or in print with every seaman whom they carry to sea as one of the crew, in the manner the act prescribes, which shall be as near as practicable in the form therein directed, to be dated at the time of the first signature, and to be signed by the master before any seaman signs the instrument.

Vessels excepted from those requirements are all such as are engaged in trade between the United States and the British North American possessions or the West India Islands or the Republic of Mexico; nor do those requirements apply to masters of vessels where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage, nor to masters of coastwise or of lake-going vessels that touch at foreign ports, but they do apply without qualification to vessels of seventy-five tons burden or upward bound from a port on the Atlantic to a port on the Pacific, or *vice versa;* the vessels bound on such voyages being subject in that regard to the same rules as those bound on a voyage from a domestic port to a foreign port. Rev. Stat., sect. 4511.

Detailed specification of the stipulations and regulations which such an agreement shall contain are also set forth in the

same section: and the succeeding section provides to the effect that every such agreement, except where it is otherwise provided, shall be signed by each seaman in the presence of a shipping commissioner; that when the crew is first engaged the agreement shall be signed in duplicate, and that one part shall be retained by the commissioner, and that the other part shall contain a special place or form for the description and signatures of persons engaged subsequently to the departure of the ship, and that it shall be delivered to the master; and that every such agreement so made shall be acknowledged, and certified under the hand and seal of the commissioner, and that the certificate shall be appended to the agreement in the form therein prescribed.

Argument to show that vessels engaged in trade between the United States and the West India Islands are not subject to the regulations enacted with respect to vessels employed in foreign commerce not falling within the exceptions contained in the section, is quite unnecessary, as it is as clear as language can make it that vessels engaged in trade between the United States and the British North American possessions and the West India Islands and the Republic of Mexico are excepted from the operation of the clause made applicable to vessels bound from a port of the United States to any foreign port, by the words "other than;" which clearly and to a demonstration exclude the voyages subsequently described from the category of those previously mentioned in the preceding part of the section.

Concede that the Revised Statutes do support that theory, still it may be suggested that, inasmuch as the case was adjudged in the court below as if it was controlled by the previous acts of Congress, it ought to be determined here in view of the same statutory provisions. Suppose that it is so, still it is certain that it will not benefit the libellants, as it is obvious that the antecedent legislation of Congress, when properly understood, must lead to the same conclusion.

Power to appoint shipping commissioners was conferred by the act of the 7th of June, 1872; and the act provides that the general business of such a commissioner shall be as follows: 1. To afford facilities for engaging seamen, by keeping a reg-

ister of their names and characters. 2. To superintend their engagement and discharge in the manner prescribed. 3. To provide means for securing the presence of the men so engaged on board at the proper times. 4. To facilitate the making apprenticeships to the sea service, and to perform such other duties relating to merchant seamen and ships as the powers conferred by the act require. 17 Stat. 262.

Where no such appointment has been made, the whole or any part of such business may be conducted by the collector or deputy-collector of such place or port.

Appended to that section is a proviso that nothing in the act shall be so construed as to prevent the owner or consignee or master of any vessel, except such as are described in sect. 12 of the act, from performing himself, so far as the ship is concerned, the duties of shipping commissioner under the act. Id. 263.

Sect. 12 of the same act provides that the master of every ship bound from a port in the United States to any foreign port, or of any ship of the burden of seventy-five tons or upward bound from a port on the Atlantic to a port on the Pacific, or *vice versa*, shall, before he proceeds on such voyage, make an agreement in writing or in print with every seaman whom he carries to sea as one of the crew, in the manner particularly set forth in the act, which shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same.

Agreements of the kind, subject to certain exceptions not necessary to be noticed, must be signed by each seaman in the presence of a shipping commissioner; and, when the crew is first engaged, the agreement must be signed in duplicate, one part being retained by the commissioner, and the other part to contain a place or form for the description and signature of persons engaged subsequently to the departure of the ship.

Annexed to sect. 12 is a proviso equivalent to what is enacted in the Revised Statutes, that the section shall not apply to masters of vessels when the seamen are, by custom or agreement, entitled to participate in the profits or results of a cruise or voyage, nor to masters of coastwise vessels or of lake-going vessels that touch at foreign ports.

Congress, on the 15th of January, 1873, added another proviso to sect. 12 of the original act, to the effect that the section shall not apply to masters of vessels when engaged in trade between the United States and the British North American possessions or the West India Islands or the Republic of Mexico. Id. 410.

Explicit as that provision is, it may well be contended that it applies only to the twelfth section of the original act; but Congress, in the month of June, 1874, passed another amendatory act, by which it is provided that none of the provisions of the original act shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage. 18 id. 64.

Though the act last referred to is subsequent in date to the supposed wrongful acts of the respondent, as alleged in the libel, yet the language of the act is in terms an explicit declaration that Congress never intended that the original act should apply to vessels engaged in any part of the coasting trade, except that between the Atlantic and Pacific coasts. Nor is it necessary to refer to that act to support the decree below in this case, as the prior act expressly provides that sect. 12 of the original act shall not apply to masters of vessels when engaged in trade between the United States and the British North American possessions or the West India Islands or the Republic of Mexico, which affords a demonstration that the decree below, whether tested by the provisions of the Revised Statutes or by the previous legislation of Congress, is correct.

Masters of vessels bound from the port of a State to a port in any other than an adjoining State were required by an early act of Congress, before the vessel proceeded on her voyage, to make an agreement in writing or print with every seaman of the crew, declaring the voyage and the term of time for which such seaman was shipped. 1 id. 131. Attempt is now made to support the theory of the libel, by invoking the provisions

of that act, and blending the same with the provisions of the act creating the shipping commissioners; but the attempt cannot be successful in the case before the court, as the amendment to the last-mentioned act provides that the twelfth section of the prior act shall not apply to the masters of vessels when engaged in trade between the United States and the West India Islands.

Beyond all doubt, that amendment and the twelfth section of the original act must be read together in disposing of the present case, as the amended act was passed before the supposed wrongful act of the respondent was committed. When those two provisions are read together, it is an easy matter to specify the cases in which shipping commissioners must act, or in which the agreement of the seaman is required to be signed in the presence of such a commissioner. They are as follows: 1. Where the ship is bound from a port in the United States to a foreign port, not including the ports of the British provinces or the ports of the West India Islands or the Republic of Mexico, or lake-going vessels touching at foreign ports. 2. Ships of seventy-five tons burden or upward bound from a port on the Atlantic to a port on the Pacific, or *vice versa*.

Provision was made by the second proviso in sect. 12 of the original act that that section should not apply to masters of vessels where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage, nor to masters of coastwise voyages or masters of lake-going vessels which, as before explained, touch at foreign ports. Three other exceptions to the operation of the twelfth section of the original act were added to the preceding list by the amendatory act, which provides that the twelfth section of the act shall not apply to masters of vessels when engaged in trade between the United States and the British North American possessions or the West India Islands or the Republic of Mexico.

Duties are assigned to shipping commissioners which all other persons are forbidden to perform, under the penalty therein prescribed; but the same section provides that nothing in the act shall be so construed as to prevent the owner or consignee or master of any ship, except such as are described in

sect. 12 of the act, from performing himself, so far as the ship is concerned, the duties of shipping commissioner under the act.

Tested by these considerations, it follows that the provision requiring the agreements of seamen to be signed in the presence of a shipping commissioner refers only to the agreements described in sect. 12 of the original act; nor does it include those which are excepted from the operation of sect. 12 by the second proviso to the same section, nor either of the three cases excepted out of the operation of the same section by the amendatory act subsequently adopted.

Penalties are imposed for shipping seamen contrary to the regulations which the original act prescribes; but it is clear that the clause imposing the penalty does not refer to seamen who have agreed to make a voyage other than one of the two classes within the operation of sect. 12, as modified by the amendatory act subsequently adopted. 17 id. 410.

Where the voyage to be made does not fall within the operation of sect. 12 as amended by the subsequent act, the owner or consignee or master of the ship may himself perform, so far as the ship is concerned, the duties of shipping commissioner which the act prescribes, as the same is expressly authorized by the proviso to the eighth section of the act.

Shipping articles, called agreements in the original act under consideration, are to be made in writing or in print with every seaman shipped for the voyage before the ship proceeds from the port of shipment; and if the voyage is a foreign one in the sense already explained, or one from a port of the Atlantic to a port of the Pacific, or from a port of the Pacific to a port of the Atlantic, in a vessel of the burden of seventy-five tons or upward, the agreement must be signed in presence of a shipping commissioner, unless it appears that the shipment was made in a port or place in which no shipping commissioner has been appointed, in which event the whole or any part of the business of such a commissioner may be conducted by the collector of the customs or his deputy at the port or place of shipment.

Such agreements with each and every seaman must be made before the ship or vessel proceeds for the port of destination

in all the other voyages mentioned in the act which are not excepted out of the operation of the twelfth section. Conclusive support to that proposition is found in the first clause of the fourteenth section of the original act, which provides that if any person shall be carried to sea as one of the crew on board of any ship making a voyage hereinbefore specified, without entering into an agreement with the master of said ship in the form and manner and at the place and times hereby in such cases required, the ship shall be held liable, and shall incur the penalty therein provided. Where it is not required that such agreements shall be signed in the presence of a shipping commissioner, or that the business of such a commissioner shall be conducted by the collector of the customs or his deputy, the owner or consignee or master of the ship, so far as the ship is concerned, may himself perform the duties of shipping commissioner under the act, by virtue of the provisos contained in the eighth and twelfth sections of the original act.

Ships may be liable to the penalty prescribed by the fourteenth section of the act in case a seaman is carried to sea as one of the crew on board, though making a voyage excepted out of the operation of sect. 12, if it appears that the ship proceeded on such voyage before the master made the required agreement with the seamen in writing or in print, provided the charge in the information covers such a delinquency; but the sole charge in the libel in this case is, that the agreement was not signed by the seamen in the presence of a shipping commissioner. It contains no allegation that the agreement was not in due form, nor that it was not signed in presence of the owner or consignee, or of the master of the ship.

Enough has already been remarked to show that the voyage was one excepted out of the operation of the twelfth section of the act, and that it was one where the owner or consignee, or the master of the ship himself, might lawfully perform the duties of shipping commissioner. Nothing being alleged to the contrary, it must be presumed that the required agreement was made in due form, and that it was properly signed by the seamen in the presence of some one of the three persons authorized by the act to perform that duty, before the ship proceeded on the described voyage.

Examined in the light of these suggestions, it is clear that the decree dismissing the libel is correct. Different conclusions, we are aware, have been reached by other judges; but it must suffice to say, that we are not able to concur in the reasons given in support of those decisions.

Decree affirmed.

UNITED STATES *v.* SMITH.

The act of Congress approved June 7, 1872 (17 Stat. 262), does not apply to the shipping of seamen upon vessels engaged only in and for voyages coastwise between Atlantic ports of the United States.

CERTIFICATE of division in opinion between the judges of the Circuit Court of the United States for the District of Massachusetts.

This is an information under the act of June 7, 1872, 17 Stat. 262, against the defendant Smith, for that he, not being a shipping commissioner, did ship and engage one John Riley as a seaman, to go on board a certain American vessel called the "Proteus," and make a voyage from Boston, in Massachusetts, to Philadelphia, in Pennsylvania, said Smith not then and there being the owner, consignee, or master of said vessel.

The defendant demurred; and the judges were opposed in opinion on the following question: Whether said act applies to the shipping of seamen upon vessels engaged only in and for voyages coastwise between Atlantic ports of the United States, as was the vessel described in the information.

The Solicitor-General for the United States.

No opposing counsel.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Shipping commissioners are vested with certain powers and are charged with the performance of certain duties in engaging seamen for the merchant service; and the act of Congress providing for their appointment forbids other persons, in certain cases, from performing the duties with which such commissioners are charged by the provisions of that act.

Penalties are enacted for the violation of such prohibitions; and the information in this case charges that the defendant, on the 5th of September, 1872, not being a shipping commissioner, at Boston, in the district of Massachusetts, did then and there ship and engage one John Riley as a seaman, to go on board a certain vessel, and make a voyage from Boston to Philadelphia, the defendant not being then and there the owner, consignee, or master of the vessel, contrary to the statute in such case made and provided.

Service was made; and the defendant appeared and demurred to the information, and assigned for cause that the libel does not set forth any acts to impeach him touching or concerning the matters whereof he is accused. Joinder in due form was filed by the district attorney, and the parties were duly heard.

By the record it appears that the question, whether the act providing for the appointment of shipping commissioners applies to the shipping of seamen upon vessels engaged only in and for voyages coastwise between the Atlantic ports, was raised and argued by counsel, and that the judges being opposed in opinion, the question in difference, together with the pleadings in the case, was certified to this court pursuant to the act of Congress.

Discussion of the question whether a vessel engaged in a coastwise voyage from one Atlantic port to another on our coast falls within the operation of the body of sect. 12 of the act providing for the appointment of shipping commissioners is wholly unnecessary, as the court has just affirmed the negative of that proposition, and now refers to the reasons given in the prior case in support of the decree in that case. Such voyages are not mentioned in the body of the twelfth section; and they are expressly excluded from the operation of that part of the section by the second proviso annexed to the same, which provides in effect that the same shall not apply to coastwise voyages nor to voyages of lake-going vessels that touch at foreign ports. 17 Stat. 262.

Seamen, however, for such a voyage must be regularly shipped; and the master, before he proceeds on the voyage, must make with each seaman whom he carries to sea as one of the crew

an agreement in writing or in print, in the manner and form required by that act. Voyages of the kind not being within the operation of the body of sect. 12, the agreement is not required to be signed in the presence of such a commissioner. Instead of that, the owner or consignee or the master of the ship, so far as the ship is concerned, may himself in such a case perform the duties of such a commissioner; but third persons possess no such authority in any case.

Suppose that is so, still it is not charged in the information, nor does it appear in any other way, that the defendant attempted to perform any such duty. It is said that he engaged the seamen; but it is not alleged that he attempted to perform any act which a commissioner is required to perform in cases falling within the operation of the body of sect. 12 of the act prescribing the duties of such a commissioner, nor that he attempted to perform any duty which the proviso to the eighth section allows to be performed in such a case by the owner or consignee or by the master of the ship, where the voyage is one excepted out of the operation of the body of sect. 12 in the same act. All that is charged against the defendant is that he engaged the seamen, which is an act that any one may lawfully perform, provided the seaman is subsequently lawfully shipped in the manner and form required in the act providing for the appointment of shipping commissioners. Nothing being alleged to the contrary, it must be presumed that the required agreement was duly executed if the seamen went to sea at all, which is not alleged in the libel of information.

Tested by these considerations, it is clear that no legal offence is properly charged against the defendant, from which it follows that it must be certified to the court below that the act in question does not apply to coastwise voyages from one port to another on our Atlantic coast.

CLARK *v.* UNITED STATES.

1. The act of Congress approved June 2, 1862 (12 Stat. 411), which makes it the duty of the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior to require every contract made by them severally on behalf of the government, or by officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties, is mandatory, and in effect prohibits and renders unlawful any other mode of making the contract.
2. Where, however, a parol contract has been wholly or partly executed on one side, the party performing will be entitled to recover the fair value of his property or services as upon an implied contract for a *quantum meruit*.
3. In the present case, the contract for the use of the claimant's vessel, and for the payment of her value if she should be lost in the service of the government, was not reduced to writing. When in that service she was manned by a captain and crew furnished by the Quartermaster's Department and lost; but no negligence was attributed to them. *Held*, that the implied contract being such as arises upon a simple bailment for hire, the claimant cannot recover for her loss.
4. The forms of pleading in the Court of Claims do not preclude a claimant from recovering what is justly due him upon the facts stated in his petition, although there be no count in the petition as upon an implied contract.
5. No question having been raised as to the claimant's title to the vessel, and there being no suggestion of any concealment or suppression of the truth on his part at the time the agreement to compensate him for the use of her was made, she being then in Mexican waters, it would be bad faith on the part of the government, after getting her within its jurisdiction and into its possession, under the pretence of hiring her, to set up that the claimant, having obtained her from the Confederate government in 1863 in payment for supplies furnished to the Quartermaster's Department of that government, had no valid title to her as against the United States.

APPEAL from the Court of Claims.

This is a claim against the United States for the value of a steamer lost in the government service in September, 1865, and for her use for eight days before the loss occurred, at $150 per day.

The Court of Claims found the following facts: —

1. In September, 1865, at Brownsville, Texas, the claimant and Major O. O. Potter, an officer in the Quartermaster's Department, entered into an oral agreement, with the approval of General Steele, commanding the western division of Texas. The agreement was that the Quartermaster's Department should pay the claimant $150 a day for the use of the steamer "Belle;"

but no specific contract was made, or to be made, as to time, until she had made a trial trip from Brownsville to Ringgold Barracks and return, to prove her ability to perform the service for which the Quartermaster's Department needed a steamer; and, if she made a satisfactory trial trip, the parties were then to enter into a formal written contract for her future use at the same price per day. It was also at the same time agreed orally that the Quartermaster's Department was to run the steamer on her trial trip at the expense of the government, and that if she were lost on her trial trip the government should pay for her whatever three disinterested men should estimate her value to be.

2. Under this agreement the claimant delivered the steamer to the Quartermaster's Department, at Brownsville. The quartermaster then put his own captain and crew on the vessel, and sent her to Ringgold Barracks. On her voyage, while thus in the service of the government, she was wrecked, and proved a total loss. Three disinterested persons were then agreed upon and requested by Major Potter and the claimant to appraise the value of the vessel. They so acted, and, by a written award, found the vessel to be of the value of $60,000. The claimant has also proved by evidence other than the award that $60,000 was the reasonable value of the vessel. The steamer was in the service of the government before her loss eight days. The United States has not paid for the value of the vessel nor for her service.

3. The steamer "Belle" was previously owned by, and in the military possession of, the Confederate government. The claimant acquired his title to her about the year 1863, taking her in part payment of a claim he held for supplies furnished by him to the Confederate Quartermaster's Department. At the time she was chartered by Major Potter, as set forth in the first finding, she was in the claimant's possession as alleged owner, and she was also in Mexican waters, beyond the jurisdiction of the United States.

Upon these facts the claim was dismissed.

The claimant then brought the case here.

Mr. Enoch Totten for the appellant.

The Solicitor-General, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The first objection made to the claim is, that the contract was not in writing, as required by the act of June 2, 1862, entitled "An Act to prevent and punish fraud on the part of officers intrusted with the making of contracts for the government." 12 Stat. 411. This act provides: —

"SECT. 1. That it shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, immediately after the passage of this act, to cause and require every contract made by them severally on behalf of the government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof, a copy of which shall be filed by the officer making and signing the said contract in the 'returns office' of the Department of the Interior (hereinafter established for that purpose), as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, as also a copy of any advertisement he may have published inviting bids, offers, or proposals for the same; all the said copies and papers in relation to each contract to be attached together by a ribbon and seal, and numbered in regular order numerically, according to the number of papers composing the whole return."

The act further provides that the officer shall affix an affidavit to his return, and makes it a misdemeanor to neglect making his return, and directs the heads of departments to furnish printed instructions and forms of contracts, &c.

It is contended on the part of the government that this act is mandatory and binding both on the officers making contracts and on the parties contracting with them; whilst the claimant insists that it is merely directory to the officers of the government, and cannot affect the validity of contracts actually made, though not in writing. The Court of Claims has heretofore held the act to be mandatory, and as requiring all contracts made with the departments named to be in conformity with it. The arguments by which this view has been enforced by that court are of great weight, and, in our judgment, conclusive. The facility with which the government may be pillaged by the presentment of claims of the most extraordinary charac-

ter, if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the government should be in writing. Perhaps the primary object of the statute was to impose a restraint upon the officers themselves, and prevent them from making reckless engagements for the government; but the considerations referred to make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this. And we think that the statute in question was intended to operate as such. It makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law. We are of opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it. After that, if the officer fails to follow the further directions of the act with regard to affixing his affidavit and returning a copy of the contract to the proper office, the party is not responsible for this neglect.

We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*. In the present case, the implied contract is such as arises upon a simple bailment for hire; and the obligations of the parties are those which are incidental to such a bailment. The special contract being void, the claimant is thrown back upon the rights which result from the implied contract. This will cast the loss of the vessel upon him. A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed. This is not only the common law, but the

general law, on the subject. See Jones, Bailm., p. 88; Story, Bailm., sects. 398, 399; Domat, Lois Civiles, lib. 1, tit. 4, sect. 3, pars. 3, 4; 1 Bell, Com., pp. 481, 483, 7th ed.

As negligence is not attributed to the employés of the government in this case, the loss of the vessel, as before stated, must fall on the owner.

Of course, the claimant is entitled to the value of the use of his vessel during the time it was in the hands of the government agents, which, as shown by the findings, was the period of eight days. This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract. Though not binding or conclusive, it may be regarded as admissible evidence for that purpose. Neither party thought fit to adduce any other. The cases bearing on this subject are collected in Browne's Treatise on the Statute of Frauds, sects. 117–130; but they mostly refer to the question whether the contract, though void by the Statute of Frauds, can be regarded as conclusive evidence of the *quantum meruit*. Whether or not it is admissible as some evidence, though not conclusive on either party, is apparently not much discussed; though it seems to us that it may fairly be deduced from the tenor of the cases that the evidence is admissible. At all events, that is our view. As a declaration of the parties, it is entitled to some credence.

The stipulation in this case, as appears by the findings, was for $150 per day. This would make the amount of the claim $1,200. For this amount the claimant is entitled to a decree.

If objected that the petition contains no count upon an implied contract for *quantum meruit*, it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived.

The other objection relied on by the government in this case is, that the claimant had no valid title to the steamer as against the United States, having obtained her from the Confederate government, in 1863, in payment for supplies furnished to the

Quartermaster's Department of that government. This objection cannot be sustained. When the contract was made with the claimant, the vessel was in Mexican waters, and not subject to the jurisdiction of the United States. The claimant was applied to for its use. It was agreed that he should be compensated. No question was made about his title, and it is not suggested that he was guilty of any concealment or suppression of the truth in regard to it. Under these circumstances, it would be bad faith on the part of the government, after getting possession of the steamer and getting it within its jurisdiction, under pretence of hiring it of the claimant, to set up that he had no title to it. This is so obviously in accordance with the justice of the case, that we deem it unnecessary to make any further observations on the subject.

The decree of the Court of Claims must be reversed, and the cause remanded with directions to enter a judgment in accordance with this opinion; and it is *So ordered.*

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE HUNT, dissenting.

While I agree to the reversal of the judgment in this case, and to so much of the opinion as gives compensation for the use of the vessel before she was destroyed, I cannot agree to the more important part of the opinion, which holds the contract void because it was not reduced to writing.

The act of June 2, 1862, which is interpreted by the court to be a statute of frauds, making all contracts of the Departments of War, Navy, and Interior void which are not reduced to writing and signed by the parties, is not, in my judgment, properly construed.

It cannot be doubted that it was competent for Congress to impose upon the officers of these departments the duty of having all their contracts made in writing and filed in the proper office, without making absolutely void a parol contract made on a fair consideration and within the scope of their authority. In other words, Congress had a right to give such directions to those officers as would secure a statement in writing of the contract itself, for the use of the proper officers of the government, without making it obligatory on the individual contracting with

the government, so that his contract, otherwise valid, would be void for want of that formality.

Looking at sect. 1 of the statute, as it is cited in the opinion of the court, it will be found wanting in the essential words of all known statutes of fraud.

There is no declaration that a parol contract shall be void, or that it shall not be enforced, or that no suit may be sustained on it.

There is no language in it addressed to the party contracting with the government. It is obvious that the primary purpose of the statute — in my judgment, the only one — is to secure authentic and perfect statements of such contracts, and of the proposals, advertisements, bids, and all the papers relating to them, to be filed in an office at Washington, where they can be inspected by any one having an interest, and especially by those superior officers whose approval or rejection may affect their validity. The statute seems in terms to apply to contracts in existence when it was passed as well as to those to be made in future. Returns of all contracts are to be made and filed in the office created for that purpose, within thirty days, together with bids, advertisements, &c.

The second section requires the officer making these returns to verify them by affidavit; and the object of this undoubtedly was to have evidence on which the government could rely, of the precise nature of the contract, and of the circumstances under which it was made.

The third section imposes a penalty on the officer for failing to make returns to the proper office, as required by the statute, by a fine; but no penalty for making a contract not in writing and signed by the parties.

In short, I cannot conceive, looking to the whole statute, that Congress intended any thing more than to regulate the conduct of its own officers, in compelling them to furnish all the evidence in their power of the contract and the circumstances attending its negotiation; and it seems to me to be going a long way to hold that it was the purpose to establish an entirely new rule as to the validity of contracts, at variance with any law heretofore known in this country, or, perhaps, any other.

If that was the purpose, it is hard to see why contracts in the three departments mentioned are selected for the operation of the rule, while the far more numerous and equally important contracts of the Post Office, the Attorney-General's Office, the Treasury and the State Departments are left to be controlled by the law as it stood before.

If there is any branch of the public service where contracts must often be made speedily, and without time to reduce the contract to writing, it is in that of the army. Sudden occasions for supplies, for the occupation of buildings, for the transportation of food and munitions of war, are constantly arising, and in many of them it is impossible to do more than demand what is wanted, and agree to pay what it is worth. Did Congress intend to say that the patriotic citizen, who said "take of mine what is necessary," is to lose his property for want of a written contract, or be remitted to the delays of an act of Congress?

It seems to me that if Congress had been intending to enact a statute of frauds, they would have made some limitation of its operation to cases of future delivery of property or future performance of service, and would not have passed a statute like this, which, if its effect is such as the court declares, renders void all contracts for compensation for the thousand small services and supplies which are daily needed by those in the employment of the government for its use.

I think the construction given by the court unwarranted and unfortunate, and of sufficient importance to record my dissent from it.

INSURANCE COMPANIES *v.* THOMPSON.

Certain insurance companies insured T. & Co. against loss or damage by fire "upon whiskey, their own or held by them on a commission, including government tax thereon for which they may be liable." They were so liable as sureties on the bond of the distiller in whose warehouse the whiskey was. The whiskey belonged to them, and was destroyed by fire; and the amount of the loss apart from the tax was paid by the companies. The tax was not paid; and, suit having been brought against T. & Co. on their bond, the companies, although thereunto requested, declined to defend it. Judgment was rendered against T. & Co., who thereupon gave in due form a bond which, under the laws of Kentucky, operated to satisfy the judgment; and they brought this action against the companies for the amount thereof. *Held*, 1. That the interest of T. & Co. in the whiskey, by reason of their liability to pay the government tax, was an insurable one. 2. That the policy was intended to furnish indemnity against that liability, as well as to insure the interest which, at the time of the loss, they had as owners of the whiskey. 3. That the companies are liable to them for the amount of the judgment so rendered.

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

The facts are stated in the opinion of the court.

Mr. Charles W. Jones and *Mr. J. Hubley Ashton* for the plaintiffs in error.

Mr. G. C. Wharton, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The defendants in error recovered in the Circuit Court of the United States for the District of Kentucky a joint judgment for $3,317.58 on a policy of insurance issued by The Germania Fire Insurance Company, The Hanover Fire Insurance Company, The Niagara Fire Insurance Company, and The Republic Fire Insurance Company, on whiskey in a distiller's bonded warehouse. The distillery and the warehouse were owned and conducted by George H. Dearen, but the spirits were distilled for and owned by the defendants in error at the time the policy was issued. They were also sureties on Dearen's distillery bond to the United States, and as such were liable for the tax on the whiskey if not paid by Dearen, or made out of the whiskey. It will be thus seen that Thompson & Walston had two distinct interests in the whiskey; namely,

the general ownership of it, and their liability for the tax on it which Dearen had assumed to pay, and which, if he did not pay, might fall upon them in either of two ways, — to wit, by a seizure and sale of the whiskey for the tax by the government, or by a suit on the bond on which they were sureties. The policy, which was manifestly designed to protect both these interests of the assured from loss or damage by fire, was for that reason peculiar and special in its provisions. By its terms the companies bind themselves to "insure Messrs. Thompson & Co. against loss or damage by fire to the amount of $8,000, for the term of one year, upon whiskey, their own or held by them on a commission, including government tax thereon for which they may be liable, contained in the log bonded warehouse of G. H. Dearen."

After the whiskey was burned, these companies paid their share with others of the loss on the value of the whiskey apart from the tax; but by the receipt which they took it was stated that the claim for liability on account of tax remained undecided. Thompson & Co. were sued on their bond with Dearen for this tax; and they notified the insurance companies of the suit, and asked them to defend it, which was declined. Judgments were obtained in each case on the bonds, and Thompson & Co. replevined the judgments. By this is meant that they gave bail which operated as a stay of execution for the period which the law of Kentucky allowed in such cases. The present action was brought by Thompson & Walston to recover the amount of these judgments.

On the trial, evidence was given tending to show that before the fire Walston had sold to his partner, Thompson, all his interest in the partnership, and that Hite Thompson had become interested with the other Thompson in the business to the extent of one-fifth. And, on the hypothesis that the jury believed this, the counsel for the companies asked the court in several forms to instruct the jury that plaintiffs could not recover. This proposition was based on a provision in the policy that it should be void "if the property be sold, or transferred, or any change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance."

The refusal of the court to do so, and the charge of the court

to the effect that this change in regard to the ownership, if true, did not defeat the right to recover the amount of the judgments against plaintiffs for taxes, are the errors on which a reversal is asked.

The argument of counsel on the effect of a mere change in the title by one partner selling to another his interest in the property insured, and the authorities presented on both sides, are very able and full, and the decisions are conflicting. So, also, the effect of the introduction of a new part-owner, in a case like the present, where the possession and care of the goods remain unchanged, are well considered; but in the view we take of the case it is not necessary that this court should decide these questions.

We are of opinion that a careful consideration of the facts of this case, in their relation to some of the most elementary principles of the contract of insurance, will enable us to dispose of it without much difficulty.

It is to be observed, that, whether insurance be against fire, or marine loss, or loss of life, it is neither the property nor the life that is insured. Nor does the contract propose or intend to say that there shall be no destruction of the property or loss of life. In point of fact, the obligation of the insurer is designed to come into operation after the loss either of property or life has occurred, and to give compensation to some one interested in the life or the property, for the loss of that life or injury to the property.

In regard to property this compensation is intended by the fundamental principles of insurance to bear a direct relation to the moneyed value of the interest which the party insured had in the property. Where the only interest of the assured is the full and perfect ownership of the property, that is the interest insured; and the amount to be recovered on the policy of insurance is that full value or such sum less than that as the insurer stipulates to be liable for.

But it often occurs that the interest of the party insured is not that of full ownership. His interest may be that of a trustee, or executor, or some other representative character, in which case the recovery will be in accordance with the nature of the contract. The policy before us is a striking illustration

of this. The interest of the plaintiffs in the whiskey which is insured is threefold, — their own, or held on a commission, and the government tax, for which they may be held liable. If the makers of this policy intended to insure no other interest of Thompson & Co. in the whiskey than their proprietary interest, the interest which at the time of the loss they had as owners of the whiskey, the enumeration of the two other interests was useless and misleading. The facts already stated show that they had another interest; and, since they insured it, it must be presumed that it was known to the insurers. The whiskey which they owned was liable to the government for a tax; and this Dearen was primarily liable for and had promised to pay, but, if he did not, the whiskey could be sold for it. They had also become bound with him on his bond for the payment of this tax. In the event of the whiskey being destroyed by fire, the danger of their personal liability was greatly increased. They were, therefore, right in wishing to be secured against this loss also, if the whiskey was burnt. It is impossible to give any other construction to the policy than that the company agreed to furnish this indemnity. The language, when brought into relation with the conceded facts of the case, admits of no other.

This interest was an insurable interest, as much as freights at sea or profits in an adventure. The whiskey stood between them and their loss. The whiskey when in the warehouse was loaded with this tax. It would sell for as much less as the tax, unless the tax was paid. So long as it was in the warehouse, plaintiffs were not liable for the tax. The moment it was lost they became liable. This was a fair subject of insurance. *Fireman's Fire Insurance Co.* v. *Powell*, 13 B. Mon. (Ky.) 311; *Gordon* v. *Massachusetts Fire & Marine Insurance Co.*, 2 Pick. (Mass.) 249; *Rohrbach* v. *Germania Fire Insurance Co.*, 62 N. Y. 47.

In regard to this interest, Walston had never parted with it. His sale of the partnership interest did not release him from his liability on Dearen's bonds; nor did the subsequent purchase of Hite Thompson of one-fifth interest in the whiskey have that effect, or destroy Walston's interest to that extent in the whiskey. As to him, it is very clear that he had the strong-

est interest that the whiskey should be secure from fire until the tax on it was paid, since its continued existence was his best, if not his only, security against liability on the bonds.

It is to be observed that no other interest of Thompson & Co. is in issue in this suit. They never held the whiskey on commission, and the loss in regard to the proprietary interest had been paid by the companies. This was another and a different interest in the same property. A man might insure his interest in property as an executor, and his interest as a legatee. His removal from the office of executor by the proper court might, within the terms of this policy, prevent his recovering in that character; but if his interest in the property as legatee was one-sixth, would the change of executorship bar his recovery as legatee? This would hardly be asserted by any one.

It is objected further to a recovery that plaintiffs have not actually paid the judgment. The answer to this, if any were necessary, is that by the law of Kentucky the replevin bond is a satisfaction of the judgment. It is as to this obligor a debt discharged. It is said that, in case of a loss like this, the government cannot collect the tax from the bondsmen. The answer is, that the government has sued and obtained judgment for the tax; and defendants were asked to defend that suit, and declined to do so. *Judgment affirmed.*

MORROW v. WHITNEY.

1. When an act of Congress, confirming a claim to land, contains a proviso that the confirmation shall not include any lands occupied by the United States for military purposes, the fact of such occupancy can be established by parol evidence, and is not necessarily a matter of record.
2. Where such occupancy does not exist, the act perfects the title of the confirmee, if the tract has clearly defined boundaries or can be identified. The interest of the United States having been thereby vested in him, a patent subsequently issued to him is only documentary evidence of title.
3. *Langdeau* v. *Hanes*, 21 Wall. 521, cited and approved.
4. In a description of premises, distances and quantities, when inconsistent with metes and bounds, must yield to them.

ERROR to the Supreme Court of the State of Wisconsin.

This is an action of ejectment brought in the Brown County

Circuit Court, Wisconsin, by Whitney and Baker, for the possession of a tract of land, consisting of ninety-four acres and a fraction of an acre, situated in the borough of Fort Howard, in that county and State. On the trial, the plaintiffs deraigned title to the premises from one Pierre Grignon, to whom a patent of the United States was issued June 2, 1870. The defendant Morrow set up an adverse possession of the premises in himself, and parties through whom he derived his interest, for more than forty years, under a claim of title founded upon a written instrument as a conveyance of the premises. On the trial he relied upon a legislative confirmation of a claim under the act of Congress of Feb. 21, 1823, of one Alexis Gardapier, from whom he traced his title.

Judgment was rendered in favor of the plaintiffs, and, it having been affirmed by the Supreme Court of the State, Morrow sued out this writ of error. The additional facts are stated in the opinion of the court.

Mr. Timothy O. Howe for the plaintiff in error.
Mr. Matt. H. Carpenter, *contra.*

MR. JUSTICE FIELD delivered the opinion of the court.

The act of Feb. 21, 1823, 3 Stat. 724, after reviving and continuing in force certain previous acts for the adjustment of land claims in the Territory of Michigan, which then included Wisconsin, provided, in its fifth section, that every person who, on the 1st of July, 1812, was a resident at Green Bay, or at other places named, and had then occupied and cultivated a tract of land within either of those settlements, or had occupied a tract of land formerly cultivated by him, and had continued to submit to the authority of the United States, should be confirmed in the tract thus occupied and cultivated. The section did not in terms require the commissioners created under the previous acts, and continued in authority with reference to other claims, to report to Congress their action upon the new claims arising under this section; but we think it was the intention of Congress to place such claims on a similar footing with those to which the previous acts referred; and that with respect to them the commissioners should be invested with similar powers and be subject to similar duties. And upon that idea the com-

missioners acted. They considered the claims presented under the fifth section, and the evidence to bring the claims within its provisions, and they reported the result of their labors to the Secretary of the Treasury. The report stated what claims they had confirmed, and what claims they had rejected, with the evidence upon which their decision was based. Among the claims considered and confirmed by them was one presented by Alexis Gardapier, and one presented by Pierre Grignon. The claim of Gardapier was to a certain tract situated on the west bank of Fox River, at Green Bay, described "as being a vacant strip lying between tract number one, confirmed to Jacques Porlier, on the north, and tract number two, confirmed to Louis Grignon, on the south, commencing at low-water mark and running west eighty arpents, and in width three arpents on the aforesaid river." American State Papers, Public Lands, vol. iv. p. 272. The commissioners decided that the tract claimed be confirmed to Gardapier, provided it did not interfere with a previous confirmation.

The claim of Pierre Grignon was to a tract of land near Fort Howard, on the west side of Fox River, at Green Bay, immediately below the first creek that emptied into the river, being about fifteen acres in front on the river, and extending back indefinitely. The commissioners decided that this claim be confirmed, provided it did not interfere with the confirmation previously made to Jacques Porlier, or with the one made by them to Alexis Gardapier. The commissioners gave their decision upon both of these claims on the same day, Nov. 21, 1823. Their report was presented to the Secretary of the Treasury, and by him referred to Congress; and, on the 17th of April, 1828, Congress passed an act confirming the claims "purporting to be confirmed, or recommended for confirmation," by the commissioners. 4 Stat. 260. The act required the Secretary of the Treasury to adopt such measures as might be necessary to give full effect to the reports of the commissioners, but with a proviso, among other things, that the confirmations should not be so construed as to extend to any lands occupied by the United States for military purposes. The act, also, made it the duty of the register of the land-office at Detroit to issue to the claimants whose claims were confirmed patent cer-

tificates, upon which patents were to be granted by the Commissioner of the General Land-Office.

If the land claimed by Gardapier were not occupied at the time by the United States for military purposes, there was no impediment to the immediate operation of the act upon his title. Whether there was any evidence of such occupation we shall presently consider. Assuming now that there was no such occupation, the effect of the act was not doubtful. It recognized the validity of the claim of Gardapier, and operated to transfer to him the interest of the United States as effectually as a grant or quitclaim could have done. A confirmation is a conveyance of an estate or right in lands to one who has the possession or some estate therein. The tract confirmed appears to have had clearly defined boundaries, or to have been at least capable of identification; and, if such were the case, the confirmation perfected the claimant's title. A subsequent patent would only have served as documentary evidence of that title.

From the earliest period in the history of the country, claims to tracts of land, upon which persons have settled and made improvements in advance of the public surveys, and before the lands have been offered for sale, sometimes upon the express invitation of the public authorities, and sometimes upon their supposed acquiescence, have been presented for the equitable consideration of the government. Such claims in great numbers have arisen under other governments from which we have acquired territory, with treaty stipulations for their protection. Sometimes such claims have been submitted to boards of commissioners for approval or rejection; sometimes they have been referred to the judicial tribunals for determination, and sometimes they have been directly acted upon by Congress. In the settlement of these claims the law has generally provided that a patent of the United States should be issued to the claimant when his claim has been recognized as valid or entitled to confirmation. The patent in such cases, as we have recently had occasion to observe, operates in two ways. "It is a conveyance by the government, when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title or of such

equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government." *Langdeau* v. *Hanes*, 21 Wall. 521.

In this case, the patent would have been of great value to the claimant. It would have enabled him, without other proof, to maintain his title in the tribunals of the country. Founded as it would have been upon a survey by the government, it would have removed the doubt as to the boundaries of the tract, which always arises where their establishment rests in the uncertain recollection of witnesses as to an ancient possession. It would thus have proved to its possessor an instrument of quiet and security, but it would not have added any thing to the interest vested by the confirmation. *Ryan et al.* v. *Carter et al.*, 93 U. S. 78.

If, then, there was no military occupation of the premises when the confirmatory act passed, as we have thus far assumed, the title of Gardapier became perfect by force of the confirmation. His claim, in our judgment, embraced the entire tract lying between tract number one, confirmed to Jacques Porlier, on the north, and tract number two, confirmed to Louis Grignon, on the south, commencing on the river and running back eighty arpents. If there were a mistake, as alleged, in the statement of the distance the tract extended along the river, it was one which must yield to the clearly designated northern and southern boundaries. Metes and bounds in the description of premises control distances and quantities when there is any inconsistency between them. This is a familiar rule, and is founded upon the principle that those particulars are to be regarded in which error is least likely to occur. Gardapier might easily have been mistaken as to the length of his frontage on the river; but he could not well have been mistaken as to the land bordering on each side of his small tract, or as to whom it was confirmed. His tract was sufficiently identified by the boundaries named; and in such cases it is immaterial if a false or mistaken circumstance be added to the description.

The question, therefore, which was vital to the case, was whether the land claimed by Gardapier was occupied for mili-

tary purposes on the passage of the confirmatory act. There is no evidence in the record that there was at that time any such occupation, and the record purports to state all the testimony given. It was nearly a year after the confirmation before the general of the army recommended, and the President ordered, the reservation for military purposes of a tract which embraced within its limits the land claimed by Gardapier. It was then too late to affect his title. It is true the recommendation of the commanding general was accompanied with a description of the land ordered to be reserved, and a statement that the land had been previously occupied for military purposes; but that statement does not mention when such occupation commenced, or how long it existed. The statement could only be evidence of the representation upon which the President acted; it was not competent evidence of any other fact. And the order of the President, effectual to create the reservation if the land had continued the property of the United States, was of course inoperative if the title had passed to Gardapier.

The military occupation was a fact to be established by parol proof; it was not a matter of record, like the order of the President directing the reservation, to be shown by the production of a copy. And the defendants offered in various forms to prove, by witnesses produced for that purpose, that the tract was not thus occupied on the passage of the act of Congress, and had not been thus occupied previous to that date. They also offered to prove that from the year 1824 down to the commencement of this action, a period of nearly forty-nine years, the land had been in the actual, open, notorious, and exclusive possession of Gardapier and parties claiming under him, and that during this time it had been fenced, cultivated, improved, and built upon without interruption, objection, or dispute on the part of any one. But the court refused to admit the proof, and also refused an instruction to the jury asked by the defendants, that in order to find a verdict for the plaintiff they must be satisfied from the evidence that the land in controversy was occupied by the United States for military purposes on April 17, 1828, or was reserved for military purposes at that time, or was treated by the government as thus reserved.

So far as the proof offered related to the occupation at the

passage of the confirmatory act and previously, it was competent and should have been received, and the instruction asked for was proper and should have been given. The refusal of the court to receive the proof, and also to give the instruction, was error, for which the judgment must be reversed and a new trial had. The proof as to subsequent possession was immaterial, if military occupation existed at that date. If such occupation then existed, the confirmation did not apply to the land, and it continued as before the property of the United States. Occupation of the public lands can never be adverse to the government so as to defeat or affect in any way the title subsequently conferred by its grant or patent. In such cases, the doctrine declared in *Gibson* v. *Choteau*, 13 Wall. 92, applies.

Judgment reversed, and cause remanded with direction to order a new trial.

West St. Louis Savings Bank *v.* Shawnee County Bank.

The cashier of a bank is not, by reason of his official position, presumed to have the power to bind it as an accommodation indorser on his individual note; and the payee who fails to prove that the cashier, as such, had authority to make the indorsement cannot recover against the bank.

Appeal from the Circuit Court of the United States for the District of Kansas.

Parmelee, cashier of the Shawnee County Bank, made his individual note for $3,000, payable to the order of the West St. Louis Savings Bank, indorsed it "G. F. Parmelee, cashier," and gave as collateral security a certificate of stock in the Shawnee County Bank, issued to and owned by him. The consideration of the note was money lent to him by the payee, who was advised that he intended to use it to pay for his stock in the Shawnee County Bank. He failed to pay the note; whereupon this suit was commenced by the payee against him as maker, and the Shawnee County Bank as indorser, of the note.

The court passed a decree against Parmelee, but dismissed the bill so far as it asked relief against the Shawnee County Bank.

The complainant then brought the case here.

The remaining facts in the case are stated in the opinion of the court.

Mr. Henry Hitchcock for the appellant.

No counsel appeared for the appellee.

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

The testimony in this case satisfies us beyond all doubt that the liability of the Shawnee County Bank, if any liability exists, is that of an accommodation indorser or surety for Parmelee, its cashier, and that this was known to the St. Louis Bank when it made the discount. The note itself bears upon its face the most unmistakable evidence of this fact. It is made payable directly to the St. Louis Bank, and the Shawnee Bank appears only as an indorser in blank of a promissory note before indorsement by the payee and while the note is in the hands of the maker. Such an indorsement by a bank is, to say the least, unusual, and sufficient to put a discounting bank upon inquiry as to the authority for making it.

But we are not left in this case to inquiry or presumption. Both the correspondence and the testimony of the cashier of the St. Louis Bank show conclusively that this was the understanding of the parties. Parmelee, in transmitting the note for discount, wrote for himself, and not as cashier. He spoke of his own note, and authorized a draft upon himself personally for the interest. He pledged his own stock for the payment of the note. Wernse, the St. Louis cashier, says the negotiations opened with an application by Parmelee for a loan to enable him to pay for his stock in the Shawnee Bank, upon the pledge of the stock as collateral. There is not a single circumstance tending in any manner to prove that the transaction was looked upon as a rediscount for the Shawnee Bank, except the entries in the books of the St. Louis Bank, and these are far from sufficient to overcome the positive testimony as to what the agreement actually was.

This being the case, the question is directly presented as to the liability of the Shawnee County Bank upon such an indorsement. It is certain from the testimony that no indorsement of the kind was ever expressly authorized by the bank. None of the officers, except Parmelee, and Hayward, the vice-president, ever knew that it had been made until long after the last discount had been obtained. The books of the Shawnee Bank contained no evidence of such a transaction, and the accounts of the St. Louis Bank, as rendered, gave no indication of the actual character of the paper discounted.

Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of banking. Thus, he is generally understood to have authority to indorse the commercial paper of his bank and bind the bank by the indorsement. So, too, in the absence of restrictions, if he has procured a *bona fide* rediscount of the paper of the bank, his acts will be binding, because of his implied power to transact such business; but certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers; and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power. The very form of the paper itself carries notice to a purchaser of a possible want of power to make the indorsement, and is sufficient to put him on his guard. If he fails to avail himself of the notice, and obtain the information which is thus suggested to him, it is his own fault, and, as against an innocent party, he must bear the loss.

Decree affirmed.

EDDY v. DENNIS.

DENNIS v. EDDY.

1. In reissued letters-patent No. 1515, granted to Paul Dennis Aug. 4, 1863, for a new and useful improvement in cultivators, the second claim in the specification is for a combination of the beam and the mould-board with the adjustable wheel, of which combination the adjustable wheel is an essential element.
2. The first claim does not cover an inclined shovel mould-board simply, nor the principle of passing the earth over the recess of the plow into the furrow behind, or passing it over a recess formed exclusively with a curved edge. Its effect is to provide for that which is not novel; viz., a recess cut or carved out for the purpose intended.
3. There is no evidence in this case to show that, by passing the earth through a recess in the mould-board formed by curved lines, any advantage is obtained over passing it through one formed by right lines.
4. There having been no infringement by the defendants of the rights of the complainant, the question of his measure of damages does not arise here.

APPEALS from the Circuit Court of the United States for the Northern District of New York.

This is a suit by Paul Dennis against Daniel Eddy, Walden Eddy, and Abram Reynolds, doing business as Eddy & Co., for an infringement of reissued letters-patent No. 1515, granted to the complainant Aug. 4, 1863, being a reissue of original letters No. 19,412, which bear date Feb. 23, 1858. The specification and drawings of the reissue are as follows: —

"To all whom it may concern:

"Be it known that I, Paul Dennis, of Bemis Heights, in the county of Saratoga, and State of New York, have invented a new and improved shovel-plow, and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawings, making a part of this specification, in which Fig. 1 is a side view of my invention; Fig. 2, a back view of the same; Fig. 3, a plan or top view of the same. Similar letters of reference indicate corresponding parts in the several figures.

"This invention consists in a peculiar manner of constructing or forming the upper edge of the mould-board, with recesses, so that the earth, as the implement is drawn along, will pass over the top of the mould-board and drop into the furrow behind it, and partially or wholly fill the same, thereby leaving the earth in a level

and also in a loose, light, or pliable state, permeable to air and moisture, and at the same time preventing earth, sods, stone, &c., being cast against the growing plants by the mould-board, a contingency of frequent occurrence in using the ordinary plows.

"The invention further consists in the employment or use of a gauge applied to the implement in such a manner as to admit of the mould-board penetrating the soil at a greater or less distance, as may be desired.

"To enable those skilled in the art to fully understand and construct my invention, I will proceed to describe it.

"A represents a metallic bar, which is curved so that the front part will form the beam of the implement, and the back part an inclined portion to which the mould-board B is firmly attached. The form of the bar A is clearly shown in Fig. 1.

"To the bar A, near the centre of its curve or bend, the lower ends of handles *c c* are attached by a bolt, as shown at *a*. These handles are braced by a V-shaped support, D, the lower end of which is secured to the bar A, as shown at *b*.

"The mould-board B is of shovel form, and is much like those usually made, with the exception that its upper edge or part is scalloped out so as to form a recess *c* at each side of the bar A, as shown clearly in Figs. 2 and 3, said recesses extending down nearly or about one-half the length of the mould-board. The mould-board may be constructed of malleable cast-iron.

"E is the point or share, which is constructed of steel, the lower end being pointed, and its sides slightly rounded or curved, so that the form of the mould-board and point or share, when connected together, will closely approximate to those which are cast in one piece, the recesses *c* being excepted. The point or share E may be attached to the mould-board B by bolts *d*, which are attached to the under side of the point or share, and pass through a projecting plate, *e*, at the under side of the mould-board. (See Figs. 1 and 2.)

"F is an adjustable metallic roller, which is attached to the bar A, just back of the mould-board B. The axis of the roller F is fitted or has its bearings in arms *f f*, which project obliquely from a plate *g*, said plate being slotted longitudinally, so that the bolts *h h*, which secure the mould-board to the bar, may pass through said slot, the bolts *h* having each a nut *i* on them, by screwing up which the plate *g*, and consequently the roller F, may be secured higher or lower, as desired.

"From the above description it will be seen that the point or share

E and mould-board B may be made to penetrate the soil at a greater or less depth, as may be desired, by adjusting the roller F and draught-chain, said roller serving as a gauge or guide, and the draught-chain being adjusted at the end of the beam so that the draught may aid the roller, and the point or share be made to have a tendency to penetrate the soil or otherwise. This will be understood by referring to Fig. 1, in which it will be seen that, by depressing or lowering the roller on the bar, the mould-board will be less inclined, and, consequently, if the draught-chain or whiffletree be properly adjusted at the end of the beam, the point or share will have a greater tendency to penetrate the earth than if the roller were higher up on the bar, the roller always bearing upon the earth.

"The mould-board B does not cast the earth from either side as usual, but the earth, in consequence of the recesses *c c*, will pass over the top of the mould-board and drop behind it, so that no furrow will be formed or left behind the mould-board, but the soil will be left in a loose, light state, permeable to air and moisture, and all grass, weeds, roots, and the like perfectly cut up. The mould-board, by operating in this manner, does not, of course, cast earth, sods, or stones upon the growing plants, as is frequently the case in using the ordinary shovel-plows, which cast the earth from either side of them. This is an important feature of the invention.

"The point or share E, also, in consequence of being made separate, of steel, and attached to the mould-board, may be readily detached and sharpened; and, when much worn, a new one may be attached to the mould-board. The plow is, therefore, not only rendered far more durable, but it may always be kept in perfect order; for the mould-board will last an indefinite period of time, if not being subjected to much wear, and the plow will always be in order, provided the point or share is kept in proper condition. By my improvement this can be done; but it cannot be done when the mould-board and share are cast in one piece.

"The ordinary shovel-plows cannot be regulated by the draught-chain so as to regulate the depth of the furrow, for they have no guide, the point or share merely penetrating the soil. The roller F in my improvement diminishes friction, and serves as a more perfect guide than the land-side of ordinary plows.

"Having thus described my invention, I wish it distinctly understood that I do not claim broadly the idea of passing a portion of the earth over the mould-board into the furrow behind, as I am aware that this has before been done.

"Neither do I claim applying a movable mould-board to one of

the outer edges of the share, as described in an application of J. Drummond, rejected Oct. 25, 1844.

"Neither do I claim the use of projecting blades at the outer ends of the share, as described in the patent of B. Langdon, granted June 22, 1842, and others; but,

"Having thus described my invention, what I claim as new therein and desire to secure by letters-patent is —

"1st, The inclined shovel mould-board B, formed and mounted substantially as described, and constructed highest at its outer edges, so as to form on each side of the standard A a recess, *c*, through which recesses a portion of the earth may, after rising upon the mould-board, descend into the furrow in the rear of the plow.

"2d, The combination with the beam A and mould-board B of the adjustable wheel F, arranged and operating substantially as and for the purposes specified.

"PAUL DENNIS."

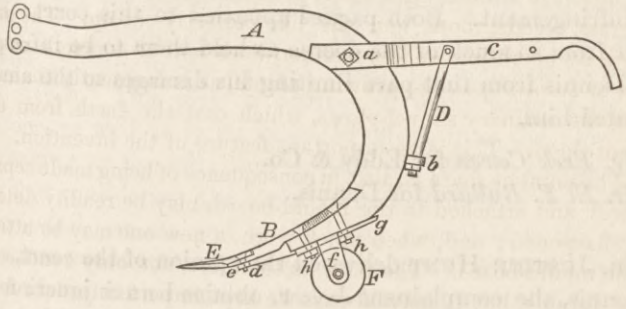

Fig. 1.

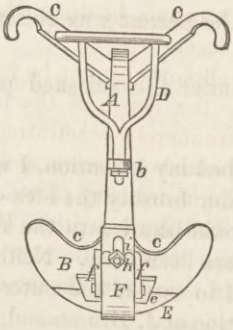

Fig. 2.

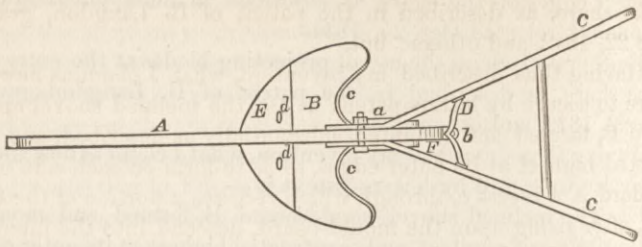

Fig. 3.

The court below, upon hearing, was of opinion that the defendants had infringed the first claim of the specification, but not the second. An injunction was thereupon issued against the defendants; and they were decreed to pay the complainant $596.50 damages, on account of gains and profits resulting from the infringement. Both parties appealed to this court: Eddy & Co. from so much of the decree as held them to be infringers, and Dennis from that part limiting his damages to the amount awarded him.

Mr. Esek Cowen for Eddy & Co.
Mr. E. F. Bullard for Dennis.

MR. JUSTICE HUNT delivered the opinion of the court.

Dennis, the complainant below, obtained an injunction and recovered damages against Eddy and others for an infringement of his letters-patent for an improvement in "shovel plows." The original letters were issued on the twenty-third day of February, 1858, and the patent was reissued on the fourth day of August, 1863.

The claim made under the reissued patent is in the words following: —

"Having thus described my invention, I wish it distinctly understood that I do not claim broadly the idea of passing a portion of the earth over the mould-board into the furrow behind, as I am aware that this has before been done. Neither do I claim applying a movable mould-board to one of the outer edges of the share, as described in an application of J. Drummond, rejected Oct. 25, 1844. Neither do I claim the use of projecting blades at the outer ends

of the share, as described in the patent of B. Langdon, granted June 22, 1842, and others; but,

"Having thus described my invention, what I claim as new and desire to secure by letters-patent is, 1st, the inclined shovel mould-board B, formed and mounted substantially as described, and constructed highest at its outer edges, so as to form on each side of the standard A a recess *c*, through which recesses a portion of the earth may, after rising upon the mould-board, descend into the furrow in the rear of the plow.

"2d, The combination with the beam A and mould-board B of the adjustable wheel F, arranged and operating substantially as and for the purposes specified."

The original patent claimed only what is here described as the second claim. The point of the reissue is in the claim as first above set forth.

The use of the shovel-plow is in cultivating the soil between the rows of growing crops, after they are somewhat advanced in their growth, to stir up and loosen the soil, and to free it from weeds. This plow is distinct in many parts of its construction, as well as in its intended effect, from the plow used in breaking up the soil; that is, from the plow in common use.

In first considering the claim contained in both the original and reissued patents, and in the latter described as the second claim, we remark, that we concur entirely with the learned judge who tried this case at the circuit, in his view of it.

The adjustable wheel is the important feature of this claim. The bar or beam and the mould-board suggest nothing in the way of novelty, invention, or of peculiarity. The use of the base of a plow as a fulcrum, by means of which the plowman can raise or lower the point of the plow, or turn it in different directions, has long been in use, and on nearly every kind of plow. Peter Dutton's stay-iron, rejected in 1865, affords an illustration.

That an adjustable wheel was deemed by the inventor to be quite a different thing from the simple bar or shoe in ordinary use, is manifest from the careful description of its advantages in the original patent. It is described in these words: —

"F is an adjustable metallic roller, which is attached to the bar A, just back of the mould-board B. The axis of the roller F is

fitted or has its bearings in arms *f f*, which project obliquely from a plate *g*, said plate being slotted longitudinally, so that bolts *h h*, which secure the mould-board to the bar, may pass through said slots, the bolts *h* having each a nut *i* on them, by screwing up which the plate, and consequently the roller, may be secured higher or lower, as may be desired."

It is also set forth that the point or share of the plow may be made to penetrate the soil at a greater or less depth, by adjusting the roller and draught-chain; the roller serving as a gauge or guide, and the draught-chain being adjusted at the end of the beams, so that the draught may aid the roller; the point or share may be made to penetrate the soil, or otherwise.

The plows proved to have been manufactured by Eddy & Co., the defendants, have none of them this element of an adjustable wheel or roller. Their plow rests upon a plain bar or shoe of iron. It has no mechanical contrivance for fixing the angle at which the point shall penetrate the earth. This is done by the strength of the plowman, who uses the shoe as a fulcrum for that purpose.

No argument is needed to show that there has been no violation by the defendants of the Dennis patent in this particular.

In considering the effect of the remaining claim of the reissue, we are greatly aided by the clear and explicit statement of the patentee of what he does not claim as his invention.

There are three mechanical advantages in his plow, which he says he does not claim to have invented: —

1st, The idea of passing the earth over the mould-board into the furrow behind. This result is really the fundamental advantage in both the plaintiff's and defendants' plows. In other words, the principal benefit to be derived from either is found in the fact that the earth, loosened and broken, will be deposited in the furrow behind the plow, the movable mould-boards and the projecting blades at the outer ends of the share both contributing to this result. But the patentee says that he is aware that this had been done before his invention, and he makes no claim to an invention or discovery in this respect.

2d, The patentee does not claim the application of a movable mould-board to one of the outer edges of the share. This, he says, was described in an application previously made (in 1844) by Drummond.

3d, The patentee does not claim the use of projecting blades at the outer ends of the share. This had been described in a patent granted to Langdon in 1842.

To these disclaimers we may add that he does not make a claim for invention in using the shovel of this plow in an inclined form. He does not even give the angle of inclination at which it shall be used, whether it shall be 75°, like the old plows, or 45°, like this one. Ever since plows have been used, — and there is no secular history of man in which the plow and the hoe are not recorded, — we may safely believe that there has been an inclination, sometimes greater and sometimes less, in the shovel and mould-board. A perfectly upright shovel would be nearly immovable, except in a light soil and to a very slight depth, while one perfectly flat would be of little value.

Remembering these four items as not being parts of the plaintiff's invention, we are prepared to consider what he claims to have invented and desires to secure by a patent. In his own words, it is "the inclined shovel mould-board B, formed and mounted substantially as described, and constructed highest at its outer edges, so as to form on each side of the standard A a recess *c*, through which recesses a portion of the earth may, after rising upon the mould-board, descend into the furrow in the rear of the plow."

An inclined shovel mould-board, simply and alone, is not spoken of as an invention. It had long been in use in other plows. What the claim means to appropriate is a shovel "formed and mounted and constructed as described." There is nothing in the form of mounting — that is, placing it upon the beam of the plow — that is peculiar. It is the construction that gives it effect. How is it formed and mounted and constructed? He says, in the general description, that it is a metallic bar so formed or curved that the front will form the beam of the implement, and the back an inclined portion to which the mould is attached, while the upper edge of the mould-board is so scol-

loped out as to form a recess over which the earth may pass, to which is attached a metallic adjustable roller, serving as a gauge or guide to regulate the depth that the point shall penetrate the earth.

The defendants insisted that, like the other, this claim also describes a combination, of which the adjustable roller is an essential element, and that there can be no infringement unless the roller is used. There is much force in this argument.

There is, also, another view of this part of the case. Eliminate from this description, first, the idea of an inclined shovel or mould-board, and, second, the idea of passing the earth over the plow into the furrow, both of which are outside of the plaintiff's invention, and nothing remains, except a recess formed by a scolloped edge on which the earth will pass, and an adjustable roller in connection with the beam of the plow.

As has been before said, the defendants have never used the adjustable roller. The infringement, then, if any, consists in the use of a recess formed by a scolloped edge over which the earth will pass. The learned judge at the circuit held that the patent was good for this claim, and that the defendants had infringed it. We have reached a different conclusion.

We think the use of the expression, "scolloped out so as to form a recess," was not intended to say that the particular form in which the recess was made should be that of a curve. A scollop may, indeed, imply the idea of a curve, but in a vague and indefinite manner. It is as if it had been said, it "shall be so cut out as to form a recess." The formation of the recess was the idea in the mind of the draughtsman, with no reference to any question of curved lines or right lines. That this was the fact, is made evident by the absence of the word "scolloped" in the claim itself, although used in the general description. If that form had been deemed material, it would have been inserted where the patentee sets out with precision what it is that he claims. In the claim, it is described by the words "constructed highest at its outer edges, so as to form on each side a recess" through which the earth may pass. A recess made by the outer edges being higher than the inner parts was the effect intended to be provided for, and that only. If it had

been intended to describe a recess made by a curve, to the exclusion of a recess made in any other manner, it was very easy to say so; but the patentee did not so say, and we think he did not so mean.

If the patentee here had been the inventor of the mould-board with a recess for the purpose of passing the earth through it into the furrow behind, and had described his invention in the words used in his reissued patent, would it not have included as well a structure made by right lines as one made by curved lines? In *Winans* v. *Denmead*, cited by the respondent's counsel, it is said, "Although a particular geometrical form is best for a certain purpose, yet other forms, giving substantially the same result, are infringements. The result need not be the same in degree if it be the same in kind." 15 How. 344.

If this be so, it can scarcely be denied that the words used in this reissued patent include both forms of a recess, and that it thereby claimed what was previously known and in use; to wit, a structure for the passage of the earth into the furrow behind.

No testimony is given that the sod will be more thoroughly broken, the earth better pulverized, or the furrows better filled by the passage of the earth through a recess made by curved lines, than by its passage through a recess of the same depth made by straight lines. The plaintiffs, although witnesses, gave no testimony to that effect. Of our own knowledge, we do not know that it is so. As a matter of law, certainly we are not able to decide that the right-lined recess is any less efficacious for the purpose desired than a curved-line recess.

There is, indeed, testimony to show that the earth and sod passing over the low mould-boards of the exhibit M were left in a worse condition than when passed over the recess of the Dennis plow.

In speaking on this subject, Henry Holmes says that it left the furrow behind hard and flat, as if a log had been drawn between the rows. The witness Broughton speaks of it as throwing a double furrow outward, and as leaving the furrow bare behind.

But neither of these witnesses attribute the excellences of the one plow or the defects of the other to the existence of curved or straight lines in forming the recess.

To recapitulate:

1. The second claim of the plaintiff's specification, "the combination with the beam A and the mould-board B with the adjustable wheel F, arranged and operating substantially as used for the purposes specified," gives no cause of action. It is a claim for a combination of which the adjustable wheel F is an essential element; and it is not pretended by any one that the defendants have ever used an adjustable wheel in the plows made by them.

2. The first claim does not cover an inclined shovel mould-board simply, nor does it cover the principle of passing the earth over the recess of the plow into the furrow behind, nor does the claim cover the passage of the earth over a recess formed exclusively with a curved edge. Its effect is to provide for a recess cut or carved out for the purpose intended. This is not novel, the evidence showing many instances prior to the plaintiff's original patent in which the principle and process had been used and patented.

3. There is no evidence to show that there is any advantage in passing the earth through a recess formed by curved lines, rather than through a recess formed by right lines.

For these reasons, the decree of the court below must be reversed.

As Dennis has no cause of action, the question of the amount of damages cannot arise.

Decree reversed, and cause remanded with instructions to dismiss the bill with costs.

United States *v.* Two Hundred Barrels of Whiskey.

1. Distilled spirits, owned by and found upon the premises of a rectifier or wholesale liquor-dealer, cannot be seized as forfeited to the United States, under sect. 96 of the "Act imposing taxes on distilled spirits," &c., approved July 20, 1868 (15 Stat. 164), because such rectifier or wholesale liquor-dealer has knowingly and wilfully neglected, omitted, or refused to cause packages of distilled spirits containing more than twenty gallons each, filled for shipment or sale on his premises, to be gauged, inspected, and stamped, in accordance with the provisions of sect. 25 of the same act.
2. The rules and regulations which the Commissioner of Internal Revenue is authorized by sect. 2 of that act (id. 125) to prescribe, may aid in carrying the law into execution; but they cannot change its positive provisions.

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

April 18, 1874, the property in controversy in this suit, said to be owned by one Karstendiek, was seized, as forfeited to the United States, by the collector of internal revenue for the first collection district of Louisiana; and it was at once libelled by the United States attorney for Louisiana, who, on the twenty-seventh day of March, 1875, filed an amended libel, setting out the causes of seizure and forfeiture in these words, viz.: —

"For that the said Karstendiek, at the time and place of seizure of said property as aforesaid, being, and for more than six months prior thereto having been, a rectifier of distilled spirits, and, as such, having paid the special tax required by the statute of the United States, and being then and there on said premises engaged in and carrying on the business of rectifier as aforesaid, for and during the time and period aforesaid, did, on the fifth day of January, 1874, and at divers other times and dates during the period of six months aforesaid, the precise times and dates whereof are to the said attorney unknown, fill for shipment, sale, and delivery, on his said rectifying premises, a large number of casks, barrels, and packages with distilled spirits, the precise number whereof being to the said attorney unknown, each and every which said casks and packages, so filled as aforesaid, then and there did contain, respectively, more than twenty gallons of distilled spirits, and did then and there, as to each and all of said casks and packages aforesaid, wilfully and knowingly omit, neglect, and refuse to procure and cause, as by the statute of the said United States he was then and there to do, in carrying on and conducting his said business of rectifier as afore-

said, a United States gauger to then and there gauge and inspect the said casks and packages, and to place thereon the stamps required by law, contrary to the form of the statute of the United States in such case made and provided, by reason whereof, and by force of the statutes of the United States in such case made and provided, all the said distilled spirits hereinbefore enumerated and described, found and seized at the time and place aforesaid, and so owned by the said Karstendiek aforesaid, at the time and under the circumstances aforesaid, became forfeited to the United States.

"For that the said Karstendiek, at the time and place of seizure of said property as aforesaid, being, and for more than six months prior thereto having been, a wholesale liquor-dealer as aforesaid, for and during the time and period aforesaid, did, on the fifth day of January, 1874, and at divers other times and dates during the period of six months aforesaid, the precise times and dates whereof are to the said attorney unknown, fill for shipment, sale, and delivery, on his said premises, a large number of casks, barrels, and packages with distilled spirits, the precise number whereof being to the said attorney unknown, each and every which said casks and packages, so filled as aforesaid, then and there did contain, respectively, more than twenty gallons of distilled spirits, and did then and there, as to each and all of said casks and packages aforesaid, wilfully and knowingly omit, neglect, and refuse to procure and cause, as by the statute of the said United States he was then and there to do, in carrying on and conducting his said business of wholesale liquor-dealer as aforesaid, a United States gauger then and there to gauge and inspect the said casks and packages, and to place thereon the stamps required by law, contrary to the form of the statute of the United States in such case made and provided, by reason whereof, and by force of the statutes of the United States in such case made and provided, all the said distilled spirits hereinbefore enumerated and described, found and seized at the time and place aforesaid, and so owned by the said Karstendiek aforesaid, at the time and under the circumstances aforesaid, became forfeited to the United States."

Twenty-five barrels of the whiskey seized were never the property of Karstendiek, but were claimed by and found to belong to other parties. All the claimants demurred to the information, upon the ground that neither count set forth or alleged any facts warranting the seizure or forfeiture of the liquors.

The demurrer was sustained and the information dismissed. The case was then brought here.

Mr. Assistant Attorney-General Smith for the United States.
Mr. J. D. Rouse, contra.

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

This case presents the question, whether property owned by and found upon the premises of a rectifier or wholesale liquor-dealer can be seized as forfeited to the United States, under sect. 96 of the "Act imposing taxes on distilled spirits," &c., passed July 20, 1868, 15 Stat. 164, because such rectifier or wholesale liquor-dealer has knowingly and wilfully neglected, omitted, or refused to cause packages of distilled spirits containing more than twenty gallons each, filled for shipment or sale on his premises, to be gauged, inspected, and stamped, in accordance with the provisions of sect. 25 of the same act.

Sect. 25 provides, that whenever any cask or package of rectified spirits shall be filled for shipment, sale, or delivery on the premises of any rectifier who shall have paid the special tax required by law, it shall be the duty of a United States gauger to gauge and inspect the same, and place thereon an engraved stamp of a particular kind; and whenever any cask or package of distilled spirits shall be filled for the same purpose on the premises of any wholesale liquor-dealer, it shall be the duty of the United States gauger to gauge, inspect, and stamp the same in a like manner.

Sect. 96 provides, "that if any . . . rectifier or wholesale liquor-dealer . . . shall knowingly and wilfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law to be done in the carrying on or conducting of his business, or shall do any thing by this act prohibited, if there be no specific penalty or punishment imposed by any other section for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of $1,000, and . . . all distilled spirits or liquors owned by him, or in which he has any interest as owner, . . . shall be forfeited to the United States."

Sect. 57 provides, that "all distilled spirits found, after thirty days from the time this act takes effect, in any cask or package

containing five gallons or more, without having thereon each mark and stamp required therefor by this act, shall be forfeited to the United States."

Sect. 25 does not specifically impose the duty upon the rectifier or wholesale dealer of causing or procuring the filled casks to be gauged, inspected, or stamped. It is made the duty of the gauger to do the gauging, inspecting, and stamping, but not, in terms of the dealer, to cause it to be done. If there were nothing more, it would be clear that any omission of the rectifier or dealer to act in the matter would not be a cause of forfeiture. Sect. 96 was, however, undoubtedly intended to impose upon rectifiers and wholesale liquor-dealers the duty of doing, or causing to be done, every thing pertaining to their respective occupations which was necessary, in order to enable others acting under the law to do what was required of them. If they failed in this, and there was no other penalty provided for the neglect, they were subjected to the provisions of that section. If, however, by any other section a specific duty was imposed on them, which, if performed, would enable the other parties to act in the proper manner, and a penalty was prescribed for the omission to perform such duty, they were not to be proceeded against under sect. 96. It was not intended by Congress in that section to add to the already-existing penalties for an offence, but to provide for omitted cases only. The object evidently was to so contrive the machinery of the law that when one part was set in motion the rest must follow.

If, then, it is found that by some other section of the act a penalty is imposed upon the rectifier or wholesale dealer, as a consequence of the failure of the gauger to stamp the casks filled on his premises for shipment, sale, or delivery, it may fairly be presumed that this was the penalty he was to suffer for neglecting to procure the stamping to be done; for the gauging and inspecting, under the law, are only preliminary to the stamping. The only neglect he could be charged with under sect. 96 would be a failure to make known at the proper office that there were on his premises packages requiring the action of the gauger, under sect. 25. Now, sect. 57 provides, that if packages of distilled spirits are found on his premises containing five gallons or more each, which do not have upon

them each mark or stamp required by the law, they shall be forfeited. This, then, is a specific penalty provided for the failure to procure or cause the stamping to be done on packages of five gallons and upward; and it follows the packages wherever found. The unstamped packages in this case contained each twenty gallons or more.

It has been contended, however, that this special provision of sect. 57 applies only to distilled spirits on hand when the act of 1868 was passed. Such seems to have been the opinion of Judge Ballard, of the Kentucky district, as reported in the case of *United States* v. *Thirty-seven Barrels of Apple Brandy*, 11 Int. Rev. Rec. 136; but since that time, in 1871, Judge Lowell, of the Massachusetts district, has decided the other way. *United States* v. *Ninety-five Barrels of Distilled Spirits*, 14 id. 6. Judge Knowles, of the Rhode Island district, afterwards followed this ruling of Judge Lowell. *United States* v. *Thirty-four Barrels Distilled Spirits*, 13 id. 188. Other able district judges have decided that sect. 96 did apply to this class of omissions, but it nowhere appears from their opinions that their attention was called to the provision of sect. 57. *United States* v. *One Rectifying Establishment*, 11 id. 45, decided in 1869, in the northern district of Mississippi, and *United States* v. *One Hundred and Thirty-three Casks Distilled Spirits*, id. 191, decided not long after in the California district. The circuit judge in this case has decided in accordance with the opinions of Judges Lowell and Knowles, and held that sect. 57 did apply. The rulings of two commissioners of internal revenue are to the same effect, one dated Sept. 10, 1869, 10 id. 97, and the other, May 13, 1871, 13 id. 170; and it seems to us that this is the proper construction of the law. It is true that the clause referred to is found in a section of the statute which relates especially to spirits on hand when the law was passed; but it is general in its terms, and broad enough to cover the case. As was well said by Judge Lowell in the case against ninety-five barrels of distilled spirits, "to limit the meaning will not only require us to read 'act' as if it were 'section,' but to disregard 'each;' because there is but one particular stamp required by this section, and this would naturally be mentioned 'as the stamp required by the section,' or some such expres-

sion." And again, as is also said by the same judge, "It is proper and usual that the goods which are not stamped should be forfeited, and it is so provided in respect to cigars and tobacco, by sects. 70 and 90; but there is no provision for forfeiting unstamped spirits, unless it be the one in question."

The rules and regulation which the Commissioner of Internal Revenue is authorized by sect. 2 to prescribe cannot have the effect of bringing the case under the operation of the penalty provided in sect. 96, if it was already covered by sect. 57. The regulations of the department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions. *Decree affirmed.*

RAILROAD COMPANY v. DURANT.

1. Where a conveyance of real estate is made to the grantee, as "trustee," without setting forth for whom or for what purpose he is trustee, parol evidence is admissible to establish the fact.
2. A trustee cannot claim adversely to those for whom he acquired and holds the property.

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

This was a bill in equity by the Union Pacific Railroad Company against Thomas C. Durant, to compel his conveyance to the company of certain lots and lands.

The case made by the complainant, in its bill, is substantially this: That in the month of November, 1863, the Union Pacific Railroad Company, having commenced surveys at or in the vicinity of Omaha, for the purpose of ascertaining the best point for the location of the eastern terminus of its road, and the most practicable route thence westward, certain citizens of Omaha proposed to the engineer in charge of said surveys to convey to the defendant, the then vice-president and principal managing officer and agent of the company, for its use, certain tracts of lands and certain lots therein described, "said conveyances to be made conditional upon the location of the said eastern terminus within one and a quarter miles of Farnham Street,

thence running west from said point towards the Platte Valley;" that such proposal was accepted, and the conditions performed, and that the several parties, being satisfied therewith, made conveyances according to their agreement, but by the express direction of the defendant his name was inserted therein as grantee and trustee; that the said conveyances recited that they were made "in consideration of the location of the eastern terminus of the Union Pacific Railroad at Omaha, within one and a quarter miles of Farnham Street, thence running west from said point to the Platte Valley;" that it was the intention of the donors to convey, and that the defendant took the lands and lots in trust for the company, it having furnished the consideration therefor, and still so holds the same, but has refused, upon request, to convey to the company. The bill prays for a decree to compel him to execute the trust and convey them to the complainant.

The substance of the answer is that the company did not fix the location of the eastern terminus or the westward route of the road, but that the surveys therefor were made at the defendant's individual expense, and under his management and direction; that the proposed donation was intended to be made to him individually, in order to secure his influence with the president and the company in establishing said terminus and route; that the word "trustee" was inserted in said deeds solely at his own instance, to declare a trust in favor of the grantors, in case of a non-performance of the conditions of the agreement; that he has conveyed to the corporation a portion of the lands necessary to its use, but that the residue he still holds; that the sole consideration of said conveyances was the location of the eastern terminus within one mile and a quarter of Farnham Street, and the approval of the route westward by the president, in whom alone was vested the power to locate the said terminus or the said route; that the condition of the contract never was complied with, and that therefore there has been a reversion of the lots and lands to the grantors, for whom he holds, and who should be made parties to the action.

Upon the final hearing the court dismissed the bill, on the ground, as to most of the property in controversy, that the pro-

posal pursuant to which the conveyances were subsequently executed to the defendant as trustee was secured by an illegal and oppressive exercise of his power as the acting president and active manager of the company, and that he held the property as trustee for the donors, except as to certain tracts, which, it was admitted, he had received as trustee for the company.

From the decree dismissing the bill this appeal was taken.

Mr. Andrew J. Poppleton for the appellant.
Mr. James M. Woolworth, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

There are no questions of law or fact of any difficulty in this case. A brief opinion will be sufficient to dispose of it.

An examination of the record has satisfied us that the consideration for the conveyances to the appellee proceeded wholly from the appellant; that the appellee took the titles in trust; that he was a trustee; that the appellant was the *cestui que trust;* and that the appellee has stood in that relation ever since the conveyances were executed to him, and that he still holds the premises in that capacity. This is the whole case. The claim of the appellee that he took the titles in trust for the grantors is absurd upon its face, and contradicted by the proofs. If the grantors intended to deny the right of the company to demand the performance of the contract, why did they convey at all? *Potior est conditio defendentis.* Why interpose a trustee? and especially why recite in the deeds that the condition of the subscriptions had been fulfilled?

These suggestions set in a strong light the character of this pretence.

But it is said the conveyances grew out of an illegal transaction between the company and the grantors. To this there are several answers. The grantors have voluntarily executed the contract. They have not intervened, and do not complain.

The conveyances to the trustee were, in the view of the law, the same thing as if they had been to the company. The transaction between the parties in interest was thus finally closed. There will be neither more nor less of illegality between the original parties, whether the trustee does or does not respond to his obligation to the company. In that obligation there is no pre-

tence for saying there is any taint of any kind; and it is that obligation alone which it is sought to enforce by this proceeding. All the deeds but one designate the appellee as "trustee," without setting forth for whom or for what purpose. Parol evidence was admissible to show these things. The designation alone was sufficient to devolve the duty of inquiry upon any third person dealing with the property. *Duncan* v. *Jaudon*, 15 Wall. 165; *Shaw* v. *Spencer and Others*, 100 Mass. 321; *Sharp* v. *Taylor*, 2 Ph. 801; *McBlair* v. *Gibbs*, 17 How. 232; *Brooks* v. *Martin*, 2 Wall. 70. The appellee cannot claim adversely to those for whom he acquired and holds the property. The rights of others, if such rights exist, do not concern him. He cannot vicariously assert them.

The office of a trustee is important to the community at large, and frequently most so to those least able to take care of themselves. It is one of confidence. The law regards the incumbent with jealous scrutiny, and frowns sternly at the slightest attempt to pervert his powers and duties for his own benefit. The tenant cannot deny the title of his landlord. *A multo fortiori* ought not the trustee to be permitted to deny that of his beneficiary.

The position assumed by the trustee in this case is not unlike that of one who, having deprived the owner of the possession of his property, when called to account civilly or criminally, should insist that the owner's title was fatally tainted with fraud, and that hence the offender had the right to "take and carry away," and keep and enjoy, the property himself with impunity.

The conduct of the appellee, stripped of the verbiage with which it has been surrounded, and viewed in its nakedness, strongly offends the moral sense of the judicial mind.

The decree will be reversed, and the cause remanded with directions to enter a decree in favor of the complainant; and it is

So ordered.

UNITED STATES v. MANN.

Under sect. 3177 of the Revised Statutes, authorizing any collector, deputy-collector, or inspector, to enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, within his district, so far as it may be necessary for the purpose of examining said articles or objects, the United States brought suit against the cashier of a national bank, having charge of its place of business, where were kept checks drawn upon and paid by it, who refused to permit the collector of the proper district to examine said bank-checks. *Held*, that the declaration was bad in not alleging that the paid checks on the bank remaining in its possession were not duly stamped at the time they were made, signed, and issued.

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

This is an action by the United States to recover from the defendant $500, as a forfeiture for an alleged violation of sect. 3177 of the Revised Statutes.

The complaint alleges that on the 7th of January, 1875, in the daytime, in the city of St. Paul, Minn., the defendant, Walter Mann, who was then and there the vice-president of the Merchants' National Bank of St. Paul, had the charge and superintendence of the place of business, to wit, the rooms and vaults occupied by said bank, in which said place of business were then and there kept by said bank certain articles subject to tax, to wit, certain bank-checks which had theretofore been drawn upon and paid by said bank, a more particular description whereof is to the plaintiff unknown.

That the defendant, having then and there the charge and superintendence of the said place of business of said bank in which were then and there kept the aforesaid paid bank-checks, was, by Irving Todd, who was then and there the collector of the internal revenue of the United States in and for the collection district of which the said city was then and is a part, and who had then and there entered the said place of business of said bank for the purpose of examining, as such collector, the said paid bank-checks, then and there duly requested to suffer him, the said collector, as such, to examine the paid bank-checks aforesaid, so kept by said bank then and there in its said place of business, and that the said defendant then and there refused to suffer the said collector to examine said checks, or

any one or part of the same, contrary to the statute in such case made and provided.

The defendant demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The demurrer having been sustained, and judgment rendered for the defendant, the United States brought the case here.

The Solicitor-General for the United States.
Mr. George L. Otis, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Authority is given to any collector, deputy-collector, or inspector of internal revenue to enter, in the daytime, any building or place within his district, where any articles or objects subject to such taxation are made, produced, or kept, so far as it may be necessary for the purpose of examining such objects or articles; and the provision is, that any owner of such building or place, or any person having the agency or superintendence of the same, who refuses to admit such officer, or suffer him to examine such articles or objects, shall for every such refusal forfeit $500. Rev. Stat., sect. 3177.

Founded upon that provision in the act of Congress, the complaint filed in the Circuit Court alleges and charges that the defendant, having at the time mentioned the care and superintendence of the described bank and its place of business, in which certain paid bank-checks were then and there kept, refused then and there to suffer the collector of the district, who then and there entered the bank for the purpose, to examine the said paid bank-checks so kept then and there in said place of business, though thereto requested by the collector, which said refusal was then and there contrary to the form of the statute in such case made and provided.

Service was made, and the defendant appeared and demurred to the complaint. Hearing was had, and the court sustained the demurrer, the reasons for the conclusion not being exhibited in the transcript; but the record contains a statement to the effect that the plaintiffs standing on their complaint, the court rendered judgment for the defendant. Error was assigned by the plaintiffs, and they sued out the present writ of error. It is now contended by the United States that the judgment was

for the wrong party; that it should have been rendered for the plaintiffs, and not for the defendant, which is the only error assigned for the consideration of this court.

Bank-checks, drafts, or notes for the payment of money, drawn upon any bank, broker, or trust company, at sight or on demand, are subject to a tax of two cents, to be paid by the person who makes, signs, or issues the same, or for whose use or benefit the same are made, signed, or issued. 18 Stat. 310; Rev. Stat., sect. 3418. Exceptions exist to that requirement in behalf of Federal and State officers, and in behalf of county, town, and other municipal corporations, when in the strict exercise of functions belonging exclusively to their ordinary governmental or municipal capacity. Id., sect. 3420.

Cases arise where such an instrument is issued without being duly stamped; and in such a case the provision is, that neither the instrument nor any copy thereof shall be admitted or used in evidence in any court until a legal stamp denoting the amount of the tax is affixed thereto, as prescribed by law. Instruments of the kind are required to be stamped at the time of their issue; and the provision is, that unless a stamp or stamps of the proper amount shall be affixed to the same, and cancelled, it shall not be lawful to record the instrument, and that the record if so made shall be utterly void. Provision is also made that parties violating those regulations, by making, signing, or issuing any such instrument, document, or paper, without being duly stamped, shall for every such offence forfeit the sum of $50, and that the unstamped instrument shall be deemed invalid and of no effect. Id., sect. 3422.

Such officer may enter, in the daytime, any building or place within his district where any articles or objects subject to taxation are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects. Unless articles or objects of taxation are made, produced, or kept in any building belonging to another, the collector derives no authority under that act to enter the building at all; and even then his right to enter the same is strictly limited by the words, "so far as it may be necessary for the purpose of examining such articles or objects."

Where articles or objects subject to taxation are made, pro-

duced, or kept in any building, by whomsoever owned, the provision is that the collector or other officer named may enter the same, so far as it may be necessary for the purpose of examining said articles or objects; but the act of Congress gives the officer no authority whatever to enter the building of another for any other purpose than that which the act specifically describes.

Strictly limited as the right conferred is, it is a privilege easily defined; and it is equally clear that the prohibition addressed to the owner or person in charge of the place of business is explicitly confined to the refusal to suffer the officer to enter the building where the articles or objects subject to taxation are made, produced, or kept, for the special purpose particularly set forth in the section. Owners of such a building, or persons having the agency or superintendence of the same, are forbidden to refuse to admit the collector, deputy-collector, or inspector to enter such building for the described special purpose; and the provision is, that if they do so refuse, and do not suffer the officer to examine such articles or objects, they shall for every such refusal forfeit $500.

Persons other than the owner of the building or place of business cannot be held liable to the penalty prescribed in the section, unless it be alleged and proved that he or they had at the time the agency or superintendence of the same, and that it was a building or place where articles or objects subject to taxation were made, produced, or kept, and that the person or persons accused of having violated the prohibition of the section then and there refused to allow the officer to enter the building or place of business for the described purpose, or to suffer him to examine the articles or objects subject to taxation then and there kept in said building or place of business.

Informations for offences or penalties created and defined by statute, like indictments, must follow the words of the statute; and where there is no substantial departure from that requirement, the information, like 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. Offences created by statute as well as offences at common law consist, with rare exceptions, of more than one

ingredient; and the rule is universal, that every ingredient of which the offence is composed must be accurately and clearly expressed in the indictment or information, or the pleading will be held bad on demurrer. *United States* v. *Cook*, 17 Wall. 168; 1 Bishop, Cr. Pro. (2d ed.), sect. 81; Archb. Cr. Pl. & Ev. (18th ed.) 54.

Orders for the payment of money, including checks and drafts drawn upon any bank, banker, or trust company, are subject to a tax of two cents; and it is understood to be the opinion of the department that the exaction specified is a tax upon the instrument to be paid by the person who makes, signs, or issues the same, or the person for whose use or benefit the order or check was made, signed, or issued. 18 Stat. 310; Rev. Stat., sect. 3418.

Suppose that is so, then it may perhaps be suggested that a bank-check, though paid, if it was made, signed, and issued without being duly stamped with a stamp denoting the amount of the tax, is still an article or object subject to taxation within the meaning of the provision under consideration, unless it can be held that the tax is merged in the penalty prescribed for the violation of the requirement that the instrument shall be stamped at the time it is made, signed, and issued. Id., sect. 3421.

Such a question may arise in a subsequent case; but it is wholly unnecessary to discuss it in the case before the court, as it is not alleged in the information that the paid bank-checks therein described were not duly stamped at the time the same were made, signed, and issued, as required by the act of Congress. Instead of that, the charge in the information is to the effect that the paid bank-checks were then and there kept in the bank or place of business then and there under the charge and superintendence of the defendant; that the collector of the district then and there entered the said bank or place of business for the purpose of examining the said paid bank-checks, and that he, the collector, then and there requested the defendant to suffer him to examine the said paid bank-checks so kept by the said bank then and there in their said place of business; and that the defendant then and there refused the said request of the said collector. Matters not alleged in the information

cannot be regarded as confessed by the defendant, as the demurrer only admits what is well pleaded.

Certain bank-checks which had theretofore been drawn upon and paid by the bank, it is alleged in the information, were then and there kept in the rooms and vaults of the bank; and it is proper to say that the said checks are described in the preliminary part of the information as "articles subject to tax," but it is nowhere alleged in the information that the said paid bank-checks were not duly stamped with stamps denoting the tax to which the same were subject at the time the checks were made, signed, and issued.

Ingredients or elements not set forth in the information or other criminal accusation cannot be incorporated into the charge against the defendant after he is served with process, and it is equally clear that paid bank-checks which were duly and sufficiently stamped at the time they were made, signed, and issued are not articles or objects subject to taxation, within the meaning of the act of Congress on which the information in this case is founded; and, if so, then it follows as a necessary conclusion that the defendant might lawfully refuse to suffer the collector to examine the paid bank-checks described in the information.

Penal offences created by statute, whether to be prosecuted by indictment or information, must be accurately and clearly described in the pleadings for the recovery of the penalty; 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 accusation must be expanded to that extent, as it is universally true that no pleading in such a case can be sufficient which does not accurately and clearly allege all the ingredients of which the charge is composed, so as to bring the accused within the true intent and meaning of the statute defining the accusation.

In general, says Chief Justice Marshall, it is sufficient in a libel of information to charge the offence in the very words which direct the forfeiture; but the proposition, we think, is not universally true. If the words which describe the subject-matter of the prohibition are general, including a whole class, . . . we think the charge in the libel ought to conform to the true

sense and meaning of the words as used by the legislature. *The Mary Ann*, 8 Wheat. 380; *The Schooner Hoppet and Cargo* v. *United States*, 7 Cranch, 389; 2 Pars. Ship. & Adm. 386.

Examples of the kind where it has been held that it is not sufficient to follow the words of the statute are quite numerous, and they show that many of the exceptions are as extensively recognized and as firmly settled as any other rule of pleading in such cases. Views of a corresponding character are expressed by this court in another case, where the opinion was delivered by Mr. Justice Story. Having stated the rule that it is in general sufficient 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 known principles of law, both of which exceptional requirements are applicable in this case.

Known principles of law require greater particularity to be observed in order that all the ingredients which constitute a violation of the statutory offence may be accurately and clearly alleged; and it is equally clear that the intention of Congress requires the same thing, as it is obvious that Congress never could have intended that paid bank-checks, duly and sufficiently stamped at the time they were made, signed, and issued, should be regarded as articles or objects subject to taxation within the meaning of the provision in the act of Congress under consideration. *Brig Caroline* v. *United States*, 7 Cranch, 496; *The Schooner Anne* v. *United States*, id. 570; Conkl. Treat. (5th ed.) 546.

Authorities other than those already referred to are not necessary to show that an information to recover a penalty created by statute must state all the material facts and circumstances which constitute the offence, so as to bring the party impleaded precisely within the provisions of the statute defining the offence; but, should it be desired to consult other authorities, it will be found that the following fully support the propositions: 2 Colby, Cr. Law, 114; *People* v. *Wilbur*, 4 Park. (N. Y.) Cr. 19; *Steel* v. *Smith*, 1 Barn. & Ald. 95; Conkl. Treat. (5th ed.) 548.

Viewed in the light of these suggestions, it is clear that the

right conferred upon the officer to enter the building or place of business of another in such a case is strictly limited to a building or place of business in which articles or objects subject to taxation are, at the time of the proposed entry and examination, made, produced, or kept, and that paid bank-checks, unless it is alleged and proved that they were not duly and sufficiently stamped at the time they were made, signed, and issued, are not articles or objects subject to taxation within the meaning of the act of Congress on which the information is founded. Nothing is admitted by the demurrer except what is well pleaded in the information; and inasmuch as the only charge of the information in that regard is that paid bank-checks were then and there kept in the said building or place of business described, the court is of the opinion that the information does not set forth any legal offence against the defendant, as defined by the said act of Congress.

Judgment affirmed.

MITCHELL v. MOORE.

1. A trustee residing in Alabama during the rebellion, who kept no separate accounts of the trust fund, but invested it in his own name, cannot charge it with the losses he sustained from payments made to him in Confederate money.
2. Where the allegations of a bill charging a breach of trust, and praying for an account by the trustee, the payment of the amount found due, his removal, and general relief, are sustained by the proofs, — *Held*, that the appointment of a new trustee, and the decree for the payment to him of the principal of the fund, is necessary to carry into full effect an order for the removal of the old trustee.

APPEAL from the Circuit Court of the United States for the Southern District of Alabama.

In November, 1873, Catharine Moore, by L. D. Moore, her husband and next friend, filed her bill against Daniel Mitchell, her trustee, charging him with neglect in the execution of his trust, and with loss of the fund.

This trust was created by James Mitchell, her father, who, by will, appointed said Daniel and one Baskin his executors, and bequeathed to them a negress and her child, in trust for

Catharine. The hire of these was to be paid to her annually; and if the executors should deem it proper to sell the slaves, then the interest on the purchase-money was to be paid annually to her. The fifth item provides, in case she should survive her husband, the slaves were to be delivered to her, or, if they were sold, the purchase-money was to be paid to her.

The will further provides that the executors shall sell the real estate of the testator, the proceeds to be equally distributed among the children named in the will. "The share of Catharine to be held in trust by my executors, and the interest accruing annually to be paid to Catharine, as specified in the fifth item, and finally disposed of in the same manner as the property directed in the fifth item."

James Mitchell died in Sumter County, Alabama, in 1856, and immediately thereafter the executors qualified under the will.

The bill avers that there was a large amount due her for the hire of the slaves, and that the executors, on a settlement with the Probate Court, were charged with the sum of $9,204.60, which, divided into shares according to the will, left them indebted to the complainant in the amount of $1,150.54; that they have neglected for the past eleven years to pay interest, and mingled the fund with their own, and used it, to her great loss; that Baskin resides beyond the jurisdiction of the court; and that said Daniel had "almost if not the exclusive management of the trust and the property created thereby."

The prayer is that the trust be established, and an account taken of what is due for principal and interest; that the trustees be removed; and that Mitchell "may be decreed to pay to your oratrix whatever she may be found entitled to under said trust."

To this is added a prayer for general relief.

An amended bill avers that the executors had sold the slave girl and her child before the late war, and had never accounted for the hire or the purchase-money.

The answer sets forth that said Daniel accepted the trust purely for the accommodation of his sister, the complainant, and by agreement with his father was not to charge any

compensation for his services; that he never received or made any claim therefor; and that by this agreement he was not to be charged with any loss in the execution of the trust, if he should manage it as he did his own affairs.

It admits the sale of the negress and her child in July, 1856, for the sum of $1,375.25, and avers that up to 1862 said Daniel accounted annually for the interest thereon; that payment was not subsequently made, as there was no communication during the war between Alabama and Texas, in which latter State his sister then resided; and that the money was loaned out on good security, and was during the war paid to him in Confederate money, then the only currency. It further avers that "all of the said money, together with a large sum owned by defendant, became valueless and lost to him;" that the complainant's distributive share, $1,150.54, was loaned out on good security, and the interest thereon annually paid up to 1862; and that the amount due on the loan was paid to him in March, 1863, in Confederate currency, which at that time was worth three and a half for one in United States currency.

A decree was rendered against Mitchell, removing him as trustee, and adjudging that he pay the principal to a new trustee.

Mitchell appealed to this court, assigning for error the ruling of the court below that he was liable for the amount decreed against him, and that the principal amount be paid to a new trustee.

The remaining facts are stated in the opinion of the court.

Mr. Philip Phillips for the appellant.

Mr. Conway Robinson and *Mr. Leigh Robinson, contra.*

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

There can be no doubt that the trust fund in this case was always used by the defendant as his own, and that all investments were made by him in his own name, with nothing whatever to indicate an appropriation to the purposes of the trust. When inquired of by the complainant in October, 1860, in respect to the trust, the defendant wrote: "If you will be contented I will fix your money so that you can see it any instant. But as the time is now, it is in a better fix now than

it would be if you had it." In his deposition, taken in his own behalf, when upon cross-examination he was required to make a full, complete, and detailed statement of his execution of the trust, he said: "I kept no separate account of the trust fund after it came into my hands. I accounted for the annual interest to the agent of the complainant, and was ready to pay over the principal in the event of the death of A. L. D. Moore, which was the time fixed by the will of my father for me to pay over to my sister the *corpus* of the trust. I thought this was all I was required to do, and, therefore, kept no separate and distinct accounts of the trust fund, and cannot give the dates of the loans, or other particulars inquired about. . . . When necessary, I put some of my own funds with it to make out the sum a borrower might wish to get, and kept no separate accounts of it, and can furnish none."

Under these circumstances, clearly the defendant is in no condition to charge the trust with the losses he has sustained from payments to him in Confederate money. As long ago as 1681, it was said in argument, and approved by the then Lord Chancellor of England, in *Dashwood* v. *Elwall*, 2 Ch. Cas. 56, that "if an executor hath orphan's or other men's money in his hands, and hath power to lend it, if he do so, and take security in his own name, which faileth, he shall answer the debt in his own money, unless that he indorse the bond, or do some other thing, at the time of lending the money or taking the security, which may doubtless declare the truth," and this because "heed was to be taken that we make not such examples under which dishonest men may shelter themselves." If this were not the rule, it was also said, "It will be in the power of one who deals for several persons and for himself also, taking security by bond in his own name, if any of the debts fail, to gratify whom he pleaseth with good securities, yea, himself, and play the securities, good or bad, into his own hands, or what he pleaseth." Thus were set forth in the language of the time a rule, and the reason of it, by which courts of equity have universally required trustees to account; and it can never be departed from, without danger that wrong will be done. *Massey* v. *Banner*, 4 Madd. 413; *Wren* v. *Kirton*, 11 Ves. Jr. 377; *McAllister* v. *The Commonwealth*, 30 Pa. St. 536; *Stanley's Appeal*, 8 id. 431.

This disposes of the first assignment of error. There is no dispute as to the amount of the trust fund, and no complaint is made of the rate of interest for which the defendant has been decreed to account, if he is liable to account at all.

The second assignment of error is to the effect that the court could not direct the payment of the principal sum to a new trustee, because such a decree was inconsistent with the specific relief prayed for. The prayer is for an account, the removal of the old trustees, the payment to the complainant of the money she is entitled to, and for general relief. There is no specific prayer for the appointment of a new trustee, or the payment of the principal of the fund to him when appointed; but such relief is necessary, in order to carry into full effect an order for the removal of the old trustees.

Decree affirmed.

GIVEN *v.* HILTON.

1. Where the intent of a testator to make a complete disposition of all his property is manifest throughout his will, its provisions should be so construed, if they reasonably may, as to carry that intent into effect.
2. While an apparent general intent cannot control his particular directions plainly to the contrary, or enlarge dispositions beyond their legitimate meaning, it is of weight in determining what he intended by particular devises or bequests that may admit of an enlarged or a limited construction.
3. The rule in the construction of wills, where certain things are enumerated, that a more general description, which is coupled with the enumeration, is commonly understood to cover only things *ejusdem generis* with the particular things mentioned, rests on a mere presumption, easily rebutted by any thing which shows that the larger subject was in fact in the testator's view.
4. The will in this case construed, and *held*, 1. That the testator intended to dispose of his entire estate, and not to die intestate as to any portion of it. 2. That his direction to his executors to sell all his estate not otherwise devised and bequeathed was intended to secure a complete conversion, to all intents, of his entire property into personal estate. 3. That, with the exception of the lot devised, his entire estate, both real and personal, after the payment of his debts and of the legacies prior to that given to the residuary legatee, passed to the latter.

APPEAL from the Supreme Court of the District of Columbia.

The bill in this case was filed by John Emory Hilton and certain other heirs-at-law and next of kin of John P. Hilton,

against John T. Given and Carberry S. Hilton, his executors, and others, to obtain judicial construction of his last will and testament. It prayed for an injunction restraining the executors from selling any portion of the real estate until they should first have applied the personal estate to the payment of debts and the legacies specified in the will, and, in the event of any deficiency, then to sell no greater portion of such real estate than would be sufficient to discharge such debts and legacies.

The court decreed that the debts due by the deceased were to be first paid, then the legacies, and both from the personal estate, if that be sufficient; but if not, then that the real estate be resorted to, but only to discharge any deficiency, and that the residue of said real estate be equally divided among the heirs.

From this construction of the will the defendants appealed to this court.

This will, which was duly attested and admitted to probate, is as follows: —

"In the name of God, amen. I, John P. Hilton, of Washington City, in the District of Columbia, . . . do . . . make and publish this my last will and testament, in manner and form following, that is to say: . . .

"After my debts and funeral charges are paid, my worldly estate, with which it hath pleased God to intrust me with, I devise and bequeath as follows: —

"*Item.* As soon after my decease as possible, I direct that my debts and funeral expenses be paid out of any portion of my estate which may first come into the hands of my executors hereinafter named.

"*Item.* Secondly, I direct that all of my estate, except such as is hereinafter otherwise devised and bequeathed, be sold by my executors at as early a day as practicable, upon such terms and conditions as may seem best in their judgment for the best interest of all herein concerned, and that the proceeds arising therefrom shall be divided in the following manner and proportions as they are first herein named, written, and stated, as far as the amount realized from the sale of my said estate will allow, viz.: —

"*Item.* I give and devise unto my kind and obedient son, Carberry S. Hilton, and my grandchildren, John Perry Hilton and Harry Slicer Hilton, sons of Carberry S. Hilton, all that part of lot eight (8) of Davidson subdivision of square two hundred and

fifteen (215), fronting on 14th Street west, between L and M Streets north, with the improvements; that is to say, one-half of the said lot and improvements to the said Carberry S. Hilton, in fee-simple, and the remaining half as he may choose, to him the said Carberry S. Hilton, in trust for the sole use and benefit of his said children, John Perry Hilton and Harry Slicer Hilton, in fee-simple, to be equally divided between them.

[Here follows a number of pecuniary legacies.]

"*Item.* I give and bequeath unto my kind, affectionate son, Carberry S. Hilton, all the rest and residue of my estate of which I may die seised or possessed, which is not herein otherwise devised and bequeathed, such as moneys, bonds, stocks, judgments, notes, household furniture, and all personal effects of every description, and not herein otherwise disposed of, for his sole use and benefit and that of his children.

"*Item.* I direct that the rents accumulating from my estate, until such time as my executors shall have disposed of the same, shall be distributed as follows: After deducting all expenses for repairs, taxes, and insurance, the same shall be equally divided among my four children; namely, Carberry S. Hilton, Ann Terring Smith, John Emory Hilton, and Laura R. Morsell.

"And, lastly, I do hereby constitute and appoint my dear son, Carberry S. Hilton, and my esteemed friend, John T. Given, of Washington City, District of Columbia, to be sole executors of this my last will and testament, revoking and annulling all former wills by me heretofore made, ratifying and confirming this and none other to be my last will and testament, requesting that my son, Carberry S. Hilton, the first-named executor of this my will, that he make no charge for any service he may render in the execution thereof.

"In testimony whereof, I have hereunto set my hand and affixed my seal this nineteenth day of March, in the year of our Lord eighteen hundred and seventy-three.

[SEAL.] "JNO. P. HILTON."

Mr. Richard T. Merrick and *Mr. William F. Mattingly* for the appellants.

Mr. Walter S. Cox and *Mr. John J. Johnson, contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

The ultimate question in this case is what passed under the residuary clause of the testator's will. It can be answered

intelligently only after a careful examination of all the provisions of the instrument, and an ascertainment therefrom of the testator's general scheme. That he intended to make a complete disposition of all his property, leaving none to pass under the intestate laws, is abundantly manifest. He commenced by declaring that, after his debts and funeral charges were paid, he devised and bequeathed the worldly estate with which it had pleased God to intrust him. Next followed a direction that these debts and expenses should be paid, as soon after his decease as possible, out of any portion of his estate that might first come into the hands of his executors. Then followed a direction that all his estate, not otherwise devised and bequeathed (all except a single lot of ground devised to a son), should be sold as soon as practicable, and that the proceeds thereof should be divided in a manner and in proportions described thereafter. Here the real estate and the personalty are commingled and treated as one fund. All is to be converted into money, and all is to be distributed; and, to guard against the least intestacy, and insure that all his estate should pass under his will, by a subsequent disposition he disposed of the rents that might accumulate from his estate, before the executors should sell it, by distributing them among his children. These dispositions are utterly inconsistent with an intention to leave any portion of his estate to descend under the intestate laws; and they accord with the general rule that no presumption of an intent to die intestate as to any part of his property is allowable when the words of a testator's will may fairly carry the whole. *Stehman and Others* v. *Stehman*, 1 Watts (Pa.), 466. The law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may reasonably be given, *Vernon* v. *Vernon et al.*, 53 N. Y. 351; and certainly when, as in this case, the intent to make a complete disposition of all the testator's property is manifest throughout his will, its provisions should be so construed, if they reasonably may be, as to carry into effect his general intent.

We do not mean to be understood as asserting that an apparent general intent to make by his will a complete disposition of all a testator's estate can control particular directions plainly

to the contrary, or enlarge dispositions beyond their legitimate meaning. What we do assert is, such a general intent is of weight in determining what was intended by particular devises or bequests that may admit of enlarged or limited constructions.

It has already been noticed, the testator in this case ordered that all his estate, except a single lot, and confounding realty and personalty, should be sold by his executors as soon as practicable. This sale he directed to be made upon such terms and conditions as might seem best in their judgment for the interests of all concerned in the will; and he directed the proceeds arising therefrom to be divided in the manner and proportions, "as first written, named, and stated" in the will, as far as the amount realized from the sale would allow. Then followed a devise of the excepted lot, and various pecuniary bequests, succeeded by a residuary legacy to his son, given in the following words: "I give and bequeath unto my kind and affectionate son, Carberry S. Hilton, all the rest and residue of my estate, of which I may die seised or possessed, which is not herein otherwise devised and bequeathed, such as moneys, bonds, stocks, judgments, notes, household furniture, and all personal effects of every description, and not herein otherwise disposed of, for his sole use and benefit and that of his children."

If by this residuary clause the testator intended to give only the residue of that which was personalty immediately preceding his death, then he died intestate as to all his real estate not needed for the payment of his debts and other legacies, and as to the surplus of the proceeds of its sale not necessary for those payments. Then there is a resulting interest in all his children as collectively heirs-at-law; and, as that which was personalty at his death is, by admission, largely insufficient for the payment of those debts and legacies, the residuary legatee takes nothing under the bequest to him, for the personal property is first to be applied to discharge the debts and legacies. But, on the other hand, if by the direction to sell all his estate the testator intended its conversion into personalty out and out, or for all intents, and not merely for the payment of the legacies prior to the residuary gift, the residuary clause carried all that may remain after those legacies shall be paid.

It is a fundamental question, therefore, whether the testator's direction to his executors to sell "all his estate" worked an absolute conversion of his realty into personalty. It is undoubtedly established doctrine that when a will directs conversion of realty only for certain purposes, which are limited, for example, for the payment of particular legacies, and follows the direction by a bequest of the residue of personal estate, the conversion takes place only so far as the proceeds of the sale are needed to pay the legacies prior to the residuary one, and the gift of the personalty will not carry the produce of the sale of the lands in the absence of a contrary intent plainly manifested. The surplus or excess retains the quality of realty, and is transmitted either by a devise of the realty, if there be one, or descends under the intestate laws. Hence it is often a question, and frequently a difficult one, whether the direction to sell was for a limited purpose, or for all purposes, and, consequently, whether the testator's intent was to impress upon all the proceeds of the sale the quality of personalty. There are certain things which are considered indicative of an intent to cause a complete conversion. It has been held that a general direction to sell and apply the proceeds indiscriminately to the payment of debts and legacies operates as a conversion out and out. Roper on Legacies, 341, 342, *et seq.*; *King* v. *Woodhull*, 3 Edw. (N. Y.) 82; *Durour* v. *Motteux*, 1 Ves. 320.

Blending the proceeds of realty and personalty in one fund for the payment of debts and legacies is generally regarded evidence of an intention to give to the proceeds of a sale ordered the character of personalty throughout, though not a conclusive indication in all cases. These indications exist in the will before us, and, were it necessary, they might be called in aid of its construction; but, after all, little assistance is derived from general rules in the construction of a will. The intent of a testator is to be sought in the instrument itself. In making it he does not often have in mind any particular rules of construction applied to other wills. He uses those expressions which he supposes convey his own thought and wishes.

Turning, then, to the will before us, the first thing noticeable is that the direction to sell was positive, and that it comprehended all the estate. The testator must have known that

his personal property was largely insufficient to pay his debts, funeral expenses, and the pecuniary legacies he proposed to give. Yet his order was, not to sell so much of his real estate as might be necessary for satisfying debts and certain legacies, not that what should prove lacking of personalty should be supplied from sales of realty, but all was directed to be sold, whether necessary for the payment of legacies or not; and in the direction he recognized the interest of the residuary legatee as fully as he did the interests of any other legatee therein. The executors were required to sell on such terms and conditions as, in their judgment, might seem best for the interests of all concerned in the will. The residuary legatee was one of those concerned. Why consult his interest, if, as a beneficiary under the will, he had no concern in the sale, if by virtue of the legacy to him he was to have no portion of the proceeds of the sale, and if what remained after payment of the legacies prior to his was intended to continue realty, and descend under the intestate laws?

The will further directed that the proceeds of the sale, *i. e.* the whole proceeds, should be divided in the manner and proportions first in the will named, written, and stated, as far as the amount realized would allow. It is not quite clear what was meant by this direction: but it rather seems the intent was, that, if the sum for which the property might be sold should prove insufficient to pay all the legacies in full, they should be paid in the order named; that is, that the legatee first named should be first paid, and so on, in the order in which the different beneficiaries were mentioned, down to the residuary legatee. If this is not so, the word "first" can have no significance; and then the testator intended that legacies to his children and grandchildren should abate ratably with his gifts to strangers: but, however this may be, it was a fund arising from the sale of the testator's whole estate that was to be divided among legatees; and the residuary bequest to the son, Carberry S. Hilton, was as truly a legacy as any one of the gifts that preceded it. We can discover nothing, therefore, in this clause of the will that indicates an intent to effect only a partial conversion, or merely a conversion for the payment of those legacies which preceded the residuary bequest. On the contrary, the more reasonable

and the true interpretation, we think, is that the testator meant to direct a complete conversion, to all intents, of his entire property into personal estate. If so, the residuary bequest, even if it was only a legacy of his personal estate, carried to the legatee not only that which was personalty at his death, but that which by the conversion he ordered became personalty.

But it is not to be admitted as certain that the subject of the residuary bequest was personal property alone. Certainly the bequest is not an ordinary gift of the residue of personalty. Its phraseology is very peculiar. Were it not for the enumeration of "moneys, stocks, judgments, notes, household furniture, and all personal effects of every description" (most of which, if not all, may have been the product of the sales of the real estate ordered to be sold), the residuary clause, beyond doubt, would be broad enough to carry real estate, as well as all personalty. It is doubtless true that in the construction of wills, as well as of statutes, where certain things are enumerated, and a more general description is coupled with the enumeration, that description is commonly understood to cover only things *ejusdem generis* with the particular things mentioned. This is because it is presumed the testator had only things of that class in mind; but this rule of construction rests on a mere presumption, easily rebutted by any thing that shows the larger subject was in fact in the testator's view. In the present case, it is quite plain the testator had in mind all his estate, whether realty or personalty, when he made the disposition of the residue. Indeed, he must have had his real estate, or the proceeds of his sale, mainly in view; for, as we have said, he knew that his personal estate would be exhausted by the payment of debts and prior legacies. And this appears in the language he used. He gave unto his "kind and affectionate son" all the rest and residue of his estate of which he might die seised or possessed, not otherwise devised and bequeathed (enumerating some species of personal effects), and all personal effects of every description, not otherwise disposed of by the will. This included not only that which he possessed, namely, personalty, but also that of which he was seised, — his realty. The form of his expression denotes that he had before his mind at the time alike every thing that was real and every thing that was personal; and, in

making the bequest, he used the most comprehensive language which could have been adopted.

The residuary gift, therefore, ought not, in view of the whole will, to be construed as embracing only the remainder, if any, of that which was personalty at the death of the testator. Its scope was larger. It embraced all of the testator's estate, both realty and personalty, not devised or bequeathed by the preceding dispositions of the will.

This construction is fortified by another consideration. Carberry S. Hilton, the residuary legatee, was a favorite son of the testator. This appears from the manner in which he is more than once spoken of in the will. No other pecuniary legacy is given to him; and it cannot be believed that his father intended, by his residuary bequest, to make to him a barren gift, and leave a portion of his estate to descend under the intestate laws.

We conclude, therefore, that the Supreme Court of the District erred in its construction of the will and in the decree made, so far as it was ordered that any portion of the residue of the testator's estate, after the payment of his debts and of the legacies prior to that given to the residuary legatee, should be equally divided among the heirs, and in not decreeing that the whole of the estate, except the lot devised, both real and personal, after the payment of those debts and legacies, passed, under the residuary clause, to Carberry S. Hilton.

Decree reversed, and the record remitted with instructions to enter a decree in accordance with this opinion.

THE "WANATA."

1. A collision occurred at night, about a half mile off the coast of New Jersey, north of Barnegat and between that point and Long Branch, between a schooner and a pilot-boat, the latter, lying there at anchor in four fathoms of water, displaying the light required by art. 7 of the sailing regulations, and having a proper lookout, who was, however, at the time of the collision, momentarily absent from her deck. The schooner displayed no lights, owing, her claimants allege, to unavoidable accident due to the force of the wind. *Held*, 1. That the pilot-boat was not anchored in an improper place. 2. That the light displayed by her was a proper one. 3. That the momentary absence of the lookout from her deck did not contribute to the accident. 4. That the collision was not the result of inevitable accident, but was owing entirely to the fault of the schooner.
2. Like other ships, and subject to all the conditions specified in art. 7, prescribed by Congress (13 Stat. 59), concerning lights, pilot-boats, when at anchor in roadsteads or fairways, are required to exhibit a white light in a globular lantern of eight inches in diameter.
3. Art. 8 applies to sailing pilot-vessels only when they are under way.
4. The act of Congress limiting the liability of ship-owners in a case of collision does not release them from the payment of costs in the District Court, beyond the amount of the stipulation filed therefor, if they appear and make defence, nor, in case they appeal to the Circuit Court, from the payment of the costs taxable there, or of interest in the nature of damages occasioned by the appeal.
5. Stipulators for a definite amount are only bound to make good the liability of their principal to that amount, unless they have been guilty of default or contumacy, in which event, they may be held for costs and interest in the nature of damages to the extent that the same have arisen from their breach of duty.
6. Appeals, in admiralty, to the Circuit Court carry up the whole fund; and mere technical errors in the decree of that court, not injuriously affecting the rights of the parties, do not present sufficient grounds for reversing it here.
7. As the appeal-bond in this case may be treated as an admiralty stipulation, all sums due the libellants for costs and interest over and above the stipulation for costs may be collected from the sureties on that bond.

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

This was a libel against the "Wanata," to recover $23,000 damages caused by her colliding with the pilot-boat "Josiah Johnson" about nine o'clock P.M., on the 6th of March, 1869. The libellant, Johnson, was the owner of the pilot-boat, and the others were the owners of certain clothing and other property on board of her. The "Wanata" was on a voyage from

New York to Charleston, and the wind was very strong from the north-west. The pilot-boat, having split her foresail, was at anchor off the coast of New Jersey, about half a mile from the shore, in four fathoms of water, and from fifteen to twenty miles north of Barnegat Light. She was struck on her starboard side by the "Wanata," and sank in a few minutes. The libellants allege that the collision happened through the fault of the "Wanata," in not keeping a proper lookout, and in sailing at too great a rate of speed. The claimants maintain that the collision was caused by the negligence of the pilot-boat in anchoring at an improper place, in not exhibiting a proper light, and in not keeping a proper watch on her deck.

The other facts in the case are stated, and the assignment of errors set forth in the opinion of the court.

The vessel was seized by the marshal, and was subsequently released from his custody on her claimants entering, with sureties, into a stipulation for costs in the sum of $250, and into one for value in the sum of $16,000, her appraised value.

The District Court was of opinion that the "Wanata" was wholly at fault, and entered a decree against her, awarding the libellants $16,000 on account of the loss of the pilot-boat, clothing, and interest, and $305.27 as costs.

The claimants appealed, giving bond for $2,000 in the usual form with the same sureties. The Circuit Court, on appeal, decreed that the libellants recover against the stipulators for value $16,000, damages by reason of the collision, and against the stipulators for costs and on appeal for the costs in the District Court, amounting, with interest, to the sum of $323.12, and also the costs in the Circuit Court, which, including the interest on the amount of the damages aforesaid from the time of the decree in the District Court, were taxed and adjusted at the further sum of $1,085.35, amounting altogether to $17,407.47.

The claimants having entered into an undertaking with sureties in the sum of $36,000, conditioned to prosecute their appeal to effect, and answer all damages and costs, upon failure to make it good, brought the case here.

Mr. Joseph H. Choate for the appellants.

The collision was the result of inevitable accident, and the "Wanata" was therefore guilty of neither fault nor negligence. *The Virgil*, 2 Wm. Rob. 201; 1 Pars. Marit. Law, 187; *The Thornly*, 7 Jur. 659; *The Ebenezer*, id. 117; *The William Lindsay*, 29 L. T. N. S. 355; *The Amio and The Amelia*, id. 118; *The Grace Girdler*, 7 Wall. 196; *The Morning Light*, 2 id. 550.

The "Wanata" having been released upon the filing of a stipulation for value in the sum of $16,000, the stipulation took the place of the *res* in the further progress of the cause, and bore no interest. Therefore, the decree of the Circuit Court adding interest to that, and including it in the costs, is wholly without precedent or authority. *Hemmenway* v. *Fisher*, 20 How. 258; *The Ann Caroline*, 2 Wall. 538; *The Steamer Webb*, 14 id. 406.

The circumstance that the decree of the District Court was for the exact amount of that stipulation does not alter the principle or increase the power of the Circuit Court. All that the latter had before it representing value was the stipulation which had been substituted for the *res*.

Nor could interest as damages in excess of the value of the *res* be awarded against the obligors in the bond, upon appeal from the District to the Circuit Court; for interest is neither costs nor damages, within the meaning or purpose of that bond. A bond given for costs and damages on appeal in such a suit as this does not add to the original stipulation for value, but covers such damages only as the appellee is entitled to recover; and the above-cited cases establish that he is not entitled to interest. In admiralty, the cause in the Circuit Court is heard *de novo*; and that court awards damages by an original decree, and, of course, without interest. The bond for costs and damages on appeal might be made available not only for the costs of appeal, but for a deficiency up to and within the amount of the stipulation for value occasioned by the insolvency of the stipulators, but never in excess of it, by way of interest or otherwise.

It is obvious, in this case, that the learned circuit judge, in his opinion, meant only to award as damages the $16,000, the

amount of the *res*. The addition of interest crept into the decree. But even there it is not adjudged as damages. It is awarded specifically as interest and as part of the costs, for which there was no power in that court.

Of course, in *The Ann Caroline* and *The Steamer Webb* similar bonds for costs and damages on appeal were given as in this case, and in the same form. No appeal could be taken without them. And if the value of the *res* in court could be thereby increased, the appellees in those cases would not have been limited, as they were strictly, to the amount of the original stipulation for value; but this court would have awarded, in addition, interest on that amount, at least to the extent of the appeal-bond, after providing for the costs on appeal. The question, in any form in which it may be presented, has been determined by this court.

As to the decree of the District Court, so far as it awarded costs in excess of the $250 stipulated for costs, it will be conceded to be erroneous.

If interest should be claimed in this court upon the decree of the Circuit Court rightly adjusted, it is submitted that a review of the evidence will more than confirm the doubts expressed in the opinion of the circuit judge as to the damages awarded, and satisfy this court that $16,000 now, without interest, is an ample indemnity for all the losses sustained by the libellants. In the exercise of the discretionary power reserved in this court, as laid down in *Hemmenway* v. *Fisher*, 20 How. 255, to add further damages by way of interest to the $16,000 would give the libellants more than they ought to have, and would work injustice to the appellants.

Mr. William Allen Butler, *contra*.

The courts below having upon the same proofs found that there was no fault on the part of the pilot-boat, and that the collision was caused solely by the fault of the "Wanata," this court, unless manifest error is shown, will not reverse the decrees. Every presumption is in favor of them. *The Juniata*, 93 U. S. 337; *The Hypodame*, 6 Wall. 216; *The Grace Girdler*, 7 id. 196; *The Quickstep*, 9 id. 665; *The Spray*, 12 id. 366; *The Commerce*, 16 id. 33; *The Ship Potomac*, 2 Black, 581; *The Scioto*, Daveis, 359.

The attempt to excuse the schooner on the ground of inevitable accident wholly fails. *The Morning Light*, 2 Wall. 550; *The Virgil*, 2 Wm. Rob. 201.

There is no error as to the amounts awarded. The decree of the District Court was properly limited to the amount of the stipulation for value. There was no decree against the stipulators for either the $16,000 or the costs, but only against the schooner, with a direction that the amount awarded, with the costs, be paid out of the proceeds of the stipulations for costs and value, when paid into the registry of the court. Before any such payment was made, the appeal to the Circuit Court was taken. There was therefore no error.

The bond in the sum of $2,000 given by the claimants, on appeal to the Circuit Court, was for all damages and costs which should be awarded against them, as appellants, if they failed to make their appeal good. The total amount decreed by the Circuit Court was $17,407.47, a sum less than the amount of the stipulation and appeal-bond.

The bond given on the appeal to this court is for the sum of $36,000, and is conditioned to answer all damages and costs. The interest on the amount of the decree of the Circuit Court is the only addition to be made by way of increase to the damages below, and to this libellants are entitled.

Rule 29 of the General Rules of this court provides that *supersedeas* bonds in the Circuit Court must be taken that the appellant shall prosecute his appeal, and answer all damages and costs if he fail to make his plea good; and that "such indemnity, including 'just damages for delay,' and costs, must be for the whole amount of the decree, and interest, on the appeal." The plain distinction between the present case and *The Ann Caroline* and *The Steamer Webb*, cited by the appellants, is, that in those cases the actual assessment and award exceeded the amount of the stipulation for value. Here the amount was carefully restricted to the stipulated value; and the only question is, whether interest as well as costs shall follow an affirmance of the decree of the Circuit Court. There is no ground for depriving the libellants of interest.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Ship-owners are in no case liable for any loss, damage, or injury occasioned by collision beyond the amount of their interest in the colliding ship and her freight pending, except for costs and interest by the way of damages in case of default of payment and suit to recover the amount. 9 Stat. 635; *The Propeller Niagara* v. *The Cordes*, 21 How. 7. Nor are the stipulators, either for cost or value, ever liable for any default of their principal beyond the amount specified in the stipulation which they gave, except for costs and interest by the way of damages in case of their own default to make payment pursuant to the terms of the stipulation. *The Ann Caroline*, 2 Wall. 538; *The Union*, 4 Blatch. 90.

Whenever the obligation of the stipulator, as expressed in the stipulation, is for a definite sum, the surety stipulating to pay that sum cannot be compelled to pay more than that amount for any default of his principal. *The Steamer Webb*, 14 Wall. 406; *Brown* v. *Burrows*, 2 Blatch. 341.

Stipulators, like sureties, where the stipulation is for a definite sum, are bound to make good the liability or default of the principal to the amount of the stipulation; but they cannot be held to any greater sum, unless they themselves have been guilty of default, in which case they may be held liable for costs and interest, by the way of damages, to the extent that the same have arisen from the breach of their duty to comply with the terms of their stipulation. Where the stipulation or bond is given for the value of the ship, the obligation of the stipulator is that he pay into court the sum ascertained as the value. Benedict, Adm. (2d ed.) 294; Dunlap, Adm. 174; *Lane* v. *Townsend*, Ware, 289.

Sufficient appears to show that the collision occurred between the pilot-boat and the schooner at the time alleged, off the coast of New Jersey, north of Barnegat, and between that point and Long Branch, and that the collision resulted in the total loss of the pilot-boat belonging to the first-named libellant, and of certain clothing and other property belonging to the other libellants. Pending the suit, the owner of the pilot-boat deceased, and his executors were by consent substituted as libellants in his place.

Thirteen persons, including the boat's company and six Sandy Hook pilots, were on board the pilot-boat at the time of the collision; and it appears that the pilot-boat was at anchor at the time, about a half-mile from the shore, in four fathoms of water. During the afternoon of the day, in course of her cruise for employment, she had lost or burst her foresail, and came in to repair it, and anchored at six o'clock prior to the collision, which occurred about nine o'clock the same evening.

Eleven of the persons on board were examined as witnesses; and, from their testimony, it satisfactorily appears that the wind was north-west, blowing hard; that the sails of the pilot-boat were furled; that when she anchored she backed off to the south-east, heading north-west; that it was not a thick night, and that it was pretty clear at the time of the collision; that vessels anchored all along the coast; and that the place where the pilot-boat was lying is a well-known anchorage ground.

Service was made, and the claimants appeared and filed an answer. Before answering to the libel, however, the claimants filed a stipulation for costs in the sum of $250.

Three principal defences are set up in the answer, as follows: 1. That the pilot-boat was anchored in an unusual, unsafe, and improper place, which exposed her to the very disaster which happened. 2. That she did not display a proper light. 3. That she did not have a proper watch upon her deck to guard and provide against such accidents, especially in the night-time and in stormy weather.

Due attachment of the schooner was made by the marshal under the process of monition; and it appears that the ship was subsequently discharged from custody by consent, the claimants having executed a stipulation for value, in addition to the stipulation for costs, in the sum of $16,000, the parties agreeing that, in case of default or contumacy of the claimants or their sureties, execution for the amount may issue against their goods, chattels, and lands. Testimony was taken on both sides, which is fully reported in the transcript. Hearing was had; and the District Court entered a decretal order in favor of the libellants, and sent the cause to a commissioner to ascertain and compute the amount of the damages due to the owner of the pilot-boat,

and to the other libellants respectively for the loss of clothing and other property on board the pilot-boat at the time when sunk and lost by the collision.

Pursuant to the decretal order, the commissioner heard the parties, and made a detailed report, in substance and effect as follows: 1. That the owner of the pilot-boat is entitled to recover the sum of $14,694.94. 2. That the other nine libellants are each entitled to recover the sum therein set forth, amounting in the aggregate to the sum of $1,305.06.

Remark should be made that the owners of the schooner, George Sparrow and David L. Turner, are the claimants of the colliding schooner, and that they excepted to the report of the commissioner. Both sums, when added together, make $16,000, which is the exact amount of the stipulation for value.

Amendment was made to the libel, which obviated all except one of the material exceptions of the claimants to the report of the commissioner. They excepted to the amount reported as the value of the pilot-boat, which exception was overruled by the District Court.

Matters of a preliminary character being disposed of, the District Court confirmed the report of the commissioner, and entered a final decree against the schooner and in favor of the libellants, ten in number, for the sum of $16,000 for the loss of the pilot-boat, clothing, and the other property lost, together with interest by way of damages, with costs taxed at $305.27.

Throughout it was the owners of the schooner as claimants who made defence to the libel, and they appealed to the Circuit Court. Both parties were heard in the Circuit Court upon the evidence introduced in the District Court, and the Circuit Court affirmed the decree of the District Court, and ordered and decreed that the libellants recover against the schooner the sum of $16,000 as damages sustained by the collision, and the costs taxed in the District Court, amounting with interest to the sum of $323.12, and also the costs taxed in the Circuit Court, which, including the interest on the damages from the date of the decree in the District Court to the date of the decree of the Circuit Court, taxed at the further sum of $1,085.35, amounting together to the sum of $17,407.47.

Stipulation for costs in the sum of $250 was given by the claimants in the District Court when they entered their appearance, and they subsequently gave a stipulation for value in the sum of $16,000. Apart from that, it should also be borne in mind that it was the claimants who appealed to the Circuit Court, and that they gave bond with sureties in the sum of $2,000 to prosecute their appeal with effect.

Two stipulations and an appeal-bond were given in the District Court, the sureties in each being the same persons; and the record shows that the Circuit Court, at the same time that the decree was entered against the schooner, entered a decree against the stipulators for value in the sum of $16,000, and against the stipulators in the other stipulation and the sureties in the appeal-bond in the sum of $1,407.47, the two sums being exactly equal to the amount of the decree entered against the schooner, which includes the $16,000 recovered as damages in the District Court, together with the costs taxed in the District Court, and interest on the sums recovered in that court to the date of the decree entered in the Circuit Court, and the costs taxed in the Circuit Court, amounting in all to the sum of $17,407.47.

Immediate appeal was taken to this court by the claimants of the schooner; but neither the stipulators for value nor for costs, nor the sureties in the bond given to prosecute the appeal from the District Court to the Circuit Court, have ever appealed from the decree entered against them in the Circuit Court.

Since the appeal was entered here, the appellants, who are the owners and claimants of the schooner, have assigned error as follows: 1. That the Circuit Court erred in holding that the place where the pilot-boat was lying was a proper anchorage. 2. That the court erred in holding that the pilot-boat showed a proper light. 3. That the court erred in holding that the pilot-boat was not bound to show the light required of such boats when under way. 4. That the court erred in holding that the want of a lookout on the pilot-boat did not contribute to the collision. 5. That the court erred in holding that the schooner had no proper lookout. 6. That the court erred in holding that the schooner was in fault and that the pilot-boat was without fault. 7. That the court erred in awarding costs

taxed in the District Court in excess of the stipulation for costs.

Pilot-boats, when lying at anchor like other ships, are required to exhibit a white light in a globular lantern of eight inches in diameter, with all the other conditions specified in the article prescribed in the act of Congress concerning lights. 13 Stat. 59. Art. 8 applies to sailing pilot-vessels when under way, and it does not apply to pilot-boats when lying at anchor.

Enough appears to show that the pilot-boat was lying at anchor, and the uncontradicted testimony shows that she was anchored in a proper place. Other support to that proposition is unnecessary; nor is any other argument required to support the proposition that the light shown by the pilot-boat was the proper one, as regulated by the act of Congress, than that exhibited in the very able opinion of the district judge. Full proof was exhibited that the light was trimmed and replaced in the halyards sixteen feet above the deck at half-past seven o'clock in the evening, and the evidence clearly shows that it burned brightly from that time to the collision.

Even suppose that is so, still it is contended by the appellants that the pilot-boat had no lookout, and that the Circuit Court erred in holding that the want of a lookout on board the pilot-boat did not contribute to the collision.

Evidence to support the first branch of the proposition is entirely wanting, as appears from a careful examination of all the testimony in the case. Instead of that, it clearly appears that the anchor-watch came on deck as early as eight o'clock, and that he kept a constant lookout until just before the schooner struck the starboard side of the pilot-boat. Prior to that he was standing on the port side of the quarter-deck, and was in the act of getting his coat from the forecastle, having left the deck for that purpose when the collision occurred.

Viewed in the light of these circumstances, the court is of the opinion that the momentary absence of the lookout from the deck did not contribute to the collision, inasmuch as it clearly appears that the schooner did not show any signal-lights, and that she had no lookout forward, where a lookout should be stationed.

Lookouts should be stationed forward; and, if the anchor-watch had been on deck, it is exceedingly doubtful whether he would have seen the schooner in season to adopt any precautions, and, if he had, he could not have done any thing except to hail; and, inasmuch as there was no lookout on the forward part of the schooner to give heed to any such warning, it is scarcely possible that the watch, if he had remained on deck, could have rendered any useful service.

Vessels under way in the night-time are required by law to display proper signal-lights; and they should never be without a competent lookout properly stationed on the vessel. Delinquent as the schooner was in respect to both of those requirements, the suggestion that the lookout of the pilot-boat was absent from the deck at the moment of the collision is not entitled to much weight, as the circumstances afford a strong presumption that his absence did not contribute to the disaster.

Attempt is made by the appellants to ascribe the omission of the schooner to display signal-lights to inevitable accident, but the evidence introduced to support the theory is quite insufficient for the purpose. Proper signal-lights were shown by the pilot-boat; and the court is of the opinion that the schooner might have done so, if those who were responsible for her navigation had made proper exertions to comply with that requirement. Nothing is shown in the case to support that theory, or to furnish any proper excuse for omitting to adopt that highly useful precaution. *Union Steamship Co.* v. *New York Steamer Co.*, 24 How. 307; *The Morning Light*, 2 Wall. 550.

Weighed in the light of these suggestions, it follows that the schooner was wholly in fault, and that all the assignments of error, except the last, must be overruled. Suppose that is so, still it is insisted that the District Court erred in awarding costs to the libellants in excess of the stipulation filed for that purpose, it appearing that the decree for damages was equal to the whole amount of the stipulation for value, and that the Circuit Court erred in affirming that decree and in allowing costs to the libellants beyond the amount of the stipulation for costs filed in the District Court. Superadded to that, they also contend that the Circuit Court erred in decreeing that interest should be taxed as costs in addition to the damages awarded by

the decree of the District Court, inasmuch as the damages there awarded were equal to the full amount of the stipulation filed in the District Court.

Beyond all doubt, the decree for the damages awarded in the District Court is correct, as it is for the exact sum specified in the stipulation for value; but it is equally clear that the costs taxed against the schooner exceed the stipulation for costs filed by the claimants in the District Court in the sum of $55.27, as appears by the record.

Prompt appeal was taken by the owners of the schooner, as claimants, to the Circuit Court; and the principal owner of the schooner, George Sparrow, with James R. Sparrow and James R. Sparrow, Jr., as sureties, gave bond to the libellants in the sum of $2,000, the condition of the instrument being that if the appellants, George Sparrow and David L. Turner, shall prosecute their appeal with effect, and pay all damages and costs which shall be awarded against them, if they fail to make their appeal good, then the obligation to be void; otherwise, to remain in full force.

Admiralty courts proceed according to the principles, rules, and usages which belong to the admiralty, as contradistinguished from courts of common law. *Manro* v. *Almeida*, 10 Wheat. 473; 1 Stat. 276.

Whenever a stipulation is taken in the admiralty for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators are held liable to the exercise of all those authorities on the part of the court which it could properly exercise if the thing itself were still in the custody of the court. *The Palmyra*, 12 Wheat. 1.

Such a stipulation is binding on the Appellate Court, unless it appears that the property was released by misrepresentation and fraud. *Houseman* v. *The North Carolina*, 15 Pet. 40.

Bail is taken for property attached for the value of the same when delivered to the claimant, and it will not be reduced if the property when sold brings less than the appraised value; and it is the settled rule, that, where the value of the property held in a cause of damage is insufficient to pay the loss, it is not competent for the court to award damages against the sure-

ties in the stipulation beyond the proceeds or value. *The Hope*, 1 Rob. A. 155.

Nor can the sureties in a stipulation for costs be held for any greater sum on account of the default or contumacy of the principal than the sum specified in the stipulation; but it is well settled that costs may be awarded against the owner beyond the stipulation, if he appeared and made defence. *The John Dunn*, id. 160.

Sureties in admiralty, like sureties at law, are only bound to the extent of the obligation expressed in their stipulation, unless they are themselves guilty of default, or appear and make defence, in which case they become responsible for costs, and, in some cases, for interest by the way of damages for the delay of payment.

Costs, unquestionably, were taxed in the District Court beyond the sum expressed in the stipulation filed to secure their payment; but the decree in the District Court, both for costs and damages, was against the schooner. No decree was entered in that court either against the stipulators for costs or the stipulators for value; and the contention is, that the owners defending the suit are liable for costs even where the damages are equal to the stipulated value of the property, and the costs taxed exceed the amount of the stipulation for costs filed when the owners appeared in the District Court.

Doubtless the rule was so prior to the passage of the act of Congress limiting the liability of ship-owners. 9 Stat. 635. Since the passage of that act, the question arises whether costs can be allowed in such a case, where it appears that the decree for damages exhausts the whole amount of the stipulation for value.

Much aid is derived in the solution of that question from the decisions of the British courts in construing the act of Parliament passed for the same purpose. By that act the liability of ship-owners was limited, in the cases therein specified, to the value of the ship or freight. 53 Geo. III., c. 159. Cases have arisen under that act where the proceeds of the ship were insufficient to make good the loss, in which it is held that the court cannot decree against the owner for the excess of damage beyond the proceeds of the ship. *The Volant*, 1 Rob. A. 383.

Other decided cases support the same rule; but it is settled law that the defending owners in such a case are liable for costs, even though the damages recovered exhaust the whole amount of the stipulation for value. *The John Dunn*, *supra*.

Costs were awarded against the owners in that case beyond the amount of the proceeds of the vessel, the owners having appeared and defended the suit. Pending the litigation, the owners applied to the Queen's Bench for a prohibition, and insisted that costs could not be allowed even against the owners where the damages were equal to the value of the ship, the words of the act of Parliament being that the liability of shipowners shall be limited to the value of the ship or freight. Hearing was had, eminent counsel appearing on both sides, and the court, Lord Denman delivering the opinion, decided to the effect that the limitation did not discharge defending shipowners from costs.

Interest in such a case is allowed as well as costs; and, in case of appeal, the interest is cast upon the whole amount of the decree in the court below, including the costs as well as the amount of the damage. *The Dundee*, 2 Hagg. 137.

Due objection to a decree settled in that form was made in that case; but Lord Stowell held that the allowances were correct, that the costs to which the party is put to recover his just damages is a part of his loss, and that the costs in such a case are properly added to the damages in the computation of interest. Objection was also made in that case to the allowance of interest, as the damages were equal to the value of the ship; but the same learned judge answered that the sufferer is entitled to such costs as he shall incur in recovering the value of the ship, and to interest if payment is delayed, meaning, of course, that the party causing the delay is liable in such a case: and he added, that the suffering party is entitled to remuneration for the costs to which he is driven for recovering his loss, as the costs constitute a part of the same; that the act of Parliament is not guilty of the injustice which would ensue if it excluded the costs, which are necessary for replacing the sufferer in a just state of compensation. Such a party, if he is reinstated in the value of the property without litigation, is not entitled to costs; but if he cannot obtain the benefit of the regulation in respect

to compensation without being driven to the necessity of a suit, the statute would be chargeable with great injustice if it did not allow him to recover costs; and these remarks apply with equal force to the charge of intervening interest arising from delay occasioned by such litigation.

Common-law authorities support the same construction of the act of Parliament referred to, and show to a demonstration that the rule is firmly established in all the courts of the parent country. *Ex parte Rayne*, 1 Gal. & Dav. 377; *Gall* v. *Laurie*, 5 B. & C. 163.

None of these authorities, however, conflict in the least degree with the proposition that the sureties in an admiralty stipulation can never be compelled to pay more than the specific sum expressed in the stipulation for any default or contumacy of the principal. Seasonable payment of the sum expressed in the instrument is all that can be required at their hands; but if they neglect to fulfil the terms of the instrument, and the suffering party is driven by their neglect to resort to legal measures to recover the amount to satisfy his loss, they are then, like the delinquent ship-owner, liable for costs and interest occasioned by their neglect and contumacy. Our act of Congress limiting the liability of ship-owners was passed subsequent to the British act referred to, and, in the respect involved in this case, is subject to the same construction.

Tested by these considerations, it follows that the decree of the District Court, which was a decree against the schooner, is correct.

Concede that, and still the appellants insist that the Circuit Court erred in awarding costs taxed in the District Court in excess of the stipulation filed there before or at the time the claimants entered their appearance.

Properly analyzed, the decree of the Circuit Court is as follows: 1. That the decree of the District Court is affirmed. 2. That the ten libellants recover as damages the sum of $16,000, which is the exact amount of the stipulation for value. 3. That they recover the costs taxed in the District Court, with interest to the date of the decree, amounting to the sum of $323.12. 4. That they recover the costs taxed in the Circuit Court, including the interest to date on the dam-

ages awarded in the District Court, amounting to the sum of $1,085.35, making in the aggregate the sum of $17,407.47.

Two technical errors occur in adjusting the terms of the decree of the Circuit Court; but, inasmuch as neither will injuriously affect the rights of the parties, the decree will not be disturbed. 1. Interest is not costs in any sense, and, when allowed, it should be decreed as damages, and be added to the damages awarded in the District Court. 2. Costs and interest should never be blended in such a case, as it would be difficult, if not impossible, to ascertain the amount to be paid by the stipulators for costs, if less than the full amount of the stipulation, or to separate the same from the amount to be paid by the sureties in the appeal-bond.

Cases often arise where such an adjustment is necessary; and it would arise here were it not that the sureties in the stipulation for costs in the District Court and the sureties in the appeal-bond are the same persons. Nor will the other error operate to the prejudice of any one of the parties, as it is clear that the allowance of interest is a proper charge in the decree against the schooner and the appellants, within the principle of the authorities to which reference has been made.

Nothing remains for re-examination except that portion of the decree which adjudges what portion of the aggregate sum awarded shall be paid by the sureties in the respective stipulations, and what portion shall be paid by the sureties in the appeal-bond.

Sixteen thousand dollars were awarded to the ten libellants as damages; and the decree is, that the stipulators for value shall pay that amount, which is obviously correct. They stipulated for that amount; and, inasmuch as they did not make defence, and have not been guilty of default or contumacy, they cannot be compelled to pay interest or costs to the libellants beyond their stipulation. *The Palmyra*, 12 Wheat. 10. Nor can the stipulators for costs be compelled to pay more than the sum of $250 for the same reasons, as they stipulated for a definite sum, and have not made defence, nor been guilty of any default. Clerk's Praxis, tit. 63, p. 141; *The Ann Caroline*, 2 Wall. 538; *The Steamer Webb*, 14 id. 406.

Accrued interest was allowed in the Circuit Court in addition

to the damages awarded in the District Court, which, if added to the sum there awarded, would exceed the stipulation for value; and the costs taxed in the Circuit Court, if added to the costs taxed in the District Court, would much exceed the stipulation for costs, which was only for the sum of $250.

Allowances of the kind, if the case stopped there, would clearly be error; but the case does not stop there, as will presently fully and satisfactorily appear. Mention has already been made that the claimants, who were the owners of the schooner, appealed to the Circuit Court, and that they gave an appeal-bond in the sum of $2,000, with the same persons as sureties as those who became sureties in the stipulation for costs and value.

Nothing can be better settled, said Judge Story, than that the admiralty may take a *fidejussory* caution or stipulation in cases *in rem*, and may in a summary manner award judgment and execution there thereon. Jurisdiction to that effect is possessed by the District Court; and, being fully authorized to adopt the process and modes of proceeding of the admiralty, they have an undoubted right to deliver the property on bail and to enforce conformity to the terms of the bailment. Authority to take such security is undoubted, and, whether it be by a sealed instrument or by a stipulation in the nature of a recognizance, cannot affect the jurisdiction of the court. Having jurisdiction of the principal cause, the court must possess jurisdiction over all the incidents, and may, by motion, attachment, or execution, enforce its decrees against all who become parties to the proceedings. *The Alligator*, 1 Gall. 145; *Nelson* v. *United States*, Pet. C. C. 235. Bonds, says Dunlap, are, to all intents and purposes, stipulations in the admiralty. Dunlap, Prac. 164.

Where the claimant appeals from the decree of the District Court, the bond and other stipulations follow the cause into the Circuit Court; and, upon the affirmation of the decree, the fruits of the appeal-bond and other stipulations may be obtained in the same manner as in the court below, they being in fact nothing more than a security taken to enforce the original decree, and are in the nature of a stipulation in the admiralty. *McLellan* v. *United States*, 1 Gall. 227.

It matters not, says that learned magistrate, whether security

in an admiralty and maritime cause be by bond, recognizance, or stipulation, as the court has an inherent authority to take it, and to proceed to award judgment or decree thereon according to the course of the admiralty, unless where some statute has prescribed a different course. *The Octavia*, 1 Mason, 150; 2 Conkl. Adm. (2d ed.) 105; *Holmes* v. *Dodge*, Abbott, Adm. 60; *Gaines* v. *Travis*, id. 422; Benedict, Adm. (2d ed.) 290.

Everywhere it is admitted that an appeal in admiralty carries up the whole fund, and that is the duty of the Circuit Court to execute its own decree; and it is equally clear that the fund in this case consists of the stipulation given in the District Court for costs, the stipulation given there for value, and the bond or stipulation in the sum of $2,000 to prosecute the appeal with effect and pay all damages and costs awarded against them, if the appellants shall fail to make their appeal good. *Montgomery* v. *Anderson*, 21 How. 386.

Two points were ruled in that case applicable to this: 1. That the appeal in admiralty carries up the *res*. 2. That the Circuit Court must carry into execution its own decree. *The Collector*, 6 Wheat. 194; 2 Pars. Ship. 493.

Sureties in such an appeal-bond or stipulation may become liable for the whole amount specified, as the condition of the instrument is that the principal shall prosecute his appeal with effect, and pay all damages awarded against the appellant, if he fail to make good his appeal. Hence it was decided by this court that the surety in such a bond is liable for the entire amount of damages and costs, to the extent of the penalty, and interest thereon from the date of the institution of the suit, when the property attached produces less than the judgment or decree. *Ives* v. *Merchants' Bank*, 12 How. 159.

Examined in the light of these suggestions, as the decree should be, it is manifest that it contains no error, as the amount of the stipulation for value is decreed to be paid to the libellants for the losses sustained by the collision, and the stipulation for costs is decreed to be paid to the libellants in part discharge of the taxed costs, leaving the balance of the taxed costs and the accrued interest from the date of the decree in the District Court to the date of the decree in the Circuit Court to be paid by the sureties in the appeal-bond, which

may, by the rules and usages which belong to courts of admiralty, be treated as an admiralty stipulation. 1 Stat. 276; Admiralty Rules 5 and 21.

Admiralty bonds and stipulations taken in the District Court, inasmuch as they constitute the fund out of which compensation is to be decreed to the libellants, follow the appeal into the Circuit Court.

Authorities of highest character show that sureties for a definite sum in an admiralty stipulation can never be compelled to pay more than the sum stipulated, unless they are guilty of default or contumacy, in which event they may become liable for interest and the taxable costs incurred by the delay; but the respondent, where there is no statutory prohibition, may become liable for costs beyond the security given for the same, and for additional damages in the nature of interest, in case of appeal. Were it not so, the injured party, in case of delay, would never be made whole; but such a recovery against the respondent will not enlarge the liability of the sureties in the stipulation for cost or value, as the remedy of the libellants in that event is found in the appeal-bond or stipulation given to make the appeal good. Costs and interest are given in such a case, not as indemnity for the loss set forth in the libel, but for the reason that the loss ascertained in the decree of the District Court was not paid at the proper time. *The Northumberland*, Law Rep. 3 Adm. & Ecc. 33, 35; *Ives* v. *Merchants' Bank*, *supra*; *The Diana*, 3 Wheat. 58; *Sneed* v. *Wister*, 8 id. 690; 5 Stat. 518.

Suffice it to say, there is no error in the record.

Decree affirmed.

COUNTY OF HENRY *v.* NICOLAY.

1. Where the charter of a railroad company, granted by Missouri prior to the adoption of the Constitution in 1865, made it lawful for the county court of any county in which any part of the route of said railroad or of its authorized branches might be, or for any county adjacent thereto, to subscribe to the stock of the company, and to issue bonds of the county in payment therefor, the power of the county court so to subscribe did not become subject to the fourteenth section of art. 11 of that Constitution, which requires the assent of two-thirds of the qualified voters of the county to such subscription.
2. The Supreme Court of that State has decided that the said fourteenth section does not apply to the construction of branch roads authorized by the original charter of a railroad company, but undertaken as an independent enterprise under the act of the legislature of March 21, 1868.
3. Where the bonds of a county, issued by the county court in payment of its subscription to the stock of a railroad company, show on their face that they were issued pursuant to a law which authorized their issue without the assent of the qualified voters of the county, given at an election, and there is nothing on them to show that they were not regularly issued, it is not incumbent upon a purchaser of them to inquire whether the company has pursued the regular steps necessary to entitle it to receive them. Where the agents of the company have them for sale, he has a right to presume that they were lawfully entitled to them.
4. The fact that subsequently to making the subscription, but before the issue of the bonds, the company transferred its franchises to another company does not alter the case.
5. *County of Scotland* v. *Thomas*, 94 U. S. 682, reaffirmed.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

This is an action for the recovery of the amount due upon certain coupons annexed to bonds issued by the county of Henry, Missouri. The following is a copy of one of the bonds: —

"HENRY COUNTY BOND. — STATE OF MISSOURI.

"$1,000.

"Interest ten per cent per annum, payable semiannually on the first days of January and July.

"Know all men by these presents, that the county of Henry, in the State of Missouri, acknowledges itself indebted and firmly bound to the Tebo and Neosho Railroad Company, to the use and in the name of the Clinton and Memphis Branch of the Tebo and

Neosho Railroad, in the sum of $1,000, which sum the said county hereby promises to pay to the Tebo and Neosho Railroad Company, or bearer, to aid in building said branch railroad, at the National Park Bank, in the city of New York, on the first day of January, 1881, together with interest thereon at the rate of ten per cent per annum, which interest shall be paid semiannually on the first days of July and January of each year, on the presentation and delivery at said bank of the coupons hereto severally subjoined.

"This bond is issued under and in pursuance of an order of the county court of Henry County in the State of Missouri, and in pursuance of and by authority of an act of the General Assembly of the State of Missouri, entitled 'An Act to incorporate the Tebo and Neosho Railroad Company,' approved Jan. 16, 1860, and of an act of the General Assembly of the State of Missouri, entitled 'An Act to aid in the building of branch railroads in the State of Missouri,' approved March 21, A.D. 1868."

The bond is duly signed, sealed, and attested, and the coupons attached are in the usual form.

The act of incorporation thus mentioned authorizes the company thereby created to "survey, mark, locate, construct, maintain, and operate a railroad, commencing at a point on the Pacific Railroad, between the west bank of the Lamine River, and Muddy Creek, in Pettis County, by the most direct and practical route, in a southerly or south-westerly direction, through Henry County; thence to some point on the State line, between the north-west corner of Jasper County and the south-east corner of McDonald County, . . . and to extend branch railroads into and through any counties that the directors may deem advisable."

It declares as applicable to the company certain sections of the act incorporating the Osage Valley and Southern Kansas Railroad Company, approved Nov. 21, 1857, among which is the fourteenth, providing that "It shall be lawful for the county court of any county in which any part of the route of said railroad or branch may be, or any county adjacent thereto, to subscribe to the stock of the company; and, for the stock subscribed in behalf of the county, may issue bonds of the county to raise the funds to pay the same, and to take proper steps to protect the interest and credit of the county court."

The following is an act of the General Assembly of Missouri, approved March 21, 1868: —

"SECTION 1. Any railroad company in this State, authorized by law to build branches, and wishing to avail themselves of the provisions of this act, shall, by its board of directors, pass, and cause to be entered upon its records, a resolution setting forth such desire, and designating the name under which such branch shall be built, its point of intersection with its main line, and general course, a certified copy of which resolution shall be filed with the secretary of state, after which they shall be governed by the provisions of this act.

"SECT. 2. Whenever any such railroad company shall undertake the construction of a branch designated, as provided in the first section of this act, they shall receive donations or subscriptions to stock to aid in its construction in the name of such branch, which shall be expressed in the certificate of stock issued; the cost and expenses of constructing and operating such branch shall be kept separate and distinct from expenses on the main line. They may borrow money and issue bonds secured by mortgage on such branch road to aid in its construction, and, in general, may operate, lease, sell, or consolidate with any connecting road, distinct and separate from their main line, and in any other way may manage or dispose of such branch as by law they may be authorized, with reference to their main line, and separate therefrom.

"SECT. 3. Any branch road so constructed shall not be holden for any debt, lien, or liability of the main line, nor shall the main line be holden for any debt, lien, or liability of such branch. Any dividends of profits arising out of the business of such branch road shall be divided among the stockholders in said branch, and in all respects the interest of the stockholders in the branch shall be kept separate and distinct from the interests of the stockholders in the main line.

"SECT. 4. The holders of stock in any railroad company which was subscribed in aid of the construction of a branch road, according to the provisions of this act, shall have the same rights as other stockholders in the company in the choice of officers; but in all matters directly and specially affecting the interests of such branch road the stockholders in such branch shall control, and for such purposes the directors, under their by-laws, may, or on the petition of parties representing one-tenth of such stock shall, call a meeting of the stockholders in such branch, setting forth the object of such

meeting; and at any such meeting such stockholders may instruct the board of directors in all matters relating especially to their interests, and they shall be governed by such instructions, if not inconsistent with the laws of the State and the powers of such company.

"SECT. 5. This act shall be in force and take effect from and after its passage."

The "Clinton and Memphis Branch of the Tebo and Neosho Railroad" was organized and undertaken with the consent of the directors of the Tebo and Neosho Railroad Company.

On the 4th of August, 1870, the county court of the county of Henry, on "the application of the Clinton and Memphis Branch of the Tebo and Neosho Railroad for a subscription to the capital stock of said branch road from the county of Henry, to aid in the construction of said branch road," ordered and adjudged that the said county "do subscribe for and agree to take one thousand five hundred shares of the capital stock of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, each share being of the denomination of $100, and amounting, in the aggregate, to the sum of $150,000, under and by virtue of the authority in the charter of the Tebo and Neosho Railroad Company contained, and under the act of the General Assembly of the State of Missouri, entitled 'An Act to aid the building of branch railroads in the State of Missouri,' approved March 21, 1868, and in accordance with the resolution and orders of the board of directors of said Tebo and Neosho Railroad Company, establishing said branch railroad company and authorizing subscriptions to the capital stock thereof, adopted on the sixth day of June, 1870, the said capital stock to be paid for by the issue and delivery to the committee appointed to construct said branch road of the coupon bonds of the county," of the foregoing tenor. The subscription was made on certain conditions as to the location of the branch railroad, and none of the bonds were to be delivered until the grading and masonry of the road within the limits of the county were let by contract to persons of whose responsibility the court should be satisfied. One Hillegas was appointed the agent of the county to subscribe the stock in accordance with

the terms of the order, and to cause the bonds to be issued and delivered.

Oct. 11, 1870, the Tebo and Neosho Railroad Company executed a deed, whereby it, with the consent of a majority of its stockholders, sold, conveyed, and transferred to the Missouri, Kansas, and Texas Railway Company "all its privileges, rights, powers, franchises, real estate, and other property, the whole or a part of which is in this State, excepting only such as belong to the extension of the Tebo and Neosho line north from Sedalia, *via* Boonville, Fayette, and Moberly, to the railroad bridge at West Quincy, declared July 2, 1869, certificate of which, dated July 3, 1869, was filed in the office of secretary of state, and doth consent to a merger of the same with the franchises, property, and rights of said party of the second part; and the said Missouri, Kansas, and Texas Railway Company, party of the second part, shall have, exercise, and enjoy all the rights, powers, privileges, and immunities of the original charter of the Tebo and Neosho Railroad Company, and of the several amendments thereto, in the same manner and to the same extent as has been heretofore exercised and enjoyed by the said Tebo and Neosho Railroad Company, party of the first part, or by the several shareholders in said company, whose stock shall be exchanged as herein provided, either or both; and the said party of the second part does hereby accept the terms and conditions of the within instrument."

On the 7th of November following, the county court made an order, which, after reciting that of Aug. 4, the subscription made by Hillegas, and the fact of the compliance by said branch road, with all the conditions precedent to the delivery of said bonds, concluded as follows: —

"Now, therefore, it is considered by the court that said bonds be signed by the presiding justice of this court, and attested by the clerk of this court, under the seal thereof, and the coupons signed by said clerk as directed in said order; and that said bonds, numbered from No. 1 to No. 150, inclusive, of the denomination of $1,000 each, and amounting in the aggregate to $150,000, signed and sealed as aforesaid, be delivered to the chairman of the committee of construction of said branch railroad, and that the clerk of this court take his receipt therefor."

The petition of the plaintiff is in the usual form.

The answer of the county alleges that the bonds were issued without authority of law; that they were not ordered to be issued, nor were they in fact issued, to the Tebo and Neosho Railroad Company, to the use and in the name of the Clinton and Memphis branch; that said branch never had any legal existence; that, if it did have such existence, it was under the act of March 21, 1868, and therefore the issue of the bonds was illegal, as the consent thereto of two-thirds of the qualified voters of the county was not first obtained; that prior to the issue of the bonds the Tebo and Neosho Company sold all its rights and franchises to the Missouri, Kansas, and Texas Railroad Company, which sale revoked the authority, if any existed, to issue said bonds; that after their issue and sale proceedings were instituted in the State court to enjoin the collection of the tax for the payment of either their principal or interest; and that all of these matters were known to the plaintiff when he brought his action.

The plaintiff demurred to the evidence offered by the county. There was nothing to show that, when he purchased the bonds, he had notice of the facts relied on in support of the answer. The court sustained the demurrer, and instructed the jury to find a verdict for him; which was done, and judgment rendered accordingly.

The county then sued out this writ of error.

Mr. John F. Philips and *Mr. James O. Broadhead* for the plaintiff in error.

Mr. James Grant, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Since the decision of this court in *County of Scotland* v. *Thomas*, 94 U. S. 682, little remains to be considered in this case. It is conceded that the charter of the Tebo and Neosho Railroad Company, passed Jan. 16, 1860, gave the power to establish a railroad through Henry County, and to extend branch railroads into and through any counties that the directors might deem advisable; and it was made lawful for the county court of any county in which any part of the route of said railroad or branches might be, or any county adjacent

thereto, to subscribe to the stock of the company, and for such stock to issue bonds of the county to raise funds to pay for the same. This charter being granted prior to the Constitution of Missouri, adopted in 1865, according to the settled law of the State did not become subject to the provision in that Constitution, which requires the assent of two-thirds of the lawful voters of a county to a subscription of stock in aid of the railroad.

But it is objected that the project of the branch road, in aid of which the stock was subscribed in this case, was undertaken as an independent enterprise under the act of March 21, 1868, and, consequently, that the constitutional provision applies to it. It is true that the branch in question was projected, and the organization for its construction was made, under the provisions of that act. It is necessary, therefore, to inquire whether branches of railroads thus projected are thereby made subject to the constitutional provision relied on; for the bonds sued on in this case show on their face that they were issued in pursuance of that act as well as under the authority of the original charter, and being made "to the use and in the name of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, . . . to aid in building said branch railroad." The Supreme Court of Missouri has decided this question, holding that the constitutional provision does not apply to branch roads built under the act of 1868. *The State ex rel. the Attorney-General* v. *Green County*, 54 Mo. 540, is precisely in point. That was the case of a branch road authorized by the original charter of the Kansas City, &c. Railroad Company, but constructed as an independent interest under the act of 1868; and in that case, also, the original company had consolidated with the Hannibal and St. Joseph Railroad Company, before the subscription to the stock for the branch was made. The court said: "This branch road commences and ends in the same places designated for the branch road in the original charter. It proposes nothing but what was intended to be accomplished by the act creating it, and its union with another company is in name only; no new powers are granted to either the branch or the company with which it is consolidated, and no original powers are taken away. I see nothing that alters, affects, or changes

the power of the county court to subscribe the stock. I think the power existed when the subscription was made, the same as it did when the act of incorporation of 1857 was passed."

It is true, in that case, that the board of directors of the parent company, before it consolidated with the Hannibal and St. Joseph Railroad Company, and the latter company afterwards, passed resolutions authorizing the construction of the branch, and that this was not done in the present case; the branch in the present case being organized and undertaken only with the consent of the directors of the parent company. But, under the decisions of this court, the purchasers of the bonds were not bound to know whether or not the proceedings of the company were regular. The charter of the Tebo and Neosho company contained the power to construct the branch, and gave the county court power to subscribe stock for it; and the act of 1868 authorized such branch and stock to be an independent interest; and the bonds on their face simply showed that they were made to the parent company, "to the use and in the name of the Clinton and Memphis branch," "to aid in building said branch." The purchaser, therefore, was apprised by the law that power existed in the county court to issue such bonds, without any election of the people; and there was nothing on their face to show that they were not regularly issued. It was not incumbent on him to inquire whether the railroad company had pursued all the regular steps necessary to entitle it to receive the bonds. Its agents, that is, the agents of the branch road, had them for sale, and he had a right to presume that they were lawfully entitled to them.

The fact that before bonds were issued, but not before the subscription was made, the parent company sold and assigned a portion of its route, and all franchises connected therewith, to the Missouri, Kansas, and Texas Railroad Company, does not alter the case. So far as appears, the Tebo and Neosho company did not cease to exist. In the deed of sale it expressly reserves a very material portion of its franchises; namely, all those belonging to "the extension of the Tebo and Neosho line north from Sedalia, *via* Booneville, Fayette, and Moberly, to the railroad bridge at West Quincy, declared July 2, 1869, certificate of which, dated July 3, 1869, was filed in the office

of the secretary of state." But had the company ceased to exist, it would make no difference. Its franchises were not extinguished, but only transferred, and the subscription had been ordered before the sale took place. It is unnecessary to discuss this point further, as the grounds on which it rests were sufficiently considered in the case of Scotland County, already referred to.

In our judgment, the defence set up by the county was properly overruled, it not being shown that the plaintiff, when he purchased the bonds, had any knowledge or notice of the facts relied on. *Judgment affirmed.*

TERRY *v.* ANDERSON.

1. An enactment reducing the time prescribed by the Statute of Limitations in force when the right of action accrued, is not unconstitutional, provided a reasonable time be given for the commencement of a suit before the bar takes effect.
2. This court concurs in opinion with the Supreme Court of Georgia that the time prescribed by the statute of that State, approved March 16, 1869, in which suits for the enforcement of rights which accrued prior to June 1, 1865, should be brought, is not so short or unreasonable, under the circumstances which led to its enactment, as to render it unconstitutional.
3. That statute may be set up as a valid bar to suits brought after Jan. 1, 1870, to enforce the individual liability of the stockholders of a bank in that State for the ultimate redemption of its bills which it ceased and failed to pay before June 1, 1865, or to recover the unpaid balance due on stock subscriptions at the time of such failure.
4. That balance is a debt to the bank, and inures to the benefit of all its creditors, while the individual liability for the redemption of its bills operates only in favor of the holders of them.
5. *Quære,* Can a creditor of a dissolved corporation, who has not recovered a judgment and exhausted his remedies at law, proceed in equity to subject choses in action to the payment of his demand?
6. A statutory liability is as much the subject of remedial legislation as a liability by contract, unless the remedy enters into and forms a part of the obligation which the statute creates.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

The Planters' Bank of the State of Georgia was incorporated by the legislature of that State, with a charter, providing that the stockholders, for the time being, shall "be pledged and bound, in proportion to the amount of the shares that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by or from said bank, during the time he, she, or they may hold such stock, in the same manner as in ordinary commercial cases, or in simple cases of debt."

The bank issued notes, some of which, in due course of trade, came into the possession of the complainants.

The bank failed to pay its notes in lawful money on the twentieth day of February, 1865, and nothing has been paid thereon, except as hereinafter stated.

On the 24th of May, 1866, the stockholders, being of opinion that the corporation was insolvent and unable to pay its debts,

ordered the board of directors to execute an assignment to Anderson and Mercer of the assets of the bank, for the purpose of equally distributing them among the creditors and bill-holders, and to surrender its charter to the governor of the State at such time as they might deem expedient.

On the 9th of July, 1866, the directors, in the name of the bank, assigned to Anderson and Mercer its property, both real and personal, and made said assignees their attorneys, in the name of the bank or otherwise, and, for the trusts created by the assignment, to ask, demand, recover, and receive of and from all and every person and persons all and singular the property and estate, goods, chattels, wares, merchandise, debts, choses in action, sum and sums of money and demands due and owing or belonging to said bank; . . . and, in default of delivery or payment in the premises, to sue, prosecute, and implead for the same, as they might see fit, &c.

The assignees accepted their trust on the same day, and soon after published a notice to all bill-holders and other persons having claims against the bank, to present them for liquidation.

On the 24th of December, 1869, Harvey Terry presented to the assignees for liquidation bills of the said bank, to the amount of $5,605.

Joshua and Thomas Green, in December of that year, presented to the assignees for liquidation bills to the amount of $5,791. Upon the bills so presented a dividend of twenty per cent was paid before Jan. 1, 1870.

Subsequently to the payment of this dividend, the assignees filed a bill in equity in the Superior Court of Chatham County, Georgia. McNish and other creditors of the bank, including the present complainants, were made defendants.

Their object was to obtain direction as to the mode of paying out the assets in their hands; and the court, July 14, 1871, adjudged, among other things, that there was due to Terry the sum of $5,605, less the dividend of twenty per cent received by him, and also the sum of $1,117, on bills on which he had received no dividend; that there was due to Joshua and to Thomas Green $5,791 on bills of the bank, less the dividend of twenty per cent previously paid thereon; and that the assignees

should pay the balance of the assets to all creditors named in the decree, in proportion to their respective dues.

In obedience to the decree, the assignees paid further dividends, making the whole amount so paid thirty and one-eighth per cent of the face value of the bills; and they were finally discharged June 30, 1873.

On the eighteenth day of March, 1869, the General Assembly of Georgia passed an act accepting the surrender of the charter of the bank.

The amount of bills outstanding at the time of the failure of the bank was $1,460,112. Of this amount, $207,448 were redeemed before the bank executed its deed of assignment.

Besides the bills so presented by said Terry, he is now the owner and holder of bills to the amount of $1,464, upon which no dividend has been paid.

The present bill of complaint was filed April 6, 1874, by him, Joshua Green, and Thomas Green, on behalf of themselves and others, against said Anderson and Mercer, the assignees and the other defendants who are stockholders of the bank. It sets forth the preceding facts, and alleges that at the time the bank failed its capital stock was not paid in in full, and that many of the stockholders had paid in only about eighty per cent of their subscription; that the right to sue for and recover the several balances due by them on their shares passed by the assignment of July 9, 1866, to the assignees, who had never collected them.

It prays that the stockholders be decreed to pay such sum upon each share of stock owned and held by them respectively as shall make up the full sum of $100, — its par value, — and such further sums respectively as may be found due, in order to pay the complainants' demands.

The defendant Anderson demurred generally.

The others demurred specially, upon the ground, 1, that the suit was barred by the Statute of Limitations; 2, that complainants, although defendants in the case of Anderson and Mercer against McNish and others, in the Superior Court for Chatham County, allege no reason or excuse for not seeking the aid of that court to require the assignees to collect the unpaid subscriptions due from the several stockholders, or why

the decree rendered in that cause should not be conclusive and binding upon them; 3, that the complainants do not allege that the defendants held any stock of the bank when the bills were issued; and, 4, that as to the bills amounting to $1,464, as to which Terry seeks judgment, the complaint does not set forth whether he became the holder of them before or after the final decree in that case, or why they were not presented for participation in the distribution of assets of the bank.

The demurrers were sustained and the bill was dismissed. The complainants thereupon brought the case here.

The Statute of Limitations of Georgia approved March 16, 1869, so far as it bears upon this case, is as follows: —

"SECTION 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 statute or acts of incorporation, or in any way by the operation of law which accrued prior to the 1st of June, 1865, not now barred, shall be brought by the 1st of 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. 4. And be it further enacted, that all actions on promissory notes, bills of exchange, or other simple contracts in writing, and all actions on open accounts, or for the breach of any contract not under the hand of the party sought to be charged, or upon any implied assumpsit or undertaking, which accrued on a contract which was made prior to June 1, 1865, not now barred, shall be brought by the 1st of January next, after the passage of this act, or the right of the party, plaintiff or claimant, and all right of action for its enforcement shall be for ever barred."

"SECT. 6. And be it further enacted, that all other actions upon contracts, expressed 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 of June, 1865, and are not now barred, shall be brought by the 1st of 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 limitation shall take effect in all cases mentioned in this act, whether the right of action had actually accrued prior to the 1st of June, 1865, or was then only inchoate and imperfect, if the contract or liability was then in existence."

Mr. Harvey Terry and *Mr. William Stone* for the appellants. *Mr. Henry R. Jackson*, contra.

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

In *Terry* v. *Tubman*, 92 U. S. 156, we decided that 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 stockholder arose when the bank refused or ceased to redeem, and was notoriously insolvent; and that when such insolvency occurred prior to June 1, 1865, an action against a stockholder not commenced by Jan. 1, 1870, was barred by the Statute of Limitations of Georgia of March 16, 1869. That act, as recited in its preamble, was passed on account of the confusion that had "grown out of the distracted condition of affairs during the late war," and substantially barred suits upon all actions which accrued before the close of the war, if not commenced by the first day of January, 1870.

This is a suit to enforce the liability of the stockholders of a bank, under a provision of the charter similar to that considered in *Terry* v. *Tubman;* and it is expressly averred in the bill that the bank stopped payment on the 20th of February, 1865, and never resumed. The affairs of the bank were closed up under an assignment made July 9, 1866, the proceeds of which paid only a small percentage upon its liabilities. The case is thus brought directly within our former ruling; but it is insisted that the act of 1869 is unconstitutional, because it impairs the obligation under which the complainants claim, and, as that question was not directly passed upon in the other case, we are asked to consider it now. The argument is, that as the statute of limitations in force when the liability of the defendants was incurred did not bar an action until the expiration of twenty years from the time the action accrued, a statute passed subsequently reducing the limitation impaired the contract, and was consequently void.

This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the

bar takes effect. *Hawkins* v. *Barney*, 5 Pet. 451; *Jackson* v. *Lamphire*, 3 id. 280; *Sohn* v. *Waterson*, 17 Wall. 596; *Christmas* v. *Russell*, 5 id. 290; *Sturges* v. *Crowninshield*, 4 Wheat. 122. It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain.

In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts.

Here, nine months and seventeen days were given to sue upon a cause of action which had already been running nearly four years or more. The third section of the statute is as follows: —

"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 statute or acts of incorporation, or in any way by operation of law which accrued prior to the 1st of June, 1865, not now barred, shall be brought by the 1st of January, 1870, or the right of the party, plaintiff or claimant, and all right of action for its enforcement, shall be for ever barred."

The liability to be enforced in this case is that of a stockholder, under an act of incorporation, for the ultimate redemp-

tion of the bills of a bank swept away by the disasters of a civil war which had involved nearly all of the people of the State in heavy pecuniary misfortunes. Already the holders of such bills had had nearly four years within which to enforce their rights. Ever since the close of the war the bills had ceased to pass from hand to hand as money, and had become subjects of bargain and sale as merchandise. Both the original billholders and the stockholders had suffered from the same cause. The business interests of the entire people of the State had been overwhelmed by a calamity common to all. Society demanded that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things. This clearly presented a case for legislative interference within the just influence of constitutional limitations. For this purpose the obligations of old contracts could not be impaired, but their prompt enforcement could be insisted upon or an abandonment claimed. That, as we think, has been done here, and no more. At any rate, there has not been such an abuse of legislative power as to justify judicial interference. As was said in *Jackson* v. *Lamphire*, *supra*: "The time and manner of their operation [statutes of limitation], the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend upon the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment."

The Supreme Court of Georgia, in *George* v. *Gardner*, 49 Ga. 441, held that the time prescribed in this act was not so short or unreasonable under the circumstances as to make it unconstitutional; and the Circuit Court of the United States for the Southern District of Georgia held to the same effect in *Samples* v. *The Bank*, 1 Woods, 523. We are satisfied with these conclusions. The circumstances under which the statute was passed seem to justify the action of the legislature. The time, though short, was sufficient to enable creditors to elect whether to enforce their claims or abandon them.

This disposes of the questions arising upon the individual liability of the stockholders under the charter. It still remains to consider the cases of the stockholders whose subscriptions

were not paid in full at the time of the failure of the bank. For this purpose, it is not necessary to decide whether this liability passed to the assignees under the assignment. If it did not, and the present complainants have the right to sue for it, their action is barred by the statute of 1869. It was a debt due the corporation June 1, 1865; and, by sect. 6 of that statute, all actions upon any debt or liability due a corporation, which accrued prior to that date and was not barred when the act was passed, must be brought by Jan. 1, 1870. The case of *Cherry* v. *Lamar*, decided by the Supreme Court of Georgia in January, 1877, is not, as we understand it, at all in conflict with this. There the charter of the bank made a call by the directors, and sixty days' notice of it to the stockholders, conditions precedent to the collection of unpaid stock subscriptions; and it was consequently held that the statute did not commence to run against such a liability until the requisite call had been made and notice given. Neither in this case nor in *Terry* v. *Tubman* does any such provision of the charter appear. For all that is shown in the record, the stockholders were liable to suit at any time for the recovery of the balance due from them.

These complainants are neither of them judgment creditors of the bank. In a suit instituted by the assignees to close up the assignment, they proved their claims, and the amount due them was found for the purposes of a dividend. The finding was sufficient for the purposes of distribution; but it has none of the characteristics of a judgment or decree, to be enforced as against any thing but the fund which the court was then administering.

We see nothing to take this case out of the operation of the decision in *Terry* v. *Tubman*, and the decree of the Circuit Court is therefore

Affirmed.

At a subsequent day of the term, a petition for rehearing was filed.

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

In this petition it is suggested that the provision of the

charter of the Planters' Bank, in respect to the liability of subscribers to the capital stock for the payment of the balances due upon their subscriptions, is substantially the same as that passed upon in *Cherry* v. *Lamar*, and that consequently, under the ruling in that case, the Statute of Limitations is no bar to this action for the recovery of balances due. This does not appear either in the record or in the voluminous printed arguments filed at the hearing. If it was mentioned in the oral argument, it did not attract our attention.

But upon the facts as they are now stated the result will not be changed. The liability of the stockholders upon their unpaid subscriptions is that of debtors to the bank. *Ogilvie* v. *Knox Insurance Co. et al.*, 22 How. 380. Consequently the balances now in controversy passed to the assignees under the assignment, which was "of all the property, estate, credits, and assets of the" bank. The liability of a stockholder for his subscription is entirely different from that imposed by the charter "for the ultimate redemption of the bills" issued by the bank. The subscription inures to the benefit of all creditors, while the individual liability under the charter operates only in favor of billholders.

Since the debts due upon the subscriptions passed to the assignees, the appellants, being parties to the suit instituted by them to close their trust, had the right to insist that this part of the assets should be reduced to possession, and distributed before the trust was closed and the assignees were discharged.

Ordinarily, a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions; and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation. If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund which will be administered by a court of equity in the absence of a trustee; the principle being that equity will not permit a trust to fail for want of a trustee. But here there was a trustee invested with ample powers to collect and dispose of all the assets belonging to the alleged trust fund. In a suit to which

these appellants were parties one court of equity has found that this trustee has fully executed his trust, and that the fund is exhausted. That decree is a bar to any further proceeding in equity by them, as creditors of the bank before judgment, for the purpose of securing the administration of the same trust. If there are assets which the trustee did not reach, the appellants are remitted to their remedies, after judgment against the bank, to subject equitable assets to the payment of their demands. We have seen, in the former opinion filed, that they do not now occupy the position of judgment creditors.

The other questions presented by the petition for rehearing have already been sufficiently considered. A liability by statute is as much the subject of remedial legislation as a liability by contract, unless the remedy enters into and forms part of the obligation which the statute creates. Such, we think, is not the case here. *Petition overruled.*

NOTE. — In *Terry* v. *Coskery*, error to the Circuit Court of the United States for the Southern District of Georgia, which was argued at the same time as was the preceding case by *Mr. Harvey Terry* and *Mr. William Stone* for the plaintiff in error, and by *Mr. W. H. Hull* for the defendant in error, MR. CHIEF JUSTICE WAITE, in delivering the opinion of the court, remarked: "There is nothing to distinguish this case in principle from that of *Terry* v. *Tubman*, 92 U. S. 156, and that of *Terry* v. *Anderson*, *supra*, p. 628." *Judgment affirmed.*

BURDETTE *v.* BARTLETT.

Under sect. 827 of the Revised Statutes of the United States relating to the District of Columbia, persons severally liable upon the same obligation or instrument, including the parties to promissory notes, may all or any of them, at the option of the plaintiff, be included in the same action.

ERROR to the Supreme Court of the District of Columbia.

This was an action brought by Bartlett, Robbins, & Co. against Howard, Peugh, Lacey, and Ross, as makers, and Helmick and Burdette, as indorsers, of a certain joint and several promissory note for $1,993, dated July 16, 1873, and payable to the order of said Helmick. The note was duly protested for non-payment, and the indorsers served with notice. The defendants, with the exception of Ross and Helmick, were served

with process; but the action was subsequently dismissed as to all of them but Burdette. Judgment by default was rendered against him, which the general term, upon appeal, affirmed. Burdette then sued out this writ, and here assigns for error: 1. The court below erred in giving judgment for plaintiffs, because there was a misjoinder of parties defendants. 2. Because the makers and indorsers of a promissory note cannot be joined as defendants in the same action.

Mr. William F. Mattingly, for the plaintiff in error.

Sect. 827 of the Revised Statutes relating to the District of Columbia unquestionably does not, in express terms, authorize the joinder of makers and indorsers of a promissory note as defendants. Where such is the intent of the legislature, it has been expressed in plain and unambiguous terms, as in Mississippi. *Keary* v. *Farmers' & Merchants' Bank of Memphis*, 16 Pet. 89.

That section was, by its terms, evidently intended to modify the common-law rule, that, in a case of a joint and several contract, all the parties must be sued in one action, or a separate action be brought against each, and to allow a plaintiff to unite, at his pleasure, two or more of the parties in one action.

The contract of a maker and that of an indorser of a promissory note are wholly distinct and different. The maker promises to pay absolutely, while the undertaking of the indorser is merely conditional; and, unless a statute in plain terms authorizes the parties to two such independent contracts to be joined in one action, no such construction should be given to it.

Mr. Andrew C. Bradley, *contra*.

The joinder of the makers and indorsers of a promissory note, or of part of them, as defendants in "one action," is expressly authorized by the statute; and such, since its enactment, has been the judicial construction uniformly given to it. No clause excludes from its provisions the parties severally liable upon promissory notes, whether as makers or as indorsers. The statute is a remedial one, and should be liberally construed. *Atcheson* v. *Everitt*, Cowp. 381; *Eyston* v. *Studd*, 2 Plowd. 465; *Wilkinson* v. *Leland*, 2 Pet. 267; 1 Bl. Com. 87; Dwarris on Statutes, 231.

What is implied in a statute is as much a part of it as what is expressed. *Gelpcke* v. *City of Dubuque*, 1 Wall. 221; *Dubois* v. *Hepburn*, 10 Pet. 1; *Hoguet* v. *Wallace*, 4 Dutch. (N. J.) 524; *Cullerton* v. *Mead*, 22 Cal. 95; *Jackson* v. *Warren*, 32 Ill. 331; *Pearson* v. *Lovejoy*, 53 Barb. (N. Y.) 407; *People* v. *Tibbets*, 4 Cow. (N. Y.) 384; *Holmes* v. *Carley*, 31 N. Y. 289; *Hudler* v. *Golden*, 36 id. 446; *Adm'x of Tracy* v. *Adm'r of Card*, 2 Ohio St. N. S. 431; *Staniels et al.* v. *Raymond & Trustee*, 4 Cush. (Mass.) 314; *Gibson* v. *Jenney*, 15 Mass. 205; *State* v. *Jones et al.*, 8 Md. 88; *Converse* v. *Burrows*, 2 Minn. 229.

MR. JUSTICE HUNT delivered the opinion of the court.

By sect. 827 of the Revised Statutes of the United States relating to the District of Columbia, it is enacted as follows, viz.: —

"Where money is payable by two or more persons jointly or severally, as by joint obligors, covenantors, makers, drawers, or indorsers, one action may be sustained and judgment recovered against all or any of the parties by whom the money is payable, at the option of the plaintiff. But an action against one or some of the parties by whom the money is payable may, while the litigation therein continues, be pleaded in bar of another action against another or others of the said parties." 14 Stat. 405, § 20.

This is a portion of an act of Congress entitled "An Act to amend the law of the District of Columbia in relation to judicial proceedings therein." In the case before us, an action was commenced and the process served upon two of the several makers of a promissory note and one of the indorsers thereof, there being other makers and other indorsers of the note.

The statute is not happily expressed, whatever may have been the intention of its framers. It is contended, on the one hand, that it was designed merely to modify the common-law rule, that, in case of a joint and several contract, all the parties must be sued in one action, or a separate action be brought against each, and to allow the plaintiff to sue one or more of the parties in one action, and to omit a portion of them, at his pleasure.

It is insisted, on the other hand, that it is an enactment in the spirit of the provisions of numerous State statutes, permitting the holder of a note to join the makers and indorsers, at his discretion, in the same action. The latter, we are told in the brief, has been the uniform construction of the statute by the courts of the District since its passage, more than ten years since, and we are of the opinion that it is a sound construction. The words, "as by joint obligors, covenantors, makers, drawers, or indorsers," are inserted by way of illustration, and, like many other intended illuminations, serve but to darken the subject. Omitting these words (as parenthetical), the statute provides that one action may be sustained against all or any of the parties by whom payable, where money is payable by two or more persons jointly or severally.

In the present case, there is a sum of $1,993 payable upon an instrument in writing. It is payable by Howard, one of the makers of the note. It is payable also by Burdette, one of the indorsers of the note, and it is the same sum of $1,993 that is payable by each of them. A collection of the money by the holder from one of the parties would be a bar to further proceedings by him against the others. So an action simply against Howard alone would, in our opinion, give Burdette the benefit of the latter clause of the statute; to wit, that an action against one of the parties, while it continued, might be pleaded in bar of another action against him, as another party to the contract. So far as the present question is concerned, the act of Congress was intended to produce the effect of the statutes of several of the States; to wit, "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange or promissory notes, may all or any of them be included in the same action, at the option of the plaintiff." 2 Edm. Stat. of N. Y., p. 32.

The judgment of the Supreme Court of the District of Columbia was right, and is

Affirmed.

YOUNG *v.* UNITED STATES.

The decision of the Court of Claims awarding, on the motion of the United States, a new trial, while a claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, cannot be reviewed here.

ON motion for a writ of *certiorari*.

A judgment was rendered in this case by the Court of Claims, May 15, 1874, from which the United States took an appeal to this court. On the 5th of May, 1876, while that appeal was pending, the United States moved the Court of Claims for a new trial, under the provisions of sect. 1088, Rev. Stat. The motion was as follows: —

"And now comes the Attorney-General in behalf of the United States, and moves the court to grant the United States a new trial in the above-stated case, lately decided in this court, and that an order may be made staying the payment of the judgment so rendered in favor of said Alexander Collie, the said claimant. And the Attorney-General herewith submits to the court in support of this motion the affidavits of sundry witnesses taken abroad by the counsel of the United States, and certain papers and documents duly proved and verified, which the United States, by its Attorney-General, says have been discovered and obtained since the trial of the case, and which evidence the United States, by its Attorney-General, insists should satisfy the court that fraud, wrong, and injustice have been done to the United States by the recovery by said Collie of said judgment."

Upon the hearing of this motion a new trial was granted. The United States then came to this court, and moved to dismiss their appeal. This motion was resisted by the then appellee, who asked that a writ of *certiorari* might issue to bring here the proceedings of the Court of Claims in granting the new trial. This application was denied, and the appeal dismissed. Afterwards, the Court of Claims reheard the cause, and gave judgment for the United States. From that judgment this appeal was taken; and the transcript of the record sent here contains the motion of the United States for the new trial and the action of the court thereon, but not the affidavits filed in

support of or in opposition to the motion. The appellant now moves for a writ of *certiorari* to bring here these affidavits, with the papers and documents appended thereto.

Sect. 1088 of the Revised Statutes is in these words: —

"The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial, and stay the payment of any judgment therein upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States."

Mr. W. W. MacFarland and *Mr. J. Hubley Ashton* in support of the motion.

Mr. Assistant Attorney-General Smith, contra.

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

Under the act of June 23, 1868 (15 Stat. 75), re-enacted in sect. 1008, Rev. Stat., it was said, in *Ex parte Russell*, 13 Wall. 664, that to justify the grant of a new trial "a new case must be made, — a case involving fraud or other wrong practised upon the government. It is analogous to the case of a bill of review in chancery to set aside a former decree or a bill impeaching a decree for fraud." This remark of the judge, in the argument of the opinion, is to be construed in connection with the particular objection to the jurisdiction of the Court of Claims he was then considering, which was "that the granting of a new trial after a decision by this court is, in effect, an appeal from the decision of this court." This, he said, "would be so, if it were granted upon the same case presented to us; but it is not. A new case must be made," &c.

When this case was before us at the last term, upon the application for the writ of *certiorari* to bring up the proceedings of the Court of Claims in granting the new trial, it was contended that the court had proceeded "without jurisdiction, power, or authority;" and, in denying the writ, we said, "the proceedings under which the new trial was obtained are now part of the record below, and, after judgment is finally rendered, may be brought here by appeal for review." *United*

States v. *Young*, 94 U. S. 258. They are now here; and the record, instead of showing that the court did not have jurisdiction to proceed, shows affirmatively that it had. The motion, as made, brings the case directly within the statute. That being so, the objection as to the jurisdiction of the court, which alone we were then considering, is answered. A case having been made upon the record, such as would justify its interference, that court had the right to hear the evidence, and decide. Over its decision within that jurisdiction we have no control, for the statute has not provided an appeal. The new trial is to be granted if the evidence submitted, whether cumulative or otherwise, is sufficient to satisfy that court "that fraud, wrong, or injustice had been done to the United States." The act was passed for the protection of the United States. It constitutes one of the conditions which Congress has seen fit to attach to the grant of a right to sue the United States. The suitor cannot complain, for he accepted this condition of the jurisdiction when he commenced his suit. If the record showed affirmatively that the Court of Claims had granted a new trial after the term at which the judgment was rendered, under circumstances which gave it no jurisdiction, — as, for instance, after the expiration of two years from the final disposition of the claim, or for some cause not within the provisions of the statute, — a different case would be made from that which is here now, and one which it will be time enough to consider when it arises. We are all of the opinion that the decision of the Court of Claims, upon a motion by the United States, within the prescribed jurisdiction, is conclusive, and not subject to review. The claimant must rely upon his appeal from the final judgment upon the merits for protection against wrong under this form of proceeding.

Motion denied.

NEW ORLEANS *v.* CLARK.

1. Where an ordinance of a city, authorizing a contract with a gas company, and the issue to it of bonds of the city, provided that the company should "guarantee the said bonds and assume the payment of the principal thereof at maturity," — *Held*, 1. That the guaranty embraced both the principal and interest of the bonds. 2. That the ordinance contemplated two undertakings by the company, — one, to the bondholder, to answer for the city's liability; and the other, to the city, to provide for the payment of the principal of the bonds on their maturity.
2. The indorsement on the bonds by the president of the company, guaranteeing "the payment of the principal and interest" of them, was a compliance with the ordinance and contract as to the guaranty.
3. It is competent for the legislature to impose upon a city the payment of claims just in themselves, for which an equivalent has been received, but which, from some irregularity or omission in the proceedings creating them, cannot be enforced at law.
4. A law requiring a municipal corporation to pay such a claim is not within the provision of the Constitution of Louisiana inhibiting the passage of a retroactive law.

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

This was an action commenced Feb. 7, 1874, by Freeman Clark against the Jefferson City Gas-light Company and the city of Carrollton, La., to recover $7,200, the amount of overdue interest coupons cut from certain bonds issued by said city to that company.

On the 11th of January, 1871, the mayor and council of the city of Carrollton passed an ordinance authorizing the mayor to enter into a contract with that company to light the city and supply the citizens with gas-light, and providing that, in consideration of the execution of the contract by the company within a specified time, "the city of Carrollton, through the mayor, shall provide and issue forty-five $1,000 bonds of the city of Carrollton, payable in thirty years, with interest at eight per cent, payable semiannually to the order of the said Gas-light Company: *Provided*, the said company shall guarantee the said bonds, and assume the payment of the principal thereof at maturity; *And provided further*, that if at the maturity the said company shall fail to pay said bonds, then the said city shall pay the same, and become the owner of all

the gas-works, main-pipes, posts, &c., then lying and being within the present limits of the city of Carrollton.

"That the treasurer of the city of Carrollton shall specially appropriate and set aside in lawful money, every month, such amount or proportion of the taxes and dues of said city as shall be necessary to meet the interest on said bonds and such gas-bills as may accrue against said city; and that the mayor in said act shall be authorized to make such other agreements, not inconsistent herewith, as may be necessary to carry out the purposes of the ordinance, and make the said contract legal and conclusive on both parties thereto."

A contract embracing the terms and stipulations of the ordinance was entered into between the mayor and the company; and the latter, having complied therewith, received the bonds, with coupons for interest attached.

The bonds and coupons were in the following form: —

"No. 1.] CITY OF CARROLLTON. [$1,000.

"A.] *State of Louisiana.* [No. 1.

"Know all men by these presents, that the city of Carrollton will pay to the Jefferson City Gas-light Company, or order, the sum of $1,000, in current money of the United States, in thirty years from the date thereof, with interest at the rate of eight per cent per annum, payable semiannually on the first day of January and first day of July of each year, at the office of the city treasurer, on the delivery of interest coupon attached to said bond. For the payment of the principal and accruing interest on this bond the faith and credit of the city of Carrollton is pledged, as set forth in the ordinance printed on the reverse hereof, passed and approved Jan. 11, 1871.

"In testimony whereof, the seal of the city of Carrollton is hereto affixed, and the signatures of the mayor, controller, and treasurer appended in writing on the first day of July, 1871.

[SEAL.] "T. A. MARTIN, *Controller.*
"FREDERICK KERN, *Treasurer.*
"D. M. BISBEE, *Mayor.*

(Written across the face:) "The Jefferson City Gas-light Company guarantee the payment of the principal and interest on this bond to the holder thereof.

"JOHN LOCKWOOD, *President.*"

"$40.] COUPON.

"The city of Carrollton will pay to bearer forty dollars at the office of the city treasurer, being six months' interest due July 1, 1874, on bond No. 1, for one thousand dollars.

"A. FREDERICK KERN, *Treasurer.*"

An act of the legislature of Louisiana, passed Feb. 12, 1872, empowered the mayor and city council of the city of Carrollton to ordain, establish, and cause to be carried into effect and execution, all such by-laws, ordinances, resolutions, rules, and regulations as they might deem expedient for the good government of said corporation which are not contrary to the Constitution and laws of the State or the United States. They were also authorized and empowered to fund the outstanding debts and obligations of the city created for wharves, streets, gas, and other improvements of said city, by issuing its bonds in such sums as they might deem advisable, running for thirty years, with interest at eight per cent payable semiannually: *Provided*, that any ordinance for the issue of bonds should provide for the payment of their principal and interest by levying such annual tax as would raise a sufficient sum to pay the interest of said bonds as the same might come due, and should create a sufficient sinking fund to meet the principal at maturity.

April 10, 1872, the following ordinance was adopted by the mayor and council of the city of Carrollton: —

"An ordinance to provide for the payment of the bonds and interest on the same, as authorized by the provisions of the new charter of the city of Carrollton, bearing date the twelfth day of February, 1872, providing for the funding of the outstanding debts and obligations of the said city created for the wharves, streets, gas, and other improvements of said city.

"SECTION 1. Be it ordained by the mayor and council of the city of Carrollton, that there shall be assessed and levied a tax on all real and personal property within the limits of said city, as per amended charter, bearing date the twelfth day of February, 1872, and to be collected annually, one-half of one per cent (½ per cent), for the purpose of paying the principal and interest of two hundred bonds of $1,000 each, or as much thereof as may be required to

fund the city debt, and to be issued under this ordinance, and running for thirty years, the proceeds of the same to be applied for the purpose of funding the city indebtedness.

"SECT. 2. Be it further enacted, that the aforesaid tax of one-half of one per cent shall be assessed and levied on the assessment rolls of 1872, and shall not be exigible or collectible before the year 1873, and shall then be collected in the same manner as other taxes, and in accordance with the city charter in relation thereto.

"SECT. 3. Be it further enacted, &c., that the treasurer of the city of Carrollton shall annually set aside, after paying the interest as provided semiannually on said bonds, a sufficient amount to pay the principal at maturity: *And provided further*, that any failure or neglect upon the part of the treasurer of said city to comply with the provisions of said ordinance shall be a sufficient cause for his removal from office.

"SECT. 4. Be it further enacted, that the mayor of the said city, and chairman of the finance and the chairman of the streets and landings committees, be, and are hereby, authorized and empowered to forthwith negotiate a loan, sufficient in amount and as heretofore provided for in this ordinance, to liquidate the indebtedness of said city; and that the mayor is hereby authorized and empowered to have engraved and printed two hundred bonds of $1,000 each, with coupons attached, and to warrant on the treasurer for the payment of the printing and engraving of the said bonds, and to issue the necessary amount of bonds payable in thirty years required to meet said loan thus negotiated.

"SECT. 5. That this ordinance take effect from and after its passage."

An act of the legislature, approved March 23, 1874, enacts as follows: —

"SECTION 1. That all that portion of the parish of Jefferson being and lying below the centre of Upper Line Street of the city of Carrollton, commencing at Mississippi River, and extending northwardly along the centre of said street to its terminus, and thence along the centre of the line of the New Orleans and Carrollton Railroad to Lake Pontchartrain, shall be and constitute the upper boundary line of the parish of Orleans and the city of New Orleans; and all that portion of the city of Carrollton thus detached from the parish of Jefferson and added to the city of New Orleans and parish of Orleans shall be governed by the mayor and administrators of the city

of New Orleans, in accordance with existing laws, except so far as not inconsistent with this act."

"SECT. 5. That all the rights, titles, and interest of the city of Carrollton, as now existing, in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets, stalls, levees, landing-places, buildings, and other property of whatsoever description and wherever situated, and of and with all goods, chattels, money, effects, dues, demands, bonds, obligations, judgments and judgment liens, actions and rights of action, books, accounts, and vouchers, be, and they are hereby, vested in the city of New Orleans: *Provided*, that all estates, income funds, or property of every description now held in trust by said city of Carrollton, or which shall have been specially pledged or affected by the payment of any debt, shall be held by the city of New Orleans, under this act, upon and for the same use, trust, limits, limitation, charities, and conditions as the same are now held; and the debt and all other indebtedness or liabilities of the city of Carrollton, including the funding and improvement bonds, and the bonds issued to the Jefferson City Gas-light Company, and known as the gas bonds, and notes, interest coupons, wages, salary due or to become due, warrants, or other species of obligations whatsoever, shall be assumed and paid by the city of New Orleans; and said city is hereby declared liable therefor: *Provided further*, that all officers of said city of Carrollton shall continue as at present constituted to discharge the duties of their respective offices until this act of incorporation can be completed by putting into possession of the proper officers of the city of New Orleans the books, papers, records, documents, and other property now belonging to the city of Carrollton, and no longer, and after which time all the powers, rights, privileges, and immunities possessed and enjoyed by the mayor and council of the city of Carrollton shall cease and terminate: *And provided further*, that the claims or vested rights of any person or persons, or company or corporation, of said city of Carrollton, that have been granted, acquired, or received from or against said corporation of the city of Carrollton, or otherwise, shall not be interfered with, divested, or impaired by this act, nor by the city of New Orleans, without adequate compensation."

"SECT. 8. That the act entitled 'An Act to incorporate the city of Carrollton,' approved March 17, 1859, and all acts amendatory thereof, be, and the same are hereby, repealed."

"SECT. 12. That all laws and parts of laws in conflict herewith be, and the same are hereby, repealed; and this act shall take effect from and after its passage."

Sect. 4 of an act of the General Assembly of Louisiana passed in 1855, No. 263, provides: —

"That the constituted authorities of incorporated towns and cities in this State shall not hereafter have power to contract any debt or pecuniary liability, without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt or contract."

The city of Carrollton pleaded the general issue, and, in addition, declared that it was in no wise bound for said bonds; because, 1, they were issued by the officers of the city in violation of its charter; 2, that the ordinance and the contract made under it were illegal, null, and void; and, if the city had been expressly authorized to issue the bonds, the council, by the ordinance contracting said debt, made no provision to pay the principal or interest.

The gas company, in its answer, insisted that the bonds issued under the contract for supplying the city with gas were valid; that the city had accepted the works of the company, and enjoyed the benefit of the same ever since, and was therefore bound to pay the coupons as they became due. The answer prayed that the city of Carrollton be called in warranty, and be condemned to pay to the company any sum of money which the company might be decreed to pay to the plaintiff. March 26, 1875, after said answer had been made, Clark filed a supplemental petition, averring that since the commencement of his suit the legislature had passed an act, approved March 23, 1874, repealing the act incorporating Carrollton and annexing it to the city of New Orleans; and, further, that by the fifth section of that act the latter city was made liable for said bonds *in solido* with the said gas company.

To this supplemental petition the company filed an answer, denying all the allegations of the petition tending in any way to show responsibility on its part, and alleging that the city of New Orleans was bound to hold the respondent harmless from any claim of the plaintiff, and praying that said city be called in warranty, and condemned to hold the respondent harmless, &c.

The city of New Orleans also filed an answer, insisting upon

the exception filed by the city of Carrollton, and that it should first be disposed of. After a general denial of the allegations of the supplemental petition, the answer averred that the city of Carrollton was without power to issue the bonds; that there was neither a moral nor a legal obligation on New Orleans to pay the same; and that any act of the legislature imposing such obligation was null and void.

There was a judgment in favor of Clark for $7,200 against the gas company, and one in favor of the company, on the call in warranty, against the city of New Orleans for a like sum.

The company and the city each sued out a writ of error, and brought the case here.

Submitted on printed arguments for the Jefferson City Gas-light Company by *Mr. Thomas J. Semmes* and *Mr. Robert Mott;* for Clark, by *Mr. Samuel Shellabarger* and *Mr. Jeremiah M. Wilson;* and for the city of New Orleans, by *Mr. Philip Phillips.*

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action upon several coupons for interest annexed to bonds issued by the late city of Carrollton, in Louisiana, to the Jefferson City Gas-light Company, a corporation created under the laws of that State, for laying gas-pipes through certain streets of the city, and introducing gas for the use of its citizens. The bonds were indorsed by the president of the company, with its guaranty, for the payment of their principal and interest. His authority to make this guaranty, so far as it relates to the interest, was denied by the company; but the Circuit Court held that the admissions and evidence in the case showed a *prima facie* case of liability.

The bonds were issued pursuant to an ordinance of the city, which provided for the payment of the interest thereon, but made no provision for the payment of the principal; and for this omission, and because they were issued in aid of a private corporation, their validity was questioned by the city of New Orleans, upon which the liabilities of Carrollton were cast upon its annexation to that city; and as it was contended in answer to this position that the legislature had subsequently,

in the act of annexation, legalized the issue, the power of the legislature to do this was denied, but the Circuit Court held that the legislature possessed the power; and the city of New Orleans was adjudged bound to pay the bonds.

The record shows that the bonds were issued after the work had been done for which the contract was made and the gas had been introduced into the city, and that they were transferred to the plaintiff for a valuable consideration.

Two questions are presented for our determination: —

1st, Whether the Jefferson City Gas-light Company is liable on the guaranty made by its president for the interest on the bonds; and,

2d, Whether it was competent for the legislature of Louisiana to legalize the issue of the bonds, if for any cause they were originally invalid, or, more properly, to compel their payment by the city of New Orleans.

1. The ordinance which authorized the contract with the company, and the issue of the bonds of the city, in terms provided that the company should "guarantee the said bonds and assume the payment of the principal thereof at maturity." Their delivery to the company was made dependent upon this condition; but as the provision mentioned that the company was to assume payment of the principal, after specifying that it was to guarantee the bonds, it is argued that the guaranty of the principal only was intended. This is not, however, a just inference from the language. The guaranty of the bonds embraced both the principal and the interest. The payment of bonds, without other designation, always implies a payment of the principal sum and its incident; and a guaranty in similar terms covers both. The ordinance contemplated two undertakings by the company, — one to the bondholder, and one to the city. The guaranty was to be for the security of the bondholder; it was to be an undertaking to answer for the city's liability, and to be collateral to it. The other undertaking was to be for the security of the city, by placing the company under obligation to provide for the payment of the principal of the bonds at their maturity, an obligation which otherwise would not have existed.

The contract embraced the stipulations contained in the ordi-

nance, and the indorsement of the guaranty of the company by its president on the bonds was a substantial compliance with both. The language used, guaranteeing "the payment of the principal and interest," only declared in terms what would have been implied from a simple guaranty of the bonds. It is not denied that the president was the proper officer to execute whatever guaranty was authorized.

2. The invalidity of the bonds was asserted, as already stated, on two grounds: first, that they were issued in aid of a private corporation; and, second, that the city of Carrollton, in issuing them, created a debt, without providing in the same ordinance the means of paying its principal. The first of these grounds is not one which affects the validity of the bonds. A private corporation, as well as individuals, may be employed by a city in the construction of works needed for the health, comfort, and convenience of its citizens; and, though such works may be used by the corporation for its own gain, yet, as they advance the public good, the corporation may be properly aided in their construction by the city; and for that purpose its obligations may be issued, unless some constitutional or legislative provision stands in the way. The bonds here were not given to the company as a gratuity, but for a valuable consideration; and if the company failed to pay them at maturity, and their payment was made by the city, the gas-works were to become the property of the city.

The second of these grounds is not without force. An act of the legislature of Louisiana, passed in March, 1855, had declared that the constituted authorities of incorporated towns and cities in the State should not thereafter "have power to contract any debt or pecuniary liability, without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt or contract." This enactment imposed a restriction upon the creation of liabilities by municipal bodies, which could not be disregarded. It was intended to keep their expenditures within their means; and its efficacy in that respect would be entirely dissipated, if debts contracted in violation of it were held legally binding upon the municipalities.

Assuming, then, that the bonds were invalid for the omission

stated, they still represented an equitable claim against the city. They were issued for work done in its interest, of a nature which the city required for the convenience of its citizens, and which its charter authorized. It was, therefore, competent for the legislature to interfere and impose the payment of the claim upon the city. The books are full of cases where claims, just in themselves, but which, from some irregularity or omission in the proceedings by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured. The power of the legislature to require the payment of a claim for which an equivalent has been received, and from the payment of which the city can only escape on technical grounds, would seem to be clear. Instances will readily occur to every one, where great wrong and injustice would be done if provision could not be made for claims of this character. For example, services of the highest importance and benefit to a city may be rendered in defending it, perhaps, against illegal and extortionate demands; or moneys may be advanced in unexpected emergencies to meet, possibly, the interest on its securities when its means have been suddenly cut off, without the previous legislative or municipal sanction required to give the parties rendering the services or advancing the moneys a legal claim against the city. There would be a great defect in the power of the legislature if it could not in such cases require payment for the services, or a reimbursement of the moneys, and the raising of the necessary means by taxation for that purpose. A very different question would be presented, if the attempt were made to apply the means raised to the payment of claims for which no consideration had been received by the city.

The act of 1874, which annexed Carrollton to New Orleans, provided that all property, rights, and interests of every kind of the former city should be vested in the latter, and that the debts and liabilities of Carrollton, "including the funding and improvement bonds, and the bonds issued to the Jefferson City Gas-light Company, and known as gas bonds," should be assumed and paid by the city of New Orleans; and that city was in terms declared liable therefor. Independently of this legislation, the liabilities of Carrollton would have devolved

with its property upon New Orleans on the annexation to that city, so far, at least, that they could be enforced against the inhabitants and property brought by the annexation within its jurisdiction. *Broughton* v. *Pensacola*, 93 U. S. 266. Equitable claims which had existed against the dissolved city would continue as before, and be equally subject to legislative recognition and enforcement, or their payment might be required, as in this case, by the act of annexation. The power of taxation which the legislature of a State possesses may be exercised to any extent upon property within its jurisdiction, except as specially restrained by its own or the Federal Constitution; and its power of appropriation of the moneys raised is equally unlimited. It may appropriate them for any purpose which it may regard as calculated to promote the public good. Of the expediency of the taxation or the wisdom of the appropriation it is the sole judge. The power which it may thus exercise over the revenues of the State it may exercise over the revenues of a city, for any purpose connected with its present or past condition, except as such revenues may, by the law creating them, be devoted to special uses; and, in imposing a tax, it may prescribe the municipal purpose to which the moneys raised shall be applied. A city is only a political subdivision of the State, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent. *The People ex rel. Blanding* v. *Burr*, 13 Cal. 343; *Town of Guilford* v. *Supervisors of Chenango County*, 18 Barb. (N. Y.) 615; s. c. 13 N. Y. 143.

The Constitution of Louisiana of 1868, which provides that no retroactive law shall be passed, does not forbid such legislation. A law requiring a municipal corporation to pay a demand

which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law, — no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the State, or of any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion.

Judgment affirmed.

RAILWAY COMPANY *v.* STEVENS.

A., who was the owner of a patented car-coupling, for the adoption and use of which by a railway company he was negotiating, went, at the request and expense of the company, to a point on its road to see one of its officers in relation to the matter. A free pass was furnished by the company to carry him in its cars. During the passage, the car in which he was riding was thrown from the track, by reason of the defective condition of the rails, and he was injured. *Held*, 1. That the pass was given for a consideration, and that he was a passenger for hire. 2. That, being such, his acceptance of the pass did not estop him from showing that he was not subject to the terms and conditions printed on the back of the pass, exempting the company from liability for any injury he might receive by the negligence of the agents of the company, or otherwise.

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

This was an action on the case for negligence, brought against the Grand Trunk Railway of Canada, to recover damages for injuries received by Stevens whilst a passenger in its cars. The plaintiff, being owner of a patented car-coupling, was negotiating with the defendant, at Portland, Me., for its adoption and use by the latter, and was requested by the defendant to go to Montreal to see the superintendent of its car department in relation to the matter, the defendant offering to pay his expenses. The plaintiff consented to do this; and, in pursuance of the arrangement, he was furnished with a pass to carry him in the defendant's cars. This pass was in the usual form

of free passes, thus, "Pass Mr. Stevens from Portland to Montreal," and signed by the proper officer. On its back was the following printed indorsement: —

"The person accepting this free ticket, in consideration thereof, assumes all risk of all accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property, of the passenger using the ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket and collect fare."

The plaintiff testified that he put the pass into his pocket without looking at it; and the jury found specially that he did not read the indorsement previous to the accident, and did not know what was indorsed upon it. He had been a railroad conductor, however, and had seen many free passes, some with a statement on the back, others without.

During the passage from Portland to Montreal, the car in which the plaintiff was riding ran off the track and was precipitated down an embankment, and he was much injured. The direct cause of the accident, according to the proof, was that, at the place where it occurred, and for some considerable distance in each direction, the bolts had been broken off the fish-plates which hold the ends of the rails together, so that many of these plates had fallen off on each side, leaving the rails without lateral support. The consequence was that the track spread, and the cars ran off, as before stated. There was also evidence that at this place the track was made of old rails patched up.

The above facts appeared on the plaintiff's case, and the defendant offered no evidence, but requested the court to instruct the jury as follows: —

First, That if the plaintiff, at the time of sustaining the injury, was travelling under and by virtue of the pass produced in evidence in the case, he was travelling upon the conditions annexed to it.

Second, That if the plaintiff, at the time of sustaining the injury, was travelling under and by virtue of the pass produced in evidence in the case, the defendant is not liable.

Third, That if the plaintiff, at the time of sustaining the

injury, was travelling as a free passenger, the defendant is not liable.

Fourth, That if the plaintiff, at the time of sustaining the injury, was travelling as a gratuitous passenger, without any consideration to the defendant for his transportation, the defendant is not liable.

The court refused these instructions, as inapplicable to the evidence produced, and instructed the jury as follows, viz.: —

That if the jury find that, in May, 1873, the plaintiff was interested in a car-coupling, which had been used on the cars of the defendant since December previous, and that the officers of the company were desirous that the plaintiff should meet them at Montreal to arrange about the use of such couplings on their cars by defendant, and they agreed with him to pay his expenses if he would come to Montreal, and he agreed so to do, and took passage on defendant's cars, and was, by the reckless misconduct and negligence of the defendant, and without negligence on his part, injured whilst thus a passenger in defendant's car, the defendant is not exonerated from liability to plaintiff for his damages occasioned by such negligence, by reason of the indorsement upon the pass produced in evidence.

There was a verdict and judgment for the plaintiff. The defendant then sued out this writ of error.

Mr. John Rand for the plaintiff in error.

The plaintiff below was travelling gratuitously under a free pass, and subject to its conditions. The company was, therefore, not liable. *Wells* v. *New York Central Railroad Co.*, 24 N. Y. 181; *Perkins* v. *Same*, id. 196; *Bissell* v. *Same*, 25 id. 442; *Poucher* v. *Same*, 49 id. 263; *Cragin* v. *Same*, 51 id. 64. He cannot be permitted to deny that he knew and accepted those conditions. *Steen* v. *Steamship Company*, 57 N. Y. 1; *Monitor Company* v. *Buffum*, 115 Mass. 345.

Mr. C. P. Mattocks, *contra*.

A pass, purporting on its face to be a free pass, may, nevertheless, be given for a consideration, and the holder be a passenger for hire. That such was the fact in this case is conclusively shown by the evidence, and the company is liable. *Kinney* v. *Central Railroad Co.*, 34 N. J. L. 513; s. c. 3 Am. Rep. 265; *Philadelphia & Reading Railroad Co.* v. *Derby*, 14 How. 486;

Wilton v. *Middlesex Railroad Co.*, 107 Mass. 108; *Jacobus* v. *St. Paul & Chicago Railway Co.*, 20 Minn. 125; *Rose* v. *Des Moines Valley Railroad Co.*, 39 Iowa, 346; *Cleveland, Painesville, & Ashtabula Railroad Co.* v. *Curran*, 19 Ohio St. 1; s. c. 2 Am. Rep. 362. *Bissell* v. *New York Central Railroad Co.*, 25 N. Y. 442, and *Poucher* v. *Same*, 49 id. 263, can have no weight in this court since *Railroad Company* v. *Lockwood*, 17 Wall. 357.

Even admitting that the words printed on the back of the pass furnished to the plaintiff could, if assented to by him, have limited the company's liability, there is no evidence whatever that he had knowledge of them. There was, therefore, no assent upon his part to the terms of the alleged special contract or notice. *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344; *The Philadelphia & Reading Railroad Co.* v. *Derby*, 14 id. 468; *The Steamboat New World* v. *King et al.*, 16 id. 469; *York Company* v. *Central Railroad*, 3 Wall. 107; *Walker* v. *The Transportation Company*, id. 150; *Express Company* v. *Kountze Brothers*, 8 id. 342; *Railroad Company* v. *Lockwood*, *supra*.

MR. JUSTICE BRADLEY delivered the opinion of the court.

It is evident that the court below regarded this case as one of carriage for hire, and not as one of gratuitous carriage, and that no sufficient evidence to go to the jury was adduced to show the contrary; and, hence, that under the ruling of this court in *Railroad Company* v. *Lockwood*, 17 Wall. 357, it was a case in which the defendant, as a common carrier of passengers, could not lawfully stipulate for exemption from liability for the negligence of its servants. In taking this view, we think the court was correct. The transportation of the plaintiff in the defendant's cars, though not paid for by him in money, was not a matter of charity nor of gratuity in any sense. It was by virtue of an agreement, in which the mutual interest of the parties was consulted. It was part of the consideration for which the plaintiff consented to take the journey to Montreal. His expenses in making that journey were to be paid by the defendant, and of these the expense of his transportation was a part. The giving him a free pass did not alter

the nature of the transaction. The pass was a mere ticket, or voucher, to be shown to the conductors of the train, as evidence of his right to be transported therein. It was not evidence of any contract by which the plaintiff was to assume all the risk; and it would not have been valid if it had been. In this respect it was a stronger case than that of Lockwood's. There the pass was what is called a "drover's pass," and an agreement was actually signed, declaring that the acceptance of the pass was to be considered as a waiver of all claims for damages or injury received on the train. The court rightly refused, therefore, in the present case, to charge that the plaintiff was travelling upon the conditions indorsed on the pass, or that, if he travelled on that pass, the defendant was free from liability. And the court was equally right in refusing to charge, that, if the plaintiff was a free or gratuitous passenger, the defendant was not liable. The evidence did not sustain any such hypothesis. It was uncontradicted, so far as it referred to the arrangement by virtue of which the journey was undertaken.

The charge actually given by the court was also free from material error. It stated the law as favorably for the defendant as the latter had a right to ask. If subject to any criticism, it is in that part in which the court supposed that the jury might find that the plaintiff was injured by the reckless misconduct and negligence of the defendant. If this degree of fault had been necessary to sustain the action, there might have been some difficulty in deducing it from the evidence. However, the condition of the track where the accident took place, without any explanation of its cause, was perhaps sufficient even for such an inference. If the defendant could have shown that the injury to the rails was the result of an accident occurring so shortly before the passage of the train as not to give an opportunity of ascertaining its existence, it did not do so, but chose to rest upon the evidence of the plaintiff. In fact, however, negligence was all that the plaintiff was bound to show; and of this there was abundant evidence to go to the jury. On the whole, therefore, we think that the charge presents no sufficient ground for setting aside the verdict. The charge, if not formally accurate, was not such as to prejudice the defendant.

It is strongly urged, however, that the plaintiff, by accepting

the free pass indorsed as it was, was estopped from showing that he was not to take his passage upon the terms therein expressed; or, at least, that his acceptance of the pass should be regarded as competent, if not conclusive, evidence that such a pass was in the contemplation of the parties when the arrangement for his going to Montreal was made. But we have already shown that the carrying of the plaintiff from Portland to Montreal was not a mere gratuity. To call it such would be repugnant to the essential character of the whole transaction. There was a consideration for it, both good and valuable. It necessarily follows, therefore, that it was a carrying for hire. Being such, it was not competent for the defendant, as a common carrier, to stipulate for the immunity expressed on the back of the pass. This is a sufficient answer to the argument propounded. The defendant being, by the very nature of the transaction, a common carrier for hire, cannot set up, as against the plaintiff, who was a passenger for hire, any such estoppel or agreement as that which is insisted on.

Since, therefore, from our view of the case, it is not necessary to determine what would have been the rights of the parties if the plaintiff had been a free or gratuitous passenger, we rest our decision upon *Railroad Company* v. *Lockwood*, *supra*. We have no doubt of the correctness of the conclusion reached in that case. We do not mean to imply, however, that we should have come to a different conclusion, had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case; and it is often asked, with apparent confidence, "May not men make their own contracts, or, in other words, may not a man do what he will with his own?" The question, at first sight, seems a simple one. But there is a question lying behind that: "Can a man call that absolutely his own, which he holds as a great public trust, by the public grant, and for the public use as well as his own profit?" The business of the common carrier, in this country at least, is emphatically a branch of the public service; and the conditions on which that public service shall be performed by private enterprise are not yet entirely settled. We deem it the safest plan not to anticipate questions until they fairly arise and become necessary for our decision. *Judgment affirmed.*

UNITED STATES v. WILCOX.

Sects. 73 and 74 of the act entitled "An Act imposing taxes on distilled spirits and tobacco, and for other purposes," approved July 28, 1868 (15 Stat. 157), were not intended to repeal the rule prescribed by sect. 24 of the act of July 13, 1866 (14 id. 153), as amended by sect. 9 of the act of March 2, 1867 (id. 473), for the allowance of commissions to collectors of internal revenue upon taxes collected by them for articles removed from one district to a bonded warehouse in another district.

APPEAL from the Court of Claims.

This was an action by Wilcox to recover from the United States certain commissions which he claimed were due to him as a collector of internal revenue upon taxes collected by him for articles removed in bond from his district to another.

The Court of Claims found the following facts: —

1. Under the provisions of the act of July 20, 1868, c. 186, sect. 73, 15 Stat. 157, the Commissioner of Internal Revenue designated and established at different ports of entry bonded warehouses for the storage of manufactured tobacco and snuff in bond intended for exportation, under the control of the collector of internal revenue in charge of exports at the port and in the district where located.

2. The commissioner promulgated the following instructions and regulations applicable to the withdrawal of tobacco from said warehouses for consumption, so far as material in this case: —

"The law makes no provision for the removal of tobacco in bond without payment of tax, except such tobacco and snuff as are intended for export. . . .

"Sect. 73 of the act of 1868, c. 186, provides . . . that said goods may be withdrawn from warehouses either for immediate export to a foreign country, or after the tax has been paid thereon. . . .

"The following rules and regulations are prescribed for the deposit in, and the withdrawal from, any export bonded warehouse of . . . manufactured tobacco and snuff. . . .

"WITHDRAWAL AFTER PAYMENT OF TAX.

"The party desiring to withdraw manufactured tobacco or snuff from an export bonded warehouse, after the tax has been paid

thereon, will file with the collector an entry for withdrawal in the following form, describing the goods as they were entered for warehousing, viz.: —

"ENTRY FOR WITHDRAWAL.

"Entry of merchandise intended to be withdrawn from the export bonded warehouse of , at , in the district of the State of , by , for consumption, on payment of the taxes, the same having been stored in said warehouse by , on the day of , 18 , and which were described as follows, viz.: —

. . . . . .

"The taxes having been fully paid and the stamps affixed and cancelled, the collector will issue a permit for the delivery of the goods, which permit must be presented to the assessor of the district for his certificate that the same has been presented to him, and that the amount of taxes paid thereon has been entered in his bonded account of the district."

And the collector was required to certify that the full amount of tax due and owing thereon had been paid to him.

3. The claimant was collector of internal revenue for the Fifth Collection District of Virginia from April, 1869, to March, 1871, as alleged in his petition.

4. During the time the claimant was collector as aforesaid there were removed from manufactories in his district, without the payment of tax thereon, and transported directly to export warehouses in other districts, under the provisions of sect. 74 of said act, 15 Stat. 157, and the regulations of the commissioner, a large quantity of manufactured tobacco, to each package of which was affixed, by said collector, an engraved stamp, as required by said section.

5. Of the tobacco so removed from manufactories in the district of the claimant, and shipped to export bonded warehouses in other districts, there was withdrawn by the owners from said warehouses, to be sold in districts other than that of the claimant, and not for export, in accordance with the regulations of the commissioner mentioned in the second finding, a large quantity of tobacco, and the tax thereon was paid to the collectors in the districts where said warehouses were situated.

6. Adding one-half the amount of the tax received on the

quantity of tobacco shipped from the claimant's district, as set forth in the fourth finding, and withdrawn from the warehouses in other districts to be sold, as stated in the fifth finding, to the amount of taxes collected by the claimant on which his commissions were calculated, if he was entitled to have such addition made under the provisions of the act of June 30, 1864, c. 173, § 25, 13 Stat. 231, as amended by the act of July 13, 1866, c. 184, § 9, 14 id. 106, and the act of March 2, 1867, c. 169, § 9, id. 171, the claimant would be entitled to additional commissions amounting to the sum of $1,020, which has not been paid to him.

As a conclusion of law, the court found that the claimant was entitled to recover the sum of $1,020, and rendered judgment accordingly.

The United States then appealed here.

The Solicitor-General, for the United States.
Mr. J. G. Kimball, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

We agree with the Court of Claims in the opinion that the act of Congress of July 20, 1868, c. 186, §§ 73, 74, was not intended to change the rule prescribed by the act of July 13, 1866, c. 184, § 24, 14 Stat. 153, as amended by the act of March 2, 1867, id. 473, for the allowance of commissions to collectors of internal revenue upon taxes collected by them for articles removed from one district to a bonded warehouse in another district. The purposes of the act were distinct.

The act of June 30, 1864, as amended by the ninth section of the act of July 13, 1866, enacted that manufactured tobacco might be removed from the place where manufactured to a bonded warehouse in another collection district without payment of the tax, under certain treasury regulations, and might be withdrawn from the bonded warehouse on payment of the tax, or removed for export to a foreign country without such payment. The warehouses provided were for two purposes, — one for the custody of tobacco designed for export, and the other for custody of tobacco designed either for export or for domestic consumption or sale. Whenever the tobacco was removed for the latter uses, and when, consequently, the tax was

paid to the collector of the district in which the warehouse was situated, the proviso inserted by the act of 1866 divided the commissions on the tax between the collector of that district and the collector of the district from which the tobacco had been removed.

Such was the law when the act of 1868 was enacted. That act was plainly intended to throw around the removal of the manufactured tobacco greater security against evasion of payment of the tax upon it than had existed before. In no manner did it attempt to deal with the subject of collectors' commissions. Nor did it relieve collectors from any of the duties incumbent upon them before. We cannot better express our opinion of it than by adopting the language of the Court of Claims: —

"The only real changes effected were the substitution of export bonded warehouses for internal bonded warehouses, and requiring the owners of tobacco shipped from the manufactory to the warehouses to affix to each package an engraved stamp, for which he paid to the government through the collector of the shipping district twenty-five cents, and which was to be indicative of the owner's intention to export the package. But, notwithstanding that stamp, the owner was not bound to export the tobacco, but was permitted to withdraw it from bond for consumption on payment of the taxes due thereon, precisely as before.

"And it is upon this narrow construction that the defence in this case rests; that because under the act of 1868 tobacco could be shipped in bond from the manufactory only with a stamp thereon indicative of the intention of the owner to export it, while the language of the proviso of 1866 referred to articles 'shipped in bond to be sold in another district,' therefore the commissions of collectors were to be calculated on a different basis in the two cases, upon taxes collected in like manner upon tobacco shipped in bond from the manufactory and withdrawn for consumption from the bonded warehouse alike under both acts.

"In our opinion, the Fortieth Congress, in passing the act of 1868, c. 186, had no such intention and expressed no such will; and to adopt the construction contended for by the defendants would be to defeat the clearly established policy of Congress in this particular, by giving substantial force to language not material to the subject-matter legislated upon, and by establishing an incidental and accidental change of the law beyond the contemplation of the legislators."

Judgment affirmed.

CHUBB *v.* UPTON.

1. A party who made a contract with an organization which had attempted irregularly to create itself into a corporation, and which acted as such, or who subscribed to its capital stock, cannot, in a suit by the corporation, defend himself against a claim growing out of such contract or subscription by alleging the irregularity of such organization.
2. The same rule applies where the stock of a corporation has been increased, and the question arises upon the liability of a subscriber for the increased stock.
3. An assignee in bankruptcy of a corporation represents it and its creditors, and the defence of its irregular organization cannot be set up against him by such subscriber.
4. A party receiving a certificate for a certain number of shares of stock, at a given sum per share, thereby becomes liable to pay the amount thereof when called upon by the corporation or its assignee.
5. *Upton* v. *Tribilcock*, 91 U. S. 45, *Sanger* v. *Upton*, id. 56, and *Webster* v. *Upton*, id. 65, cited and approved.

ERROR to the Circuit Court of the United States for the Western District of Michigan.

Upton, as assignee in bankruptcy of the Great Western Insurance Company, a corporation organized under the laws of Illinois, brought this suit against Chubb. The company was originally chartered by the legislature in 1857.

In 1870, acting under the general laws of that State authorizing insurance companies to increase their capital stock, the directors and stockholders of the company took measures to increase its capital stock, and filed their papers for that purpose with the secretary of state, and the auditor of public accounts. By these proceedings the company undertook to increase its stock to $5,000,000.

The company, assuming that its stock had been increased, took subscriptions and issued certificates therefor, and immediately commenced doing business, issuing policies, &c., upon the basis of such an increase. Dec. 31, 1870, it held out to the public that its subscribed stock was $1,188,000, of which $222,831 was paid in, and $965,169 subscribed, for which the subscribers or holders were liable. Chubb became a subscriber to this increased stock, and a certificate for fifty shares was issued to him on the twenty-fifth day of November, 1870.

The company had a branch office at Grand Rapids, where

meetings of the stockholders residing there were held. Chubb was president of said branch, took part in those meetings, and also in a meeting of stockholders and directors held at Chicago in January, 1871. He paid money on his stock, and at one time, while holding it, gave another person a proxy to attend and vote at a stockholder's meeting at Chicago.

The company continued to do business, issue policies, &c., until it was put into bankruptcy, February, 1872. Upton was duly appointed assignee of the company on the eleventh day of April, 1872; and the court sitting in bankruptcy made an order upon the stockholders to pay, on or before Aug. 15, 1872, the balance due upon their stock. Notice was duly served upon them.

Upon the trial of the cause, Chubb objected to the production in evidence of the proceedings by which the company increased its stock, upon the ground of their alleged irregularities, and of informality in the papers filed in the public offices. The objections were overruled, and Chubb excepted to the ruling of the court.

He also objected to the introduction in evidence of papers filed in the public offices of Illinois by the company, showing that it was doing business, and that it had stock subscribed to a large amount. This objection was overruled, and an exception taken.

He further offered to prove that he was induced to purchase the stock by false representations that he would only be compelled to pay twenty per cent upon the amount subscribed; and that the holders of the stock in the original company never increased their stock or authorized any one to increase it, and never sold or transferred it to the new company. The court excluded the evidence, and he excepted.

The court substantially charged the jury, that upon the admitted facts, and upon further facts proved by the plaintiff by uncontradicted and documentary evidence, the plaintiff was entitled to recover, and that the matters offered in evidence by the defendant constituted no defence to the action. The defendant excepted to the instruction.

There was a judgment against Chubb, who thereupon removed the case here.

Mr. J. W. Champlin for the plaintiff in error.
Mr. M. J. Smiley, *contra*.

MR. JUSTICE HUNT delivered the opinion of the court.

The numerous questions raised upon the trial of this action depend upon a few general principles which are not difficult of application.

It is settled by the decisions of the courts of the United States and by the decision of many of the State courts that one who contracts with an acting corporation cannot defend himself against a claim on such contract, in a suit by the corporation, by alleging the irregularity of its organization. This was settled more than a half a century since in the courts of the State of New York, and has recently been affirmed in this court. *Dutchess Collar Manufacturing Co.* v. *Davis*, 14 Johns. (N. Y.) 237; *Sanger* v. *Upton*, 91 U. S. 56; *Upton* v. *Tribilcock*, id. 45; *Buffalo & Allegheny Railroad Co.* v. *Cary*, 26 N. Y. 75; *Bissell* v. *Michigan Southern Railroad Co.*, 22 id. 258.

The same principle applies to the case of a subscription to the capital stock in an organization which has attempted irregularly to create itself into a corporation, and has acted as such. *Methodist Episcopal Church* v. *Pickett*, 19 N. Y. 482; *Upton* v. *Hamborn*, 3 Biss. 417.

The rule applies to increasing the stock of a corporation when the question arises upon paying a subscription for stock forming a part of such increase. The duty and the necessity of performing the contract of subscription are the same as in the case of an original stockholder.

An assignee appointed under the bankrupt laws of the United States represents both the corporation and its creditors, and the defence of irregular organization cannot be urged against him.

It has been several times adjudged in this court, that, in an action by such assignee to recover unpaid subscriptions upon stock in such an organization, the defence of false and fraudulent representations inducing such subscription cannot be set up; especially when the subscriber has not been vigilant in discovering such fraud, and in repudiating his contract. *Upton* v. *Tribilcock*, 91 U. S. 45; *Webster* v. *Upton*, id. 65; *Sanger*

v. *Upton*, id. 56; *Ogilvie* v. *Knox Insurance Co.*, 22 How. 380.

The same authorities hold that one who receives a certificate of stock for a certain number of shares, at a given sum per share, thereby becomes liable to pay the amount thereof when called upon by the corporation or its assignee. Nor is it necessary to sustain the action that there should have been a subscription for the whole amount named on the articles. *Rensselaer & Washington Plank Road Co.* v. *Westel*, 21 Barb. (N. Y.) 56.

The statute of Illinois of 1869 authorized an increase of the capital of the Great Western Insurance Company. Papers were filed under the law for that purpose, which were examined by the Attorney-General, and certified to be in due form; and the company proceeded to issue its stock upon that theory.

The defendant became a subscriber for fifty shares of this increased stock, the shares being $100 each. He paid a portion, to wit, thirty per cent, of this subscription. He attended meetings of the stockholders and of the directors, acting himself as such. He gave another person a proxy to attend a meeting of the stockholders at Chicago, and to vote for him; and he was elected and acted as the president of a branch of the said company.

It is idle to deny that this was the case of an organization which claimed to have taken, and apparently supposed that it had taken, the measures required by law to complete its increase of capital. It acted as such, and the defendant, by receiving his certificate of stock, entered into engagements with it as such. If it be conceded that its increased stock was but *de facto*, and that it could have been annulled or suppressed by the action of the Attorney-General as acting under an irregular organization, the defendant derives no aid from the admission. The cases cited are clear to the point that he cannot make the objection, but must perform the engagements he has made.

The last offer of the defendant was intended to present this question in its most formidable shape. It was to show that the original capital of $100,000 was fully subscribed; that the holders of this stock never increased the capital nor authorized its increase; that this company ceased to do business prior to

1868; that the $100,000 was not transferred to the company claiming to have organized on the increased capital; and that there was no valid transfer of the original stock or charter.

All this does not alter the fact that there was an attempted alteration of the company under the forms of law, approved by the Attorney-General, with an increased capital, in the organization and management of which the defendant took part; that he paid his money, received his certificate of stock, attended meetings, voted, acted as an officer, and, so far as the record shows, never repudiated his position at any time, even to the time of the trial. If successful, he would have shared in its profits. He may have been the dupe and victim of the action of others. He may have been an accomplice. At all events, he was so far an actor in the affair that he cannot escape the consequences of his position.

Another series of objections is to the admission of various pieces of evidence introduced to show that the defendant was a stockholder. The original stock-ledger had been destroyed by fire, and the plaintiff supplied its place by the introduction of sundry other kinds of evidence tending to prove who were the stockholders, and that the defendant was one of them. The importance of this evidence was at an end when the certificate of shares was afterwards given in proof, and when it was expressly admitted by the defendant that he held the same; that he made payments thereon, and acted as a holder of shares in the company. It is not necessary, therefore, to inquire whether or not the evidence was properly admitted.

At the time this writ of error was taken, the decisions of this court in *Upton* v. *Tribilcock*, *Sanger* v. *Upton*, and *Webster* v. *Upton*, to which we have referred, had not been made. They contain a clear statement of our views upon all the material questions arising in this record, and we suppose that this writ of error would not have been brought had they then been known to the party and his counsel. The careful examination then given to the several questions renders unnecessary a detailed review of them.

We think there is nothing in the record before us that would justify us in disturbing the verdict and judgment rendered in the Circuit Court. *Judgment affirmed.*

UNITED STATES v. FOX.

1. An act which is not an offence at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection. Accordingly, that part of sect. 5132, Rev. Stat., which declares that every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor, who, within three months before their commencement, obtains goods upon false pretences with intent to defraud shall be punished by imprisonment, is inoperative to render the act an offence, because its criminal character is to be determined by subsequent proceedings, which, at the time the goods were so obtained, may not have been in his contemplation, and may be instituted, against his will, by another.
2. It is competent for Congress to enforce, by suitable penalties, all legislation necessary or proper to the execution of powers with which it is intrusted; and any act committed with a view of evading such legislation, or fraudulently securing its benefits, may be made an offence against the United States. But it is otherwise, when an act committed in a State has no relation to the execution of a power of Congress, or to any matter within the jurisdiction of the United States.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of New York.

In November, 1874, the defendant filed a petition in bankruptcy in the District Court for the Southern District of New York. In March, 1876, he was indicted in the Circuit Court for that district for alleged offences against the United States, and, among others, for the offence described in the ninth subdivision of sect. 5132 of the Revised Statutes, which provides that "every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor," who, within three months before their commencement, "under the false color and pretence of carrying on business, and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud," shall be punished by imprisonment for a period not exceeding three years.

The indictment, among other things, charged the defendant with having, within three months previous to the commencement of his proceedings in bankruptcy, purchased and obtained on credit goods from several merchants in the city of New York, upon the pretence and representation of carrying on business

and dealing in the ordinary course of trade as a manufacturer of clothing; whereas he was not carrying on business in the ordinary course of trade as such manufacturer, but was selling goods to some parties by the piece for cost, and to other parties at auction for less than cost, and that these pretences and representations were made to defraud the parties from whom the goods were purchased.

The defendant was convicted; and, upon a motion in arrest of judgment, the judges holding the Circuit Court were opposed in opinion, and have certified to this court the question upon which they differed. That question is thus stated in the certificate: —

"If a person shall engage in a transaction which, at the time of its occurrence, is not a violation of any law of the United States, to wit, the obtaining goods upon credit by false pretences, and if, subsequently thereto, proceedings in bankruptcy shall be commenced respecting him, is it within the constitutional limits of congressional legislation to subject him to punishment for such transaction considered in connection with the proceedings in bankruptcy?"

Mr. Assistant Attorney-General Smith for the United States.
Mr. B. F. Tracy, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

The question presented by the certificate of division does not appear to us difficult of solution. Upon principle, an act which is not an offence at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection. By the clause in question, the obtaining of goods on credit upon false pretences is made an offence against the United States, upon the happening of a subsequent event, not perhaps in the contemplation of the party, and which may be brought about, against his will, by the agency of another. The criminal intent essential to the commission of a public offence must exist when the act complained of is done: it cannot be imputed to a party from a subsequent independent transaction. There are cases, it is true, where a series of acts are necessary to constitute an offence, one act being auxiliary to another in carrying out the criminal design.

But the present is not a case of that kind. Here an act which may have no relation to proceedings in bankruptcy becomes criminal, according as such proceedings may or may not be subsequently taken, either by the party or by another.

There is no doubt of the competency of Congress to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of powers with which it is intrusted. And as it is authorized "to establish uniform laws on the subject of bankruptcies throughout the United States," it may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system. The object of such a system is to secure a ratable distribution of the bankrupt's estate among his creditors, when he is unable to discharge his obligations in full, and at the same time to relieve the honest debtor from legal proceedings for his debts, upon a surrender of his property. The distribution of the property is the principal object to be attained. The discharge of the debtor is merely incidental, and is granted only where his conduct has been free from fraud in the creation of his indebtedness or the disposition of his property. To legislate for the prevention of frauds in either of these particulars, when committed in contemplation of bankruptcy, would seem to be within the competency of Congress. Any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offence against the United States. But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the State can alone legislate.

The act described in the ninth subdivision of sect. 5132 of the Revised Statutes is one which concerns only the State in which it is committed: it does not concern the United States. It is quite possible that the framers of the statute intended it to apply only to acts committed in contemplation

of bankruptcy; but it does not say so, and we cannot supply qualifications which the legislature has failed to express.

Our answer to the question certified must be in the negative; and it will be so returned to the Circuit Court.

National Bank v. Insurance Company.

1. When a party states, in his application for an insurance, that he has made a just, full, and true exposition of all material facts and circumstances in regard to the condition, situation, value, and risk of the property, so far as known to him, and the application is expressly made a part of the policy, should it afterwards appear that he overestimated the value of the property, the policy would not be vitiated, unless it be shown that the estimate was intentionally excessive.
2. When a policy contains contradictory provisions, or is so framed as to render it doubtful whether the parties intended that the exact truth of the applicant's statements should be a condition precedent to any binding contract, that construction which imposes upon the assured the obligations of a warranty should not be favored.
3. The policy having been prepared by the insurers, it should be construed most strongly against them.

Error to the Circuit Court of the United States for the Western District of Missouri.

This is an action on a policy of insurance issued by the Hartford Fire Insurance Company to W. D. Oldham, on certain mill property, building, and machinery, and by him transferred and assigned to the First National Bank of Kansas City, Mo. The parties, by written stipulation, waived a jury; and, upon a special finding of facts, the Circuit Court gave judgment for the company. The bank thereupon sued out this writ of error.

It appears from the special finding, that, by the terms of the application, the assured was required to state separately "the estimated value of personal property and of each building to be insured, and the sum to be insured on each; . . . the value of the property being estimated by the applicant." The applicant was also directed to answer certain questions, and sign the same "as a description of the premises on which the insurance will be predicated." Among the questions to be answered were:

"What is the cash value of the buildings, aside from hand and water power? What is the cash value of the machinery?" The answer was: "$15,000, building; $15,000, machinery."

The application concludes with these words: —

"And the said applicant hereby covenants and agrees to and with said company, that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk."

The policy refers to the application in these words: —

"Special reference being had to assured's application and survey, No. 1462, on file, which is his warranty, and a part hereof."

The policy further recites: —

"If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this policy, and a warranty by the assured; and if the assured, in a written or verbal application, makes any erroneous representation, or omits to make known any fact material to the risk, . . . then, and in any such case, this policy shall be void. . . . Any fraud or attempt at fraud, or any false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy."

The policy also declares that it is made and accepted upon the above, among other, express conditions.

It is found by the court that when the policy was issued, as well as at the date of the destruction of the property by fire, the cash value of the building, aside from hand and water power, was $8,000, and no more; and the cash value of the machinery, at the same dates, was $12,000, and no more.

The court also found that "the answers made by the assured to the questions contained in the application were made by him in good faith, without any intention on his part to commit any fraud on the defendant."

It is further declared in the special finding, that, "under the provisions of the policy and application, made part thereof, the court finds, as a conclusion of law, that the answers of the assured as to the value of the property insured defeat the right to recover on the policy."

Mr. John K. Cravens for the plaintiff in error cited May on Ins., sects. 156, 160, 164, 168, 169; *Elliot* v. *Hamilton Mutual Insurance Co.*, 13 Gray (Mass.), 139; *Fitch* v. *American Popular Life Insurance Co.*, 59 N. Y. 557; *Germania Fire Insurance Co.* v. *Casteel*, 9 Chicago Legal News, 374; *Franklin Insurance Co.* v. *Vaughan*, 92 U. S. 516; *Yeaton* v. *Fry*, 5 Cranch, 342.

Mr. John C. Gage, *contra*, cited *Owens* v. *Holland Purchase Insurance Co.*, 56 N. Y. 565; *First National Bank of Ballston Spa* v. *Insurance Company of North America*, 50 id. 45; *Ripley* v. *The Ætna Insurance Co.*, 30 id. 136; *Ætna Life Insurance Co.* v. *France et al.*, 91 U. S. 110; *Jeffries* v. *Life Insurance Co.*, 22 Wall. 47; *Leroy* v. *The Market Fire Insurance Co.*, 39 N. Y. 90; *Conover* v. *The Massachusetts Insurance Co.*, 3 Dill. 217; *Miles et al.* v. *Connecticut Mutual Life Insurance Co.*, 3 Gray (Mass.), 580; *Campbell* v. *New England Mutual Life Insurance Co.*, 98 Mass. 381; *Cooper* v. *Farmers' Mutual Fire Insurance Co.*, 50 Pa. St. 305.

MR. JUSTICE HARLAN delivered the opinion of the court.

On behalf of the company, it is contended that, under any proper construction of the contract, the assured warranted, absolutely and without limitation, the truth of the several statements in the application, including the statement as to the value of the property. If this view be sound, the judgment of the Circuit Court must be affirmed; otherwise, it must be reversed.

Our conclusion is that the plaintiff in error, who is the beneficiary of the policy, is entitled to a judgment, notwithstanding the overvaluation of the property by the assured.

The entire application having been made, by express words, a part of the policy, it is entitled to the same consideration as if it had been inserted at large in that instrument. The policy and application together, therefore, constitute the written agreement of insurance; and, in ascertaining the intention of the parties, full effect must be given to the conditions, clauses, and stipulations contained in both instruments.

Looking first into the application, we find no language which, by fair construction, was notice to the assured that, in answering questions, he was assuming, or was expected to assume, the

strict obligations which the law attaches to a warranty. There is no intimation anywhere in that instrument that the exact truth of the answers was a condition precedent, either to the consideration of the application or to the issuing of a policy. On the contrary, the application contains the covenant of the assured that he had in that instrument made a just, full, and true exposition of all material facts and circumstances in regard to the condition, situation, value, and risk of the property, so far as known to him. The taking of that covenant, at the threshold of the negotiations, was, in effect, an assurance that a frank statement of all such material facts as were within the knowledge of the applicant would meet the requirements of the company. It was a covenant of good faith on the part of the assured, — nothing more; and, so far as it related to the value of the property, was not broken, unless the estimates by the assured were intentionally excessive. If the case turned wholly upon the construction to be given to the application, it is quite clear that the overvaluation of the property would not defeat a recovery upon the written agreement, since the assured, by the special finding, is acquitted of any purpose to defraud the company. That is equivalent to saying that the assured did not withhold any material fact within his knowledge concerning the condition, situation, value, or risk of the property.

But the difficulty in the case arises from the peculiar wording of the policy, considering the application as a part thereof. While the assured in one part of the written agreement is made to stipulate for a warranty, and in another the policy is declared to be void if the assured "makes any erroneous representation, or omits to make known any fact material to the risk," in still another part of the same agreement — the application — he covenants that, as to all material facts within his knowledge, respecting the condition, situation, value, and risk of the property, he has made a full, just, and true exposition. If the purpose of the company was to secure a warranty of the correctness of each statement in the application, and if the court should adopt that construction of the contract, there could be no recovery on the policy, if any one of these statements were proven to be untrue; and this, although such statement may have been wholly immaterial to the risk, and was made without

any intent to mislead or defraud. Such a construction, according to established doctrine, might defeat the recovery, even if the overvaluation had been so slight as not to have influenced the company in accepting the risk. But if such was the purpose of the company, why did it not stop with the express declaration of a warranty? Why did it go further, and incorporate into the policy a provision for its annulment in the event the assured should make an "erroneous representation, or omit to make known any fact material to the risk"? — language inconsistent with the law of warranty. Still further, why did the company make the application a part of the policy, and thereby import into the contract the covenant of the assured, not that he had stated every fact material to the risk, or that his statements were literally true, but only that he had made a just, true, and full exposition of all material facts, so far as known to him.

It is the duty of the court to reconcile these clauses of the written agreement, if it be possible to do so consistently with the intention of the parties, to be collected from the terms used.

It will be observed, from an examination of the questions propounded to the assured, that, among other things, he was asked whether the building was of stone, brick, or wood; how the premises were warmed; what materials were used for lighting them; whether a watchman was kept during the night; what amount of insurance was already on the property; whether it was mortgaged, &c. These and similar questions refer to matters of which the assured had actual knowledge, or about which he might, with propriety, be required to speak with perfect accuracy. They are matters capable of precise ascertainment, and in no sense depending upon estimate, opinion, or mere probability. But his situation and duty were wholly different when required to state the cash value of his property. He was required to give its "estimated value." His answers concerning such value were, in one sense, and, perhaps, in every just sense, only the expression of an opinion. The ordinary test of the value of property is the price it will command in the market if offered for sale. But that test cannot, in the very nature of the case, be applied at the time application is

made for insurance. Men may honestly differ about the value of property, or as to what it will bring in the market; and such differences are often very marked among those whose special business it is to buy and sell property of all kinds. The assured could do no more than estimate such value; and that, it seems, was all that he was required to do in this case. His duty was to deal fairly with the company in making such estimate. The special finding shows that he discharged that duty and observed good faith. We shall not presume that the company, after requiring the assured in his application to give the "estimated value," and then to covenant that he had stated all material facts in regard to such value, so far as known to him, and after carrying that covenant, by express words, into the written contract, intended to abandon the theory upon which it sought the contract, and make the absolute correctness of such estimated value a condition precedent to any insurance whatever. The application, with its covenant and stipulations, having been made a part of the policy, that presumption cannot be indulged without imputing to the company a purpose, by studied intricacy or an ingenious framing of the policy, to entrap the assured into incurring obligations which, perhaps, he had no thought of assuming.

Two constructions of the contract may be suggested. One is to regard the warranty expressed in the policy as limited or qualified by the terms of the application. In that view, the assured would be held as only warranting that he had stated all material facts in regard to the condition, situation, value, and risk of the property, so far as they were known to him. This is, perhaps, the construction most consistent with the literal import of the terms used in the application and the policy. The other construction is to regard the warranty as relating only to matters of which the assured had, or should be presumed to have had, distinct, definite knowledge, and not to such matters as values, which depend upon mere opinion or probabilities. But, without adopting either of these constructions, we rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the

exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself.

Wherefore, as it does not clearly appear that the parties intended that the validity of the contract of insurance should depend upon the absolute correctness of the estimates of value, and as it does appear that such estimates were made by the assured without any intention to defraud, our opinion is that the facts found do not support the judgment.

The judgment will, therefore, be reversed, and the cause remanded with directions to enter a judgment upon the special finding for the plaintiff in error; and it is

So ordered.

FARRINGTON *v.* TENNESSEE.

The charter of a bank, granted by the legislature of Tennessee, provides, that the bank "shall pay to the State an annual tax of one-half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes." *Held*, 1. That this provision is a contract between the State and the bank, limiting the amount of tax on each share of the stock. 2. That a subsequent revenue law of the State, imposing an additional tax on the shares in the hands of stockholders, impairs the obligation of that contract, and is void.

ERROR to the Supreme Court of the State of Tennessee.

The Union and Planters' Bank of Memphis is a banking corporation, doing business at Memphis, Shelby County, Tennessee, organized under a charter granted by the General Assembly of that State March 20, 1858, and amended Feb. 12, 1869, the tenth section of which provides that "said company shall pay

to the State an annual tax of one-half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes."

Sect. 1 of an act of the General Assembly of 1869–70, c. 81, provides: "All shares of stock in any bank, institution, or company, now or hereafter incorporated by or in pursuance of any law of this State or any other State, . . . shall be valued and assessed, and subject to taxation."

The bank paid the said tax of one-half of one per cent for the year 1872.

Farrington was throughout that year the owner of one hundred and fifty shares of the stock of the bank, upon which the State and the county of Shelby, severally claiming the right under that act to do so, assessed against him for that year, taxes at the same rate that they were assessed and levied upon other taxable property. He resisted the payment of them, upon the ground that, by sect. 10 of the charter, the bank, its franchises and capital stock, and also the shares of stock of the individual stockholder, were subject to no taxation other than the specific sum nominated in the charter; and that the act in question impaired the obligation of the contract stipulating to accept that sum in lieu of all other taxes, and was, therefore, in violation of sect. 10, art. 1, of the Constitution of the United States.

A suit was brought to test the validity of the assessment in the Second Chancery Court of Shelby County; and it was agreed, that, in the event of a decision adverse to Farrington, judgment should be rendered against him for $60 and $180, the amount of the taxes assessed by the State and county respectively, with interest from the first day of January, 1873. If the decision should be in his favor, then the judgment should be that said taxes were illegally assessed; that said shares of stock were exempt from all other taxation except the aforesaid one-half of one per cent to the State, as provided in the tenth section of the bank's charter; and, further, that the collection of said taxes be enjoined, and such other appropriate decree rendered as the court might deem proper, in order to protect him and his assigns from taxation on said stock. Each party reserved the right of appeal. The court rendered a decree enjoining the collection of the taxes, which was reversed by

the Supreme Court of the State, on the ground that the said shares of stock were not the property or thing exempted, but other and different, and so were not within the protection of the charter and of the Constitution of the United States; and it was adjudged that Farrington should pay to the State and the county respectively the said sums of money assessed upon his shares of stock.

Farrington thereupon sued out this writ of error.

The case was argued by *Mr. H. E. Jackson* and *Mr. L. D. McKisick* for the plaintiff in error, and by *Mr. J. B. Heiskell*, Attorney-General of Tennessee, and *Mr. S. P. Walker*, for the defendant in error.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This case lies within narrow limits. The question to be decided arises under the Constitution of the United States. The ground of the discussion has been well trodden by our predecessors. Little is left for us but to apply the work of other minds. The facts are agreed by the parties, and may be briefly stated.

The Union and Planters' Bank of Memphis was duly organized under a charter granted by the Legislature of Tennessee, by two acts, bearing date respectively on the 20th of March, 1858, and the 12th of February, 1869. Since its organization, it has been doing a regular banking business. Its capital stock subscribed and paid in amounts to $675,000, divided into six thousand seven hundred and fifty shares of $100 each. Farrington, the plaintiff in error, was, throughout the year 1872, the owner of one hundred and fifty shares, of the value of $15,000.

The tenth section of the charter of the bank declares "that the said company shall pay to the State an annual tax of one-half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes."

The State of Tennessee and the county of Shelby claiming the right, under the revenue laws of the State, to tax the stock of the plaintiff in error, assessed and taxed it for the year 1872. It was assessed at its par value. The tax imposed by the State was forty cents on the $100, making the State tax $60. The

county tax was $1.20 on the $100, making the county tax $180.

The plaintiff in error denies the right of the State and county to impose these taxes. He claims that the tenth section of the charter was a contract between the State and the bank; that any other tax than that therein specified is expressly forbidden; and that the revenue laws imposing the taxes in question impair the obligation of the contract. The Supreme Court of the State adjudged the taxes to be valid. The case was thereupon removed to this court by the plaintiff in error for review.

A compact lies at the foundation of all national life. Contracts mark the progress of communities in civilization and prosperity. They guard, as far as is possible, against the fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellowman. They are the springs of business, trade, and commerce. Without them, society could not go on. Spotless faith in their fulfilment honors alike communities and individuals. Where this is wanting in the body politic, the process of descent has begun, and a lower plane will be speedily reached. To the extent to which the defect exists among individuals, there is decay and degeneracy. As are the integral parts, so is the aggregated mass. Under a monarchy or an aristocracy, order may be upheld and rights enforced by the strong arm of power. But a republican government can have no foundation other than the virtue of its citizens. When that is largely impaired, all is in peril. It is needless to lift the veil and contemplate the future of such a people. *Trist* v. *Child*, 21 Wall. 441; 1 Montesquieu's Spirit of Laws, 25. History but repeats itself. The trite old aphorism, that "honesty is the best policy," is true alike of individuals and communities. It is vital to the highest welfare.

The Constitution of the United States wisely protects this interest, public and private, from invasion by State laws. It declares that "no State shall . . . pass any . . . law impairing the obligation of contracts." Art. 1, sect. 10. This limitation no member of the Union can overpass. It is one of

the most important functions of this tribunal to apply and enforce it upon all proper occasions.

This controversy has been conducted in a spirit of moderation and fairness eminently creditable to both parties. The State is obviously seeking only what she deems to be right. The judges of her own highest court, whence the case came here, were divided in opinion.

Contracts are executed or executory. A contract is executed where every thing that was to be done is done, and nothing remains to be done. A grant actually made is within this category. Such a contract requires no consideration to support it. A gift consummated is as valid in law as any thing else. *Dartmouth College* v. *Woodward*, 4 Wheat. 518. An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both the parties. Only a slight consideration is necessary. *Pillans* v. *Van Mierop*, 3 Burr. 1663; *Forth* v. *Stanton*, 1 Saund. 210, note 2, and the cases there cited.

The constitutional prohibition applies alike to both executory and executed contracts, by whomsoever made. The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of this court to redress the wrong. *Von Hoffman* v. *City of Quincy*, 4 Wall. 535.

The doctrine of the sacredness of vested rights has its root deep in the common law of England, whence so much of our own has been transplanted. Kent, then chief justice, said: It is a principle of that law, "as old as the law itself, that a statute even of its omnipotent Parliament is not to have a retrospective effect. *Nova constitutio futuris formam imponere debet et non preteritis*. Bracton, lib. 228; 2 Inst. 292." *Dash* v. *Van Kleeck*, 7 Johns. (N. Y.) 477. See also *Society, &c.* v. *Wheeler et al.*, 2 Gall. 105, and Broom's Legal Maxims, 34.

It was settled at an early period that it was the prerogative of the king to create corporations; but he could not grant the same identical powers to a second corporation while the prior one subsisted, and, unless the power was reserved, he could not alter, amend, or annul a charter without the consent of the cor-

porate body to which it belonged. To the extent of such assent amendments were effectual, and no further. *Dartmouth College* v. *Woodward*, *supra*; *The King* v. *Passmore*, 3 T. R. 199, and the cases cited.

In the worst times of English history no attempt was made by the crown to do either of these things *in invitum*.

Near the close of the reign of Charles the Second, the charters of many cities were wrested from them. The case of the City of London was the most memorable. It was done under the forms of law, by means of a corrupt judiciary. After the Revolution of 1688, and the accession of William and Mary to the throne, the charter of the metropolis was restored, and immunity was given to it, by an act of Parliament, against such assaults in future. 3 Bl. Com. 264; 2 Campbell's Lives of the Chief Justices, 41.

It is the theory of the British Constitution that Parliament is omnipotent. It can pass bills of attainder and acts of confiscation. Gibbon's Autobiography, 14. It can also create and destroy corporations. But these things involve the exercise, not of its ordinary, but of an extraordinary power, not unlike that of the Roman emperors, sometimes applied in moulding and administering the civil law in special cases.

In *The King* v. *Passmore*, *supra*, Justice Buller said he "considered the grant of incorporation to be a compact between the crown and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves to" carry out the objects of the grant.

The question whether there is in such cases a contract within the meaning of the contract clause of the Constitution of the United States came for the first time before this court in the Dartmouth College case. A college charter was granted by the king before the American Revolution. The State of New Hampshire, by several acts of her legislature, of the 27th of June and of the 18th and 26th of December, 1816, attempted materially to change the original charter and modify the government of the institution which had grown up under it. The college resisted. The case was brought here for final decision. It was argued at the bar with consummate ability. The judg-

ments of the justices of this court who delivered opinions were characterized by a wealth of learning and force of reasoning rarely equalled. Perhaps the genius of Marshall never shone forth in greater power and lustre.

It was said, among other things, that the ingredients of a contract are parties, consent, consideration, and obligation. The case presented all these. The parties were the king, and the donees of the powers and privileges conferred. Consent was shown by what they did. The consideration was the investment of moneys for the purposes of the foundation, the public benefits expected to accrue, and an implied undertaking of the corporation faithfully to fulfil the duties with which it was charged. The obligation was to do the latter, under the penalty of forfeiture in case of "non-user, misuser, or abuser." On the part of the king there was an implied obligation that the life of the compact should be subject to no other contingency. The question decided in that case has since been considered as finally settled in the jurisprudence of the entire country. Murmurs of doubt and dissatisfaction are occasionally heard; but there has been no reargument here, and none has been asked for. The same doctrine has been often reaffirmed in later cases. The last one is *New Jersey* v. *Yard*, decided at this term, *supra*, p. 104. In none of them has there been a dissent upon this point.

In cases involving Federal questions affecting a State, the State cannot be regarded as standing alone. It belongs to a union consisting of itself and all its sister States. The Constitution of that union, and "the laws made in pursuance thereof, are the supreme law of the land, . . . any thing in the Constitution or laws of any State to the contrary notwithstanding;" and that law is as much a part of the law of every State as its own local laws and Constitution. *Farmers' & Mechanics' Bank* v. *Deering*, 91 U. S. 29.

Yet every State has a sphere of action where the authority of the national government may not intrude. Within that domain the State is as if the union were not. Such are the checks and balances in our complicated but wise system of State and national polity.

This case turns upon the construction to be given to the

tenth section of the charter of the bank. Our attention has been called to nothing else.

The exercise of the taxing power is vital to the functions of government. Except where specially restrained, the States possess it to the fullest extent. *Prima facie* it extends to all property, corporeal and incorporeal, and to every business by which livelihood or profit is sought to be made within their jurisdiction. When exemption is claimed, it must be shown indubitably to exist. At the outset, every presumption is against it. A well-founded doubt is fatal to the claim. It is only when the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported. *West Wisconsin Railway Co.* v. *Board of Supervisors*, 93 U. S. 595; *Tucker* v. *Ferguson*, 22 Wall. 527.

Can the exemption here in question, examined by the light of these rules, be held valid?

Upon looking into the section, several things clearly appear: 1. The tax specified is upon each share of the capital stock, and not upon the capital stock itself. 2. It is upon each share subscribed. Nothing is said about what is paid in upon it. That is immaterial. The fact of subscription is the test, and that alone is sufficient. 3. This tax is declared to be "in lieu of all other taxes." Such was the contract of the parties.

The capital stock and the shares of the capital stock are distinct things. The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations. It represents whatever it may be invested in. If a large surplus be accumulated and laid by, that does not become a part of it. The amount authorized cannot be increased without proper legal authority. If there be losses which impair it, there can be no formal reduction without the like sanction. No power to increase or diminish it belongs inherently to the corporation. It is a trust fund, held by the corporation as a trustee. It is subject to taxation like other property. If the bank fail, equity may lay hold of it, administer it, pay the debts, and give the residuum, if there be any, to the stockholders. If the corporation be dissolved by judgment of law, equity may interpose and perform the same functions. *Wood* v. *Dummer*,

3 Mas. 308; *Curran* v. *Arkansas*, 15 How. 304; *Gordon* v. *The Appeal Tax Court*, 3 id. 133; *People* v. *The Commissioners*, 4 Wall. 244; *Van Allen* v. *The Assessors*, 3 id. 573; *Queen* v. *Arnaud*, 9 Ad. & E. N. S. 806; *Bank Tax Cases*, 2 Wall. 200.

The shares of the capital stock are usually represented by certificates. Every holder is a *cestui que trust* to the extent of his ownership. The shares are held and may be bought and sold and taxed like other property. Each share represents an aliquot part of the capital stock. But the holder cannot touch a dollar of the principal. He is entitled only to share in the dividends and profits. Upon the dissolution of the institution, each shareholder is entitled to a proportionate share of the residuum after satisfying all liabilities. The liens of all creditors are prior to his. The corporation, though holding and owning the capital stock, cannot vote upon it. It is the right and duty of the shareholders to vote. They in this way give continuity to the life of the corporation, and may thus control and direct its management and operations. The capital stock and the shares may both be taxed, and it is not double taxation. The bank may be required to pay the tax out of its corporate funds, or be authorized to deduct the amount paid for each stockholder out of his dividends. Angell & A. on Corp., sects. 556, 557; *Union Bank* v. *The State*, 9 Yerg. (Tenn.) 490; *Van Allen* v. *The Assessors*, *supra*; *Bradley* v. *The People*, 4 Wall. 459; *Queen* v. *Arnaud*, *supra*; *National Bank* v. *Commonwealth*, 9 Wall. 353; *The State* v. *Branin*, 3 Zab. (N. J.) 484; *M' Culloch* v. *Maryland*, 4 Wheat. 316.

There are other objects in this connection liable to taxation. It may be well to advert to some of them.

1. The franchise to be a corporation and exercise its powers in the prosecution of its business. Burroughs on Taxation, sect. 85; *Hamilton* v. *Massachusetts*, 6 Wall. 632; *Wilmington Railroad* v. *Reid*, 13 id. 264.

2. Accumulated earnings. *The State* v. *Utter*, 34 N. J. L. 493; *The St. Louis Mutual Insurance Co.* v. *Charles*, 47 Mo. 462.

3. Profits and dividends. *The Attorney-General* v. *Bank, &c.*, 4 Jones (N. C.) Eq. 287.

4. Real estate belonging to the corporation and necessary

for its business. *Wilmington Railroad* v. *Reid*, *supra*; *The Bank of Cape Fear* v. *Edwards*, 5 Ired. (N. C.) L. 516.

5. Banks and bankers are taxed by the United States: 1. On their deposits. 2. On the capital employed in their business. 3. On their circulation. 4. On the notes of every person or State bank used and paid out for circulation. Rev. Stat. 673 *et seq.*

The States are permitted, in addition, to tax the shares of the national banks. Id. 1015.

This enumeration shows the searching and comprehensive taxation to which such institutions are subjected, where there is no protection by previous compact.

Unrestrained power to tax is power to destroy. *M'Culloch* v. *Maryland*, *supra*.

When this charter was granted, the State might have been silent as to taxation. In that case, the power would have been unfettered. *The Providence Bank* v. *Billings*, 4 Pet. 514. It might have reserved the power as to some things, and yielded it as to others. It had the power to make its own terms, or to refuse the charter. It chose to stipulate for a specified tax on the shares, and declared and bound itself that this tax should be "in lieu of all other taxes."

There is no question before us as to the tax imposed on the shares by the charter. But the State has by her revenue law imposed another and an additional tax on these same shares. This is one of those "other taxes" which it had stipulated to forego. The identity of the thing doubly taxed is not affected by the fact that in one case the tax is to be paid vicariously by the bank, and in the other by the owner of the share himself. The thing thus taxed is still the same, and the second tax is expressly forbidden by the contract of the parties. After the most careful consideration, we can come to no other conclusion. Such, we think, must have been the understanding and intent of the parties when the charter was granted and the bank organized. Any other view would ignore the covenant that the tax specified should be "in lieu of all other taxes." It would blot those terms from the context, and construe it as if they were not a part of it.

There is no reservation or discrimination as to any "other

tax." All are alike included. Such is the natural effect of the language used. The most subtle casuistry to the contrary is unavailing. Under such a contract between individuals, a doubt could not have existed. It may as well be said the power is reserved to tax any thing else, as further to tax the shares. We cannot so hold, without interpolating into the clause a term which it does not contain. This we may not do. Our duty is to enforce the contract as we find it, and not to make a new one. If it was intended to make the exception claimed from the universality of the exemption as expressed, it would have been easy to say so, and it is fairly to be presumed this would have been done. In the absence of this expression, we can find no evidence of such an intent. Our view is fully sustained by the leading authorities upon the subject. We will refer to a few of them.

In *The Binghampton Bridge*, 3 Wall. 51, it was declared by the act of the legislature authorizing the bridge to be built that it should not be lawful to build any other bridge within two miles above or below the one so authorized. This court held the inhibition to be a covenant, and upheld and enforced the restriction against the authority conferred by a later act of the legislature authorizing a bridge to be so built.

In *Wilmington Railroad* v. *Reid*, *supra*, the charter declared that "the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever." The legislature passed laws taxing the entire franchise and rolling-stock, and certain lots of land necessary to the business of the company. This court held the exemption to be a contract, and adjudged the laws to be void.

The Union Bank v. *The State*, 9 Yerg. (Tenn.) 490, is a case marked by eminent judicial ability and careful thought. There it was stipulated, "that, in consideration of the privileges granted by this charter, the bank agrees to pay to the State annually the one-half of one per cent on the amount of the capital stock paid in by stockholders other than the State."

It was held that a further tax on the capital stock was void, but that the State might tax the shares in the hands of individuals.

In the case before us, the charter tax is upon the shares.

The tax complained of is a further tax on those shares. Without the phrase, "in lieu of all other taxes," the parallelism is complete. A further tax could no more be imposed upon the shares in one case than upon the capital stock in the other. The same negative considerations apply to both.

In *The Bank of Cape Fear* v. *Edwards*, *supra*, the charter provided "that a tax of twenty-five cents on each share of stock owned by individuals in said bank shall be annually paid into the treasury of the State by the president or cashier of the said bank on or before the first day of October in each year, and the said bank shall not be liable to any further tax." It was held that the bank was liable to no other tax, State or county, and that the banking-house and the lot upon which it stood was within the exemption.

Gordon v. *The Appeal Tax Court* seems to us conclusive of the case in hand. The legislature of Maryland continued the charters of certain banks on condition that they would make a road and pay a school tax; and it was provided that, upon any of the banks complying, the faith of the State was pledged not to impose any further tax or burden upon them during the continuance of their charters under the act.

It was held by this court that this was a contract, and that it exempted the stockholders from a tax levied upon them as individuals, according to the amount of their stock.

Comment here is unnecessary. The points of analogy are too obvious and cogent to require remark. See also *State Bank of Ohio* v. *Knoop*, 16 How. 369; *Dodge* v. *Woolsey*, 18 id. 331; and *Home of the Friendless* v. *Rouse*, 8 Wall. 430.

The decree of the Supreme Court of Tennessee will be reversed, and the case remanded with directions to enter a decree in favor of the plaintiff in error; and it is *So ordered.*

NOTE. — In *Dunscomb* v. *Tennessee*, *Wicks* v. *Same*, *Neely* v. *Same*, error to the Supreme Court of the State of Tennessee, which were argued by the same counsel as was the preceding case, and in *Hill* v. *Tennessee*, which was argued by *Mr. D. E. Myers* for the plaintiff in error, and by *Mr. J. B. Heiskell*, Attorney-General of Tennessee, and *Mr. S. P. Walker*, for the defendant in error, MR. JUSTICE SWAYNE, in delivering the opinion of the court, remarked: These cases are all disposed of by the opinion in *Farrington* v. *Tennessee*, *supra*, p. 679. The questions are substantially the same as in that case, and the results must be the same. The decrees of the Supreme Court of Tennessee are reversed, and the cases will be remanded with directions to enter decrees in favor of the respective plaintiffs in error.

MR. JUSTICE STRONG, with whom concurred MR. JUSTICE CLIFFORD and MR. JUSTICE FIELD, dissenting.

I cannot concur in the judgments entered in these cases. If there be any doctrine founded in justice, and necessary to the safety and continued existence of a State, it is that all presumptions are against the legislative intent to relinquish the power of taxation over any species of property. In *The Providence Bank* v. *Billings*, 4 Pet. 514, Chief Justice Marshall, speaking for the court, said: "As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon does not appear." In *The Ohio Life Insurance and Trust Co.* v. *Debolt*, 16 How. 416, Chief Justice Taney, speaking of legislative acts incorporating companies, said: "The rule of construction in cases of this kind has been well settled by this court. The grant of privileges and exemptions to a corporation are (is) strictly construed against the corporation and in favor of the public. Nothing passes but what is granted in clear and explicit terms. And neither the right of taxation nor any other power of sovereignty which the community have an interest in possessing undiminished will be held by this court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken." This doctrine we have many times reiterated and applied. And I do not understand that it is now denied. But I think a majority of my brethren, in the judgments now given, have failed to apply it to the construction of the acts of the Tennessee legislature under consideration in these cases.

One other thing, it appears to me, should be regarded as settled beyond doubt. It is that a tax upon a corporation proportioned to the capital stock, or to the number of shares of its capital stock, is a different thing from a tax upon the individual shareholders of stock in the corporation. The capital stock, and the shares of that stock in the hands of stockholders, are different properties, and consequently distinct subjects for taxation. An exemption of the one is not of itself an exemption of the other, nor is the taxation of the one a tax upon the other in such a sense as to interfere with any exemption the lat-

ter may have from taxation. In *The Delaware Railroad Tax*, 18 Wall. 206, a clause in a charter providing that a company should, in addition to other taxes, pay to the treasurer of the State, for its use, one-fourth of one per cent upon the actual cash value of every share of its capital stock, was held to be not a tax upon the shares of the individual stockholders, but a tax on the corporation, determined by a rule which, though arbitrary, was yet approximately just. So, in *Van Allen* v. *The Assessors*, 3 id. 573, this court said a tax on shares of stock is not a tax on the capital of a bank, and that the shares are a distinct, independent interest or property held by the stockholder, and, like any other property that may belong to him, subject to taxation.

If, now, these two acknowledged doctrines are allowed to have their just effect upon the decision of these cases, I cannot see how the stockholders in the several corporations whose charters we are requested to construe can claim an exemption from taxation upon their individual shares of stock. The exemption clause in the charters of two of the companies is: "Said institution shall pay to the State an annual tax of one-half of one per cent on each share of capital stock subscribed, which shall be in lieu of all other taxes." The exemption clause in two other of the charters is in substantially the same words, except that the word "company" is substituted for the word "institution." The clause in the fifth charter reads thus: "That there shall be levied a State tax of one-half of one per cent upon the amount of capital stock actually paid in, to be collected in the same way and at the same time as other taxes are by law collected, which shall be in lieu of all other taxes and assessments."

I agree with the majority of the court that there is no substantial difference in the extent of the exemption offered in these several charters, though there is some difference in their phraseology. But I think that the benefit of the exemption is in each case for the corporation. It was not intended for the individual stockholder. The legislature were dealing with the proposed corporations. The corporate power granted and the immunities allowed were to the corporations, and the contract found in the charter was with the artificial being created,

rather than with the natural persons who might have an interest in them. The language of the acts is, the "institution" shall pay, or the "company" shall pay, an annual tax, which shall be in lieu of all other taxes. It was, therefore, the institutions or corporations the legislature had in view, alike in imposing the tax and granting the immunity, and not the natural persons who might happen to own shares of stock in the corporations. It is true that in several of the charters the corporations are required to pay a tax on each share of capital stock subscribed, and in one upon the amount of capital stock paid in. Hence it has been argued the legislature had shares in view; and from this the further inference is sought to be drawn, that the purpose was to tax alike the corporations and the stockholders, and to exempt both from all other taxation. Such a construction is, however, directly in conflict with the ruling in *The Delaware Railroad Tax*, *supra*, and with the expressed declaration that the company or institution shall pay the tax to the State, which was to be in lieu of other taxation. Besides, the reference to each share of capital stock subscribed is easily accounted for, without holding that the shareholder, as well as the companies, were intended to be exempted. The amount of capital stock authorized for each company was fixed by its charter, and divided into shares. It was quite possible that the whole stock authorized might not be subscribed. In view of this, the companies were required to pay a tax, not upon their entire authorized capital, but to the extent of the shares subscribed. If such was the intent of the legislature, reference to the shares was necessary, and it raises no implication that the tax imposed was designed to be for the individual interest of the shareholders in the corporations, and that the exemption from further taxation was granted to them.

After all, the true question in these cases is, whether a contract in express terms between the State and a corporation, to exempt its property and franchises from taxation, shall, by construction, extend to and exempt the property of individual stockholders, — property which, for the purposes of taxation, is entirely different from that of the corporation. I think there is no ground for such a construction; none for any such implication. If, however, I am mistaken, it is certainly true

that such a construction is not necessary. The words of the charter granting the exemption are fully satisfied by confining their operation to the corporations themselves; and I do not feel at liberty to give them a broader significance, in view of the settled rule I have noticed, that a State's right of taxation will not be held to have been surrendered unless the intention to surrender is manifested in words too plain to be mistaken. Had the legislature intended to extend the exemption beyond the companies themselves, it would have been easy to place the intent beyond doubt, by simply saying the tax should be in lieu of all other taxation of the company or its stockholders. But nothing like this, or equivalent to it, is found in the charter.

I find nothing in *Gordon* v. *The Appeal Tax Court*, 3 How. 133, so much relied upon by the plaintiffs in error, necessarily inconsistent with what I have said. That case has not been well understood. The circumstances were peculiar, and the decision rendered should be considered with reference to the peculiar facts which appeared in it. What was, in fact, decided we had occasion to observe in *People* v. *The Commissioners*, 4 Wall. 244, where Mr. Justice Nelson directed attention to the circumstances that more or less controlled the judgment.

For these reasons, which I have not time to elaborate, I think the judgments of the Supreme Court of Tennessee should be affirmed.

THOMPSON *v.* BUTLER.

In a suit in the Circuit Court, where the defendant pleaded neither a set-off nor a counter-claim, the plaintiff remitted so much of a verdict in his favor as was in excess of $5,000, and took judgment for the remainder "in coin." The defendant sued out a writ of error. *Held*, that the amount in controversy, whether payable in coin or any other kind of money, is not sufficient to give this court jurisdiction.

MOTION to dismiss a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

Mr. G. A. Somerby and *Mr. L. S. Dabney*, for the defendant in error, in support of the motion.

Mr. J. Hubley Ashton and *Mr James Thomson, contra.*

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

This was an action by Butler against Thompson, to recover damages for not accepting a quantity of iron under an alleged contract of purchase. Upon the trial, the jury rendered a verdict against Thompson of $5,066.17 "in gold;" but, before judgment, Butler remitted $66.17, and judgment was entered Nov. 13, 1876, for $5,000 "in coin." Thompson having brought the case here by writ of error, Butler moves to dismiss, because the "matter in dispute" does "not exceed the sum or value of $5,000."

As the writ of error was sued out by the defendant below, the amount in controversy was fixed by the judgment. *Gordon* v. *Ogden*, 3 Pet. 33; *Knapp* v. *Banks*, 2 How. 73; *Walker* v. *United States*, 4 Wall. 163; *Merrill* v. *Petty*, 16 id. 338. No question is presented growing out of a set-off or counter-claim, as was the case in *Ryan* v. *Bindley*, 1 id. 66.

Our jurisdiction cannot be invoked until the final judgment below has been rendered; and we cannot open the record to look for errors until jurisdiction has been established. The court below retains full control of a cause until final judgment has been entered; and it follows that, if for any reason a judgment is given against a defendant in a case involving the plaintiff's cause of action alone, unaffected by counter-claim or set-off, for a sum less than our jurisdictional amount, we have no power, at the instance of the defendant, to correct errors that may have been committed in settling the amount. We can only look at a verdict through the record; and, if the record is closed to us, so necessarily must be the verdict. In this case, therefore, we are precluded from inquiry into the propriety of allowing the verdict to be reduced before judgment was entered upon it. Necessarily, verdicts are, to some extent, subject to the control of the court. It is not unusual for a court to announce that a new trial will be granted unless a part of a verdict shall be remitted, and to enter judgment upon the reduced amount if the suggestion is followed. All such matters may properly be left to the sound judicial discretion of the court in which the trial is had; and errors committed under this power can only be corrected by an appellate court in the same manner that

other errors are. Undoubtedly, the trial court may refuse to permit a verdict to be reduced by a plaintiff upon his own motion; and, if the object of the reduction is to deprive an appellate court of jurisdiction in a meritorious case, it is to be presumed the trial court will not allow it to be done. If, however, the reduction is permitted, the errors in the record will be shut out from our re-examination in cases where our jurisdiction depends upon the amount in controversy. In *Sampson* v. *Welch*, 24 How. 207, we refused to take jurisdiction upon an appeal in admiralty, where a decree had been rendered against a respondent for more than $2,000, with leave to him, if he chose, to set off an amount due him for freight, and he afterwards, by the set-off, reduced the decree below our jurisdictional amount, notwithstanding, in signifying his election to make the set-off, he expressly stated in a writing, which appeared in the record, that he did not thereby waive his right of appeal.

If the *remittitur* had not been entered until after the judgment, the case would have been different, and, if the reduction was made without the assent of the defendant, more like *Kanouse* v. *Martin*, 15 id. 198, where a declaration was amended in a State court so as to reduce the damages claimed below the jurisdictional amount, after the necessary steps had been taken for the transfer of the cause to the Circuit Court, and in which we held that the jurisdiction of the Circuit Court could not be defeated in that way.

We have no jurisdiction if the sum or value of the matter in dispute does not exceed $5,000. One owing a debt may pay it in gold coin or legal-tender notes of the United States, as he chooses, unless there is something to the contrary in the obligation out of which the debt arises. A coin dollar is worth no more for the purposes of tender in payment of an ordinary debt than a note dollar. The law has not made the note a standard of value any more than coin. It is true that in the market, as an article of merchandise, one is of greater value than the other; but as money, that is to say, as a medium of exchange, the law knows no difference between them. We are aware that in *Bronson* v. *Rodes*, 7 Wall. 229, it was said that a contract to pay in gold or silver coins "is, in legal import, nothing else than an agreement to deliver a certain weight of standard

gold, to be ascertained by a count of coins," and that "it is not distinguishable, . . . in principle, from a contract to deliver an equal weight of bullion of equal fineness;" but, notwithstanding this, it is a contract to pay money, and none the less so because it designates for payment one of the two kinds of money which the law has made a legal tender in discharge of money obligations.

This judgment is for coined money, which at the time it was rendered and now is worth more in the market as merchandise than paper money; but our jurisdiction is to be determined by the amount of money to be paid and not the kind. If, instead of paper dollars and gold dollars legalized as money, the law had provided for silver dollars and gold dollars, and this judgment had been for payment in gold, we think it would hardly be contended that this court could take jurisdiction, because when the judgment was rendered gold happened to be worth more in the market as merchandise than silver; but, in principle, that case would not be different from this. Notwithstanding, therefore, the judgment is for coined money, we are satisfied that we have no jurisdiction.

Writ of error dismissed.

RAILROAD COMPANY v. HOUSTON.

1. The neglect of the engineer of a locomotive of a railroad train to sound its whistle or ring its bell on nearing a street-crossing does not relieve a traveller on the street from the necessity of taking ordinary precautions for his safety. Before attempting to cross the railroad track, he is bound to use his senses, — to listen and to look, — in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if, using them, he sees the train coming, and, instead of waiting for it to pass, undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain. If one chooses in such a position to take risks, he must suffer the consequences. They cannot be visited upon the railroad company.
2. To instruct upon assumed facts to which no evidence applies, is error.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

This was an action against the Chicago, Rock Island, and

Pacific Railroad Company, brought under a statute of Missouri, which subjects a corporation to a penalty of $5,000 where death is caused by an injury resulting from "the negligence, unskilfulness, or criminal intent" of any of its officers, agents, servants, or employés, whilst running, conducting, or managing a locomotive, car, or train of cars. In this case, the deceased was the wife of the plaintiff; her death was caused by injuries inflicted by the defendant's locomotive whilst the train was passing through the village of Cameron in that State. The defendant had two tracks, one main and the other a side track, which extended through a considerable portion of the village, and passed south of Second Street. The tracks were separated from each other by only a few feet. The house at which the deceased resided was north of Second Street and east of Harris Street, which the tracks crossed. South of the two tracks, and about ninety feet east from Harris Street, was situated a building belonging to the company, called the section-house, near which was a well of water. The building and well were on the company's right of way. The train was due, on the evening when the accident occurred, at half-past six, and it entered the village from the west. At that time a gravel-train had been switched on the side track east of Harris Street, between the section-house and the depot. Freight-cars were also standing on the side track west of, but near, Harris Street. There was a plank-crossing over the railway at Harris Street. When cars were not standing on the tracks there was nothing to prevent one passing in a direct or nearly direct line from the house of the deceased to the section-house. Persons, in going to the well from that house, sometimes passed the road at the public crossing, and sometimes on the right of way of the company east of Harris Street. The evidence disclosed by the record relating to the accident only shows that at about half-past six in the evening of the 13th of March, 1872, the deceased took a pail upon her arm and left her house, and, it is supposed, started for the well near the section-house. She was seen by her daughter as she left, and by the engineer only a few seconds before she was struck by the locomotive. It does not appear that she was seen by any other person after leaving the house before she was injured. When discovered by the engineer, the locomotive

was within four feet of her. She was then on the main track of the railway, about ninety feet east of Harris Street, and was apparently passing from the track south. She was struck by the extreme end of the beam of timber running across the engine, known as the bumper, and was thrown into a ditch about ten feet from the section-house. The engineer testified, that when he discovered her it was impossible to stop the train so as to avoid striking her. She died within an hour after receiving the injury.

It appears from the evidence, also, that the railway was in plain view from the house of the deceased, and that a train approaching from the west could be seen from it, and from any point between the Harris Street crossing and the section-house for a distance of three-quarters of a mile. At the time of the accident there was a bright moonlight; and the headlight of the engine was burning, and the movement of the train created a loud noise. There was some conflict of evidence as to the rate of speed at which the train was running at the time, and whether its bell was rung and its whistle sounded. As to the other facts stated, the evidence was all one way.

There was a verdict and judgment for the plaintiff, whereupon the company brought the case here. The substance of the charge of the court below to the jury is stated in the opinion of the court.

Mr. Thomas F. Withrow for the plaintiff in error.

The court below erred in charging the jury upon assumed facts of which no evidence was offered. *Michigan Bank* v. *Eldred*, 9 Wall. 544; *United States* v. *Breiting*, 20 How. 252; *Goodman* v. *Simonds*, id. 343; *Chandler* v. *Von Roeder et al.*, 24 id. 224; *Improvement Company* v. *Munson*, 14 Wall. 442; *Milwaukee & St. Paul Railway Co.* v. *Arms et al.*, 91 U. S. 489; *Artz* v. *Chicago, Rock Island, & Pacific Railroad Co.*, 34 Iowa, 154.

Under the evidence, the court should have instructed the jury to find for the defendant. The deceased was a trespasser, and the company only liable for wilful negligence. *Harlan* v. *St. Louis, Kansas City, & Northern Railroad Co.*, 64 Mo. 480; *Philadelphia & Reading Railroad Co.* v. *Hummell*, 44 Pa. St.

375; *Finlayson* v. *Railroad Company*, 1 Dill. 579; *Illinois Central Railroad Co.* v. *Godfrey*, 71 Ill. 501.

Where it is manifest that, upon the evidence, the court should set aside a verdict against a party, it is its duty to charge the jury not to return such a verdict. *Pleasants* v. *Fant*, 22 Wall. 116; *Improvement Company* v. *Munson*, *supra*; *Wilds* v. *Hudson River Railroad Co.*, 24 N. Y. 430; *Lake Shore & Michigan Southern Railroad Co.* v. *Miller*, 25 Mich. 274.

The deceased did not exercise that degree of care and diligence required of her. *Wild* v. *Hudson River Railroad Co.*, 29 N. Y. 315; *Pennsylvania Railroad Co.* v. *Beale*, 73 Pa. St. 504; *North Pennsylvania Railroad Co.* v. *Heileman*, 49 id. 60; *Butterfield* v. *Western Railway Corporation*, 10 Allen (Mass.), 532; *Wheelock* v. *Boston & Albany Railroad Co.*, 105 Mass. 203; *Gaynor* v. *Old Colony & Newport Railroad Co.*, 100 id. 208; *Burns* v. *Boston & Lowell Railroad Co.*, 101 id. 50; *Lucas, Adm'r*, v. *Taunton & New Bedford Railroad Co.*, 6 Gray (Mass.), 64; *Wild* v. *Hudson River Railroad Co.*, *supra*; *Ernst* v. *Hudson River Railroad Co.*, 39 N. Y. 61; *Wilcox* v. *Rome & Watertown Railroad Co.*, id. 358; *Davis* v. *New York Central & Hudson River Railroad Co.*, 47 id. 400; *Wilds* v. *Hudson River Railroad Co.*, *supra*; *Gorton* v. *Erie Railway Co.*, 45 N. Y. 660; *Steves* v. *Oswego & Syracuse Railroad Co.*, 18 id. 422; *Sheffield* v. *Rochester & Syracuse Railroad Co.*, 21 Barb. (N. Y.) 339; *Gonzales* v. *New York & Harlem Railroad Co.*, 38 N. Y. 440; *Morris & Essex Railroad Co.* v. *Haslan et al.*, 33 N. J. L. 149; *Telfer* v. *Northern Railroad Co.*, 30 id. 188; *Pennoyer* v. *Central Railroad Co.*, 25 id. 558; *Toledo & Wabash Railroad Co.* v. *Shuckman, Adm'r*, 50 Ind. 42; *Pittsburgh, Fort Wayne, & Chicago Railroad Co.* v. *Vining*, 27 id. 513; *Lafayette & Indianapolis Railroad Co.* v. *Huffman*, 28 id. 287; *Toledo & Wabash Railroad Co.* v. *Goddard*, 25 id. 185; *Chicago & Rock Island Railroad Co.* v. *Still*, 19 Ill. 500; *Galena & Chicago Union Railroad Co.* v. *Dill*, 22 id. 265; *Chicago & Alton Railroad Co.* v. *Gretzner*, 46 id. 74; *Chicago & Northwestern Railway Co.* v. *Sweeney*, 52 id. 325.

Mr. Jefferson Chandler, *contra*.

The charge given the jury covers every aspect of the case as presented by the evidence.

As to the negligence of the defendant. *Railroad Company* v. *Whitton*, 13 Wall. 270; *Maginnis* v. *Railroad Company*, 52 N. Y. 215; *Philadelphia Railroad Co.* v. *Hagan et al.*, 47 Pa. St. 244; *Chicago, Burlington, & Quincy Railroad Co.* v. *Payne*, 59 Ill. 534; *Artz* v. *Chicago & Rock Island Railroad Co.*, 34 Iowa, 154; *Railroad Company* v. *Stout*, 17 Wall. 657; *Baltimore & Ohio Railroad Co.* v. *Trainor*, 33 Md. 542; *Same* v. *Boteler*, 38 id. 568; *O'Mara* v. *Railroad Company*, 38 N. Y. 445; *Renwick* v. *New York Central Railroad Co.*, 36 id. 132; *Beisiegel* v. *Same*, 34 id. 622; *Richardson* v. *Same*, 45 id. 846; *White* v. *Phillips*, 15 C. B. N. S. 245; *State* v. *Manchester & Lawrence Railroad*, 52 N. H. 528; *Brown* v. *The Hannibal & St. Joseph Railroad Co.*, 50 Mo. 461.

As to contributory negligence. *Railroad Company* v. *Whitton*, *supra*; *Railroad Company* v. *Stout*, *supra*; *Smith* v. *Union Railway Co.*, 61 Mo. 588; *Kennayde* v. *Pacific Railroad Co.*, 45 id. 255; *Burham* v. *St. Louis & P. M. Railroad Co.*, 56 id. 338; *Tabor* v. *Missouri Valley Railroad Co.*, 46 id. 353; *Brown* v. *The Hannibal & St. Joseph Railroad Co.*, 50 id. 461; *Walsh* v. *Mississippi Valley Transportation Co.*, 52 id. 434; *Artz* v. *Chicago, Rock Island, & Pacific Railroad Co.*, *supra*; *Baltimore & Ohio Railroad Co.* v. *Trainor*, *supra*; *Same* v. *Fitzpatrick*, 35 Md. 32; *Railroad Company* v. *State*, 36 id. 366; *Brown* v. *Lynn*, 31 Pa. St. 510; *Railroad Company* v. *Chendworth*, 52 id. 382; *Gray* v. *Scott*, 66 id. 345; *Butler* v. *Milwaukee & St. Paul Railroad Co.*, 28 Wis. 487; *The Lafayette & Indianapolis Railroad Co.* v. *Adams*, 26 Ind. 76; *The Bellefontaine Railroad Co.* v. *Hunter*, 33 id. 365; *Kerwhacker* v. *The Cleveland, Columbus, & Cincinnati Railroad Co.*, 3 Ohio St. 172; *Same* v. *Terry*, 8 id. 570; *Macon & Western Railroad Co.* v. *Davis*, 18 Ga. 679; *Central Railroad and Banking Co.* v. *Davis*, 19 id. 437; *Daley* v. *Norwich & Worcester Railroad Co.*, 26 Conn. 591; *Trow* v. *The Vermont Central Railroad Co.*, 24 Vt. 487; *Bridge* v. *The Grand Junction Railway Co.*, 3 M. & W. 244; *Lane* v. *Atlantic Works*, 107 Mass. 104; *Britton* v. *Inhabitants*, *&c.*, id. 347.

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

If the positions most advantageous for the plaintiff be as-

sumed as correct, that the train was moving at an unusual rate of speed, its bell not rung, and its whistle not sounded, it is still difficult to see on what ground the accident can be attributed solely to the "negligence, unskilfulness, or criminal intent" of the defendant's engineer. Had the train been moving at an ordinary rate of speed, it would have been impossible for him to stop the engine when within four feet of the deceased. And she was at the time on the private right-of-way of the company, where she had no right to be. But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employés in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant.

But the plaintiff in error specially complains that the court below gave instructions which assumed as established matters not in proof, and thus directed the attention of the jury to subjects which might mislead their judgment. Thus, while the

train coming from the west could be seen, as already stated, at any point between Harris Street crossing and the section-house for a distance of three-quarters of a mile, the court in its charge assumed that the light from the train might have been obstructed by cars on the side track in the vicinity of the place where the injury was inflicted, and told them that whether the view was thus obstructed was for them to determine. Again, there was no evidence of any attempt on the part of the deceased to cross the railway at the Harris Street crossing. She was not seen, as already stated, except when leaving her house, until immediately previous to her injury, and then she was ninety feet east of the crossing. Yet the court, at the request of the plaintiff, instructed the jury, as to the right of the deceased in passing the railway upon a public crossing, to rely upon a substantial compliance by the servants of the company with the duties required by law in giving signals and warnings of approach; and as to its liability if the deceased was killed by the cars while they were running to and over a public street-crossing, without giving the required and usual signals of approach: and further instructed them, upon its own motion, that there was a controversy upon the evidence whether she crossed or attempted to cross the railway at the Harris Street crossing, or at a place not a crossing; and that this was a question of fact for their determination.

To instruct a jury upon assumed facts to which no evidence applied was error. Such instructions tended to mislead them, by withdrawing their attention from the proper points involved in the issue. Juries are sufficiently prone to indulge in conjectures, without having possible facts not in evidence suggested for their consideration. In no respect could the instructions mentioned have aided them in reaching a just conclusion.

The judgment must be reversed and the cause remanded for a new trial; and it is

So ordered.

MR. JUSTICE HARLAN did not sit in this case.

NEAL v. CLARK.

1. The word "fraud," as used in the thirty-third section of the bankrupt law of 1867, which provides that "no debt created by the fraud or embezzlement of the bankrupt, or by defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged under this act," means positive fraud or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality.
2. Accordingly, where a party paid an executor for a portion of the assets of an estate which he purchased at a discount, but without any actual fraud, and where he was, with the executor, who failed to account therefor, held liable for a *devastavit*, — *Held*, that his subsequent discharge in bankruptcy was a complete defence to an action against him for such *devastavit*.

ERROR to the Supreme Court of Appeals of the State of Virginia.

The facts out of which this case arises, so far as it is material to state them, are substantially these: —

William Fitzgerald, Jr., of the State of Virginia, by his will, which was admitted to probate in 1857, directed his executor to sell his entire landed estate, and distribute the proceeds among those entitled to them, according to the provisions of the will. The lands were sold as directed, in the same year, the purchasers giving bonds, with security, payable to the executor as such. Two of these bonds, each dated Dec. 1, 1857, — one for $1,000, due Nov. 18, 1859, with interest from Nov. 18, 1858, and the other for $2,293, due, with like interest, Nov. 18, 1860, — were sold and assigned by the executor, in June, 1859, to Griffith D. Neal, the plaintiff in error, for the sum of $2,780, who sold them to Richard Jones for $3,056. The latter collected them. When this transaction occurred, the executor, who was a brother of the testator, was a man of large property and undoubted solvency. Neal made no inquiry as to the condition of the estate, but the executor gave, as a reason for selling the bonds, that the estate was in debt to him for moneys advanced.

In 1860, a suit was instituted against the executor in the Circuit Court for Pittsylvania County, Virginia, to obtain a settlement of his accounts and a distribution of the estate. In 1861,

in obedience to an order of court, he gave a new bond, with Clark and Holland as sureties; and in 1868 they were made defendants, and a decree was asked against them for whatever sum should be ascertained to be due from the executor. In 1869, — ten years after Neal had purchased the bonds, about seven years after the executor had become insolvent and removed from the State, and without any question having been previously raised as to Neal's liability, — Clark and Holland exhibited their bill in the same court against the executor, the distributees, Neal, Jones, and others. They allege that the executor, in disposing of the bonds, committed a *devastavit* of the estate, and that, in view of the circumstances under which he received them, Neal became a participant in that *devastavit*, and is liable to the distributees for the amount of the bonds. They ask that, as sureties of the executor, they be substituted to the rights which the distributees have against Neal by reason of his alleged unlawful appropriation of the testator's assets. In the event of any judgment against them, they pray that it be rendered to be first satisfied by the purchaser of the notes.

In the District Court of the United States for the District of Virginia Neal was duly adjudged a bankrupt, and received his certificate, dated Feb. 11, 1869, showing his discharge from all debts and claims which, by the bankrupt law, were provable against his estate, and which existed on the 25th of January, 1868, "except such debts as were exempted from the operation of a discharge in bankruptcy."

Neal pleaded his discharge in bar of the action against him, but the Circuit Court for Pittsylvania County gave judgment against him and Jones for the amount of the two notes purchased from the executor. That judgment, so far as it held Neal liable, was affirmed in the Supreme Court of Appeals of Virginia, but, so far as it related to Jones, was reversed. Thereupon Neal brought the case here.

Mr. William A. Maury for the plaintiff in error.

The "fraud or embezzlement" described by the bankrupt law of 1867 refers only to transactions involving criminal intent and wilful wrong-doing.

The object of statutes in relation to embezzlement is to

embrace certain cases where, although the moral guilt was quite as great as in larceny, the technical objection, arising from the fact of possession lawfully acquired by the offending party, screened him from punishment. They were, therefore, declared crimes punishable by law. *Commonwealth* v. *Simpson*, 9 Met. (Mass.) 192.

The association of "fraud" with "embezzlement" fully justifies the conclusion that the legislature used the former word to indicate a transaction involving moral turpitude.

To deprive a party guilty of no intentional wrong of the benefit of his discharge in bankruptcy, upon the ground that he has committed a technical *devastavit*, defeats to that extent an act for the relief of the unfortunate debtors who in good faith surrender their property to their creditors.

No counsel appeared for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case involves the meaning of the word "fraud," as used in the thirty-third section of the bankrupt law of 1867. That section provides that "no debt created by the fraud or embezzlement of the bankrupt, or by defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged under this act."

In the very able opinion of the Court of Appeals, it is said that "all the cases agree in the principle that a purchaser from an executor of personal property of the testator for valuable consideration need not inquire, and has no means of inquiry, whether the condition of the testator's estate requires a sale of the property, and is not bound to see to the application of the purchase-money, but may fairly presume that the sale is rightly made, and that the purchase-money will be properly applied; and that such a purchaser can only be made liable on the ground of a fraudulent participation with the executor in the commission of a *devastavit* of his testator's estate. In other words, that the purchaser must be guilty of a fraud in that respect."

"The only diversity in the cases," continues that court, "seems to have arisen from the different views of the judges as to the nature of the fraud within the meaning of the principle;

that is, whether there must be actual fraud, or whether it is enough that there is implied or constructive fraud, or gross negligence, which may be equivalent to fraud."

Upon an elaborate review of the authorities, mainly its own previous decisions, and upon consideration of all the evidence, that court reached these conclusions: —

1st, That the executor had committed a *devastavit* by selling the bonds at a discount, since the needs of the estate did not require it, and since they had not become his property by reason of any advances made by him, or otherwise.

2d, That Neal was not chargeable with actual fraud, but, in view of the circumstances attending his purchase, he had committed constructive fraud, which implicated him in the *devastavit*.

3d, That "fraud," in the thirty-third section of the bankrupt law of 1867, included both constructive and actual fraud, and consequently that Neal, although guilty of constructive fraud only, was equally liable with the executor who had wasted the estate and failed to account for the amount of the bonds assigned to Neal.

Whether Neal, according to the previous decisions of the Virginia courts, was guilty of constructive fraud, and, upon that ground, became liable to the distributees as a participant in the *devastavit* of the estate, it is not within our province, upon this appeal, to inquire. Our jurisdiction extends to the re-examination of the final decree, only so far as it involves the construction of the bankrupt law and the denial, by the State court, of rights claimed by the bankrupt under that law.

We concur in the view expressed by the State court, that Neal was not guilty of actual fraud. The evidence does not show that he entertained any purpose himself to commit a fraud, or to aid the executor in committing one. The fair inference from all the testimony is that he purchased the bonds in good faith, not doubting the power or the right of the executor to sell, and having no reason to believe that he meditated any wrong to those interested in the estate which he was administering. Indeed, it appears from the opinion of the State court, that, a few months prior to the purchase, a commissioner had reported a settlement of the executor's accounts, showing a

balance due the latter of $765.41. That settlement was of record.

But we do not concur in the construction which the State court gave to the thirty-third section of the bankrupt law of 1867. In reaching this conclusion, we have not been assisted by any express decisions upon the question before us.

The Bankrupt Act of 1841 exempted from discharge debts "created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any fiduciary capacity." The question arose under that act whether a factor who had sold the property of his principal, and had failed to pay over the proceeds, was a fiduciary debtor within the meaning of that clause. This court, in *Chapman* v. *Forsyth et al.*, 2 How. 202, said: "If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and, indeed, all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor; and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act.

"The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied, but special, trusts; and 'the other fiduciary capacity' mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act."

A like process of reasoning may be properly employed in construing the corresponding section of the act of 1867. It is a familiar rule in the interpretation of written instruments and statutes that "a passage will be best interpreted by reference to that which precedes and follows it." So, also, "the meaning of a word may be ascertained by reference to the meaning of words associated with it." In Broom's Legal Maxims, p. 450, it is said: "It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu*, — the coupling of words together shows that they are to be under-

stood in the same sense. And where the meaning of any particular word is doubtful or obscure, . . . the intention of the party who has made use of it may frequently be ascertained and carried unto effect by looking at the adjoining words." The same author says (p. 455): "In the construction of statutes, likewise, the rule *noscitur a sociis* is very frequently applied; the meaning of a word, and, consequently, the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject-matter."

Applying these rules to this case, we remark, that, in the section of the law of 1867 which sets forth the classes of debts which are exempted from the operation of a discharge in bankruptcy, debts created by "fraud" are associated directly with debts created by "embezzlement." Such association justifies, if it does not imperatively require, the conclusion that the "fraud" referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. Such a construction of the statute is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system.

It results from what has been said that the debt or claim asserted against Neal was not "created by the fraud . . . of the bankrupt," within the meaning of the thirty-third section of the law of 1867. His discharge in bankruptcy affords him complete protection. The court erred in adjudging otherwise.

The judgment of the Supreme Court of Appeals of Virginia will, therefore, be reversed, with directions to reverse the decree rendered against Neal in the Circuit Court for Pittsylvania County, and to remand the case to the last-named court, with an order requiring it to dismiss the original and cross-bill of Clark and Holland against Neal, with costs, and for other proper action in conformity to this opinion; and it is

So ordered.

KELLY v. CALHOUN.

1. The formula prescribed by the laws of Tennessee for the acknowledgment of deeds is: "Personally appeared before me . . . the within-named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained." *Held*, that a certificate of an officer taking the acknowledgment of the grantor in a deed of trust, in which the officer certifies that said grantor is "personally known" to him, is a compliance with the statute.
2. To be "personally acquainted with" and to "know personally" are, in such a certificate, equivalent phrases.
3. There is no statutory provision in Tennessee as to the execution or acknowledgment of deeds by a corporation. In such cases, its officer affixing its seal is the party executing the deed, within the meaning of the statutes requiring deeds to be acknowledged by the grantor.

APPEAL from the Circuit Court of the United States for the Western District of Tennessee.

The facts are stated in the opinion of the court.

Mr. S. P. Walker for the appellants.

Mr. Josiah Patterson, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The appellees, Calhoun and Meyer, are the grantees in a deed of trust covering the Paducah and Memphis Railroad, which has its northern terminus at Paducah, Ky., and its southern at Memphis, Tenn. A corporation known as the Paducah and Memphis Railroad Company, and authorized to build the road, executed the deed of trust to secure the payment of certain liabilities therein described. The deed, bearing date the first day of February, 1872, was acknowledged the fifth of that month, and duly lodged for record in the proper office in Shelby County the 9th of March in the same year. The company made default in the payment of the interest on the bonds intended to be secured by the deed; and Calhoun and Meyer, the trustees, thereupon filed this bill to enforce its provisions. The Circuit Court placed the road *pendente lite* in the hands of a receiver.

After this was done, the appellants, Kelly and others, procured leave to intervene, and filed their joint petition. It sets forth the facts already stated, and that the petitioners severally

recovered judgment against the company in the first Circuit Court of Shelby County, at the following dates: on the 9th of January; on the 27th of January; on the 25th of May, and on the 13th of October, in the year 1875; and on the 26th of January, and on the 3d of June, 1876. It further alleges that the certificate of the proof and acknowledgment of the deed of trust is fatally defective, and that their judgments are, therefore, the first lien upon the premises. They pray to be permitted to levy executions, that the premises may be sold under the order of the court, that the proceeds may be applied in payment of their several judgments, and for general relief. Leave was given to them to levy, but not to sell. They levied accordingly. The deed and certificate alleged to be defective are set out in full. Calhoun and Meyer demurred. The Circuit Court held the certificate good, sustained the demurrer, and dismissed the bill.

The deed was well executed. The *testatum* clause sets forth that the company had caused its corporate seal to be affixed, and the instrument to be signed by its president and secretary, which appear on its face to have been done. The sealing and delivery were attested by two subscribing witnesses. Angell & A. on Corp., sect. 225.

The attack is confined to the certificate of acknowledgment, which, less the caption and official signatures affixed, is as follows: —

"Be it remembered, that on this fifth day of February, 1872, before me, Charles Nettleton, a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the State of Tennessee to take acknowledgments of deeds, &c., to be used or recorded therein, personally appeared Ex. Norton, the president of the Paducah and Memphis Railroad Company, and Henry L. Jones, the secretary of said company, who are personally known to me to be such; and who, being by me duly sworn, did depose and say that he, the said Ex. Norton, resided in the city, county, and State of New York; that he, the said Henry L. Jones, resided in Paducah, in the State of Kentucky; that he, the said Norton, was president of the said Paducah and Memphis Railroad Company; that he, the said Jones, was secretary of the said company; that they knew the corporate

seal of said company; that the seal affixed to the foregoing instrument, purporting to be the corporate seal of said company, was such corporate seal; that it was affixed thereto by order of the board of directors of said company, and that they signed their names thereto by the like order, as the president and secretary of said company, respectively; and the said Ex. Norton and Henry L. Jones also acknowledged to me that they executed said instrument as their act and deed, and the act and deed of said company, for the uses and purposes therein mentioned. And, at the same time and place, before me, also personally appeared Philo C. Calhoun and L. H. Meyer, also parties to the foregoing instrument, with each of whom I am personally acquainted, who severally acknowledged that they executed the within instrument for the purposes therein mentioned."

The law of Tennessee requires deeds for the conveyance of lands, "in what manner or form soever drawn," to be "acknowledged by the maker, or proved by two subscribing witnesses, at least." Code, sects. 2005–2038. Where the instrument is acknowledged, the prescribed formula, omitting the caption, is, "Personally appeared before me, clerk (or deputy-clerk) of the county court of said county, the within-named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained." Sect. 2042. If the acknowledgment be taken without the State, by one of the officers designated in sect. 2043, the same formula must be followed. *Bone* v. *Greenlee*, 1 Coldw. (Tenn.) 29; *Mullins* v. *Aikens*, 2 Heisk. (Tenn.) 535.

There is no statutory provision in Tennessee as to the execution or acknowledgment of deeds by corporations. In such cases, the officer affixing the seal is the party executing the deed, within the meaning of the statutes requiring deeds to be acknowledged by the grantor. *Lovett* v. *The Steam Saw-Mill Association*, 6 Paige (N. Y.), 54. In the formula we have quoted, both the phrases "personally appeared" and "with whom I am personally acquainted" are found. It has been held by the Supreme Court of the State that the latter means more than the former, and that personal knowledge is indispensable. But it has been also held that a substantial compli-

ance with the statute is all that is required. *Johnson* v. *Walton*, 1 Sneed (Tenn.), 258; *Fall et al.* v. *Roper*, 3 Head (Tenn.), 485; see also *Farquharson* v. *McDonald*, 2 Heisk. (Tenn.) 404. And such is the rule laid down by this court. *Carpenter* v. *Dexter*, 8 Wall. 513. The certificate here in question sets forth: "Before me," &c., "personally appeared Ex. Norton, the president of the Paducah and Memphis Railroad Co., and Henry L. Jones, the secretary of the same company, who are personally known to me to be such, and," &c. To be "personally acquainted with" and to "know personally" are equivalent phrases. Upon looking into the paragraph just quoted, two points are found to be salient. It is certified, 1, that the parties named appeared in person; 2, that they were personally known to the commissioner to be the incumbents of the offices specified. He might have known them to be the latter, by information derived from various sources, without personal knowledge upon the subject. Such knowledge is independent, and complete in itself. It might exist with or without other information. Personal knowledge to the extent certified necessarily included the personal identity of the officers, as well as the incumbency of their offices. A defect of such knowledge as to either point would be inconsistent with the language used, and falsify the certificate. It can hardly be doubted that the paragraph was meant to cover both points. It is a reasonable and necessary construction to give it that effect. Indeed, it involves no straining to hold that the phrase "personally known to me to be such" applies *proprio vigore* to those named, alike individually and officially; in other words, that the certifier meant that he personally knew them to be such individuals and such officers. The certificate was evidently drawn with studied deliberation. It seems to have been intended to meet the requirements of the law both as to proof of execution and acknowledgment without proof. In the latter aspect we hold the certificate to be sufficient. In the former, we have, therefore, no occasion to consider it.

Instruments like this should be construed, if it can be reasonably done, *ut res magis valeat quam pereat.* It should be the aim of courts, in cases like this, to preserve and not to destroy. Sir Matthew Hale said they should be astute to find

means to make acts effectual, according to the honest intent of the parties. *Roe* v. *Tranmar*, Willes, 682.

The second proposition relied upon by the counsel for the appellees relates to the filing of their bill and the *lis pendens* before the judgments of the intervenors were recovered. The conclusion at which we have arrived as to the certificate renders it unnecessary to consider this subject. Otherwise, it would require grave consideration.

Decree affirmed.

MR. JUSTICE HARLAN did not sit in this case.

PENNOYER *v.* NEFF.

1. A statute of Oregon, after providing for service of summons upon parties or their representatives, personally or at their residence, declares that when service cannot be thus made, and the defendant, after due diligence, cannot be found within the State, and "that fact appears, by affidavit, to the satisfaction of the court or judge thereof, and it, in like manner, appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in the State, such court or judge may grant an order that the service be made by publication of summons, . . . when the defendant is not a resident of the State, but has property therein, and the court has jurisdiction of the subject of the action," — the order to designate a newspaper of the county where the action is commenced in which the publication shall be made, — and that proof of such publication shall be "the affidavit of the printer, or his foreman, or his principal clerk." *Held*, that defects in the affidavit for the order can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally; and that the provision as to proof of the publication is satisfied when the affidavit is made by the editor of the paper.
2. A personal judgment is without any validity, if it be rendered by a State court in an action upon a money-demand against a non-resident of the State, who was served by a publication of summons, but upon whom no personal service of process within the State was made, and who did not appear; and no title to property passes by a sale under an execution issued upon such a judgment.
3. The State, having within her territory property of a non-resident, may hold and appropriate it to satisfy the claims of her citizens against him; and her tribunals may inquire into his obligations to the extent necessary to control the disposition of that property. If he has no property in the State, there is nothing upon which her tribunals can adjudicate.
4. Substituted service by publication, or in any other authorized form, is sufficient to inform a non-resident of the object of proceedings taken, where

property is once brought under the control of the court by seizure or some equivalent act; but where the suit is brought to determine his personal rights and obligations, that is, where it is merely *in personam*, such service upon him is ineffectual for any purpose.

5. Process from the tribunals of one State cannot run into another State, and summon a party there domiciled to respond to proceedings against him; and publication of process or of notice within the State in which the tribunal sits cannot create any greater obligation upon him to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.

6. Except in cases affecting the personal *status* of the plaintiff, and in those wherein that mode of service may be considered to have been assented to in advance, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other States where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property, or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*.

7. Whilst the courts of the United States are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty, and are bound to give to a judgment of a State court only the same faith and credit to which it is entitled in the courts of another State.

8. The term, "due process of law," when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a competent tribunal to pass upon their subject-matter; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or by his voluntary appearance.

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

This action was brought by Neff against Pennoyer for the recovery of a tract of land situated in Multnomah County, Oregon. Pennoyer, in his answer, denied Neff's title and right to possession, and set up a title in himself.

By consent of parties, and in pursuance of their written stipulation filed in the case, the cause was tried by the court, and a special verdict given, upon which judgment was rendered in favor of Neff; whereupon Pennoyer sued out this writ of error.

The parties respectively claimed title as follows: Neff, under a patent issued to him by the United States, March 19,

1866; and Pennoyer, by virtue of a sale made by the sheriff of said county, under an execution sued out upon a judgment against Neff, rendered Feb. 19, 1866, by the Circuit Court for said county, in an action wherein he was defendant, and J. H. Mitchell was plaintiff. Neff was then a non-resident of Oregon.

In *Mitchell* v. *Neff*, jurisdiction of Neff was obtained by service of summons by publication. Pennoyer offered in evidence duly certified copies of the complaint, summons, order for publication of summons, affidavit of service by publication, and the judgment in that case; to the introduction of which papers the plaintiff objected, because, 1, said judgment is *in personam*, and appears to have been given without the appearance of the defendant in the action, or personal service of the summons upon him, and while he was a non-resident of the State, and is, therefore, void; 2, said judgment is not *in rem*, and, therefore, constitutes no basis of title in the defendant; 3, said copies of complaint, &c., do not show jurisdiction to give the judgment alleged, either *in rem* or *personam;* and, 4, it appears from said papers that no proof of service by publication was ever made, the affidavit thereof being made by the "editor" of the "Pacific Christian Advocate," and not by "the printer, or his foreman or principal clerk." The court admitted the evidence subject to the objections.

The finding of the court in regard to the facts bearing upon the asserted jurisdiction of the State court is as follows:—

That on Nov. 13, 1865, Mitchell applied to said Circuit Court, upon his own affidavit of that date, for an order allowing the service of the summons in said action to be made upon Neff, by publication thereof; whereupon said court made said order, in the words following: "Now, at this day, comes the plaintiff in his proper person, and by his attorneys, Mitchell and Dolph, and files affidavit of plaintiff, and motion for an order of publication of summons, as follows, to wit: 'Now comes the plaintiff, by his attorneys, and upon the affidavit of plaintiff, herewith filed, moves the court for an order of publication of summons against defendant, as required by law, he being a non-resident;' and it appearing to the satisfaction of the court that the defendant cannot, after due diligence, be

found in this State, and that he is a non-resident thereof, that his place of residence is unknown to plaintiff, and cannot, with reasonable diligence, be ascertained by him, and that the plaintiff has a cause of action against defendant, and that defendant has property in this county and State, it is ordered and adjudged by the court that service of the summons in this action be made by publication for six weeks successively in the 'Pacific Christian Advocate,' a weekly newspaper published in Multnomah County, Oregon, and this action is continued for such service." That the affidavit of plaintiff, referred to in said order, is in the words following: "I, J. H. Mitchell, being first duly sworn, say that the defendant, Marcus Neff, is a non-resident of this State; that he resides somewhere in the State of California, at what place affiant knows not, and he cannot be found in this State; that plaintiff has a just cause of action against defendant for a money-demand on account; that this court has jurisdiction of such action; that the defendant has property in this county and State." That the complaint in said action was verified and filed on Nov. 3, 1865, and contained facts tending to prove that at that date said Mitchell had a cause of action against said Neff for services as an attorney, performed "between Jan. 1, 1862, and May 15, 1863." That the entry of judgment in said action contained the following averments: "And it appearing to the court that the defendant was, at the time of the commencement of this action, and ever since has been, a non-resident of this State; and it further appearing that he has property in this State, and that defendant had notice of the pendency of this action by publication of the summons for six successive weeks in the 'Pacific Christian Advocate,' a weekly newspaper of general circulation published in Multnomah County, State of Oregon, the last issue of which was more than twenty days before the first day of this term." That the affidavit showing the publication of the summons in the "Advocate" aforesaid was made as stated therein by the "editor" of that paper. That said complaint, summons, affidavit of Mitchell and of the "editor" of the "Advocate" aforesaid, and entry of judgment, were in the judgment roll, made up by the clerk in the case, but the order for publication of the summons aforesaid was not placed in said roll

by said clerk, but remains on the files of said court; and that when said court made said order for publication, and gave said judgment against Neff, the only evidence it had before it to prove the facts necessary to give it jurisdiction therefor, and particularly to authorize it to find and state that Neff's residence was unknown to Mitchell, and could not, with reasonable diligence, be ascertained by him, and that Neff had notice of the pendency of said action by the publication of the summons as aforesaid, was, so far as appears by the said roll and the records and files of the said court, the said complaint and affidavits of Mitchell and the editor of the "Advocate."

The statute of Oregon at the time of the commencement of the suit against Neff was as follows: —

"SECT. 55. When service of the summons cannot be made as prescribed in the last preceding section, and the defendant, after due diligence, cannot be found within the State, and when that fact appears, by affidavit, to the satisfaction of the court or judge thereof, or justice in an action in a justice's court, and it also appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in this State, such court or judge or justice may grant an order that the service be made by publication of summons in either of the following cases: . . .

"3. When the defendant is not a resident of the State, but has property therein, and the court has jurisdiction of the subject of the action.

"SECT. 56. The order shall direct the publication to be made in a newspaper published in the county where the action is commenced, and, if no newspaper be published in the county, then in a newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the defendant, at his place of residence, unless it shall appear that such residence is neither known to the party making the application, nor can, with reasonable diligence, be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint out of the State shall be equivalent to publication and deposit in the post-office. In either case, the defendant shall appear and answer by the first day of the term following the

expiration of the time prescribed in the order for publication; and, if he does not, judgment may be taken against him for want thereof. In case of personal service out of the State, the summons shall specify the time prescribed in the order for publication.

"SECT. 57. The defendant against whom publication is ordered, or his personal representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action; and the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, and upon such terms as may be proper, be allowed to defend after judgment, and within one year after the entry of such judgment, on such terms as may be just; and, if the defence be successful, and the judgment or any part thereof have been collected or otherwise enforced, such restitution may thereupon be compelled as the court shall direct. But the title to property sold upon execution issued on such judgment to a purchaser in good faith shall not be thereby affected."

"SECT. 60. Proof of the service of summons shall be, in case of publication, the affidavit of the printer, or his foreman, or his principal clerk, showing the same."

Mr. W. F. Trimble for the plaintiff in error.
Mr. James K. Kelly, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

This is an action to recover the possession of a tract of land, of the alleged value of $15,000, situated in the State of Oregon. The plaintiff asserts title to the premises by a patent of the United States issued to him in 1866, under the act of Congress of Sept. 27, 1850, usually known as the Donation Law of Oregon. The defendant claims to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the circuit courts of the State. The case turns upon the validity of this judgment.

It appears from the record that the judgment was rendered in February, 1866, in favor of J. H. Mitchell, for less than $300, including costs, in an action brought by him upon a demand for services as an attorney; that, at the time the action was commenced and the judgment rendered, the defendant therein, the plaintiff here, was a non-resident of the State;

that he was not personally served with process, and did not appear therein; and that the judgment was entered upon his default in not answering the complaint, upon a constructive service of summons by publication.

The Code of Oregon provides for such service when an action is brought against a non-resident and absent defendant, who has property within the State. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the non-resident. And it also declares that no natural person is subject to the jurisdiction of a court of the State, "unless he appear in the court, or be found within the State, or be a resident thereof, or have property therein; and, in the last case, only to the extent of such property at the time the jurisdiction attached." Construing this latter provision to mean, that, in an action for money or damages where a defendant does not appear in the court, and is not found within the State, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property, the declaration expresses a principle of general, if not universal, law. The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. *D'Arcy* v. *Ketchum et al.*, 11 How. 165. In the case against the plaintiff, the property here in controversy sold under the judgment rendered was not attached, nor in any way brought under the jurisdiction of the court. Its first connection with the case was caused by a levy of the execution. It was not, therefore, disposed of pursuant to any adjudication, but only in enforcement of a personal judgment, having no relation to the property, rendered against a non-resident without service of process upon him in the action, or his appearance therein. The court below did not consider that an attachment of the property was essential to its jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit upon which the order of publication was obtained, and in the affidavit by which the publication was proved.

There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of opinion that inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit *to the satisfaction of the court or judge*, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally. The majority of the court are also of opinion that the provision of the statute requiring proof of the publication in a newspaper to be made by the "affidavit of the printer, or his foreman, or his principal clerk," is satisfied when the affidavit is made by the editor of the paper. The term "printer," in their judgment, is there used not to indicate the person who sets up the type, — he does not usually have a foreman or clerks, — it is rather used as synonymous with publisher. The Supreme Court of New York so held in one case; observing that, for the purpose of making the required proof, publishers were "within the spirit of the statute." *Bunce* v. *Reed*, 16 Barb. (N. Y.) 350. And, following this ruling, the Supreme Court of California held that an affidavit made by a "publisher and proprietor" was sufficient. *Sharp* v. *Daugney*, 33 Cal. 512. The term "editor," as used when the statute of New York was passed, from which the Oregon law is borrowed, usually included not only the person who wrote or selected the articles for publication, but the person who published the paper and put it into circulation. Webster, in an early edition of his Dictionary, gives as one of the definitions of an editor, a person "who superintends the publication of a newspaper." It is principally since that time that the business of an editor has been separated from that of a publisher and printer, and has become an independent profession.

If, therefore, we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision. But it was also contended in that court, and is insisted upon here, that the judgment in the State court against the plaintiff was void for want of personal service of process on him, or of his appearance in the action in which it was rendered, and that the premises in controversy could not be subjected to the payment of the demand

of a resident creditor except by a proceeding *in rem;* that is, by a direct proceeding against the property for that purpose. If these positions are sound, the ruling of the Circuit Court as to the invalidity of that judgment must be sustained, notwithstanding our dissent from the reasons upon which it was made. And that they are sound would seem to follow from two well-established principles of public law respecting the jurisdiction of an independent State over persons and property. The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil *status* and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding

such persons or property in any other tribunals." Story, Confl. Laws, sect. 539.

But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a State affecting persons resident or property situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them, in an attempt to give ex-territorial operation to its laws, or to enforce an ex-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation.

Thus the State, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the State within which it is situated. *Penn* v. *Lord Baltimore*, 1 Ves. 444; *Massie* v. *Watts*, 6 Cranch, 148; *Watkins* v. *Holman*, 16 Pet. 25; *Corbett* v. *Nutt*, 10 Wall. 464.

So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident

have no property in the State, there is nothing upon which the tribunals can adjudicate.

These views are not new. They have been frequently expressed, with more or less distinctness, in opinions of eminent judges, and have been carried into adjudications in numerous cases. Thus, in *Picquet* v. *Swan*, 5 Mas. 35, Mr. Justice Story said: —

"Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason, that, except so far as the property is concerned, it is a judgment *coram non judice*."

And in *Boswell's Lessee* v. *Otis*, 9 How. 336, where the title of the plaintiff in ejectment was acquired on a sheriff's sale, under a money decree rendered upon publication of notice against non-residents, in a suit brought to enforce a contract relating to land, Mr. Justice McLean said: —

"Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*."

These citations are not made as authoritative expositions of the law; for the language was perhaps not essential to the decision of the cases in which it was used, but as expressions of the opinion of eminent jurists. But in *Cooper* v. *Reynolds*, reported in the 10th of Wallace, it was essential to the disposition of the case to declare the effect of a personal action against an absent party, without the jurisdiction of the court, not served

with process or voluntarily submitting to the tribunal, when it was sought to subject his property to the payment of a demand of a resident complainant; and in the opinion there delivered we have a clear statement of the law as to the efficacy of such actions, and the jurisdiction of the court over them. In that case, the action was for damages for alleged false imprisonment of the plaintiff; and, upon his affidavit that the defendants had fled from the State, or had absconded or concealed themselves so that the ordinary process of law could not reach them, a writ of attachment was sued out against their property. Publication was ordered by the court, giving notice to them to appear and plead, answer or demur, or that the action would be taken as confessed and proceeded in *ex parte* as to them. Publication was had; but they made default, and judgment was entered against them, and the attached property was sold under it. The purchaser having been put into possession of the property, the original owner brought ejectment for its recovery. In considering the character of the proceeding, the court, speaking through Mr. Justice Miller, said: —

"Its essential purpose or nature is to establish, by the judgment of the court, a demand or claim against the defendant, and subject his property lying within the territorial jurisdiction of the court to the payment of that demand. But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within the territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear; and that thereafter the court may proceed in the case, whether he appears or not. If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is

the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: first, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed, unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."

The fact that the defendants in that case had fled from the State, or had concealed themselves, so as not to be reached by the ordinary process of the court, and were not non-residents, was not made a point in the decision. The opinion treated them as being without the territorial jurisdiction of the court; and the grounds and extent of its authority over persons and property thus situated were considered, when they were not brought within its jurisdiction by personal service or voluntary appearance.

The writer of the present opinion considered that some of the objections to the preliminary proceedings in the attachment suit were well taken, and therefore dissented from the judgment of the court; but to the doctrine declared in the above citation he agreed, and he may add, that it received the approval of all the judges. It is the only doctrine consistent with proper protection to citizens of other States. If, without personal service, judgments *in personam*, obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon

which they were founded, if they ever had any existence, had perished.

Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.

The want of authority of the tribunals of a State to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below: but the position is assumed, that, where they have property within the State, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and

the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the State at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. In *Webster* v. *Reid*, reported in 11th of Howard, the plaintiff claimed title to land sold under judgments recovered in suits brought in a territorial court of Iowa, upon publication of notice under a law of the territory, without service of process; and the court said: —

"These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case, there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold."

The force and effect of judgments rendered against non-residents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States and of the several States, as attempts have been made to enforce such judgments in States other than those in which they were rendered, under the provision of the Constitution requiring that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State;" and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, and declaring that, when thus authenticated, "they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are or shall be taken." In the earlier cases, it was supposed that the act gave to all judgments the same effect in other States which they had by law in the State where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the State itself to exercise authority over the person or the subject-matter. *M'Elmoyle* v. *Cohen*, 13 Pet. 312. In the case of *D'Arcy* v. *Ketchum*, reported in the 11th of Howard, this view is stated with great clearness. That was an action in the Circuit Court of the United States for Louisiana, brought upon a judgment rendered in New York under a State statute, against two joint debtors, only one of whom had been served with process, the other being a non-resident of the State. The Circuit Court held the judgment conclusive and binding upon the non-resident not served with process; but this court reversed its decision, observing, that it was a familiar rule that countries foreign to our own disregarded a judgment merely against the person, where the defendant had not been served with process nor had a day in court; that national comity was never thus extended; that the proceeding was deemed an illegitimate assumption of power, and resisted as mere abuse; that no faith and credit or force and effect had been given to such judgments by any State of the Union, so far

as known; and that the State courts had uniformly, and in many instances, held them to be void. "The international law," said the court, "as it existed among the States in 1790, was that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defence; because neither the legislative jurisdiction nor that of courts of justice had binding force." And the court held that the act of Congress did not intend to declare a new rule, or to embrace judicial records of this description. As was stated in a subsequent case, the doctrine of this court is, that the act "was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result, nor those rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another." *The Lafayette Insurance Co.* v. *French et al.*, 18 How. 404.

This whole subject has been very fully and learnedly considered in the recent case of *Thompson* v. *Whitman*, 18 Wall. 457, where all the authorities are carefully reviewed and distinguished, and the conclusion above stated is not only reaffirmed, but the doctrine is asserted, that the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction against its recital of their existence. In all the cases brought in the State and Federal courts, where attempts have been made under the act of Congress to give effect in one State to personal judgments rendered in another State against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception, so far as we are aware, that such judgments were without any binding force, except as to property, or interests in property, within the State, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not volunta-

rily appear, as effectual and binding merely as a proceeding *in rem*, and as having no operation beyond the disposition of the property, or some interest therein. And the reason assigned for this conclusion has been that which we have already stated, that the tribunals of one State have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits. In *Bissell* v. *Briggs*, decided by the Supreme Court of Massachusetts as early as 1813, the law is stated substantially in conformity with these views. In that case, the court considered at length the effect of the constitutional provision, and the act of Congress mentioned, and after stating that, in order to entitle the judgment rendered in any court of the United States to the full faith and credit mentioned in the Constitution, the court must have had jurisdiction not only of the cause, but of the parties, it proceeded to illustrate its position by observing, that, where a debtor living in one State has goods, effects, and credits in another, his creditor living in the other State may have the property attached pursuant to its laws, and, on recovering judgment, have the property applied to its satisfaction; and that the party in whose hands the property was would be protected by the judgment in the State of the debtor against a suit for it, because the court rendering the judgment had jurisdiction to that extent; but that if the property attached were insufficient to satisfy the judgment, and the creditor should sue on that judgment in the State of the debtor, he would fail, because the defendant was not amenable to the court rendering the judgment. In other words, it was held that over the property within the State the court had jurisdiction by the attachment, but had none over his person; and that any determination of his liability, except so far as was necessary for the disposition of the property, was invalid.

In *Kilbourn* v. *Woodworth*, 5 Johns. (N. Y.) 37, an action of debt was brought in New York upon a personal judgment recovered in Massachusetts. The defendant in that judgment was not served with process; and the suit was commenced by the attachment of a bedstead belonging to the defendant, accompanied with a summons to appear, served on his wife after she had left her place in Massachusetts. The court held that

the attachment bound only the property attached as a proceeding *in rem*, and that it could not bind the defendant, observing, that to bind a defendant personally, when he was never personally summoned or had notice of the proceeding, would be contrary to the first principles of justice, repeating the language in that respect of Chief Justice DeGrey, used in the case of *Fisher* v. *Lane*, 3 Wils. 297, in 1772. See also *Borden* v. *Fitch*, 15 Johns. (N. Y.) 121, and the cases there cited, and *Harris* v. *Hardeman et al.*, 14 How. 334. To the same purport decisions are found in all the State courts. In several of the cases, the decision has been accompanied with the observation that a personal judgment thus recovered has no binding force without the State in which it is rendered, implying that in such State it may be valid and binding. But if the court has no jurisdiction over the person of the defendant by reason of his non-residence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice, — it is difficult to see how the judgment can legitimately have any force within the State. The language used can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within the State where rendered; and that, therefore, it could be called in question only when its enforcement was elsewhere attempted. In later cases, this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any State of this Union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered. *Smith* v. *McCutchen*, 38 Mo. 415; *Darrance* v. *Preston*, 18 Iowa, 396; *Hakes* v. *Shupe*, 27 id. 465; *Mitchell's Administrator* v. *Gray*, 18 Ind. 123.

Be that as it may, the courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the State courts, they are tribunals

of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them.

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution — that is, by the law of its creation — to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Except in cases affecting the personal *status* of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other States, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*. As stated by Cooley in his Treatise on Constitutional Limitations, 405, for any other purpose than to subject the property of a non-resident to valid claims against

him in the State, "due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned.

It is hardly necessary to observe, that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the State creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action. *Nations et al.* v. *Johnson et al.*, 24 How. 195.

It follows from the views expressed that the personal judgment recovered in the State court of Oregon against the plaintiff herein, then a non-resident of the State, was without any validity, and did not authorize a sale of the property in controversy.

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute

right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the State, a dissolution may be granted, may have removed to a State where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. Bish. Marr. and Div., sect. 156.

Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State. As was said by the Court of Exchequer in *Vallee* v. *Dumergue*, 4 Exch. 290, "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them." See also *The Lafayette Insurance Co.* v. *French et al.*, 18 How. 404, and *Gillespie* v. *Commercial Mutual Marine Insurance Co.*, 12 Gray (Mass.), 201. Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their

interest subject to the conditions prescribed by law. *Copin* v. *Adamson*, Law Rep. 9 Ex. 345.

In the present case, there is no feature of this kind, and, consequently, no consideration of what would be the effect of such legislation in enforcing the contract of a non-resident can arise. The question here respects only the validity of a money judgment rendered in one State, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein.

Judgment affirmed.

MR. JUSTICE HUNT dissenting.

I am compelled to dissent from the opinion and judgment of the court, and, deeming the question involved to be important, I take leave to record my views upon it.

The judgment of the court below was placed upon the ground that the provisions of the statute were not complied with. This is of comparatively little importance, as it affects the present case only. The judgment of this court is based upon the theory that the legislature had no power to pass the law in question; that the principle of the statute is vicious, and every proceeding under it void. It, therefore, affects all like cases, past and future, and in every State.

The precise case is this: A statute of Oregon authorizes suits to be commenced by the service of a summons. In the case of a non-resident of the State, it authorizes the service of the summons to be made by publication for not less than six weeks, in a newspaper published in the county where the action is commenced. A copy of the summons must also be sent by mail, directed to the defendant at his place of residence, unless it be shown that the residence is not known and cannot be ascertained. It authorizes a judgment and execution to be obtained in such proceeding. Judgment in a suit commenced by one Mitchell in the Circuit Court of Multnomah County, where the summons was thus served, was obtained against Neff, the present plaintiff; and the land in question, situate in Multnomah County, was bought by the defendant Pennoyer, at a sale upon the judgment in such suit. This court now holds, that, by reason of the absence of a personal service of

the summons on the defendant, the Circuit Court of Oregon had no jurisdiction, its judgment could not authorize the sale of land in said county, and, as a necessary result, a purchaser of land under it obtained no title; that, as to the former owner, it is a case of depriving a person of his property without due process of law.

In my opinion, this decision is at variance with the long-established practice under the statutes of the States of this Union, is unsound in principle, and, I fear, may be disastrous in its effects. It tends to produce confusion in titles which have been obtained under similar statutes in existence for nearly a century; it invites litigation and strife, and overthrows a well-settled rule of property.

The result of the authorities on the subject, and the sound conclusions to be drawn from the principles which should govern the decision, as I shall endeavor to show, are these: —

1. A sovereign State must necessarily have such control over the real and personal property actually being within its limits, as that it may subject the same to the payment of debts justly due to its citizens.

2. This result is not altered by the circumstance that the owner of the property is non-resident, and so absent from the State that legal process cannot be served upon him personally.

3. Personal notice of a proceeding by which title to property is passed is not indispensable; it is competent to the State to authorize substituted service by publication or otherwise, as the commencement of a suit against non-residents, the judgment in which will authorize the sale of property in such State.

4. It belongs to the legislative power of the State to determine what shall be the modes and means proper to be adopted to give notice to an absent defendant of the commencement of a suit; and if they are such as are reasonably likely to communicate to him information of the proceeding against him, and are in good faith designed to give him such information, and an opportunity to defend is provided for him in the event of his appearance in the suit, it is not competent to the judiciary to declare that such proceeding is void as not being by due process of law.

5. Whether the property of such non-resident shall be seized

upon attachment as the commencement of a suit which shall be carried into judgment and execution, upon which it shall then be sold, or whether it shall be sold upon an execution and judgment without such preliminary seizure, is a matter not of constitutional power, but of municipal regulation only.

To say that a sovereign State has the power to ordain that the property of non-residents within its territory may be subjected to the payment of debts due to its citizens, if the property is levied upon at the commencement of a suit, but that it has not such power if the property is levied upon at the end of the suit, is a refinement and a depreciation of a great general principle that, in my judgment, cannot be sustained.

A reference to the statutes of the different States, and to the statutes of the United States, and to the decided cases, and a consideration of the principles on which they stand, will more clearly exhibit my view of the question.

The statutes are of two classes: first, those which authorize the commencement of actions by publication, accompanied by an attachment which is levied upon property, more or less, of an absent debtor; second, those giving the like mode of commencing a suit without an attachment.

The statute of Oregon relating to publication of summons, *supra*, p. 718, under which the question arises, is nearly a transcript of a series of provisions contained in the New York statute, adopted thirty years since. The latter authorizes the commencement of a suit against a non-resident by the publication of an order for his appearance, for a time not less than six weeks, in such newspapers as shall be most likely to give notice to him, and the deposit of a copy of the summons and complaint in the post-office, directed to him at his residence, if it can be ascertained; and provides for the allowance to defend the action before judgment, and within seven years after its rendition, upon good cause shown, and that, if the defence be successful, restitution shall be ordered. It then declares: "But the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected." Code, sects. 34, 35; 5 Edm. Rev. Stat. of N. Y., pp. 37–39.

Provisions similar in their effect, in authorizing the commencement of suits by attachment against absent debtors, in

which all of the property of the absent debtor, real and personal, not merely that seized upon the attachment, is placed under the control of trustees, who sell it for the benefit of all the creditors, and make just distribution thereof, conveying absolute title to the property sold, have been upon the statute-book of New York for more than sixty years. 2 id., p. 2 and following; 1 Rev. Laws, 1813, p. 157.

The statute of New York, before the Code, respecting proceedings in chancery where absent debtors are parties, had long been in use in that State, and was adopted in all cases of chancery jurisdiction. Whenever a defendant resided out of the State, his appearance might be compelled by publication in the manner pointed out. A decree might pass against him, and performance be compelled by sequestration of his real or personal property, or by causing possession of specific property to be delivered, where that relief is sought. The relief was not confined to cases of mortgage foreclosure, or where there was a specific claim upon the property, but included cases requiring the payment of money as well. 2 Edm. Rev. Stat. N. Y., pp. 193–195; 186, m.

I doubt not that many valuable titles are now held by virtue of the provisions of these statutes.

The statute of California authorizes the service of a summons on a non-resident defendant by publication, permitting him to come in and defend upon the merits within one year after the entry of judgment. Code, sects. 10,412, 10,473. In its general character it is like the statutes of Oregon and New York, already referred to.

The Code of Iowa, sect. 2618, that of Nevada, sect. 1093, and that of Wisconsin, are to the same general effect. The Revised Statutes of Ohio, sects. 70, 75, 2 Swan & Critchfield, provide for a similar publication, and that the defendant may come in to defend within five years after the entry of the judgment, but that the title to property held by any purchaser in good faith under the judgment shall not be affected thereby.

The attachment laws of New Jersey, Nixon Dig. (4th ed.), p. 55, are like those of New York already quoted, by which title may be transferred to all the property of a non-resident debtor. And the provisions of the Pennsylvania statute regu-

lating proceedings in equity, Brightly's Purden's Dig., p. 5988, sects. 51, 52, give the same authority in substance, and the same result is produced as under the New York statute.

Without going into a wearisome detail of the statutes of the various States, it is safe to say that nearly every State in the Union provides a process by which the lands and other property of a non-resident debtor may be subjected to the payment of his debts, through a judgment or decree against the owner, obtained upon a substituted service of the summons or writ commencing the action.

The principle of substituted service is also a rule of property under the statutes of the United States.

The act of Congress "to amend the law of the District of Columbia in relation to judicial proceedings therein," approved Feb. 23, 1867, 14 Stat. 403, contains the same general provisions. It enacts (sect. 7) that publication may be substituted for personal service, when the defendant cannot be found, in suits for partition, divorce, by attachment, for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanics' liens and all other liens against real or personal property, and in all actions at law or in equity having for their immediate object the enforcement or establishment of any lawful right, claim, or demand to or against any real or personal property within the jurisdiction of the court.

A following section points out the mode of proceeding, and closes in these words: —

"The decree, besides subjecting the thing upon which the lien has attached to the satisfaction of the plaintiff's demand against the defendant, shall adjudge that the plaintiff recover his demand against the defendant, and that he may have execution thereof as at law." Sect. 10.

A formal judgment against the debtor is thus authorized, by means of which any other property of the defendant within the jurisdiction of the court, in addition to that which is the subject of the lien, may be sold, and the title transferred to the purchaser.

All these statutes are now adjudged to be unconstitutional and void. The titles obtained under them are not of the value

of the paper on which they are recorded, except where a preliminary attachment was issued.

Some of the statutes and several of the authorities I cite go further than the present case requires. In this case, property lying in the State where the suit was brought, owned by the non-resident debtor, was sold upon the judgment against him; and it is on the title to that property that the controversy turns.

The question whether, in a suit commenced like the present one, a judgment can be obtained, which, if sued upon in another State, will be conclusive against the debtor, is not before us; nor does the question arise as to the faith and credit to be given in one State to a judgment recovered in another. The learning on that subject is not applicable. The point is simply whether land lying in the same State may be subjected to process at the end of a suit thus commenced.

It is here necessary only to maintain the principle laid down by Judge Cooley in his work on Constitutional Limitations, p. 404, and cited by Mr. Justice Field in *Galpin* v. *Page*, 3 Sawyer, 93, in these words: —

"The fact that process was not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings. Where a party has property in a State, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

The learned author does not make it a condition that there should be a preliminary seizure of the property by attachment; he lays down the rule that all a person's property in a State may be subjected to all valid claims there existing against him.

The objection now made, that suits commenced by substituted service, as by publication, and judgments obtained without actual notice to the debtor, are in violation of that constitutional provision that no man shall be deprived of his property "without due process of law," has often been presented.

In *Matter of the Empire City Bank*, 18 N. Y. 199, which

was a statutory proceeding to establish and to enforce the responsibility of the stockholders of a banking corporation, and the proceedings in which resulted in a personal judgment against the stockholders for the amount found due, the eminent and learned Judge Denio, speaking as the organ of the Court of Appeals, says: —

"The notice of hearing is to be personal, or by service at the residence of the parties who live in the county, or by advertisement as to others. It may, therefore, happen that some of the persons who are made liable will not have received actual notice, and the question is, whether personal service of process or actual notice to the party is essential to constitute due process of law. We have not been referred to any adjudication holding that no man's right of property can be affected by judicial proceedings unless he have personal notice. It may be admitted that a statute which should authorize any debt or damages to be adjudged against a person upon a purely *ex parte* proceeding, without a pretence of notice or any provision for defending, would be a violation of the Constitution, and be void; but where the legislature has prescribed a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend, I am of the opinion that the courts have not the power to pronounce the proceeding illegal. The legislature has uniformly acted upon that understanding of the Constitution."

Numerous provisions of the statutes of the State are commented upon, after which he proceeds: —

"Various prudential regulations are made with respect to these remedies; but it may possibly happen, notwithstanding all these precautions, that a citizen who owes nothing, and has done none of the acts mentioned in the statute, may be deprived of his estate, without any actual knowledge of the process by which it has been taken from him. If we hold, as we must in order to sustain this legislation, that the Constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, it then belongs to the legislature to determine whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him."

In *Happy* v. *Mosher*, 48 id. 313, the court say: —

"An approved definition of due process of law is 'law in its regular administration through courts of justice.' 2 Kent, Com. 13. It need not be a legal proceeding according to the course of the common law, neither must there be personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity afforded him to defend."

The same language is used in *Westervelt* v. *Gregg*, 12 id. 202, and in *Campbell* v. *Evans*, 45 id. 356. *Campbell* v. *Evans* and *The Empire City Bank* are cases not of proceedings against property to enforce a lien or claim; but in each of them a personal judgment in damages was rendered against the party complaining.

It is undoubtedly true, that, in many cases where the question respecting due process of law has arisen, the case in hand was that of a proceeding *in rem*. It is true, also, as is asserted, that the process of a State cannot be supposed to run beyond its own territory. It is equally true, however, that, in every instance where the question has been presented, the validity of substituted service, which is used to subject property within the State belonging to a non-resident to a judgment obtained by means thereof, has been sustained. I have found no case in which it is adjudged that a statute must require a preliminary seizure of such property as necessary to the validity of the proceeding against it, or that there must have been a previous specific lien upon it; that is, I have found no case where such has been the judgment of the court upon facts making necessary the decision of the point. On the contrary, in the case of the attachment laws of New York and of New Jersey, which distribute all of the non-resident's property, not merely that levied on by the attachment, and in several of the reported cases already referred to, where the judgment was sustained, neither of these preliminary facts existed.

The case of *Galpin* v. *Page*, reported in 18 Wall. 350, and again in 3 Sawyer, 93, is cited in hostility to the views I have expressed. There may be general expressions which will justify

this suggestion, but the judgment is in harmony with those principles. In the case as reported in this court, it was held that the title of the purchaser under a decree against a non-resident infant was invalid, for two reasons: 1st, That there was no jurisdiction of the proceeding under the statute of California, on account of the entire absence of an affidavit of non-residence, and of diligent inquiry for the residence of the debtor; 2d, the absence of any order for publication in Eaton's case, — both of which are conditions precedent to the jurisdiction of the court to take any action on the subject. The title was held void, also, for the reason that the decree under which it was obtained had been reversed in the State court, and the title was not taken at the sale, nor held then by a purchaser in good faith, the purchase being made by one of the attorneys in the suit, and the title being transferred to his law partner after the reversal of the decree. The court held that there was a failure of jurisdiction in the court under which the plaintiff claimed title, and that he could not recover. The learned justice who delivered the opinion in the Circuit Court and in this court expressly affirms the authority of a State over persons not only, but property as well, within its limits, and this by means of a substituted service. The judgment so obtained, he insists, can properly be used as a means of reaching property within the State, which is thus brought under the control of the court and subjected to its judgment. This is the precise point in controversy in the present action.

The case of *Cooper* v. *Reynolds*, 10 Wall. 308, is cited for the same purpose. There the judgment of the court below, refusing to give effect to a judgment obtained upon an order of publication against a non-resident, was reversed in this court. The suit was commenced, or immediately accompanied (it is not clear which), by an attachment which was levied upon the real estate sold, and for the recovery of which this action was brought. This court sustained the title founded upon the suit commenced against the non-resident by attachment. In the opinion delivered in that case there may be remarks, by way of argument or illustration, tending to show that a judgment obtained in a suit not commenced by the levy of an attachment will not give title to land purchased under it. They are,

however, extra-judicial, the decision itself sustaining the judgment obtained under the State statute by publication.

Webster v. *Reid*, 11 How. 437, is also cited. There the action involved the title to certain lands in the State of Iowa, being lands formerly belonging to the half-breeds of the Sac and Fox tribes; and title was claimed against the Indian right under the statutes of June 2, 1838, and January, 1839. By these statutes, commissioners were appointed who were authorized to hear claims for accounts against the Indians, and commence actions for the same, giving a notice thereof of eight weeks in the Iowa "Territorial Gazette," and to enter up judgments which should be a lien on the lands. It was provided that it should not be necessary to name the defendants in the suits, but the words "owners of the half-breed lands lying in Lee County" should be a sufficient designation of the defendants in such suits; and it provided that the trials should be by the court, and not by a jury. It will be observed that the lands were not only within the limits of the territory of Iowa, but that all the Indians who were made defendants under the name mentioned were also residents of Iowa, and, for aught that appears to the contrary, of the very county of Lee in which the proceeding was taken. Non-residence was not a fact in the case. Moreover, they were Indians, and, presumptively, not citizens of any State; and the judgments under which the lands were sold were rendered by the commissioners for their own services under the act.

The court found abundant reasons, six in number, for refusing to sustain the title thus obtained. The act was apparently an attempt dishonestly to obtain the Indian title, and not intended to give a substitution for a personal service which would be likely, or was reasonably designed, to reach the persons to be affected.

The case of *Voorhees* v. *Jackson*, 10 Pet. 449, affirmed the title levied under the attachment laws of Ohio, and laid down the principle of assuming that all had been rightly done by a court having general jurisdiction of the subject-matter.

In *Cooper* v. *Smith*, 25 Iowa, 269, it is said, that where no process is served on the defendant, nor property attached, nor garnishee charged, nor appearance entered, a judgment based

on a publication of the pendency of the suit will be void, and may be impeached, collaterally or otherwise, and forms no bar to a recovery in opposition to it, nor any foundation for a title claimed under it. The language is very general, and goes much beyond the requirement of the case, which was an appeal from a personal judgment obtained by publication against the defendant, and where, as the court say, the petition was not properly verified. All that the court decided was that this judgment should be reversed. This is quite a different question from the one before us. Titles obtained by purchase at a sale upon an erroneous judgment are generally good, although the judgment itself be afterwards reversed. *McGoon* v. *Scales*, 9 Wall. 311.

In *Darrance* v. *Preston*, 18 Iowa, 396, the distinction is pointed out between the validity of a judgment as to the amount realized from the sale of property within the jurisdiction of the court and its validity beyond that amount. *Picquet* v. *Swan*, 5 Mas. 35; *Bissell* v. *Briggs*, 9 Mass. 462; *Ewer* v. *Coffin*, 1 Cush. (Mass.) 23, are cited; but neither of them in its facts touches the question before us.

In Drake on Attachment, the rule is laid down in very general language; but none of the cases cited by him will control the present case. They are the following: —

Eaton v. *Bridger*, 33 N. H. 228, was decided upon the peculiar terms of the New Hampshire statute, which forbids the entry of a judgment, unless the debtor was served with process, or actually appeared and answered in the suit. The court say the judgment was "not only unauthorized by law, but rendered in violation of its express provisions."

Johnson v. *Dodge* was a proceeding in the same action to obtain a reversal on appeal of the general judgment, and did not arise upon a contest for property sold under the judgment. *Carleton* v *Washington Insurance Co.*, 35 id. 162, and *Bruce* v. *Cloutman*, 45 id. 37, are to the same effect and upon the same statute.

Smith v. *McCutchen*, 38 Mo. 415, was a motion in the former suit to set aside the execution by a garnishee, and it was held that the statute was intended to extend to that class of cases. *Abbott* v. *Shepard*, 44 id. 273, is to the same effect, and is based upon *Smith* v. *McCutchen*, *supra*.

So in *Eastman* v. *Wadleigh*, 65 Me. 251, the question arose in debt on the judgment, not upon a holding of land purchased under the judgment. It was decided upon the express language of the statute of Maine, strongly implying the power of the legislature to make it otherwise, had they so chosen.

It is said that the case where a preliminary seizure has been made, and jurisdiction thereby conferred, differs from that where the property is seized at the end of the action, in this: in the first case, the property is supposed to be so near to its owner, that, if seizure is made of it, he will be aware of the fact, and have his opportunity to defend, and jurisdiction of the person is thus obtained. This, however, is matter of discretion and of judgment only. Such seizure is not in itself notice to the defendant, and it is not certain that he will by that means receive notice. Adopted as a means of communicating it, and although a very good means, it is not the only one, nor necessarily better than a publication of the pendency of the suit, made with an honest intention to reach the debtor. Who shall assume to say to the legislature, that if it authorizes a particular mode of giving notice to a debtor, its action may be sustained, but, if it adopts any or all others, its action is unconstitutional and void? The rule is universal, that modes, means, questions of expediency or necessity, are exclusively within the judgment of the legislature, and that the judiciary cannot review them. This has been so held in relation to a bank of the United States, to the legal-tender act, and to cases arising under other provisions of the Constitution.

In *Jarvis* v. *Barrett*, 14 Wis. 591, such is the holding. The court say: —

"The essential fact on which the publication is made to depend is property of the defendant in the State, and not whether it has been attached. . . . There is no magic about the writ [of attachment] which should make it the exclusive remedy. The same legislative power which devised it can devise some other, and declare that it shall have the same force and effect. The particular means to be used are always within the control of the legislature, so that the end be not beyond the scope of legislative power."

If the legislature shall think that publication and deposit in the post-office are likely to give the notice, there seems to be

nothing in the nature of things to prevent their adoption in lieu of the attachment. The point of power cannot be thus controlled.

That a State can subject land within its limits belonging to non-resident owners to debts due to its own citizens as it can legislate upon all other local matters; that it can prescribe the mode and process by which it is to be reached, — seems to me very plain.

I am not willing to declare that a sovereign State cannot subject the land within its limits to the payment of debts due to its citizens, or that the power to do so depends upon the fact whether its statute shall authorize the property to be levied upon at the commencement of the suit or at its termination. This is a matter of detail, and I am of opinion, that if reasonable notice be given, with an opportunity to defend when appearance is made, the question of power will be fully satisfied.

UNITED STATES *v.* MEIGS.

The deputy-clerk, crier, and messengers of the Supreme Court of the District of Columbia are not entitled to the twenty per cent additional compensation granted by the joint resolution of Congress approved Feb. 28, 1867 (14 Stat. 569).

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

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

Mr. A. G. Riddle and *Mr. Francis Miller*, *contra*.

MR. JUSTICE MILLER delivered the opinion of the court.

Of the appellees, one was a deputy-clerk of the Supreme Court of the District of Columbia, another was the crier of that court, and two others were messengers. They each sued in the Court of Claims to recover the additional compensation allowed to certain employés of the government by the joint resolution of Congress of Feb. 28, 1867. 14 Stat. 569.

The Court of Claims finds the above facts, and while it says, in what purports to be an opinion, that it believes that the resolution refers to clerks and employés of the executive branches of the government alone, and does not extend to those of the judiciary, it nevertheless renders a judgment for the claimants.

We concur with the Court of Claims in the opinion that the resolution does not extend to the officers and employés of the judicial department of the government, and though in some instances it may not be easy to say to which department a claimant may belong, we have no difficulty in holding that each of the present claimants belongs to that department.

The deputy-clerk, Meigs, whose case is the principal one, was appointed by the clerk of the court, and the latter was appointed by the court. The deputy served at a salary fixed by contract between him and the clerk. He was also paid by the clerk, and worked for the clerk, and performed services which it was the duty of the clerk to perform, and for which the clerk received compensation by fees paid by the litigants for whom those services were rendered. It is very difficult to see how this deputy-clerk can be called an employé of the government at all. The government was never liable to him for any salary at any time, and, if the principal clerk had failed to pay him the $2,000, the government clearly would not have been liable for it. How, then, can it be liable for the additional twenty per cent?

Mulloy, the crier, and Taylor and Grimes, the messengers, were employés of the court, — the first appointed by the court and the others by the marshal, to perform services immediately in connection with the court and its judges; and, if employés of the government at all, they certainly belong to the judicial department, and not to the executive.

The case of Manning, 13 Wall. 578, is relied on as covering the case of the present claimants. Manning was a guard in the jail of the penitentiary of the District of Columbia. He was appointed by the warden of the jail, and his compensation fixed by the Secretary of the Interior. Whether the warden of the jail, since the office has been disconnected from the marshal's office, can be held to belong to the judicial branch of the government, it is not necessary to decide; but a decision

which would recognize all the county jails, penitentiaries, and other prisons of the United States as belonging to the judicial, as distinguished from the executive, department of government, would, we imagine, excite surprise. It is very clear that Manning was not an employé under the court, and that the crier and the messengers are; and, if the deputy-clerk can be said to be in the employment of any but his principal, he also performs duties under the immediate control of the court.

The circumstance that in the emolument account of the clerk the auditor allows him to deduct, from the fees which he would otherwise pay into the treasury, the deputy's compensation, does not make him an employé of the department. All claims paid out of the treasury of the United States must be audited by one of its officers, and approved by one of the comptrollers; but their action in allowing or refusing to allow a claim proves nothing as to which of these great constitutional divisions, executive, legislative, or judicial, the claimant belongs.

Judgment reversed, with directions to dismiss the petitions.

UNITED STATES v. McLEAN.

1. After the salary of a deputy-postmaster has been fixed, it cannot be increased until a readjustment of it, based upon his quarterly returns, shall have been made by the Postmaster-General.
2. Such readjustment is an executive act, taking effect in all cases prospectively; and, if it be not performed, the law imposes no obligation upon the government to pay an increased salary.
3. Courts cannot enforce rights depending for their existence upon a prior performance by an executive officer of certain duties which he has failed to perform.

APPEAL from the Court of Claims.

This was an action by McLean to recover $569.50 for compensation which he claimed to be due him as deputy-postmaster at Florence, Kansas, from April 14, 1871, to July 1, 1872.

The Court of Claims found in his favor, and rendered judgment for that amount. The United States appealed to this court.

The facts are stated in the opinion of the court.

The Solicitor-General for the United States.
Mr. Harvey Spalding, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

The case of the claimant appears to be a hard one; but we think he has no remedy by suit in the Court of Claims. His claim rests not upon any contract with the government, either express or implied, but upon acts of Congress providing for a regulation of the salaries of deputy-postmasters.

On the thirteenth day of March, 1871, he was appointed postmaster at Florence, Kansas, and his salary was fixed at seven dollars, until it could be ascertained what the business of his office would be. He entered upon the duties of the appointment on the 14th of April, 1871, and continued therein until after July 1, 1872, from which date his salary was fixed at $560 a year. His claim now is, that, under the statutes prescribing the basis for compensation, adjustment and readjustment of salaries of postmasters, he is entitled to be paid for his service between April 14, 1871, and July 1, 1872, the sum of $578.

Before examining the acts of Congress bearing upon the subject, some further notice of the facts is necessary. In a letter accompanying the claimant's appointment, he was required to make out, at the end of each quarter, and forward to the Third Assistant Postmaster-General, a statement, under oath, of the total value of postage-stamps cancelled during the quarter; and he was informed that his salary could not exceed the amount to which the office would be entitled, from commissions and box-rents under the former laws, but that it would be readjusted at the proper time by the Postmaster-General, on the basis of the amount of business done, as shown by the quarterly statements required. On the 1st of June, 1871, he was instructed from the department, that, in order to enable the Postmaster-General to review and readjust his salary from and after the first day of July, 1872, he should keep an account of the total number of stamps cancelled at his office for the six months beginning July 1, 1871, and ending Dec. 31, 1871; also the amount collected on unpaid letters, on newspapers, and other printed matter, and for box-rents during the same period; and that, on the 1st of January, 1872, he should make out and forward a sworn

statement of the amount arising from each of those sources. With this latter order he complied, and on the 1st of January, 1872, he forwarded a sworn statement, showing the revenue of his office to have been $482.67 during the six months next preceding Jan. 1, 1872; and, at the regular biennial adjustment of salaries, in June next following, the Postmaster-General readjusted his salary on the basis of his statement, and fixed it at $560 a year, from July 1, 1872. From April 14, 1871, till July 1, 1872, the claimant made no application for readjustment of his salary as first fixed, unless a letter written by him to the Third Assistant Postmaster-General, complaining of the inadequacy of his compensation, can be regarded as an application for readjustment. But that letter was unaccompanied by any sworn statement of the income of his office, and it furnished no basis for readjustment; nor was there any subsequent application, except that, in October, 1872, after the salary had been fixed at $560 from July 1 of that year, a person claiming to be the claimant's attorney wrote to the department, requesting that the order readjusting the salary should be modified, so as to take effect from April 14, 1871. But this application also was accompanied by no sworn statement of revenue.

Upon this statement of facts it appears to us very clear that the acts of Congress give to the claimant no right to any greater salary between April 14, 1871, and July 1, 1872, than that which was fixed at the time of his appointment, and which he has received. The act of June 22, 1854, authorized the Postmaster-General to allow to deputy-postmasters, in lieu of the compensation before allowed, commissions on the postage collected at their respective offices, at varying rates, according to the amounts collected. 10 Stat. 298. The act of July 1, 1864, divided such postmasters into five classes, and substituted fixed salaries for commissions. In the classification made, the claimant, when appointed, belonged to the fifth class, — his salary being less than $100. The second section of the act enacted that the Postmaster-General shall review once in two years, and in special cases, upon satisfactory representation, as much oftener as he may deem expedient, and readjust on the basis of the first section the salary assigned by him to any office; but that any change made in such salary should not take effect

until the first day of the quarter next following such order. The fourth section enacted that, at offices which had not been established for two years prior to July 1, 1864, the salary might be adjusted upon a satisfactory return by the postmaster of the receipts, expenditures, and business of his office. 13 id. 335. The act of June 12, 1866, 14 id. 60, amended the second section of the act of 1864, by adding the proviso, that when the quarterly returns of any postmaster of the third, fourth, or fifth class show that the salary allowed is ten per cent less than it would be on the basis of commissions under the act of 1854, fixing compensation, then the Postmaster-General shall review and adjust under the provisions of that, the second, section.

From a review of these statutory provisions it appears plainly that, after a salary of a postmaster has been fixed, a readjustment by the Postmaster-General must be made before it can be increased, and the readjustment takes effect in all cases prospectively. The law imposes no obligation upon the government to pay an increased salary, unless a readjustment has preceded it. And by the act of 1866, the Postmaster-General is not to readjust an existing salary, unless the quarterly returns made show cause for it. Now, if it be conceded that the quarterly returns made on the last day of each quarter, beginning with June 30, 1871, made it the duty of the Postmaster-General to make a readjustment immediately on the receipt of the returns, still his readjustment was an executive act, made necessary by the law, in order to perfect any liability of the government. If the executive officer failed to do his duty, he might have been constrained by a *mandamus*. But courts cannot perform executive duties, or treat them as performed when they have been neglected. They cannot enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform. The right asserted by the claimant rests upon a condition unfulfilled. The judgment was therefore erroneous, and must be reversed, and the record remitted to the Court of Claims, with instructions to dismiss the petition; and it is

So ordered.

INSURANCE COMPANY *v.* BRAME.

1. A. killed B., upon whose life there was a policy of insurance in favor of a third party. The company paid the insurance, and sued A. for the damages it had sustained by his act. *Held*, that the action does not lie at common law, or under the Civil Code of Louisiana, where the homicide was committed.
2. That code gives a right of action against the wrong-doer to certain relatives of the deceased, for injuries to the person resulting in death. At common law, an action for such injuries abates.

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

This is an action by the Mobile Life Insurance Company against Brame, to recover the sum of $7,000.

The plaintiff alleged that it insured the life of one Craven McLemore, a citizen of Louisiana, for that amount in favor of third parties; that on the 24th of October, 1875, while its policies were in force, Brame did, in the town of Delhi, in Louisiana, wilfully shoot said McLemore, and inflict upon him a mortal wound, from the effects of which he died on the twenty-sixth day of that month; that the shooting was an illegal and tortious act on the part of Brame, and caused damage to the plaintiff in the amount of the policies on the life of the deceased, which amount the plaintiff acknowledges to be due, and a part of which has been paid.

An exception of the defendant to the plaintiff's petition was sustained, and judgment rendered in his favor. The company then brought the case here.

The Revised Civil Code of Louisiana contains the following articles: —

"ART. 2314. Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive, in case of death, in favor of the minor children and widow of the deceased, or either of them, and in default of these, in favor of the surviving father or mother, or either of them, for the space of one year from the death."

"ART. 2316. Every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence, or his want of skill."

"ART. 2324. He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable *in solido* with that person for the damage caused by such act."

Mr. Charles E. Fenner for the plaintiff in error.

The authorities agree that a man is responsible for any direct damage to another, resulting from his unlawful act. 1 Chitty on Plead., 125–130, 147; 1 Hilliard on Torts, 97; Field on Damages, sect. 599; *Scott* v. *Shepherd*, 2 Black., W. 892; *Reynolds* v. *Clarke*, Stra. 635; *Salsbury* v. *Hershinroder*, 106 Mass. 458; *Smith* v. *Rutherford*, 2 Serg. & R. (Pa.) 358; *Mott* v. *Hudson River Railroad Co.*, 8 Bosw. (N. Y.) 345; and particularly *Ricker* v. *Freeman*, 50 N. H. 420.

For the purposes of this case, it stands admitted that the act of defendant was unlawful; and it would be difficult to conceive of a more direct consequence than the damage done to the plaintiff. The damage is not only direct, but it is also a certain pecuniary loss, thoroughly appreciable in dollars and cents, according to scientific life-tables, which have been frequently recognized by the courts as proper standards in estimating such damage. Field on Damages, sect. 632; *Rowley* v. *London Railroad Co.*, 8 Law Rep. Ex. 221; *David* v. *Southwestern Railroad Co.*, 41 Ga. 223; *Donaldson* v. *Mississippi Railroad Co.*, 18 Iowa, 280; *Blake* v. *Midland Company*, 18 Q. B. 93.

Hubgh v. *New Orleans & Carrollton Railroad Co.*, 6 La. Ann. 495, and *Hermann* v. *Carrollton Railroad Co.*, 11 id. 5, are confined to actions for damages by relations of the deceased, and neither by their terms nor reasons extend to this action.

The amendment to art. 2294, now 2314, of the Civil Code of Louisiana does not affect the case, because it only applies to the right of action of the injured party for the damage done to him, and provides that the right, in case of his death, shall survive in favor of certain relatives.

Connecticut Mutual Life Insurance Co. v. *New York & New Haven Railroad Co.*, 25 Conn. 265, relied upon by the other side, is entitled to no greater weight as authority than results from the mere force of its reasoning. The present case is

governed by the law of Louisiana, which differs from the common law and from that of Connecticut.

A contract of life insurance is similar to a valued policy of fire or marine insurance. The insurer who has paid the loss has in either case the right to recover from the tortious destroyer of the thing insured.

Under the law of Louisiana, which does not differ from the French law in this particular, the right of action of the plaintiff results directly to him without the intervention of any doctrine of subrogation.

Arts. 2314, 2316, and 2324 of the Revised Civil Code of Louisiana fully sanction this action, unless excluded by some authoritative interpretation of them. There has been no such interpretation by the courts of Louisiana which applies either in terms or reasons to this case.

Mr. John H. Kennard, contra.

It is the general rule that a party is not liable *civiliter* for taking human life, or for any damages resulting therefrom. *Connecticut Mutual Life Insurance Co.* v. *New York & New Haven Railroad Co.*, 25 Conn. 265. The exceptions to this rule under the Civil Code of Louisiana have no relation to any other parties than the relatives of the deceased.

MR. JUSTICE HUNT delivered the opinion of the court.

The argument of the insurance company is that the killing of the deceased was an injury to or violation of a legal right or interest of the company; that, as a consequence thereof, it sustained a loss, which is the proximate effect of the injury.

The answer of the defendant is founded upon the theory that the loss is the remote and indirect result merely of the act charged, that at the common law no civil action lies for an injury which results in the death of the party injured, and that the statutes of Louisiana upon that subject do not include the present case.

The authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the State

courts, and no deliberate, well-considered decision to the contrary is to be found. In Hilliard on Torts, p. 87, sect. 10, the rule is thus laid down: "Upon a similar ground it has been held that at common law the death of a human being, though clearly involving pecuniary loss, is not the ground of an action for damages." The most of the cases upon the subject are there referred to. *Baker* v. *Bolton et al.*, 1 Camp. 493; *Connecticut Mutual Life Insurance Co.* v. *New York & New Haven Railroad Co.*, 25 Conn. 265; *Kramer* v. *Market Street Railroad Co.*, 25 Cal. 434; *Indianapolis, Pittsburg, & Cleveland Railroad Co.* v. *Kealy*, 23 Ind. 133; *Hyatt* v. *Adams*, 16 Mich. 180; *Shields* v. *Yonge*, 15 Ga. 349; *Peoria Marine & Fire Insurance Co.* v. *Frost*, 37 Ill. 333. The only cases that tend to the contrary of this rule, so far as we know, are *Cross* v. *Guthery*, 2 Root (Conn.), 90, *Plummer* v. *Webb*, Ware, 69, and *Ford* v. *Monroe*, 20 Wend. (N. Y.) 210. They are considered by the New York Court of Appeals in *Green* v. *The Hudson River Railroad Co.*, 2 Keyes (N. Y.), 294, and compared with the many cases to the contrary, and are held not to diminish the force of the rule as above stated. In that case, the plaintiff alleged that, on the ninth day of January, 1856, his wife was a passenger on the defendants' road, and by the gross carelessness and unskilfulness of the defendants a collision occurred, by means of which his wife was killed, "whereby he has lost and been deprived of all the comfort, benefit, and assistance of his said wife in his domestic affairs, which he might and otherwise would have had, to his damage," &c. A demurrer to this complaint, upon the ground that the facts alleged constituted no cause of action, was sustained by the New York Court of Appeals.

In *Hubgh* v. *New Orleans & Carrollton Railroad Co.*, 6 La. Ann. 495, the same principle was decided, and in the same manner. In giving its opinion, the court say: "The exception of the defendants presents the question whether the death of a human being can be the ground of an action for damages." Not being satisfied with this decision, Messrs. Ogden & Duncan asked for a rehearing, the argument for which is reported in the same volume, pp. 498–508. It was denied in an elaborate opinion delivered by Chief Justice Eustis.

In *Hermann* v. *Carrollton Railroad Co.*, 11 id. 5, this principle was again affirmed in an opinion by Chief Justice Merrick.

It is only necessary to refer to one other case, involving the same principle as those already cited, but in its facts more closely resembling the case under consideration.

In *Connecticut Mutual Life Insurance Co.* v. *New York & New Haven Railroad Co.*, *supra*, the declaration alleged that on the twentieth day of March, 1850, the plaintiffs had outstanding and in force a policy of insurance for $2,000 upon the life of Samuel Beach; that Beach was on that day a passenger on the defendants' road; that the defendants so carelessly, negligently, and unskilfully conducted themselves that the train on which Beach was riding was thrown down a bank into the river; that Beach was greatly wounded and bruised, by means whereof he then and there died, by reason of which the plaintiffs were compelled to pay to his administrators the sum of $2,000 upon the said policy.

The allegation of the present plaintiffs is that Brame tortiously and illegally took the life of McLemore by shooting him. This is open to the inference that the act of Brame was felonious. The case in Connecticut is based upon the allegation of negligence and carelessness, and is the more favorable to a recovery, in that it avoids the suggestion existing in the present case, that the civil injury is merged in the felony. The Supreme Court of Connecticut held that the action could not be sustained.

We have cited and given references to the important cases on this question; they are substantially uniform against the right of recovery.

Upon principle, we think, no other conclusion could be reached than that stated. The relation between the insurance company and McLemore, the deceased, was created by a contract between them, to which Brame was not a party. The injury inflicted by him was upon McLemore, against his personal rights; that it happened to injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing. As in *Rockingham Insurance Co.* v. *Mosher*, 39 Me. 253, where an

insurance company brought suit against one who had wilfully fired a store upon which it had a policy of insurance, which it was thereby compelled to pay, it was held that the loss was remote and indirect, and that the action could not be sustained. In *Ashley et al.* v. *Dixon*, 48 N. Y. 430, it was held that if A. is under a contract to convey his land to B., and C. persuades him not to do so, no action lies by B. against C. So a witness is not liable for evidence given by him in a suit, although false, by which another is injured. *Grove* v. *Brandenburg*, 7 Blackf. (Ind.) 234; *Dunlap* v. *Gledden*, 31 Me. 435. And in *Anthony* v. *Slaid*, 11 Metc. (Mass.) 290, a contractor for the support of town paupers had been subjected to extra expense in consequence of personal injury inflicted upon one of them; and he brought the action against the assailant to recover for such expenditure. The court held the damage to be remote and indirect, and not sustained by means of any natural or legal relation between the plaintiff and the party injured, but simply by means of a special contract between the plaintiff and the town. Some text-writers are referred to as holding a different view, but we are not cited to any case in this country or Great Britain where a different doctrine has been held.

By the common law, actions for injuries to the person abate by death, and cannot be revived or maintained by the executor or the heir. By the act of Parliament of Aug. 21, 1846, 9 & 10 Vict., an action in certain cases is given to the representatives of the deceased. This principle, in various forms and with various limitations, has been incorporated into the statutes of many of our States, and among others into that of Louisiana. It is there given in favor of the minor children and widow of the deceased, and, in default of these relatives, in favor of the surviving father and mother. Acts of La., 1855, pr. 223, p. 270. The case of a creditor, much less a remote claimant like the plaintiff, is not within the statute.

In each of the briefs it is stated that the defendant was tried for the homicide, and acquitted. In the view we take of the case, the fact of a trial or its result is a circumstance quite immaterial to the present question, however important it may have been to the defendant. *Judgment affirmed.*

UNITED STATES *v.* MOORE.

1. The words, "after date of appointment" and "from such date," which occur in sect. 1556 of the Revised Statutes, fixing the annual pay of passed assistant-surgeons of the navy, refer not to the original entry of the officer into the service as an assistant-surgeon, but to the notification by the Secretary of the Navy that he has passed his examination for promotion to the grade of surgeon, and will thereafter, until such promotion, be considered as a passed assistant-surgeon.
2. A passed assistant-surgeoncy is an office, and the notification of the Secretary of the Navy is a valid appointment to it.

APPEAL from the Court of Claims.

This was an action in the Court of Claims by Andrew M. Moore against the United States to recover certain pay which he alleged was due him as an officer in the navy.

That court found the following facts: —

1. On the 12th of April, 1869, the claimant was appointed and commissioned an assistant-surgeon in the navy of the United States.

2. On the 24th of February, 1874, after examination, he was found qualified for promotion to the grade of surgeon. He was, on the following day, notified by the Secretary of the Navy that the report of the board of examiners, before whom he had appeared for examination, was approved by the department, and that from that date he would be regarded as a passed assistant-surgeon; and from that date up to the date of the institution of this suit, May 3, 1876, he received pay as passed assistant-surgeon in the first five years after appointment as such.

3. From the 12th of April, 1874, till May 3, 1876, the claimant's service was as follows: On shore-duty, four hundred and thirty-eight days, for which he was paid at the rate of $1,800 per annum; on leave or waiting orders, three hundred and twenty-three days, for which he was paid at the rate of $1,500 per annum.

Upon the foregoing facts the court, being equally divided in opinion, held *pro forma*, for the purposes of an appeal, that the claimant was entitled to the rate of pay established by law for a passed assistant-surgeon, after five years from the date of

appointment; that is to say, when on shore-duty, at the rate of $2,000 per annum, and when on leave or waiting orders, at the rate of $1,700 per annum; and that the claimant was therefore entitled to receive, for the seven hundred and sixty-one days specified, the additional sum of $409.95, for which judgment was entered.

The United States appealed.

Mr. Assistant Attorney-General Smith for the United States.
Mr. John B. Sanborn and *Mr. Charles King*, *contra*.

Mr. JUSTICE SWAYNE delivered the opinion of the court.

On the 12th of April, 1869, the appellee was appointed an assistant-surgeon in the navy of the United States. On the 24th of February, 1874, he was examined for promotion to the grade of surgeon. On the following day, he was notified by the Secretary of the Navy that the report of the board of examiners was approved by the department, and that from that date he would be regarded as a passed assistant-surgeon. From that time up to the institution of this suit he received the pay fixed by law for passed assistant-surgeons during the first five years after their appointment as such.

The statutes of the United States provides as follows: —

"The active list of the medical corps of the navy shall consist of fifteen medical directors, fifteen medical inspectors, fifty surgeons, and one hundred assistant-surgeons." Rev. Stat., sect. 1368. "No person shall be appointed surgeon until he has served as an assistant-surgeon at least two years on board a public vessel of the United States at sea, nor until he has been examined and approved for such appointment by a board of naval surgeons designated by the Secretary of the Navy." Id., sect. 1370. "The commissioned officers and warrant officers on the active list of the navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employés in the navy, shall be entitled to receive annual pay at the rates herein stated after their respective designations." . . . "Passed assistant-surgeons, passed assistant-paymasters, and passed assistant-engineers, during the first five years after date of appointment, when at sea, $2,000; on shore-duty, $1,800; on leave or waiting orders, $1,500; after

five years from such date, when at sea, $2,200; on shore-duty, $2,000; on leave or waiting orders, $1,700." Assistant-surgeons, assistant-paymasters, and second assistant-engineers, during the first five years after date of appointment, when at sea, $1,700; on shore-duty, $1,400; on leave or waiting orders, $1,000; after five years from such date, when at sea, $1,900; on shore-duty, $1,600; on leave or waiting orders, $1,200." Id., sect. 1556.

The appellee claims that the phrases, "after date of appointment" and "from such date," touching passed assistant-surgeons, refer to the date of his original appointment, when he entered the service as assistant-surgeon, and not to the time of the notification by the Secretary of the Navy that he would thereafter be regarded as a passed assistant-surgeon. The question arising from these conflicting constructions is the one presented for our determination. The government entertains the latter view, and we think correctly. It has always heretofore obtained in the Navy Department.

The place of passed assistant-surgeon is an office, and the notification by the Secretary of the Navy was a valid appointment to it. *United States* v. *Hartwell*, 6 Wall. 385; Const. U. S., art. 2, sect. 2.

The context in which the phrases occur shows clearly that they relate to the appointment of passed assistants, and not to that of assistants who have not passed. The former are there expressly named and provided for. The latter are neither named nor alluded to. They belong to distinct classes, and separate and distinct provision is made for the pay of each.

According to the construction contended for by the appellee, if a passed assistant did not become such until ten years after he entered the service as an assistant, he would receive pay five years as a passed assistant before he reached that grade. This is a necessary consequence of the appellee's proposition, and sets its error in a strong light. Such a result could not have been intended by Congress. It would make the law in all such cases retrospective. A statute is never to be so construed as to have this effect, if it can be reasonably avoided. The presumption, until rebutted, is the other way. Sedgw. Const. 161 and notes.

The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *Edwards* v. *Darby*, 12 Wheat. 210; *United States* v. *The State Bank of North Carolina*, 6 Pet. 29; *United States* v. *MacDaniel*, 7 id. 1. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.

The appellee insists that he was not appointed by the Secretary of the Navy, because sect. 1369 of the Revised Statutes requires that "all appointments in the medical corps shall be made by the President, by and with the advice and consent of the Senate."

It is retorted, in effect, in behalf of the government, that this proposition, if sound, proves too much for the appellee's case; and that, if there was no appointment by the Secretary, then the appellee could not be a passed assistant-surgeon, because, in addition to the Secretary's notification, he was not nominated by the President and confirmed by the Senate.

There is certainly as much foundation for the second theory as for the first one; but neither is correct. The place has every ingredient of an office, and, as we have seen, the appellee was legally appointed to it. The difficulty has arisen from the collators not having been careful to harmonize the language of the sections. Hence the seeming conflict. But the intention of Congress is clear, and that intention constitutes the law. A thing may be within the letter of a statute, and not within its meaning; and it may be within the meaning, though not within the letter. *Slater* v. *Cave*, 3 Ohio St. 85; 9 Bac. Abr., pp. 244, 247, tit. Statute, I., 5; *United States* v. *Babbit*, 1 Black, 55. In cases like this, the construction should be such that both provisions, if possible, may stand. The clause in question was obviously as much intended to have effect as the section with which it is in seeming conflict. It may well be held to be an exception, though not so expressed, to the universality of the language of the latter. This obviates the difficulty, harmonizes the provisions, and gives effect to both. We cannot doubt that the phrases, "after date of appointment" and

"from such date," have reference to the action of the Secretary, and to nothing else.

Judgment reversed, and cause remanded with directions to dismiss the petition.

YEATMAN *v.* SAVINGS INSTITUTION.

1. Except where, within a prescribed period before the commencement of proceedings in bankruptcy, an attachment has been sued out against the property of the bankrupt, or where his disposition of his property was, under the statute, fraudulent and void, his assignees take his real and personal estate, subject to all equities, liens, and incumbrances thereon, whether created by his act or by operation of law.
2. Until he shall be paid, the pledgee is entitled to the possession of the property which he holds under a valid pledge as security for his debt against the pledgors, notwithstanding a subsequent adjudication of bankruptcy against them; and his refusal to surrender it to their assignees is not a conversion of it.
3. The failure of the pledgee to appear and prove his claim in the bankruptcy court forfeits only his right to participate in the distribution of the bankrupt's estate ordered by that court.

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

On the 22d of July, 1871, O'Fallon & Hatch, a firm doing business at St. Louis, delivered, in pledge, to the New Orleans Savings Institution, a corporation created by the laws of Louisiana, having its place of business in New Orleans, two certificates of indebtedness issued by that State, each for the sum of $5,000, to secure the payment of a promissory note of the firm for $5,000, dated July 21, 1871, made payable to its own order on the 21st of January, 1872, and by it indorsed in blank. It is conceded that the corporation acquired the note and the certificates of indebtedness in due course of business, and for a valuable consideration. The firm and the individuals composing it were, Nov. 27, 1871, adjudged bankrupts by the District Court of the United States for the Eastern District of Missouri; and, upon the application of creditors, a receiver of the estate and effects of the bankrupts was, by an *ex parte* order, appointed, with authority to demand and receive all property of every kind and description belonging to them.

An assignee in bankruptcy was afterwards appointed, to whom was conveyed, in the prescribed mode, all the real and personal estate of the bankrupts. First the receiver, and subsequently the assignee, each claiming to act under the authority of that court, demanded of the corporation, in the city of New Orleans, the surrender of the certificates. That demand, repeated more than once, and accompanied by copies of the orders of that court, was uniformly met with a refusal to surrender them, except upon the payment of the note for which they had been pledged. The corporation, by its president, expressed its willingness to surrender them, or have them sold, if an amount sufficient to pay the note was left in New Orleans, with the agent of the receiver and assignee, until proof of its debt should be made in the bankruptcy court. Neither the receiver nor the assignee assented to such an arrangement, but insisted upon the right to the actual custody of the certificates pending the proceedings in bankruptcy. The assignee, upon one occasion, authorized the president of the corporation to sell them, at not less than sixty-eight cents on the dollar, and retain the proceeds, without prejudice to the rights of either party, until the claim of the institution should be proven before a register in bankruptcy, and allowed. But a sale could not be made at that limit, and the authority to sell was withdrawn.

The corporation did not become a party to the proceedings in bankruptcy by proving its debt, or in any other mode.

This action by the assignee in bankruptcy, to recover of the corporation the value of the certificates, was based upon the ground that, by its refusal to surrender possession of them, it had converted them to its own use, and become liable therefor.

The corporation insisted that, having obtained the certificates in due course of business, and for a valuable consideration, it was entitled to hold them until the note should be fully paid.

There was a finding in favor of the corporation; and, judgment having been rendered thereon, Yeatman sued out this writ of error.

Mr. Given Campbell for the plaintiff in error.

Mr. Thomas Allen Clarke for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

Counsel for the plaintiff in error has raised numerous questions for our consideration, which, under the view we take of the case, it is not necessary to determine. The sole question which, under the pleadings, it seems essential to decide, is, whether the savings institution, by its refusal to surrender the certificates, can be held to have converted them to its own use.

We are of opinion that this question must receive a negative answer. The savings institution, by virtue of the pledge, acquired a special property in the certificates, and, until the payment of the note for $5,000, was not bound to return them either to the bankrupt, the receiver, or the assignee in bankruptcy. Such are, beyond doubt, its rights at common law, as well as under the Code of Louisiana, which declares that "the creditor who is in possession of the pledge can only be compelled to return it when he has received the whole payment of the principal as well as the interest and costs." Rev. Code La., sect. 3164.

These rights were not affected by any of the provisions of the bankrupt law. The established rule is, that, except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. *Brown* v. *Heathcote*, 1 Atk. 160; *Mitchell* v. *Winslow*, 2 Story, 630; *Gibson* v. *Warder*, 14 Wall. 244; *Cook* v. *Tullis*, 18 id. 332; *Donaldson, Assignee*, v. *Farwell et al.*, 93 U. S. 631; *Jerome* v. *McCarter*, 94 id. 734. He takes the property in the same "plight and condition" that the bankrupt held it. *Winsor* v. *McLellan*, 2 Story, 492. In *Goddard* v. *Weaver*, 1 Wood, 260, it was well said that the assignee "takes only the bankrupt's interest in property. He has no right or title to the interest which other parties have therein, nor any control over the same, further than is expressly given to him by the Bankrupt Act, as auxiliary to the preservation of the bankrupt estate for the benefit of his cred-

itors. It would be absurd to contend that the assignee in bankruptcy became *ipso facto* seised and possessed in entirety, as trustee, of every article of property in which the bankrupt has any interest or share."

These views find direct support in more than one provision of the Bankrupt Act. Among the rights which vest at once in the assignee by virtue of the adjudication in bankruptcy, and of his appointment as such assignee, is the right to redeem the property or estate of the bankrupt. Act of 1867, sect. 14; Rev. Stat., sect. 5046. And, in order that it may be exercised for the benefit of creditors, the assignee is given express authority, "under the order and direction of the court, to redeem and discharge any mortgage or conditional contract, or pledge, or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrance." Act of 1867, sect. 14; Rev. Stat., sect. 5066. This is a distinct recognition of the rights of the pledgee as against the assignee. Of course, where the pledge is in fraud of the bankrupt law, and consequently void, the assignee may disregard the contract of pledge, and recover the property for the benefit of creditors. Not so where the pledge, as in this case, was made in good faith, for a valuable consideration, and not in violation of the provisions of the bankrupt law.

The savings institution, therefore, incurred no liability by its refusal to surrender the certificates upon the demand of the receiver or the assignee. Such refusal affords no evidence of a conversion of them to its use.

Nor was its right to hold them impaired by its failure to appear in the bankruptcy court, or its refusal to prove its debt, in the customary form, against the estate of the bankrupts. The only effect of such refusal was to lose the privilege of participating in such distribution of the estate as might be ordered by that court. It had the right to forego that advantage, and look for ultimate security wholly to the certificates which it held under a valid pledge. If the assignee regarded them as of greater value than the debt for which they had been pledged, or if the interest of the creditors required prompt action, he had authority, under the statute and the orders of the court, to

tender performance of the contract of pledge, or to discharge the debt for which the certificates were held. He had the right, perhaps, under the orders of the court, to sell them, subject to the claim of the defendant in error. If he desired a sale of them, and a distribution of the proceeds, or if he doubted the validity of the pledge, he could have instituted an action against the corporation in some court of competent jurisdiction in Louisiana, and thereby obtained a judicial determination of the rights of the parties. But none of these obvious modes of proceeding were adopted. The receiver and assignee seem to have acted throughout upon the theory that they had the right, immediately upon and by virtue of the adjudication in bankruptcy, to assume control of all property of every kind and description, wherever held, in which the bankrupt had an interest, without reference either to the just possession of others, lawfully acquired, prior to the commencement of proceedings in bankruptcy, or to the liens, incumbrances, or equities which existed against the property at the time of the adjudication in bankruptcy. We have seen that such a theory is unsupported by law.

The conclusions we have announced render it unnecessary to consider any other questions raised in the case.

Judgment affirmed.

NOTE. — In *Yeatman* v. *Butler*, *Yeatman* v. *Turnell*, *Yeatman* v. *Smith*, and *Yeatman* v. *Generès*, error to the Circuit Court of the United States for the District of Louisiana, which were argued by the same counsel as was the preceding case, MR. JUSTICE HARLAN, in delivering the opinion of the court, remarked, that the same questions of law which arose in them had been determined in *Yeatman* v. *Savings Institution*, *supra*, p. 764, and that the ruling in that case controlled them. *Judgment in each case affirmed.*

UNITED STATES *v.* COUNTY OF CLARK.

1. A *mandamus* enforces the exercise of an existing power, but does not confer power upon those to whom it is directed.
2. Where bonds were not issued prior to Jan. 1, 1874, by a county court in Missouri, in payment of its subscription to the stock of a railroad company, and the special tax of one-twentieth of one per cent, which, after the issue of the bonds, was allowed by law for the specific purpose of providing means to pay the interest on them, was levied for that year, — *Held*, that a *mandamus* to levy and collect such special tax for the years 1872 and 1873 would not lie.
3. Where the county court has no authority by law to levy, in addition to said special tax, a county tax exceeding the rate of one-half of one per cent on the valuation of the taxable property in the county, and it appears by the record that the county tax was levied and collected for the year 1874, — *Held*, that there was no error in the refusal of the court below to order a *mandamus* to enforce the collection of such tax.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

On the 24th of September, 1874, the United States, on the relation of William A. Johnston, filed a petition for a *mandamus* against the county court of Clark County, Missouri, and the justices thereof.

An amended alternative writ was filed on the 5th of April, 1875, in which it is alleged, that William A. Johnston obtained in said Circuit Court a judgment, June 6, 1874, against said county, for $8,606.64, on four instalments of interest on one hundred bonds of said county, for $500 each, which it executed and delivered June 1, 1871, by order of its county court, under the authority conferred by the charter of the Missouri and Mississippi Railroad Company; that the said county court was authorized and empowered to levy a tax of one-twentieth of one per cent upon the assessed value of taxable property for each year after the issue of said bonds; that by the laws of said State it is the duty of said county court to levy taxes, and pay all the indebtedness of said county; and that, in addition to the said one-twentieth of one per cent, the said county is authorized to levy a tax of one-half of one per cent yearly, on the taxable property of the county, to pay its debts and expenses; that the valuation of taxable property in said county is not less than $3,740,000; that said county court, for the year 1874, levied

a tax for county purposes of only four mills on the dollar, leaving unlevied one mill, which they were authorized to levy; that said county court did not levy the tax of one-twentieth of one per cent, nor any other sum, for the years 1872, 1873, and 1874, to pay the interest on said bonds, for which said judgment was rendered; that the tax of one-twentieth of one per cent would not raise over $1,500 or $2,000 a year, while the amount of the bonds issued was $200,000, and required a tax yielding $16,000; that a tax of one mill on the dollar of the valuation will not exceed $3,750, and is not sufficient with the one-twentieth of one per cent to pay said judgment in one year; that an execution was issued on said judgment, and returned "no property found," and a demand made on said county court to levy and collect taxes to pay said judgment; that said officers have neglected to levy and collect said taxes; and that said Johnston is without adequate remedy at law.

The writ was thereupon issued, commanding the county court and the justices thereof to "levy and collect a tax of one-twentieth of one per cent, for the years of 1872, 1873, and 1874, and each of the following years, and apply a *pro rata* share thereof on the plaintiff's judgment; and to levy the residue of said five-mill tax for the year 1874, and each succeeding year, and collect said taxes, and apply the same yearly on the plaintiff's judgment, until interest at the rate of seven per cent and costs are paid and satisfied in full," or that they appear on a day named in the writ, and show cause why they refuse to do so.

The defendants, in their answer, alleged, that Clark County, in the year 1872, adopted what is termed in the laws of Missouri "township organization," and had from that time been governed by the laws of Missouri pertaining to township organization; that the county court of said county, on May 3, 1871, executed $200,000 in bonds of said county, to pay for two thousand shares of stock for which it had that day wrongfully, fraudulently, and corruptly subscribed in the Missouri and Mississippi Railroad Company, and placed said bonds in the hands of an agent, to be paid over to said company, from time to time, as the said road progressed through said county; that all of said bonds had been fraudulently disposed of by said agent, and

remained unpaid, with the coupons thereon; that a judgment for $4,124 had been rendered against said county on coupons of part of said bonds in favor of Waterman & Beaver, on June 6, 1874; that none of said $200,000 of bonds were delivered on the first day of June, 1871, or before January, 1874, and that the same belonged to the county of Clark, until January, 1874; that the county court of said county had no authority to subscribe for said two thousand shares of the capital stock of said Missouri and Mississippi Railroad Company, or issue bonds therefor, or levy a tax to pay the same, except in so far as such authority was conferred by the thirteenth section of an act passed by the General Assembly of the State of Missouri, entitled "An Act to incorporate the Missouri and Mississippi Railroad Company," approved Feb. 20, 1865, which provides that it shall be lawful for the corporate authorities of any city or town, or the county court of any county desiring so to do, to subscribe to the capital stock of said Missouri and Mississippi Railroad Company, and issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent, upon the assessed valuation of the taxable property for each year; that the taxes of 1873 had been levied before the present justices of the county court had been elected; that, knowing that all of said bonds had been fraudulently issued and disposed of, and believing that the holders thereof took the same with notice of the frauds, the defendants refused to levy the tax of one-twentieth of one per cent for the year 1874; that said judgment on said coupons was not rendered until June, 1874, and that by the laws of Missouri the county court is authorized to levy taxes only in the month of April of each year, and has no authority to levy said special tax of one-twentieth of one per cent for more than one year, at one and the same time, or during or for more than one and the same year, and had no authority to levy said tax until said bonds were sold; that Clark County was not authorized to levy a tax of one-half per cent yearly on all the taxable property of said county, to pay its debts and expenses, but that said county, by its county court, was, for the year 1874, empowered to levy such sums as might be necessary to defray the expenses of said county by a tax upon all property and licenses made taxable by law for State

purposes, but the county tax should in no case exceed one-half of one per cent; that the defendants did not fail to levy said tax of one-half of one per cent for the year 1874, but that it was fully levied, collected, and paid out for county expenses; that the county court has no authority in any one year to levy taxes for the purpose of paying the expenses of said county, except to the extent of said one-half of one per cent; that all that said tax can produce is necessary to pay the current expenses of said county, and that the said county court had no authority to levy said county taxes to pay the judgment of said Johnston; and that defendants had no authority or power to make any other order or provision than that said special tax of one-twentieth of one per cent on all the taxable property of Clark County, when collected, should be applied *pro rata* to the payment of all the interest coupons on said $200,000 in bonds, including the said judgment of said Johnston.

The plaintiff demurred to the return. The court overruled the demurrer.

The cause was submitted on the amended writ and return; whereupon the court ordered that a peremptory writ of *mandamus* be issued against the defendants, commanding them "to cause a tax levy to be made for the year 1874, on the assessment of that year, to the extent of one-twentieth of one per cent; and for the year 1875, on the assessment of the latter year, at the same rate of one-twentieth of one per cent; the proceeds thereof to be applied, *pro rata*, to the amount of the judgment in this case, and in other cases, on coupons of bonds of same issue, and also to interest on the other bonds of the same issue; and that respondents cause to be levied, from year to year, the same per cent on assessed values until the *pro rata* portion thereof, applicable to the judgment, interest, and costs in this case, shall be paid."

The United States, on the relation of Johnston, having excepted to the refusal of the court to require the levy and collection of the tax of one-twentieth of one per cent for the years 1872 and 1873, and also the levy prayed for in excess of said tax, sued out this writ of error.

Mr. James Grant for the plaintiff in error.

Mr. James O. Broadhead and *Mr. George W. McCrary*, *contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

The judgment of the Circuit Court was correct. The return of the defendants to the alternative writ set up a complete defence, and its averments of fact are admitted by the demurrer of the United States. It is then, for the purposes of this case, an established fact that the county bonds held by the relator, and the coupons upon which his judgment was obtained, were not issued, and, therefore, did not become a debt of the county until Jan. 1, 1874. Until they were issued, they imposed no liability upon the obligor; and, until the liability arose, there was no obligation resting on the county court to levy the tax of one-twentieth of one per cent, authorized by the charter of the Missouri and Mississippi Railroad Company. That tax was, by the act of the General Assembly conferring that charter, allowed for the specific purpose of providing means for the payment of the bonds which might be issued for the payment for the county's subscription to the capital stock of that company. So long as the bonds remained unissued, the tax remained unauthorized. There never was, therefore, any authority given by law for the levy of that special tax for the years 1872 and 1873. The fact that the bonds, when delivered in 1874, had attached to them coupons for interest, which, apparently, had accrued prior to their delivery, could not enlarge the power of the county court, or confer upon it authority to levy in any year more than one special tax of one-twentieth of one per cent. It need not be said that no court will by *mandamus* compel county officers of a State to do what they are not authorized to do by the laws of the State. A *mandamus* does not confer power upon those to whom it is directed. It only enforces the exercise of power already existing, when its exercise is a duty. The Circuit Court was, therefore, right in refusing to order a peremptory *mandamus* to levy and collect the special tax for the years 1872 and 1873, and in directing it only for the subsequent years.

There was also no error in refusing to order the writ to enforce the levy and collection of other taxes. The county court has, by law, no power to levy, in addition to the special tax allowed by the charter of the Missouri and Mississippi Railroad

Company, a tax exceeding the rate of one-half of one per cent of the valuation of the taxable property; and the return to the alternative writ avers, that, for the year 1874, a county tax of one-half of one per cent had been fully levied and collected. If this was so, and the demurrer admits it, the county court was in no default in this particular; and as the petition for the *mandamus* was presented in 1874, before any default in levying a tax, a more favorable judgment on the demurrer could not have been given for the relator than the court gave.

In thus deciding, we are not to be understood as maintaining all that is averred in the defendants' return to the alternative writ. We do not assert that the relator is without remedy against the county, or that his remedy is restricted to a resort to the proceeds of the special tax. It is enough for this case that the judgment of the Circuit Court was correct on the pleadings. *Judgment affirmed.*

ALEXANDRIA *v.* FAIRFAX.

1. Every corporation has officers, who speak and act for it by authority of law; and some one of them, either by an express statutory provision, or by the nature of their functions, is the proper person on whom the process or notice, which is necessary to bind it in a judicial proceeding, must be served.
2. Where the proceeding to confiscate a debt of the corporation to an individual is, by reason of his absence beyond the jurisdiction, necessarily *in rem*, the service of the process or notice on the corporation, which is requisite to a valid seizure of the debt, should be made upon some one of the officers of the corporation on whom a similar service would bind it in an ordinary suit against it.
3. By the Code of Virginia, such service, in case of a town or a city, may be made on the mayor, or, in his absence, on the president of the council or board of trustees, or, if both be absent, on an alderman or trustee.
4. Service on the auditor of Alexandria, without an appearance by the city or the creditor, did not give the court jurisdiction of the debt which the city owed the creditor; and its decree condemning the debt to confiscation and sale is void.

ERROR to the Supreme Court of Appeals of the State of Virginia.

This was an action of covenant, brought in the Circuit Court

of the city of Alexandria, Va., by Orlando Fairfax, against the city council of Alexandria, to recover the principal of certain bonds, amounting in the aggregate to $8,700, with the arrearages of interest due thereon.

The following is a copy of one of the bonds: —

"No. 35.] ALEXANDRIA CORPORATION STOCK, $5,200.

"There is due from the common council of Alexandria unto Dr. Orlando Fairfax, $5,200, bearing interest at the rate of six per cent per annum from the first day of July, 1858, payable half-yearly, being stock issued in pursuance of an act of the common council of Alexandria, passed on the twenty-third day of July, 1845, the principal of which is redeemable on the first day of January, in the year 1870, and is transferable only at the office of the auditor of the corporation, in person or by attorney.

"Witness the seal of the common council of Alexandria.

{ Alexandria } { Corporation. }

"W. D. MASSEY, *Mayor.*
"J. H. MCVEIGH,
"*President of Council.*

"SAM. J. MCCORMICK, *Auditor.*"

The defence was that the stock whereof mention is made in the bonds or certificates, and all the right, title, and interest of Fairfax therein, had, with the accrued interest thereon, been condemned to confiscation and sale, under an act of Congress of July, 1862, by a decree of the District Court of the United States for the Eastern District of Virginia, May 4, 1864, and sold by the marshal, who transferred the stock to the purchasers on the books of the auditor of the city. The council recognized this transfer as valid, and issued to the purchasers or their assigns certificates of stock of like tenor and effect. They are still outstanding, and the interest thereon has been paid to the holders of them.

Fairfax was a resident of Alexandria, until the commencement of the rebellion. He then went to Richmond, Va., where he has since resided, taking with him the said bonds or certificates of indebtedness, and he retained possession of them until he brought this suit.

The present controversy turned on the jurisdiction of the District Court. Neither Fairfax nor the city council entered

an appearance to the proceedings which resulted in the decree. The order of seizure which the district attorney of the United States for the district within which the city of Alexandria is situate directed to the marshal, with the return made by the latter thereon, is set out in the opinion of this court, and is, therefore, omitted here. The Circuit Court of the city of Alexandria rendered a judgment against Fairfax, which the Supreme Court of Appeals reversed, and rendered one in his favor. The city council thereupon sued out this writ of error.

Mr. S. Ferguson Beach and *Mr. Charles E. Stuart* for the plaintiff in error cited *Miller* v. *United States*, 11 Wall. 268; *Tyler* v. *Defrees*, id. 331; *Cooper* v. *Reynolds*, 10 id. 308; *Brown* v. *Kennedy*, 15 id. 591; *Pelham* v. *Way*, id. 196; *Pelham* v. *Rose*, 9 id. 103; *Grignon's Lessee* v. *Astor*, 2 How. 319; *Voorhees* v. *Bank of the United States*, 10 Pet. 449; *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173; *Williams* v. *Armroyd*, 7 id. 423.

Mr. John Johns, Jr., and *Mr. C. W. Wattles* for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

Orlando Fairfax, a resident of the city of Alexandria, Va., previous to the outbreak of the late civil war, was the owner of about $8,700 of the obligations of said city, which were in the form of bonds, not negotiable on their face, bearing interest at the rate of six per cent per annum, payable semiannually, and having several years to run, and transferable on the books of the corporation. These obligations were called stock of the city of Alexandria. At the beginning of the war, Fairfax left Alexandria, and joined the Confederates at the city of Richmond, and did not return until the war was over.

During his absence, proceedings were instituted to confiscate this stock, and prosecuted to a decree and sale. The marshal made a transfer of it to the purchaser, who received the interest regularly until Fairfax commenced the present suit against the city to recover the interest so paid, and establish his right to the stock.

The Supreme Court of Appeals of Virginia rendered judgment in his favor, and the city sued out this writ of error.

The single question which we shall consider is, whether there was such a seizure of this stock, or of Fairfax's interest in the debt which the city owed him, as gave to the District Court of the United States jurisdiction to confiscate and sell it under the act of Congress on that subject.

All that was done in the way of seizure appears in the following paper issued by the district attorney of the United States to the marshal of the district, and the marshal's return, indorsed on it: —

"OFFICE U. S. DISTRICT ATTORNEY FOR THE EASTERN DISTRICT OF VIRGINIA,
"ALEXANDRIA, VA., Feb. 22, 1864.

"*To the Marshal of the United States for the Eastern District of Virginia.*

"In compliance with general instructions, issued by the Attorney-General, under the act of July 17, 1862, entitled 'An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes.'

"I have to direct that you seize all the right, title, and interest of Dr. Orlando Fairfax, in and to eighty-seven shares of the stock of the corporation of Alexandria, in the eastern district of Virginia, together with all the moneys due him, and becoming due from the said corporation, for dividends upon said stock, together with all the improvements, buildings, rights, privileges, appurtenances, and other hereditaments to the same belonging, or in any wise appertaining, and all right, title, interest, and estate of Dr. Orlando Fairfax therein, as proceedings are to be instituted to secure the confiscation of the same to the use of the United States, under the above-entitled act.

"You will report the seizure to me when the same shall have been made.

"L. H. CHANDLER, *U. S. District Attorney.*

(Indorsed as follows:) "No. 88. Order of seizure. Dr. Orlando Fairfax."

"UNITED STATES MARSHAL'S OFFICE,
"ALEXANDRIA, VA., Feb. 23, 1864.

"I certify that I have seized the within-described property, and given notice to R. Johnson, Esq., auditor of the corporation of Alexandria, as within directed.

"JOHN UNDERWOOD, *U. S. Marshal.*

"Filed Feb. 24, 1864."

In the present suit, it is among the facts agreed to by both parties, and signed by their counsel as part of the record, that these bonds or certificates of stock were carried by Fairfax to Richmond, and remained in his personal possession during the war. It is, therefore, clear that the marshal made no manual seizure of them, and did not mean to say so by his return, unless he intended to make a false return. It is a fair and reasonable inference from the return and the agreed facts in this case, that what he actually did to constitute a seizure, and what he understood to constitute the seizure of this stock, was "notice to R. Johnson, auditor of the corporation of Alexandria." The words "as within directed" turn our attention to the order of the district attorney, under which the marshal acted. It will be there seen that he was directed to seize the interest of Fairfax in eighty-seven shares of the stock of the corporation of Alexandria, with all the moneys due him and becoming due on said stock, together with all improvements, buildings, &c., to the same belonging. If any buildings were seized as "part of the within-described property," in the language of the marshal's return, nothing has ever been heard of it since. The order was, in legal effect, to attach the interest of Fairfax in this stock.

We are of opinion that *Miller* v. *United States*, 11 Wall. 268, and *Tyler* v. *Defrees*, id. 331, establish the proposition that a valid seizure or attachment of this stock, or his interest in it, under the order of the district attorney, is a sufficient seizure to give the court jurisdiction, provided the order and the marshal's action under it are returned into court as the foundation for proceedings under the libel. But no more can be claimed for what was done as a seizure, or intended as a seizure, than if the order had been a writ under the seal of the court.

We are compelled, then, to inquire whether the simple statement of the marshal, that he had given notice to R. Johnson, auditor of the city, was a sufficient seizure, in face of the conceded fact that he had made no actual or manual seizure of any thing, to give jurisdiction. In determining what it was of which Johnson had notice, it is perhaps fair to infer that the marshal read to him the paper issued by the district attorney. He then had notice that the United States govern-

ment was aware of the existence of the stock or bonds which Fairfax owned; in other words, that the city was indebted to Fairfax, and that proceedings were in this manner initiated for the confiscation of that indebtedness. There can be no doubt that the statute authorized the confiscation of the credits of one who came within its provisions. We have as little doubt that these stocks were credits within its meaning. It is clear that there was a mode of reaching them under the act of Congress, notwithstanding the evidences of Fairfax's right to them were in his pocket, and beyond the reach of the process of the court. If the debt due him had been by an individual, there would have been no difficulty in serving such a process or notice on the debtor as would have subjected him to the orders of the court in regard to it. If Johnson, as an individual, had owed the debt to Fairfax, it is probable that the notice served on him would have been sufficient.

But an incorporated city is not an individual, and service of notice or process on one of its citizens is not service on it. It has its officers, who speak and act for it by authority of law; and some one of these officers, either by an express statutory provision, or by the nature of their functions, is the proper person on whom all notices and processes necessary to bind it by judicial proceedings must be served.

It would seem to be reasonable that in proceedings *in rem* to confiscate property in the absence of its owner, where the seizure of it is a *sine qua non* to the jurisdiction of the court, and where, as in the present case, actual manucaption is impossible, the evidence which supports a constructive seizure should be scrutinized as closely, and be of a character as satisfactory, as that which would subject the party holding the fund or owing the debt which is the object of the proceedings to an ordinary civil suit in the same court. If this be a correct view of the subject, and we think it is quite as favorable to the validity of the judgment of confiscation as can be maintained on sound principle, it is necessary to inquire if service of process on the auditor would authorize a judgment by default against the city in an ordinary action. We are not informed by any thing in this record, or in the brief, of the nature of his functions. We have no reason to believe that it is any part of his

duty to defend actions at law against the city, or to employ counsel for that purpose, or that he had any authority to do so. The word used to describe his office does not imply that, as treasurer, he had in his possession the money or other property of the city. He was not even bound to make record of matters done by or affecting the corporation, as the clerk or secretary of the governing body would be. He was not, probably, a member of the board of councilmen or aldermen, who governed the city, and whose duty it would have been to protect her in such a matter as this.

But we are relieved from any difficulty on this subject by the statute of Virginia, which prescribes, as every law should do under which corporations are organized, the mode of serving process or notice on them. It points out the officers of the corporation on whom such process or notice may be served, and is so liberal in providing for service as to leave no excuse for departing from it by a service on any one else. "It shall be sufficient to serve any process against or notice to a corporation on its mayor, rector, president, or other chief officer, or, in his absence from the county or corporation in which he resides, or in which is the principal office of the corporation against or to which the process or notice is, if it be a city or town, on the president of the council or board of trustees, or in his absence, on the recorder, or any alderman or trustee." Code of Virginia of 1860, p. 707, c. 170, sect. 7.

It appears from these bonds or certificates of debt that there was a mayor of the city. On him, if in the city, the law required service to be made. There is no return that he was absent, nor is any reason given why service was not made on him. There were, as it appears, a council, and a president of that council, and he is specially named in the statute as an officer on whom service may be made. No reason is given why service was not made on him.

But if, against all sound principle, we could indulge in presumptions in favor of this jurisdiction, and suppose that both these officers were absent, notice should have been served on an alderman or councilman, since it appears that there were such officers.

We are not informed whether there was a recorder of that

city. If there was, he was not served. But, by a strange inadvertence, almost the only officer not mentioned in the statute as one on whom the service may be made is the one selected, while all those are omitted whom the law specifically points out as the proper ones; and for the failure to serve them no reason is given.

In the absence of any appearance by Fairfax or by the city in a case where the proceedings against the debtor and the owner of the debt are wholly *ex parte* and by default, and in the absence of actual seizure of any tangible evidence of the debt, we are of opinion that no jurisdiction of that debt was acquired by the notice to the auditor, and on this alone it is supposed to rest.

As in this point we concur with the Court of Appeals of Virginia, its judgment is *Affirmed.*

MR. CHIEF JUSTICE WAITE concurred in the judgment.

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