REPORTS OF THE SUPREME COURT

OF THE

UNITED STATES

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CASES

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1878.

REPORTED BY

WILLIAM T. OTTO.

VOL. VIII.

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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.

ALLOTMENT, ETC., OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

As made April 22, 1878, under the Acts of Congress of July 23, 1866, and March 2, 1867.

NAME OF THE JUSTICE, AND STATE FROM WHENCE APPOINTED	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE OF COMMISSION, AND BY WHOM APPOINTED.
CHIEF JUSTICE.		
Hon. M. R. WAITE, Ohio.	FOURTH. Maryland, West Virginia, Virginia, N. Carolina, and S. Carolina.	1874. Jan. 21. President Grant.
ASSOCIATES.		
Hon. N. CLIFFORD, Maine.	FIRST. Maine, New Hampshire, Massachusetts, and Rhode Island.	1858. Jan. 12. President Buchanan.
Hon. WARD HUNT, New York.	SECOND. New York, Vermont, and Connecticut.	1872. Dec. 11. President Grant.
Hon. WM. STRONG, Pennsylvania.	THIRD. Pennsylvania, New Jersey, and Delaware.	1870. Feb. 18. President Grant.
Hon. J. P. BRADLEY, New Jersey.	FIFTH. Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.	1870. March 21. President Grant.
Hon. N. H. SWAYNE, Ohio.	SIXTH. Ohio, Michigan, Kentucky, & Tennessee.	1862. Jan. 24. President Lincoln.
Hon. J. M. HARLAN, Kentucky.	SEVENTH. Indiana, Illinois, and Wisconsin.	1877. Nov. 29. President Hayes.
Hon. S. F. MILLER, Iowa.	EIGHTH. Minnesota, Iowa, Missouri, Kansas, Arkansas, & Nebraska.	1862. July 16. President Lincoln.
Hon. S. J. FIELD, California.	NINTH. California, Oregon, and Nevada.	1863. March 10. President Lincoln.

MR. JUSTICE HUNT, *by reason of indisposition, took no part in deciding the cases reported in this volume after Little Rock* v. *National Bank*, p. 308.

TABLE OF CASES.

REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1878.

PALMER *v.* LOW.

1. Under *Donner* v. *Palmer* (31 Cal. 500), which establishes a rule of property in California, the courts of the United States accept as competent primary evidence of alcalde grants of the pueblo land of San Francisco, the record of them, which, in accordance with the requirements of Mexican laws, was kept by the alcalde before the date of the incorporation of the city of San Francisco by that State, and which record, now in the custody of the city and county recorder, is known as one of the books of the former alcalde's office, the same having been, pursuant to law, turned over to the county recorder's office.
2. A grant appearing in that record is in the following form: —

"No. 39.

"Whereas George Donner has presented a petition soliciting for a grant of a title to a lot of ground as therein described, therefore I, the undersigned alcalde, do hereby give, grant, and convey unto the said George Donner, his heirs and assigns for ever, lot number thirty-nine (39), one hundred varas square, in the vicinity of the town of San Francisco, subject to all the rules and regulations governing in such cases.

"In testimony whereof, I have hereunto set my hand as alcalde, this nineteenth day of July, A.D. 1847.

"GEORGE HYDE, 1*st Alcalde.*"

Held, that the terms used are sufficient to pass a title in fee to the land, and that, in the absence of any thing to the contrary, the instrument must be presumed to be sufficient in form to give full effect to the evident intention of the parties.

3. That grant was made to an infant, but it has remained uncancelled, and was affirmed before the ordinance of the city council, known as the Van Ness

ordinance, passed June 20, 1855, was approved by Congress. *Held*, that his title is superior to that of a party who, without right, entered upon the land, and whose claim thereto, arising out of his possession thereof, is grounded solely upon the enacting clause of that ordinance.

4 In ejectment, commenced April 30, 1872, it appearing that the grantors of the plaintiff entered without title, in 1851 or 1852, and that they and he continued until May 8, 1867, in the exclusive and adverse possession of the land covered by that grant, when said Donner, under whom the defendant claimed title, was placed in possession by the proper officer, under legal process issued in a suit to which neither the plaintiff nor any of his grantors deriving title from any party to the suit after the commencement thereof was a party. *Held*, that as the title did not pass out of the United States until the passage by Congress of the act of July 1, 1864 (13 Stat. 332), to "expedite the settlement of the titles to lands in the State of California," the Statute of Limitations of that State did not run in favor of the plaintiff, by reason of his own and his grantors' possession, so as to transfer to him a title which could be asserted against the record title of the defendant.

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

This was an action of ejectment, commenced April 30, 1872, by Daniel Palmer, the plaintiff in error, against Joseph W. Low, S. O. Houghton, and others, to recover possession of a portion of a one hundred vara lot No. 39, part of the pueblo lands of San Francisco, lying east of Larkin Street and northeast of Johnston Street. The city of San Francisco was first incorporated by the State of California, April 15, 1850, with certain defined boundaries. Acts of 1850, p. 223. It was the successor of the Mexican pueblo of Yerba Buena, or San Francisco. The original charter was repealed, and a new one granted, April 15, 1851. Acts of 1851, p. 357. The premises in controversy are within the boundaries of the city, as defined in this last act of incorporation, and constitute part of the lands claimed from the United States by the city, on account of its succession to the property and rights of the pueblo.

On the 20th of June, 1855, the city council of San Francisco passed an ordinance, known as the Van Ness ordinance, the sections of which material to the present controversy are as follows: —

"SECT. 2. The city of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate

limits to the parties in actual possession thereof, by themselves or tenants, on or before the first day of January, A.D. 1855, and to their heirs and assigns for ever, excepting the property known as the slip property, and bounded on the north by Clay Street, on the west by Davis Street, on the south by Sacramento Street, and on the east by the water-line front; and excepting also any piece or parcel of land situated south, east, or north of the water-lot front of the city of San Francisco, as established by an act of the legislature of March 26, A.D. 1851: *Provided*, such possession has been continued up to the time of the introduction of this ordinance in the common council, or, if interrupted by an intruder or trespasser, has been or may be recovered by legal process; and it is hereby declared to be the true intent and meaning of this ordinance, that when any of the said lands have been occupied and possessed under and by virtue of a lease or demise, they shall be deemed to have been in the possession of the landlord or lessor under whom they were so occupied or possessed: *Provided*, that all persons who hold title to lands within said limits by virtue of any grant made by any ayuntamiento, town council, alcalde, or justice of the peace of the former pueblo of San Francisco, before the seventh day of July, 1846, or grants to lots of land lying east of Larkin Street and northeast of Johnston Street, made by any ayuntamiento, town council, or alcalde of said pueblo, since that date and before the incorporation of the city of San Francisco by the State of California; and which grant, or the material portion thereof, was registered, or recorded, in a proper book of record deposited in the office or custody or control of the recorder of the county of San Francisco, on or before the third day of April, A.D. 1850; or by virtue of any conveyance duly made by the commissioners of the funded debt of the city of San Francisco, and recorded on or before the first day of January, 1855, shall, for all the purposes contemplated by this ordinance, be deemed to be the possessors of the land so granted, although the said lands may be in the actual occupancy of persons holding the same adverse to the said grantees.

"SECT. 3. The patent issued or any grant made by the United States to the city shall inure to the several use, benefit, and behoof of the said possessors, their heirs and assigns, mentioned in the preceding section, as fully and effectually, to all intents and purposes, as if it were issued or made directly to them individually and by name."

"SECT. 10. Application shall be made to the legislature to confirm and ratify this ordinance, and to Congress to relinquish all the

right and title of the United States to the said lands, for the uses and purposes hereinbefore specified.

"SECT. 11. Nothing contained in this ordinance shall be construed to prevent the city from continuing to prosecute to a final determination her claim now pending before the United States land commission for pueblo lands, for the several use, benefit, and behoof of the said possessors mentioned in sect. 2, as to the lands by them so possessed, and for the proper use, benefit, and behoof of the corporation as to all other lands not hereinbefore released and confirmed to the said possessors."

On the 11th of March, 1858, the legislature of the State of California passed "An Act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," whereby this ordinance was in all respects ratified and confirmed. Sect. 2 of that act is as follows: —

"SECT. 2. That the grant or relinquishment of title made by the said city in favor of the several possessors by sects. 2 and 3 of the ordinance first above recited shall take effect as fully and completely, for the purpose of transferring the city's interest, and for all other purposes whatsoever, as if deeds of release and quitclaim had been duly executed and delivered to and in favor of them individually and by name; and no further conveyance or other act shall be necessary to invest the said possessors with all the interest, title, rights, benefits, and advantages which the said order and ordinances intend or purport to transfer or convey, according to the true intent and meaning thereof: *Provided*, that nothing in this act shall be so construed as to release the city of San Francisco, or city and county of San Francisco, from the payment of any claim or claims due or to become due this State against said city, or city and county, nor to effect or release to said city and county any title this State has or may have to any lands in said city and county of San Francisco." Cal. Acts 1858, p. 52.

Afterwards, on the 1st of July, 1864, Congress passed "An Act to expedite the settlement of the titles to lands in the State of California" (13 Stat. 332), sect. 5 of which is as follows: —

"SECT. 5. And be it further enacted, that all the right and title of the United States to the lands within the corporate limits of the

city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the State of California on the 15th of April, 1851, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city ratified by an act of the legislature of the said State, approved on the 11th of March, 1855, entitled 'An Act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city,' there being excepted from this relinquishment and grant all sites or other parcels of lands which have been or now are occupied by the United States for military, naval, or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States within one year after the rendition to the General Land-Office by the surveyor-general of an approved plat of the exterior limits of San Francisco, as recognized in this section in connection with the lines of the public surveys: *And provided*, that the relinquishment and grant by this act shall in no manner interfere with or prejudice any *bona fide* claims of others, whether asserted adversely under rights derived from Spain, Mexico, or the laws of the United States, nor preclude a judicial examination and adjustment thereof."

Both parties claim title under this ordinance and this legislation of the State and of Congress. A jury was waived on the trial below, and the court made and filed its finding of facts, from which it appears, —

1. That the grantors of the plaintiff entered into the possession of the premises in controversy, without title, about the year 1851 or 1852, and they and the plaintiff continued in the exclusive and adverse possession thereof down to the 8th of May, 1867, when the grantor of the defendant, S. O. Houghton, was placed in possession thereof by the sheriff of the city and county of San Francisco, under legal process issued in the case of *Donner* v. *Palmer et al.*, to which suit neither the plaintiff nor any of his grantors deriving title from any party to the suit after the commencement thereof was a party.

2. On the 19th of July, 1847, George Hyde was the duly qualified and acting alcalde of the pueblo of San Francisco, and, as such alcalde, on the day last mentioned granted the premises in controversy to George Donner, by a grant thereof duly made, recorded, and delivered by the alcalde; and the

material portion of the grant was registered and recorded in a proper book of records, deposited in the office and in the custody and control of the recorder of the county of San Francisco, before the third day of April, 1850, and which book remained in the office and in the custody and control of the recorder until and on the third day of April, 1850, and has continued so to remain from that date.

3. That the defendant, S. O. Houghton, has, through mesne conveyances, acquired all the right, title, and interest of Donner in the premises, and that the defendants other than Houghton were, at the time the action was commenced, in possession as tenants under him.

4. At the time of the alleged grant to him, Donner was an infant of about ten years of age.

To prove the grant to Donner, the defendants offered in evi dence an entry on "Book A" of original grants, from the custody of the county recorder of the city and county of San Francisco, which is as follows: —

"LOT No. 39.

"Whereas George Donner has presented a petition soliciting for a grant of a title to a lot of ground as therein described, therefore I, the undersigned alcalde, do hereby give, grant, and convey unto the said George Donner, his heirs and assigns for ever, lot number thirty-nine (39), one hundred varas square, in the vicinity of the town of San Francisco, subject to all the rules and regulations governing in such cases.

"In testimony whereof, I have hereunto set my hand as alcalde, this nineteenth day of July, A.D. 1847.

"GEORGE HYDE, 1*st Alcalde*."

In connection with this offer, it was satisfactorily shown that "Book A" was part of the archives of the office of the city and county of San Francisco, and it was admitted that the book was the original "Book A" of alcalde grants in the custody of the city and county recorder, and known in the office as one of the books turned over to the county recorder's office in pursuance of the directions of the statutes of California, as one of the books of the former alcalde's office. It was satisfactorily proved that the signature of George Hyde to the alcalde entry

of grant, or memorandum of grant, is in his handwriting, and his genuine signature, and that at the date of the entry he was the acting alcalde of San Francisco.

To the introduction of this entry in "Book A" plaintiff's counsel objected, "on the ground that it was incompetent, irrelevant, and immaterial, also on the ground that it is not primary evidence, or the best evidence, of a grant having been made to George Donner; that it is but secondary evidence, for the introduction of which no foundation had been laid; that there has been no proof of the loss or destruction of the original instrument, of which the said entry is a mere memorandum; that the entry in 'Book A' of original grants is a mere memorandum made by the alcalde; that the grant should have been made and signed by both parties, the grantor and grantee, and should have been attested by parties as witnesses of the fact; that the whole proceeding should have been set out on that book; that if it be a mere memorandum-book, it was indicative merely that there was some other instrument which had to be executed and delivered, and which is primary evidence in the case."

These objections were overruled by the court, and an exception was then and there taken by the plaintiff.

Sect. 6 of an act of the legislature of California, "defining the time for commencing civil actions," passed April 22, 1850, is as follows: —

"SECT. 6. No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question, within five years before the commencement of such action." Acts of 1850, 344, sect. 6.

On the 11th of April, 1855, this section was amended by adding the following proviso: —

"*Provided, however*, that an action may be maintained by a party claiming such real estate, or the possession thereof, under title derived from the Spanish or Mexican governments, or the authorities thereof, if such action be commenced within five years from the time of the final confirmation of such title by the govern-

ment of the United States, or its legally constituted authorities." Acts 1855, 109, sect. 1.

On the 18th of April, 1863, this proviso was repealed, and the following enacted as a substitute: —

"SECT. 6. . . . *And provided further*, that any person claiming real property, or the possession thereof, or any right or interest therein, under title derived from the Spanish or Mexican governments, or the authorities thereof, which shall not have been finally confirmed by the government of the United States, or its legally constituted authorities, more than five years before the passage of this act, may have five years after the passage of this act in which to commence his action for the recovery of such real property, or the possession thereof, or any right or interest therein, or for rents or profits out of the same, or to make his defence to an action founded upon the title thereto. . . .

"SECT. 7. Final confirmation, within the meaning of this act, shall be deemed to be the patent issued by the government of the United States, or the final determination of the official survey under the provisions of the act of Congress, entitled 'An Act to amend an act entitled an act to define, &c., approved June 14, 1860.'" Cal. Acts 1863, 327.

Upon this state of facts the court below found as conclusions of law, —

"1. That defendant, S. O. Houghton, by virtue of said grant to said Donner, the said ordinance of the city of San Francisco, and the said acts of the legislature of California and of Congress, and the said mesne conveyances from said Donner to him, is the owner of, and has the legal title to, said demanded premises, and that the defendants are lawfully and rightfully in the possession thereof.

"2. That the Statutes of Limitations have not run in favor of the plaintiff, by reason of his own and his grantor's possession, from 1851 or 1852 to May 8, 1867, and that such possession gives him no title as against defendants."

Judgment having been rendered in favor of the defendants in accordance with this finding, the plaintiff below sued out this writ of error, and assigns, in substance, for error the ruling of the court admitting "Book A" as primary evidence to prove

the grant to Donner, and the judgment for the defendants upon the facts as found.

Mr. Walter H. Smith and *Mr. James K. Redington* for the plaintiff in error.

1. Both parties claim under the Van Ness ordinance of June 20, 1855, the California act of March 11, 1858, and the act of Congress of July 1, 1864, confirming the title of San Francisco to certain lands.

As the plaintiff had actual, adverse, and exclusive possession of the demanded premises from 1851 to 1867, the enacting clause of that ordinance relinquished and granted to him the claim and right of the city to them. He therefore made out a clear *prima facie* title to recover.

2. The defendant cannot defeat that *prima facie* title, unless he produces first a grant of the premises, and, secondly, a record, showing that the "grant, or a material portion of it, was registered." These two substantive and independent facts must be established by legal evidence, to bring his case within the proviso to that ordinance.

The grant must, of course, be in such form as would possess intrinsic validity and transfer the title, if the alcalde had been vested with power to make it, and the grantee must have been competent to take.

The "Plan of Pitic," founded upon a royal ordinance, was not pursued in later years by the Mexican alcaldes in San Francisco, but was partially superseded by a custom which prevailed in July, 1846, when Upper California was conquered by the military forces of the United States. Dwinelle, Col. Hist. of San Francisco, 111. By that custom the only document containing the "entire proceedings" was "signed and attested in due form by the proper officer," and delivered to the grantee; whilst the record-book contained a mere condensed copy or summary statement, often not signed at all, and it omitted the condition that the grantee should build a house on the land within a year, and conform to the police regulations. Id. 162–165. The grant was not produced nor its absence accounted for; and the pretended grantee, under whom the defendant claims, was then a child ten years old, and consequently incapable of performing the required condition.

"Book A" was inadmissible to prove an original grant. It could only be allowed upon the footing of mere secondary evidence, after the necessary preliminary proof had been made. It is not like a common-law record of proceedings in court, for that is itself an original, and supposes no better evidence in existence; whereas a record or registry of a deed or other instrument is only a copy, and presupposes an original. 2 Phill. Evid. 490; *Brooks* v. *Marbury*, 11 Wheat. 79; *Rice* v. *Cunningham*, 29 Cal. 492.

During the time which elapsed between the conquest of California and the establishment of her State government, an American officer, who acted as alcalde and granted pueblo lands, was bound to conform to pre-existing laws and customs until they were superseded by the conqueror. They made the delivery of the grant an essential prerequisite to the investiture of title, and in that respect conformed to the common-law doctrine applicable to the forms of conveyance prevailing in the United States, which were after the conquest introduced in California.

The record is not primary evidence of the execution and delivery of the alleged grant, and if it were, the grant as it there appears — containing no condition whatever — passed no right to the land.

3. Plaintiff's possession for the period prescribed by the Statute of Limitations vested in him a title which he could affirmatively assert against any adverse right or claim. *Shelly* v. *Guy*, 11 Wheat. 370; *Pendleton* v. *Alexander*, 8 Cranch, 469; *Leffingwell* v. *Warren*, 2 Black, 605; *Bradstreet* v. *Huntington*, 5 Pet. 402.

This proposition has been repeatedly affirmed by the Supreme Court of California in the construction of the statutes of that State. *Grattan* v. *Wiggins*, 23 Cal. 36; *Le Roi* v. *Rodgers*, 30 id. 234; *Arrington* v. *Liscom*, 34 id. 370, 371; *Cannon* v. *Stockman*, 36 id. 540; *San Francisco* v. *Fulde*, 37 id. 352.

4. The Statute of Limitations, set up by the defendants, was not a bar to this suit. *Richardson* v. *Williamson*, 24 Cal. 296 *Maris* v. *De Celis*, 51 id. 60; *Arrington* v. *Liscom*, *supra*.

Mr. S. O. Houghton, *contra*.

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

The questions presented for decision in this case may be stated as follows: —

1. Was the entry in original "Book A" of alcalde grants admissible as primary evidence to prove a grant to Donner?

2. Did the record show a grant sufficient in form?

3. Was the grant void because made to an infant?

4. Was the action barred by the Statute of Limitations?

These questions will be considered in their order.

1. As to the admissibility of the evidence.

The point of the inquiry is whether the record of alcalde grants of the pueblo lands of San Francisco, kept by the alcalde in accordance with the requirements of Mexican laws before the incorporation of the city of San Francisco by the State of California, in the custody of the city and county recorder, and known as one of the books of the former alcalde's office turned over to the county recorder's office, pursuant to the statutes of California, can be used as primary evidence of the recorded grants, or only as secondary evidence, after sufficiently accounting for the absence of the original certificate of grant issued to the grantee.

The rank in the scale of evidence which the Mexican archives occupy has been oftentimes the subject of consideration in the courts of California. As early as 1859, in the case of *Gregory* v. *McPherson* (13 Cal. 562), the question arose in reference to the admissibility of an expediente filed in the archives of the Mexican government, to prove a grant under the colonization laws, a copy of which grant, signed by the governor and countersigned by the secretary of state, was annexed to and formed a part of the expediente. The expediente itself consisted of the petition, plat, reference, report, act of concession, approval, grant, &c. It was rejected in the court below on the ground that it was secondary evidence only, and the absence of the copy of the grant which had been issued and delivered to the grantee had not been satisfactorily accounted for; but the Supreme Court said (p. 572): "We are at a loss to know upon what grounds such a document can be denied the weight of original evidence. It was made, and signed, and authenticated

as a record by public officers in the discharge of public duties. The papers were retained in the custody of the appropriate public officer for the purposes of proof, and the highest and most authentic proof, of their own action. The documents receive the stamp, and the most satisfactory stamp, of official authenticity. The signatures are made on this as on the papers sent out by the department. We cannot see why such papers should be called copies, or why, in the scale of proofs, they should stand in any subordinate relation to the paper handed to the grantee. If not counterparts, or duplicates, it would seem that the original paper is the record retained by the department as part of its public records. . . . We cannot presume that any governmental system of granting land could be so loose as that no records were preserved by the granting power. And it follows, we apprehend, as a universal rule, that wherever the acts of public officers are authenticated by their records, these records are evidence, in all courts of justice, of those acts. If by law, or usage having the force of law, a California grant was matter of record, then it would seem to follow that the record is proof of the grant, especially where, as in this case, the record is itself an exemplification of the grant, and contemporaneously signed by the same officers issuing the grant."

Following this, in 1864, was the case of *Downer* v. *Smith* (24 Cal. 114), where the question arose upon the admissibility of an entry of a grant of land in the pueblo of San José made in the book of alcalde grants; and although it was held that a statute of the State applicable to the county in which the lands were located made the entry admissible, it was said (p. 122), "We think the court was warranted in finding that the book was one of original entries, and therefore entitled to be admitted as evidence upon that ground." In *Rice* v. *Cunningham* (29 id. 492), decided in 1866, it best suited the purposes of one of the parties to use the same "Book A" which is now under consideration, as secondary evidence to prove an alleged lost grant, and thus avoid the effect of an apparent cancellation of the grant which appeared upon the face of the record; but the court said (p. 497), "The argument of counsel for the appellant, in support of their exception, is grounded upon a false assumption. They lower 'Book A' to the level of a chance copy-book, and

strip it of all its character and dignity as a public record of the transactions of a government official vested with the exercise of most important functions, and then seek to use it on a question not then before the court."

But in *Donner* v. *Palmer* (31 id. 500), decided in 1867, the precise question we are now considering was presented in reference to the identical grant under which the defendants in error claim, and it was held, after full argument, and with due regard to both the written and unwritten law of Mexico, including the "Plan of Pitic," so often alluded to in the argument here, that the entry was to be received as primary evidence. In the opinion, after copying the seventeenth section of the "Plan of Pitic," the court proceeds as follows (p. 508): "In view of this language, there can be no doubt as to the mode in which grants of town lots were to be made. The entire proceedings were to be first entered in the official book required to be kept for that purpose, signed and attested in due form by the proper officer. A copy or summary statement of the proceedings as contained in the official book, also duly signed and attested by the proper officer, was then to be given to the grantee as evidence of his title; and in the event of its loss, the officer in whose official custody the book might be at the time was authorized and required to give him another 'like copy' of the original proceedings. The record so kept became an official and public record of the transactions of the alcaldes in the matter of granting town lots; and, as such, primary evidence of the acts they recited, under any system of law with which we are acquainted. Entries in such a book, if made in conformity with the regulations of the 14th of November, 1789, became, under the Mexican law, what is denominated an authentic instrument, that is to say, an instrument which proves itself, and, under the common law, an official record. Under both systems such entries have always been esteemed the highest and most satisfactory evidence of the facts which they recite, because they are made by the direction of the law, and are of public concern, and because they are made under the sanction of an oath, or, at least, of official duty, and made at or about the time the acts which they recite transpired. They are retained in the custody of the functionary or department by which they are required

to be kept, and are so retained for the express purpose of making them permanent and primary evidence of the transactions of the government. 1 Greenl. Evid., sect. 488 *et seq.*"

The result thus reached has never been disturbed, and it is clear that a rule of property has been established by the courts of the State, binding as well upon the courts of the United States as upon those of the State. While the precise question presented to us was only decided in *Donner* v. *Palmer*, all the other cases point directly to the conclusion there reached, and it needed only the occasion to make the formal declaration. Certainly, if the Mexican archives possess the character which the courts have given them, there can be no doubt of the rank they take as evidence, under our system of jurisprudence. *Hedrick* v. *Hughes*, 15 Wall. 123. We see no error in the admission of the testimony.

2. As to the form of the grant.

There can arise here no question as to the payment of municipal fees or the delivery of the grant; for the bill of exceptions shows that the court below found as facts upon the evidence contained in the record of the grant and other evidence submitted, that the municipal fees were paid, and that the grant was actually delivered. Neither does any question arise as to the power of an American alcalde to make the grant; for the ordinance under which both parties claim, in terms confers the title upon grantees holding by such grants.

The only question then is as to the form of the instrument appearing in the record. It is certain that it does not meet all the requirements contained in the "Plan of Pitic;" but the counsel for the plaintiff in error, in their argument here, say it is "beyond the reach of contradiction, and matter of history, that the 'Plan of Pitic' was not pursued by Mexican alcaldes in San Francisco. Grants were made in a very different manner, and quite repugnant to its requirements. A long-established custom pursued by these alcaldes, under Mexican rule, modified and superseded the 'Plan of Pitic.'" What these modifications were we have not been informed. No authorities are cited upon the subject except those which go to show that after the conquest the American alcaldes usually followed the American system of conveyancing and registration. *Donner*

v. *Palmer*, *supra*; *Montgomery* v. *Bevans*, 1 Sawyer, 653. We are then left to inquire whether the language of the grant is sufficient to pass the title, if there was no statute or custom prescribing the form in which such conveyances should be made. The government of the United States had not undertaken to regulate this subject, and the Mexican law, whatever it may have been, whether enacted by statute or established by custom, was in force; for the rule is well settled that the laws of a conquered territory, which regulate private rights, continue in force after the conquest until they are changed by the act of the conqueror. *American Insurance Co. et al.* v. *Canter*, 1 Pet. 511.

The language of this grant is: "I, the undersigned alcalde, do hereby give, grant, and convey unto George Donner, his heirs and assigns for ever," &c. These are the operative words of a present grant in fee-simple, and, being found in an official public record, will be presumed, in the absence of any thing to the contrary, to be sufficient to accomplish the purpose the parties had in view. While the alcalde was not the sovereign, he was the officer designated by law to make distribution of this kind of property among those to whom, under the Mexican law, it belonged; and the official record of his official acts, which the law requires him to keep, carries with it the presumption that his acts were in form such as was necessary to give full effect to what he was attempting to do.

This same question was presented to the Supreme Court of California in *Donner* v. *Palmer* (*supra*), and the same conclusion reached. As the point decided is one which relates to the effect to be given the statute of the State accepting and confirming the Van Ness ordinance, if not in fact the construction of a State statute absolutely binding upon us, it ought not to be disregarded except for imperative reasons.

3. As to the infancy of Donner.

We are not advised that the Mexican law prohibited such a grant to an infant. The distribution was to be made to "settlers," and was evidently left largely to the "wise judgment" of the "commissioner in charge." If he erred in his judgment, it might be cause for setting aside the grant in some appropriate direct proceeding for that purpose; but so long as the grant

remained uncancelled and duly recorded, it would certainly be a grant within the letter of the Van Ness ordinance, and it was so decided by the Supreme Court of California in *Donner* v. *Palmer*, *supra*. While infants cannot make grants, they may accept them. A grant to an infant is voidable, not void. The grant in this case has never been avoided, but, on the contrary, affirmed, and that, too, long before the Van Ness ordinance was confirmed by Congress. The title of Donner, therefore, from whom these defendants claim, was superior to that of the plaintiff under the ordinance.

4. As to the Statute of Limitations.

The nature of the title of San Francisco to her pueblo lands has often been the subject of consideration in this court, and was carefully stated by Mr. Justice Field in *Townsend* v. *Greeley*, 5 Wall. 326, and *Grisar* v. *McDowell*, 6 id. 363. At the time of the conquest, the pueblo, of which the city of San Francisco became the successor, did not have an indefeasible estate in the unconveyed portion of these lands, but only a limited right of disposition and use, subject in all particulars to the control of the government of the country. "It was a right which the government might refuse to recognize at all, or might recognize in a qualified form." 6 Wall. 373. Upon the conquest, the United States succeeded to the rights and authority of the Mexican government, subject only to their obligations under the treaty of Guadalupe Hidalgo. As before that time the fee had not passed out of the government of Mexico, it was transferred to the United States by the conquest and the treaty which followed. Before, therefore, the estate of the pueblo could become absolute and indefeasible, some action was required on the part of the United States. It is conceded that this action was not taken until the act of July 1, 1864. Down to that time the city held under its original imperfect Mexican title only. Afterwards it was possessed of the fee "for the uses and purposes specified" in the Van Ness ordinance.

In *Henshaw et al.* v. *Bissell* (18 Wall. 255), we held in effect that the State Statute of Limitations did not begin to run against the title thus perfected until July 1, 1864; and this decision was followed by the Supreme Court of California in

Gardiner v. *Miller*, 47 Cal. 576. After the act of Congress no survey or patent was necessary for the consummation of the title. *Ryan et al.* v. *Carter et al.* 93 U. S. 78; *Morrow* v. *Whitney*, 95 id. 551. But independently of this, and looking only to the statutes of the State, it is clear that, after 1855 until the act of 1863, there was no statute of limitations in California affecting titles derived from the Spanish or the Mexican government before their final consummation by the government of the United States. The act of 1863 gave a right of action upon such titles for five years after the date of its passage; and within the five years, to wit, May 8, 1867, Donner, under whom the defendants claim, was put in actual possession of the premises, and he and they have continued in possession claiming title ever since. The statute runs only so long as the adverse possession continues. When the possession is ended the operation of the statute ceases, except in respect to titles previously acquired under it; for in California it is held that adverse possession for the requisite length of time transfers a title to the possessor, which may be asserted affirmatively against an otherwise valid record title. *Arrington* v. *Liscom*, 34 Cal. 366.

It follows, then, that Palmer acquired no title by his possession from 1851 to 1867, as against the Donner title, if that title was derived "from the Spanish or Mexican government, or the authorities thereof;" and it seems to us clear that it was. It was so expressly decided by Mr. Justice Field in *Montgomery* v. *Bevans* (*supra*); and the cases of *Townsend* v. *Greeley* (*supra*), *Grisar* v. *McDowell* (*supra*), and *Merryman* v. *Bourne et al.* (9 Wall. 592), evidently proceeded upon that assumption. Donner claimed under the city of San Francisco, and the city under its equitable title derived from the Mexican government, finally ratified and confirmed by the United States. Whatever rights the city had under the Mexican title it held for the use and benefit of the inhabitants; and the United States, by the act of 1864, relinquished and granted all their right and title for the same uses and purposes. Clearly, therefore, the act of Congress could not have been intended as the grant of a new right, but simply as the confirmation of the old one. The title of the city is the old imperfect title from Mexico, confirmed by the

authoritative recognition of Congress. Previous to the passage of this act, the city had prosecuted its claim against the United States under the act of March 3, 1851, to ascertain and settle private land-claims in California, and that action was still pending when this confirmatory statute was passed. The original claim being for a larger quantity of land than was embraced in this relinquishment, the suit went on in the courts until March 8, 1866, when the United States, by another statute "to quiet the title to certain lands within the corporate limits of the city of San Francisco" (14 Stat. 4), in terms confirmed the claim of the city to all the lands embraced in the decree of the Circuit Court then pending here on appeal. It is clear, therefore, that the case is within that part of the statute which relates to titles derived from the Mexican government.

One other question, arising under the Statute of Limitations, remains to be considered, and this grows out of the last clause in the proviso of the act of 1863, in which five years is given to the holder of a title derived from the Spanish or the Mexican government "to make his defence to an action founded upon the title thereto." If we understand correctly the position taken by counsel, it is that the holder of a title under a Mexican grant will not be permitted to set up his grant as a defence to an action brought against him for the recovery of the property granted, unless he makes his defence within five years after the date of confirmation, whether the suit in which the defence is to be made was commenced within that time or not. The courts of California have had no little difficulty in giving a construction to this and other kindred portions of this statute; but whatever else it may mean, we think it clear that it cannot be what the plaintiff claims. The facts in this case present, in the strongest light, the utter absurdity of such an interpretation. The plaintiff's grantor entered into the possession of the premises in 1850 or 1851, without a shadow of title, and remained until May 8, 1867, when he was ousted. He acquired no title by his possession. The title under which he was ousted was a Mexican grant, not confirmed until July 1, 1864. The owner of this grant remained in peaceable possession, claiming title, until April 30, 1872, when this suit was begun. This was more than five years after the date of the

confirmation of the grant, but less than that time by eight days from the commencement of possession. As the possession of the owner had not ripened into a perfect title, he was driven to his defence under the grant. The plaintiff, a mere trespasser originally, having no right whatever except that of prior naked occupancy, purposely delaying his action for more than five years from the date of the confirmation of the grant, now seeks to get rid of the grant as a defence to his action, because it is more than five years old. If this be the operation of the statute, it has, in a single line, made substantially worthless as muniments of title all confirmed Mexican grants, and that, too, in a State where titles are so largely drawn from such sources. It would be monstrous to suppose the legislature could have been guilty of such folly.

The pleadings are sufficient to enable the defendants to avail themselves of their proof. In ejectment, the plaintiff recovers upon the strength of his own title, and not upon the weakness of that of his adversary. The plaintiff declared generally upon his title, without setting out the particulars. The answer of the defendant was a general denial. The plaintiff undertook to establish his title under the Van Ness ordinance, by proving the requisite possession. To rebut the effect of this evidence the defendants made proof of the grant, under which they claimed, to show that the title under the ordinance did not pass to the plaintiff. Until the plaintiff put in his testimony, there was nothing upon the record to show what his claim of title was. Certainly, under such circumstances, it was not incumbent on the defendant to state in his answer the matters on which he relied, to defeat any title that might be developed upon the trial.

Judgment affirmed.

GLENNY *v.* LANGDON.

1. It is only through the instrumentality of his assignees that creditors can recover, and subject to the payment of their claims, the property which the bankrupt fraudulently transferred prior to the adjudication in bankruptcy, or which he conceals from, and fails to surrender to, his assignees.
2. Assignees of the bankrupt are subject to the control and direction of the proper court, and it may, for good cause shown, compel them to take the requisite steps for the full and complete protection of the rights of his creditors.

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.

The case was argued by *Mr. S. T. Crawford* for the appellant, and by *Mr. Stanley Matthews* for the appellee.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

District courts of the United States are constituted courts of bankruptcy, and as such they have original jurisdiction in all matters and proceedings in bankruptcy, with power to hear and adjudicate the same according to the provisions of the Bankrupt Act.

Jurisdiction of those courts in that regard extends as well to the collection of all the assets of the bankrupt as to all cases and controversies between the bankrupt and any of his creditors, and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the bankruptcy proceedings. 14 Stat. 518; Rev. Stat., sect. 4972.

Creditors appoint the assignee; and the provision is, that, as soon as he is appointed and qualified, the judge, or when there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and that such assignment shall relate back to the commencement of the proceedings in bankruptcy, the express enactment being that by operation of law

the title to all such property and estate, both real and personal, shall vest in such assignee. Id., sect. 5044.

Explicit, comprehensive, and unqualified as the words of that provision are, still the instrument of assignment is made even more extensively operative by what follows in the same section of the original enactment, which provides that all property conveyed by the bankrupt in fraud of his creditors, . . . and all his rights of action for property or estate, real or personal, and all other causes of action arising from contract or from the taking or detention or injury to the property of the bankrupt, . . . shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee. 14 Stat. 523; Rev. Stat., sect. 5046.

Sufficient appears to show that certain debtors of the complainant and other creditors failed in business, and made, under the State law, a general assignment of their property to an assignee for the benefit of their creditors, prior to their being adjudged bankrupts. Pursuant to that assignment the assignee accepted the trust, and converted all of the visible property of the insolvents surrendered to him into money, and made final distribution of the proceeds among the creditors.

Charges of fraud against the debtors are made by the complainant, to the effect that they concealed large amounts of other property from their creditors and from the assignee, as fully set forth in the bill of complainant.

On the 10th of August, 1867, one of the said debtors filed his petition in bankruptcy, and on the 11th of October following, the firm of which the first-named debtor was a partner also filed their petition in bankruptcy; and the firm and each partner were duly adjudged bankrupts, the respondent, J. W. Caldwell, being subsequently appointed assignee in each case. They, the bankrupts, surrendered no property, and made oath that they had none, not excepted from the operation of the Bankrupt Act. Discovery has since been made, as the complainant alleges, that the bankrupts had fraudulently concealed a large amount of property not surrendered to the State assignee, or the assignee in bankruptcy, and that one of the firm made large gains and profits subsequent to the assignment

under the State law and prior to the time when the firm was adjudged bankrupt.

Secret and fraudulent devices, as the complainant alleges, were employed by the insolvent debtors to conceal their property from the knowledge of their creditors and the assignee; and he describes the means which led to the discovery of the property, and avers that the respondent assignee was advised of the facts set forth, and that he was requested to adopt means to recover the same, or to allow his name to be used for that purpose, but that he refused so to do.

Both the complainant and respondents are citizens of the same State; but the complainant, being a creditor of the bankrupts, instituted the suit in his own name, claiming the right to do so because the assignee refused to proceed to recover the property, or to allow his name to be used for that purpose. Service was made; and the respondents appeared, and demurred to the bill of complaint, showing, among other things, the following causes: 1. That the complainant has no capacity or right in equity to bring the suit. 2. That the complainant has never proved his claim against the estate of the bankrupts.

Beyond all doubt, the suit in this case is brought to recover property conveyed by the bankrupts in fraud of their creditors, which, by the express words of the Bankrupt Act, vested in the assignee by virtue of the instrument of assignment executed at the time the assignee was appointed.

Jurisdiction of the Circuit Court in the case cannot be sustained upon the ground of the citizenship of the parties, as the record shows that the complainant and respondents are citizens of the same State; nor can it be upheld under the provision of the Bankrupt Act, which provides that the circuit courts shall have concurrent jurisdiction with the district courts of all suits at law or in equity, brought by an assignee in bankruptcy against any person claiming any adverse interest, or by such person against an assignee, touching any property or rights of the bankrupt, transferable to or vested in such assignee, for the plain reason that controversies, in order that they may be cognizable under that provision, either in the circuit or district court, must have respect to some property or rights of property

of the bankrupt, transferable to or vested in such assignee, and the suit, whether it be a suit at law or in equity, must be in the name of one of the parties described in the provision, and be against the other, as appears by the express words of the provision. *Smith* v. *Mason*, 14 Wall. 431; *Morgan* v. *Thornhill*, 11 id. 75.

Nor is there any thing in the case of *Clark* v. *Clark et al.* (17 How. 315) inconsistent with the preceding proposition, when that case is properly understood. By the pleadings and proofs, it appears that the debtor had a large claim against Mexico pending before commissioners prior to the time he filed his petition in bankruptcy; that he was adjudged bankrupt before his claim was allowed; that the description of the claim in his schedule of assets was not such as to render it available to his creditors; that the assignee, having been empowered to sell his assets, sold the same to the sister of the bankrupt for a nominal sum, and that she immediately reconveyed the same to her brother; that he, the brother, subsequently prosecuted the claim, and recovered the same to the amount of $69,429.04, which was paid into the national treasury; that his brother, a judgment creditor, for himself and others, filed a bill of complaint here in the Circuit Court against the bankrupt, claiming the fund, the assignee having died before the same was recovered. Immediate steps were taken to procure the appointment of a new assignee, which appointment was made by the proper district court without delay; and the case shows that he forthwith petitioned the Circuit Court here to be admitted a party complainant in the same bill of complaint, and that he claimed the fund. Hearing was had; and the Circuit Court admitted the new assignee as a party complainant, and enjoined the secretary of the treasury not to pay out the fund until the further order of the court, and finally decreed that the fund belonged to the newly appointed assignee. Appeal was taken by the bankrupt, and this court affirmed the decree of the Circuit Court.

Nothing was decided in that case except that the newly appointed assignee was a proper party complainant in the bill filed by the bankrupt subsequent to the decease of the original assignee, and before his place was filled by a new appointment,

and that the fund belonged to the successor as the representative of the bankrupt estate. Further litigations followed, which show to a demonstration that neither the bankrupt nor any creditor could maintain any such suit. *Clark* v. *Hackett*, 1 Cliff. 273; s. c. 1 Black, 77.

Suppose it to be true, as alleged, that the described property and rights of the bankrupts which form the subject-matter of the present controversy were transferred to and vested in the assignee, it by no means follows that the Circuit Court has jurisdiction of the case, or that the complainant can maintain the suit; as it is clear to a demonstration that the instrument of conveyance referred to did not vest the property or any right to recover the same in the complainant or his associate creditors; nor is the claim which he makes to the property in any legal sense adverse to the rights of the assignee. What the complainant claims as against the assignee is that he, the assignee, refused to institute the suit, or to allow his name to be used for the purpose. He claims no interest in the property of the bankrupt adverse to the assignee; and if he did, the claim could not be sustained for a moment, as the entire property is transferred to the assignee, to be converted into money for distribution.

Unless the assignee can collect what is due to the bankrupt, he can never perform the duty assigned to him as the representative of the bankrupt; and the first section of the Bankrupt Act expressly provides that the jurisdiction of the district courts shall extend to the collection of all the assets of the bankrupt, and to all acts, matters, and things to be done under and in virtue of the bankruptcy.

"Debts due" to the bankrupt, as well as all his rights of action, vest in the assignee by virtue of the adjudication in bankruptcy, and the appointment of the assignee as the representative of the bankrupt. *Shearman* v. *Bingham*, 7 Nat. Bank Reg. 493.

Power and authority are also vested in the assignee by virtue of the bankruptcy, and his appointment to manage, dispose of, sue for, and recover all his property or estate, real or personal, debts or effects, and to defend all suits at law or in equity pending against the bankrupt. 14 Stat. 525.

Congress, in framing the Bankrupt Act, it is believed, intended to provide instrumentalities for its complete execution, and such as are sufficient to carry it into full effect. State courts may, doubtless, exercise concurrent jurisdiction with the district courts in certain cases for the collection of assets not inconsistent with the Bankrupt Act; but Congress, in the judgment of the court, intended to provide the means for the execution of the law in all cases, even though the State courts should refuse to exercise jurisdiction in such cases. *Lathrop, Assignee*, v. *Drake et al.*, 91 U. S. 516.

Support to that proposition is found in the fact that the assignee is authorized under the order of the court to redeem or 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 thereof, or to sell the same, subject to such mortgage, lien, or other incumbrances; the provision being that the debtor shall, at the request of the assignee, and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt.

Other provisions of the Bankrupt Act forcibly confirm the same views, two of which will be mentioned: 1. That the assignee shall demand and receive from any and all persons holding the same, all the estate assigned, or intended to be assigned, real or personal, and shall sell all such as is unincumbered which comes to his hands, on such terms as he thinks most for the interest of the creditors, subject to the right of the court for cause shown to make such order concerning the time, place, and manner of sale, as will, in its opinion, promote those objects. 2. That the assignee shall have the like remedy to recover all said estate, debts, and effects, in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered, and no assignment had been made. 14 Stat. 524.

Bankruptcy courts have original jurisdiction in their respective districts of all matters and proceedings in bankruptcy, and are authorized to hear and adjudicate upon the same, according to the provisions of the Bankrupt Act. They have full author-

ity to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity.

Assignees are in the first instance chosen by the creditors; but they may be removed by the court, after due notice, for any cause which, in the judgment of the court, renders such removal necessary or expedient. Id. 525.

Authority for a creditor to bring suit to recover the property or rights of property of the bankrupt, under any circumstances, is certainly not given in the Bankrupt Act, nor is any such pretence set up by the complainant. Instead of that, he admits, what cannot be denied, that the entire property of the bankrupt, except what is reserved from the operation of the Bankrupt Act, vests in the assignee by virtue of the instrument of conveyance required to be made as soon as the assignee is appointed and qualified.

Due conveyance of the kind was made in this case, nor does he attempt to controvert the proposition that the assignee is the only party designated by the Bankrupt Act as the proper claimant of the bankrupt's property and estate. The grounds of recovery, as stated in the bill of complaint, are that before filing the same he made application to the assignee to proceed by bill in chancery or other proper mode, or allow his name to be used for the purpose, to subject the said property and rights of the bankrupt, fraudulently concealed and retained, and to convert the same into money, to be paid and distributed to the creditors, which he as such assignee declined and refused to do.

Viewed in the light of those allegations, the theory of the complainant is that the assignee, inasmuch as he declined to comply with the request, and refused either to bring the suit or to allow his name to be used to recover the property and rights of property of the bankrupt, was guilty of a fraud against the creditors; and that the latter, by virtue of such request and refusal, had a right to seek a remedy in their own names, not only against the bankrupt and the possessor of the concealed property and estate, but also against the assignee, who is deemed to be responsible for the concealed property. Such a remedy, it is conceded, does not grow out of or depend upon the

bankrupt law; but the argument is, that it is founded upon the enlarged principles of equity which adapt themselves to the exigencies of the case, and enable the court to mould the decree to suit the various equities arising between the parties to the litigation.

Authorities are cited to prove that the person for whose benefit a trust is executed, who is to be the ultimate receiver of the money, may maintain a suit in equity to have it paid to himself; and the proposition is advanced, that, where a trustee is guilty of what the law considers a breach of trust in regard to the trust property, the *cestui que trust* may invoke the aid of equity to give him such remedy in the premises as the circumstances may require.

Grant that, and the concession shows to a demonstration that the present suit cannot be maintained, as the record shows that the complainant and respondents are citizens of the same State; and of course the Circuit Court had no jurisdiction of the case, it being conceded by the complainant that the remedy sought does not grow out of or depend upon the bankrupt law.

Conceded or not, it is clear that the suit in this case finds no support in the provisions of the Bankrupt Act, as sufficiently appears from the references to that act already made; but if more be needed, it will be found in the section which provides that no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined. Rev. Stat., sect. 5106.

Appellate jurisdiction, as exercised under the twenty-second section of the Judiciary Act, is not conferred upon the circuit courts in any case under the Bankrupt Act, where the ruling, order, decision, or decree of the Circuit Court is made or rendered by that court in a summary way. All such rulings, orders, decisions, or decrees must be revised, if at all, under the first clause of the second section of that act, in respect to which the determination of the Circuit Court is final and conclusive. *Knight* v. *Cheney*, 5 Bank. Reg. 313; *Morgan* v. *Thornhill*, 11 Wall. 65.

Creditors can have no remedy which will reach property

fraudulently conveyed, except through the assignee, for two reasons: 1. Because all such property, by the express words of the Bankrupt Act, vest in the assignee by virtue of the adjudication in bankruptcy and of his appointment. 2. Because they cannot sustain any suit against the bankrupt.

Property fraudulently conveyed vests in the assignee, who may recover the same and distribute its proceeds as the Bankrupt Act requires. Such a conveyance, says Curtis, is no effectual conveyance as against the interest intended to be defrauded, which is represented by the assignee, so far as respects all creditors who prove their claims. They can have no remedy which will reach such property except through the assignee, not only for the reasons already assigned, but because their remedies are absorbed in the great and comprehensive remedy under the commission by virtue of which the assignee is to collect and distribute among them the property of their debtor, "to which they are justly and legally entitled." *Carr* v. *Hilton*, 1 Curt. C. C. 234.

Opposed to that proposition is the case of *Franklin* v. *Farr* (2 Eq. Ca. Abr. 102), in which it was held that, if the assignee refuses to bring a bill that is for the benefit of the bankrupt's estate, the creditor has the right to bring such a bill, under peril of costs.

Enough has been already remarked to show that the Bankrupt Act makes it the express and positive duty of the assignee to collect and distribute all the assets of the bankrupt, including property fraudulently conveyed prior to the decree of bankruptcy, and that authority is given to him to sue for the same under the direction and control of the court, which may, in its discretion and for good cause shown, require the assignee by a specific order to take any proper step to secure the due administration of the bankrupt law, and the full and complete protection of the rights of the creditors interested in the proceedings; that ample means are placed in the hands of the creditors to enable them to inform the court of the necessity of any particular proceeding to be taken for that purpose, to which it may be added that the power of the court to compel a compliance with any such order is plenary and beyond all doubt; or if the assignee fails to do so, to

punish him for contempt, or to remove him and appoint another in his place. Bump, Bankruptcy (10th ed.), 147.

Plenary as the powers granted to the bankrupt courts are, there is no occasion for any departure from them in order to the complete execution of the duties imposed, which of itself is a sufficient reason for holding that the rule laid down in the preceding case is not applicable in our bankrupt system. Rev. Stat., sect. 5039.

Neither the assignee nor any creditor can have any greater right under the Bankrupt Act than the act itself confers; and if it be conceded that the remedy sought in this case does not depend upon the Bankrupt Act, then it is clear that the court below had no jurisdiction of the case, unless the proposition can be sustained that such a suit may be maintained in a circuit court, where both parties are citizens of the same State.

Nor is that the only objection to the theory advanced by the complainant; for if one creditor may sue in such a case, then all may sue, and the result might be that the proceedings in bankruptcy would be transferred not only to the Circuit Court, but to every State court within whose jurisdiction a defendant may reside.

Even if the case referred to, and others of like character, were good law in the courts of the country where they were made, still it is clear that the question before the court must be controlled by the provisions of our Bankrupt Act; but the doctrine of that case has long since been overruled, and is no longer regarded as correct, even in the jurisdiction where it was made, of which there is abundant evidence.

Creditors of an insolvent, said Lord Cottenham, cannot maintain a suit to recover the property or rights which belong to the insolvent, and the same rule applies to suits for a similar object brought by the insolvent himself. *Heath* v. *Chadwick*, 2 Ph. 649.

Prima facie the bankrupt is divested of the whole estate, nor have the creditors any right to sue; but if it be represented that the assignees will not sue, the court having jurisdiction of the matter may direct the recusant assignees to proceed, or may give the bankrupt or a creditor the right

to institute the suit in the name of the assignee, first indemnifying the assignee against costs. *Benfield* v. *Solomons*, 9 Ves. 83.

Attempt to maintain such a suit was made in *Yewens* v. *Robinson* (11 Sim. 105); but the assignees demurred to the bill of complaint, and the court sustained the demurrer, holding that the true method to proceed in such a case was to apply to the court of insolvency to have the assignees removed and others appointed in their place.

Application was made to the court in the case of *Ex parte Ryland*, and the petitioning creditor was allowed by the court to sue in the name of the assignee, first giving the assignee indemnity against cost and damage. 2 Deac. & Chit. 393. Corresponding decision was made in the case of *Hammond* v. *Atwood* (3 Madd. Ch. 158), the court holding that the proper course was to apply to the court by petition to have the assignees removed and new assignees appointed. *Major* v. *Aukland*, 3 Hare, 77.

Bankrupts uncertificated cannot file a bill of complaint against their assignees for an account; nor can the bankrupt obtain such relief by charging fraud and collusion between the assignees and a third party, the true remedy being a petition for relief to the court of original jurisdiction. *Turleton* v. *Hornby*, 1 You. & Coll. 193.

Suffice it to say that the law is now well settled in the parent country that creditors cannot maintain any such suit against the assignee, for the purpose set forth in the present bill of complaint.

Strong support to the conclusion is also derived from the fact that cases arise in bankruptcy proceedings where the assignee is not bound to take possession of some particular asset which passed to him by the instrument of assignment. Examples of the kind, such as certain leasehold estates which would burden instead of benefiting the fund to be distributed, are given by Judge Ware in the case of *Smith* v. *Gordon* (6 Law Rep. 317), to which reference is made as showing the principle of the rule.

Leasehold estates pass to the assignee under the English bankrupt laws; but the assignee, in certain cases, is not bound

to take the lease of the estate where the rent is greater than the value of the lease, as the effect would be to burden the estate of the bankrupt, and to diminish the fund to be distributed among the creditors. *Copeland* v. *Stephens*, 1 Barn. & Ald. 604; *Amory* v. *Lawrence*, 3 Cliff. 535; *Fowler* v. *Down*, 1 Bos. & Pull. 157; *Fox* v. *Webb*, 7 T. R. 397; *Wilkins* v. *Fry*, 1 Meriv. 244.

It has long been a recognized principle of the bankrupt law, says Robson, that the assignees of a bankrupt are not, in certain cases, bound to take property of an onerous or unprofitable character, which would burden instead of benefiting the estate; and there are numerous decisions, English and American, which support the proposition; nor are the creditors without remedy in such a case, even if the assignee should erroneously or unwisely fail to take such possession, as the creditors may, by petition, apply to the court of original jurisdiction to compel him to carry out their wishes; and if the District Court should deny their petition, they would have the right to demand a review of the decision by the Circuit Court, under the first clause of the second section of the Bankrupt Act. Robson (3d ed.), 398.

Decree affirmed.

BATES *v.* COE.

1 Persons sued as infringers may, if they comply with the statutory condition as to notice, give the special defences mentioned in the Patent Act in evidence, under the general issue.

2. Such notices, in a suit in equity, may be given in the answer; and the provision is, that if any one of those defences is proved, the judgment or decree shall be in favor of the defending party, with costs.

3. Defences of the kind, where the invention consists in a combination of old elements, incapable of division or separate use, must be addressed to the entire invention, and not merely to separate parts of the thing patented.

4. Pursuant to that rule, the respondents alleged in their answer four of the statutory defences, besides the denial of infringement: 1. That the complainant is not the original and first inventor of the improvement. 2. That the alleged improvement is fully described in the several patents, printed publications, and rejected applications for patents, set forth in the answer. 3. That the improvement secured by the reissued patent is not for the same invention as the original. 4. That the improvement had been in public use

and was known to the several persons named in the answer before the complainant made his application for a patent.

5. All of these defences were overruled in the Circuit Court; and the respondents appealed to the Supreme Court, where the decision is that the first two defences are not proved, the court being of the opinion that the evidence introduced for the purpose was not sufficient to overcome the *prima facie* presumption which the patent affords in favor of the complainant.

6. Two points were ruled in response to the third defence: 1. That the complainant is not obliged in such a case to introduce the original patent in evidence. 2. That the respondent cannot have the benefit of such a defence, if the original patent is not exhibited in the record.

7. Improvements were made by the complainant in drilling and bolt-tapping machines, called in the specification a new and improved drilling and screw-cutting machine. Annexed to the specifications are the four claims of the patent, as set forth in the opinion of the court.

8. Inventors may, if they can, keep their inventions secret, and, if they do, no neglect to petition for a patent will forfeit their right to apply to the commissioner for that purpose. Mere delay is not a good defence, but the respondent, in a suit for infringement, if he gives the required notice, may allege and prove that the invention embodied in the patent in suit had been in public use or on sale more than two years prior to the complainant's application for a patent; and if he alleges and proves that defence, he is entitled to prevail in the suit. Those requirements constitute conditions to the sufficiency of the defence; and the court held that the respondents had not complied with either to any effectual extent.

9. Infringement being denied in the answer, the burden of proof is upon the complainant; and the court decided that the charge in this case was fully proved.

10. Besides these defences, the assignment of errors presented two others, not set up in the answer: 1. That the Circuit Court erred in holding that the patentee was the original and first inventor of the improvement specified in the second claim. 2. That the Circuit Court erred in holding that the patentee was the original and first inventor of the improvement specified in the fourth claim of the patent. Both of those claims refer to parts of the drilling feature of the improvement, which is merely a combination of old elements; and the court overruled the defences, for two reasons: 1. Because they were not set up in the answer. 2. Because they were addressed to a part only of an indivisible improvement, and not to the entire invention, as required by the act of Congress.[1]

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. James Moore for the appellant.

Mr. E. E. Wood, contra.

[1] These head-notes were prepared by Mr. Justice Clifford, for the "Patent Office Official Gazette," and are with his permission here inserted.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Persons sued as infringers in a suit in equity, if they give the required notice in their answer, may prove at the final hearing the same special matters in defence to the charge of infringement as those which the defendant, in an action at law, may set up under like conditions.

Defences of the kind which it is important to notice in the present case are the following: 1. That the patentee is not the original and first inventor of any material and substantial part of the thing patented. 2. That the improvement had been patented or described in some printed publication prior to the supposed invention. 3. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public.

Notices of the kind, when the suit is in equity, may be given in the answer or amended answer; and if the defence is previous invention, knowledge, or use of the thing patented, the respondent must state in the notice 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. Each of these defences, it will be seen, goes to the entire invention, and not to separate parts of the thing patented; and the provision is, that if any one or more of the special matters alleged shall be found for the defending party, the judgment or decree shall be rendered in his favor, with costs. Rev. Stat. (2d ed.), sect. 4920.

Evidence to sustain the second defence is sufficient if the patent introduced for the purpose, whether foreign or domestic, was duly issued or the complete description of the invention was published in some printed publication prior to the patented invention in suit; and the patent offered in evidence or the printed publication will be held to be prior, if it is of prior date to the patent in suit, unless the patent in suit is accompanied by the application for the same, or unless the complainant introduces parol proof to show that his invention was actually made prior to the date of the patent, or prior to the time the application was filed.

Neither the defendant in an action at law nor a respondent

in an equity suit can be permitted to prove that the invention described in the prior patent, or the invention described in the printed publication, was made prior to the date of such patent or printed publication, for the reason that the patent or publication can only have the effect as evidence that is given to the same by the act of Congress. Unlike that, the presumption in respect to the invention described in the patent in suit, if it is accompanied by the application for the same, is that it was made at the time the application was filed; and the complainant or plaintiff may, if he can, introduce proof to show that it was made at a much earlier date.

Improvements, it seems, were made by the complainant in drilling and bolt-tapping machines, called in the introductory part of the specification a new and improved drilling and screw-cutting machine, for which he, on the 20th of January, 1863, received letters-patent in due form; and the record shows that on the 19th of February, four years later, he surrendered the same, and that a new patent, being the reissued patent in suit, was granted to him for the same invention.

Special reference is made in the specification to the figures given in the drawings for a description of the invention, and they show, beyond doubt, what the specification alleges, that the invention relates to a novel and improved arrangement of the parts of a machine constructed and designed for the purpose of drilling and cutting screws; nor is it doubted that the allegation of the patentee is true, that it affords to the operator engaged in cutting screws considerable advantages beyond what he would obtain by the use of the ordinary hand-machine.

Inventors, before they can receive a patent, are required to file in the Patent Office a written description of their invention, and of the manner and process of making and using the same, in such full, clear, concise, and exact terms as to enable any person skilled in the art to make, construct, and use the same.

Pursuant to that requirement, the patentee gave a particular and full description of all the operative devices of the machine, even to the minutest, and of the function performed by each, and of the mode of operation of the whole when the machine is put in motion, including the devices employed when the machine is operated by steam. The devices may be divided

into two classes: 1. Those employed to do the work. 2. Those employed to operate the machine, whether by steam or by hand.

Constituted, as the machine is, of numerous devices operating as a whole, it is scarcely possible to define its operations without first taking into the account its separate parts. Of course it has a frame secured to some appropriate fixture, which constitutes, directly or indirectly, the support of all the parts of the machine. Operated, as the machine is, by power, which may be either steam or hand power, it follows almost necessarily that it has a shaft, which in this machine is fitted horizontally in the upper part of the frame, with a fly-wheel at one end and a bevel-pinion at the other, which latter device gears into the bevel-wheel shown in the drawings, the shaft of which is fitted in suitable bearings on the upper part of the frame and at right angles with the main shaft, as shown in the second figure of the drawings, the outer end of the last-named shaft being provided with a crank.

Besides the pinion already mentioned, there is another, called a bevel-pinion, which also gears into the same wheel, the statement being that it is fitted loosely on the shaft of the wheel in such a manner that the shaft may rise and fall independently of the wheel, and the latter be made at the same time to rotate the shaft, which is tubular at its lower end, and is provided with a set-screw, by which a drill or screw-cutting die may be secured in it.

In addition to that, there is a vertical screw, which works in a nut on the upper part of the frame, the lower end of the screw being connected by a swivel-joint with the upper end of the tubular shaft. On the screw above the nut there is placed a ratchet, fitted on the screw in such a manner that when turned it turns the screw, and at the same time admits the latter to rise and fall under the action of the nut.

Speaking of the ratchet, the patentee states that it is turned by means of a pawl which is connected by a pivot to the arm, the latter being attached to the frame of the machine by a pivot. Connected with the arm is a spring, which has a tendency to keep the outer or free end of the pawl in contact with the face of the wheel, which is of such a shape as to form a cam

and operate the pawl, so that the latter will turn the ratchet and cause the ratchet as it rotates to turn the screw, the ratchet causing the same to descend as it is turned, so that the tubular shaft will be forced down and the drill fed to its work.

Such is the described mode of operation of the working devices when the motive power is steam; but the patentee states that it is easy to throw the pawl back so that it can no longer be operated by the cam, in which event the drill must be fed to its work by hand, which is done by turning the screw by means of the handle attached to the wheel on top of the screw.

Next follows the description of that feature of the machine which may be denominated the screw-cutting apparatus. Brief as the description is, it is obviously sufficient to justify the patentee in his claim that it is both new and useful. He commences by stating that the base of the frame has an oblong opening made through it vertically to receive the shanks of the jaws constituting the vice, one of which has the ends of the yoke, so called, bolted to it. Two screws are also described, one of which passes through the semicircular end of the yoke, and the other passes into the jaws of the vice. These jaws are for the purpose of clamping or holding the rods on which screws are to be cut. Such rods are clamped firmly between the jaws by turning the screw that passes through them which constitutes the vice, the screw-cutting die being screwed in the lower end of the tubular shaft, and the pawl being disengaged from the ratchet. No feed movement is required in the operation, as the jaws and rod rise and fall under the action of the die, the shanks of the jaws serving as guides. When more speed is required for either drilling or screw-cutting than can be obtained by turning the bevel-wheel, it is accomplished by applying additional power to the main shaft, which shows that the machine is adapted to both heavy and light work.

Service was made; and the respondents appeared and filed an answer setting up several defences, as follows: 1. That the complainant is not the original and first inventor of the alleged improvement. 2. That the alleged improvement, in all its parts, was fully described in the several patents, printed publications, and rejected applications for patents set forth in the

answer, prior to the alleged invention thereof by the complainant. 3. That the improvement secured by the reissued patent is not for the same invention as that embodied in the original patent. 4. That the alleged improvement was in public use and was known to divers persons in the United States prior to the alleged invention thereof by the patentee, more particularly set forth in the amended answer subsequently filed by leave of court. 5. That the respondents have not infringed the alleged invention, and that if they have, the complainant has not suffered any damages by such infringement.

Proofs were taken, hearing had, and the court entered a decree in favor of the complainant, and sent the cause to a master to compute the gains and profits of the infringement made by the respondents. Prompt report was made by the master, to which both parties excepted; but it is wholly unnecessary to notice the exceptions of the complainant, as he did not appeal; nor is it necessary to give much consideration to the exceptions filed by the respondents, as the assignment of errors varies materially from the exceptions taken to the master's report.

Both parties appeared, and were heard; and the court confirmed the report of the master as to the amount awarded, and entered a final decree that the complainant recover of the respondents the sum of $290 and costs; from which decree the respondents appealed to this court.

Since the appeal was entered here the respondents have filed the following assignment of errors: 1. That the Circuit Court erred in finding that the respondents had infringed the first claim of the reissued patent. 2. That the court erred in finding that the complainant was the original and first inventor of the improvement specified in the second claim of the patent. 3. That the court erred in finding that the respondents had infringed the second claim of the patent. 4. That the court erred in finding that the respondents had infringed the third claim of the patent. 5. That the court erred in finding that the complainant was the original and first inventor of the improvement specified in the fourth claim of the patent. 6. That the court erred in finding that the respondents had infringed the fourth claim of the patent. 7. That the court erred in adjudging that the reissued patent is a good and valid

patent. 8. That the court erred in confirming the fifth finding in the report of the master. 9. That the court erred in the construction given to the reissued patent.

Annexed to the specification are the claims of the patent, which are as follows: 1. The arrangement of the three bevel-wheels in such a manner that the tubular shaft may be revolved with more or less speed and power for the different purposes to which the machine may be adapted. 2. The automatic feed arrangement, consisting of the ratchet, pawl, spring, and cam, whereby the drill is fed to its work, the arrangement being so made that it can be detached and the drill fed by hand. 3. He also claims the vice for holding the rods for making screws, in combination with the machine, the vice consisting of the described jaws and the described screw arranged in the base of the frame. 4. Finally, he claims the combination of the tubular shaft and the described vertical screw with the pinion and nut, whereby the rotary motion and the necessary feed is given to the drill, as described in the specification.

Cases arise not unfrequently where the actual invention described in the specification is larger than the claims of the patent; and in such cases it is undoubtedly true that the patentees in a suit for infringement must be limited to what is specified in the claims annexed to the specification, but it is equally true that the claims of the patent, like other provisions in writing, must be reasonably construed, and in case of doubt or ambiguity it is proper in all cases to refer back to the descriptive portions of the specification to aid in solving the doubt or in ascertaining the true intent and meaning of the language employed in the claims; nor is it incorrect to say that due reference may be had to the specifications, drawings, and claims of a patent, in order to ascertain its true legal construction. *Brooks et al.* v. *Fisk et al.*, 15 How. 215.

Apply that rule to the case, and it follows that there is no substantial variance between the claims of the patent and the description of the invention or inventions described in the specification.

In construing patents, it is the province of the court to determine what the subject-matter is upon the whole face of the

specification and the accompanying drawings. Curtis, Patents (4th ed.), sect. 222.

In case of a claim for a combination, where all the elements of the invention are old, and where the invention consists entirely in the new combination of old elements or devices whereby a new and useful result is obtained, such combination is sufficiently described if the elements or devices of which it is composed are all named, and their mode of operation given, and the new and useful result to be accomplished pointed out, so that those skilled in the art and the public may know the extent and nature of the claims, and what the parts are which co-operate to produce the described new and useful result. Curtis, Patents (4th ed.), sect. 289 *a*, p. 275; *Seymour* v. *Osborne*, 11 Wall. 542.

Accurate description of the invention is required by law, for several important purposes: 1. That the government may know what is granted, and what will become public property when the term of the monopoly expires. 2. That licensed persons desiring to practise the invention may know during the term how to make, construct, and use the invention. 3. That other inventors may know what part of the field of invention is unoccupied. *Gill* v. *Wells*, 22 id. 27.

Sufficient has already been remarked to show that the invention in its primary feature is an improved machine for drilling, composed of the devices pointed out in the specification, which operate and perform the functions therein described, and which by their joint operation in the manner described accomplish the patented result; that the other feature of the invention is an improved vice constructed on the same frame, consisting of the several devices already described, and which operate in the manner described to accomplish the described result.

Construed in that way, as the specification should be, it is clear that the whole invention, including the drill and the vice, is sufficiently described both in the specification and in the claims of the patent, and that the objection of the respondents in that regard must be overruled.

Reissued letters-patent must be for the same invention as that secured in the original patent; and if it appears that such

a patent is for a different invention, it is clear that it is void, as no such power is vested in the commissioner; but no such defence can be sustained in this case, as the original patent was not introduced in evidence. Persons seeking redress for the infringement of a reissued patent are not obliged to introduce the surrendered patent; and if the old patent is not given in evidence by the party sued, he cannot have the benefit of such a defence. *Seymour* v. *Osborne*, 11 id. 546.

Power to grant patents is conferred upon the commissioner; and when that power has been duly exercised, it is of itself, when introduced in evidence in cases like the present, *prima facie* evidence that the patentee is the original and first inventor of that which is therein described as his invention. Proof may be introduced by the respondent to overcome that presumption; but in the absence of such proof, the *prima facie* presumption is sufficient to enable the party instituting the suit to recover for the alleged violation of his rights.

Availing himself of that rule of law, the complainant in this case introduced the reissued patents referred to in the bill of complaint, the effect of which is to cast the burden of proof upon the respondent to prove his first defence, — that the complainant is not the original and first inventor of the alleged improvement. Both parol and documentary evidence is admissible to establish that defence; and inasmuch as the same documentary evidence is sufficient to prove the second defence, the two defences will be considered together.

Throughout, it should be borne in mind that such defences are authorized by the act of Congress, and that they are required to be addressed to the invention as described in the specifications and claims of the patent. None of the elements or devices of the patented machine are new, and the invention itself consists in a combination of old devices. Such a combination is an entirety, though more than one combination may be included in the same patent. *Gill* v. *Wells*, 22 id. 2–24.

Where there is only one combination of an entire character, incapable of division or separate use, the defences of the kind mentioned must be addressed to the invention. Exact conformity to that rule was observed by the respondents in framing their answer in this case; and inasmuch as no parol evidence

of any considerable importance was introduced to support the first defence, the two under consideration are substantially identical in respect to the proofs introduced in their support. Exhibits in great numbers were introduced by the respondents to establish those defences, consisting of patents, printed publications, and rejected specifications, of which those regarded as most material will be separately examined.

Briefly described, the invention embodied in the reissued patent is a hand-drill and screw-cutter, designed for ordinary mechanical use, with five constituent or elementary parts: 1. The frame to support the operating mechanism, with a base for holding the material to be wrought or worked. 2. Bevel-gearing for driving a shaft or spindle propelled by manual power, capable of running at two speeds, and arranged so that the operator who turns the crank can properly adjust and attend to the material and cause the several parts of the machine to work harmoniously. 3. Automatic and hand-feeding devices, so arranged to the machine as to be easily controlled by the operator, to give vertical motion to the spindle when used for drilling. 4. A shaft or spindle for holding the tool for performing the work, constructed and arranged in the machine so that it may be fed automatically or by hand, or by both, and so connected by a pinion to the crank that it can receive rotary motion independent of its vertical feeding motion, by means of which it is enabled to act as a screw-cutter. 5. A vice attachment for holding rods when the machine or spindle is receiving rotary motion only and is cutting screws.

Screw-cutting requires the drill to be made vertical, so as to allow the vice to rise and fall under the action of the die, in which respect the invention differs from all other hand-drills described in the record. Owing to the peculiar construction of the machine, it is adapted to drilling, and may be converted into a screw-cutter by placing a vice in the opening of the base and detaching the feed devices. Arranged as it is, it may be propelled at two different speeds, so that it can have more or less power either to cut screws or drill holes, simply by changing the point where power is applied. When the greater power and less speed is required, the smaller gear

is used; and when greater speed and less power is required, the larger gear is used as the driving-pinion, — the change being only in the use of pinions acting on the driving-gear.

Exhibit 1, introduced by the respondents, is a wooden model of a part of a planer. Unquestionably, it shows a cam, spring, ratchet, and pawl; but they are not combined so as to give vertical or lateral motion to a revolving spindle, and as separate devices will perform no useful function. They are connected by a series of rods and levers, but they give simply an intermittent motion to the shaft. Instead of that, the device of the reissued patent employs in connection with the spindle a swivel-joint, nut, and screw, to give vertical as well as rotary motion to the shaft.

Devices in one machine may be called by the same name as those contained in another, and yet they may be quite unlike, in the sense of the patent law, in a case where those in one of the machines perform different functions from those in the other. In determining about similarities and differences, courts of justice are not governed merely by the names of things; but they look at the machines and their devices in the light of what they do, or what office or function they perform, and how they perform it, and find that a thing is substantially the same as another, if it performs substantially the same function or office in substantially the same way to obtain substantially the same result; and that devices are substantially different when they perform different duties in a substantially different way, or produce substantially a different result. *Cahoon* v. *Ring*, 1 Cliff. 620.

Reference will next be made to the patent of Amos Morgan, dated May 30, 1844, and called exhibit 3. It is what is called a horizontal machine, and is so arranged that all parts of the operative machinery, including the feeding devices and driving machinery, move forward on ways like the carriage of a mill. Unlike the invention of the reissued patent, it has but one speed for the spindle, which is imparted by two pinions. Two pinions are also employed to feed the spindle when the machine is to bore wood. When iron is to be drilled, two cams are employed, which are put through the driving-shaft, and made to slip out and in so as to adjust the apparatus to feed fast or

slow. Suffice it to say that the claim of the patent, without entering further into the descriptive portion of the specification, shows that the two inventions are unlike in most or all of their essential features. It is not in any aspect a vertical machine, and it is without any such base for a vice as that exhibited in the reissued patent of the complainant, and is not at all adapted to be used as a screw-cutter; nor is it arranged with two speeds, nor with a cam fixed on the pinion driving the spindle, so that the automatic feed will always correspond, as in the patent in suit, with the speed of the spindle. Many other differences might be pointed out; but those given are amply sufficient to show that the exhibit has no tendency to support the defence for which it was introduced.

Next follows exhibit 4, which is a second patent granted to the same patentee for a small horizontal hand-drill, with one motion or speed. By the specification it appears that it is fed automatically by certain described devices, which are so entirely unlike those employed in the reissued patent, both in their combination and mode of operation, that it is not deemed necessary to waste words in their description, as it is clear that the invention, if any, secured by the patent, is in every material respect different from the patent in suit.

Nor will it be necessary to examine very fully two other exhibits introduced by the respondents, for the same reasons. They consist of two patents issued to George C. Taft, of which the first in date is for an improved drill-shaft apparatus, and in the construction of the machine, so far as respects its automatic feed arrangement, it bears a pretty strong resemblance to the mechanism described in exhibit 3, already somewhat fully described; but it is not adapted to feed a drill running at different speeds, and in that respect bears no resemblance to the mechanism described in the reissued patent in suit. Complicated as the devices of the feeding apparatus are, it is quite difficult to compare the same with the more simple mechanism found in the machine of the complainant, except by saying that they are unlike the former in almost every important particular.

Three years later, the same patentee obtained another patent, called in this case exhibit 5, which is also for an improved

hand-drill or drilling-machine of a horizontal construction. According to the specification, the invention consists in the arrangement and application of a support-piece to the slide-rod, together with the drill-shaft, and the operating mechanism of such shaft, by the employment of which the patentee is enabled to support not only the vibrating lever of the pawl, but other parts of the drilling apparatus, and particularly to employ a driving-shaft and certain gears for the purpose of increasing the speed of the drill-shaft.

Evidently it is an improvement grafted upon the prior invention of the patentee, bearing very little resemblance to the invention of the complainant, except that it has automatic feed devices, by which alone the drill is fed to the work. Precisely what the feed mechanism is it is difficult to state, as the only description given of it in the specification is the following: During the rotations of the drill-shaft the pawl mechanism will be put in action in such a manner as to turn the ratchet-gear and the tubular shaft, and thus cause the drill-shaft to be moved forward regularly and gradually, in order that the drill may be fed into an article during the process of drilling the same.

Should inquiry arise as to what the mechanism is that performs those functions, it is very clear that no one can answer the question without other means than those given in the specification. Better description is given of the operating devices of the machine, in respect to which it will be sufficient to say that they are quite unlike those shown in the specification of the complainant.

Improvements in machinery for making envelopes and paper were made by E. W. Goodale, and the patents granted to him were introduced by the respondents as exhibits in the case to support the first and second defences; but it is so obvious that they have no such tendency, that it is not necessary to give the exhibits any special examination.

Certain extracts from a printed publication were also introduced in evidence by the respondents for the same purpose, in respect to which it is only necessary to state that, in the judgment of the court, they fall far short of what is required in such a controversy to constitute satisfactory proof that the

invention had been described in a printed publication prior to the invention of the complainant. *Seymour* v. *Osborne*, 11 Wall. 555.

These several exhibits have been carefully examined; and the conclusion of the court is, that there is not found in any one of them a machine with a frame secured as described in the complainant's specification, to which a drill-spindle is attached by means of the device called a nut, with a hand-wheel and the described screw and the automatic feed devices, consisting of the ratchet carrying the drill-shaft, the pawl, and the spring keeping the lever in contact with the cam mounted on the hand-wheel, which is capable of being operated at two different speeds; nor is there found in any one of them the two kinds of feeding mechanism designed to be employed in the manner and for the purposes described in the complainant's specification. For these reasons, the court is of the opinion that the first and second defences set up by the respondents in their answer and amended answer must be overruled.

Evidence of a parol character was also introduced by the respondents, having some slight tendency to prove that the complainant is not the original and first inventor of the patented improvement; but it is so slight, and so manifestly insufficient to overcome the *prima facie* presumption arising in favor of the complainant, that the court does not deem it necessary to enter into the details of the evidence.

Suppose that is so, still it is insisted by the respondents that the improvement was in use in divers places in the United States prior to any alleged invention thereof by the complainant.

Before proceeding to examine the evidence in that regard, it is proper to remark that the defence as pleaded does not state how long the invention had been in public use, nor does the answer state any thing from which it can be inferred when the public use commenced, except that it was prior to any alleged invention thereof by the patentee.

Authority is given by the act of Congress to plead or set up in the answer that the invention had been in public use or on sale in this country for more than two years before the application for a patent. Rev. Stat. (2d ed.), sect. 4920.

Inventors may, if they can, keep their invention secret; and if they do for any length of time, they do not forfeit their right to apply for a patent, unless another in the mean time has made the invention, and secured by patent the exclusive right to make, use, and vend the patented improvement. Within that rule and subject to that condition, inventors may delay to apply for a patent; but the Patent Act provides, as before stated, that the defending party in a suit for infringement may plead the general issue, and, having given the required notice, may prove in defence that the patented invention had been in public use or on sale for more than two years before the alleged inventor filed his application for a patent, and the provision in that event is, that if the issue be found for the party setting up that defence, the judgment or decree shall be in his favor.

Different phraseology was employed in a prior Patent Act, which made it necessary for the party setting up such a defence to prove that the invention had been in public use or on sale, with the consent and allowance of the patentee, before his application for a patent was filed. 5 Stat. 123. Decided cases adjudicated under that act and certain earlier acts show that a very limited public use or sale of the invention, if prior to the application and with the consent and allowance of the patentee, was held to be sufficient to defeat the right of the inventor to the protection of the Patent Act. *Pennock* v. *Dialogue*, 2 Pet. 19; *Whiting* v. *Emmet*, Baldw. 310; *Ryan* v. *Goodwin*, 3 Sumn. 518; *Wyeth* v. *Stone*, 1 Story, 281.

Congress, however, interfered, and provided that no patent shall be held to be invalid by means of such purchase, sale, or use prior to the application of a patent, except on proof of abandonment to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application. 5 Stat. 354.

Public use or sale, even under that provision, which was in the nature of an amendment to the earlier Patent Act, in order to defeat the right of the inventor to a patent, must have been for the period prescribed, with his consent and allowance. *Pierson* v. *Eagle Screw Co.*, 3 Story, 305.

Unlike that, the present Patent Act provides that the defending party, having given the requisite notice, may prove

that the invention has been in public use or on sale in this country for more than two years before the inventor applied for a patent, and that if that special matter is found in his favor he is entitled to the judgment or decree with costs. Nothing of the kind is pleaded in the answer, nor is there any thing in the record to support the proposition, if it had been well pleaded, from which it follows that the fourth defence must be overruled.

Two assignments of error, to wit, the second and the fifth, must not be passed over without comment. They are to the effect that the court erred in holding that the patentee was the original and first inventor of the respective improvements specified in the second and fourth claims of the patent.

Two objections to those assignments of error exist, each of which is sufficient to show that they cannot be allowed: 1. That there is no such defence set up either in the answer or amended answer. Nothing can be assigned for error which contradicts the record, nor can an appellant be allowed to assign for error the ruling of the court in respect to any defence not set up in his plea or answer. Appellate courts cannot amend the pleadings, nor can they allow that to be accomplished by an assignment of error. 2. Neither of those defences is pleaded as required by the act of Congress, as each is pleaded to a separate claim of the patent, and not to the invention which is embodied in the specification.

Such defences, if well pleaded to the invention described in the Patent Act, are good defences, as the act of Congress provides that the defending party may plead a general denial of the charge of infringement, and, having complied with the requirement as to notice, may give such special matters in evidence to defeat the patent. Under such a pleading and notice, the respondent in an equity suit may prove that the patentee was not the original and first inventor of the alleged improvement, or that it had been patented or described in some printed publication, or that the invention had been in public use or on sale in this country for more than two years prior to the application; and the provision is, that the judgment or decree must be in favor of the defending party, if he proves any one or more of these special matters.

Where the thing patented is an entirety, consisting of a single device or combination of old elements, incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire thing is found in one prior patent or printed publication or machine, and another part in another prior exhibit, and still another part in a third one, and from the three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement.

Attempts of the kind are sometimes made; but it is plain that the plea, which in the action at law is the general issue, is required to be addressed to the entire charge of the declaration, and that its effect is to cast the burden of proof upon the plaintiff to make good the charge of infringement. Infringement is the charge made by the party seeking redress; and it is competent beyond all doubt for the defending party to show that he does not infringe at all, or that he has infringed only a part of the claims of the patent. Authority for that proposition is found in the very nature of the issue between the parties; but the only authority for attacking the originality or validity of the patent is that given in the act of Congress, and consequently the attack must be made in the mode the Patent Act prescribes. Rev. Stat., sect. 4920.

Defences of the kind must, if the thing patented be an entirety, and incapable of division or separate use, be addressed to the invention, and not merely to one or more of the claims of the patent if less than the whole invention. More than one patent may be included in one suit, and more than one invention may be secured in the same patent; in which cases the several defences may be made to each patent in suit, and to each invention included in the bill of complaint. *Gill* v. *Wells*, 22 Wall. 24.

Combination patents may be mentioned as examples where more than one invention may be secured by a single patent, and in such a case the patentee may give the description of each combination in one specification. Cases of the kind often arise; and in such a case the party charged with infringement may plead and prove the statutory defences to each

invention, just as if the two combinations had been embodied in separate patents, for the reason that each combination in such a case, like what is secured in a division patent, must be regarded as a distinct invention, at least for the purpose of pleading the statutory defences to the charge of infringement.

Ample support to that proposition is found in the language of the Patent Act and in the practice of the courts; but where the patent is an entire invention, incapable of division or separate use, the defences authorized by the act of Congress must be addressed to the thing patented, and the evidence to support the defence must show that the patentee was not the original and first inventor, or establish some one of the other statutory defences.

Patentees seeking redress for the infringement of their patent must undoubtedly allege and prove that they are the original and first inventors of the alleged improvement, and that the same has been infringed by the party against whom the suit is brought. In the first place, the burden to establish both of those allegations is upon the party instituting the suit; but the law is well settled that the patent in suit, if introduced in evidence, affords to the moving party a *prima facie* presumption that the first allegation is true, the effect of which is to shift the burden of proving the defence upon the defending party. *Blanchard* v. *Putnam*, 8 Wall. 42; *Seymour* v. *Osborne*, 11 id. 538. Infringement being denied, the burden of proof is upon the complainant to establish the charge.

Where the invention is embodied in a machine, manufacture, or product, the question of infringement, which is a question of fact, is ordinarily best determined by a comparison of the exhibit made by the respondent with the mechanism described in the complainant's patent. Both parties gave evidence upon the subject; but the weight of the proofs, in the judgment of the court, supports the affirmative of the charge.

Strong support to that view is derived from the stipulation filed in the case, in which the respondents admit that between the date of the patent and the filing the bill of complaint they made and sold drilling-machines with a vice attached, like complainant's exhibit B, which is equivalent to a confession of the

charge, leaving open only the question as to the extent of the infringement.

They also except to the master's report; but the exception is not well founded, and the amount of profits found being quite reasonable, it is clear that the decree of the Circuit Court is correct.

Decree affirmed.

KESNER *v.* TRIGG.

1. In Virginia, a party cannot avail himself of the defence of usury, without averring and proving it, and he is required to pay the principal of his debt.
2. Where a party at the time of contracting a debt, executed to secure the payment thereof, a deed of trust of lands to which he had a perfect record title, and a third party subsequently makes claim that he had, at the date of the deed, a title to them, — *Held*, that the trustee and *cestui que trust* must be considered as purchasers; and if they had no notice of such claim, the lands are subject to sale to satisfy the debt. If the sale yields a surplus, the rights of such third party thereto will be the same as they were to the land.
3. A post-nuptial contract, made upon sufficient consideration, and wholly or partially executed, will be sustained in equity.
4. By the common law, if the husband and wife sell and convey her lands, the money which he receives therefor, without any reservation of rights on her part, will belong to him.

APPEAL from the Circuit Court of the United States for the Western District of Virginia.

Philip Kesner, of Washington County, Virginia, an adjudicated bankrupt, surrendered real estate, viz.: —

"One-half interest in $150\frac{8}{100}$ acres of land lying in Washington County, Virginia, near Cedarville, with improvements thereon.

"Life-estate in the other one-half of the above tract, $800.

"The other half of this tract belongs to the petitioner's wife."

Afterwards, on the 6th of August, 1873, by leave of the court he filed an amended schedule, varying the description of his land, viz.: —

"All the petitioner's interest in a tract of $150\frac{8}{100}$ acres of land lying in Washington County, Virginia, near Cedarville, conveyed to petitioner by George Dutton, in consideration chiefly of his wife's lands, near Lyon's Gap, in Smyth County.

"If his wife's claim to one-half is sustained, then he surrenders his petitioner's life-interest in that half.

"Petitioner's wife claims one-half of this land: value of the whole tract $2,400

"If his wife sustains her claim of one-half, will be . . 1,200

"Value of life-interest . . . . . 800"

Kesner's assignee advertised the land; but Jane B. Kesner, his wife, filed her bill, and a temporary injunction was awarded forbidding the sale.

She claims that the whole land is her own property, and that there was a contract between her and her husband, not reduced to writing, by which she was to claim no interest in his property, and he none in hers; that an arrangement between one Thomas T. Hull, one George Dutton, and her husband, by which Dutton was to get Hull's land, Hull hers, and her husband Dutton's, was made, to which she assented, with the distinct understanding between her husband and herself, and in the belief, that she would have in the Cedarville land (the land surrendered by Philip Kesner) the same rights she had in her own land; that she was one of the three children of John Davis, who died intestate, leaving real estate at Lyon's Gap, which was divided, and one-third of it assigned to Kesner and wife, one-third to Moffett and wife, and one-third to Porterfield and wife; that Moffett and wife sold their third to Kesner and wife, who conveyed the two-thirds thus acquired to Hull's executor, by their deed, duly executed and acknowledged, May 26, 1852, and recorded 24th August, 1853; that the deed to the Cedarville land was made by Dutton and wife to Philip Kesner alone, on the 25th of January, 1851, and recorded Aug. 6, 1853; that the purchase-money paid to Moffett and wife was derived from the sale of certain slaves which the complainant received as part of her father's estate.

The bill further alleges that Philip Kesner executed a deed of trust, conveying the Cedarville farm, Jan. 29, 1862, to one Bekem, to secure the payment of a promissory note, of even date therewith, for $2,000, borrowed money, payable two years thereafter to one Greenway; that the money borrowed consisted of Virginia and North Carolina notes, which were

greatly depreciated; that said debt is not a lien on the land, and that if it be set up as such, it should only be at its "scaled value."

The deed of said Kesner and wife to Hull's executor was acknowledged by her before two justices of the peace of the county, who state in their certificate that she was by them examined privily and apart from her husband, and that the deed having been fully explained to her, she acknowledged the same to be her act, and declared that she had voluntarily executed the same, and did not wish to retract it.

The remaining facts are stated in the opinion of the court.

The bill makes Trigg, the assignee in bankruptcy, Greenway, and other persons parties. The grounds therein set up for relief are denied by the answers. Upon final hearing, the bill was dismissed, and the complainant appealed to this court.

Submitted on printed arguments by *Mr. James H. Gilmore* for the appellant, and by *Mr. John W. Johnston* for the appellees.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The bill, so far as it relates to the debt claimed to be owing to the estate of John C. Greenway, deceased, secured by the deed of trust to Bekem, cannot be sustained, for several reasons. It is silent as to the objection of usury. In Virginia, a party cannot avail himself of this defence, without averring and proving it; and in such case he is required by statute to pay the principal of the debt. *Brown* v. *Toell's Adm'r*, 5 Rand. (Va.) 543; *Harnsbarger* v. *Kinney*, 6 Gratt. (Va.) 287.

It is asserted that the consideration of the note was a loan of Virginia and North Carolina bank-notes; that at the time of the transaction they were largely depreciated; that the value of the consideration should be fixed by scaling this currency; and that the amount to be paid on the note should be reduced accordingly. But, upon looking into the record, we find no evidence whatever upon the subject. The depreciation may have been more or less, or there may have been none. We cannot, as is suggested, take judicial notice of the facts, whatever they may have been. We must take the record as it is, and we cannot look beyond it.

No notice of any infirmity in the title of Kesner to the premises is brought home, either to the trustee or to the *cestui que trust*, and it is denied by the latter. Like a mortgagee, they are regarded as purchasers; and, in this case, they must be considered as such, *bona fide*, and without notice of the adverse rights of the appellant, if any she have. *Wickham & Goshorn* v. *Lewis, Morton, & Co.*, 13 Gratt. (Va.) 427; *Evans, Trustee*, v. *Greenhouse et al.*, 15 id. 156. This part of the case may, therefore, be laid out of view. The premises in question are clearly liable for the amount secured by the deed of trust. The position of the judgment creditors is different. They were not purchasers, and they can take by virtue of the liens of their judgments only what Kesner was entitled to. 15 Gratt. *supra.*

It remains to consider the claim of the appellant touching the premises in controversy. It is clear that she inherited from her father one-third of Lyon's Gap farm, and received, as a distributee of the estate of her father and mother, several slaves; that she and Kesner bought another third of the farm from her sister, Mrs. Moffett, and took from Asbury, the attorney of her sister and her sister's husband, a bond for the execution of a deed. The purchase-money was procured by the sale of slaves which came to Kesner by the appellant. On the 26th of May, 1852, the appellant and her husband, Kesner, conveyed the two-thirds of the Lyon's Gap farm to Sheffy, as executor of Hull. On the 25th of January, 1851, Dutton and wife conveyed to Kesner alone the Cedarville farm, which is the property in controversy. The transaction was an exchange of lands. $600 was paid to Dutton, as the difference in value of the two tracts. Kesner raised the money in the same way as that before mentioned. The appellant is neither named nor referred to in the deed to her husband. On the 29th of January, 1862, Kesner alone executed the trust-deed to Bekem. It embraced the entire Cedarville property. The tract contained about a hundred and fifty acres. In his first inventory in bankruptcy Kesner gave in half of this farm, and his life-interest in the other half, which was stated to belong to his wife. In an amended schedule subsequently filed, he gave in all his interest in the entire tract, which, he alleged, was conveyed to him

chiefly in consideration of the deed to Sheffy of his wife's lands near Lyon's Gap. He stated that she claimed one-half of the tract, and that if her claim were sustained, then he surrendered his life-interest in that half.

The whole tract must be sold to satisfy the debt secured by the deed of trust. If there should be any surplus, the appellant's rights will be the same with respect to that fund that they were as to the land. *Jones* v. *Lackland*, 2 Gratt. (Va.) 81; *Graham* v. *Dickens*, 3 Barb. (N. Y.) Ch. 1; *Olcott* v. *Bynum et al.*, 17 Wall. 44.

If there were no valid contract between the appellant and her husband, as claimed, the slaves — by the law of Virginia being chattels — were the absolute property of the latter, and at his death would have been assets in the hands of his personal representative. So by the common law, if the husband and wife sell and convey her land, and he receives the consideration money without any reservation of rights on her part, the money belongs to him. *Hamlin, Receiver*, v. *Jones and Wife*, 20 Wis. 536; Schouler, Domestic Relations, 120. No question is raised as to the Statute of Frauds, and we need not, therefore, consider that subject. It is now well settled that a post-nuptial contract made upon sufficient consideration, and wholly or partly executed, will be sustained in equity. *Gosden and Wife* v. *Tucker's Heirs*, 6 Munf. (Va.) 1; *Livingston* v. *Livingston*, 2 Johns. (N. Y.) Ch. 537; *Bullard* v. *Briggs*, 7 Pick. (Mass.) 533; 2 Kent, Com. 139; Cord, Married Women, sects. 36, 37. The counsel on both sides have argued the case upon the hypothesis that the contract set out in the bill, if made, was valid. The contention between them is only as to the sufficiency of the proof of its existence. Our further examination of the case will be upon this basis, and our remarks will be confined to that subject.

The alleged contract is thus set out in the bill. Speaking of her marriage to Kesner, the appellant says: "It was then agreed, and has always since been agreed and understood between herself and her husband, that she was to take no interest in his property, and he was to take no interest in hers. On their marriage they settled on a farm owned by Mr. Kesner in

this county of Washington, and in pursuance of this agreement she relinquished her rights in this land."

With reference to the conveyance by herself and Kesner to Sheffy, executor of Hull, and the conveyance by Dutton and wife to Kesner, she says: "Your oratrix being assured this was an exchange of land, and that she would thereby acquire an interest in this land exchanged for her land, assented to it. Your oratrix never would have consented to a sale of her land for money, or to any arrangement which would have deprived her of her inheritance in her land, and have her fee-simple converted into a mere dower right. With this distinct understanding between her husband and herself, and believing she would have in the Cedarville land the same rights she had in her own land, she assented to this arrangement. But being a *feme covert*, and ignorant of business, she intrusted the whole management of her business to her husband."

She claims one-half of the land free from her husband's tenancy by the curtesy, and the reversion of one-half of the residue at her husband's death.

While Kesner, in his schedule, speaks of his wife's means as having chiefly paid for the property in question, he is wholly silent as to any contract between them. She claims three-quarters, while his concession is only to the extent of one-half; and he does not put that admission upon any ground of right growing out of a contract. They seem not to have understood her claim alike. His deposition was subsequently taken, but he was asked no question upon the subject. In Dutton's deposition this question was asked: "Was the trade and exchange intended to preserve to Jane Kesner the same rights in the Cedarville land which she had in the Lyon's Gap land?"—*Ans.* "This was my understanding of it." From whom or in what way he got his understanding is not disclosed.

James C. Porterfield, who married the sister of the appellant, was present at her marriage to Kesner, and had known them both thirty years, testified fully as to the means which came to Kesner in right of his wife. He was asked no question and said nothing as to any contract between them. Mrs. Porterfield, the sister, also testified. At the close of her deposition this question and answer are found: "After the trade for the

Cedarville land, did you hear Mrs. Kesner claiming it as her land?" — *Ans.* "I don't recollect hearing her claim it as her land."

There is no other testimony in the record bearing in any wise upon the subject. It is perhaps not a violent presumption that the appellant knew in 1852 that Dutton and wife conveyed the land to her husband alone, and that she knew he treated it as exclusively his in 1862, by conveying it, without her concurrence, to Bekem in trust to secure the debt to Greenway. It does not appear that she set up any special claim, or alleged the contract set up in her bill, until Kesner went into bankruptcy in 1873. But irrespective of those deeds, it is too clear to admit of doubt that the contract set forth in the bill is wholly unsustained by the proofs in the record. See *Harris's Ex'rs* v. *Barnett et als.*, 3 Gratt. (Va.) 339.

Decree affirmed.

PETERS *v.* BOWMAN.

1. In a suit to enforce a lien for the purchase-money, where there has been no fraud and no eviction, actual or constructive, the vendee, or the party in possession of the lands under him, cannot controvert the title of the vendor.
2. A party claiming the lands by an adverse title cannot be permitted to bring it forward, and have it settled in that suit.
3. The vendee and those claiming under him must rely on the covenants of title in the deed of the vendor: if there be none, there is, in the absence of fraud, no redress.

APPEAL from the District Court of the United States for the Northern District of Mississippi.

The facts are stated in the opinion of the court.

Mr. James R. Chalmers and *Mr. Mike L. Woods* for the appellant.

Mr. H. T. Ellett, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is a bill to enforce a lien upon real estate situate in Tunica County, in the State of Mississippi. Bowman owned the premises in fee-simple, and sold the undivided half to

Bostick, and gave him a written contract, valid in equity, but not sufficient to pass the legal title.

Bostick died in 1868, possessed of property in Mississippi and Tennessee, and leaving a last will and testament.

By one of the clauses he appointed Gwinn his executor in Mississippi, and the appellee, Elliott, his executor in Tennessee.

By another clause he authorized the Mississippi executor to lease or cultivate the premises in question with Bowman, and finally, under the circumstances named, "to join the said Bowman in making sale and title to the purchasers."

By another clause, after the payment of all legacies, debts, and expenses of administration, he gave to three persons, whom he named, and their successors, as trustees, the entire residue of his estate, "to be invested by them in a suitable site and buildings for a female academy" in Tennessee, and to be otherwise devoted to that institution.

Gwinn died in the lifetime of the testator.

On the 11th of January, 1869, the Probate Court of Tunica County granted "letters testamentary of the said last will and testament" to Elliott.

On the 25th of January, 1869, Elliott, describing himself as "executor of the last will and testament of J. Bostick, acting under the powers conferred by said will," and Bowman, united in a conveyance with full covenants to the four brothers, Jaquess, for the consideration of $4,000, paid in cash, and the further sum of $24,000, for which four notes were given by the vendees, each for the sum of $6,000, and payable respectively on the first day of January in the years 1870, 1871, 1872, and 1873, with interest at the rate of six per cent per annum.

In reference to these notes the deed contains the following provision: "And to secure the payment of each and all of which said notes and interest an express lien is hereby retained by the parties of the first part upon the real estate and premises" in question.

The note maturing on the 1st of January, 1870, was paid by the Jaquess Brothers.

On the 26th of January, 1870, they sold and conveyed the premises to the appellant, Peters, for the consideration ex-

pressed in the deed of the sum of $11,920 cash in hand, "and the assumption by the said Peters of the payment of three promissory notes for $6,000, made by the first parties (Jaquess Brothers), and payable to Elliott and Bowman, for the same land herein conveyed."

This deed contains a covenant of the right to convey, of seisin, and of general warranty.

The covenant of good right to convey is synonymous with the covenant of seisin. The actual seisin of the grantor will support both, irrespective of his having an indefeasible title.

These covenants, if broken at all, are broken when they are made. They are personal, and do not run with the land. *Marston* v. *Hobbs*, 2 Mass. 432; *Greenby & Kellogg* v. *Wilcocks*, 1 Johns. (N. Y.) 2; *Hamilton* v. *Wilson*, 4 id. 72.

Peters put his co-defendants, General Chalmers and wife, in possession of the premises, under an arrangement whereby, when they should pay the balance of the purchase-money, he would convey to Mrs. Chalmers. Their possession has since continued, and has been undisturbed.

On the 8th of November, 1869, the same Probate Court granted letters of administration "upon the estate of J. Bostick, deceased, with the will of said Bostick annexed," to Elliott, upon his giving a sufficient bond and taking the oath prescribed by law, both of which were then done.

The original bill was filed on the 28th of February, 1873, to enforce the lien reserved in the deed of Elliott and Bowman to Jaquess Brothers, to secure the notes given for the purchase-money, the three last of which are wholly unpaid.

On the 31st of July, 1874, Elliott, to obviate objections made to the prior deed, executed a second deed to the Jaquess Brothers for the same premises. In this deed he describes himself as "administrator with the will annexed of said Bostick," &c.

The deposition of Elliott shows that Bostick never had any title to the premises but what he derived from his contract with Bowman; that Bowman, after Bostick's death, insisted upon selling, and hence the sale to the Jaquess Brothers.

The court below decreed in favor of the complainants. Peters brought the case here for review.

There is no controversy about the leading facts of this case.

The questions presented are all questions of law. Bowman had the legal title to the entire premises, and that title he conveyed to Jaquess Brothers, and they conveyed it to Peters. The deed of Elliott and Bowman contained all the usual covenants of title. The covenant of warranty ran with the land, and passed by assignment to Peters. The deed of the Jaquess Brothers produced that result. In the event of a failure of title, Peters can sue upon this covenant in either deed. *King* v. *Kerr's Adm'r*, 5 Ohio, 154. When broken, it becomes a chose in action, but a subsequent grantee may sue the warrantor in the name of the holder. There can be but one satisfaction. Id. A sheriff's or a quitclaim deed will carry the covenant before its breach to the grantee. *White* v. *Whitney*, 3 Metc. (Mass.) 81; *Hunt* v. *Amidon*, 4 Hill (N. Y.), 345.

Where at the time of the conveyance with warranty there is adverse possession under a paramount title, such possession is regarded as eviction, and involves a breach of this covenant. Where the paramount title is in the warrantor, and the adverse possession is tortious, there is no eviction, actual or constructive, and no action will lie. *Noonan* v. *Lee*, 2 Black, 499; *Duval* v. *Craig*, 2 Wheat. 45. Here there is no adverse possession, and no eviction, actual or constructive; nor does it appear that suit has been threatened, or that an adverse claim has been set up by any one. The possession and enjoyment of the property by General Chalmers and his wife have been the same as if their title were indisputable. It is insisted that the first deed of Elliott was fatally defective, because the letters from the Probate Court, under which he acted in making it, were issued to him as executor, and that both deeds were void, because under the will and the circumstances there was no authority to sell; and, lastly, because the residuum of the estate of the testator, including proceeds of the premises in question, was disposed of in a way forbidden by a law of the State of Mississippi.

We prefer to rest our judgment upon a ground independent of all these points, and which renders it unnecessary to examine them.

It is the settled law of this court that upon a bill of foreclosure, or, as in this case, a bill to enforce a lien for the pur-

chase-money, and where there has been no fraud and no eviction, actual or constructive, the vendee, or a party in possession under him, cannot controvert the title of the vendor; and that no one claiming an adverse title can be permitted to bring it forward, and have it settled in that suit. Such a bill would be multifarious, and there would be a misjoinder of parties. *Noonan* v. *Lee*, *supra*; *Dial* v. *Reynolds*, 96 U. S. 340. In such cases, the vendee and those claiming under him must rely upon the covenants of title in the deed of the vendor. They measure the rights and the remedy of the vendee; and if there are no such covenants, in the absence of fraud, he can have no redress. This doctrine was distinctly laid down in *Patton* v. *Taylor*, 7 How. 159, and was re-examined and affirmed in *Noonan* v. *Lee*. See also *Abbott* v. *Allen*, 2 Johns. (N. Y.) Ch. 519; *Corning* v. *Smith*, 6 N. Y. 82; *Beebe* v. *Swartwout*, 8 Ill. 162. That the vendor is insolvent or absent from the State, or that an adverse suit is pending which involves the title, does not withdraw the case from the operation of this principle. *Hill and Wife* v. *Butler*, 6 Ohio St. 207; *Platt* v. *Gilchrist*, 3 Sandf. (N. Y.) 118; *Latham* v. *Morgan & Fitz*, 1 Smed. & M. (Miss.) Ch. 611.

The rule is founded in reason and justice. A different result would subvert the contract of the parties, and substitute for it one which they did not make. In such cases the vendor, by his covenants, if there are such, agrees upon them, and not otherwise, to be responsible for defects of title. If there are no covenants, he assumes no responsibility, and the other party takes the risk. The vendee agrees to pay according to his contract, and secures payment by giving a lien upon the property. Here it is neither expressed nor implied that he may refuse to pay and remain in possession of the premises, nor that the vendor shall be liable otherwise than according to his contract.

Where an adverse title is claimed, it cannot be litigated with binding effect, unless the claimant is before the court. We have shown that he cannot be made a party. One suit cannot thus be injected into another. Without his presence, the judgment or decree as to him would be a nullity. The law never does or permits a vain thing.

A title which cannot be made good otherwise may be made so by the lapse of time or the Statute of Limitations. Is the vendor to wait until this shall occur? and, in the mean time, can the vendee, or those claiming under him, remain in possession and enjoy all the fruits of the contract, and pay neither principal nor interest to the vendor?

Chancellor Kent well says, "It would lead to the greatest inconvenience, and perhaps abuse, if a purchaser in the actual possession of land, and when no third person asserts or takes any measures to assert a hostile claim, can be permitted, on a suggestion of a defect or failure of title, and on the principle of *quia timet*, to stop the payment of the purchase-money, and of all proceedings at law to recover it." *Abbott* v. *Allen*, *supra*.

Decree affirmed.

UNITED STATES *v.* THROCKMORTON.

1. It is essential to a bill in chancery on behalf of the United States to set aside a patent for lands, or the final confirmation of a Mexican grant, that it shall appear in some way, without regard to the special form, that the Attorney-General has brought it himself, or given such authority for bringing it as will make him officially responsible therefor through all stages of its presentation.
2. The frauds for which a bill to set aside a judgment or a decree between the same parties, rendered by a court of competent jurisdiction, will be sustained, are those which are extrinsic or collateral to the matter tried, and not a fraud which was in issue in the former suit.
3. The cases where such relief has been granted are those in which, by fraud or deception practised on the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit.
4. The Circuit Court of the United States has now no original jurisdiction to reform surveys made by the land department of confirmed Mexican grants in California.

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

The facts are stated in the opinion of the court.

Mr. Walter Van Dyke for the appellant.

Mr. Delos Lake, *contra*.

MR. JUSTICE MILLER delivered the opinion of the court.

In this case a bill in chancery is brought in the Circuit Court of the United States for the District of California, to use the language of the bill itself, "by Walter Van Dyke, United States attorney for that district, on behalf of the United States," against Throckmorton, Howard, Goold, and Haggin.

The object of the bill is to have a decree of the court, setting aside and declaring to be null and void a confirmation of the claim of W. A. Richardson under a Mexican grant, to certain lands, made by the board of commissioners of private land-claims in California on the twenty-seventh day of December, 1853; and the decree of the District Court of the United States, made Feb. 11, 1856, affirming the decree of the commissioners, and again confirming Richardson's claim. The general ground on which this relief is asked is that both these decrees were obtained by fraud.

The specific act of fraud which is mainly relied on to support the bill is, that after Richardson had filed his petition before the board of commissioners, with a statement of his claim and the documentary evidence of its validity, March 16, 1852, he became satisfied that he had no sufficient evidence of an actual grant or concession to sustain his claim, and with a view to supply this defect, he made a visit to Mexico, and obtained from Micheltorena, former political chief of California, his signature, on or about the first day of July, 1852, to a grant which was falsely and fraudulently antedated, so as to impose on the court the belief that it was made at a time when Micheltorena had power to make such grants in California; and it is alleged that in support of this simulated and false document he also procured and filed therewith the depositions of perjured witnesses.

There is much verbiage, repetition, and argumentative matter in the bill; but no allegation whatever that any of the attorneys, agents, or other officers of the government were false in their duty to it, or that they assisted or connived at the fraud, unless a single allegation on that subject, which will be hereafter considered, sufficiently makes such charge. For the present, it will be assumed that no such charge is made.

While the bill is elaborate in its statement of matters which

are supposed to impeach the decree, and is correspondingly silent as to any thing tending to its support, there are important facts which, it cannot escape attention, could not be omitted. Among these is, that, in attempting to negative the idea that juridical possession of the land was ever delivered to Richardson by the Mexican authorities, it is incidentally admitted that at the time the transaction occurred on which his claim is founded, he was in actual possession and residing on part, if not all, of the land in controversy. So, also, it is tacitly admitted that the archives of the Mexican government, turned over to the office of the United States surveyor-general, and original documents produced by Richardson, showed an espediente which was sufficient to establish the claim, except for the want of the final concession. It is, therefore, to be taken as true that Richardson, being on the land prior to 1838, made his petition to the governor for a grant of this land, which was appropriately referred for information, and that the proper report was had that there was no objection to the grant. According to Mexican law, but two things remained to perfect the title; namely, a grant or concession by the governor, and the delivery of juridical possession. The latter has never been held by this court as indispensable to a confirmation of the grant, and least of all when the party was already in possession, which he had held for many years. It is also important to observe that the original petition was filed before the board, March 16, 1852, and its decree was rendered Dec. 27, 1853, that an appeal was taken to the District Court, where the case remained until Feb. 11, 1856, when it was affirmed; that an appeal was again taken to the Supreme Court of the United States, which was dismissed by order of the Attorney-General on the second day of April, 1857. The case was pending in litigation, therefore, more than five years before the decree became final, and more than four years after the alleged fraudulent grant by Micheltorena was filed in the case. It is also to be observed that the necessity of such a paper to the support of Richardson's claim had been made obvious to the board of commissioners, to the claimant himself, and to the attorneys representing the government, by the report of the surveyor-general, that while every thing else seemed right in

his office, the important final decree of concession was not there. The attention, therefore, of all the parties and of the court must have been drawn to a close scrutiny of any proceeding to supply this important document.

There was also ample time to make all necessary inquiries and produce the necessary proof, if it existed, of the fraud. The allegation of the bill is that this simulated concession was filed with the board of commissioners in January, 1853, and the decree rendered on December 27, thereafter. The appeal was pending after this in the District Court over two years; and after the final decree in that court it remained under the consideration of the Attorney-General another year, when he authorized the dismissal of the appeal. The case, then, unless these officers neglected their duties, underwent the scrutiny of two judicial tribunals and of the Attorney-General of the United States, as well as of his subordinate in the State of California, and was before them for a period of five years of litigation.

The bill in this case is filed May 13, 1876, more than twenty years after the rendition of the decree which it seeks to annul. During that time Richardson, the claimant, and the man who is personally charged with the guilt of the fraud, has died; his heirs, who with himself were claimants in the suit, are not made parties, and the land has passed from his ownership to that of the present defendants by purchase and conveyance.

It is true that the defendants are charged in general terms with being purchasers with notice.

It is true that the United States is not bound by the Statute of Limitations, as an individual would be. And we have not recited any of the foregoing matters found in the bill as sufficient of itself to prevent relief in a case otherwise properly cognizable in equity. But we think these are good reasons why a bill which seeks under these circumstances to annul a decree thus surrounded by every presumption which should give it support, shall present on its face a clear and unquestionable ground on which the jurisdiction it invokes can rest.

Let us inquire if this has been done.

There is no question of the general doctrine that fraud vitiates the most solemn contracts, documents, and even judg-

ments. There is also no question that many rights originally founded in fraud become — by lapse of time, by the difficulty of proving the fraud, and by the protection which the law throws around rights once established by formal judicial proceedings in tribunals established by law, according to the methods of the law — no longer open to inquiry in the usual and ordinary methods. Of this class are judgments and decrees of a court deciding between parties before the court and subject to its jurisdiction, in a trial which has presented the claims of the parties, and where they have received the consideration of the court.

There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; namely, *interest rei publicæ, ut sit finis litium*, and *nemo debet bis vexari pro una et eadam causa.*

If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So in a suit in chancery, on proper showing a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated.

But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the

defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, — these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See Wells, Res Adjudicata, sect. 499; *Pearce* v. *Olney*, 20 Conn. 544; *Wierich* v. *De Zoya*, 7 Ill. 385; *Kent* v. *Ricards*, 3 Md. Ch. 392; *Smith* v. *Lowry*, 1 Johns. (N. Y.) Ch. 320; *De Louis et al.* v. *Meek et al.*, 2 Iowa, 55.

In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.

On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. Mr. Wells, in his very useful work on Res Adjudicata, says, sect. 499: "Fraud vitiates every thing, and a judgment equally with a contract; that is, a judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent instrument; for, in general, the court will not go again into the merits of an action for the purpose of detecting and annulling the fraud." . . . "Likewise, there are few exceptions to the rule that equity will not go behind the judgment to interpose in the cause itself, but only when there was some hindrance besides the negligence of the defendant, in presenting the defence in the legal action. There is an old case in South Carolina to the effect that fraud in obtaining a bill of sale would justify equitable interference as to the judgment obtained thereon. But I judge it stands almost or quite alone, and has no weight as a precedent." The case he refers to is *Crauford* v. *Crauford*, 4 Desau. (S. C.) 176. See also Bigelow on Fraud, 170–172.

The principle and the distinction here taken was laid down as long ago as the year 1702 by the Lord Keeper in the High Court of Chancery, in the case of *Tovey* v. *Young*, Pr. Ch. 193.

This was a bill in chancery brought by an unsuccessful party to a suit at law, for a new trial, which was at that time a very common mode of obtaining a new trial. One of the grounds of the bill was that complainant had discovered since the trial was had that the principal witness against him was a partner in interest with the other side. The Lord Keeper said: "New matter may in some cases be ground for relief, but it must not be what was tried before; nor, when it consists in swearing only, will I ever grant a new trial, unless it appears by deeds, or writing, or that a witness on whose testimony the verdict was given was convicted of perjury, or the jury attainted." The case seems to have been well considered, for the decree was a confirmation of one made by the Master of the Rolls.

The case of *Smith* v. *Lowry* (*supra*) was also a bill for a new trial, on the ground that the witness on whose testimony the amount of damages was fixed was suborned by the plaintiff, and that complainant had learned since the trial that a fictitious sale of salt had been made for the purpose of enabling this witness to testify to the market price. Chancellor Kent said that complainant must have known, or he was bound to know, that the price of salt at the place of delivery would be a matter of inquiry at the trial; and he dismissed the bill for want of equity, citing the case of *Tovey* v. *Young* with approval. And he cites a number of cases to show that chancery will not interfere though new evidence has been discovered since the trial, which, if the party could have introduced it, would have changed the result.

In *Bateman* v. *Willoe* (1 Scho. & Lef. 201), Lord Redesdale said: "I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law a matter capable of being discussed there, and over which the court of law had full jurisdiction." The rule must apply with equal force to a bill to set aside a decree in equity after it has become final, where the object is to retry a matter which was in issue in the first case and was matter of actual contest.

The same doctrine is asserted in *Dixon* v. *Graham*, 16 Iowa, 310; *Cottle* v. *Cole & Cole*, 20 id. 482; *Borland* v. *Thornton*, 12 Cal. 440; *Riddle et al.* v. *Baker et al.*, 13 id. 295; *Railroad Company* v. *Neal*, 1 Wood, 353.

But perhaps the best discussion of the whole subject is to be found in *Greene* v. *Greene* (2 Gray (Mass.), 361), where the opinion was delivered by Chief Justice Shaw. That was a bill filed by a woman against her husband for a divorce. The husband had five years before obtained a decree of divorce against her. In her bill she alleges that the former decree was obtained by fraud, collusion, and false testimony, and she prays that this may be inquired into, and the decree set aside. The court was of opinion that this allegation meant that the husband colluded or combined with other persons than complainant to obtain false testimony, or otherwise to aid him in fraudulently obtaining the decree. The Chief Justice says that the court thinks the point settled against the complainant by authority, not specifically in regard to divorce, but generally as to the conclusiveness of judgments and decrees between the same parties. He then examines the authorities, English and American, and adds: "The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be contradicted." It is otherwise, he says, with a stranger to the judgment. This is said in a case where the bill was brought for the purpose of impeaching the decree directly, and not where it was offered in evidence collaterally. We think these decisions establish the doctrine on which we decide the present case; namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

That the mischief of retrying every case in which the judg-

ment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases.

The case before us comes within this principle. The genuineness and validity of the concession from Micheltorena produced by complainant was the single question pending before the board of commissioners and the District Court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and the litigation endless about the single question of the validity of this document.

We have alluded to an allegation concerning the agent representing the United States before the board of commissioners.

The substance of it is that Howard, one of the present defendants, then the law agent of the government before the board, had, from the papers in some other suit, derived notice of the fraudulent character of the Micheltorena grant, and that he failed and neglected to inform the commissioners of the fact, or otherwise to defend the interest of the United States in the matter. If there had been a further allegation that Howard was then interested in the Richardson claim, or that Richardson had bribed him, or that from any corrupt motive he had betrayed the interest of the government, the case would have come within the rule which authorizes relief. But nothing of the kind is alleged; and the statement is a mere charge of carelessness or negligence on the part of the attorney for the government, which would not have supported a motion for a new trial in a case at law at the same term, much less a suit in chancery to set aside a decree twenty years after it had been rendered.

Nor is there any such clear statement of the notice which Howard had as is necessary to establish his negligence.

In fact, one great if not fatal defect in the bill is the absence of any declaration of the means by which the fraud has been discovered or can be now established.

There is another objection to the bill which, though not going to the merits, is, in our opinion, equally fatal to it in its present shape.

We are of opinion that, unless by virtue of an act of Congress, no one but the Attorney-General, or some one authorized to use his name, can bring a suit to set aside a patent issued by the United States, or a judgment rendered in its courts on which such a patent is founded.

That is the case before us, and we see nothing in the bill to indicate to the court that it ever received the sanction of the Attorney-General, or was brought by his direction. The allegation already cited implies that Mr. Van Dyke, the district attorney, is the complainant; but if, construing it liberally, we hold that the United States is the complainant, the statement is clear that the bill was brought by the district attorney, and not by the Attorney-General. Leaving out of consideration all mere questions of form, there arises no presumption from the act of Congress which gives the Department of Justice a general supervision over the district attorneys, that this suit was brought by his direction; for they, in the strict line of their duty, bring innumerable suits, indictments, and prosecutions, in which the United States is plaintiff, without consulting him. In the class of cases to which this belongs, however, the practice of the English and the American courts has been to require the name of the Attorney-General as indorsing the suit before it will be entertained. The reason of this is obvious; namely, that in so important a matter as impeaching the grants of the government under its seal, its highest law officer should be consulted, and should give the support of his name and authority to the suit. He should, also, have control of it in every stage, so that if at any time during its progress he should become convinced that the proceeding is not well founded, or is oppressive, he may dismiss the bill.

There is appended to this record, though no part of it, a

bond, given by some private persons to the United States, to save it harmless of costs in regard to this suit. If it is intended by this to show that the Attorney-General authorized the suit, it fails to prove it, though the bond recites that that officer had directed the district attorney to bring the suit.

It is not in this way that the then Attorney-General should have placed himself on the record as responsible for such a bill. In confirmation of this view, it does not appear that he or his successors have ever given the slightest attention to the case. In the argument of it before us, no officer of the government appeared. It would be a very dangerous doctrine, one threatening the title to millions of acres of land held by patent from the government, if any man who has a grudge or a claim against his neighbor can, by indemnifying the govern ment for costs, and furnishing the needed stimulus to a district attorney, institute a suit in chancery in the United States to declare the patent void. It is essential, therefore, to such a suit, that without special regard to form, but in some way which the court can recognize, it should appear that the Attorney-General has brought it himself, or given such order for its institution as will make him officially responsible for it, and show his control of the cause.

It is unnecessary at this day to say that, as a substantive matter, standing alone, the Circuit Court has no jurisdiction to interfere with or relieve against a survey which, by the allegation of the bill itself, is pending before the District Court.

For these reasons, we are of opinion that the decree of the Circuit Court sustaining a demurrer to the bill, and dismissing it on the merits, was right.

Decree affirmed.

WILLIAMS *v.* HAGOOD.

Where a bill shows no equity in the complainant, and contains no averment that he has been injured by certain statutes of a State, this court will not pass upon an abstract question the object of which is plainly to obtain a decision touching their constitutionality, but will dismiss the bill without prejudice.

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

The facts are stated in the opinion of the court.

Mr. Denis McMahon for the appellant.

Mr. Le Roy F. Youmans, Attorney-General of South Carolina, *contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

This is a bill in equity against the comptroller-general of the State of South Carolina, the county treasurer of Charleston County, in said State, and the assignees in bankruptcy of the Blue Ridge Railroad Company, in which the relief sought is an injunction commanding the comptroller "to cease from refusing to levy a tax for retiring" certain certificates of the State indebtedness, and commanding the county treasurer "to cease from refusing to receive the same for taxes and dues to the State, except to pay interest on the public debt."

The facts of the case, so far as they are exhibited by the bill, and so far as they are material for present consideration, are as follows: —

By an act of the legislature of the State, enacted March 2, 1872, reciting in its preamble that in pursuance of a former act the guaranty of the faith and credit of the State had been indorsed on four millions of dollars of bonds issued by the Blue Ridge Railroad Company, and that it was desired to recover and destroy the bonds thus issued and relieve the State from the liability incurred by its indorsement and guaranty thereof, the State treasurer was directed, with the written consent of the railroad company, to require the financial agent of the State to deliver to him for cancellation all the bonds of the company indorsed and guaranteed as aforesaid, then in the agent's possession and held by him as collateral security for advances.

The second section of the act enacted that upon the surrender by the company to the State treasury of the balance of the said four millions of dollars of bonds thus guaranteed by the State, the State treasurer should be authorized and required to deliver to the president of the railroad company treasury certificates of indebtedness (styled revenue-bond scrip) to the amount of $1,800,000, executed in a manner directed afterwards in the act. And if the company should not be able to deliver all of said bonds at one time, the act required the treasurer to deliver to the said president such amount of the treasury certificates as should be proportioned to the amount of bonds delivered.

The third section made it the duty of the State treasurer, in order to carry out the purposes of the act, to have treasury certificates of indebtedness prepared, to be known and designated as "revenue-bond scrip of the State of South Carolina," which should be signed by the treasurer, and which should express that the sum mentioned therein is due by the State of South Carolina to the bearer thereof, and that the same would be received in payment of taxes and all other dues to the State, except special tax levied to pay interest on the public debt.

The fourth section pledged the faith and funds of the State for the ultimate redemption of the scrip, and required county treasurers to receive it in payment of all taxes levied by the State, except in payment of special tax levied to pay interest on the public debt. It also required the State treasurer and all other public officers to receive the same in payment of all dues to the State; and, still further to provide for its redemption, the section levied an annual tax of three mills on the dollar in addition to all other taxes on the assessed value of all taxable property in the State, to be collected in the same manner and at the same time as might be provided by law for the levy and collection of the regular annual taxes of the State. And the State treasurer was required to retire, at the end of each year from their date, one-fourth of the amount of the treasury scrip authorized to be issued, and to apply to such purpose exclusively the taxes by the act required to be levied.

The sixth section required the guaranteed bonds to be cancelled and destroyed on their delivery to the treasurer.

In obedience to this act, the revenue-bond scrip was prepared and signed by the State treasurer. When this was done, a large part of the four millions of dollars of bonds of the railroad company, indorsed and guaranteed by the State, had been sold, or were pledged as securities for money borrowed by the company. The complainant was a purchaser for value of $417,000 thereof, and he was the *bona fide* owner and holder of them when the act of March 2, 1872, was passed. Relying upon the faith of the State as pledged in the said act of its legislature, and in the said certificates of indebtedness, he consented to exchange the bonds, amounting to $417,000, for said treasury certificates, amounting to $166,000; and the exchange was made. His bonds, guaranteed as above stated, were delivered to the State treasurer, and they have been cancelled. The railroad company and the State have thus been discharged from all obligation to pay the bonds, and the complainant holds in lieu thereof only the certificates of indebtedness to the extent of $166,000.

After this exchange had been effected, the bill charges, and it appears, that the State, in various ways, legislated in such a manner as practically to deny the obligation apparently assumed in the certificates of indebtedness, or revenue-bond scrip. By an act approved Oct. 22, 1873, the legislature repealed the fourth section of the act of March 2, 1872, by which a tax was levied for the redemption of the scrip, and forbade the comptroller-general to levy any tax, for any purpose, unless expressly thereafter authorized therefor. By another act, approved Dec. 22, 1873, the county auditors and county treasurers of the State were forbidden to collect, or cause to be collected, any tax other than such as were levied by that act, unless expressly authorized thereafter so to do. This legislation was manifestly inconsistent with the undertaking of the State expressed in the act of March 2, 1872, and in the revenue-bond scrip issued thereunder, and its constitutionality and obligatory force would be a legitimate subject for consideration if the complainant had placed himself in a position to invoke our judgment. But he has not. His bill does not aver that he has been injured, or will be injured, by this legislation, or by any act or neglect of the comptroller-general or the county treasurer. It does not

aver that the comptroller-general has neglected or refused to perform every duty imposed upon him by the statute under which the revenue-bond scrip was issued, nor even that he threatens such neglect or refusal. It does not aver that the county treasurer has refused, or even threatened to refuse, receiving the complainant's scrip, or any scrip, in payment of taxes or dues to the State, other than taxes levied to pay the interest on the State debt. It does not aver any demand from the State treasury, or any tender to the county treasurer. Its object is plainly to obtain from this court a declaration that the legislative acts of Oct. 22 and Dec. 22, 1873, are unconstitutional, because impairing the obligation of the contract made by the act of 1872, and the certificates thereby authorized and thereunder issued, and this without any averment that the complainant will be injured by them. The question presented to the court is, therefore, merely an abstract one; such a one as no court can be called upon to decide, and the bill shows no equity in the complainant. Hence it was properly dismissed in the court below, and it must be dismissed here, but without prejudice to the complainant's right to bring and prosecute another suit, when he shall be in a condition to exhibit any equity in himself.

So ordered.

GARRATT *v.* SEIBERT.

Reissued letters-patent No. 5328, granted to William T. Garratt March 18, 1873, for a new and useful improvement in lubricators, infringe letters-patent No. 111,881, granted to Nicholas Seibert Feb. 14, 1871, for a new and useful improvement in lubricators. They are, therefore, void.

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

The facts are stated in the opinion of the court.

Mr. M. A. Wheaton for the appellant.
Mr. A. H. Evans, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

This bill is founded upon the act of Congress of July 8, 1870

(16 Stat. 207, c. 230, sect. 58), re-enacted in the Revised Statutes, sect. 4918. That section enacted, "That whenever there shall be interfering patents, any person interested in any one of such interfering patents, or in the working of the invention claimed under either of such patents, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court having cognizance thereof (as in the act provided), on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented." The complainant charges that, on the fourteenth day of February, 1871, he obtained letters-patent No. 111,881, for a new and useful improvement in lubricators, fully described in said letters, for the term of seventeen years from and after the date thereof, and that he is the sole and exclusive owner thereof. He charges further, that letters-patent were issued to William T. Garratt, the defendant, on the nineteenth day of November, 1872, for the period of seventeen years, purporting to secure to him the exclusive right to make, use, and vend a new and useful improvement in lubricators, alleged to have been invented by him. It is further charged that, in March, 1873, the defendant surrendered his said letters, and on the 18th of that month they were reissued (No. 5328), upon an amended specification, for the term of seventeen years, from Nov. 19, 1872. The bill further charges that the alleged invention, patented to the defendant by the said reissued letters, is substantially the same invention made by the complainant in the month of May, 1870, and patented to him on the 14th of February, 1871, as before mentioned, and that the reissued letters granted to the defendant are a direct interference with the prior letters granted, as aforesaid, to the complainant.

The answer of the defendant does not deny the grant of the several letters-patent, as charged in the bill, at the several dates mentioned, nor does it directly deny that his reissued letters are an interference with those granted to the complainant on the 14th of February, 1871. But it avers that in the Patent

Office, in the year 1872, an interference was declared between the complainant and the respondent, in order to try the question of priority of invention, that testimony was taken, and that the Commissioner of Patents decided that the defendant was the first and original inventor of the invention described in his letters, and granted him letters therefor, which were afterwards reissued. This averment is unsupported by proof.

In view of such pleadings, it is hardly necessary to inquire whether there is an interference. The answer does not deny it. It rather impliedly admits it. And if it did not, a comparison of the complainant's and the defendant's specifications, including the models and drawings, precludes all doubt that both patents are for the same invention, and that the arrangement of devices in each produces the same result in substantially the same way.

All that remains, therefore, is to determine whether Seibert was the first and original inventor of the invention, or whether the invention was first made by Garratt, the defendant.

Seibert's patent, as we have stated, was granted on the fourteenth day of February, 1871, for a new and useful improvement in lubricators. He had previously (in 1869, Sept. 14) obtained a patent for a lubricator, in which hydrostatic pressure in forcing the lubricant from its cup, or reservoir, was found to act beneficially, though the patent did not claim that specifically, and the inventor seems not to have been aware at that time of its value. The model for this patent Seibert procured to be made by Garratt. Subsequently, having discovered its value in May, 1870, he caused to be made a new arrangement, by which the lubricant reservoir was made to stand vertically, instead of horizontally, as in his first invention, and hydrostatic pressure was applied near its base at the bottom of the lubricant. For this arrangement, he took out his patent of February, 1871. The principle was manifestly the same as that revealed in the earlier patent, though the arrangement for its operation was different. In the one, the lubricant and the condensed water were separated by a piston; in the other, by the difference of their specific gravities. It is not, however, very material to determine that Seibert's invention was made before May, 1870: for we are of opinion that even if it was not

made before February, 1871, there is not sufficient evidence in the case to show it was anticipated by Garratt, or by any one. Garratt was a brass founder. In 1869, he had the agency for making the Roscoe oilers, or lubricators, then covered by a patent. It is plain those lubricators were designed for the use of tallow, and tallow alone. They were arranged to admit steam into the reservoir containing the lubricant, whereby it came in contact with the surface of the tallow, melted it, and caused it to mix with the steam, and pass out in a volatile condition into the steam-chest. They did not work well. The steam, acting only on the surface of hard tallow, would not melt and take up enough to lubricate the engine; and Garratt, late in the fall of 1869, after Seibert's first patent was granted, as he and some other witnesses testify, undertook to remedy the defect. He put on a Roscoe lubricator, what he calls a condensing pipe, with a regulating cock. It connected the bottom of the reservoir with the steam-pipe of the engine, at a point above the top of the reservoir. Notwithstanding what he testifies, it is plain that this pipe was intended only to heat and melt the tallow. In view of the difficulty it was designed to remedy, and of the utter uselessness of a condensing pipe applied to the base of hard tallow, this cannot be doubted. The tallow needed heat, not pressure, not a column of water; and the evidence is very satisfactory that the pipe put on was a melting pipe, and used as such alone. It was soon shortened from six feet to two. Why was that done, if it was a condensing pipe? If it was a melting pipe, it is easy to see why its length was reduced; and the proof is, that it never was used for hydrostatic pressure. The cocks were kept wide open in its use, except when the reservoir was to be cleaned out or filled. Such is the testimony of the engineers who had it in charge. We think, also, the weight of the evidence is that the application of the melting pipe was not Garratt's device, even if it involved invention. It seems rather to have been suggested by Watson.

Without going minutely over the evidence, we may notice that after Garratt caused the pipe to be put on the Roscoe lubricator, and after he had made Seibert's first model, he obtained drawings of the Seibert device, and had a model

made of it for himself. Not until after this was done did he apply for a patent. It is difficult to believe, in view of this evidence, that he did not obtain the idea of his alleged invention from the prior invention and patent of Seibert. There is nothing, then, to rebut the presumption arising from his patent that Seibert was the first and original inventor. It follows that the decree of the Circuit Court was right.

Decree affirmed

IVINSON v. HUTTON.

A. and B., having arranged the terms on which the partnership between them should be dissolved, stipulated that their clerk should examine their books, ascertain the amount which each had put into the firm and each had drawn out, and report the same as the basis of their agreed settlement, and that if any error was made, it should be corrected when discovered. The clerk made the examination, and reported that the sum of $47,039.54 was due from B. to A. Thereupon, supposing the report to be correct, each made, executed, and delivered to the other all the papers necessary to perfect and complete the terms and conditions of the dissolution of the partnership. On the same day, the clerk discovered that he had made an error of $4,036.12 against A. B. having refused to correct it, A. filed his bill praying for an account, the correction, amendment, and cancellation of the papers so executed by them, and for a decree for the payment of the $4,036.12 due him. The bill was dismissed, on the ground that A.'s remedy was at law. *Held*, that the decree was erroneous.

APPEAL from the Supreme Court of the Territory of Wyoming.

The facts are stated in the opinion of the court.

Mr. Jeremiah M. Wilson for the appellant.
Mr. W. W. Corlett, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Except in an action of account, which is almost obsolete, it is a general rule that between partners, whether they are so in general or for a particular transaction only, no account can be taken at law. *Worrall* v. *Grayson*, 1 Mee. & W. 168; 1 Collyer, Partnership (6th ed.), 339.

Owing to the ability of courts of equity not only to investi-

gate complicated accounts, but also to compel the specific performance of agreements, and to reform or rescind the same, in case of fraud or mistake, and to restrain breaches of duty for the future, it is to them rather than courts of law that partners usually have recourse for the settlement of controversies among themselves. 2 Lindley, Partnership (3d ed.), 933.

Sufficient appears to show that the parties to the present controversy on the 6th of September, 1872, entered into a copartnership for the purpose of raising cattle in the county where they resided; that their business transactions and accounts were large; that the complainant put into the copartnership the sum of $51,075.66, and that he had drawn out from the same the sum of $7,257; that on the 11th of April, 1874, the partnership was dissolved by mutual consent, upon the terms following: 1. That the respondent should pay the complainant $5,000 and all the money the complainant had put into the partnership, less the amount he had drawn out, and that the respondent should pay or secure all debts and liabilities due and owing by the firm. 2. That the complainant should release, assign, and convey to the respondent all the interest of every description which he, the retiring partner, had in the partnership property when the partnership was dissolved.

Neither party knew what amount the complainant had put into the firm nor what amount he had drawn out, but they mutually agreed that their clerk should examine the partnership books, ascertain the amount, and report the same as the basis of their agreed settlement, and that if any error was made, that it should be corrected when discovered.

Pursuant to that arrangement, the clerk examined the books, and reported to the parties that the sum shown to be due from the respondent to the complainant was $47,039.54. By the record it also appears that both parties supposed that the sum reported was correct, and that they made, executed, and delivered each to the other all the papers necessary to perfect and complete the terms and conditions of the dissolution of the copartnership; that in the course of the same day the clerk discovered that he had made an error of $4,036.12 against the complainant in making the computation.

Prompt notice of the error was given to the parties; and the complainant alleged in the original bill of complaint that the respondent then and there promised and agreed to re-examine the accounts, and that he would rectify the error or errors, if any were found to have been made, which he subsequently refused to do. Service was made, and the respondent appeared and demurred to the bill of complaint.

Leave of the court having been first obtained, the complainant amended the bill of complaint by striking out the words containing the promise to rectify the error or errors, and the respondent demurred to the amended bill of complaint. Responsive to the same demurrer, the complainant filed a motion to strike it from the files as irregular; but the court denied the motion, overruled the demurrer, and directed the respondent to file an answer to the amended bill of complaint.

These preliminary matters being settled, the respondent filed an answer denying the jurisdiction of the court, and setting up several defences. Hearing was had upon the bill of complaint and answer, and the court sent the cause to a special master to take the proofs and report the same to the court. Due report was accordingly made by the master, with his findings of fact, which substantially support all the material allegations of the amended bill of complaint. Exceptions to the report of the master were filed by the respondent, all of which were overruled by the court.

Before making that order, the parties were again heard; and the court confirmed the report of the master, and entered a decree that all the papers, instruments, agreements, notes of hand, and mortgages made and executed by the parties in effecting the dissolution of their copartnership be reformed and corrected in accordance with the findings of the master. From which decree the respondent appealed to the territorial Supreme Court, where the parties having been again heard, the appellate court reversed the decree of the court of original jurisdiction and dismissed the bill of complaint, holding that the complainant had a plain, adequate, and complete remedy at law; and from that decree the complainant appealed to this court.

Since the appeal was entered here, the complainant assigns for error that the court erred in holding that the case was not

one of equitable jurisdiction; that the complainant's remedy was at law and not in equity, and in dismissing the bill of complaint on that ground.

Courts of equity have jurisdiction of controversies arising out of transactions evidenced by written instruments which are lost; or if through mistake or accident the instrument has been incorrectly framed, or if the transaction is vitiated by illegality or fraud, or if the instrument was executed in ignorance or mistake of facts material to its operation, the error may be corrected or the erroneous transaction may be rescinded.

Equities of the kind, whether it be for the re-execution, reform, or rescission of the instrument, like the equity for specific performance of a contract, are incapable of enforcement at common law, and therefore necessarily fall within the peculiar province of the courts invested with equitable jurisdiction.

Power to reform written contracts for fraud or mistake is everywhere conceded to courts of equity, and it is equally clear that it is a power which cannot be exercised by common-law courts. *Hearne* v. *Marine Insurance Company*, 20 Wall. 490.

Relief in such a case can only be granted in a court of equity; and Judge Story says, if the mistake is made out of proofs entirely satisfactory, equity will reform the contract so as to make it conform to the precise intent of the parties; but if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy. 1 Story, Eq. Jur. (9th ed.), sect. 152; *Gillespie* v. *Moon*, 2 Johns. (N. Y.) Ch. 585; *Rhode Island* v. *Massachusetts*, 15 Pet. 271; *Daniel* v. *Mitchell*, 1 Story, 172.

Authorities which support that proposition are quite too numerous for citation, and the rule is equally well established that parol proof is admissible to prove the alleged accident or mistake which is set up as the ground of relief. *Hunt* v. *Rousmanier*, 8 Wheat. 174; 1 Story, Eq. Jur. (9th ed.), sect. 156; 3 Greenl. Evid. (8th ed.), sect. 360; Adams, Eq. (6th ed.) 171.

Support to the latter proposition is also found in all the

standard writers upon the law of evidence. Courts of equity, says Taylor, will also admit parol evidence to contradict or vary a writing where, by some mistake in fact, it speaks a different language from what the parties intended, and where, consequently, it would be unconscionable or unjust to enforce it against either party, according to its terms. 2 Taylor, Evid. (6th ed.) 1041.

Viewed in the light of these suggestions, it is evident that the ruling of the court below, that the complainant had a plain, adequate, and complete remedy at law, was erroneous and utterly subversive of the complainant's rights, as it is clear that the common-law courts could not give him adequate relief. *Hipp et al.* v. *Babin et al.*, 19 How. 274; *Insurance Company* v. *Bailey*, 13 Wall. 621.

Reported cases of the highest authority decide that courts of equity possess the power to correct mistakes in written instruments, even to the extent of changing the most material stipulations they contain and which are the subjects of special agreement; but the settled rule of practice is that the power should always be exercised with great caution, and only in cases where the proof is entirely satisfactory. *Finley* v. *Lynn*, 6 Cranch, 249; *Oliver* v. *Insurance Company*, 2 Curt. 295.

Where an instrument is drawn and executed which professes or is intended to carry a prior agreement into execution, whether in writing or by parol, which by mistake violates or fails to fulfil the manifest intention of the parties, equity, if the proof is clear, will correct the mistakes, so as to produce a conformity of the written instrument to the antecedent agreement of the parties. *Hunt* v. *Rousmanier*, 8 Wheat. 211; S. C. 1 Pet. 13.

Proof of the most unquestionable character is exhibited in the record that the understanding of the parties was that the respondent was to pay to the complainant the whole amount the latter paid into the firm, less the sums he had drawn out, and that the clerk designated by the parties to examine the books and compute the amount made the mistake alleged in the bill of complaint. Clear proof is also exhibited that corresponding mistakes were made in the writings executed between the parties to effect the agreed dissolution of the copartnership.

Under such circumstances, equity, if the proof is clear, will reform the agreements and correct the mistakes, as appears by many standard authorities in addition to those to which reference has already been made. *Henkle* v. *Insurance Company*, 1 Ves. 314; *Moteux* v. *Insurance Company*, 1 Atk. 545; *Collett* v. *Morrison*, 12 Eng. L. & Eq. 171; *Andrews* v. *Essex Co*, 3 Mason, 10.

Controversies of the kind often arise in respect to policies of insurance; and the rule is, when once the contract is agreed to, the underwriters are bound to insert it in the policy, and if they omit to do it, the insured have a right to insist upon a perfect conformity to the original agreement. *Canedy* v. *Morey*, 13 Gray (Mass.), 377; *Wake* v. *Harrow*, 1 Hurlst. & Colt. 202.

Concede that, and still it is suggested by the respondent that errors in matters of practice were committed by the court of original jurisdiction. Suppose that is so, still it cannot afford any justification for the appellate court in dismissing the bill of complaint, as the errors, if any, were amendable, and might have been corrected if the appellate court had reversed the decree of the court of original jurisdiction and remanded the cause for further proceedings. Instead of that, the appellate court dismissed the bill of complaint without qualification, the effect of which, if not corrected, will be that the complainant will be barred of relief.

Irregularity in the proceedings may frequently justify a reversal of the decree and a remanding of the case, but it will seldom or never present just cause for dismissing the bill of complaint. By a reversal in such a case, the right of the complainant is not barred, and when the cause goes down, he may, if he can, correct the errors and preserve his rights. Even if the alleged errors of practice were material, the decree could not be justified, as, if not reversed, it would for ever bar the right of the complainant; but upon a careful examination of the supposed errors, it is clear that they presented no just obstacle to the rightful determination of the controversy. Nor is it correct to suppose that the alleged errors of practice constituted the cause of dismissal in this case. On the contrary, the opinion of the court shows that the bill was dismissed solely

upon the ground that the complainant had a plain, adequate, and complete remedy at law, which is a manifest error, as fully shown by the authorities previously cited.

The decree will be reversed, and the cause remanded with directions to enter a decree affirming the decree of the court of original jurisdiction; and it is

So ordered.

SNELL v. INSURANCE COMPANY.

A., a member of the firm of A., B., & Co., who were the owners of cotton, communicated the facts touching its ownership, situation, value, and risk, so far as he knew them, to C., a duly accredited agent of an insurance company; and thereupon the company, through C., entered into a verbal agreement with A., acting for and on behalf of the firm, to insure for a certain period the cotton for its whole value against loss by fire, at a premium which was subsequently paid to the company. A. assented that the insurance should be made in his name, upon the representation and agreement of C. that the entire interest of the firm in the cotton would be thereby fully protected. The cotton was burnt within the specified period. The policy was then issued and delivered to A., who, being at once advised by his attorneys that it in terms covered his interest, but not that of the firm, forthwith requested the company to correct it, so that it should conform to the agreement. The company having declined to do so, A., B., & Co. filed against it this bill, praying that the policy be reformed, and that the value of the cotton be awarded to them. *Held*, 1. That the acceptance of the policy was not such as waived any right of A., B., & Co. under the agreement covering their interest in the cotton, which A. in their behalf had made with the company, and that they are entitled to the relief prayed for. 2. That a mere mistake of law does not, in the absence of other circumstances, constitute any ground for the reformation of a written contract.

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

This was a suit in equity instituted by Thomas Snell, Samuel L. Keith, and Abner Taylor, partners under the firm name of Snell, Taylor, & Co., to reform a certain policy issued by the Atlantic Fire and Marine Insurance Company of Providence, insuring Samuel L. Keith, from Dec. 6, 1865, at noon, to Jan. 7, 1866, at noon, against loss or damage by fire, on two hundred and twenty bales of cotton, described as "stored in open

shed at West Point, Miss.; loss, if any, payable to Messrs. Keith, Snell, & Taylor."

The material allegations in the bill are as follows: That said firm, on Dec. 6, 1865, were the owners of two hundred and twenty bales of cotton, worth more than $50,000, stored at West Point, Miss., awaiting transportation to some northern market; that Keith applied in behalf of his firm to Holmes & Bro., general insurance agents at Chicago, representing several companies, including the defendant, to procure insurance upon all the cotton, for the benefit of the firm, in the sum of $49,500, during such time as it remained at West Point, which time was uncertain, in view of the difficulties of transportation; that Holmes & Bro., the duly accredited and authorized agents, among others, of the defendant, did agree with Keith, acting for and in behalf of his firm, to make, grant, and secure insurance in the companies by them represented on this cotton in the sum of $49,500, while it was stored at West Point and until shipped to a northern market, and to receive a premium of one per cent on the total amount insured, to wit, $495, which sum Keith agreed to pay Holmes & Bro., provided the time for the insurance did not exceed one month, but to have a decreased rate if the time exceeded one month, the agreed rate to be paid by Keith when the cotton was removed from West Point, when the extent of the insurance could be definitely fixed; that on Dec. 6, 1865, Holmes & Bro., with intent to carry this agreement into effect, caused to be made several policies in different companies, among them the policy sued on, making an aggregate insurance of $49,500, and after the loss occurred notified Keith to pay, and he did pay, the sum of $495, the premium on the whole amount insured, $80 of which was paid to and received by the defendant for and on account of his firm and in pursuance of the agreement with Holmes & Bro.; that the policy sued on remained in the possession of Holmes & Bro. until some time after the loss; that after the loss, and before any application to adjust the same was made, Holmes & Bro., with the intent to carry out the agreement that the cotton should be insured until its shipment from West Point, filled up the policy so that by the terms thereof the insurance extended from Dec. 6, 1865, until Jan. 7, 1866, at noon; that Keith was assured by

Holmes & Bro., when the insurance was taken, that it was not necessary that the policy should state in terms that the insurance was for and on account of Snell, Taylor, & Co., and that the firm would be as fully protected, and the loss would be as promptly paid, as if the policy had expressly stated that the insurance was for and on its account; that relying upon those assurances, and ignorant that, by the terms and legal effect of the terms employed, no other interest in the cotton was insured except his, Keith took the policy into his possession in the full belief that it covered the entire interest of the firm; that soon thereafter, upon being advised to the contrary by his attorney, he demanded of the insurance agents that the policy be corrected so as to conform to the real contract and agreement, but Holmes & Bro. refused to correct or alter the same in any way.

The prayer of the bill is that the company be decreed and ordered to correct and reform the policy by inserting therein the stipulation that the insurance was made for the benefit or for the account of Snell, Taylor, & Co., and that the firm have a decree for the sum so intended to be insured on the cotton.

The company filed an answer traversing the allegations of the bill, and setting up sundry matters in defence. The court, upon a final hearing on the pleadings and proofs, dismissed the bill, and the complainants appealed to this court.

Mr. Leonard Swett, for the appellants, contended that the error committed by inserting the name of Keith instead of that of the firm as the party assured, when the contract was reduced to writing, would not defeat their rights; but that the policy would be reformed so as to effectuate the intention of the parties, and be enforced by a court of equity. *Ellis* v. *Towsley*, 1 Paige (N. Y.), 278, 279; *Franklin Fire Insurance Co.* v. *Hewitt*, 3 B. Mon. (Ky.) 231; *Harris* v. *The Columbian Insurance Co.*, 18 Ohio, 121; *New York Ice Co.* v. *Northwestern Insurance Co.*, 23 N. Y. 359; *Woodbury Savings Bank* v. *Charter Oak Insurance Co.*, 31 Conn. 526; *The Malleable Iron Works* v. *Phœnix Insurance Co.*, 25 id 465.

No counsel appeared for the appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

The elaborate answer of the insurance company comprehends, in the form of express denials and affirmative statements, almost every defence which the ingenuity and skill of able counsel could suggest. But in view of the points to which the evidence seems to have been mainly directed, it is only necessary to consider certain grounds of defence, which will sufficiently appear in this opinion.

We are satisfied that a valid contract of insurance was entered into, on the 6th of December, 1865, between Keith, representing Snell, Taylor, & Co., and Holmes & Bro., representing the defendant and other insurance companies, and we entertain no serious doubt as to its terms or scope. Although there is some conflict in the testimony as to what occurred at the time the contract was concluded, it is shown, to our entire satisfaction, not only that the agreed insurance covered the two hundred and twenty bales of cotton, but that Holmes & Bro., with knowledge or information that the cotton was owned by Snell, Taylor, & Co., and not by Keith individually, intended to insure, and, by direct statements, induced him to believe that they were insuring, in his name, the interest of the firm. He assented to the insurance being taken in his name, because of the distinct representation and agreement that the interest of the firm would be thereby fully protected against loss by fire so long as the cotton remained at West Point. But according to the technical import of the words used in the policy which the company subsequently issued and delivered, only Keith's interest in the cotton is insured. Such is the construction which the company now insists should be put upon the policy, if the court decides that there was a binding contract of insurance. The fundamental inquiry, therefore, is whether Snell, Taylor, & Co. are entitled to have the policy reformed so as to cover their interest.

We have before us a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed. A definite, concluded agreement as to insurance, which, in point of time, preceded the preparation and delivery of the policy, is established by legal and exact evidence, which removes all

doubt as to the understanding of the parties. In the attempt to reduce the contract to writing there has been a mutual mistake, caused chiefly by that party who now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not effect that which the parties intended. That a court of equity can afford relief in such a case, is, we think, well settled by the authorities. In *Simpson* v. *Vaughan* (2 Atk. 33), Lord Hardwicke said that a mistake was "a head of equity on which the court always relieves." In *Henkle* v. *Royal Exchange* (1 Ves. Sen. 318), the bill sought to reform a written policy after loss had actually happened, upon the ground that it did not express the intent of the contracting parties. The same eminent judge said: "No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts, so that if reduced to writing contrary to the intent of the parties, on proper proof, would be rectified." In *Gillespie* v. *Moon* (2 Johns. (N. Y.) Ch. 585), Chancellor Kent examined the question both upon principle and authority, and said: "I have looked into most, if not all, of the cases in this branch of equity jurisdiction, and it appears to me established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake, affirmatively by bill, or as a defence." In the same case he said: "It appears to be the steady language of the English chancery for the last seventy years, and of all the compilers of the doctrines of that court, that a party may be admitted to show, by parol proof, a mistake, as well as fraud, in the execution of a deed or other writing." And such is the settled law of this court. *Graves* v. *Boston Marine Insurance Co.*, 2 Cranch, 419; *Insurance Company* v. *Wilkinson*, 13 Wall. 222; *Bradford* v. *Union Bank of Tennessee*, 13 How. 57; *Hearne* v. *Marine Insurance Co.*, 20 Wall. 488; *Equitable Insurance Co.* v. *Hearne*, id. 494. It would be a serious defect in the jurisdiction of courts of equity if they were without the power to grant relief against fraud or mutual mistakes in the execution of written instruments. Of course parol proof

in all such cases, is to be received with great caution, and, where the mistake is denied, should never be made the foundation of a decree, variant from the written contract, except it be of the clearest and most satisfactory character. Nor should relief be granted where the party seeking it has unreasonably delayed application for redress, or where the circumstances raise the presumption that he acquiesced in the written agreement after becoming aware of the mistake. Hence, in *Graves* v. *Boston Marine Insurance Co.* (*supra*), this court declined to grant relief against an alleged mistake in the execution of a policy, partly because the complainant's agent had possession of the policy long enough to ascertain its contents, and retained it several months before alleging any mistake in its reduction to writing. But no such state of case exists here. The policy in question was retained for Keith by the insurance agents. It was not surrendered to him, nor did he see it, until after the loss had happened. Immediately upon being advised by his attorney that the policy, in terms, covered only his individual interest, he promptly avowed the mistake, and asked that it be corrected in conformity with the original agreement. There was no such acceptance by him of the written policy as would justify the inference that he had either waived any rights existing under the original agreement, or conceded that the instrument correctly set forth the contract.

It may be said that the mistake made out was a mistake of law, and, therefore, not relievable in equity. It was stated in *Hunt* v. *Rousmaniere's Administrators* (1 Pet. 1), as a general rule, that mistake of law is not a ground for reforming a deed, and that the exceptions to the rule were not only few in number, but had something peculiar in their character. The court, however, was careful to say that it was not its intention "to lay it down, that there may not be cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law." In the same case (8 Wheat. 174), Mr. Chief Justice Marshall said that he had found no case in the books in which it has been decided that a plain and acknowledged mistake of law was beyond the reach of equity. In 1 Story, Eq. Jur., sect. 138 *e* and *f* (Redf. ed.), the author, after stating certain qualifications to be observed in granting relief upon the ground of

mistake of law, says that "the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity, resting on discretion, and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best considered and best reasoned cases upon the point, both English and American." The same author says: "We trust the principle that cases may and do occur where courts of equity feel compelled to grant relief, upon the mere ground of the misapprehension of a clear rule of law, which has so long maintained its standing among the fundamental rules of equity jurisprudence, is yet destined to afford the basis of many wise and just decrees, without infringing the general rule that mistake of law is presumptively no sufficient ground of equitable interference."

In the case under consideration, the alleged mistake is proven to the entire satisfaction of the court. It is equally clear that the assent of Keith to the insurance being made in his name was superinduced by the representation of the company's agent, that insurance in that form would fully protect the interest of the firm in the cotton. We assume, as we must from the evidence, that this representation was not made with any intention to mislead or entrap the assured. It is, however, evident that Keith relied upon that representation, and, not unreasonably, relied also upon the larger experience and greater knowledge of the insurance agents in all matters concerning the proper mode of consummating, by written agreement, contracts of insurance according to the understanding of the parties. He trusted the insurance agents with the preparation of a written agreement which should correctly express the meaning of the contracting parties. He is not chargeable with negligence, because he rested in the belief that the policy would be prepared in conformity with the contract. As soon as he had a reasonable opportunity to consult counsel, he discovered the mistake, and promptly insisted upon the rights secured by the original agreement. A court of equity could not deny relief under such circumstances, without aiding the insurance company to obtain an unconscionable advantage, through a mistake, for which its agents were chiefly responsible. In all such cases, there being

no laches on the part of the party, either in discovering and alleging the mistake, or in demanding relief therefrom, equity will lay hold of any additional circumstances, fully established, which will justify its interposition to prevent marked injustice being done. *Wheeler* v. *Smith*, 9 How. 55.

In deciding, therefore, as we do, that the complainants are entitled to have the policy reformed in accordance with the original agreement, it is not perceived that we enlarge or depart, in any just sense, from the general and salutary rule, that a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts.

We have not overlooked, in this connection, that portion of the evidence which shows that Holmes & Bro., when, by letter, advising the company of the contract, stated, in a postscript, that the insurance would be for a few days only. The officers of the company testify that they would not have permitted the contract to stand, and would have promptly cancelled the policy, had they not supposed the insurance would last but a few days. It was doubtless the belief of Keith, which he expressed to the insurance agents, that the cotton would not remain at West Point beyond a few days. The evidence shows that he had reasonable ground for such belief. But he seems to have guarded against disappointment in that regard, by having it distinctly agreed that the insurance should last until transportation could be obtained, and the cotton shipped from West Point. That Holmes & Bro. so understood the agreement is evident from their letter of Dec. 6, 1865, to the secretary of the company, in which they state that they had taken insurance "on two hundred and twenty bales of cotton stored in open shed at West Point, Miss., said cotton to remain insured from above date till time of shipment." It is true that the response of the secretary shows that the company did not approve of such risks. But the contract was not repudiated or cancelled, and they only enjoined upon their agents to "decline such business in future." The act of the agents in filling up the blanks in the policy after the loss had occurred was manifestly in consummation of the original contract of insurance.

But independently of the issue in the pleadings as to the mistake in reducing the contract to writing, the company de-

fends the action, and denies its liability upon other grounds, which must now be considered.

The answer alleges that at the time of, and prior to, the alleged verbal contract of insurance the cotton was guarded, night and day, by soldiers of the United States, who occupied the shed in which it was stored, and who were in the habit of sleeping and eating their meals upon it, and smoking and otherwise using fire upon it, or in its immediate vicinity; that those facts were material to the risk, and would or might have influenced Holmes & Bro. and the company in taking and continuing the insurance, or in regard to the rate of premium; and that such facts, although well known to Keith when he applied for insurance, were not communicated by him to Holmes & Bro., or to the company, but were concealed, whereby the contract of insurance, whether reduced to writing correctly or not, became and was void.

The evidence does not authorize a defence upon such grounds. The proof does not show that Keith, when applying for insurance, withheld any fact known to him, and material to the risk. By the terms of the policy, he was under an obligation to make a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, so far as the same were known to him, and were material to the risk. The same clause of the policy provides that the risk shall cease, and the policy become null and void, "if any material fact or circumstance shall not have been fairly represented." This language must, of course, be construed in connection with the preceding words of the same clause. We find no evidence in the record showing that Keith did not fairly represent every material fact known to him. Rawley, who was within hearing of the conversation between Keith and Edgar Holmes (the active manager of the business of Holmes & Bro.), says, that while he cannot recall the language used, he is "positive that Keith explained the character of the risk. . . . I know Keith described the character of the risk fully." When Keith applied to Edgar Holmes for the insurance, the latter asked him how the cotton was stored. He replied, "In an open shed." Holmes then said that he did not like the manner in which it was stored; and Keith replied, it

"was guarded day and night." Thus were Holmes & Bro. notified of its condition and situation. The information that it was guarded day and night indicated that there was something in the attendant circumstances which made a guard necessary for its safety. Indeed, if it was to remain, while under insurance, in an open shed, and at a point remote from the company's place of business, it was clearly in the interest of the insurer to have it guarded day and night. But it is said that the habits of the guard were such, at the time of the insurance, as to endanger its safety. If this were clearly proven, the evidence furnishes no ground for imputing to Keith or Snell or Taylor knowledge of any habitual carelessness or misconduct upon the part of the guard which increased the danger of the cotton being burned.

The answer further alleges that on the 8th of December, 1865, whatever cotton there was in the shed at West Point belonging to the complainants was seized by the United States government, or by its officers, under its orders and direction, excluding complainants thereafter from all possession and control over the cotton, and that such seizure and exclusion from possession and control were maintained until the cotton was burned; that after such seizure the shed passed to the exclusive possession of soldiers of the United States, who were in the habit of using the same for military defence, of sleeping and eating therein, and of smoking and otherwise using fire upon it and in its immediate vicinity; that at the time of the alleged verbal contract of insurance large quantities of loose cotton were lying under the flooring of the shed, which consisted of loose boards, and immediately under the cotton stored in the shed, whereby the risk of fire was greatly increased; that these facts were, each and all of them, material to the risk, and would or might have influenced the judgment of Holmes & Co. and of the company in regard to continuing the insurance, or to the rate of premium therefor; that Taylor, one of the complainants, knew these facts on the 8th of December, 1865, and in ample time before the fire to have communicated them to the company's agents, and sufficiently long before to have enabled the company to cancel the policy and give complainants timely notice thereof; that by reason of his concealing them

from the company and its agents, the policy became and was wholly void.

This defence is doubtless based upon that clause in the policy which declares that "if the situation or circumstances affecting the risk thereupon (the property) shall be so altered or changed, either by change of occupancy in the premises insured, or containing property insured, or from adjacent exposure, whereby the hazard is increased, and the assured fail to notify the company, or if the title to said property shall be in any way changed, . . . in every such case the risk thereupon shall cease and determine, and the policy be null and void."

It will be observed that an alteration or a change in the occupancy of the premises containing the insured property, unless it increases the hazard, does not avoid the policy, although no notice be given to the insurer. We have already seen that when the contract was made the company's agents were informed that the cotton was guarded by day and by night. There was no change in the character of the guard, except that prior to Dec. 8, 1865, Federal soldiers guarded it as a personal favor to Taylor, while after that date they did so under an order for its seizure. There is some evidence that they were, at times, negligent and careless; but we are not satisfied that their conduct was such as to increase the hazard. In view of the peculiar condition of public sentiment at West Point and in its vicinity against Taylor and others, who had been officially connected with the seizure and collection of cotton, under treasury regulations, the strong presumption is that the presence of Federal soldiers largely decreased, rather than increased, the hazard, and was, therefore, for the benefit of all parties interested in the preservation of the property. We attach no weight to its seizure, under orders of Federal officials, as, in and of itself, affecting the rights of the assured. It had been purchased by Taylor for his firm, and with its money, and it does not appear that any of the cotton claimed by him for the firm did, in fact, belong to the United States, or had become forfeited by reason of his violation of the laws, or of the treasury regulations made in pursuance of them. Nor does it appear that he caused or promoted its seizure. So far as the record shows, it was an unauthorized seizure of the private

property of the citizen, caused by the personal hostility towards Taylor of a former treasury agent, who had himself been suspended from his position through the influence or machinations, as he suspected or believed, of Taylor. If, as alleged, the cotton, upon its seizure, passed from the control of the owner to the exclusive temporary possession of Federal officers, such change did not, by the terms of the policy, impose upon the assured the duty of communicating to the company that fact. It was only when the change in the surrounding circumstances increased the hazard that the assured was under an obligation to inform the company thereof. If the seizure had involved a change of title, then the company could have elected to avoid the policy, since it contains express stipulations to that effect. But, as already said, the record furnishes no evidence of any change of title, but only a change of possession and control, made without the assent of the owner, and which he, perhaps, had no power to prevent; and it does not clearly appear that the hazard was thereby increased.

We come now to the only remaining question which it seems necessary to consider; viz., the quantity of cotton in the shed belonging to Snell, Taylor, & Co. at the time of the fire.

Upon this point a large amount of testimony was taken which is of a very unsatisfactory nature. Witnesses who passed and repassed the shed from time to time, and who had no special reason for making an estimate of the cotton there stored, were asked to give their best judgment as to the quantity.

If the record contained no other evidence than such opinions of witnesses, the court would have great difficulty in reaching a conclusion as to the quantity of the cotton burned. But there is other and better evidence upon which to rest the determination of this question. The officer commanding the Federal troops stationed at West Point, and who were in possession of the shed from a date prior to Dec. 6, 1865, up to the time of the fire, states that about the time he took possession, under orders from Federal officials, he examined its general condition and counted the bales, — not every bale, but made such a count as satisfied him that there were not less than two hundred and twenty bales, certainly over two hundred bales. He

swears that none of the cotton claimed by Taylor was removed after he took possession of the shed, and he was in such possession up to the time of the fire, except for about two weeks in the latter part of December, during which time Captain Pyle guarded it under the same order. But the most important evidence upon this point comes from the witness Freel. Under the authority of the freight conductor of the Memphis and Charleston Railroad Company he contracted with Taylor for the transportation of this cotton to Memphis. He made a contract with Taylor for its shipment as soon as the conductor could get to West Point with the necessary cars. In order to ascertain the number of cars needed for the transportation, he counted the bales in the shed, claimed by Taylor, as well as it was possible for him to do. He found that the front tier contained forty-five bales, and that there were five tiers, and his calculation was that transportation was needed for two hundred and twenty-two bales. At the time of this count, which was in the last of December, he made a memorandum for the benefit of the conductor, in a memorandum-book which he produced when giving his testimony. The memorandum was, "222 bales of Taylor's cotton for you to get cars for."

The conductor expected to reach West Point with the cars by the first day of January, but he failed to do so. The cars reached West Point on the 7th, the day after the fire, for the purpose of transporting the cotton to Memphis under the contract made by Freel with Taylor. We see no escape, under the evidence, from the conclusion that there were two hundred and twenty-two bales in the shed, belonging to Taylor's firm, at the time of the fire, unless some of it was stolen or fraudulently withheld after Freel's count. Only one witness states any fact from which it may be inferred that any portion of the cotton was stolen prior to the fire, and he only speaks of eight or nine bales being taken off, with the consent of the guard, during a certain night when Taylor was absent from the shed. If that quantity be deducted, as we think it must be, there will be left two hundred and thirteen bales of cotton, averaging, according to the testimony, five hundred pounds per bale, and worth, at the place of its destruction, forty cents per pound.

The decree of the court below will be reversed, with directions to enter a final decree in conformity with this opinion; and it is

So ordered.

COUNTY OF DAVIESS *v.* HUIDEKOPER.

Where, pursuant to the assent given by two-thirds of the qualified voters of a county in Missouri, at an election therein, stock in a railway company, which afterwards constructed its road through the county, was subscribed for by the county court, and the county exercised its rights as a stockholder, and issued its bonds to pay for the stock, — *Held*, that the bonds are not, in the hands of a *bona fide* holder for value, rendered void by the fact that, at the time of such election, the company was not created according to law.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

The facts are stated in the opinion of the court.

Mr. Willard P. Hall for the plaintiff in error.

Mr. Joseph Shippen, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

The plaintiff below brought this suit to collect from the County of Daviess, Missouri, the amount of forty-four interest-coupons for $35 each, formerly attached to bonds issued by the county to the Chillicothe and Omaha Railroad Company, to aid in the construction of its railroad. A demurrer to the amended petition was overruled, and final judgment for the amount of the coupons was rendered by the court below, which also certified a division of opinion on points presented.

The questions certified are as follows: —

First, Whether the bonds, for the collection of the interest-coupons of which the suit was brought, were issued without due authority of law, and are void in the hands of a *bona fide* purchaser for value, because the railroad company to which said bonds were issued, in payment of capital stock by it subscribed, was not created according to law until subsequent to the favorable vote of the qualified voters and the order of subscription.

Second, Whether the former judgment recovered by the plaintiffs in a former suit in this court against the defendant, upon interest-coupons from the same bonds again set forth in this suit, estops the defendant from pleading in bar to the merits herein.

The Constitution of Missouri (1 Wagn. Stat. 62), sect. 14 of art. 11, provides as follows, viz.: —

"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 General Statutes provide (1 Wagn. Stat. 295) how railroad companies may be formed, and further provide (id. 305): —

"Sect. 17. It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city, or town in, or loan the credit thereof to, any railroad company duly organized under this or any other law of the State: *Provided*, that two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent to such subscription."

Having paid his money in good faith for the bonds issued by this county, and the interest becoming payable, it is not unnatural that the holder and owner should demand payment of such interest. The subscription by the county to the railroad stock, the receipt and holding of the stock by the county, the assent by two-thirds of the qualified voters of the county that such subscription should be made, the actual issuing of the bonds, and the purchase of the same by the plaintiff below, without knowledge of any objection to them, are conceded.

It is said, however, that these things were not done in their proper order; that the vote of the citizens assenting to the subscription was taken before the organization of the railroad company was complete, and that although that act was not under the control or direction of the holder of the bond, but an irregularity of the county, if it is an irregularity, the county is thereby relieved from the payment of its debts, which would otherwise be not only just and honest, but lawful. This is the point that

is made in the first of the questions presented by the certificate of the judges. The facts on which this branch of the case rests are these: The articles of incorporation of the road in question, which bear date June 18, 1867, contain the statements required by the statute, giving the length of the road, the amount of the capital stock, and the names of the directors, and were subscribed by the subscribers for the amounts indicated. The amount subscribed was not then as large as that required by the statutes of Missouri, to wit, $1,000 per mile for the length of the road. This sum was, however, obtained as early as the eleventh day of July, 1868, when the articles were filed in the office of the secretary of state, and the incorporation became perfect. On the 1st of July, 1869, the county court made its subscription, issued and sold its bonds, and with the proceeds paid for and received the stock. The road was built through the county; and for several years the county levied and collected taxes to pay the interest of the bonds, and did pay the interest for those years.

The precise question now presented has never been decided in this court, but its determination depends upon principles which are well settled. These bonds are securities which pass from hand to hand with the immunity given by the common law to bills of exchange and promissory notes. The persons who execute and deliver them — the officers of the county court in this instance — are the agents of the municipal body authorizing their issue, and not of the persons who purchase or receive them. If these agents exceed their authority as to form, manner, detail, or circumstance, if they execute it in an irregular manner, it is the misfortune of the town or county, and not of the purchaser; the loss must fall on those whom they represent, and not on those who deal with them. There must, indeed, be power, which, if formally and duly exercised, will bind the county or town. No *bona fides* can dispense with this, and no recital can excuse it. Thus, if the constitution or the statute should peremptorily prohibit a municipal body from loaning its credit to or subscribing for stock in a railroad corporation, a subscription or a loan made subsequently to the passage of the act would give no right against the county, although the bond should recite that there was such authority,

and the purchaser should pay full value in the belief of its truth. There is no difficulty in appreciating the distinction stated; and we are now to ascertain whether the error we are considering, assuming it to be one, arises from an irregularity in the exercise of an existing power, or whether there is total want of authority to act.

The case concedes that the question of subscription to the stock of this very company was submitted to the voters of Daviess County, that two-thirds of the qualified voters of that county assented to the making of that subscription, and that the bonds, the coupons from which are here in suit, were issued pursuant to an order of the county court of Daviess County, made under authority of the Constitution and General Statutes of the State of Missouri.

After admitting that it made a contract with this company to take its stock, and not with some other company, and that the contract with this identical company was authorized with the forms and solemnities set forth, and that it received, and, so far as known, has ever since held and enjoyed, and now holds and enjoys, the profits of the stock of this very company issued for such bonds; and also admitting that when the bonds were so issued and delivered by it the incorporation had been completed in form and detail for one year, — can it now be permitted to urge as a defence that such company was not a legally organized corporation when the election was held, and did not become such until after that period?

The Missouri statute already quoted shows that the municipal body, in regard to its privileges, liabilities, and responsibilities as a taker and holder of railroad stock, stands like an individual subscriber. Its eighteenth section is as follows: —

"Sect. 18. Upon the making of such subscription by any county court, city, or town, as provided for in the previous section, such county, city, or town shall thereupon become, like other subscribers to such stock, entitled to the privileges granted, and subject to the liabilities imposed, by this chapter or by the charter of the company in which such subscriptions shall be made; and in order to raise funds to pay the instalments which may be called for from time to time by the board of directors of such railroad, it shall be the duty of the county court, or city council, or trustees of such town

making such subscription, to issue their bonds or levy a special tax upon all property made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in the county, city, or town to pay such instalments, to be kept apart from other funds, and appropriated to no other purpose than the payment of such subscription; but the total amount of tax levied for railroad purposes in one year in any county, city, or town shall not exceed thirty per cent of the subscription made by such county, city, or town."

It shows, also, that it devolved upon the county court, subject to the question of power before stated, to determine whether a subscription had been made, and to raise money for its payment. This included a determination of the questions whether an assent had been given by the voters, and whether a subscription had in fact been made by the county court. It did determine both of these questions in the affirmative, and so certified in the bonds issued by the same authority, and which are now in suit.

Under these circumstances, the authorities in this court and in the State of Missouri hold that the decision of the voters and the action of the county court in issuing the bonds in question, and their subsequent action in receiving and retaining their benefits, gave validity to the bonds, and that they are now to be taken as valid instruments.

Among these authorities are the following: *Town of Coloma* v. *Eaves*, 92 U. S. 484, 491; *County of Randolph* v. *Post*, 93 id. 502; *County of Leavenworth* v. *Barnes*, 94 id. 70; *Commissioners of Douglass County* v. *Bolles*, id. 104; *Commissioners of Johnson County* v. *Thayer*, id. 631; *County of Cass* v. *Johnson*, 95 id. 360; *City of St. Louis* v. *Shields*, 62 Mo. 247; *Smith* v. *Clark County*, 54 id. 58, 81.

These authorities show that if the county had made a contract with the railroad company in April, 1868, it would not have been permitted, under the circumstances stated, to deny it. But here was no contract. It was a simple indication of the pleasure or wish of the voters of the county that aid should be furnished to this railroad. The statute was intended as a guard against hasty action in this respect, and makes no requi-

sition that the corporation shall be so perfected that a *quo warranto* could not reach it. If assent is given to a specified aid to a railroad named, we are of the opinion that a perfection of the corporation before the subscription is made and the bonds issued is a compliance with the statute.

Ruby v. *Shain* (54 Mo. 207) is cited to the contrary. There are several reasons why that case does not control the one we are considering.

1. The question of the legality of the subscription was never properly reached. Whether the tax which was levied to pay the county subscription for stock was legal or illegal, it was certain that the collector, who had a warrant for its collection valid on its face, and who was the defendant in that suit, was not liable for enforcing it. That an officer in such case is protected by his writ, and that to protect himself he need not even produce the evidence of a judgment, was held as long ago as in *Holmes* v. *Newcaster* (12 Johns. (N. Y) 395), and has been so held from that time to the present. Such, too, is the express holding of the court in *Ruby* v. *Shain*, and an examination of the merits of the case was unnecessary.

2. It differed from the present case in the fact that not only the township vote of assent, but the subscription to the stock and the issuing of the bonds, all occurred before the organization of the company. The vote was taken in June, 1869, the subscription ordered and the bonds issued on the 9th of November, 1869, while the articles of association were executed on the 10th, and filed with the secretary of state on the 12th of the same month and year. In the present case, the election was held April 7, 1868, the articles were filed July 14, 1868, the subscription made and the bonds dated July 1, 1869. The organization was complete for a year before the subscription was made.

3. In that case, the subscription was needed to complete the organization. In this case it was not. The court, in *Ruby* v. *Shain*, say, "that it is not intended that counties, cities, or towns shall, by their subscription, form the basis on which a future corporation is to be erected, a nucleus around which aid is to be gathered from other quarters, to construct roads, but that they may, by their subscriptions or loans, aid corporations

already in existence." There is a broad difference between the cases where the subscription is actually made and the bonds are issued in fact after the corporation is complete, and where these things are done while the corporation remains incomplete.

Upon the whole matter, we are of the opinion that the case was well decided. The first question certified is answered in the affirmative, and as that disposes of the entire controversy, no attention need be given to the second question.

Judgment affirmed.

BRADLEY *v.* UNITED STATES.

A. and the Postmaster-General executed an indenture, whereby the former leased to the United States, for the use of the Post-office Department, at an annual rent of $4,200, payable quarterly, a building in Washington, for three years from and after June 5, 1873, with the privilege of renewing the term for the further period of two years. It was thereby "understood and agreed" by the parties that the indenture was made subject to an appropriation by Congress for the payment of the stipulated rent, and that no payment should be made to A. on account thereof until such appropriation should be available, when the arrears then due would be paid in full, and thereafter the payments be made at the time and in the manner stipulated. Congress made the requisite appropriations to pay the specified rent to the end of the second year of the term. By the act of March 3, 1875 (18 Stat. 367), making appropriations for the fiscal year ending June 30, 1876, Congress appropriated for the rent $1,800, with a proviso "that the above sum shall not be deemed to be paid on account of any lease for years of said building: *Provided, however,* that at the end of the present fiscal year the Postmaster-General be directed, upon the demand of the lessor, to deliver up the possession of said premises." No such demand by the lessor was made. A. having received no rent for the third year, sued the United States therefor, and claimed $4,200. *Held,* 1. That the parties to the indenture, by their expressed understanding and agreement, intended to incorporate into the instrument the substance of the act of Congress which prohibits any department from "involving the government in any contract for the future payment of money in excess of the appropriations." 2. That the appropriations for two years of the term were not such a recognition by Congress of the validity of the contract as bound the United States to pay the stipulated rent for the third year. 3. That by the said proviso A. had seasonable notice that no more than $1,800 would be paid to him as rent for the third year, and that he, not having demanded the possession of the premises, must be held to have assented to the terms offered by said act.

APPEAL from the Court of Claims.

This was an action by Andrew C. Bradley for the use of George Taylor, Samuel Cross, and Peter F. Bacon, trustees, to recover the sum of $4,200 rent claimed to be due from the United States for the premises No. 915 E Street, in the city of Washington, for the fiscal year ending June 30, 1876.

The court below found the following facts: —

1. On the 6th of June, 1873, the Postmaster-General and the claimant, Bradley, made and executed an indenture, of which the following is a copy: —

"This indenture, made this sixth day of June, in the year one thousand eight hundred and seventy-three, by and between Andrew C. Bradley, of Washington, D. C., of the first part, and John A. J. Creswell, Postmaster-General, for and in behalf of the United States of America, of the second part, witnesseth: That the said party of the first part, for and in consideration of the rents, covenants, and agreements to be paid, kept, and performed by the party of the second part, doth hereby demise and lease unto the said party of the second part, those certain premises, with the four-story brick house and brick stable thereon, situated on the north side of E Street, between 9th and 10th Streets, in the city of Washington, in the District of Columbia, and known as house numbered 915 on said E Street northwest, to have and to hold to the party of the second part, for the term of three years from and after the fifth day of June, Anno Domini one thousand eight hundred and seventy-three, with the privilege to the said party of the second part of a renewal of the said term for the further period of two years.

"The said party of the second part yielding and paying therefor the annual rent, during the said term and a subsequent renewal thereof, as aforesaid, of four thousand two hundred dollars ($4,200), payable quarterly, on the thirtieth day of September, the thirty-first day of December, the thirty-first day of March, and the thirtieth day of June.

"And it is hereby mutually understood and agreed, by and between the parties hereto, that this lease is made subject to an appropriation by Congress for the payment of the rental herein stipulated for, and that no payment shall be made to said party of the first part on account of such rental until such appropri-

ation shall be available, and that as soon as practicable after such appropriation shall become available the arrears of the rent then due shall be paid in full, and thereafter payment shall be made at the times and in the manner hereinbefore stipulated.

"And it is hereby agreed by said party of the first part that he will, at his own expense, remove such partitions and construct such partitions, with necessary doorways and doors, in said building, and construct such water-closets, with the necessary water connections, as may be required by the supervising architect of the Treasury Department, and that he will leave in good order all gas-fixtures now in said building for the use of the said party of the second part; and the party of the second part will keep the said premises in good repair during the continuance of this lease and any renewed term thereof, and the expenses of any alterations of or additions to the interior, not herein otherwise provided for, so as to adapt it to the use of the United States, and not calculated to damage the premises, are to be borne by the party of the second part, and all taxes and assessments legally levied or charged upon the property are to be paid by the party of the first part.

"And it is hereby further provided that in case the premises, or any part thereof, during said term, or the renewal thereof, be destroyed or injured by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use, then the rent hereinbefore reserved, or a just and proportionable part thereof, according to the extent and nature of the injury sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use by and at the expense of the said party of the first part; and the said party of the second part covenants to deliver up the said premises to the party of the first part at the determination of this lease, or at the end of any renewal of the term thereof, in good order and condition, reasonable wear and use thereof and injury by unavoidable fire or other casualty excepted.

"And it is further stipulated that the party of the second part may, at or before the delivery of the premises aforesaid, remove such additions to or improvements of the same, placed on the premises by the said party of the second part, the removal of which, as aforesaid, will not injure the premises, as he, the said party of the second part, may elect so to do.

"In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

"A. C. BRADLEY. [SEAL.]
"JNO. A. J. CRESWELL, [SEAL.]
"*Postmaster-General.*

"Signed, sealed, and delivered in presence of } T. A. SPENCE. A. G. MILLS."

2. The premises described in said indenture were sold and conveyed, and the lease was assigned, by said Bradley to Alexander R. Shepherd, and by him conveyed and assigned to George Taylor, Samuel Cross, and Peter F. Bacon, as alleged in the petition and in the amendment thereof.

3. Said premises were used and occupied for the uses and purposes of the Post-Office Department, and for the benefit of the United States, under the direction of the Postmaster-General, from the time of executing said indenture until and including June 30, 1876, as well as subsequently thereto.

4. The claimants have been paid the rent of said premises, through special appropriations of Congress, up to and including June 30, 1875, but have been paid nothing for the year ending June 30, 1876.

5. It does not appear that demand has ever been made upon the Postmaster-General on the part of the claimants for delivery up of the possession of the premises.

On the foregoing facts, and the statutes in relation thereto, the court concluded as matter of law that the claimants were entitled to recover the sum of $1,800. Judgment having been rendered for that amount, the claimants appealed to this court.

When the indenture was executed, two statutes were in force.

"No contract or purchase shall hereafter be made, unless the same be authorized by law, or be under an appropriation adequate to its fulfilment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year." Act of March 2, 1861, sect. 10, 12 Stat. 220; Rev. Stat., sect. 3732.

"It shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government

in any contract for the future payment of money in excess of such appropriations." Act of July 12, 1870, sect. 7, 16 Stat. 251; Rev. Stat., sect. 3679.

The deficiency bill for the fiscal years ending June 30, 1873 and 1874, contained the following provision: —

"For rent of house numbered nine hundred and fifteen E Street northwest, for further accommodation of the clerical force of the department, from June sixth, eighteen hundred and seventy-three, to June thirtieth, eighteen hundred and seventy-four, four thousand four hundred and eighty-eight dollars and eighty-six cents, and hereafter no contract shall be made for the rent of any building, or part of any building in Washington, not now in use by the government, to be used for the purposes of the government, until an appropriation therefor shall have been made in terms by Congress." 18 Stat. 144.

The act making appropriations for the legislative, executive, and judicial expenses of the government for the year ending June 30, 1875, appropriated $4,200 "for rent of house numbered nine hundred and fifteen E Street northwest." Id. 107.

The act of March 3, 1875 (id. 367), making appropriations for the fiscal year ending June 30, 1876, contains the following: —

"For rent of house numbered nine hundred and fifteen E Street northwest, eighteen hundred dollars: *Provided*, that the above sum shall not be deemed to be paid on account of any lease for years of said building: *Provided, however*, that at the end of the present fiscal year the Postmaster-General be directed, upon the demand of the lessor, to deliver up the possession of said premises."

Mr. J. Hubley Ashton and *Mr. Nathaniel Wilson* for the appellants.

The construction given by the Court of Claims to that clause of the lease which provides for the payment of the rent violates the settled rules of interpretation applicable to contracts and to the relations of landlord and tenant, and is wholly inconsistent with the intention of the parties as expressed in the other provisions of the indenture. It attributes to the lessor the manifestly irrational purpose and intent of giving the possession of his property for five years, while he in the mean time was to keep it in good repair and make extensive improvements, and was to accept whatever rent the tenant might think proper to pay.

It is equally incredible that the parties should have intended to agree, and to put in writing an agreement, to submit to Congress "the right to make or refuse appropriations."

Such a construction destroys the lease, with all its covenants save those which are for the advantage of the lessee, and is inconsistent not only with its general conditions, but with the obvious meaning of other provisions in the same clause which is relied upon to exempt the tenant from liability. The provision for regular quarterly payments after "an appropriation" is wholly irreconcilable with the theory that the lessor intended to leave the time as well as the amount of payment to the arbitrary determination of the tenant.

The clause under consideration was inserted for the purpose of designating the method and source of payment, and not of making the legal rights and relations of the parties dependent upon any future contingent event.

If, however, this court shall be of opinion that the agreement contemplated that such rights and relations, as well as the mode of payment, were to be determined by Congress, then the recognition of the binding obligation of the contract was to be manifested by an appropriation, which, when once made, was an acceptance of the lease, thereby validating it for the entire term, and entitling the lessor to the stipulated rent.

Apart from and independently of the expressed intention of the parties, it is apparent that Congress considered that the lease was presented as a conditional contract for a term of years, to be approved or disapproved. That body obviously intended that its action should be construed to be, and it by implication was, an acceptance and ratification of the lease for the whole term. If Congress had not so intended, it would not have provided in such specific terms for the payment of rent, nor declared that thereafter, except as to buildings then in use in Washington, no contract should be entered into until an appropriation had been made; but, as a subsequent Congress did, would have appropriated the requisite money without reference to the term, with a proviso that the same should not be deemed to be paid on account of any lease for years.

While it may be admitted that, where the United States is a principal, acts and omissions which would create a presumption of ratification in the case of an individual will create no presumption against it, the action of Congress, when fully cognizant of all the facts, in accepting the benefits of a contract, has the same legal significance and consequences as the similar action of an individual. *Fremont* v. *United States*, 2 Nott & H. 461; Story, Agency (8th ed.), sect. 239; *McCauley* v. *Brooks*, 16 Cal. 1; *Roberts et al.* v. *United States*, 92 U. S. 41.

A ratification once deliberately made, upon a full knowledge of all the material circumstances, becomes *eo instanti* obligatory, and cannot afterwards be revoked or recalled. Wharton, Commentaries on Agency, sects. 72, 73.

If it should be held that the action of Congress did not ratify the contract and validate the lease for the entire term, it must be admitted that it did validate it for the first and second years; and as the government entered the premises and maintained possession under the lease, it is liable for the stipulated rent for the third year.

A tenant holding over after the expiration of his lease, with the consent of the landlord, becomes a tenant from year to year, subject to the terms and conditions of the original lease. Taylor, Landlord and Tenant, sect. 22; *Kingler* v. *United States*, 4 Nott & H. 407; *Baker* v. *Root*, 4 McLean, 572.

A lease for years, though void as to the term, is good for one year if the lessee enters, and the tenancy thereafter becomes a tenancy from year to year.

A lease void under the Statute of Frauds, for want of authority of the agent who executed it, will regulate the rights of the parties during the actual existence of the tenancy. Taylor, Landlord and Tenant, sect. 26; *Porter* v. *Bleiler*, 17 Barb. (N. Y.) 140.

The rights and liabilities of the parties are to be measured and determined by the lease under which possession was obtained, and neither party can change the terms of the tenancy without the assent of the other.

Furthermore, if the lease was void, and not subsequently

validated, the government, having entered upon and occupied the premises, is to be deemed as having entered under an implied lease, and is bound to make a fair and reasonable compensation for the rent or the use and occupation of the premises.

It has been held by this court that, in the absence of an express contract, or when the express contract is void, the government is liable for the value of the property which it has received and used. *Salomon* v. *United States*, 19 Wall. 17; *United States* v. *Gill*, 20 id. 517.

The Solicitor-General, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Leases, like deeds or other written instruments, must receive a reasonable construction, as derived from the language employed, without the aid of extrinsic evidence beyond what may be necessary to identify the premises and to disclose the circumstances surrounding the transaction when the instrument was executed. *Quackenboss* v. *Lansing*, 6 Johns. (N. Y.) 49; Taylor, Landlord and Tenant, sect. 160, note.

Sufficient appears from the findings of the court below to show that, on the 6th of June, 1873, an indenture of lease was executed by the appellant to the United States, whereby the former, in consideration of the rents, covenants, and agreements in the instrument specified, demised and leased to the United States the premises described in the petition for the term of three years from and after June 5, 1873, with the privileges to the lessees of a renewal of the term for the further period of two years, at and for the annual rent, during the said term and subsequent renewal thereof, of $4,200, payable quarterly on the days specified in the indenture of lease exhibited in the record.

Both sides concede what the lease and record show, that the premises were leased by the United States for the convenience of the Post-Office Department, and that the Postmaster-General took immediate possession of the same, and that the premises have ever since been used for the purposes of his department.

Four other findings of the court below should be noticed in this connection: 1. That the lessor sold and conveyed the

premises to Alexander R. Shepherd and assigned the lease to him, and that he, the assignee, conveyed and assigned the same to the other persons named in the petition. 2. That the premises were used by the United States for the purposes mentioned for the whole period alleged. 3. That the holders of the lease have been paid the whole rent, except for the last year, for which they have been paid nothing. 4. Adequate appropriations were made by Congress authorizing the payments which have been made, but Congress refused to appropriate more than $1,800 for the last year.

Pursuant to those findings, the court below held that the plaintiffs could only recover the sum appropriated, and rendered judgment in their favor for that amount, from which judgment the plaintiffs appealed to this court. Since the appeal was entered here, the appellants assign for error that the court below erred in the construction given to the indenture of lease, and to the two acts of Congress referred to in the findings of fact.

Due appropriation of the sum of $1,800 was made by Congress to pay the rental for the last year; and the court below rendered judgment in favor of the appellants for that sum, which exhausts the appropriation made by Congress for that purpose, the only question for decision being whether the appellants can recover in this case the balance of their claim which has never been appropriated by Congress.

Moneys not appropriated cannot be drawn from the treasury; and it is equally clear that the parties, by the terms of the lease, understood and agreed with each other that the lease was made subject to an appropriation by Congress for the payment of the stipulated rental, and "that no payment shall be made" to the lessor "on account of such rental until such an appropriation shall become available;" that as soon as practicable after such an appropriation shall become available, the arrears of rent then due shall be paid in full, and that payment thereafter shall be made at the times and in the manner stipulated in the indenture of lease.

Prior to that time, Congress had enacted that it shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of the appropriation made by

Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriation; and both parties concur in the proposition that that provision was in full force and operation at the time the indenture of lease under consideration was executed. 16 Stat. 231; Rev. Stat., sect. 3679.

Such contracts or purchases for the future were forbidden by the act of the 2d of March, 1861, unless the same were authorized by law or were made under an appropriation adequate to their fulfilment, except for clothing, subsistence, forage, fuel, quarters, or transportation, in the War or Navy Department; nor could those departments make any such contracts, even for those purposes, beyond the necessities of the current year. 12 Stat. 220; Rev. Stat., sect. 3732.

Forty years earlier, Congress enacted that neither the Secretary of State, or of the Treasury, or of War or Navy Department, should thereafter make any contract other than such as were necessary for the subsistence and clothing of the army and navy, and contracts for the quartermaster's department, except under a law authorizing the same, or under an appropriation adequate to its fulfilment. 3 Stat. 768.

Congress passed an act directing the Secretary of the Navy to cause floating dry-docks to be constructed at three of the national navy-yards, and specified appropriations were made towards constructing the several docks. Proper measures were adopted by the Secretary to ascertain what each structure would cost, from which it appeared that the appropriation for each was greatly insufficient. In view of these facts, the Secretary doubted whether he could lawfully contract to have the work done, and submitted the question to the Attorney-General, who decided that the facts as stated brought the case directly within the prohibition of the act last named, and that the contracts could not lawfully be made. 4 Op. Att'y-Gen. 600.

Cases arise, as there stated, where the authority to contract for the work is expressly given in the appropriation act, and in such cases it is clear, as there admitted, that the power to contract exists even though the price to be paid exceeds the amount appropriated. Examples of the kind are given in that

opinion, to which many more might be added; but when no such authority is given, and nothing is contained in the act appropriating the money from which such an authority may be implied, it is clear that the head of the department cannot involve the government in an obligation to pay any thing in excess of the appropriation.

Argument to show that money cannot be drawn from the treasury before it is appropriated is unnecessary, as the Constitution provides that "no money shall be drawn from the treasury but in consequence of an appropriation made by law;" nor is it necessary to enter into much discussion to show that the act of Congress making it unlawful for the head of a department to involve the government in any contract for the future payment of money in excess of an appropriation is a valid act, and of binding obligation, as such regulations and prohibitions in one form or another have been in operation without question throughout nearly the whole period since the adoption of the Constitution.

Acts of Congress of the kind, it must be admitted, are both valid and salutary in their operation; and it is equally clear that the party who drafted the indenture of lease intended to incorporate into the instrument the substance of the provision which prohibits the head of a department from involving the government in any contract for the future payment of money in excess of the appropriation made for its fulfilment. Well-founded doubt upon that subject cannot be entertained, and the court is of the opinion that the words of the indenture are amply sufficient to effect the object which the person who drafted the instrument intended to accomplish.

Both parties agreed that the indenture was subject to an appropriation to be made by Congress for the payment of the rental, and that no payment should be made to the lessor on account of such rental until such an appropriation should become available. Concede that these stipulations are valid, of which there can be no doubt, and it is clear to a demonstration that the claim of the appellants in excess of the amount allowed by the court below is utterly groundless.

Even suppose that is so, still it is insisted by the appellants that Congress, by subsequent legislation, has committed the

United States to the annual payment of the stipulated rental for the whole term of three years specified in the indenture of lease, and that they are entitled to judgment for the entire rental of the third year which remained unpaid when the suit was commenced, irrespective of the fact that the judgment rendered in their favor by the court below exhausts the whole amount of the money appropriated by Congress for that purpose.

Two annual appropriations were made by Congress, which in the aggregate were sufficient to pay the stipulated rental of the premises for the first two years; and the findings of the court below show that the payments for those two years were duly made, and that nothing more is claimed by the appellants in that regard. Of these, the first was simply an appropriation of the amount required to pay the stipulated annual rental, without any explanation whatever beyond what was necessary to describe the premises leased, from which it is plain that nothing can be inferred from that act to support the theory of the appellants. 18 Stat. 107.

Annexed to the second appropriation, which is for the sum of $4,488.86, is the following proviso, to wit: that hereafter no contract shall be made for the rent of any building, or part of any building in Washington, not now in use by the government, to be used for the purposes of the government, until an appropriation therefor shall have been made in terms by Congress. Id. 144.

Specific appropriations by these two acts were made available to pay the rental of the premises leased for the first two years; but it is clear as any thing in legal decision can be, that they furnish no ground whatever to support the theory that Congress entered into any legal obligation to make such an appropriation for the third year. Instead of that, the inference, if any, to be drawn from the last act tends to negative the appellants' theory, and to show that Congress intended to adhere to the stipulations of the lease, — that it was made subject to an appropriation by Congress for the payment of the rental stipulated, and that no payment should be made to the lessor on account of such rental until such an appropriation should become available.

Unsupported as that theory is by those two appropriation acts, or by any thing else exhibited in the record, it may well be dismissed as destitute of merit, without further consideration.

If the indenture of lease had been for three years without any covenant that it was made subject to an appropriation by Congress, and that no payment on account of rental should be made until such an appropriation became available, it may be that the theory of the appellants, that the contract was for three years as an entire term, might be maintained; or if not, that it might perhaps be held that Congress had ratified the instrument by appropriating money to pay the rental for the first two years. Be that as it may, it is still true that no ratification of the present indenture by any such act would benefit the appellants in that regard, so long as it contains the covenant that no payment of the rental shall be made until an appropriation for the purpose becomes available.

Viewed in that light, as the case should be, a few observations will be sufficient to show that nothing is found in the remaining appropriation act to warrant a judgment in favor of the appellants for any sum beyond what was allowed by the court below.

Eighteen hundred dollars were appropriated by Congress for the third year, several months before the second year expired. Appended to that appropriation is the proviso that the above sum shall not be deemed to be paid on account of any lease for years of said building, which shows conclusively that Congress intended to negative the theory of the appellants that the indenture gave them the right to recover any thing of the United States beyond the sum appropriated by Congress.

Confirmation of that proposition is also derived from a second proviso annexed to the same appropriation, by which it is enacted that at the end of the present fiscal year the Postmaster-General be directed, upon demand of the lessor, to deliver up the possession of the said premises. Id. 367.

Construed as those provisions should be, in view of the subject-matter and the surrounding circumstances, it is clear that Congress intended to give seasonable notice to the lessor of the premises that no more than the sum appropriated would be paid as rental of the same for the third year, and that he might

take possession of the same if he did not see fit to accept the sum appropriated for their use and occupation.

Corresponding views were expressed by the court below, and they held, and well held, that inasmuch as the appellants never demanded the redelivery of the premises, it must be determined that they acquiesced in and assented to the terms of rent offered by Congress for the third year.

Public officers, in such a case, having no funds in the treasury and being without authority to bind the United States, can only agree to pay the stipulated rental, provided the money is appropriated by Congress, and if the lessor, voluntarily and without any misrepresentation or deception, enters into a lease on those terms, he must rely upon the justice of Congress; nor do the circumstances in this case disclose any hardship, as the appellants were seasonably notified that they would not be paid for the third year any greater rent than the sum appropriated for the purpose. *Churchward* v. *The Queen*, Law Rep. 1 Q. B. 199.

For these reasons the court is of the opinion that there is no error in the record.

Judgment affirmed.

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE FIELD, MR. JUSTICE STRONG, and MR. JUSTICE HARLAN, dissenting.

I am of opinion that the two annual appropriations expressly for the sum due for each year's rent, according to the terms of the lease, were recognitions of the validity of that contract which bind the United States, and that the claimant was entitled to recover the same amount for the third year

WIRTH *v.* BRANSON.

1. Where, in ejectment, it appeared that a location of a military bounty land warrant, duly made by A. on the demanded premises, the same being a part of the surveyed public land of the United States, had not been vacated or set aside, — *Held*, that a subsequent entry of them by B. was without authority of law, and that a patent issued to him therefor was void.
2. A party who has complied with all the terms and conditions which entitle him to a patent for a particular tract of public land, acquires a vested interest therein, and is to be regarded as the equitable owner thereof. While his entry or location remains in full force and effect, his rights thereunder will not be defeated by the issue of a patent to another party for the same tract.
3. *Branson* v. *Wirth* (17 Wall. 32) commented on and approved.

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

The facts are stated in the opinion of the court.

Mr. Horatio C. Burchard for the plaintiff in error.

Mr. S. Corning Judd, *contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case was before us at the December Term, 1872. *Branson* v. *Wirth*, 17 Wall. 32. It comes before us now on a different state of facts; the original patent to Giles Egerton, which was not produced on the former trial, being produced on the trial which has taken place since our decision, and purports to be for the southeast quarter of section 18, instead of the northeast quarter in controversy. The question is, whether this fact changes the rights of the parties. A statement of the case, however, is necessary, in order to show the precise questions which are now raised by the record.

The action is ejectment, brought by the plaintiff in error to recover a quarter-section of land in Fulton County, Illinois; namely, the northeast quarter of section 18, township 4 north, range 2 east, from the fourth principal meridian. On the trial, the plaintiff produced a regular patent for the lot, issued by the United States to one Edward F. Leonard, dated Feb. 20, 1868; and a conveyance from Leonard to himself.

The defendants then offered in evidence a duly exemplified copy of a military land-warrant, No. 13,598, bearing date Dec.

3, 1817, issued to one Giles Egerton, a sergeant in the 26th regiment United States infantry, and purporting to be in pursuance of the second section of the act of May 6, 1812, and certifying that said Egerton was entitled to one hundred and sixty acres of land, to be located agreeably to said act on any unlocated parts of the six millions of acres appropriated for that purpose, — it being conceded that the lot in question is part of said military reservation. They then proved by an exemplified record of the General Land-Office at Washington, that the aforesaid land-warrant was located according to law on the tenth day of January, 1818, by Giles Egerton, on the lot in question. The defendants then gave in evidence an exemplified copy from the records of the land-office of a patent from the United States to Giles Egerton, dated Jan. 10, 1818, reciting that he had deposited the said land-warrant, No. 13,598, in the land-office, and granting to him the said lot. On the margin of this certified copy of the patent was written a memorandum, without date, as follows: —

"This patent was issued for the S. E. ¼ instead of the N. E. ¼ as recorded; sent a certificate of that fact to E. B. Clemson, at Lebanon, Ill's, see his letter of 19th May, 1826."

The plaintiff insisted that this memorandum should be read with the record of the patent. In accordance with our decision in the former case, the court refused to allow it to be read. The defendants then offered in evidence a deed from Giles Egerton to Thomas Hart, dated July 29, 1819, for the southeast quarter of section 18, reciting that the same was granted to said Giles in consideration of his military services, as would appear by a patent dated Jan. 10, 1818. The defendants then gave in evidence an exemplified copy of a patent from the United States to one James Durney for the said southeast quarter of section 18, dated Jan. 7, 1818 (three days prior to the date of Egerton's patent), referring to land-warrant No. 5144 as the basis of the grant. The defendants then gave in evidence a tax-title for the lot in question, being a deed from the sheriff of Fulton County, Illinois, to one Timothy Gridley, dated Nov. 14, 1843, under a judgment of June Term, 1840, for the taxes for the year 1839; and also several mesne conveyances from the said

Gridley to the defendants in February, 1849; and they proved that they and their grantors had occupied, cultivated, and had full and undisturbed possession of the land ever since November, 1843, paying the taxes thereon. The plaintiff objected to the reception of this evidence relating to the tax-title and possession.

In rebuttal of this defence the plaintiff gave in evidence a deed for the southeast quarter of section 18 from Thomas Hart to Samuel F. Hunt, dated May 12, 1824; also a deed from Hunt to one Eli B. Clemson, dated April 7, 1825; and from Clemson to one John Shaw, dated Oct. 20, 1829; also an act of Congress, approved March 3, 1827, entitled "An Act for the relief of the legal representatives of Giles Egerton," by which it was enacted that the legal representatives of Giles Egerton, late a sergeant, &c., be authorized to enter with the register of the proper land-office, any unappropriated quarter-section of land in the tract reserved, &c., in lieu of the quarter patented to said Giles on the 10th of January, 1818, which had been previously patented to James Durney. The plaintiff further proved that John Shaw, assignee of Giles Egerton, on the 6th of April, 1838, entered another quarter-section in pursuance of this act. The plaintiff then gave in evidence the original patent, dated Jan. 10, 1818, given to Giles Egerton for the southeast quarter of section 18, purporting to be based on the warrant in his favor, numbered 13,598. All this rebutting evidence of the plaintiff was objected to by the defendants, but was received by the court.

Upon this evidence, each party asked the court for instructions; and the instructions given were, 1st, that the defendants had proved that the land in controversy was granted by the United States to Giles Egerton on the 10th of January, 1818, and that Egerton had conveyed it to Thomas Hart, which constituted an outstanding title that defeated the plaintiff's right of recovery; 2d, that defendants had shown that on the 10th of January, 1818, the land-warrant of Giles Egerton was duly located on and upon the land in controversy, which location was not shown to be vacated or set aside, and therefore said land was not subject to entry by or grant to Leonard in 1868: and a verdict was thereupon given for the defendants.

To these instructions the plaintiff excepted; and whether they were correct is the question now before the court.

Each of these instructions was based upon undisputed facts; and if either was correct in point of law, the defendants had a complete defence, and the judgment must be affirmed.

We are satisfied that the second instruction, at least, correctly expressed the law of the case, and renders the production of the original patent to Egerton entirely immaterial. The land in question was shown to have been located in his favor in due form, under a regular military land-warrant, and no attempt was made to show that this location was ever vacated or set aside. Whilst it was in force, no other could lawfully be made on the same land. A subsequent location, though followed by a patent, would be void. Every thing was done which was required to be done to entitle Egerton to a patent for the land. Being for military bounty, no price was payable therefor. The land became segregated from the public domain, and subject to private ownership, and all the incidents and liabilities thereof.

The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside.

This was laid down as a principle in the case of *Lytle et al.* v. *The State of Arkansas et al.* (9 How. 314), and has ever since been adhered to. See *Stark* v. *Starrs*, 6 Wall. 402. Subsequent cases which have seemed to be in conflict with these have been distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent; such as the payment of the price, the payment of the fees of surveying, or the like. The proper distinctions on the subject are so fully stated in the case of *Stark* v. *Starrs* (*supra*), *Frisbie* v. *Whitney* (9 Wall. 187), *The Yosemite Valley Case* (15 id. 77), *Railway Company* v. *McShane* (22 id. 444), and *Shepley et al.* v.

Cowan et al. (91 U. S. 330), that it would be supererogation to go over the subject again.

But it is said that Giles Egerton and his grantees and all other persons are estopped from any claim under his location of the northeast quarter of section 18, by his accepting a patent for the southeast quarter; and by the further fact, that his grantee, finding the southeast quarter already granted to another party (namely, to James Durney), applied to Congress for leave to make, and actually made, another location in lieu thereof.

This question of estoppel was fully considered by us when the case was formerly here; and the principles which were then laid down are equally decisive of the case as it now stands. The original patent to Egerton had not then been exhibited in evidence, it is true; but we do not see that the case is materially altered by its production.

The difficulty of applying the doctrine of estoppel arises from the fact that there is no privity between the defendants and the parties who procured the act of Congress referred to. The defendants rely, and have a right to rely, on the fact that the lot in question was located in due form of law, and that it thereby became exempt from further location until the first location should be set aside. The fact that a clerical error was made in the patent issued to Egerton; that his grantees, instead of claiming the northeast quarter (as they might have done), claimed the southeast quarter, which had been previously granted to another person; and that they solicited the privilege of locating another lot in lieu thereof, — are all matters with which the defendants have nothing to do. Congress might have given to those parties a dozen lots without affecting the defendants, unless the latter were in some way bound by their acts. We are unable to see how they were or should be bound thereby. They do not claim under those parties, and have no privity with them whatever.

As, however, the question of estoppel was fully discussed in the previous judgment, it is unnecessary to enlarge upon the subject.

Judgment affirmed.

NATIONAL BANK *v.* GRAND LODGE.

An association having issued bonds, some of which were as collateral security in the hands of its creditors, a corporation adopted a resolution whereby it assumed the payment of the bonds, provided that stock was issued to the corporation by the association to the amount of said assumption of payment by said corporation as the said bonds were paid. *Held*, that a holder of the bonds is not in such privity with the corporation, nor has he such interest in the contract between it and the association, as to warrant a suit in his own name to compel the corporation to pay the bonds.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This is an action by the Second National Bank of Saint Louis, Missouri, against the Grand Lodge of Missouri of Free and Accepted Ancient Masons, to compel the payment of certain coupons formerly attached to bonds issued in June, 1869, by the Masonic Hall Association, a corporation existing under the laws of the State of Missouri, in relation to which bonds the Grand Lodge, Oct. 14, 1869, adopted the following resolution: —

"*Resolved*, that this Grand Lodge assume the payment of the two hundred thousand dollars bonds, issued by the Masonic Hall Association, provided that stock is issued to the Grand Lodge by said association to the amount of said assumption of payment by this Grand Lodge, as the said bonds are paid."

The court below instructed the jury, that, independently of the question of the power of the Grand Lodge to pass the resolution, it was no foundation for the present action, and directed a verdict for the defendant.

The jury returned a verdict in accordance with the direction of the court; and judgment having been entered thereon, the plaintiff sued out this writ of error.

Mr. John C. Orrick for the plaintiff in error.
Mr. John D. S. Dryden, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

It is unnecessary to consider the several assignments of error in detail, for there is an insurmountable difficulty in the way of the plaintiff's recovery. The resolution of the Grand Lodge

was but a proposition made to the Masonic Hall Association, and, when accepted, the resolution and acceptance constituted at most only an executory contract *inter partes*. It was a contract made for the benefit of the association and of the Grand Lodge, — made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have in an agreement by which the lodge should undertake to lend money to the association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity

of contract is required. There are some other exceptions recognized, but they are unimportant now. The plaintiff's case is within none of them. Nor is he sole beneficiary of the contract between the association and the Grand Lodge. The contract was made, as we have said, for the benefit of the association, and if enforceable at all, is enforceable by it. That the several bondholders of the association are not in a situation to sue upon it is apparent on its face. Even as between the association and the Grand Lodge, the latter was not bound to pay any thing, except so far as stock of the former was delivered or tendered to it. The promise to pay and the promise to deliver the stock were not independent of each other. They were concurrent and dependent. Of this there can be no doubt. The resolution of the lodge was to assume the payment of the two hundred thousand dollar bonds, issued by the association, "*Provided*, that stock is issued to the Grand Lodge by said association to the amount of said assumption," . . . "as said bonds are paid." Certainly the obligation of the lodge was made contingent upon the issue of the stock, and the consideration for payment of the debt to the bondholders was the receipt of the stock. But the bondholders can neither deliver it nor tender it; nor can they compel the association to deliver it. If they can sue upon the contract, and enforce payment by the Grand Lodge of the bonds, the contract is wholly changed, and the lodge is compelled to pay whether it gets the stock or not. To this it cannot be presumed the lodge would ever have agreed. It is manifest, therefore, that the bondholders of the association are not in such privity with the lodge, and have no such interest in the contract, as to warrant their bringing suit in their own names.

Hence the present action cannot be sustained, and the Circuit Court correctly directed a verdict for the defendant.

Judgment affirmed

POWDER COMPANY v. POWDER WORKS.

1. Reissued letters-patent must be for the same invention as that which formed the subject of the original letters; or for a part thereof when divisional reissues are granted. They must not contain any thing substantially new or different.
2. Original letters for a process will not support reissued letters for a composition, unless it is the result of the process, and the invention of the one involves the invention of the other.
3. Letters granted for certain processes of exploding nitro-glycerine will not support reissued letters for a composition of nitro-glycerine and gunpowder or other substances, even though the original application claimed the invention of the process and the compound. They are distinct inventions.
4. The last clause of sect. 53 of the act of July 8, 1870 (16 Stat. 205; Rev. Stat., sect. 4916), relates merely to the evidence to which the commissioner of patents may resort, but does not increase his power as to the invention for which a reissue may be granted. Whether said clause relates to any other than letters granted for machines is a question not considered in this case.
5. Reissued letters-patent No. 4818, for a new and useful improvement in compounds containing nitro-glycerine, and reissued letters-patent No. 4819, for a new and useful improvement in nitro-glycerine compounds, granted March 19, 1872, to the United States Blasting Oil Company, assignee of Alfred Nobel, are for a different invention from that described or suggested in original letters-patent No. 50,617, granted to said Nobel Oct. 24, 1865, for a new and useful improved substitute for gunpowder, upon which they are founded, and which they are intended, in part, to supersede. They are therefore void.
6. When there is a demurrer to the whole bill, and also to part, and the latter only is sustained, the proper decree is to dismiss so much of the bill as seeks relief in reference to the matters adjudged to be bad, overrule the demurrer to the residue, and direct the defendant to answer thereto.

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

This is an appeal from a decree dismissing, upon demurrer, a bill filed by the Giant Powder Company against the California Powder Works and others, charging them with the infringement of three certain letters-patent belonging to the complainant, and praying for an injunction and a decree for damages. These letters, for certain alleged inventions of one Alfred Nobel, of Hamburg, in Germany, relating to the use of nitro-glycerine in the manufacture of dynamite and other explosive compounds, are all reissues; two of them bearing date the nineteenth day of March, 1872, and numbered re-

spectively 4818 and 4819; and the third bearing date the seventeenth day of March, 1874, and numbered 5799. No. 4818 is for the mixture of gunpowder with nitro-glycerine; No. 4819 is for the mixture of rocket powder with nitro glycerine; and No. 5799 is for a mixture of nitro-glycerine with porous or absorbent substances, forming what is called dynamite, or giant powder. The bill sets out the substance of the original and intermediate letters as well as those sued on, and of some of them makes *profert*. A consent order was made in the cause, that the complainant should file, as parts of the bill, copies of the several letters mentioned and described therein, of which *profert* was so made. The bill also sets forth by way of schedule a copy of the original application of Nobel filed in the Patent Office on the sixteenth day of September, 1865.

From the statements of the bill, and the documents thus annexed to and made part thereof, it appears that Alfred Nobel, on the day last aforesaid, by his attorney, filed in the Patent Office a paper describing certain alleged discoveries and inventions made by him in reference to the use of nitro-glycerine as an explosive agent and as a component in explosive compounds. Having in this document referred to the well-known property of nitro-glycerine, and the nitrates of ethyl and methyl, nitro-mannite, &c., whereby they cannot be exploded in open space by the application of fire, he proceeds to point out how he succeeds in effecting their explosion. He says: —

"A chief point of my invention consists in overcoming this difficulty. According as nitro-glycerine is to be used for fire-arms or for blasting, I adopt two different methods for promoting its explosion, viz.: —

"1*st Method.* By mixing it with gunpowder, gun-cotton, or any other substance developing a rapid heat, nitro-glycerine being an oil, fills the pores of gunpowder, and is heated by the latter to the degree of its explosion. Gunpowder treated in this way can take up from ten to fifty per cent of nitro-glycerine, and develops a greater power with a lesser quickness of explosion. Where the only object in view is to reduce the quickness of explosion of gunpowder, I mix it with or make it absorb common non-explosive oil from one to ten per cent of its weight.

"2*d Method.* When nitro-glycerine is to be used for blasting, where quickness of explosion is of great importance, I submit it to the most rapid source of heat known; viz., that developed by pressure. To effect this, I make use of the pressure developed by heating a minute portion of nitro-glycerine, or by the detonation of any other violently exploding substance. Nitro-glycerine being a liquid, if it cannot escape, as for instance in a bore, receives and propagates the initial pressure through its whole mass, and is by that pressure instantaneously heated; hence the first impulse of explosion decomposes the rest. There are many means of obtaining this impulse of explosion, such as —

"1. When nitro-glycerine in tubes is surrounded by gunpowder, or *vice versa.*

"2. By the spark or heat developed by a strong electric current when the nitro-glycerine is enclosed on all sides, so as not to afford an escape to the gas developed.

"3. By a capsule," &c., six different methods of producing explosion of nitro-glycerine being pointed out, accompanied by drawings for showing the manner in which they were employed.

He then claims as his invention: —

1. The use of gunpowder or similar substances, when mixed with nitro-glycerine or analogous substances.

2. The reduction of the quickness of explosion of gunpowder by mixing it with oily explosive, or non-explosive substances.

3. The effecting the detonation of nitro-glycerine or analogous substances (which can be ignited without exploding) by the heat developed by pressure, promoting an impulse of explosion which decomposes the rest.

4. The exclusive use of nitro-glycerine and the class of substances described above, or mixtures of such as far as their application may be classed under any of the methods indicated in this memorandum.

He then describes a new method of preparing or manufacturing nitro-glycerine, and claims to be the inventor of that.

The bill further states, that after filing the above application Nobel's agent (one Howson) filed certain amendments thereto, striking out a portion of the original; and on the twenty-fourth day of October, 1865, upon such amended application,

letters-patent were granted to Nobel for the term of seventeen years, numbered 50,617; and *profert* is made of the same in the bill, and they are set out in the record.

By reference to the specification of these letters, which are accompanied with drawings, they appear to be for a process, to wit, the process of using nitro-glycerine, or its equivalent, as a substitute for gunpowder, by exploding it in the manner pointed out. Having explained the nature of nitro-glycerine, nitrate of ethyl, methyl, and nitro-mannite, as in the original paper, the specification then points out how nitro-glycerine may be exploded after being confined in a hole drilled in the rock when to be used for blasting, or in a case when to be used for other purposes. Four distinct modes of doing this are enumerated: *first*, by exploding gunpowder in contact with the liquid; *secondly*, by passing an electric spark through a fine wire immersed in it; *thirdly*, by inserting in it a thin case containing lime-water; and, *fourthly*, by a fuse. The drawings show the manner in which the wire is arranged for passing an electric spark through the fluid.

The bill then states that on the 13th of April, 1869, the above patent was surrendered, and four new divisional patents were issued for the same inventions for which the original patent was granted, numbered respectively reissues 3377, 3378, 3379, 3380; the first, No. 3377, being for the method of exploding nitro-glycerine by detonation; the second, No. 3378, being for the application and use of percussion caps and other exploders to create the detonation necessary to explode the nitro-glycerine; the third, No. 3379, being for the improved mode of manufacturing nitro-glycerine; and the fourth, No. 3380, being (as stated in the bill) for the new explosive compounds invented by Nobel, viz. the mixture of gunpowder and nitro-glycerine, and the mixture of gun-cotton and nitro-glycerine, and the mixture of rocket powder and nitro-glycerine.

These four reissued patents are not referred to by way of *profert* in the bill; but the above description of their purport is sufficient for the purpose of understanding their character.

The bill then states that on the nineteenth day of March, 1872, the said reissue 3380 was surrendered, and two new divisional patents for the same inventions were issued in lieu

thereof, numbered respectively reissues 4818 and 4819; the former being for the mixture of gunpowder with nitro-glycerine, and the latter for the mixture of rocket powder with nitro glycerine; and each patent securing to the patentee the exclusive right of making, using, and vending the explosive compound therein described respectively. These are two of the patents on which the suit is brought; and *profert* is made of them in the bill, and they are set out in the record. By reference thereto, it appears that in reissue 4818 the patentee claims, —

1. The utilization, as explosives, of nitro-glycerine and the analogous liquid substances before mentioned (nitrate of ethyl, &c.), by combining therewith gunpowder, gun-cotton, or other similar substances developing a rapid heat or combustion, substantially as described.

2. The combination of gunpowder with nitro-glycerine, substantially as and for the purposes described.

3. The combination of gun-cotton with nitro-glycerine, substantially, &c.

In reissue 4819 the claim is for the mixture of nitro-glycerine and rocket powder.

The remainder of the bill is taken up in setting forth the other patent sued on, and various assignments by which the complainant deduces its title to the patents, with the allegation of infringement and prayer for relief.

To this bill the defendant demurred, as well to the whole bill for want of equity as to the relief sought in respect of the different patents taken separately; also for multifariousness, misjoinder of defendants, &c.

The demurrer having been sustained and a final decree entered dismissing the bill, the Giant Powder Company brought the case here.

Mr. M. A. Wheaton and *Mr. William Bakewell* for the appellant.

The vital question in this case is, Did the commissioner, when granting the reissues, have the right to look into Nobel's original specification on file, for the purpose of ascertaining what those inventions were, or was he confined to the amended specification which was issued with the letters-patent?

The Circuit Court decided that he could only look to the

amended specification. For this reason they decided reissues Nos. 4818 and 4819 to be void, and sustained the demurrer.

If, therefore, he had a right to look at the original specification, the decree must be reversed.

Both upon authority and reason, he had the right, and was bound in duty, to look as well to the original as to the amended specification.

Although most of the adjudications on this point were made under the act of 1836, they are equally applicable to that of 1870. The former did not say what should be used as evidence to prove the original invention on an application for a reissue.

As a matter of law and also of fact, the original specification, drawings, and model are never issued with the patent. They remain on file; copies only are issued.

There are many cases in which the term "*original* specification" is used, instead of naming that which issues with the patent. The correct rule is laid down in the case of *Collar Company* v. *Van Dusen* (23 Wall. 557, 558), in the following language: "Repeated decisions also have established the rule that parol testimony is not admissible in an application for a reissued patent, so as to enlarge the scope and effect of the invention beyond what was described, suggested, or substantially indicated in the original specification, drawings, or Patent-Office model, as the purpose of a surrender and reissue is not to introduce new features, ingredients, or devices, but to render effectual the actual invention for which the original patent should have been granted."

This is the whole point in this case; and it seems too plain for argument that *Seymour* v. *Osborne* (11 Wall. 516) holds that the original specification may be examined as claimed by us.

Sect. 5 of the act of 1837, and sect. 53 of the act of 1870, permitted several patents to issue for "distinct and separate parts of the thing patented."

The words "thing patented" here used doubtless refer to the thing patented by the reissues.

Nobel's whole inventions were made in utilizing nitro-glycerine. One of them was the method of exploding it by mixing it with well-known explosives which explode by the application of fire. One distinct and separate part of it was mixing

nitro-glycerine with gunpowder, another with gun-cotton, another with rocket powder, and so on. Every divisional patent issued for each one of these mixtures was valid, and reissue No. 4819 was, of course, one of them.

The law allowed divisional reissues. Sect. 5, act of March 3, 1837; act of 1870, sect. 53; *Goodyear* v. *Providence Rubber Co.*, 2 Fish. 499; s. c. 9 Wall. 788; *Goodyear* v. *Wait*, 3 Fish. 242; *Pennsylvania Salt Co.* v. *Thomas*, 5 id. 148; *Bennett* v. *Fowler*, 8 Wall. 445.

The act of 1870, sect. 53, re-enacted by sect. 4916 of the Revised Statutes, expressly provides for the introduction of new matter into the reissue of letters-patent for a process. When it was passed, there were well known, and had long been known, two classes of patents, — one with models and drawings, and the other without. The last part of the section refers to the class which includes those for processes, and not to the former class; that is, patents for machines.

As new matter was proper to be introduced into the two reissues Nos. 4818 and 4819, the court below erred in sustaining the demurrer.

The grant of the reissue is *prima facie* evidence that the commissioner did his duty, and that the reissues were granted on proof satisfactory to him that whatever new matter was introduced into them was a part of the original invention, omitted by inadvertence, accident, or mistake from the specification attached to the original patent.

In the present case, the matter omitted from the original patent, and which forms the subject-matter of reissue No. 4818, is found in the original specification on the records of the office. Furthermore, neither model nor drawing of any thing embraced in that reissue was filed, for the reason that the invention is not, in that way, susceptible of illustration, being not a machine, but a combination of nitro-glycerine with gunpowder, gun-cotton, or similar substances.

The court below having sustained the demurrer so far only as reissues Nos. 4818 and 4819 are concerned, it erred in dismissing the whole bill. 1 Daniell, Ch. Pr., p. 543, sect. 1, p. 589, sect. 3, p. 598, sect. 5; *Livingston* v. *Story*, 9 Pet. 632.

The point on which the court below held reissues Nos. 4818

and 4819 to be invalid was that these reissues were not for the same invention as the original patent.

This is a question which should not have been decided without affording the parties an opportunity to offer evidence for the consideration of the court. *Seymour* v. *Osborne*, *supra*, *Battin* v. *Taggart*, 17 How. 74–85.

It is distinctly alleged in the bill that Nobel was the original and first inventor of the subject-matter of the several patents in suit; that the patents were duly granted; that the surrenders and reissues were duly made; that the reissues were for the same inventions; that the title was in the complainant; and that the defendants had infringed each of said patents. These facts being admitted by the demurrer are sufficient to establish the complainant's equity, and to entitle it to a decree. Welford, Eq. Pl., pp. 261–265; *Kay* v. *Marshall*, 2 Webs. P. C. 39; 1 Myl. & Cr. 373; *Westhead* v. *Keene*, 1 Beav. 287.

If any of these facts are denied by the demurrer, it is no longer a demurrer, but a plea by demurrer, which is bad, and therefore should have been overruled.

Mr. George Harding, *contra*.

MR. JUSTICE BRADLEY, after stating the facts, delivered the opinion of the court.

The main defence relied on by the counsel of the defence, on the demurrer, is, that it is apparent that the reissued patents numbered 4818 and 4819 are not for the same invention as that which was described in the original letters-patent numbered 50,617, for a portion of which they purport to be reissues.

It is apparent, they say, that the original patent was for a process, to wit, a mode, or different modes, of exploding nitro-glycerine; whereas the reissues are for manufactured compounds or mixtures, namely, mixtures of nitro-glycerine with gunpowder, gun-cotton, and rocket powder. It is contended that a process and a mixture are the subjects of different inventions; that a patent granted for one cannot, by its surrender, be the basis of a reissued patent for the other. If this position is sound, and the matter can be examined on demurrer, it was not error to dismiss the bill as to all relief sought in reference to the two reissues in question.

We have no doubt that the question may be examined on demurrer; for the bill sets forth in full both the original patent and the reissues, so that they may be examined and compared together. If it were a case in which the identity or non-identity of the inventions in the original and reissued patents was a complicated question, the court might require the defendants to answer, in order to have the benefit of evidence on the subject. But in ordinary cases, the court itself will compare them. Whether a patent is for a process or a composition is especially a question of construction, and is for the court to decide; and whether a patent for a process is the same invention as a patent for a composition is certainly a mere question of law. We feel no hesitation, therefore, in approaching the consideration of the questions presented by the pleadings.

Upon due examination of the patents in question, it cannot well be doubted that the original patent, No. 50,617, granted on the 24th of October, 1865, was for a process, or rather for different processes and appliances for producing the explosion of nitro-glycerine; nor can it be doubted that the reissued patents, Nos. 4818 and 4819, granted in 1872, are for compounds and mixtures; in other words, for compositions of matter. In the specification of the original patent, the inventor says: "My invention consists in the use as a substitute for gunpowder of nitro-glycerine, or its equivalent, substantially in the manner described hereafter, so that the said liquid, which, when exposed, cannot be wholly decomposed and exploded, shall by confinement be subjected to heat and pressure, by which its total and immediate decomposition and explosion is effected." He then proceeds: "In order to enable others to make and use my invention, I will now proceed to describe the method of carrying it into effect. On reference to the accompanying drawing which forms a part of this specification, Fig. 1 is a view, partly in section, of one apparatus by means of which I render nitro-glycerine, or its equivalent, available as a substitute for gunpowder; and Fig. 2 is a plan view. There is a class of explosive substances comprising nitro-glycerine, the nitrates of ethyl and methyl, and nitro-mannite, which have long been known, but have never been practically applied as explosive

agents." He then describes the behavior of these substances, when, being in an unconfined state, they are subjected to appliances of flame and contusion, no explosion being thereby produced; and then shows how, when they are in a confined state, their complete explosion may be produced by the processes which he describes; adding, "The chief point of my invention consists in overcoming the difficulty of suddenly igniting the entire mass of the materials mentioned, so that the same can be practically used as explosive agents." He then shows how nitro-glycerine may be best prepared and manufactured for the purposes of use as an explosive agent. Then he describes the four several methods or appliances for producing the explosion desired, which have already been referred to, concluding with this formal claim: "I claim as my invention, and desire to secure by letters-patent, the use of nitro-glycerine, or its equivalent, substantially in the manner and for the purposes described." The only equivalents of nitro-glycerine referred to or pointed at in the specification are the cognate substances of nitrate of ethyl and methyl and nitro-mannite. It is to be presumed that these are referred to when the patentee uses the expression, "nitro-glycerine or its equivalent."

Now, in all this specification there is not a hint of any new mixture or new composition of matter having been invented by the patentee. The only thing that approaches it is the method which he describes, of preparing the pure nitro-glycerine. The whole invention set forth, described, and claimed consists of methods or processes of exploding the substance so as to render it a useful exploding agent. The technical form of the claim, it is true, is in appearance a little broader, being for the use (generally) of nitro-glycerine as an exploding agent; but these general terms are properly limited by those which follow, namely, "substantially in the manner and for the purposes described." If any other method of exploding nitro-glycerine should be discovered different from the processes invented and described by the patentee, it could be employed without infringing his patent. According to our view, therefore, the patent is for those processes and methods as applied to the use of nitro-glycerine, or its equivalent, as an explosive agent.

Inasmuch as the reissued patents in question, numbered 4818 and 4819, are for compounds of nitro-glycerine with various other substances, it is impossible not to say that they are for an entirely different invention from that secured, or attempted to be secured, by the original patent.

If the patent had been not for the mode or process of exploding nitro-glycerine, but for the process of compounding nitro-glycerine with gunpowder and other substances, inadvertently omitting to claim the exclusive use of the substances so produced, the case would have been one of very different consideration. That was the case with Goodyear's patent, which was issued in 1844, and claimed only the process of vulcanizing india-rubber. In 1849 it was surrendered, and two new patents issued in lieu thereof, — one for the process, and the other for the composition. In 1852, the validity of these reissues came up for consideration in the third circuit, in the case of *Goodyear* v. *Day*, which was argued by Mr. Choate, Mr. Webster, and other eminent counsel. Mr. Justice Grier disposed of the objections as follows: "We now come to the objections which have been made to the reissued or amended patents of 1849. The first objection is that the patents of 1844 and 1849 are not for the same invention. This objection is not founded in fact. Both patents are for precisely the same invention or discovery. They both describe, in nearly the same words, the best mode of manufacturing india-rubber, by exposing it to a high degree of heat in connection with sulphur and white lead; by which treatment the substance is endowed with new and valuable qualities which it did not possess before. The discovery is the same; the mode of manufacturing the compound is the same. The first patent had set forth the nature and extent of the invention defectively. There is no reason to doubt the *bona fides* and propriety of the reissue. It is apparent on the face of the papers, even if the action of the commissioner on that point was not conclusive." Again, he adds: "The fourth objection is 'that the latter patent claims more than was contained in the original.' If the latter patent is for precisely the same invention, art, or discovery as that described in the first, the objection that it claims more is a mistake of fact. If the last patent differs from the first only in stating more clearly

and definitely the real principles of the invention, so that those who wish to pirate it may not be allowed to escape with impunity through the imperfection of the language used in the first, there has arisen one of the cases for which it was the intention of the act of Congress to provide, and the objection is worthless in point of law." This case is partially reported in 2 Wall. Jr. 283, but the opinion of Mr. Justice Grier is not stated in full. In another case, arising on the original patent of Goodyear, reported in 2 Wall. Jr. 356, Mr. Justice Grier used this expression: "The product and the process constitute one discovery." The product in Goodyear's invention was the direct result of the process. They were parts of one invention, and, except in imagination, could no more be separated from each other than the two sides of a sheet of paper, or than a shadow from the body that produces it.

The present case is entirely different. The processes which the patentee described as his invention in the original patent, No. 50,617, had no connection with the compounds or mixtures which are patented in the reissued patents. They were not processes for making those compounds, and in describing them the compounds were not mentioned. The invention of the one did not involve the invention of the other. The two inventions might have been made by different persons, and at different times.

We think, therefore, that the conclusion is irresistible, that the two reissued patents, numbered 4818 and 4819, are for a different invention from that described or suggested in the original patent No. 50,617, upon which they are founded, and which they are intended, in part, to supersede.

These reissues being granted in 1872, were subject to the law as it then stood, being the act of July 8, 1870, the fifty-third section of which (reproduced in sect. 4916 of the Revised Statutes) relates to the matter in question. It seems to us impossible to read this section carefully without coming to the conclusion that a reissue can only be granted for the same invention which formed the subject of the original patent of which it is a reissue. The express words of the act are, "a new patent for the same invention;" and these words are copied from the act of 1836, which in this respect was substantially

the same as the act of 1870. The specification may be amended so as to make it more clear and distinct; the claim may be modified so as to make it more conformable to the exact rights of the patentee; but the invention must be the same. So particular is the law on this subject, that it is declared that "no new matter shall be introduced into the specification." This prohibition is general, relating to all patents; and by "new matter" we suppose to be meant new substantive matter, such as would have the effect of changing the invention, or of introducing what might be the subject of another application for a patent. The danger to be provided against was the temptation to amend a patent so as to cover improvements which might have come into use, or might have been invented by others, after its issue. The legislature was willing to concede to the patentee the right to amend his specification so as fully to describe and claim the very invention attempted to be secured by his original patent, and which was not fully secured thereby, in consequence of inadvertence, accident, or mistake; but was not willing to give him the right to patch up his patent by the addition of other inventions, which, though they might be his, had not been applied for by him, or, if applied for, had been abandoned or waived. For such inventions, he is required to make a new application, subject to such rights as the public and other inventors may have acquired in the mean time. This, we think, is what the present statute means, and what, indeed, was the law before its enactment under the previous act of 1836. If decisions can be found which present it in any different aspect, we cannot admit them to be correct expositions of the law.

The counsel for the complainant refers us to, and places special reliance on, the last clause of sect. 53 of the act of 1870, where it is said: "But where there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake." But this clause relates only to the evidence which may be employed by the commissioner in ascertaining the defects of the specification. It does not authorize him to grant a reissue for a different

invention, or to determine that one invention is the same as another and different one; or that two inventions essentially distinct constitute but one. In this case, it is not necessary for us to decide, and we express no opinion as to the precise meaning and extent of the final clause of sect. 53, to which we have referred; as, whether it relates to all patents, or only to patents for machines. But as it relates to the matter of evidence alone, it cannot enlarge the power of the commissioner in reference to the invention for which a reissue may be granted. That power is restricted, by the general terms of the section, to the same invention which was originally patented. Conceding that the commissioner had a right, in this case, by virtue of the clause in question, to examine the original application of Nobel, as it stood before it was amended, in order to ascertain what his invention really was, it would only show that he described, in that paper, two different inventions, — one for a composition, and another for a process distinct from the composition. It would not prove that the two inventions were the same; and it would not authorize the commissioner, on a reissue, to add the one to the other, as a part thereof.

The complainant insists, however, that the present reissues are for the same invention which was patented in the reissued patent, No. 3380, granted in April, 1869; and that the latter reissue was granted before the passage of the act of 1870. But this fact does not help the complainant. The law relating to reissues was substantially the same under the act of 1836 as it is under the act of 1870. As before remarked, the former act as well as the latter restricted the power of the commissioner, in granting reissues, to "the same invention" which was the subject of the original patent. It has been repeatedly so held by this court, as the following cases will show: *Burr* v. *Duryee*, 1 Wall. 531; *Seymour* v. *Osborne*, 11 id. 516; *Gill* v. *Wells*, 22 id. 1; *The Wood Paper Patent*, 23 id. 566.

Since, therefore, the reissues in question are not for the same invention for which the original patent was granted, it follows that they are void; and the bill must be dismissed so far as relates to the said reissued patents numbered respectively 4818 and 4819.

As nothing is shown, however, in the statements of the bill, which affects the validity of the third patent sued on, the bill should not have been dismissed as a whole, but only as to the said reissues 4818 and 4819. For this error the decree must be reversed, and the cause remanded with directions to enter a decree in conformity with this opinion, dismissing the bill as to all relief sought therein in respect of, or in reference to or founded upon, the said reissued patents numbered respectively 4818 and 4819, and, as to the residue of the bill, overruling the demurrer and directing the defendants to answer in accordance with the rules and practice of the court.

So ordered.

CITIZENS' BANK *v.* BOARD OF LIQUIDATION.

1. Where the record shows that a Federal question was not necessarily involved, this court has no jurisdiction to review the decision of the Supreme Court of Louisiana, that the act passed Jan. 24, 1874, does not authorize the funding board of that State to fund the bonds of a railroad company, whereon the State is liable only as a guarantor.
2. *Brown* v. *Atwell, Administrator* (92 U. S. 327), cited and approved.

ERROR to the Supreme Court of the State of Louisiana.

The facts are stated in the opinion of the court.

Mr. Armand Pitot and *Mr. Edward Janin* for the plaintiff in error.

Mr. John Q. A. Fellows, contra.

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

This was an application for a *mandamus* to compel the funding board of Louisiana to fund, under the funding act of that State, passed Jan. 24, 1874, $60,000 and accrued interest of the second-mortgage bonds of the New Orleans, Mobile, and Chattanooga Railroad Company, guaranteed by the State under the alleged authority of act No. 26, approved Feb. 16, 1869. The averment in the petition is "that the refusal of the board to fund the bonds and coupons presented by the petitioners is

in violation of the compact entered into between the people of the State of Louisiana and the bondholders."

In the answer, several defences were set up, but in none was any Federal question in terms presented. In one, which was separate and distinct from the others, and in no manner connected with them, it was alleged "that the bonds presented in this case, and the funding of which is claimed, are not included among the obligations permitted to be funded by the act, . . . and are not the bonds of this State." This defence was sustained by the Supreme Court of the State because the act only permitted the funding of "valid outstanding bonds of the State, and valid warrants drawn previous to the passage of the act," and the bonds held by the relator were not bonds of the State, but bonds of the railroad company, on which the State was liable only as guarantor.

No Federal question was involved in this decision, but it determined the cause. The relator had no contract which the funding act impaired. The State being in debt, passed the funding law. The relator, claiming the benefit of the privileges conferred by the law, asked for a *mandamus* to compel the State officers to issue funding bonds in exchange for the obligations the relator held and offered to surrender. This was refused, because, in the opinion of the court, the act did not provide for that class of State obligations. Over this decision we have no control. In fact, being the construction of a State statute by a State court, it controls us. Under these circumstances, if we should take jurisdiction we would be compelled to affirm the judgment, whether we found any error in respect to questions arising under the other defences or not. This defence is complete in itself, and sufficient to support the judgment we are asked to review.

To give us jurisdiction under sect. 709, Rev. Stat., it is not only necessary that some one of the questions mentioned in the section should exist on the record, but that the decision was controlling in the disposition of the cause. *Williams* v. *Oliver*, 12 How. 125; *Klinger* v. *State of Missouri*, 13 Wall. 257. As the State court has decided as a question of State law that even if the guaranties of the bond are valid obligations of the State, they are not fundable under the act, it matters not in

this suit whether the decision against their validity was erroneous or not. The judgment would have been the same whether the guaranties were held to be valid or invalid. No Federal question having been specially raised by the pleadings, and the record showing clearly on its face that the decision of such a question was not necessarily involved, we will not go through the opinion of the court, even in Louisiana, to ascertain whether one was in fact decided. In no event could it have affected the determination of the cause. There is nothing in *Murdock* v. *City of Memphis* (20 Wall. 590) to the contrary of this. In that case the decision of the Federal question raised was necessary. The judgment as given could not have been rendered without passing upon it. We have often since that case reaffirmed the old rule. *Moore* v. *Mississippi*, 21 Wall. 636; *Brown* v. *Atwell, Administrator*, 92 U. S. 327. In the last case, citing numerous authorities, we say, "We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for a record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it actually was decided, or that the judgment as rendered could not have been given without deciding it."

It follows that the writ must be dismissed for want of jurisdiction; and it is

So ordered.

DUMONT v. UNITED STATES.

1. A bond given at the port of New York, when certain goods were imported, was conditioned that the importer should pay $425, — that being the estimated duty based on the invoice, — *or* the amount which should be subsequently ascertained to be due, *or* that he should within three years withdraw and export them, *or* transport them to a Pacific port. That sum was paid on the withdrawal of the goods, but it was less than the duty which was afterwards regularly liquidated. A suit was brought against the surety for the balance. *Held*, that he was not liable therefor.
2. The importer is liable for the duty; but the bond is discharged as to the surety by the performance of one of its alternative conditions.
3. "Or" is never construed to mean "and," when the evident intent of the parties would be thereby defeated.

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. W. Willoughby for the plaintiff in error.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an action against the surety upon an ordinary bond for duties, given at the time of importation, upon the estimated amount, before the duties were regularly liquidated. The estimated duties, based on the invoice shown by the importer, were $425; and the condition of the bond was, that within one year the importer should pay to the collector $425, *or* the amount of the duties which should be ascertained to be due, *or* should within three years withdraw and export them, or transport them to a Pacific port. About a month after importation the goods were withdrawn by the importer, upon payment of the sum named in the bond; but the duties were not regularly liquidated until about a month later. The liquidation showed that the duties payable were $676.75, instead of the $425 which had been paid. This suit was brought to recover the balance. The surety pleaded payment of the sum named in the bond, as a fulfilment of one of the alternate conditions. The counsel for the government contended that the condition ought to be construed not alternatively, but as intended to secure the payment at all events of the true amount of duties, unless the goods should be exported or sent to the Pacific coast within three years. It was shown that the bond was in the form long in use, and had been approved by the Secretary of the Treasury; and it was undoubtedly intended to cover the full amount of the duties, whether the original estimate reached that amount or not. The word "or" is frequently construed to mean "and," and *vice versa*, in order to carry out the evident intent of the parties. But such a change cannot be made in this case; for if we make "or" to read "and," the condition would require the importer to pay the actual duties in addition to the $425. Besides, there are two other alternate conditions dependent upon the same word "or;" namely, that the bond should be void if the goods should

be re-exported, or if they should be transported to the Pacific coast, within three years. This shows that the word "or" was intended to have its ordinary sense. To make the condition mean what the counsel for the government contends it means, would require, in place of the word "or," the addition of several words, so as to make it read, "$425, *and any additional* amount of duties to be ascertained to be due and owing on the goods." The court would not have been justified, in this case, in making such a change and addition, by way of construction.

Of course the importer is liable, without reference to the bond, for the entire amount of duties. But the surety is only bound by the condition of the bond. That is all the obligation which he assumes; and as it is clear, in this case, that the condition is in the alternative, the bond was discharged by the performance of one of the alternative conditions.

The point was sufficiently raised on the trial to be reviewed here. It is true, the request for a nonsuit was not sufficient; because the court was not bound to grant a nonsuit. And it is also true that the defendant neglected to ask the court to direct a finding for the defendant. But on the proofs made the judge assumed to direct a verdict for the plaintiff; and to this direction the defendant excepted. We think this is sufficient to enable us to take cognizance of the defence.

As this is the only point made in the assignment of errors, we make no observation upon the other points raised at the trial.

The judgment of the Circuit Court will be reversed, and the cause remanded for a new trial; and it is

So ordered.

REYNOLDS v. UNITED STATES.

1. Sect. 808 of the Revised Statutes, providing for impanelling grand juries and prescribing the number of which they shall consist, applies only to the Circuit and the District Courts of the United States. An indictment for bigamy under sect. 5352 may, therefore, be found in a district court of Utah, by a grand jury of fifteen persons, impanelled pursuant to the laws of that Territory.

2. A petit juror in a criminal case testified on his *voire dire* that he believed that he had formed an opinion, although not upon evidence produced in court, as to the guilt or innocence of the prisoner; but that he had not expressed it, and did not think that it would influence his verdict. He was thereupon challenged by the prisoner for cause. The court overruled the challenge. *Held*, that its action was not erroneous.

3. Where it is apparent from the record that the challenge of a petit juror, if it had been made by the United States for favor, should have been sustained, the judgment against the prisoner will not be reversed, simply because the challenge was in form for cause.

4. Although the Constitution declares that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him, yet if they are absent by his procurement, or when enough has been proved to cast upon him the burden of showing, and he, having full opportunity therefor, fails to show, that he has not been instrumental in concealing them or in keeping them away, he is in no condition to assert that his constitutional right has been violated by allowing competent evidence of the testimony which they gave on a previous trial between the United States and him upon the same issue. Such evidence is admissible.

5. Said sect. 5352 is in all respects constitutional and valid.

6. The scope and meaning of the first article of the amendments to the Constitution discussed.

7. A party's religious belief cannot be accepted as a justification for his committing an overt act, made criminal by the law of the land. Where, therefore, the prisoner, knowing that his wife was living, married again in Utah, and, when indicted and tried therefor, set up that the church whereto he belonged enjoined upon its male members to practise polygamy, and that he, with the sanction of the recognized authorities of the church, and by a ceremony performed pursuant to its doctrines, did marry again, — *Held*, that the court properly refused to charge the jury that he was entitled to an acquittal, although they should find that he had contracted such second marriage pursuant to, and in conformity with, what he believed at the time to be a religious duty.

8. The court told the jury to "consider what are to be the consequences to the innocent victims of this delusion [the doctrine of polygamy]. As this contest goes on they multiply, and there are pure-minded women and there are innocent children, — innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land." *Held*, that the charge was not improper.

ERROR to the Supreme Court of the Territory of Utah.

This is an indictment found in the District Court for the third judicial district of the Territory of Utah, charging George Reynolds with bigamy, in violation of sect. 5352 of the Revised Statutes, which, omitting its exceptions, is as follows: --

"Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years."

The prisoner pleaded in abatement that the indictment was not found by a legal grand jury, because fifteen persons, and no more, were impanelled and sworn to serve as a grand jury at the term of the court during which the indictment was found, whereas sect. 808 of the Revised Statutes of the United States enacts that every grand jury impanelled before any District or Circuit Court shall consist of not less than sixteen persons.

An act of the legislature of Utah of Feb. 18, 1870, provides that the court shall impanel fifteen men to serve as a grand jury. Compiled Laws of Utah, ed. of 1876, p. 357, sect. 4.

The court overruled the plea, on the ground that the territorial enactment governed.

The prisoner then pleaded not guilty. Several jurors were examined on their *voire dire* by the district attorney. Among them was Eli Ransohoff, who, in answer to the question, "Have you formed or expressed an opinion as to the guilt or innocence of the prisoner at the bar?" said, "I have expressed an opinion by reading the papers with the reports of the trial."

Q. "Would that opinion influence your verdict in hearing the evidence?"

A. "I don't think it would."

By the defendant: "You stated that you had formed some opinion by reading the reports of the previous trial?"

A. "Yes."

Q. "Is that an impression which still remains upon your mind?"

A. "No; I don't think it does: I only glanced over it, as everybody else does."

Q. "Do you think you could try the case wholly uninfluenced by any thing?"

A. "Yes."

Charles Read, called as a juror, was asked by the district attorney, "Have you formed or expressed any opinion as to the guilt or innocence of this charge?"

A. "I believe I have formed an opinion."

By the court: "Have you formed and expressed an opinion?"

A. "No, sir; I believe not."

Q. "You say you have formed an opinion?"

A. "I have."

Q. "Is that based upon evidence?"

A. "Nothing produced in court."

Q. "Would that opinion influence your verdict?"

A. "I don't think it would."

By defendant: "I understood you to say that you had formed an opinion, but not expressed it."

A. "I don't know that I have expressed an opinion: I have formed one."

Q. "Do you now entertain that opinion?"

A. "I do."

The defendant challenged each of these jurors for cause. The court overruled the challenge, and permitted them to be sworn. The defendant excepted.

The court also, when Homer Brown was called as a juror, allowed the district attorney to ask him the following questions: *Q.* "Are you living in polygamy?" *A.* "I would rather not answer that." The court instructed the witness that he must answer the question, unless it would criminate him. By the district attorney: "You understand the conditions upon which you refuse?" *A.* "Yes, sir." — *Q.* "Have you such an opinion that you could not find a verdict for the commission of that crime?" *A.* "I have no opinion on it in this particular case. I think under the evidence and the law I could render a verdict accordingly." Whereupon the United States challenged the said Brown for favor, which challenge was sustained by the court, and the defendant excepted.

John W. Snell, also a juror, was asked by the district attorney on *voire dire:* *Q.* "Are you living in polygamy?" *A.* "I decline to answer that question." — *Q.* "On what ground?" *A.* "It might criminate myself; but I am only a fornicator." Whereupon Snell was challenged by the United States for cause, which challenge was sustained, and the defendant excepted.

After the trial commenced, the district attorney, after proving that the defendant had been married on a certain day to Mary Ann Tuddenham, offered to prove his subsequent marriage to one Amelia Jane Schofield during the lifetime of said Mary. He thereupon called one Pratt, the deputy marshal, and showed him a subpœna for witnesses in this case, and among other names thereon was the name of Mary Jane Schobold, but no such name as Amelia Jane Schofield. He testified that this subpœna was placed in his hands to be served.

Q. "Did you see Mr. Reynolds when you went to see Miss Schofield?"

A. "Yes, sir."

Q. "Who did you inquire for?"

A. "I inquired for Mary Jane Schofield, to the best of my knowledge. I will state this, that I inserted the name in the subpœna, and intended it for the name of the woman examined in this case at the former term of the court, and inquired for Mary Jane Schofield, or Mrs. Reynolds, I do not recollect certainly which."

Q. "State the reply."

A. "He said she was not at home."

Q. "Did he say any thing further."

A. "I asked him then where I could find her. I said, 'Where is she?' And he said, 'You will have to find out.'"

Q. "Did he know you to be a deputy marshal?"

A. "Yes, sir."

Q. "Did you tell him what your business was as deputy marshal?"

A. "I don't remember now: I don't think I did."

Q. "What else did he say?"

A. "He said, just as I was leaving, as I understood it, that she did not appear in this case."

The court then ordered a subpœna to issue for Amelia Jane Schofield, returnable instanter.

Upon the following day, at ten o'clock A.M., the said subpœna for the said witness having issued about nine o'clock P.M. of the day before, the said Arthur Pratt was again called upon, and testified as follows: —

Q. (By district attorney.) "State whether you are the officer that had subpœna in your hands." (Exhibiting subpœna last issued, as above set forth.)

A. "Yes, sir."

Q. "State to the court what efforts you have made to serve it."

A. "I went to the residence of Mr. Reynolds, and a lady was there, his first wife, and she told me that this woman was not there; that that was the only home that she had, but that she hadn't been there for two or three weeks. I went again this morning, and she was not there."

Q. "Do you know any thing about her home, — where she resides?"

A. "I know where I found her before."

Q. "Where?"

A. "At the same place."

Q. "You are the deputy marshal that executed the process of the court?"

A. "Yes, sir."

Q. "Repeat what Mr. Reynolds said to you when you went with the former subpœna introduced last evening."

A. "I will state that I put her name on the subpœna myself. I know the party, and am well acquainted with her, and I intended it for the same party that I subpœnaed before in this case. He said that she was not in, and that I could get a search-warrant if I wanted to search the house. I said, 'Will you tell me where she is?' He said, 'No; that will be for you to find out.' He said, just as I was leaving the house, — I don't remember exactly what it was, but my best recollection is that he said she would not appear in this case."

Q. "Can't you state that more particularly?"

A. "I can't give you the exact words, but I can say that was the purport of them."

Q. "Give the words as nearly as you can."

A. "Just as I said, I think those were his words."

The district attorney then offered to prove what Amelia Jane Schofield had testified to on a trial of another indictment charging the prisoner with bigamy in marrying her; to which the prisoner objected, on the ground that a sufficient foundation had not been laid for the introduction of the evidence.

A. S. Patterson, having been sworn, read, and other witnesses stated, said Amelia's testimony on the former trial, tending to show her marriage with the defendant. The defendant excepted to the admission of the evidence.

The court, in summing up to the jury, declined to instruct them, as requested by the prisoner, that if they found that he had married in pursuance of and conformity with what he believed at the time to be a religious duty, their verdict should be "not guilty," but instructed them that if he, under the influence of a religious belief that it was right, had "deliberately married a second time, having a first wife living, the want of consciousness of evil intent — the want of understanding on his part that he was committing crime — did not excuse him, but the law inexorably, in such cases, implies criminal intent."

The court also said: "I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children, — innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory, just so do these victims multiply and spread themselves over the land."

To the refusal of the court to charge as requested, and to the charge as given, the prisoner excepted. The jury found him guilty, as charged in the indictment; and the judgment that he be imprisoned at hard labor for a term of two years, and pay

a fine of $500, rendered by the District Court, having been affirmed by the Supreme Court of the Territory, he sued out this writ of error.

The assignments of error are set out in the opinion of the court.

Mr. George W. Biddle and *Mr. Ben Sheeks* for the plaintiff in error.

First, The jury was improperly drawn. Two of the jurors were challenged for cause by the defendant below, because they admitted that they had formed, and still entertained, an opinion upon the guilt or innocence of the prisoner. The holding by a juror of any opinions which would disqualify him from rendering a verdict in accordance with the law of the land, is a valid objection to his serving.

An opinion based merely upon a hypothetical case, as that "if so and so is true, the prisoner is guilty," is not always sufficient; but where the opinion is as to the *actual fact* of guilt or innocence, it is a disqualification, according to all the authorities. Burr's Trial, 414, 415; *United States* v. *Wilson*, 1 Baldw. 83; *Ex parte Vermilyea*, 6 Cow. (N. Y.) 563; *The People* v. *Mather*, 4 Wend. (N. Y.) 238; *Cancemi* v. *People*, 16 N. Y. 502; *Fouts* v. *The State*, 11 Ohio St. 472; *Neely* v. *The People*, 23 Ill. 685; *Schoeffler* v. *The State*, 3 Wis. 831; *Trimble* v. *The State*, 2 Greene (Iowa), 404; *Commonwealth* v. *Lesher*, 17 Serg. & R. (Pa.) 155; *Staup* v. *Commonwealth*, 74 Pa. St. 458; *Armistead's Case*, 11 Leigh (Va.), 658; *Stewart* v. *The State*, 13 Ark. 740.

It was clearly erroneous for the prosecution to ask several of the jurymen, upon *voire dire*, whether they were living in polygamy; questions which tend to disgrace the person questioned, or to render him amenable to a criminal prosecution, have never been allowed to be put to a juror. *Anonymous*, Salk. 153; Bacon, Abr., tit. Juries, 12 (f); 7 Dane, Abr. 334; *Hudson* v. *The State*, 1 Blackf. (Ind.) 319.

Second, The proof of what the witness, *Amelia Jane Schofield*, testified to in a former trial, under another indictment, should not have been admitted. The constitutional right of a prisoner to confront the witness and cross-examine him is not to be abrogated, unless it be shown that the witness is dead, or

out of the jurisdiction of the court; or that, *having been summoned*, he appears to have been kept away by the adverse party on the trial. It appeared not only that no such person as *Amelia Jane Schofield* had been subpœnaed, but that no subpœna had ever been taken out for her. An unserved subpœna with the name of *Mary* Jane *Schobold* was shown. At nine o'clock in the evening, during the trial, a new subpœna was issued; and on the following morning, with no attempt to serve it beyond going to the prisoner's usual residence and inquiring for her, the witness Patterson was allowed to read from a paper what purported to be statements made by *Amelia Jane Schofield* on a former trial. No proof was offered as to the genuineness of the paper or its origin, nor did the witness testify to its contents of his own knowledge. This is in the teeth of the ruling in *United States* v. *Wood* (3 Wash. 440), and the rule laid down in all the American authorities. *Richardson* v. *Stewart*, 2 Serg. & R. (Pa.) 84; *Chess* v. *Chess*, 17 id. 409; *Huidekopper* v. *Cotton*, 3 Watts (Pa.), 56; *Powell* v. *Waters*, 17 Johns. (N. Y.) 176; *Cary* v. *Sprague*, 12 Wend. (N. Y.) 45; *The People* v. *Newman*, 5 Hill (N. Y.), 295; *Brogy* v. *The Commonwealth*, 10 Gratt. (Va.) 722; *Bergen* v. *The People*, 17 Ill. 426; *Dupree* v. *The State*, 33 Ala. 380.

Third, As to the constitutionality of the Poland Bill. Rev. Stat., sect. 5352. Undoubtedly Congress, under art. 4, sect. 3, of the Constitution, which gives "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," and under the decisions of this court upon it, may legislate over such territory, and regulate the form of its local government. But its legislation can be neither exclusive nor arbitrary. The power of this government to obtain and hold territory over which it might legislate, without restriction, would be inconsistent with its own existence in its present form. There is always an excess of power exercised when the Federal government attempts to provide for more than the assertion and preservation of its rights over such territory, and interferes by positive enactment with the social and domestic life of its inhabitants and their internal police. The offence prohibited by sect. 5352 is not a *malum in se;* it is not prohibited by the decalogue; and, if it be said

that its prohibition is to be found in the teachings of the New Testament, we know that a majority of the people of this Territory deny that the Christian law contains any such prohibition.

The Attorney-General and *The Solicitor-General, contra.*

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

The assignments of error, when grouped, present the following questions: —

1. Was the indictment bad because found by a grand jury of less than sixteen persons?

2. Were the challenges of certain petit jurors by the accused improperly overruled?

3. Were the challenges of certain other jurors by the government improperly sustained?

4. Was the testimony of Amelia Jane Schofield, given at a former trial for the same offence, but under another indictment, improperly admitted in evidence?

5. Should the accused have been acquitted if he married the second time, because he believed it to be his religious duty?

6. Did the court err in that part of the charge which directed the attention of the jury to the consequences of polygamy?

These questions will be considered in their order.

1. As to the grand jury.

The indictment was found in the District Court of the third judicial district of the Territory. The act of Congress "in relation to courts and judicial officers in the Territory of Utah," approved June 23, 1874 (18 Stat. 253), while regulating the qualifications of jurors in the Territory, and prescribing the mode of preparing the lists from which grand and petit jurors are to be drawn, as well as the manner of drawing, makes no provision in respect to the number of persons of which a grand jury shall consist. Sect. 808, Revised Statutes, requires that a grand jury impanelled before any district or circuit court of the United States shall consist of not less than sixteen nor more than twenty-three persons, while a statute of the Territory limits the number in the district courts of the Territory

to fifteen. Comp. Laws Utah, 1876, 357. The grand jury which found this indictment consisted of only fifteen persons, and the question to be determined is, whether the section of the Revised Statutes referred to or the statute of the Territory governs the case.

By sect. 1910 of the Revised Statutes the district courts of the Territory have the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States; but this does not make them circuit and district courts of the United States. We have often so decided. *American Insurance Co.* v. *Canter*, 1 Pet. 511; *Benner et al.* v. *Porter*, 9 How. 235; *Clinton* v. *Englebrecht*, 13 Wall. 434. They are courts of the Territories, invested for some purposes with the powers of the courts of the United States. Writs of error and appeals lie from them to the Supreme Court of the Territory, and from that court as a territorial court to this in some cases.

Sect. 808 was not designed to regulate the impanelling of grand juries in all courts where offenders against the laws of the United States could be tried, but only in the circuit and district courts. This leaves the territorial courts free to act in obedience to the requirements of the territorial laws in force for the time being. *Clinton* v. *Englebrecht*, *supra*; *Hornbuckle* v. *Toombs*, 18 Wall. 648. As Congress may at any time assume control of the matter, there is but little danger to be anticipated from improvident territorial legislation in this particular. We are therefore of the opinion that the court below no more erred in sustaining this indictment than it did at a former term, at the instance of this same plaintiff in error, in adjudging another bad which was found against him for the same offence by a grand jury composed of twenty-three persons. 1 Utah, 226.

2. As to the challenges by the accused.

By the Constitution of the United States (Amend. VI.), the accused was entitled to a trial by an impartial jury. A juror to be impartial must, to use the language of Lord Coke, "be indifferent as he stands unsworn." Co. Litt. 155 *b*. Lord Coke also says that a principal cause of challenge is "so called because, if it be found true, it standeth sufficient of itself, without

leaving any thing to the conscience or discretion of the triers" (id. 156 *b*); or, as stated in Bacon's Abridgment, "it is grounded on such a manifest presumption of partiality, that, if found to be true, it unquestionably sets aside the . . . juror." Bac. Abr., tit. Juries, E. 1. "If the truth of the matter alleged is admitted, the law pronounces the judgment; but if denied, it must be made out by proof to the satisfaction of the court or the triers." Id. E. 12. To make out the existence of the fact, the juror who is challenged may be examined on his *voire dire*, and asked any questions that do not tend to his infamy or disgrace.

All of the challenges by the accused were for principal cause. It is good ground for such a challenge that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence, and be more than a mere impression. Some say it must be positive (Gabbet, Criminal Law, 391); others, that it must be decided and substantial (*Armistead's Case*, 11 Leigh (Va.), 659; *Wormley's Case*, 10 Gratt. (Va.) 658; *Neely* v. *The People*, 13 Ill. 685); others, fixed (*State* v. *Benton*, 2 Dev. & B. (N. C.) L. 196); and, still others, deliberate and settled (*Staup* v. *Commonwealth*, 74 Pa. St. 458; *Curley* v. *Commonwealth*, 84 id. 151). All concede, however, that, if hypothetical only, the partiality is not so manifest as to necessarily set the juror aside. Mr. Chief Justice Marshall, in *Burr's Trial* (1 Burr's Trial, 416), states the rule to be that "light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity,

brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion" of the court.

The challenge in this case most relied upon in the argument here is that of Charles Read. He was sworn on his *voire dire;* and his evidence,[1] taken as a whole, shows that he "believed" he had formed an opinion which he had never expressed, but which he did not think would influence his verdict on hearing the testimony. We cannot think this is such a manifestation of partiality as to leave nothing to the "conscience or discretion" of the triers. The reading of the evidence leaves the impression that the juror had some hypothetical opinion about the case, but it falls far short of raising a manifest presumption of partiality. In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the

[1] *Supra*, p. 147

juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case. The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so. Such a case, in our opinion, was not made out upon the challenge of Read. The fact that he had not expressed his opinion is important only as tending to show that he had not formed one which disqualified him. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed. Under these circumstances, it is unnecessary to consider the case of Ransohoff, for it was confessedly not as strong as that of Read.

3. As to the challenges by the government.

The questions raised upon these assignments of error are not whether the district attorney should have been permitted to interrogate the jurors while under examination upon their *voire dire* as to the fact of their living in polygamy. No objection was made below to the questions, but only to the ruling of the court upon the challenges after the testimony taken in answer to the questions was in. From the testimony it is apparent that all the jurors to whom the challenges related were or had been living in polygamy. It needs no argument to show that such a jury could not have gone into the box entirely free from bias and prejudice, and that if the challenge was not good for principal cause, it was for favor. A judgment will not be reversed simply because a challenge good for favor was sustained in form for cause. As the jurors were incompetent and properly excluded, it matters not here upon what form of challenge they were set aside. In one case the challenge was for favor. In the courts of the United States all challenges are tried by the court without the aid of triers (Rev. Stat. sect. 819), and we are not advised that the practice in the territorial courts of Utah is different.

4. As to the admission of evidence to prove what was sworn to by Amelia Jane Schofield on a former trial of the accused for the same offence but under a different indictment.

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

In *Lord Morley's Case* (6 State Trials, 770), as long ago as the year 1666, it was resolved in the House of Lords "that in case oath should be made that any witness, who had been examined by the coroner and was then absent, was detained by the means or procurement of the prisoner, and the opinion of the judges asked whether such examination might be read, we should answer, that if their lordships were satisfied by the evidence they had heard that the witness was detained by means or procurement of the prisoner, then the examination might be read; but whether he was detained by means or procurement of the prisoner was matter of fact, of which we were not the judges, but their lordships." This resolution was followed in *Harrison's Case* (12 id. 851), and seems to have been recognized as the law in England ever since. In *Regina* v. *Scaife* (17 Ad. & El. N. S. 242), all the judges agreed that if the prisoner had resorted to a contrivance to keep a witness out of the way, the deposition of the witness, taken before a magistrate and in the presence of the prisoner, might be read. Other cases to the same effect are to be found, and in this country the ruling has been in the same way. *Drayton* v. *Wells*, 1 Nott & M. (S. C.) 409; *Williams* v. *The State*, 19 Ga. 403. So that now, in the leading text-books, it is laid down that if a witness is kept away by the adverse party,

his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence. 1 Greenl. Evid., sect. 163; 1 Taylor, Evid., sect. 446. Mr. Wharton (1 Whart. Evid., sect. 178) seemingly limits the rule somewhat, and confines it to cases where the witness has been corruptly kept away by the party against whom he is to be called, but in reality his statement is the same as that of the others; for in all it is implied that the witness must have been wrongfully kept away. The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony. We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one.

Such being the rule, the question becomes practically one of fact, to be settled as a preliminary to the admission of secondary evidence. In this respect it is like the preliminary question of the proof of loss of a written instrument, before secondary evidence of the contents of the instrument can be admitted. In *Lord Morley's Case* (*supra*), it would seem to have been considered a question for the trial court alone, and not subject to review on error or appeal; but without deeming it necessary in this case to go so far as that, we have no hesitation in saying that the finding of the court below is, at least, to have the effect of a verdict of a jury upon a question of fact, and should not be disturbed unless the error is manifest.

The testimony shows that the absent witness was the alleged second wife of the accused; that she had testified on a former trial for the same offence under another indictment; that she had no home, except with the accused; that at some time before the trial a subpœna had been issued for her, but by mistake she was named as Mary Jane Schobold; that an officer who knew the witness personally went to the house of the accused to serve the subpœna, and on his arrival inquired for her, either by the name of Mary Jane Schofield or Mrs. Reynolds; that he was told by the accused she was not at home;

that he then said, "Will you tell me where she is?" that the reply was "No; that will be for you to find out;" that the officer then remarked she was making him considerable trouble, and that she would get into trouble herself; and the accused replied, "Oh, no; she won't, till the subpœna is served upon her," and then, after some further conversation, that "She does not appear in this case."

It being discovered after the trial commenced that a wrong name had been inserted in the subpœna, a new subpœna was issued with the right name, at nine o'clock in the evening. With this the officer went again to the house, and there found a person known as the first wife of the accused. He was told by her that the witness was not there, and had not been for three weeks. He went again the next morning, and not finding her, or being able to ascertain where she was by inquiring in the neighborhood, made return of that fact to the court. At ten o'clock that morning the case was again called; and the foregoing facts being made to appear, the court ruled that evidence of what the witness had sworn to at the former trial was admissible.

In this we see no error. The accused was himself personally present in court when the showing was made, and had full opportunity to account for the absence of the witness, if he would, or to deny under oath that he had kept her away. Clearly, enough had been proven to cast the burden upon him of showing that he had not been instrumental in concealing or keeping the witness away. Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own. Upon the testimony as it stood, it is clear to our minds that the judgment should not be reversed because secondary evidence was admitted.

This brings us to the consideration of what the former testimony was, and the evidence by which it was proven to the jury.

It was testimony given on a former trial of the same person for the same offence, but under another indictment. It was

substantially testimony given at another time in the same cause. The accused was present at the time the testimony was given, and had full opportunity of cross-examination. This brings the case clearly within the well-established rules. The cases are fully cited in 1 Whart. Evid., sect. 177.

The objection to the reading by Mr. Patterson of what was sworn to on the former trial does not seem to have been because the paper from which he read was not a true record of the evidence as given, but because the foundation for admitting the secondary evidence had not been laid. This objection, as has already been seen, was not well taken.

5. As to the defence of religious belief or duty.

On the trial, the plaintiff in error, the accused, proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church "that it was the duty of male members of said church, circumstances permitting, to practise polygamy; . . . that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practise polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come." He also proved "that he had received permission from the recognized authorities in said church to enter into polygamous marriage; . . . that Daniel H. Wells, one having authority in said church to perform the marriage ceremony, married the said defendant on or about the time the crime is alleged to have been committed, to some woman by the name of Schofield, and that such marriage ceremony was performed under and pursuant to the doctrines of said church."

Upon this proof he asked the court to instruct the jury that if they found from the evidence that he "was married as

charged — if he was married — in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be 'not guilty.'" This request was refused, and the court did charge "that there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was right, — under an inspiration, if you please, that it was right, — deliberately married a second time, having a first wife living, the want of consciousness of evil intent — the want of understanding on his part that he was committing a crime — did not excuse him; but the law inexorably in such case implies the criminal intent."

Upon this charge and refusal to charge the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining

heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration "a bill establishing provision for teachers of the Christian religion," postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested "to signify their opinion respecting the adoption of such a bill at the next session of assembly."

This brought out a determined opposition. Amongst others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government. Semple's Virginia Baptists, Appendix. At the next session the proposed bill was not only defeated, but another, "for establishing religious freedom," drafted by Mr. Jefferson, was passed. 1 Jeff. Works, 45; 2 Howison, Hist. of Va. 298. In the preamble of this act (12 Hening's Stat. 84) religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States." Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion (2 Jeff. Works, 355), but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations.

1 Jeff. Works, 79. Five of the States, while adopting the Constitution, proposed amendments. Three — New Hampshire, New York, and Virginia — included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association (8 id. 113), took occasion to say: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, — I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the eccle-

siastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

By the statute of 1 James I. (c. 11), the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience," the legislature of that State substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, "it hath been doubted whether bigamy or poligamy be punishable by the laws of this Commonwealth." 12 Hening's Stat. 691. From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of

the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound. 2 Kent, Com. 81, note (*e*). An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief?

To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married the second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defence of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion: it was still belief, and belief only.

In *Regina* v. *Wagstaff* (10 Cox Crim. Cases, 531), the parents of a sick child, who omitted to call in medical attendance because of their religious belief that what they did for its cure would be effective, were held not to be guilty of manslaughter, while it was said the contrary would have been the result if the child had actually been starved to death by the parents, under the notion that it was their religious duty to abstain from giving it food. But when the offence consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made. No case, we believe, can be found that has gone so far.

6. As to that part of the charge which directed the attention of the jury to the consequences of polygamy.

The passage complained of is as follows: "I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply,

and there are pure-minded women and there are innocent children, — innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land."

While every appeal by the court to the passions or the prejudices of a jury should be promptly rebuked, and while it is the imperative duty of a reviewing court to take care that wrong is not done in this way, we see no just cause for complaint in this case. Congress, in 1862 (12 Stat. 501), saw fit to make bigamy a crime in the Territories. This was done because of the evil consequences that were supposed to flow from plural marriages. All the court did was to call the attention of the jury to the peculiar character of the crime for which the accused was on trial, and to remind them of the duty they had to perform. There was no appeal to the passions, no instigation of prejudice. Upon the showing made by the accused himself, he was guilty of a violation of the law under which he had been indicted: and the effort of the court seems to have been not to withdraw the minds of the jury from the issue to be tried, but to bring them to it; not to make them partial, but to keep them impartial.

Upon a careful consideration of the whole case, we are satisfied that no error was committed by the court below.

Judgment affirmed.

MR. JUSTICE FIELD. I concur with the majority of the court on the several points decided except one, — that which relates to the admission of the testimony of Amelia Jane Schofield given on a former trial upon a different indictment. I do not think that a sufficient foundation was laid for its introduction. The authorities cited by the Chief Justice to sustain its admissibility seem to me to establish conclusively the exact reverse.

NOTE. — At a subsequent day of the term a petition for a rehearing having been filed, MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Since our judgment in this case was announced, a petition for rehearing has been filed, in which our attention is called to the fact that the sentence of the

court below requires the imprisonment to be at hard labor, when the act of Congress under which the indictment was found provides for punishment by imprisonment only. This was not assigned for error on the former hearing, and we might on that account decline to consider it now; but as the irregularity is one which appears on the face of the record, we vacate our former judgment of affirmance, and reverse the judgment of the court below for the purpose of correcting the only error which appears in the record, to wit, in the form of the sentence. The cause is remanded, with instructions to cause the sentence of the District Court to be set aside and a new one entered on the verdict in all respects like that before imposed, except so far as it requires the imprisonment to be at hard labor.

COUNTY OF SCHUYLER *v.* THOMAS.

1. The court again decides that the authority conferred by the charter of a railroad company in Missouri upon the county court of any county in which a part of the road of the company might be, to subscribe to the capital stock thereof, was not revoked by sect. 14 of art. 11 of the Constitution of that State, of 1865; and where the General Assembly reserved the right to amend the charter, and the company was consolidated with another, pursuant to a law passed after the adoption of the Constitution, the county court of the county through which the road passed might, without submitting the question to a popular vote, lawfully subscribe to the capital stock of the consolidated company, and issue its bonds in payment therefor.
2. *County of Callaway* v. *Foster* (93 U. S. 567) and *County of Scotland* v. *Thomas* (94 id. 682) cited and approved.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The facts are stated in the opinion of the court.

Mr. George W. McCrary for the plaintiff in error.
Mr. A. J. Baker and *Mr. F. T. Hughes*, *contra*.

MR. JUSTICE HUNT delivered the opinion of the court.

Thomas, the plaintiff below, recovered a judgment for the amount of certain bonds and coupons held by him, which were issued in the year 1871 by the county of Schuyler, in the State of Missouri. He was an honest purchaser of the bonds, without knowledge of vice or defect in their issue.

The following is a copy of one of the bonds: —

"Know all men by these presents, that the county of Schuyler, in the State of Missouri, acknowledges itself indebted to the Missouri, Iowa, and Nebraska Railway Company, a corporation existing under and by virtue of the laws of the States of Missouri and Iowa, formed by consolidation of the Alexandria and Nebraska City Railroad Company (formerly Alexandria and Bloomfield Railroad Company), of the State of Missouri, and the Iowa Southern Railway Company, of the State of Iowa, in the sum of $1,000, which sum the said county hereby promises to pay to the said Missouri, Iowa, and Nebraska Railway Company, or bearer, at the Farmers' Loan and Trust Company, in New York, on the first day of September, A.D. 1891, together with interest thereon from the thirty-first day of December, 1871, at the rate of eight per cent per annum, which interest shall be payable annually in the city of New York, on the thirty-first day of December in each year, as the same shall become due, on the presentation of the coupons hereto annexed. This bond being issued under and pursuant to orders of the county court of said Schuyler County, for subscription to the stock of the Missouri, Iowa, and Nebraska Railway Company, as authorized by an act of the General Assembly of the State of Missouri, entitled 'An Act to incorporate the Alexandria and Bloomfield Railroad Company,' approved Feb. 9, 1857.

"In testimony whereof, the said county of Schuyler 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 the clerk of said court, under the order thereof, attesting the same and affixing thereto the seal of said court.

"This done at the town of Lancaster, in the county of Schuyler, in the State of Missouri, this first day of September, A.D. 1871.

"WILLIAM CASPER,
"*Presiding Justice of the County Court of Schuyler County, Missouri.*

"Attest: D. T. TRUITT,
"*Clerk of the County Court of Schuyler County, Missouri.*

{SEAL SCHUYLER COUNTY COURT, MISSOURI.}

"Countersigned and delivered this seventeenth day of May, 1872.
"M. BAKER, *Trustee.*"

The legality of the bonds is denied.

1st, It is contended by the county of Schuyler that there was no authority in the company, as incorporated in 1857, to

locate its track through or in the county of Schuyler; that as the authority to subscribe and issue bonds depended on the power to locate, there was no authority to subscribe for stock or issue the bonds of the county.

The act to incorporate the Alexandria and Bloomfield Railroad Company, approved Feb. 9, 1857, contained the following provisions: —

"It shall be lawful for the county court of any county, in which any part of the route of said railroad may be, to subscribe to the stock of said company, . . . and issue the bonds of said county to raise funds to pay the stock thus subscribed."

"Sect. 8. Said company shall have full power to survey, locate, and construct a railroad from the city of Alexandria, in the county of Clark, in the direction of Bloomfield, in the State of Iowa, to such point on the northern boundary line of the State of Missouri as shall be agreed upon by said company, and a company authorized on the part of the State of Iowa, to construct a railroad to intersect the road authorized to be constructed by the provisions of this act, at the most practicable point on said State line, . . . and may select such route as may be deemed most advantageous."

Bloomfield, as we learn by the maps in evidence, lies in a northwesterly direction from Alexandria.

Schuyler County is also in a direction from Alexandria northwesterly as to a portion of it, and more nearly northerly as to another portion of it. As a matter of fact, an inspection of the maps furnishes evidence (and they make a part of the record on which our judgment is to be formed) that there is authority to include a portion of Schuyler County in the description of a course northwesterly from Alexandria and in the direction of Bloomfield. These maps and the geography of the State inform us that this road could be so located as to reach the immediate vicinity of Bloomfield, with but little less variation from a direct course than the line through Luray and Upton, which was first adopted.

But a straight line is not required by the statute, nor a line having the fewest curves or angles, nor is the point of crossing the State line fixed or prescribed. The most practicable and advantageous line is to be adopted, depending upon all

the elements entering into the economy, productiveness, and local advantages which would be sought by prudent men in determining such a question.

This subject was discussed in *County of Callaway* v. *Foster*, 93 U. S. 567. As there intimated, we are of the opinion that the legislature, by the expression, "any county in which any part of the route of said railroad may be," used as it was with reference to a road not yet surveyed or located, intended to give a broad latitude, and to embrace all the counties through or into which it was possible that the said road could be located. These statutes are to be construed as they were intended to be understood when they were passed, twenty years since. The after-wisdom, obtained by unfortunate results, cannot justly be applied in their interpretation. A construction may *now* be sought which will avoid the payment of the debts contracted for building the road. *Then* every inducement was presented to make subscriptions and obtain the money. Little respect would have been paid to the careful legislator or the strict interpreter of the law, who, twenty years ago, had doubted the power of these counties to make the subscription in question.

We see nothing in the law or in the necessary facts of the case, affecting the power in the first instance of the county of Schuyler to subscribe to the stock of the Alexandria and Bloomfield Railroad Company, and to issue its bonds to raise the funds to pay such subscription.

2d, It is further alleged that in the year 1866 the Alexandria and Bloomfield road was permanently located through the towns of Luray and Upton to the north boundary line of Missouri, and that no part of the line thus located was in or through the county of Schuyler, and that the same was continued into the State of Iowa by another company organized in that State; that the name of said Alexandria and Bloomfield road was in that year changed by an act of the legislature to that of Alexandria and Nebraska City Railroad, and that in its second section that act provided "that said railroad company may extend said road from a point at or near Luray to Nebraska City, in Nebraska Territory, on the most practicable and direct route by way of or near Rockport, in Atchison County, Missouri; that the

name was again changed to that of the Missouri, Iowa, and Nebraska Railroad Company; that the road was thereupon and by virtue of said act constructed through Schuyler County into the State of Iowa, and that this is the only line thus constructed through Schuyler County. It is then added, that when Schuyler County made its subscription and issued its bonds, as set forth in the complaint, to aid in the construction of this road, it was done without a submission of the same to a popular vote, and that the same was made without the previous assent of a majority of two-thirds of the voters of the said county, and it is contended that such subscription is void.

The question on this branch of the case arises upon art. 11, sect. 14, of the Constitution of the State of Missouri, which took effect in July, 1865, and yet remains of force. It is in these words: —

"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."

By the terms of the charter of the Alexandria and Bloomfield Railroad Company, the counties upon the route on which it might be located, and of which Schuyler is one, were authorized in the year 1857 to subscribe to its stock, and issue their bonds in payment therefor.

It has been repeatedly held by the Supreme Court of Missouri, as well as by this court, that the constitutional provision referred to was prospective only in its effect. The General Assembly was not permitted thereafter to authorize any county or city to make subscriptions and to issue its bonds, except upon the terms prescribed. But what it had previously authorized remained unaffected. The authority given to Schuyler County eight years before the Constitution took effect remained of the same force as if the Constitution had never been adopted. *County of Scotland* v. *Thomas*, 94 U. S. 682, and cases cited.

It is also established by the same authority that the consoli-

dation of one railroad company with another company does not extinguish the power of a county to subscribe, or the privilege of the company to receive subscriptions; and this although the consolidation be made by authority given after the Constitution took effect, and although the subscription be made to the stock of such newly organized company, and the bonds be issued after the same period. These are held to be features consti tuting alterations merely of the charter, and not affecting the rights or powers of the companies to receive subscriptions or of counties to issue their bonds.

Much weight is given in argument to the allegation that the route of the Alexandria and Bloomfield road, as first established and partly built, did not touch any portion of the county of Schuyler. It is contended that, when the route was selected and the terminal point fixed at Upton, the power of the company was exhausted, and the line was fixed, as certainly as if it had been described in the charter. Without considering that general proposition, we are of opinion that it does not govern the present case.

The legislature, in terms, retained the authority to alter or amend each one of these railroad charters. It did amend the charter of the Alexandria and Bloomfield road and its successors so as to authorize a location extending entirely through Schuyler County. It deemed this addition important to the interest of the public, and its exercise changed what may be termed the ordinary rule, that a location once fixed and a road partly constructed could not be changed. That this was within the reserved power of the legislature, if assented to by the company, and that it was a legitimate exercise of the power of amendment, whereby the original charter, with its powers and privileges, was continued and extended, the cases of Callaway and Scotland County sufficiently establish.

It is said, also, that this subscription was rendered void by the act of 1861, prohibiting such subscription. The case of *State, ex rel. Wilson*, v. *Garoute* is cited from the "Central Law Journal" to sustain this proposition.

We do not think it necessary to discuss the question. It was fully considered in *Smith* v. *County of Clark* (54 Mo. 58).

and the validity of the bonds, so far as this statute affected them, was sustained. In the subsequent case of *State* v. *Garoute*, one judge expressed a contrary opinion. The other judges expressed no approbation of the doctrine, and a deliberate opinion of the court cannot thus be disturbed.

The questions in the *County of Scotland* v. *Thomas* (*supra*) arose upon the same charter of the Alexandria and Bloomfield Railroad Company, the same consolidation forming the Missouri, Iowa, and Nebraska Railway Company, with the same original location through Luray and Upton, the same extension and change thereof through the counties of Scotland and Schuyler, and the issue of the same form of bonds at about the same time to the same company to build the same extension of the road as in the case before us.

The court, in delivering its opinion in that case, says: "The amending act, therefore, which authorized a consolidation with the Iowa Southern Railway Company, and thereby constituted the Missouri, Iowa, and Nebraska Railway Company, was in perfect accord with the general purpose of the original charter of the Alexandria and Bloomfield Railroad Company; and if the other rights and privileges of the latter company passed over to the consolidated company, we do not see why the privilege in question should not do so, nor why the power given to the county to subscribe to the stock should not continue in force."

We are of the opinion that the Scotland County case and the Callaway County case were well decided, and that they dispose of the present case. It is neither necessary nor wise to repeat a review of the authorities there discussed. We are satisfied with the cases as they stand.

The county of Schuyler was authorized to make a subscription by virtue of its original charter, and no submission of the question to a popular vote was necessary. That the company might establish a location, and change it by authority of the legislature. That it might be authorized to build a branch or extension in furtherance of its general object as originally chartered. That this might be and was accomplished by a new organization, to which, as the transferee of the original privileges, the right to receive and of the county to make subscrip-

tions pertained. That these powers were legitimately exercised is plain, upon the authorities cited.

The judgment of the court below was in accordance with these views; and without going through the several questions in detail, we answer them in the affirmative, and direct that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

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

ORVIS *v.* POWELL.

1. Where lands have been mortgaged, and parcels thereof subsequently sold at different times to different purchasers, the order in which such parcels shall be subjected to the satisfaction of the mortgage is, where the rule is established by a statute or by the decisions of the courts of the State where the lands lie, a rule of property binding on the courts of the United States sitting in that State.
2. In Illinois, the rule has been established by the Supreme Court of that State, in *Iglehart* v. *Crane* (42 Ill. 261), that the parcels first sold should be last subjected to the satisfaction of the mortgage.
3. The decision in *Brine* v. *Insurance Company* (96 U. S. 627), that the decree of the Circuit Court of the United States sitting in Illinois, in a suit to foreclose a mortgage of lands in that State, must give effect to the equity of redemption after sale, as provided by the statutes of that State, reaffirmed.

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

The facts are stated in the opinion of the court.

The case was argued by *Mr. O. D. Barrett* for the appellant, and by *Mr. Edward S. Isham* and *Mr. George L. Paddock* for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a suit in chancery to foreclose a mortgage executed by Henry H. Walker and Samuel I. Walker to Nathan Powell, the appellee, covering forty acres of land in Cook County,

Illinois. The mortgage was given April 8, 1869, to secure the payment of the sum of $40,500. The amount due at the date of the decree had been reduced by payments to $14,853.33. As they were made, releases had been executed as to part of the land; and before the suit was brought, all the land had been conveyed, in distinct parcels, at different times, to various parties, and among them to Emerson G. Orvis, the appellant. The court, in its decree, ordered that these parcels should be sold separately, and in the inverse order of the dates of the conveyances made by the Walkers, until the amount due, as ascertained by the decree, was satisfied, so that the parcels first sold should be the last subjected to the satisfaction of the debt. The decree made no provision for redemption after sale, as required by the statute of Illinois.

Three principal errors are assigned here: —

1. That the decree should have subjected all the property on which the mortgage was a lien equally, and without regard to priority of conveyances by the mortgagors.

2. That the court erred in determining the order of these priorities.

3. That the decree made no provision for redemption after sale.

As regards the question raised by the first of these assignments, we are relieved from any discussion of what is the true, equitable rule on the subject, because we consider that when such rule is adopted it is, within the decisions of this court, a rule of property affecting the title to real estate, and as such is to be governed, in its application in this court, by the law of the State where the land lies. In a case where no statute of the State makes provision on the subject, and no decisions of the State court have established a rule, it would be our duty to inquire what is the doctrine of the equity courts on the subject.

The Supreme Court of the State of Illinois having, in *Iglehart* v. *Crane* (42 Ill. 261), announced on very full consideration the rule which was followed by the Circuit Court, there was no error in that court in following it.

In regard to the order in which the parcels of the land are subjected to sale, it is to be observed that no one can com-

plain but Orvis, because he is the only party who has appealed from the decree.

So far as Orvis is concerned, the only error assigned which seems worthy of notice is that block 18 should have been subjected to plaintiff's debt first, because Walker, the mortgagor, was still owner of an equitable interest in it. This does not appear by any written instrument, but so far as it is established at all, it is by Walker's parol testimony. It thus appears, however, that Colbaugh and Powell held the title in trust to secure money advanced by them on a sale which had been rescinded, and it was by virtue of this rescission that Walker had any interest in it. What the amount of the sum is for which Colbaugh and Powell held it is not shown, nor is the value of the lot. But appellant's witness, Walker, states that the debt due these parties is more than the lot is worth, after paying some liens on it prior to theirs. As the title of Walker had passed from him to this lot long before that claimed by Orvis, we do not believe that the court was bound to prosecute an inquiry, through all the ramifications of Walker's dealing with this lot, dependent solely on conflicting oral testimony, to ascertain if Walker had a possible ultimate interest in it. Nor does it consist with the general course of equity practice to order a public sale of a very doubtful contingent interest, the value of which is incapable of estimation, and where any price given might do great injustice to the purchaser or to the party whose interest is sold, and which would lead to further expensive litigation. Besides, if in the end appellant has to pay any part of this mortgage, there is nothing to prevent his pursuing this equity of Walker's so far as may be necessary to indemnify him in an independent suit, where that matter may be fully investigated without further delaying the present plaintiff.

On the whole, we see no error to the prejudice of appellant in the order of sale adopted by the decree.

But we decided in *Brine* v. *Insurance Company* (96 U. S. 627) that a decree of foreclosure in the Circuit Court of the United States for the District of Illinois, which gave no time for redemption after the sale, was erroneous and must be reversed. The larger part of the briefs of several counsel in this

case is devoted to a consideration of the question there decided. It is sufficient to say that we are satisfied with the soundness of the opinion given in that case, and it must govern the one now before us.

The result of those considerations is, that the decree of the Circuit Court ascertaining the sum due the plaintiff, and fixing the order in which the various parcels of land shall be sold, and in fact all of said decree, will be affirmed, except so far as it fails to give a time for redemption; and the case will be remanded to that court with directions to amend the decree so as to allow redemption of each parcel which may be sold, as provided by the statute of Illinois on that subject. As appellant had to take this appeal to obtain correction of the error in this respect, he must recover costs.

So ordered.

Note. — At a subsequent day of the term, Orvis, the appellant, was granted a reargument because the question of the order in which lands mortgaged, and sold subsequently by the mortgagor, to different parties at different dates should be subjected to the satisfaction of the mortgage debt, was a new one in this court, and because the subsequent sales on which the court had to pass in the case were numerous and, as presented by the record, a little perplexing.

The reargument was had by printed briefs submitted by *Mr. Benjamin F. Butler, Mr. O. D. Barrett,* and *Mr. Melville W. Fuller* for the appellant, and by *Mr. Julius Rosenthal* and *Mr. A. M. Pence, contra.*

Mr. Justice Miller delivered the opinion of the court, ordering that the same decree be entered that was made on the former hearing.

McKnight v. United States.

United States v. McKnight.

1. Where a claim against the United States was allowed by the proper officers of the treasury, and a part thereof paid to the assignees of the claimant, upon his receipt for the whole sum, the United States, when sued by them for the balance, cannot, on the ground that the assignment was not executed in the manner prescribed by law, set up as a counter-claim the amount so paid.
2. The United States, by paying a part of the claim to the assignees, did not waive its right to withhold from them the residue.

3. A., in whose favor the allowance was made, being then indebted as surety on an official bond given to the United States, the amount of such indebtedness was properly retained by the Treasury Department as a set-off to await the final adjustment and settlement of the accounts of his principal. *Held*, that the Court of Claims was bound to adjudge accordingly.

APPEAL from the Court of Claims.

This was a suit by William S. McKnight and James W Richardson, assignees of Simeon Hart, to recover from the United States the sum of $9,000. The United States interposed a counter-claim and set-off for $21,675.68.

The court below found the following facts: —

1. On the 6th of January, 1873, the Second Comptroller of the Treasury certified to the Secretary of War a balance arising on an account settled by the Third Auditor, as follows: —

"No. 6611.] "TREASURY DEPARTMENT,
"SECOND COMPTROLLER'S OFFICE,
"Jan. 6, 1873.

"I certify, in conformity with law, that there is due from the United States to William S. McKnight and James W. Richardson, composing the firm of McKnight & Richardson, assignees of Simeon Hart, a government contractor, a balance of thirty thousand six hundred and seventy-five and $\frac{68}{100}$ dollars:

"Which amount is allowed in pursuance of the decision of the Second Comptroller, made Dec. 14, 1872, being for the value, at contract rates, of 51,920 lbs. of flour, delivered at Albuquerque, New Mexico, May 13, 1861, at 20½ cts. per lb.	$10,643.60
"May 23, 1861, 49,800 lbs. of flour, delivered at Fort Stanton, at 18½ cts. per lb.	9,213.00
"May 26, 1861, 52,776 lbs. flour, delivered at Albuquerque, at 20½ cts. per lb.	10,819.08
Total	$30,675.68

"A report in favor of the payment of said balance having been made by the Judge-Advocate-General, and approved by the Secretary of War, Feb. 28, 1872, and the allowance being in conformity with the opinion of the Attorney-General, dated Dec. 5, 1872.

"Payable out of the appropriation for subsistence of the army prior to July 1, 1870.

"To the claimant assignees, McKnight & Richardson.

"In the care of H. D. Cook, attorney of record, present.

"J. M. Brodhead,
"*Comptroller.*

"Hon. Wm. W. Belknap,
"*Secretary of War.*"

2. Subsequently the following requisition, with memorandum attached, was signed and recorded: —

"*Settlement Requisition*, No. 2254.

"War Department, Jan. 31, 1873.

"*To the Secretary of the Treasury:*

"Sir, — Please to cause a warrant for thirty thousand six hundred and seventy-five dollars and sixty-eight cents to be issued in favor of William S. McKnight and James W. Richardson, composing the firm of McKnight & Richardson, assignees of Simeon Hart, a government contractor, care of H. D. Cook, attorney of record, present; due on settlement as per certificate of Second Comptroller, No. 6611. To be charged in the undermentioned appropriations.

"Given under my hand this seventh day of January, 1873.

"$30,675.68.

"Wm. W. Belknap,
"*Secretary of War.*

"Countersigned Jan. 7, '73.

"J. M. Brodhead,
"*Second Comptroller.*

"Registered Jan. 7, '73.

"Allen Rutherford,
"*Third Auditor.*

"Appropriations:

"Subsistence of the army prior to July 1, 1870 . . . $30,675.68

"Of this amount the sum of nine thousand dollars ($9,000) will be paid to the Treasurer of the U. States, to be by him deposited in the Treasury, on 'general account,' on account of a debt due the U. States by Simeon Hart as surety on a bond given by Lieut.-Col. John B. Grayson, Com'y of Subs., to await the final adjustment and decision of Grayson's accounts.

"J. M. Brodhead, *Compt.*"

3. Thereupon the following warrant was drawn, signed, and recorded: —

"War-Settlement Warrant
No. 409. $30,675.68.

"*Appropriations.*

"Special.

"J. H. Seville,
"*Chief Clerk.*

"71. Subsistence of Army,
$30,675.68,

"It is directed that of the amount of this warrant the sum of nine thousand dollars ($9,000) be paid to the Treasurer of the United States, to be by him deposited in the Treasury, on 'general account,' on account of a debt due the U. S. by Simeon Hart, as surety on a bond given by Lieut.-Colonel John B. Grayson, commissary of subsistence.

"Geo. S. Boutwell,
[seal] "*Secretary.*

'Rec'd draft No. 615.
"H. D. Cook."

"Treasury Department.

"To the Treasurer of the
"United States, greeting:

"Pay to William S. McKnight and James W. Richardson, firm of McKnight & Richardson, assignees of Simeon Hart, care of H. D. Cook, att'y of record, present, or order, to be charged to the appropriations named in the margin, thirty thousand six hundred and seventy-five dollars and sixty-eight cents, due Simeon Hart on settlement, pursuant to a requisition, No. 2254, of the Secretary of War, dated Jan. 7, 1873, countersigned by the Second Comptroller of the Treasury and registered by the Third Auditor. And for so doing this shall be your warrant.

"Given under my hand and the seal of the Treasury Department this thirty-first day of January, in the year of our Lord one thousand eight hundred and seventy-three, and of Independence the ninety-seventh.

[seal] "J. F. Hartley,
"*Ass't Secretary.*

"Countersigned 31st.
"R. W. Tayler,
"*First Comptroller.*

"Registered 31st.
"J. A. Graham,
"*Ass't Register.*"

4. Upon said warrant the following draft was issued to said McKnight & Richardson, delivered to H. D. Cook, attorney, indorsed by claimants, and paid by defendants: —

"*Draft No.* 615 *on Warrant No.* 409, *p't, Series of* 1870, *c*

"Treasury of the United States,
"Washington, D. C., Jan. 31, 1873.

"Pay to William S. McKnight and James W. Richardson, firm of McKnight & Richardson, assignees of Simeon Hart, or order, twenty-one thousand six hundred and seventy-five $\frac{68}{100}$ dollars.

"L. R. Tuttle,
"$21,675\frac{68}{100}$. *Asst. Treasurer of the United States.*
"Registered Jan. 31, 1873.

"John Allison,
"*Register of the Treasury.*"

And at the same time the following draft was issued to the Treasurer, by him indorsed, and the amount therein specified deposited in general account as ordered; and the same has never been paid out of the Treasury of the United States: —

"*Draft No.* 616 *on War-warrant No.* 409, *p't, Series of* 1870, *d.*

"Treasury of the United States,
"Washington, D. C., Jan. 31, 1873.

"Pay to Treasurer of the U. S., to be deposited in 'general account,' on account of a debt due the U. S. by Simeon Hart, as surety on a bond given by Lt.-Col. John B. Grayson, Comm'y of Sub., or order, nine thousand dollars.

"L. R. Tuttle,
"$9,000. *Asst. Treasurer of the United States.*"

5. Said certificate of the Second Comptroller, requisition of the Secretary of War, and warrant of the Secretary of the Treasury, were founded upon the alleged voluntary indorsement, order, or assignment by Simeon Hart, of a voucher filed in the Treasury Department, alleged to have been issued by Lieut.-Col. John B. Grayson, Commissary of Subsistence of the United States Army, for flour delivered by him in May, 1861, under contracts; but the claimants did not prove, or offer to prove, at the trial in this court, the genuineness of said voucher, or the indorsement, order, or assignment thereof, or the delivery of the flour therein mentioned.

6. The following is a copy of the voucher upon which said account was settled, as transmitted by the Secretary of the Treasury to this court: —

"*The United States to Simeon Hart, Dr.*

"1861.

"May 13.	To 51,920 lbs. flour, delivered at Albuquerque, under the contracts of 3d and 10th November, 1860, at 20½ cts.	$10,643.60
" 23.	To 49,800 lbs. flour, delivered at Fort Stanton, under the contract of 10th November, 1860, at 18½ cts. per lb.	9,213.00
" 26.	To 52,776 lbs. flour, delivered at Albuquerque, under the contracts of 3d and 10th November, 1860, at 20½ cts. lb. . . .	10,819.08
" 30.	To 500 lbs. flour, delivered at Albuquerque, to make up short delivers under the contracts of 3d and 10th November, 1860, at 20½ cts. lb.	102,50
		$30,778.18

"I certify that the above is correct and just; that the services were rendered as stated, and necessary for the public service.

"I certify, on honor, that the above account is correct and just; that this flour has been faithfully issued; that I have accounted for this flour by the receipts of officers duly qualified to receive the same; that it was purchased at the prices mentioned and contracted for (see contracts of 3d and 10th November, 1860); and that Judge Hart is entitled to the amount specified on the face of this account; and I have not paid this account, owing to the order of the Secretary of War, through the Commissary-General, of 11th May, 1861.

"JNO. B. GRAYSON,

"*Brv't Lt.-Col., C'ry S'e.*

"Received 186 , of , U. S. Army, thirty thousand seven hundred seventy-eight dollars and eighteen cents, in full of the above account.

"S. HART."

7. No asssignment or power of attorney to collect the claim was executed or delivered by Simeon Hart or his personal representatives after the settlement warrant set forth in the third finding was drawn and signed.

The court below entered a judgment dismissing the petition of the claimants, and also the counter-claim of the United States, whereupon both parties appealed here.

Mr. Enoch Totten for McKnight.
Mr. Assistant Attorney-General Smith for the United States.

Mr. Justice Swayne delivered the opinion of the court.

These are cross-appeals in the same case. The sum of $30,675.68 was awarded by the proper accounting officers to McKnight & Richardson, as assignees of Simeon Hart, a government contractor, for furnishing army supplies. The assignment was made by parol, and the delivery to the assignees of a receipt signed by Hart, with a blank for the amount that might be paid by the United States, to be filled in accordingly. Upon the allowance of the claim as stated a treasury warrant was issued to McKnight & Richardson for $21,675.68. The remaining $9,000 was retained in the treasury "on account of a debt due the United States from Simeon Hart, as surety on a bond given by Lieut.-Col. Jno. B. Grayson, Com. of Subs., to await the final settlement of said Grayson's accounts." This reservation of the $9,000 was made by order of the Second Comptroller and the Secretary of the Treasury. McKnight & Richardson sued in the Court of Claims to recover this sum. The United States thereupon set up a counter-claim, and insisted upon their right to recover back the $21,675.68 which had been paid already to the petitioners.

The Court of Claims adjudged against both parties, and both appealed to this court.

The claim of the United States cannot be sustained. According to the settled usages and practice of the department, the evidence in the record was sufficient to warrant the allowance of the amount found due to Hart. Lieut.-Col. Grayson, as a commissary of subsistence, was charged with the duty of receiving and inspecting the articles delivered, and of certifying the quantities and the prices to be paid. The voucher which he gave is explicit upon these points, and presupposes full knowledge on his part of what is set forth. His fidelity in the discharge of this duty was secured by his honor as a soldier, his commission, and his bond. It does not appear that any fraud was ever suspected, or that there is the slightest ground for such an imputation. It is true the assignment was contrary to law, and therefore a nullity, but there was nothing contrary

to good morals or conscience in the payment or receipt of the money. The facts were all known. There was no indirection, concealment, or improper purpose on either side. Although the petitioners had no claim against the United States, they had a valid claim against Hart. The money was received in payment of his debt, and discharged it to that extent. He is estopped by his receipt from setting up any claim against the government. It does not appear that he has ever complained. Under the circumstances, it is quite clear that if the controversy were between private parties, there could be no recovery. 1 Story, Contracts, sect. 541.

With a few exceptions, growing out of considerations of public policy, the rules of law which apply to the government and to individuals are the same. There is not one law for the former and another for the latter.

There are also fatal objections to the case of the petitioners.

The assignment, as we have already said, was wholly void. *Spofford* v. *Kirk*, 97 U. S. 484. It conferred no right that the United States was bound to regard. The payment of a part was not a waiver of this objection as to the residue. An agreement to that effect, express or implied, looking to the future, would have been without validity. There could have been no consideration for it, and no one had authority to make it. The statute is conclusive upon the subject. In the view of the law, the claim is as if the facts of which it is predicated were not.

It was also competent for the United States to set off the amount due to Hart under his contract, so far as was necessary to meet his liability as surety on the bond of Grayson, and the Court of Claims was bound to adjudge accordingly. Rev. Stat. 1059 *Gratiot* v. *United States*, 15 Pet. 336.

Judgment affirmed.

STEWART *v.* SONNEBORN.

1. To sustain an action for malicious prosecution, the failure of the proceedings against the plaintiff must be averred and proved; but such failure is not evidence of the defendant's malice or want of probable cause in instituting them.
2. Malice, the existence of which is a question exclusively for the jury, and want of probable cause must both concur to entitle the plaintiff to recover, and although the jury may infer malice from the want of probable cause, proof even of express malice will not justify the inference that probable cause did not exist.
3. The question as to what amounts to probable cause is one of law in a very important sense. It is, therefore, generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause, or that they do not.
4. A seeming exception to this rule may grow out of the nature of the evidence, as when the defendant's belief of the facts which are relied on by the plaintiff to prove want of probable cause is a question involved. What that belief was is always a question for the jury.
5. In an action by A. to recover damages for the alleged wrongful and malicious institution of proceedings in bankruptcy against him, by B. & Co., the defendants asked the court to charge, that if the jury believed from the evidence that they, in prosecuting an action of debt against him, had acted on the advice of counsel, and upon such advice had an honest belief in the validity of the debt sued for and of their right to recover it; and in the institution of the bankruptcy proceedings had acted likewise on such advice, and under an honest belief that they were taking and using only such remedies as the law provided for the collection of what they believed to be a *bona fide* debt, they having first given a full statement of the facts of the case to counsel, — then there was not such malice in the wrongful use of legal proceedings by them as would entitle A. to recover. The court declined so to charge. *Held*, 1. That the instruction should have been given. 2. That the facts therein stated constituted in law a probable cause, and being such, the existence of malice, if such there was, would not entitle the plaintiff to recover.
6. The jury, if they find for the plaintiff, cannot, in estimating his damages, consider the fees of counsel in prosecuting the suit.

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

This was an action brought by Meyer Sonneborn, the plaintiff below, against A. T. Stewart & Co., to recover damages for an alleged wrongful and malicious institution of proceedings in bankruptcy against him. The record shows that in the years 1865 and 1866 Sonneborn was a member of the firm of

E. Leipzeiger & Co., in New York, and that while he was thus a member the firm bought goods on credit from A. T. Stewart & Co. Some time in 1866 he withdrew from the firm; but no notice of his withdrawal was published, and the firm continued business in its old name without any apparent change. In the spring of 1867 the defendants sold other goods on credit to E. Leipzeiger & Co., as they allege, without any notice that Sonneborn had previously withdrawn from the firm. On the other hand, he alleges that he did give personal notice of his withdrawal to one of the clerks in the defendants' store before the purchases of 1867 were made. No payment for these latter purchases having been made, the defendants in 1869 sued the plaintiff to recover the debt in the Circuit Court for Barbour County, Alabama, and after trial a verdict and judgment were given against them. This was at the August Term, 1871. From the verdict and judgment the defendants prosecuted an appeal to the Supreme Court of the State, where the judgment was reversed and a new trial was ordered. On the 12th of May, 1873, before the case came on for a second trial, one Jonas Sonneborn, a brother of the plaintiff, brought suit against him in the Eufaula city court, and one month afterwards recovered a judgment by default for $6,944.43 (the present plaintiff having made no resistance), and thereupon an execution was issued and levied. This proceeding having come to the notice of A. T. Stewart & Co. (and they having been advised by legal counsel that an act of bankruptcy had thereby been committed by Sonneborn), on the 15th of August, 1873, they filed their petition in the District Court, praying that he might be declared a bankrupt, and that a warrant might issue to take possession of his estate. They represented themselves to be creditors for the sales made to E. Leipzeiger & Co. in 1867, of which firm they averred Sonneborn was a member; and the act of bankruptcy alleged was that on the 12th of June, 1873, he suffered and permitted a judgment to be recovered against him by default in favor of Jonas Sonneborn, in the city court of Eufaula, upon which an execution had issued, whereon a levy had been made. Upon this petition a rule to show cause, &c., was awarded, an injunction issued, and a warrant for provisional seizure granted, which on the 19th

of August, 1873, was executed. Such was the situation when the case of the defendants against the plaintiff came on for the second trial in the Barbour County Circuit Court. The result of that trial in November, 1873, was a judgment for Sonneborn, which was subsequently affirmed by the Supreme Court of the State at its June Term, 1874. It thus having been determined that the defendants were not creditors of Sonneborn, the proceedings in bankruptcy were dismissed and the present suit was brought, alleging that they had been prosecuted maliciously and without probable cause.

There was a verdict for the plaintiff for $21,000 and costs, and judgment having been entered thereon, Stewart & Co. sued out this writ of error. So much of the charge of the court below as was excepted to by the defendants, and also the instructions reques ed by them and refused, are set forth in the opinion of the court.

Mr. Roscoe Conkling for the plaintiffs in error.

This action cannot be maintained without averring and proving malice. *Benson & Co.* v. *McCoy*, 36 Ala. 710; *McKellar* v. *Couch*, 34 id. 336; *McLaren, Ragan, & Co.* v. *Bradford*, 26 id. 616; *Lindsay* v. *Larned*, 17 Mass. 191; *McCullough* v. *Grishobber*, 4 Watts & Serg. (Pa.) 201; *Stone* v. *Swift*, 4 Pick. (Mass.) 389; *Garrard* v. *Willett*, 4 J. J. Marsh. (Ky.) 630; *White* v. *Dingley*, 4 Mass. 433; *Turner* v. *Walker*, 3 Gill & Johns. (Md.) 377; *Morris* v. *Corson*, 7 Cow. (N. Y.) 281; *Ives* v. *Bartholomew*, 9 Conn. 309; *Marshall* v. *Betner*, 17 Ala. 832; *Tatum* v. *Morris*, 19 id. 302; *Vandryen* v. *Linderman*, 10 Johns. (N. Y.) 106; *De Medina* v. *Grove*, 10 Ad. & Ell. N. S. 152; *Churchill* v. *Liggers*, 3 Ell. & Bl. 937; *Olinger* v. *McChesney*, 9 Leigh (Va.), 660.

The mere wrongful resort to legal process affords no ground of action. It is *damnum absque injuria*, the costs being cast upon the unsuccessful party, "as a satisfaction to the defendant for the inconvenience of being held to defend a groundless suit." *McKellar* v. *Couch*, *supra*.

The misuse of legal process must have been both wrongful and malicious; but the whole charge of the court ignores the essential requisite of proof of malice, while those particular portions of it to which exception was taken assert Sonneborn's

right to recover actual damages, although the misuse of legal process against him was not malicious.

Costs are the only damages allowed to the successful defendant in a civil suit, when there is no malice on the part of the plaintiff; except where other damages are expressly allowed by special statute, — such as in suits on attachment, injunction, detinue, and other bonds.

Counsel fees expended by the plaintiff in prosecuting or defending his cause cannot be allowed as part of the damages. *Arcambel* v. *Wiseman*, 3 Dall. 306; *Day* v. *Woodworth et al.*, 13 How. 363; *Teese et al.* v. *Huntingdon et al.*, 23 id. 2; *Whittemore* v. *Cutter*, 1 Gall. 429; *Blanchard Gun-stock Turning Factory* v. *Warner*, 1 Blatchf. 258; *Pacific Insurance Co.* v. *Conard*, Baldw. 138; *Simpson* v. *Leiper*, 2 Whart. Dig. 414; *Stimpson* v. *The Railroads*, 1 Wall. Jr. 64; *Oelrichs* v. *Spain*, 15 Wall. 211.

Mr. Philip Phillips, *contra*.

The judgment of the State court in favor of Sonneborn is conclusive that Stewart & Co. were not his creditors. They had, therefore, no probable cause for instituting proceedings in bankruptcy against him. What constitutes probable cause is a question of law, and the want of it implies legal malice.

Malice in fact differs from malice in law in this: the former denotes ill-will to an individual; the latter, a wrongful act, intentionally done, without just cause. *Bronage* v. *Prosser*, 4 Barn. & Cress. 321; *Watson* v. *Moore*, 2 Cush. (Mass.) 140.

The law implies malice when there is not proof to extenuate an act which has been rashly and indiscreetly done. *Long* v. *Rodgers*, 19 Ala. 321.

It results from this distinction: that when the malice is only such as is inferred from a groundless act, and there is no proof of actual malice, none but compensatory damages are allowed; and they include actual injury to property, loss of time, pecuniary expenses, counsel fees, and any other loss suffered. *Burnett* v. *Reed*, 51 Pa. St. 190.

In all cases, unless the trespass was caused by inevitable accident, the party in default must respond in damages, the intent being only material in aggravation or mitigation of them.

Sedgwick, Damages, 660; *Tracy* v. *Swartwout*, 10 Pet. 80; *Bates* v. *Clark*, 95 U. S. 204.

The court, having limited the counsel fees to those incurred in resisting the proceeding in bankruptcy, was not required to instruct that they should not be allowed in another and different proceeding.

The court thus disposed of that question fairly and distinctly, and was not bound to charge the jury in the manner that counsel might suggest. *Indianapolis, &c. Railroad Co.* v. *Horst*, 93 U. S. 291; *Railroad Company* v. *McCarthy*, 96 id. 258.

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

The errors now assigned are exclusively to the charge given by the court to the jury. The instruction given was (*inter alia*) as follows: "But if they (the defendants) had no legal claim or demand against the complainant (Sonneborn), then, whether they had probable cause or not, they had no right to institute the proceedings (in bankruptcy). They cannot go back and allege that, though they had no legal claim against him, they thought they had; in other words, that they had probable cause to believe that they had such a demand. Unless they had a debt, they cannot allege probable cause for proceeding in bankruptcy at all. Their defence cannot stand on two probable causes, one on top of the other. . . . As it has been adjudicated by the Circuit Court of Barbour County, and affirmed by the State Supreme Court, that the defendants never had a legal claim against the plaintiff, and therefore had no right to institute proceedings in bankruptcy against him, the plaintiff is entitled to recover in this action the damages he has sustained by those unlawful proceedings. The court therefore rules that the defence in this case cannot be sustained by proving that the defendants had probable cause to believe that the plaintiff had committed an act of bankruptcy; but it being shown by judicial determination that they had no legal claim or debt against the plaintiff, and had, therefore, no right to institute bankruptcy proceedings, they are liable for the damages sustained by the plaintiff thereby, and the only

question for the jury will be the amount of the damages, under the circumstances of the case. . . . We charge you, therefore, that the plaintiff is entitled to recover his actual damage, or the loss he has actually sustained at all events." . . . And again: "The actual damages sustained by the complainant, that you will give him a verdict for at all events."

This construction, we think, was erroneous, and emphatically so in view of the facts which appeared in evidence. It ignores totally the question whether the conduct of the defendants had been attended by malice, though the plaintiff's declaration charged malice, and it denied all importance to the necessary inquiry, whether they had probable cause for their action. More than this, it disregarded entirely evidence of facts which have been determined to be in law a perfect defence to an action for a malicious prosecution. The jury were positively instructed to return a verdict for the plaintiff independently of any consideration of malice in the institution of the bankruptcy proceedings, or want of probable cause therefor. If the charge was correct, then every man who brings a suit against another, with the most firm and reasonable belief that he has a just claim, and a lawful right to resort to the courts, is responsible in damages for the consequences of his action, if he happens to fail in his suit. His intentions may have been most honest, his purpose only to secure his own, in the only way in which the law permits it to be secured; he may have had no ill-feeling against his supposed debtor, and may have done nothing which the law forbids. Such is not the law. It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice, or some improper or sinister motive. Malice is essential to the maintenance of any such action, and not merely (as the Circuit Court thought) to the recovery of exemplary damages. Notwithstanding what has been said in some decisions of a distinction between actions for criminal prosecutions and civil suits, both classes at the present day require substantially the same essentials. Certainly an action for instituting a civil suit requires not less for its maintenance than an action for a malicious prosecution of a criminal proceeding. *Nicholson* v. *Coghill*, 4 Barn. & Cress. 21; *Webb*

v. *Hill*, 3 Carr. & P. 485; *Burhams* v. *Sanford*, 19 Wend. (N. Y.) 417; *Cotton* v. *Huidekoper*, 2 Pa. 149.

In *Farmer* v. *Darling* (4 Burr. 1791,) one of the earliest reported cases, if not the earliest, Lord Mansfield instructed the jury that "the foundation of the action was malice," and all the judges concurred that "malice, either express or implied, and the want of probable cause, must both concur." From 1766 to the present day, such has been constantly held to be the law, both in England and this country. See a multitude of cases collected in Vol. 8, U. S. Digest, first series, 942, pt. 95. And the existence of malice is always a question exclusively for the jury. It must be found by them, or the action cannot be sustained. Hence it must always be submitted to them to find whether it existed. The court has no right to find it, nor to instruct the jury that they may return a verdict for the plaintiff without it. Even the inference of malice from the want of probable cause is one which the jury alone can draw. *Wheeler* v. *Nesbit et al.*, 24 How. 545; *Newell* v. *Downs*, 8 Blackf. (Ind.) 523; *Johnson* v. *Chambers*, 10 Ired. (N. C.) L. 287; *Voorhees* v. *Leonard*, 1 N. Y. Sup. Ct. 148; *Schofield* v. *Ferrers*, 47 Pa. St. 194. In *Mitchell* v. *Jenkins* (5 Barn. & Adol. 588), Lord Denman said: "I have always understood the question of reasonable or probable cause on the facts found to be a question for the opinion of the court, and malice to be altogether a question for the jury." He added, that inasmuch as in that case the question of malice had been wholly withdrawn from the jury, there ought to be a new trial. In the case we have in hand, the question was withheld from the jury, and nothing was submitted to them but an estimate of damages.

There was also error in the charge in so far as it took away from the defendants the protection of probable cause for their instituting the proceedings in bankruptcy. The court ruled that the defence could not be sustained by proving they had probable cause for believing the plaintiff had committed an act of bankruptcy, because, after the proceedings had been commenced, it was established by a verdict and a judgment thereon that the plaintiff was not indebted to them, and consequently that they had no right to institute bankruptcy proceedings against him. It was further charged that "if they had no

legal claim or demand against the plaintiff, then whether they had probable cause or not, they had no right to institute the proceedings. They cannot go back and allege that though they had not a legal claim or debt against him, they thought they had, or that they had probable cause to believe they had such a demand. Unless they had a debt they cannot allege probable cause for proceeding in bankruptcy at all." To this we cannot assent. The existence of a want of probable cause is, as we have seen, essential to every suit for a malicious prosecution. Both that and malice must concur. Malice, it is admitted, may be inferred by the jury from want of probable cause, but the want of that cannot be inferred from any degree of even express malice. *Sutton* v. *Johnstone*, 1 T. R. 493; *Murray* v. *Long*, 1 Wend. (N. Y.) 140; *Wood* v. *Weir & Sayre*, 5 B. Mon. (Ky.) 544. It is true that what amounts to probable cause is a question of law in a very important sense. In the celebrated case of *Sutton* v. *Johnstone*, the rule was thus laid down: "The question of probable cause is a mixed question of law and of fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law." This is the doctrine generally adopted. *McCormick* v. *Sisson*, 7 Cow. (N. Y.) 715; *Besson* v. *Southard*, 10 N. Y. 236.

It is, therefore, generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause, or that they do not. *Taylor* v. *Willans*, 2 Barn. & Adol. 845. There may be, and there doubtless are, some seeming exceptions to this rule, growing out of the nature of the evidence, as when the question of the defendants' belief of the facts relied upon to prove want of probable cause is involved. What their belief was is always a question for the jury.

The Circuit Court thought in the present case, and so charged, that the fact that after the institution of the bankruptcy proceedings a judgment was given in the Barbour Circuit Court against the defendants, thus determining that the

plaintiff was not indebted to them, precluded them from setting up that they had probable cause for their action. That was giving undue effect to the judgment. The conduct of the defendants is to be weighed in view of what appeared to them when they filed their petition in the bankrupt court, — not in the light of subsequently appearing facts. Had they reasonable cause for their action when they took it? Not what the actual fact was, but what they had reason to believe it was. *Faris* v. *Starke*, 3 B. Mon. (Ky.) 4, 6; *Raulston* v. *Jackson*, 1 Sneed (Tenn.), 128.

In every case of an action for a malicious prosecution or suit, it must be averred and proved that the proceeding instituted against the plaintiff has failed, but its failure has never been held to be evidence of either malice or want of probable cause for its institution; much less that it is conclusive of those things. *Cloon* v. *Gerry*, 13 Gray (Mass.), 201; 1 Hilliard, Torts, and cases there collected. The final judgment in the Circuit Court of Barbour County did not, therefore, justify the court in charging either that there was no probable cause for the bankruptcy proceedings, or that the presence or absence of such cause was immaterial. If when they filed their petition to have the plaintiff declared a bankrupt, the defendants believed, and had reasonable cause to believe, that the plaintiff was indebted to them for the goods sold to E. Leipzeiger & Co. in 1867, and had reasonable cause to believe that he had committed an act of bankruptcy, there was probable cause for their action, and the plaintiff was not entitled to recover. That they had reasonable cause to believe an act of bankruptcy had been committed must be conceded in view of the manner in which the judgment of Jonas Sonneborn against him had been obtained on the 12th of June, 1873, and in view of the decision of this court in *Buchanan* v. *Smith*, 16 Wall. 277. If, therefore, they had an honest and reasonable conviction that the plaintiff was their debtor, that he was liable to them for the bills of goods sold by them in 1867 to E. Leipzeiger & Co., they had probable cause for instituting the proceedings in bankruptcy, and their defence was complete. The jury should have been so instructed.

We think, also, there was error in refusing to charge the

jury as requested in the defendants' first point, which was as follows: "If the jury believe, from all the evidence, that A. T. Stewart & Co. acted on the advice of counsel in prosecuting their claim against Sonneborn in the Circuit Court of Barbour County, and upon such advice had an honest belief in the validity of their debt, and their right to recover in said action; and in the institution of the bankruptcy proceedings acted likewise on the advice of counsel, and under an honest belief that they were taking and using only such remedies as the law provided for the collection of what they believed to be a *bona fide* debt, they having first given a full statement of the facts of the case to counsel, — then there was not such malice in the wrongful use of legal process by them as will entitle the plaintiff to recover in this form of action." This the court refused to affirm, "except as contained and qualified in the preceding charge." An examination of the charge, however, reveals that the instruction was not contained in it, nor alluded to. The defendants, we think, had a right to have it affirmed as presented. There was enough in the evidence to justify its presentation. It was proved that, before they commenced their suit in the Circuit Court of Barbour County, the defendants were advised by an eminent lawyer of Alabama, of twenty-five years' standing in the profession, respecting their legal right to recover the debt from the plaintiff, that, in his opinion, the plaintiff was liable therefor. It was further testified that the same lawyer advised them that, in his opinion, the plaintiff had rendered himself liable to involuntary bankruptcy proceedings by suffering his brother's judgment to go against him by default, and by advertising his entire stock of goods at and below New York cost. It was not until after this advice had been given that the petition in bankruptcy was prepared and filed.

That the facts stated in the point proposed, if believed by the jury, were a perfect defence to the action; that they constituted in law a probable cause, and being such, that malice alone, if there was such, was insufficient to entitle the plaintiff to recover, — is, in view of the decisions, beyond doubt. *Snow* v. *Allen*, 1 Stark. 502; *Ravenga* v. *Mackintosh*, 2 Barn. & Cress. 693; *Walter* v. *Sample*, 25 Pa. St. 275; *Cooper* v. *Utterbach*, 37 Md. 282; *Olmstead* v. *Partridge*, 16 Gray (Mass.), 381.

These cases, and many others that might be cited, show that if the defendants in such a case as this acted *bona fide* upon legal advice, their defence is perfect.

The remaining exceptions to the charge require but brief notice. They relate to the assessment of damages, under the positive instruction to find for the plaintiff. Of these but a single one need be noticed. The court was asked to charge that the jury, if they found for the plaintiff, could not, in estimating the damages, consider the fees of counsel in prosecuting the case. The instruction was not given. It was refused, and erroneously, as we think. The fees of counsel in prosecuting this case were no part of the consequences naturally resulting from the action of the defendants in suing out the decree and warrant in bankruptcy. They were not what the defendants ought to have foreseen. That such fees are not recoverable, and why they are not, was clearly shown in *Good* v. *Mylin*, 8 Pa. St. 51; *vide* also *Alexander* v. *Herr*, 11 id. 537; *Stopp* v. *Smith*, 71 id. 285; *Hicks* v. *Foster*, 13 Barb. (N. Y.) 424. The rule asserted in these cases we think is correct, and it should have been given to the jury in the present case. The defendants were the more injured by the refusal to give it, because evidence was given of the cost of prosecuting the suit calculated immensely to influence the damages, — evidence which should not have been offered or received.

The other exceptions to the charge require no notice.

The judgment of the Circuit Court will be reversed, and the case remanded with instructions to award a *venire de novo;* and it is

So ordered.

MR. JUSTICE BRADLEY dissenting.

I am obliged to dissent from the judgment of the court in this case. It hardly needs any reference to authorities to establish the familiar doctrines laid down in the opinion. As applied to ordinary cases of actions for malicious prosecution and arrest, they are elementary law. It cannot be gravely supposed that when the court below instructed the jury that the question of malice and probable cause was not before them except on the question of vindictive damages, it

meant to ignore or to dispute the law as laid down by the court.

The question, as viewed by the court below, was not as to what is incumbent on the plaintiff to prove in an ordinary action for malicious prosecution, but whether the defendant in this particular case stood in the category that entitled him to require such proof.

No one doubts that in an ordinary action of this kind malice must be proved, and that probable cause for the prosecution is a defence. The sole question was whether this was such an ordinary action, or not; and this question has not been met by the counsel at the bar, and I do not think it is met in the opinion of the court.

What are the grounds and reasons for the stringent rules imposed upon a plaintiff in an action for malicious prosecution? Why is he obliged to prove actual malice, and why is it that the defendant may justify by probable cause? The reason undoubtedly is, that every man in the community, if he has probable cause for prosecuting another, has a perfect right, by law, to institute such prosecution, subject only, in the case of private prosecutions, to the penalty of paying the costs if he fails in his suit. If this were not so, it would deter men from approaching the courts of justice for relief. Prosecutions may fail from many causes independent of the justice of the case; and it would be very hard to visit a man with heavy damages for making a complaint, or bringing a suit, when he had probable cause for it. Hence the law gives to every man a right to complain of or sue another, if he has probable cause to believe he has ground for such complaint or suit. For the exercise of this right he cannot be made accountable in damages, except so far as the law, for the discouragement of private suits, imposes upon him the costs of the litigation. In the case of criminal charges, this right of making complaint is given to every man, for all are interested in the preservation of public order. It is not necessary that the complainant or prosecutor should show any private interest in himself. But in the case of a civil suit, the prosecutor must base his demand upon some claim due, or supposed to be due, to himself. Without any claim, or pretence of claim, a suit brought in his own name, or

in the name of another, would be of itself unlawful, malicious and without probable cause.

In short, upon probable cause, every man has a right to bring a charge against another for a public offence; and every man supposing himself to be wronged by another, may bring suit for the redress of that wrong. The law gives this right, and protects it in an action brought for malicious prosecution or malicious arrest.

But suppose that, in any class of cases, the law did not give this right; could the party then stand, for his defence, upon the question of malice and probable cause? Most assuredly not. He could not bring himself within the proper category. He would then be liable, at all events, for the actual damage caused by an unjust prosecution; just as much so as the man who should assault and wound another, or take and carry away his goods. And if an action should be brought against him for such unjust prosecution, a charge of malice, or want of probable cause, introduced in the declaration, would, at most, be regarded as surplusage; or the prosecution would, *per se*, be regarded as malicious. The allegation of malice would no more prejudice the right of recovery than did similar allegations of fraud and intent to deceive and injure, in the old action of assumpsit. If a man does not bring himself within the category of right to sue given by the law, then it is clear that he cannot avail himself of the indulgence allowed by the law of showing probable cause for the suit.

That was precisely the question in this case. The court below did not pretend to say that if Stewart & Co. had a right to institute proceedings in bankruptcy against Sonneborn, they could not, if unsuccessful, have availed themselves of all the defences applicable in ordinary cases of actions for malicious prosecution. But, whether right or wrong in its views, it held that Stewart & Co. did not come within the category of persons having such right. It held that the bankrupt law gave such right to creditors only, — not to those who only believed themselves to be creditors, but were not such. It held that the fact of their being creditors was a condition precedent to their right to institute bankrupt proceedings. The words of the law as found in sect. 39 of the Bankrupt Act are, that a person

owing debts, and doing certain things enumerated in the section, "shall be deemed to have committed an act of bankruptcy, and subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amount to at least $250." In construing this section the court held that, whilst the law did not require that a man should establish his debt by a judgment before instituting proceedings in bankruptcy, it nevertheless required that he should be, in fact, a creditor; and that, if his debt was disputed by the debtor, the responsibility was on him (the creditor) to establish it. If this were not so, then, a man prosecuting an old disputed claim against another, which the latter had always repudiated, and which was still contested in the courts, could effectually ruin his antagonist by simply swearing to his claim and throwing him into bankruptcy; and the latter, though finally successful in demonstrating to the courts the invalidity of the claim, would be without any redress except the petty satisfaction of recovering the costs of the suit. The court below held that this was not the law; and that a man who assumes the responsibility of throwing another into bankruptcy, and drawing down upon him all the consequences of breaking up his business and ruining his prospects for life, must be prepared to show that at least he is in fact a creditor of his victim, and therefore in the category of those who have a right to institute such proceedings.

In the present case, Stewart & Co. claimed to be creditors of Sonneborn; but the claim was disputed and in litigation when the proceedings in bankruptcy were commenced. It seems to me that the court was right in holding that the issue of the litigation of the claim was at Stewart & Co.'s risk, so far as the question of their right to institute proceedings in bankruptcy was concerned; and that, if they failed to establish their claim against him, they could not excuse themselves for the outrageous wrong of breaking up his business, and blighting his life, by showing that they had probable cause to believe that their claim was valid.

This position does not in the least disaffirm the right of a creditor — one who is really such — to plead, or show, prob

able cause for instituting bankruptcy proceedings against his debtor, where those proceedings are dismissed for want of sufficient ground, or for any other cause. A creditor has the right, by the law, to institute such proceedings upon probable cause. But, in my judgment, one who is not a creditor in fact has no such right. The law does not give him any such right.

The power to throw a man into bankruptcy and thus destroy his business, and all hope for the future, is one of great magnitude to be given to one man over another. A wealthy man or firm, with extensive business connections, having this means of destruction in his hands, wields a tremendous power. The indiscriminate exercise of the power by many heavy capitalists throughout the country, as a means of collecting their debts, or holding it *in terrorem* over their debtors for that purpose, was one of the causes which made the late law odious to the community, and produced its repeal. In my judgment, the construction given to it by the court below, on the point in question, was a wise and proper one; calculated to prevent, or at least to moderate, that reckless resort to the law which made it so odious and tyrannical in its effects. It did not trench upon any of the acknowledged principles of the law of malicious prosecution: it distinguished the case from those which came under that head of law, and simply held that one who is not, in fact, a creditor cannot lawfully institute proceedings in bankruptcy; and if he does so to the prejudice of the alleged bankrupt, he is responsible for the damages caused to him thereby.

In the rightful prosecution of their alleged claim, whatever injury they may have caused to Sonneborn, Stewart & Co. could well have pleaded probable cause of believing their claim to be just; and Sonneborn could not have recovered damages without showing malice as well as want of probable cause. But in instituting proceedings in bankruptcy, they must at least be in fact creditors, as a condition precedent of their right to do so. If they had been in fact creditors, then they would have been entitled to all the privileges awarded to a defendant in an ordinary action for malicious prosecution, whatever the result of the proceedings might have been.

Putting the matter into a summary form, the result of my views is briefly this: —

1st, That in criminal matters every person, being interested in the public order, has a right by law, upon probable cause, to make complaint against a supposed offender.

2d, That any person believing himself to have a claim against another, having probable cause for such belief, has a right, by law, to sue therefor, subject only, if his claim be adjudged false, to pay the costs of suit.

3d, That any creditor of another may institute proceedings in bankruptcy against his debtor, if he have probable cause to believe that his debtor has committed an act of bankruptcy; but a condition precedent to such right is, that he be, in fact, a creditor.

Counsel, on argument, and it seems to me the court, in its opinion, takes for granted in this case the contrary of the last proposition, without considering the question itself. Assuming that a petitioning creditor is not under any condition precedent to be, in fact, a creditor, then I would agree to all that is laid down in the opinion. But that is the very question, and the only important question, in the case.

The exception in regard to allowing counsel fees in the suit by way of damages was not founded in truth. The court below expressly confined the jury to three specific grounds of damage, and this was not one of them. Hence the request to charge on the subject was not relevant, and the court did no wrong to the defendants in refusing to so charge.

I think the judgment should be affirmed.

SNYDER v. SICKLES.

A Spanish grant of land situate in the district of St. Louis, made May 12, 1785, which this court, in *Stanford* v. *Taylor* (18 How. 409), decided did not, without a survey, attach to any specific tract, was in 1811 confirmed by the board of land commissioners. The first survey was made in 1834, but was not carried into patent, and on an application under the act of June 2, 1862 (12 Stat. 410), the Secretary of the Interior issued instructions for another survey. It was made, but he decided that no effect should be given to it, as it did not conform to the calls of the grant. In ejectment, the demanded premises being embraced by that survey, the plaintiff, who claimed under the grantee, offered in evidence it and one subsequently made by the surveyor of St. Louis County, Missouri, accompanied by proof that they conformed to the calls of the grant, and were identical. The evidence was excluded. *Held*, 1. That the survey, having been disapproved by the Secretary, has no binding effect, and that the question of its correctness was not for the determination of the jury. 2. That in the absence of a subsisting recognized survey, the grant not having been confirmed by ascertained boundaries specifically set forth in the order of the board, so that the tract can be located without a survey, the plaintiff cannot recover. 3. That the act of June 6, 1874 (18 Stat. part 3, 62), entitled "An Act to obviate the necessity of issuing patents for certain private land-claims in the State of Missouri, and for other purposes," applies only to cases where the party interested is by law entitled to a patent.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The facts are stated in the opinion of the court.

Mr. Montgomery Blair and *Mr. Britton A. Hill* for the plaintiffs in error.

Mr. Philip Phillips, *contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Titles to lands claimed by individuals in Louisiana at the time the province was ceded to the United States were in most cases incomplete, as the governor of the province never possessed the power to grant a patent. All he could do was to issue to the donee an instrument called a concession or order of survey, which never invested the party with a fee-simple title, from which it follows that the plaintiff in a suit to recover the land must prove that his claim had been confirmed under some act of Congress.

Complete titles, of which there were a few when the juris-

diction of the province was transferred, required no such confirmation, as they needed no other protection than that afforded by the third article of the treaty of cession. 8 Stat. 202; *United States* v. *Wiggins*, 14 Pet. 350. Incomplete titles required confirmation, and Congress passed the act of the 2d of March, 1805, to "ascertain and adjust titles and claims to land in the ceded territory." 2 Stat. 326.

Prior to the passage of that act, however, the province ceded by the treaty had been divided into two organized territories, and the fifth section of the act, to ascertain and adjust titles and claims to land therein, provided for the appointment of commissioners in each of those territories, to ascertain and adjudicate the rights of persons presenting such claims. Id. 283.

Such commissioners were required by the act providing for their appointment to lay their decisions before Congress, but a subsequent act provided that the decision of the commissioners, when in favor of the claimant, should be final against the United States. Id. 441.

Forty arpens of land in front by forty arpens in depth are claimed by the plaintiffs, and they allege that the tract is bounded on the west by the survey made for Charles Gratiot, assignee of Louis Robert, and that the tract claimed was surveyed April 10, 1865, for John F. Perry, assignee of Angelica Chauvin, under the order of the Commissioner of the General Land-Office, as directed by the Secretary of the Interior.

Service was made; and the defendants appeared, and filed an answer denying that the plaintiffs are entitled to the possession of the premises described in the petition. Subsequently the parties went to trial before the circuit justice and a jury, and the verdict and judgment were in favor of the defendants. Exceptions were filed by the plaintiffs, and they sued out the present writ of error and removed the cause into this court.

Possession by the defendants being impliedly admitted, the principal question is whether the evidence introduced or offered by the plaintiffs was sufficient to prove their alleged title to the premises. Enough appears to show that John F. Perry was the assignee of the original donee of the tract under the former sovereign, and that he, Aug. 26, 1806, presented the

concession for the same to the land commissioners for confirmation. From the concession, which bears date May 12, 1785, it appears that the acting governor conceded to the applicant forty arpens of land in front by forty arpens in depth, lengthwise the river called Des Peres, from north to south, bounded on one side by Louis Robert, and on the other by the royal domain. Evidence was introduced in support of the claim; but the board rejected it, for the alleged cause that it appeared from the records in their possession that the concession had been revoked, and that a new one had been issued to another party.

Five years later, the claim came up again before the land commissioners; and the record shows that the board confirmed the same to the assignee of the original donee for the whole amount of the claim, and entered an order that the same be surveyed conformable to his possession and at his expense. Pursuant to the requirement of the sixth section of the act, the commissioners also delivered to the party an instrument known as a confirmation certificate, stating the circumstances of the case, and that he is entitled to a patent for the tract of land therein designated, which certificate, the same section provides, shall be filed with the proper register or recorder within twelve months after date, and the record shows that it was duly issued and filed as required. Id. 441, sect. 6.

Beyond doubt, these proceedings were regular; but it is a great mistake to suppose that the confirmation certificate, without more, entitled the party to a patent. Instead of that, the next section of the act provides that the tracts of land thus granted by the commissioners, unless previously surveyed, shall be surveyed at the expense of the parties, under the direction of the surveyor-general or officer acting as such, and that the officer making the survey shall transmit general and particular plats of the tracts to the proper register or recorder, and shall also transmit copies of the said plats to the Secretary of the Treasury. Id. 442, sect. 7. When those acts have been performed, then the closing regulation of sect. 6 of the same act comes into operation, which makes it the duty of the register or recorder to "issue a certificate in favor of the party, which certificate, being transmitted to the Secretary of the Treasury, shall entitle the party to a patent, to be issued in

like manner as is provided by law for the issuing of patents for public lands lying in other territories."

Certificates signed by the land commissioners were issued subsequent to the confirmation, but before the survey required to be made and transmitted to the register or recorder; but the patent certificate, so called, was required to be issued by the register or recorder, and could not lawfully be issued until the survey and plats had been made and duly transmitted to the register or recorder, as directed by the seventh section of the act.

Suffice it to say in that connection that no such subsisting survey or plat was ever made in this case, nor was any such ever transmitted to the register or recorder, nor did he register or recorder ever issue such a certificate to the party, nor is any thing of the kind pretended by the plaintiffs. They made no effort to prove any thing of the sort; but what they attempted to prove was that they had acquired a fee-simple title to the land by virtue of certain other proceedings under certain other acts of Congress, which, as they contend, dispenses with the necessity on their part of showing that they ever complied with the sixth and seventh sections of the act of Congress under which the claim in question was confirmed.

Argument to show that the plaintiffs had no sufficient title under the provisions of that act is unnecessary, as they admit that "no previous survey had been made by Spanish, French, or American authority."

Attempt was made by the plaintiffs to supply the omission and cure the defect in the instruments of title exhibited in the proceedings which followed the decree of confirmation and the issuing of the confirmation certificate, by the evidence, documentary and parol, offered at the trial before the court and jury. Besides the concession of the governor and the decree of confirmation already mentioned, the plaintiffs also offered in evidence to the jury the petition of the original donee, addressed to the governor, asking for the concession, and her deed conveying the same to her assignee, together with the petition of the assignee to the land commissioners praying for a confirmation of the tract to him as such assignee, which was followed, as before stated, by the decree of confirmation and the confir-

mation certificate. Appended to the decree of confirmation is the order that the tract be surveyed conformable to his possession, and they also offered in evidence the act obviating the necessity of issuing patents for certain private land-claims, and for other purposes. 18 Stat. 62.

Parol evidence was also offered by the plaintiffs tending to show that they held all the title confirmed to the assignee of the original donee; and in order to show that the land in question formed part of the land confirmed, they offered in evidence the concession to Louis Robert, by which the tract claimed by the plaintiffs is bounded on one side, and the survey of that tract by Antoine Soulard, Spanish surveyor-general of that part of the province before the cession, and also the concession to Charles Gratiot.

Seasonable objection to all this evidence was made by the defendants, and it was excluded from the jury by the court, and the plaintiffs excepted to the ruling.

During the trial the plaintiff introduced in evidence the letter of the Secretary of the Interior to the Commissioner of the General Land-Office, dated March 18, 1865, directing a second survey of the tract to be made whenever the plaintiffs may request, so that it is bounded on the one side by the land of Louis Robert, which is one of the distinctive calls in the grant. In the course of the letter the Secretary also remarked that attention should be given to calls upon the river Des Peres, as far as practicable, and added in the same connection, that if the claimant causes the survey to be made and the tract patented upon land not granted to the original donee, it will be his error and misfortune. They also offered in evidence the letter of the Commissioner of the General Land-Office, dated March 24, 1865, addressed to the recorder of land-titles at St. Louis, communicating those instructions; and that also was admitted in evidence without objection.

Those documents having been admitted, the plaintiff then offered in evidence the survey returned by William H. Cozzens, on the 10th of April, 1865, in conformity with those instructions, together with the letter of the Secretary of the Interior stating that the survey was made under the directions of the claimants, and that upon examination it is found that it does

not conform to the calls of the grant required by the order of survey, and that the survey being upon land not granted, no effect will be given to it by the department. Due objection was made by the defendants to the admissibility of the evidence, and it was excluded by the court, and the plaintiffs excepted.

Failing in that, the plaintiffs then offered in evidence a survey of the tract made by the surveyor of St. Louis County, with oral testimony to show that the survey was identical with the one previously ruled out, and that the land confirmed to the assignee of the original donee was correctly located by that survey; all of which, on the objection of the defendants, was ruled out by the court, and the plaintiffs excepted to the ruling of the court.

Both parties resting, the court instructed the jury that the plaintiffs were not entitled to recover, and they excepted to the charge of the court.

Since the case was entered here, they have assigned for error the several rulings of the court excluding evidence which they offered to introduce at the trial, and the charge that the court gave to the jury that they were not entitled to recover.

Questions of difficulty remain to be examined and decided, in view of the exceptions, of which the following are the most important: 1. What would be the legal effect of the survey made under the supervision of the plaintiffs if it had never been disapproved by the Secretary of the Interior? 2. Was it competent for the Secretary of the Interior to disapprove the survey so made; and if so, to what extent did such disapproval affect the right or interest of the plaintiffs? 3. Irrespective of any survey, what is the legal operation of the concession as confirmed by the decree of the land commissioners? 4. Does it contain such metes and bounds that the Circuit Court can locate it without a survey and without the aid of parol evidence? 5. Suppose that question is determined in the negative, is it competent for the Circuit Court to admit parol evidence in an ejectment suit and submit the question of location in all its aspects to the determination of a jury? 6. Concede that there is no regular subsisting survey of the tract, what is the legal operation of the provision contained in the first sec-

tion of the act obviating the necessity of issuing patents in the private land-claims included within that enactment? Id.

Remarks to show that the survey in question never was recognized or approved either by the commissioner or the Secretary of the Interior may well be omitted, as nothing of the kind appears in the record, and it is certain to a demonstration that no steps were ever taken by the Land Department to carry it into effect. Nor is it necessary to add much to what already appears to show that it does not conform to the calls of the concession, as that plainly appears by the comparison of the survey with the terms employed by the governor in making the concession. Nor is it any proper answer to that objection to say that the survey was authorized by the Secretary of the Interior, as it clearly appears that it was made in utter disregard of his directions, and that it covers land granted to other donees and which is not embraced in the concession granted to the assignor of the party who presented the claim for confirmation.

Surveys of such claims might at one time be made, if the party applied to have it done, under the direction of the proper officers of the government, the condition being that the applicant should pay the expense or secure the same to the satisfaction of the Secretary of the Interior before the work was performed. 12 id. 410.

By that act the proper executive officers, at the request of the owner of the claim, might cause it to be surveyed; but they could not pass upon the title, nor give the survey any greater effect than *prima facie* evidence of the true location of the land. Such a survey was made in this case under the direction of the Secretary of the Interior; but there is nothing in that act to compel the Secretary of the Interior to approve the survey if he deemed it erroneous, or to give it any effect whatever if he disapproved of it for good reasons. His reasons for disapproving it have already been referred to, and need not be repeated; nor is it necessary to enter into any discussion of the reasons assigned by the officer for rejecting the same, except to say that the reasons given are, in the judgment of the court, amply sufficient to sustain his action.

When first established, the land-office was made a bureau

in the Department of the Treasury. 2 id. 716. By the act to reorganize the land-office, it is enacted that the executive duties appertaining to the surveys and sale of the public lands, &c., shall be subject to the supervision and control of the General Land-Office, under the direction of the President. 5 id. 107. Prior to the passage of that act, appeals were always allowed from the decision of the commissioner to the Secretary of the Treasury, as the head of the Treasury Department.

Sect. 2 of the act establishing the Interior Department provides that the Secretary of the Interior shall perform all the duties of supervision and appeal in relation to the land-office heretofore discharged by the Secretary of the Treasury. 9 id. 395.

Assume that the power of such supervision and appeal was vested in the Secretary of the Treasury prior to the passage of that act, and it would follow beyond controversy that the same power is now possessed by the Secretary of the Interior; but the suggestion in that regard is, that the act reorganizing the land-office left the Secretary of the Treasury no such power.

Duties of the kind, it must be admitted, were rightfully performed by the Secretary of the Treasury prior to the reorganization of the land-office, as the original act creating that bureau established the office in the Department of the Treasury, and placed the commissioner under the direction of the head of that department; nor does the latter act reorganizing the office make any substantial change in that regard, as the President still acted, as before, in matters belonging to the departments, through their respective heads, which in legal contemplation and practical effect gave the Secretary of the Treasury the same supervision over the doings of the commissioner as under the prior act establishing the land-office. *Patterson* v. *Tatum*, 3 Sawyer, 164. Documentary history, however, shows that the President, when the act reorganizing the land-office was presented to him for approval, entertained doubts whether the Secretary of the Treasury, if it became a law and went into operation, would be authorized to exercise the accustomed supervision over the official acts of the commissioner in respect to the public lands, and that he deemed the matter of sufficient

importance to ask the opinion of the Attorney-General upon the subject.

Prompt response to the request of the President was given by the Attorney-General, and in the course of his reply he adverted to the fact that the act creating the land-office made it a branch of the treasury, and he expressed the opinion in very decided terms that the commissioner, under the new law, would still be, as before, subject to the general superintendence of the President, acting through the head of the Treasury Department. 3 Op. Att'y-Gen. 137. But he suggested as a measure of precaution, that the President should, before approving the act, direct the Secretary of the Treasury that he should continue under its provisions to exercise the same supervisory power as theretofore over the business of the general land-office, which suggestion, it appears, was adopted by the President, and that the President issued such an order, bearing even date with his approval of that act. 2 Laws, Instructions, and Opinions, 104. See also the opinion of President Buchanan, 1 Lester, Land Laws, 681.

Throughout the entire period from the approval of that act to the passage of the act creating the Department of the Interior, the Secretary of the Treasury was accustomed to exercise that power, without question or challenge.

Viewed in the light of these suggestions, it is clear that the power since the passage of the last-named act is vested in the Secretary of the Interior. Conclusive support to that proposition is also found in two decisions of this court, where the precise point is distinctly ruled. *Magwire* v. *Tyler*, 1 Black, 195; s. c. 8 Wall. 661.

Four points were decided in the first case, as follows: 1. That surveys under such confirmations are, in regard to their correctness, within the jurisdiction of the commissioner, and that that officer has power to adjudge the question of accuracy preliminary to the issuing of a patent. 2 That the Secretary of the Interior has the power of supervision and appeal in all matters relating to the General Land-Office, and that that power is coextensive with the authority of the commissioner to adjudge. 3. That the Secretary, in the exercise of his supervisory powers, may lawfully set aside a survey made under a con

firmed Spanish grant, and may order another to be made, and issue a patent upon it. 4. That where the construction of the acts of Congress defining the powers of the Secretary of the Interior is drawn in question in a State court, and the decision is against the title supported by the decision of the Secretary, this court has jurisdiction to revise the case.

Corresponding rules are adjudged to be correct in the second case, as appears from the following propositions: —

1. That the judicial tribunals, in the ordinary administration of justice, have no jurisdiction or power to deal with these incipient indefinite claims without survey or specific boundaries, either as to survey or fixing boundaries, but that such titles, until an authorized survey is made, attach to no land, nor can a court of justice ascertain its location or boundaries, as that power is reserved to the Executive Department. *Landes* v. *Brant*, 10 How. 370; *West* v. *Cochran*, 17 id. 414.

2. That tracts of land previously surveyed or confirmed according to the specific boundaries set forth in the concession need no further location, as the legal effect of the confirmation is to establish the right of the donee to the designated tract.

Cases of the kind, it was there admitted, do sometimes arise; but the court held that where the claim has no certain limits, and the decree of confirmation carries along with it the condition that the land must be surveyed and severed from the public domain and the concessions of other parties, then in all such cases the title of the party attaches to no particular tract, and that the courts of justice have no power or authority in law to establish the boundaries or locate the concession, the rule being that that power is reserved to the appointed executive officers. *Stanford* v. *Taylor*, 18 id. 409; *Bissell* v. *Penrose*, 8 id. 334.

3. That the power to revise surveys of such claims was vested in the first instance in the commissioner, subject to appeal, under the act creating the Department of the Interior, to the secretary of that department, who might lawfully set aside such a survey; and that the concession, when the survey was set aside by the secretary, remained before the court as it existed when confirmed without survey by the land commissioners. 9 Stat. 395.

Even a few observations will be sufficient to show what the legal effect of the concession as confirmed was, without a survey to locate the tract and define its boundaries. Commissioners to adjudicate such titles were duly appointed, and they were required, under the sixth section of the act, to transmit to the Secretary of the Treasury and to the surveyor-general of the district where the land lay, transcripts of their final decisions made in favor of each claimant, and also to deliver to the claimant the confirmation certificate, stating the circumstances of the case, and that he was entitled to a patent for the designated tract; and the further requirement was that the certificate should be filed with the recorder if the land lay in the district of Louisiana, and with the register of the land-office when the land lay in the Orleans territory.

In all cases where the tract of land confirmed by the land commissioners had not been previously surveyed, the seventh section of the act declared that the same should be surveyed under the direction of the surveyor-general, and that he should transmit general and particular plats of the tracts that were surveyed to the proper register or recorder, and also transmit copies of the same to the Secretary of the Treasury; the further enactment being that, when the confirmation certificates and plats were filed with the register or recorder, he should thereupon issue a patent certificate in favor of the claimant, which, when transmitted to the Secretary of the Treasury, entitled the party to a patent in like manner as patents are issued for lands acquired in other lawful ways. *West* v. *Cochran*, *supra*.

Survey was made in this case, as before explained; but it was disapproved by the Secretary of the Interior, and became a nullity, and of course the patent certificate could not be issued, and the rights of the claimant were never advanced beyond what he acquired by the concession, the confirmation by the land commissioners, and their certificate of confirmation.

Cases arise where the specific boundaries of the tract are set forth in the concession given to the original donee by the foreign government, in which cases it is well settled, as conceded in the authorities already cited, that the decree of confirma-

tion locates the tract without any necessity for a subsequent survey. *Alviso* v. *United States*, 8 Wall. 339; *Higueras* v. *United States*, 5 id. 827; *Bissell* v. *Penrose*, 8 How. 341.

Nothing of the kind, however, of any practical importance, is exhibited in the record before the court, nor is it necessary to enter into any extended discussion of the question, as it has already been expressly decided by this court, in a controversy founded upon the same concession. *Stanford* v. *Taylor*, *supra*. Stanford sued the defendant in ejectment, claiming title from the confirmee to the land in dispute under a concession granted by the governor to Angelica Chauvin, the tract consisting of forty arpens in front by forty arpens in depth along the river Des Peres from north to south, bounded on one side by the land of Louis Robert, and on the other by the royal domain. Due confirmation was shown, as in this case, and that the commissioners ordered in the decree that the land should be surveyed conformable to the possession by virtue of the concession. Survey was made, and the tract located west of the location of Louis Robert and on both sides of the river Des Peres, which location, as the plaintiff contended, was erroneous. What he insisted was that the location should have been made east of the tract of Louis Robert, and that that proposition was so plain on the face of the concession, that no survey was necessary to determine the matter, and he offered parol proof to prove his theory, but the court of original jurisdiction rejected the proof offered, and this court affirmed the judgment.

Three of the matters decided by the court in that case deserve to be noticed: 1. That when there is a specific tract of land confirmed according to ascertained boundaries, the title of the confirmee is complete. 2. That where the claim has no certain limits, the title attaches to no particular land, nor can a court of justice establish the boundaries. 3. That the uncertainty of the intended location and of the outboundary in the case is too manifest to require discussion to show that a public survey is required to attach the concession to any land.

Indefinite and vague as the terms of the concession are, not a doubt is entertained that the court decided correctly in that case; and it is only necessary to add in this connection that the

court here now adopts that conclusion, and the reasons given in its support.

Concede that, and no further argument is necessary to show that it is not competent for the Circuit Court in such a case to admit parol proof to establish the boundaries of such a concession, the rule being established by repeated decisions that the concession in such case being indefinite, uncertain, and vague, attaches to no particular tract, and that it must be surveyed and located as required by the seventh section of the act under which it was confirmed, before the party can be entitled to a patent. *Stanford* v. *Taylor*, *supra*; *Maguire* v. *Tyler*, 8 Wall. 661.

Authority to appoint a surveyor of lands in that territory was conferred by Congress, and it was made his duty to cause to be surveyed the lands in the territory which have been or may be hereafter confirmed, under the conditions therein provided. 3 Stat. 325.

Both parties opposed the survey in the case of *Stanford* v. *Taylor* (*supra*); and the court having instructed the jury that it did not include the land in controversy, directed the jury to return a verdict for the defendant. Neither party claims that that survey is of any validity; and the second survey having been disapproved by the Secretary of the Interior, it is clear to a demonstration that the concession in question is without any subsisting valid survey, and remains where it stood at the date of confirmation, having never been advanced to the condition where the owner of the same could claim either a patent or patent certificate under the confirmation act. 2 Stat. 441.

Grant that, and still the inquiry arises, what is the legal effect of the more recent act dispensing with the necessity of issuing patents in the cases to which it applies? 18 id. 62.

Taken alone, the first section grants, releases, and relinquishes to confirmees all of the right, title, and interest of the United States in such confirmed lands, as fully and completely as could be done by patents; but the second section of the same act provides that nothing contained in the first section shall abridge, divest, impair, injure, or prejudice any valid right, title, or interest of any person or persons in any part of the lands mentioned in the first section. Both sections must be

construed together; and when so construed, the court is of the opinion that it dispenses with the necessity of issuing patents for such lands in all cases where the party interested is by law entitled to a patent, and in no other cases.

Patents, therefore, are not required where the concession was made by specific boundaries, nor where the specific boundaries of the tract confirmed are specifically set forth in the decree of confirmation, or where the tract had been previously surveyed, as required by the decree of confirmation and the seventh section of the act providing for such confirmation.

Ample scope for the operation of the act in question is found in the several classes of cases mentioned, without extending its operation to cases where no right to a patent had been acquired and which could not in that manner be conferred, without holding that it repeals the standard land laws of the country, nor without doing great injustice to claimants by introducing confusion and uncertainty into the administration of the Land Department.

Nor is there a word in the act, when the two sections are construed together, to support the theory of the plaintiffs. Instead of that, the adoption of their theory would operate as a virtual repeal of the second section, which was doubtless inserted to guard against any such consequences as would flow from the act, if the theory of the plaintiffs should receive judicial sanction.

Constant pressure of business in the land-office occasioned great delays in issuing patents, even in cases where the applicant held regular patent certificates, as well as in cases where the muniment of title granted by the former government gave the boundaries of the concession, or where the proper location and description of the tract was made certain by the decree of confirmation; and it was to remedy that grievance that the act under consideration was passed, for the purpose of dispensing with the necessity of issuing patents in certain cases.

Persons entitled to patents may, under that act, possess and enjoy their right to the land by virtue of the act without a patent; but the act does not dispense with a survey, made necessary by the act under which the confirmation was decreed, in order to entitle the party to a patent. Nor does it repeal

the seventh section of the prior act which creates that necessity. Nor would it ultimately benefit the plaintiffs if the act dispensing with the issuing of patents could be construed, as they contend it should be, unless it could be held to supply monuments or boundaries where they are not given in the foreign concession, as the difficulty would still remain that the description of the tract as given in the concession is too vague, indefinite, and uncertain, to afford the means of location without an authentic survey.

Even construed as they would have the act, still the fact would remain, that the only guide for its identity is the description given in the concession, which is, that it is forty arpens of land in front by forty in depth, lengthwise the river Des Peres from north to south, bounded on one side by the land of Louis Robert and on the other by the royal domain. Nothing definite is stated to show where any of the lines begin or end. As given, one boundary is by Louis Robert, but it is not stated on which side, nor is any point of beginning given to enable the court to determine where it bounds on the royal domain; nor is any thing set forth in the description to enable the court to determine where it begins or ends on the river, except what may be inferred from the phrase "from north to south."

Sufficient appears to show that the tract cannot be located without a survey or without the aid of extrinsic proof, which certainly cannot be admitted while the act of Congress requiring the survey remains in full force. These difficulties in the way of the plaintiffs are insuperable; nor would a patent remove them without a survey, as the concession would still be vague, indefinite, and uncertain, and incapable of location until the party in some way should procure an authentic survey.

Such a survey being necessary to the location of the claim, and the antecedent surveys having been rejected, the question will doubtless arise whether a new one may or may not be ordered, which is not determined by the present opinion, and which it is the intention of the court to leave entirely open.

For these reasons, the court is of the opinion that there is no error in the record.

Judgment affirmed.

ELCOX *v.* HILL.

1. A. brought an action against the keeper of a public hotel in Illinois to recover the value of a stock of jewelry, worth $6,300, which he had in his travelling bags at the hotel while he was there as a guest. One of them was not locked, and both were left by him overnight in the coat-room of the hotel, he taking from the boy in charge a check therefor. The next morning, A. discovered that the jewelry had been taken from the bag which was unlocked. The other bag could not be found. A. had informed no one connected with the hotel of their contents, although there was a safe there for the custody of such property, and notice of the fact given, as required by the statute of that State. *Held*, that in the absence of proof that the loss was occasioned by the hand or through the negligence of the hotel-keeper, or by a clerk or servant employed by him in the hotel, A. was not entitled to recover.
2. A hotel-keeper is not liable for a loss occasioned by the personal negligence of the guest himself.
3. Evidence that a servant admitted that he had stolen the property while he was employed at the hotel by the landlord is not admissible in an action against the latter.

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

This is an action of trespass on the case by Elcox and Larter against Hill, proprietor of a public hotel in the city of Chicago, to recover the value of a quantity of jewelry lost by them while Larter was a guest at the hotel.

The plaintiffs were manufacturing jewellers, doing business at Newark, N. J. Larter left home for a tour through several Western cities, with some $6,300 worth of jewelry, which was contained in two travelling-bags or satchels, like those usually carried by travellers: one a large leather bag, containing about $5,300 worth of solid gold jewelry, and the other a small satchel, containing about $1,000 worth of jewelry. The smaller bag was not locked and had no key.

On arriving at the hotel, Sunday morning, March 9, 1873, he registered his name and asked for a room, but one could not be assigned to him for some three or four hours. During the time he was waiting he placed his travelling-bags in the coat-room and received a check therefor. Between twelve and two o'clock, a room was assigned to him on the upper floor of the house, and his baggage, consisting of the two bags, was taken

from the coat-room and carried up to the room, where he remained for some time and then came down to dinner. Before going into the dining-room, he gave the key of his room to the bell-boy, who had conducted him to the room and carried the bags, and directed him to go up and bring them down and put them in the coat-room again; and on coming out from dinner he received from the boy the coat-room check for them. He saw them in the coat-room two or three times after that before he went to bed, the last time being about ten o'clock at night, at which time William Drum, the boy then in charge of the coat-room, as Larter said, voluntarily told him that they were perfectly safe, and that the coat-room would be locked up at twelve o'clock. Soon after this, Larter went to his room for the night, and after breakfast in the morning called at the coat-room for his satchels. The small one only could be found, and from that the jewelry had been stolen. He had previously given no information of the contents of the bags, nor had he asked to have them placed in the safe.

At the top of the page of the register, where he wrote his name on entering the hotel, were printed these words: —

"Money, jewels, and valuable property must be placed in the safe in the office, otherwise the proprietor will not be responsible for any loss."

On the door of the room assigned to him, and on the door of every other room, was a printed notice, containing among other things the following: —

"9. All guests of the house are cautioned against leaving money, jewels, or valuables of any description in their rooms, as the proprietor will not be responsible for them if stolen. *Money or valuables, properly labelled, must be deposited in the safe at the office.*"

And also a copy of the statute of the State of Illinois, entitled "An Act for the protection of innkeepers," which is as follows: —

"SECT. 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, that hereafter every landlord or keeper of a public inn or hotel in this State, who shall constantly have in his inn or hotel an iron safe in good order and suitable for the custody of money, jewelry, and other valuable articles belonging

to his guests or customers, shall keep posted up conspicuously at the office, also on the inside of every entrance-door of every public sleeping, bar, reading, sitting, and parlor room of his inn or hotel, notices to his guests and customers that they must leave their money, jewelry, and other valuables with the landlord, his agent or clerk, for safe keeping, that he may make safe deposit of the same in the place provided for that purpose.

"SECT. 2. That such landlord, hotel or inn keeper as shall comply with the requirements of the first section of this act shall not be liable for any money, jewelry, or other valuables of gold, or silver, or rare precious stones that may be lost if the same is not delivered to said landlord, hotel or inn keeper, his agent or clerk, for deposit, unless such loss shall occur by the hand or through the negligence of the landlord, or by a clerk or servant employed by him in such hotel or inn: *Provided*, that nothing herein contained shall apply to such amount of money and valuables as is usual, common, and prudent for any such guest to retain in his room or about his person."

For the purpose of safely keeping the valuables and jewelry of guests, the proprietor had a very large vault built in the hotel, which was in plain sight, back of the counter, in the office, immediately in front of Larter when he wrote his name upon the register.

The coat-room in the hotel was only intended for the reception of ordinary hand-valises, coats, and umbrellas, and not for valuables or jewelry: the place for valuables and jewelry was in the safe or vault.

At the trial, the plaintiffs offered to prove by two witnesses the admission to them by the boy William Drum that he had stolen the jewelry, but on the objection of the defendant the evidence was excluded.

The court having charged the jury that the notice (paragraph 9, *supra*) was a sufficient compliance with the statute, further instructed them as follows: —

"If the defendant has made out to your satisfaction from the proof that he did comply with this law by providing a safe, and posting notices as required, then the plaintiffs, in order to hold him liable on the ground that the loss comes within the exceptions of the statute, must satisfy you it did in fact occur by the hand of one of the defendant's servants employed in the

hotel. The mere suspicion that Drum took the goods, or suspicious circumstances, are not enough. The evidence should be such as to reasonably satisfy your minds that the goods were so lost by the fault or hand of this servant. The burden of proof on this point is with the plaintiffs; and the failure or negligence of the defendant to prosecute Drum on a criminal charge for stealing this property does not tend to show that the boy was guilty, or that the loss occurred through his act. The defendant was no more bound to prosecute this boy for this criminal offence than any other citizen. It was a violation of the general criminal law of the land if the boy was guilty; and any citizen was as much bound to see that he was criminally prosecuted as was the defendant.

"I come now to consider the last point made by the defendant, and that is, that the goods in question were lost by reason of the want of due care on the part of Larter. Negligence is usually, in cases like this, wholly a question of fact for the jury. Negligence is a relative term; that is, what is or is not negligence depends upon circumstances, and you must determine, from all the circumstances surrounding the transaction as disclosed in the proof, whether Larter's negligence contributed directly to this loss or not. Every man is bound to act with such prudence and care as it is presumed would be taken by an ordinarily careful and prudent man under similar circumstances; and a failure to so act is what is called negligence.

"It is obvious that the degree of care with which a man is bound to act must depend largely upon the degree of responsibility with which he is charged. For instance, a man who is the custodian of several thousand dollars should be expected to be much more prudent and circumspect in his conduct than one with a very small sum of money; and what might be called gross negligence in a man with valuable jewelry or a large sum of money under his charge, might not be deemed negligence at all in a man with but little money and no jewelry or valuables in his charge.

"The admitted facts in this case are that Larter placed these two bags containing this large quantity of valuable jewelry first in the coat-room, then took them to his room with the aid of the bell-boy, then left them in his room and sent the bell-

boy after them, with directions to place them in the coat-room. Then, by frequent looks and inquiries in regard to his bags, which he admits making, he may have betrayed such solicitude for their safety as called attention to them unnecessarily. One of these bags contained over $5,000 worth of jewelry, and must necessarily have betrayed its contents, and to some extent its value, by its weight. The conversation with this boy late in the evening, and the acceptance of his voluntary assurances that the bags were perfectly safe where they were, are all circumstances bearing upon the question of negligence, and to be considered, and it is for you to say whether a person of ordinary prudence, with so responsible a trust, would have so conducted himself.

"Travellers must be presumed to know the relative duties of the different classes of employés about a hotel, that is to say, that they have no right to intrust their baggage to the care of the table-waiter, or to the hostler, from the fact that it is not the duty of such employés to look after or care for the baggage, or take the custody of it; and it is for you to say whether the leaving of this baggage by Larter in this coat-room was not of itself an act of negligence, especially when he failed to inform any one of its contents. If he had said to the landlord or the clerk in charge of the office, "My satchel is in that coat-room, it contains valuable jewelry;" and if the landlord or clerk had left it there after such information, they might be held to have assented to accept it there, and to have left it themselves in the charge of the servant in care of the coat-room; but it is a question for you to consider whether it was not such negligence as might amount to a fraud on the defendant for Larter to leave this valuable property in such a place, without informing the defendant or his proper clerk in the office of its value, so that they might govern themselves accordingly.

"As I said before, negligence is a relative or comparative term. Probably, if a guest at a hotel should deposit his money or jewelry with a table-waiter, or cook, or bell-boy, without direction to do so from the landlord or clerk in charge, or leave his satchel containing money and valuables unprotected in the halls or public passages, or leave his money exposed in his room, and his room unlocked, — no one would hesitate to say that

such an act was an act of negligence to such an extent as to excuse the landlord in case of loss. And it is for you to say in the light of the proof, and of your own knowledge and experience of the manner in which large city hotels are necessarily conducted, whether trusting valuable packages, such as jewelry like this of the plaintiff, to the care of the coat-room boy was or was not an act of negligence for which the party should suffer the consequences rather than the landlord.

"It is true, as has been urged by counsel, that the innkeeper is responsible for the acts of his servant; but that does not justify a guest at a hotel in intrusting valuable merchandise to the care of a subordinate servant, whose line of duty was not the charge or keeping of such valuables without the knowledge of the landlord, or of his clerk in charge.

"The evidence has disclosed to you to some extent the duties of the servants or employés of the hotel in charge of the coat-room; and it is for you to say in the light of the evidence whether a prudent man would have intrusted to such a servant and such a place the keeping of valuable packages like these lost by Larter, without at least first making inquiries to ascertain whether any more secure place of deposit could be provided.

"In conclusion, then, if you are satisfied from the proof that the loss in this case occurred through the want of due care on the part of Larter, under the circumstances, then the defendant is not liable, even if you should believe from the proof that the loss occurred by the fraud or the act of the boy Drum. And if you find from the evidence that the goods in question were not travellers' baggage, but merchandise, and intended for such by the plaintiffs, then the defendant is not liable, unless the defendant, or some one in his employ whose duty it was to attend to such matters, was informed of the contents of the bags, and accepted in some form the custody of them.

"As has been said and urged on the part of the plaintiffs, the loss of the goods makes a *prima facie* case of liability, and you must determine whether the defendant has relieved himself therefrom by showing negligence on the part of Larter."

To all of which charge and instruction the plaintiffs excepted.

There was a verdict and judgment for the defendant, whereupon the plaintiffs sued out this writ of error.

Mr. Melville W. Fuller for the plaintiffs in error.
Mr. Robert Hervey, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

There can be but little doubt that the goods of the plaintiffs were stolen from them while one of them was at the hotel of the defendant, in the city of Chicago. They insist thereupon that their loss shall be made good; but it does not follow, because they met with a loss, that they can recover the amount from him.

The defendant contends that he is exempt from liability for money, jewels, and the like, unless his guest who lost them complied with the statute of Illinois on that subject. Where a safe for the keeping of such articles is provided by the hotel-keeper, and the notice given as required by the statute, a loser failing to take the benefit of the protection thus furnished him must bear his own loss. *Hyatt* v. *Taylor*, 42 N. Y. 258; *Stewart* v. *Parsons*, 24 Wis. 241.

To this rule the statute makes one exception. If the loss occurs "by the hand or through the negligence of the landlord, or by a clerk or servant employed by him in such hotel or inn," the liability remains. The judge submitted that question to the jury, who found against the plaintiffs.

It is settled by the authorities that where the loss is occasioned by the personal negligence of the guest himself, the liability of the innkeeper does not exist. *Purvis* v. *Coleman & Stetson*, 21 N. Y. 111; *Cook* v. *The Champlain Transportation Co.*, 1 Den. (N. Y.) 91.

The question of personal negligence was properly submitted to the jury, and was also found against the plaintiffs.

The court refused to receive evidence that William Drum had admitted that he had stolen the jewelry in question. If he was guilty of the offence, the fact should have been established by due proof. If he were on trial himself, his admission would be competent, but upon no principle could he admit away the rights of another person.

Judgment affirmed.

ANDREAE *v.* REDFIELD.

Importations were made by A. and others, whereon they paid under protest certain duties unlawfully exacted by B., collector of customs. The latter, when sued for the excess of duties, pleaded the Statute of Limitations; whereupon A. filed his bill, setting forth that his attorney was informed by an officer of the custom-house, that by the rules and practice of the Treasury Department the presentation of A.'s claim to the auditor or refund clerk would prevent the Statute of Limitations from running, and that the statute, if the claims were so presented, could not and would not be interposed as a defence in case suits should be brought to recover said excess; that B., though he disclaimed any control in the matter, declared his confidence in the knowledge and experience of the officer who made such statement, and expressed his opinion as concurring therein; that A. did present his claim to the auditor or refund clerk, as suggested; and that, relying upon the prior action of the Secretary of the Treasury in recognizing claims of a like nature, and upon said statements and opinion of the officer of the custom-house, and the concurrence of B. therein, he and others had refrained from suing until the bar of that statute had attached. He therefore prayed that B. be enjoined from pleading it in any of the actions at law for such excess. *Held*, that the matters alleged are not sufficient to estop B. from pleading the statute.

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

The facts are stated in the opinion of the court.

Mr. Robert G. Ingersoll and *Mr. A. W. Griswold* for the appellant.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Customs duties, illegally exacted, may be recovered back by an action in the Circuit Court against the collector for money had and received, provided the payment was made under protest, in writing, signed by the party, as required by the act of Congress applicable to the case. 5 Stat. 727; 13 id. 214; *The Assessors* v. *Osborn*, 9 Wall. 567.

Circuit Courts under existing laws have not jurisdiction of suits to recover back moneys illegally exacted for internal-revenue duties, unless the parties are citizens of different States, or the suit is removed into the Circuit Court from a State court. *Hornthal* v. *The Collector*, 9 id. 560.

None of the acts of Congress, however, which exclude the

jurisdiction of the circuit courts in these cases have any application where the suit is brought to recover back duties of customs illegally exacted, if the payment was made under protest, as required by law. Rev. Stat., sects. 2931–3011.

Goods to a large amount were imported by the complainants, or by the several firms to which they belong; and they allege that the goods were subject to duty in proportion to the actual market value of the articles at the principal market of the country from which the same were imported, and that the collector, in order to ascertain the dutiable value of the merchandise, erroneously added to the said market value, or compelled the owner or consignee to add to the same, certain charges for the expenses of transportation from the market where purchased, to the place of shipment, together with two and a half per cent commissions on such charges, and that he unlawfully computed the duty upon such erroneous and excessive valuation.

Importations of the kind, it is admitted, were subject to duty; but the complaint is that the duties as ascertained and liquidated were excessive, and that the complainants, in order to obtain possession of the goods, were obliged to pay the excessive amount charged; and they aver that they paid the same under protest, as provided by law.

Sixty importations of the kind were made by the complainants, and seven years after the respondent went out of office they commenced suits to recover back the excess of duty illegally exacted in each of the sixty cases.

Service was made; and the respondent, in November, 1866, appeared and pleaded, among other defences, the Statute of Limitations. Four replications were filed by the plaintiffs to the plea, to which demurrers were interposed by the defendant. Hearing was had; and the court sustained the demurrers to the third and fourth replications, and overruled the demurrers to the first and second. Issuable matters being set forth in the first and second replications, the plaintiffs filed rejoinders to those tendering issues; and in April, 1872, the issues were joined, and the cases have since been ready for trial. Continuances from term to term followed, and on the 11th of March, 1874, the present bill of complaint was filed by the plaintiffs in those several actions, all joining as complainants. All of the

actions at law are still pending, and the only relief sought by the bill of complaint is an injunction to restrain the respondent "from prosecuting or maintaining upon the trial of any of the said sixty actions his plea of the Statute of Limitations, and from claiming and insisting in said trials" that the said actions or any of them are barred by the said Statute of Limitations.

Two objections are taken to the action of the collector: 1. That in ascertaining the dutiable value of the goods he improperly included the expense of transportation from the principal market of the country where purchased, to the place of shipment; 2. That he also erroneously included in such dutiable value a higher rate of commissions than is authorized by the revenue law.

Various matters are set forth in the bill of complaint as causes that entitle the complainants to the relief sought, which, in brief, may be described as follows: 1. That the complainants respectively have a just and legal claim to recover back the excess of duties which they paid under protest, and which were illegally exacted by the respondent. 2. That the Statute of Limitations at the time hereafter mentioned was about to take effect as a bar to the causes of action embraced in the said several suits. 3. That an officer in the custom-house where the goods were entered stated to the attorney of the importers that, by the rules and practice of the Treasury Department, the presentation of their respective claims to the auditor or to the refund clerk of the custom-house would prevent the running of the Statute of Limitations, and that the statute, if the claims were so presented, could not and would not be interposed as a defence, in case suits should subsequently be commenced to recover back such excess of duties. 4. That the respondent, as such collector, though he disclaimed any control in the matter, declared his confidence in the knowledge and experience of the officer who made that statement, and expressed to the said attorney his concurrence in the said opinion and statement. 5. That the complainants did present their respective claims to the auditor or refund clerk of the custom-house, as suggested, and that relying upon the prior action of the Secretary of the Treasury in recognizing claims of a like nature, and upon the said statements and opinion of the officer of the custom-house,

and the concurrence of the respondent therein, they respectively refrained from bringing actions to recover back such excess of duties so illegally exacted until the Statute of Limitations had run against all of their claims.

Preliminary to those allegations in the bill of complaint, it is also alleged that actions of a like kind to recover back such illegal exactions were previously commenced and prosecuted in two other districts, in which it was decided and adjudged that the charges for transportation and commissions on the same were illegal, and that the Secretary of the Treasury paid back the excess in those cases; and they also allege that orders were issued by that officer to the respondent and to his successor in office to prepare statements showing the amount of such excess, and to transmit the same to the department for consideration.

Due appearance was entered by the respondent, and he demurred to the bill of complaint. Certain interlocutory proceedings followed, which it is not important to notice in this investigation. Suffice it to say, in this connection, that the parties having been fully heard, the court entered a decree dismissing the bill of complaint, and the complainants appealed to this court. Since the appeal was entered here, the complainants assign for error the ruling of the circuit judge sustaining the demurrers of the respondent, and the decree of the court dismissing the bill of complaint.

Discussion to show that the several importers had a good cause of action, irrespective of the Statute of Limitations, is unnecessary, as that proposition is admitted by the demurrer; but it is equally clear that that admission, without more, will not avail the complainants in the present controversy, as it is obvious that they had a plain, adequate, and complete remedy at law.

Excessive customs duties illegally exacted may be recovered back in an action of assumpsit for money had and received, if due protest in writing is made by the party aggrieved, at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the required payment. 5 Stat. 727.

Suppose that is so, still it is insisted by the complainants that they were wrongfully induced by the public authorities

to delay the enforcement of their legal claims until their respective causes of action became barred by the Statute of Limitations; and attempt is made in argument to support that proposition by each and every of the grounds specifically set forth in the bill of complaint.

1. That the circuit courts in two instances decided and adjudged that the exaction of such duties was illegal, and that the Secretary of the Treasury repaid the same in accordance with the judgments.

2. That the Secretary of the Treasury submitted to the rule established in those cases, and was willing to apply it to the claims of the importers in these cases, when the claims were duly adjusted and presented in the manner required by the regulations of the department.

3. That the Secretary of the Treasury issued an order to the collector to ascertain the amount of such excess of duty, and to transmit the account when prepared to the department, together with a statement of the excess charged for commissions on the same importations.

4. Orders, it is also alleged, were adopted by the Treasury Department which show that the importers in such cases were entitled to the excess of duties illegally exacted as soon as the importers could furnish to the auditor or refund clerk detailed statements of the previous importations, and the names of the vessels in which they were made, and the dates of their arrival in the port, such statements being required in order to enable the auditor of the custom-house or refund clerk to prepare certified copies of the same to be forwarded to the department, pursuant to the instructions of the Secretary of the Treasury.

Labor, care, and attention were required to comply with that requirement; and the complainants allege that whatever devolved upon them in the matter was seasonably accomplished, but they admit that the certified statements to be forwarded to the department were not completed by the auditor or refund clerk when the respondent, as collector, went out of office.

Culpable remissness of duty is not charged upon the auditor or refund clerk, during the period while the collector who liquidated the duties remained in office as collector of the port. Nothing of the kind is alleged, but the charge is that

his successor refused to allow the process of adjusting the claims of the complainants to be continued; that they complained of the delay and the refusal of the successor, and that the Secretary of the Treasury issued an order to the new collector, requesting that the instructions upon the subject given to his predecessor should be complied with at his earliest convenience; and it is alleged that such an order was given, as shown by the exhibit annexed to the bill of complaint, but it is admitted that the claims of the complainants were never reported in pursuance of the orders of the Secretary of the Treasury.

Considerable progress was made in preparing the necessary statements; and the complainants allege that it was during that period that their attorney suggested to the auditor of the custom-house that the claims would soon be barred by the Statute of Limitations, and made inquiry of him whether it would not be necessary to commence suits to prevent the bar from attaching,— to which the auditor replied, that instructions having been given by the department to refund the money, it was not the fault of the department that it had not been done; that all the complainants had to do to prevent the Statute of Limitations from running was to present their claims to the refund clerk for adjustment, as required by the rules and practice of the Treasury Department.

Subsequent conversations were also had by their attorney with the auditor of the custom-house, of like import and to the same effect; and the complainants also allege that the respondent, in a conversation with their attorney, remarked that the auditor was very familiar with the practice of the department, and that he, the attorney, could rely upon the auditor's statements, and added, that he could see no necessity for commencing suits in the cases, as if the complainants would present their claims for adjustment the statute would cease to run from that time, and would not be interposed as a defence to the claims.

Many other excusatory allegations of a corresponding import are set forth in the bill of complaint; and the complainants allege that, relying upon those matters, and for the purpose of avoiding a multiplicity of suits, they refrained from bringing

the actions, in full faith and confidence that the Statute of Limitations would not be set up as a defence to any actions which should thereafter be brought to enforce their claims.

Afterwards the same attorney, as the complainants allege, sought an interview with the Secretary of the Treasury, and brought to his notice the representations of the auditor of the custom-house and the respondent in respect to the Statute of Limitations, and inquired of him whether the complainants could rely upon the representations and statements that suits need not be commenced to prevent the Statute of Limitations from running, provided they presented their claims for adjustment in proper time. Before replying to the inquiry, the allegation is that the Secretary of the Treasury consulted with the clerk in charge, and the complainants allege that his reply was that such had been the practice for many years, and that latterly it had become even more liberal, referring to the fact that where a favorable decision was obtained in one case the same rule was applied in others of the same class.

Claims of the kind in great numbers were in the mean time, as the complainants allege, adjusted and paid to the claimants, and they also allege that on the 10th of May, 1864, sixty of their claims remained unadjusted and unpaid, for which they brought the several suits described in the bill of complaint. Process being issued and served, the respondent appeared and pleaded *non assumpsit*, payment, and the Statute of Limitations. Replications, as before explained, were filed, and demurrers interposed and disposed of in the manner heretofore stated, leaving issues for the jury under the first two of the replications.

Viewed in the light of these several suggestions, it is clear that the several claims of the complainants were never prepared and presented, as required, to the Secretary of the Treasury for adjustment and allowance; but the complainants allege that they were induced to delay such preparation and presentation by the recited official representations and others of like import, and they pray for an injunction restraining the respondent from setting up the bar of the Statute of Limitations in defence of the several actions to recover back the moneys which the respondent, as collector, illegally exacted of them as such importers.

Importers in such cases may make payment under protest, and bring an action of assumpsit for money had and received against the collector to recover back whatever amount was illegally exacted. Preventive remedies are not authorized by the acts of Congress, nor have they ever been since the revenue system of the United States was organized. Instead of that, the act of Congress now in force provides as follows: "And no suit for the purpose of restraining the assessment and collection of a tax shall be maintained in any court." 14 Stat. 475.

Appropriate remedy is given in such cases by action against the collector, and provision is made in case the importer recovers, that no execution shall issue against the collector if the court certifies that he had probable cause for his action, or in case it appears that he acted under directions of the Secretary of the Treasury, or other proper officer of the government, the regulation being that the amount recovered shall in that event be paid out of appropriations made for the purpose. 12 id. 741; Rev. Stat., sect. 989.

Merchants importing goods find ample remedy under the provisions mentioned for illegal exactions made by collectors, and the better opinion is that it is the only judicial remedy authorized by Congress for the redress of such grievances. Beyond all doubt, the remedy the importing merchant has in such a controversy is against the collector; and in case of recovery he is entitled to an execution against the defendant in the action, unless the court shall certify that the collector had probable cause for his action, or it appears that he acted under directions from the proper official source. Directions of the kind are doubtless frequently given; and in such cases it may well be contended that the suit is in the nature of a suit against the United States, as the provision is that "the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriations from the treasury." 12 Stat. 741.

Cases of that kind present little or no difficulty of decision; but it is equally true that cases arise where no such instructions were given, and in such cases it follows that the importer, if he prevails in the suit, is entitled to an execution against the defendant which will bind his goods and estate, unless the court

where the judgment is rendered deems it proper to give the collector a certificate that he had probable cause for his action in exacting the excessive duties. Certificates of the kind are never given until the litigation is closed, and, of course, it cannot be known whether it will be given or refused pending the litigation.

Where the collector acts under antecedent directions from the proper source, it is clear that the suit is in the nature of a suit against the United States, and it may be that the suit, if the certificate of probable cause is finally given, may be regarded in the same light; but more difficulty would attend the solution of the question in a case where neither of those conditions occur, especially if it appears that the suit was not commenced until after the collector went out of office. Actions of the kind must be commenced against the collector who made the illegal exaction, and no one pretends that such an action can proceed against the successor after the incumbent goes out of office.

Importers, in case they prevail, are in any view entitled to be paid the amount which they recover; nor is it important in this case to determine whether the pending actions are in the nature of suits against the United States, or merely suits against the collector, as in either view the result must be the same. Argument to show that the actions in form are actions against the present respondent is unnecessary, as that is conceded, but there is much reason to suppose that the collector acted under official orders.

Concede that the United States is the real party, still the court is of the opinion that there is nothing in the remarks attributed to the auditor of the custom-house or to the refund clerk or to the Secretary of the Treasury which can be held to preclude the respondent from pleading any proper plea to the actions which he may think necessary in making his defence. When the suits against the collector were commenced to recover back the money which the complainants allege he exacted from them illegally, he was a private citizen, and nothing is shown in pleading to justify the conclusion that the Secretary of the Treasury or the customs officers made any remarks which can create any liability as against the respondent which he did not

incur. Nor is there any thing in the remarks of that officer, made to the attorney of the complainants, which will support the theory that he ever intended to deprive the respondent, as the defendant in these actions, of the right to plead any plea he, the respondent, might see fit in defence of the claims therein prosecuted.

Congress undoubtedly might authorize actions of the kind to be brought directly against the United States; but all must concede that such a power has never been exercised and is not conferred, and in the absence of such legislation the court is of the opinion that such actions may in certain aspects be treated as actions against the collector, unless it appears that he acted under the directions of the proper official authority, or that a case is made where no execution can issue against the collector.

Even suppose it were otherwise, still it is clear that none of the remarks attributed to the Secretary of the Treasury or to the officers of the customs can have any effect to estop the respondent from pleading any matter in defence of the actions which he may think necessary to protect his rights. Rightly interpreted, all that the respondent said to the attorney of the complainants had reference to the future action of the Secretary of the Treasury; that is, he expressed the opinion that the complainants could rely upon the statements of the auditor as correct, that according to the practice of the department the Statute of Limitations would cease to run when their claims were properly prepared and presented for adjudication and allowance.

Taken in the most favorable view for the complainants, it is clear that it is impossible to regard those remarks as a contract or promise made by either party. There was no promise to forbear instituting the suits, nor was there any promise, if forbearance was accorded, that the statute should cease to run. Every pretence of that sort is negatived by the language employed, which even fails to show that any negotiation took place between the parties looking to any such arrangement, contract, or promise. When they separated, each party was as free to pursue his own course as when the interview commenced. Complainants might have brought suits the same day; and if

they had, the respondent would have been at liberty to make any defence in his power, irrespective of any thing which had transpired at the interview.

Nor is there any thing shown in the remarks attributed to the Secretary of the Treasury which can be held to support the theory of the complainants that he entered into any contract with their attorney, or ever made any promise that the Statute of Limitations should cease to run. All he did was to answer the questions propounded as to the practice of the department; but he gave no assurance that any indulgence would be granted to the complainants, unless the claims were duly prepared and presented for adjustment in proper time.

Examined in the light of these suggestions, as the case should be, it is obvious that the complainants have no just cause of complaint, as they have not in fact been deceived or misled.

Grant that, and still the complainants contend that it had the effect to conceal from them the necessity of instituting suits to prevent their claims from being barred by the lapse of time, and they contend that the same rule should be applied in the case as when the defendant fraudulently conceals from the plaintiff his cause of action; and decided cases are referred to where it is held that in such controversies the statute does not begin to run until the fraud is discovered.

Except where the Constitution, treaties, or statutes of the United States otherwise require, the Judiciary Act provides that the laws of the several States shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. 1 Stat. 92; Rev. Stat., sect. 721.

Repeated decisions of this court decide that the court is bound to conform to the decisions of the State courts in the construction of their Statutes of Limitation. *Green* v. *Neal's Lessee*, 6 Pet. 291; *Harpending* v. *Dutch Church*, 16 id. 455; *Porterfield* v. *Clark*, 2 How. 125.

State statutes in many cases provide that, where the action proceeds upon the ground of fraud, the lapse of time is to be computed from its discovery; but the courts of New York, as well as several other States, have always held that the concealment of the cause of action *ex contractu* does not interrupt

or delay the running of the statute as a bar to the action. *Troup* v. *The Executors of Smith*, 20 Johns. (N. Y.) 44.

Assumpsit was brought in that case to recover damages, for that the testator, in his lifetime, undertook to survey a certain township of land, and to divide the same into convenient lots, to enable the plaintiff to sell the same to the best advantage; and the charge was, that he performed the work so unfaithfully and unskilfully, that it caused great damage to his employer, to which was added the money counts. Due appearance was entered by the executors of the deceased, and they pleaded *non assumpsit* and the Statute of Limitations. Issue was joined upon the first plea, and to the second the plaintiff replied that the cause of action was not discovered until within less than six years before the action was commenced. More than six years had elapsed after the fraud was committed, but it was not discovered until two or more years later; and the defendant demurred to the replication, insisting that the statute commenced to run from the time the fraud was committed, and the question of the sufficiency of the replication was argued by eminent counsel.

Plaintiff's counsel, in endeavoring to support the replication, contended that the cause of action did not accrue until the plaintiff discovered the fraud in making the survey; and in responding to that proposition, Spencer, C. J., who delivered the opinion of the court, remarked that the inquiry is, when did the plaintiff's cause of action accrue? and he immediately answered the inquiry as follows: "Most certainly, when the fraud was consummated;" which was, as the whole court held, when the testator had completed the survey, as far as it was completed, and made the return of his field-notes and received his compensation, adding, that the injury, as far as he was concerned, was then done, and that he then became liable to an action for the fraudulent and imperfect manner of executing the duties he had assumed.

Speaking to the same point, the learned Chief Justice also remarked, that the fact that the plaintiff did not discover the imposition practised is a matter entirely distinct from the existence of the fraud and imposition. If, then, the plaintiff's cause of action accrued from the consummation of the fraud

by the testator, and not at the time the plaintiff discovered it, the statute interposes as a protection, unless the action is commenced within six years next after the wrong was perpetrated.

Some countenance, he admits, is given to the opposite theory by certain decided cases, to which he refers, and then he proceeds to say: "We cannot, however, yield the convictions of our own minds to decisions evidently borrowed from the courts of equity, and which have never been sanctioned by the courts of law in the country from which our jurisprudence is derived." He admits that the rule is otherwise in courts of equity; but the court decided that courts of law are expressly bound by the statute, giving as a reason for the conclusion, that it relates to specified actions, and that it declares that such actions shall be commenced and sued within six years next after such actions accrued, and not after. Maxwell, Statutes, 6; *The Imperial Gas Light and Coke Co.* v. *The London Gas Light Co.*, 10 Exch. 39. Thus not only affirmatively declaring within what time these actions are to be brought, but inhibiting their being brought after that period.

It is no answer to a plea of the Statute of Limitations, says Nelson, C. J., that the cause of action was fraudulently concealed by the defendant until after the statute had attached, and that the suit was brought within the time limited by the statute after the discovery of the right to sue. *Allen* v. *Mille*, 17 Wend. (N. Y.) 204; *Leonard* v. *Pitney*, 5 id. 30.

Courts of equity, says Bronson, may grant relief against acts and contracts executed under mistake or in ignorance of material facts; but it is otherwise where a party wishes to avoid his act or deed on the ground that he was ignorant of the law. *Ignorantia juris non excusat.* *Champlin* v. *Laytin*, 18 id. 407; *Storrs* v. *Barker*, 6 Johns. (N. Y.) Ch. 166.

It is not a sufficient answer to the Statute of Limitations, says Phelps, in an action on the case for deceit, that the plaintiff was ignorant of his cause of action until within six years, although that ignorance was occasioned by the nature of the deceit or the manner in which the fraud was perpetrated. *Smith* v. *Bishop*, 9 Vt. 110; *Fee* v. *Fee*, 10 Ohio, 469; *Clark* v. *Reeder*, 1 Spears (S. C.), 407.

Without more, it must be conceded that these authorities are sufficient to show what the established rule in the States mentioned is, where the suit is an action at law, and that the fraudulent concealment by the defendant of the plaintiff's cause of action is not a good answer to the plea of the Statute of Limitations. Other States adopt the opposite rule, and their courts hold that the rule at law is the same as in equity. *Hovender* v. *Annesly*, 2 Sch. & Lef. 607; *Coster* v. *Murray*, 5 Johns. (N. Y.) Ch. 522; *Michoud* v. *Girod*, 4 How. 503; *Hallet* v. *Collins*, 10 id. 187; *Sherwood* v. *Sutton*, 5 Mas. 149; *Jones* v. *Conway*, 4 Yeates (Pa.), 109; *McDowell* v. *Young*, 12 Serg. & R. (Pa.) 128; Angell, Limitations (6th ed.), sects. 189, 190.

But it is not necessary to rest the case entirely upon the State rule of decision, as it is clear that the matters alleged in the bill of complaint are not sufficient to support any such theory, nor is that the true theory of the claim made by the complainants. On the contrary, they allege that they had a legal and just claim to recover back certain import duties illegally exacted by the respondent; and the necessary implication from the allegation is that they knew the legality of the claims as well when they filed their protests as when, seven years later, they instituted the pending actions against the respondent.

Fraudulent concealment of the cause of action is not alleged, nor is it the *gravamen* of the complaint. No such charge is made; but the complaint is that they were induced by the aforesaid representation to refrain from bringing their actions until the bar of the Statute of Limitations had attached, which, in the judgment of the court, the matters set forth in the bill of complaint are not sufficient to show.

Give the allegations the broadest signification the language employed will justify, and it is clear that the conversations attributed to the Secretary of the Treasury and the officers of the custom-house do not amount to a contract or promise that the Statute of Limitations should cease to run in any contingency, whether the complainants did or did not cause their claims to be prepared and presented to the Treasury Department for adjustment and allowance.

They never did prepare and present their claims to the Secretary of the Treasury for allowance, as required by the alleged

rules of the department, nor do the conversations alleged amount to a promise that the statute should cease to run even if they had complied with the supposed rules and practice of the department.

Conversations of the kind cannot benefit the complainants, for several reasons: 1. Because they do not amount to a promise that the Statute of Limitations should cease to run; and if they did, they cannot avail the complainants as a new promise, because they are not in writing. 2. They do not amount to a contract to that effect; and if they do, they are without consideration. 3. They cannot have the effect to estop the respondent from pleading the bar of the statute, because both parties were equally well informed of all the facts. *Shapley* v. *Abbott*, 42 N. Y. 443; *Packard* v. *Sears*, 6 Ad. & Ell. 474; *Freeman* v. *Clark*, 2 Exch. 654; *Foster* v. *Dawber*, 6 id. 834; *Edwards* v. *Chapman*, 1 Mee. & W. 231; *Swain* v. *Seamens*, 9 Wall. 274; s. c. 12 Blatch. 419.

Tested by these considerations, it follows that there is no error in the record. *Decree affirmed.*

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE FIELD, dissenting.

I dissent from the judgment in this case, because I believe that the acts and promises of the officers of the government, alleged in the bill, are such as to work an estoppel in equity to the plea of the Statute of Limitations in this case; and that the facts establishing this estoppel are too complex, and their relation to the defendant such that the issue cannot be well tried on a replication to the plea.

EX PARTE SCHWAB.

1. A *mandamus* cannot be used to perform the office of an appeal or a writ of error.
2. Where a suit was brought in the Circuit Court by assignees in bankruptcy, praying that a transfer of personal property by the bankrupt to A. be decreed to be fraudulent, that their title thereto be declared to be perfect, and that A. be enjoined from prosecuting an action therefor then pending in a State court, and the Circuit Court, after due notice, awarded a preliminary injunction, and an order is asked here for a *mandamus* commanding the judge who granted the injunction to set it aside, — *Held*, that the Circuit Court having jurisdiction of the suit, an error, if one was committed, can only be reviewed here after a final decree shall have been passed in that court.

MOTION for an order to show cause why a *mandamus* shall not be issued.

The facts are stated in the opinion of the court.

Mr. Matt. H. Carpenter and *Mr. Don M. Dickinson* in support of the motion.

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

Certain creditors of Scott & Feibish, of Detroit, instituted proceedings in bankruptcy, March 14, 1878, against the debtors in the District Court of the United States for the Eastern District of Michigan, and at the same time obtained a provisional order for the seizure of certain goods which, it was alleged, had been disposed of in fraud of the bankrupt law. This order was placed in the hands of Salmon S. Matthews, marshal of the district, and he, on the 29th of March, took into his possession, as the property of the bankrupts, the goods claimed by Schwab, the petitioner herein. On the 13th of April, Scott & Feibish were in due form adjudicated bankrupts.

April 27, Schwab sued Matthews, the marshal, and Mabley, Michaels, Rothschild, and Hayes, four of the creditors of Scott & Feibish, in the Superior Court of the city of Detroit, for the value of the goods seized. May 6, Joseph L. Hudson was duly elected and appointed assignee in bankruptcy of Scott & Feibish, and the goods in question were thereupon turned over to him by the marshal. Since then the goods have been sold by the

order of the bankrupt court, and the proceeds of sale remain in the hands of the assignee to be applied as part of the estate of the bankrupts, if it shall appear that the title to the goods was in the assignee at the time of the sale.

October 5, Hudson, the assignee, Matthews, the marshal, and the four creditors, defendants in the suit in the State court, filed a bill in equity against Schwab in the Circuit Court for the Eastern District of Michigan, wherein they pray that the sale and transfer of the goods to Schwab "may be set aside and held for naught, and decreed to be in violation of the Bankrupt Act, and that said goods and chattels may be decreed to be a part of the estate of Scott & Feibish, and that the title of said Joseph L. Hudson, said assignee, to said goods, or to the funds arising therefrom, may be quieted and decreed to be perfect." It is also further prayed that Schwab and his attorneys be enjoined "from further prosecution of said suit so pending in the Superior Court of Detroit, or from the prosecution of any other or further suit in regard to the seizure of said goods, save in this [the circuit] court or in the bankruptcy court."

A preliminary injunction, after notice, was granted by the judge of the District Court for the Eastern District of Michigan, November 12, and Schwab now asks for an order on the judge to show cause here why a *mandamus* should not issue commanding and enjoining him to vacate and set aside such injunction.

Mandamus cannot be used to perform the office of an appeal or a writ of error. *Ex parte Loring*, 94 U. S. 418; *Ex parte Flippin*, id. 350. The Circuit Court had jurisdiction of the action and of the parties, for the purpose of trying the title of the assignee to the goods. The injunction was granted in the course of the administration of the cause. Injunctions may be granted by the courts of the United States to stay proceedings in the courts of a State, "in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Rev. Stat., sect. 720. When the application was made for the allowance of the injunction, it became the duty of the court to determine whether the case was one in which that power could be exercised. The question arose in the regular progress of the cause, and, if decided wrong, an error

was committed, which, like other errors, may be corrected on appeal after final decree below.

The case is entirely different from what it would have been if the only object of the suit had been to enjoin Schwab from proceeding in the State court. There the question would have been as to the jurisdiction of the Circuit Court over the cause. But here is clearly jurisdiction of the cause. The assignee in bankruptcy had the undoubted right to sue Schwab in the Circuit Court to settle the title to the goods or the fund arising from their sale. The injunction was a mere incident to the principal relief he asked. Even if not granted, the suit could go on.

Being satisfied, by the petitioner's own showing, that the error, if any, in the court below cannot be corrected by *mandamus*, we deny the motion for an order to show cause.

Motion denied.

SLAUGHTER *v.* GLENN.

1. Lands in Texas belonging to a married woman are termed in that State her "separate property," and she has in equity all the power to dispose of them which could be given to her by the amplest deed of settlement.
2. During the absence of her husband, when she had the exclusive management of her interests, a married woman owning in her own right such lands conveyed them to A. by deed, which she acknowledged before the proper officer, as if she were a *feme sole*. She invested the purchase-money in another tract, and A. sold the lands to B. Some years afterwards, she and her husband brought an action to recover them. B. filed his bill, praying that the action be enjoined and his title quieted. *Held*, that, in view of the decisions of the Supreme Court of Texas as to the effect of such a conveyance, he was entitled to the relief prayed for.

APPEAL from the Circuit Court of the United States for the Western District of Texas.

The facts are stated in the opinion of the court.

Mr. W. S. Herndon for the appellants.

Mr. Isaac C. Collins, *contra*.

MR. JUSTICE SWAYNE delivered the opinion of the court.

There is a considerable mass of testimony in the record, but

the facts are few, and we think there is nothing material about which there is any room for doubt.

In the year 1863, and for some years previous, the appellant, Mrs. Slaughter, had owned in her own right the premises in controversy in this case. She was a widow when she married Slaughter, and then possessed the property. It is situated in Marion County, in the State of Texas. The land was poor and the place very unhealthy. In the spring of that year, Dunn & Co. were desirous to put up a packing establishment, and were looking for property to buy with that view. Her agent offered the premises in question. At his request Dunn called upon her. She asked $8,400. Dunn & Co. agreed to give it, and paid her in Confederate money. On the 21st of July, 1863, the payment was completed, and she executed a deed to the purchasers. She was the sole grantor, and the certificate of acknowledgment was silent as to any separate and privy examination. The certificate is as if she were a *feme sole*. Gray, the officer who took the acknowledgment, testified as follows: —

"I witnessed and attested said deed at the request of Mrs. E. J. Slaughter, the maker thereof. I took her acknowledgment to said deed. I asked her if she acknowledged it to be her act and deed, for the uses, purposes, and considerations as therein stated and expressed; she answered that she did. I cannot remember positively what other questions were propounded to her or what answers were made, but I think I asked all the questions usually asked by county clerks in taking acknowledgments, as required by the statute. She signed the deed, after an explanation of its contents made by me to her. Her husband, M. T. Slaughter, was at that time absent in the army. After the examination and explanation of the contents to her by me, she signed the deed, and acknowledged it to be her act and deed. She acknowledged it, so far as I could tell, freely and willingly.

"At the time of the making the deed, M. T. Slaughter was absent. He had been absent about four months, not less than four months. He was a soldier in the Confederate army. He was absent for more than twelve months; I cannot remember positively how long."

About the time the transaction was closed she bought another tract of land situate in the neighborhood, and paid for it out of the money she had received from Dunn & Co. A deed to her was duly executed on the 3d of August following. The tract is fully described in the bill, and a copy of the deed is in evidence. The property was known as the Culbertson farm. Before selling and buying, she consulted with her friends, and they earnestly advised both as highly advantageous.

The firm of Dunn & Co. consisted of Dunn and Price. Price sold and conveyed to Dunn his share of the premises in controversy, and Dunn sold and conveyed the entire premises to Joseph Glenn, since deceased.

On the 26th of May, 1863, the appellant, M. T. Slaughter, left his home, and entered into the Confederate military service in the State of Louisiana. He lost an arm by a casualty of the war, and thereupon returned home and remained there. He was absent about a year. He had no means. His wife had considerable property. During his absence she managed and controlled every thing as if she had been a *feme sole*. His ever returning depended upon the chances of the war. Upon getting back, he expressed himself as highly gratified by the sale and purchase she had made. She had constantly done the same thing. On the 3d of June, 1868, Slaughter and wife conveyed an undivided half of the premises in controversy to one of their counsel in the court below, with a special covenant against all persons claiming under them. By the same instrument it was provided that the learned gentleman should prosecute a suit for the recovery of the premises without any other compensation, and that in the event of defeat he should pay all costs and damages and save his clients harmless. An action of trespass to try title was instituted in the proper State court, in the name of Slaughter and wife. Glen thereupon filed this bill to quiet his title. Upon his application, both cases were removed to the Circuit Court of the United States. That court decreed a perpetual injunction in the action at law, and the equity case has been brought here for review.

The controversy between the parties is to be decided accord

ing to the jurisprudence of Texas. We must administer the law of the case in all respects as if we were a court sitting there, and reviewing the decree of an inferior court in that locality. *Olcott* v. *Bynum*, 17 Wall. 44.

The case on the part of the appellants wears the appearance of a conspiracy to defraud, which, to say the least, does not commend it to the favorable consideration of a chancellor.

A court of equity must find itself hard pressed in the other direction to refuse the relief sought by the bill upon the facts disclosed in the record. We do not find ourselves embarrassed by any such considerations.

The only objections taken by the appellants to the title of the appellees' testator are that Slaughter was not a party to the deed of his wife to Dunn & Co., and that the certificate of her acknowledgment does not conform to the requirements of the statute of the State touching deeds by married women of their own property.

Before considering that subject, it is proper to advert to two other points which arise upon the record.

All the means, legal and equitable, which Dunn had of protecting his title passed by assignment under his deed to Glenn. *Kellogg* v. *Wood*, 4 Paige (N. Y.), 578.

Mrs. Slaughter paid for the Culbertson farm entirely out of the proceeds of the property which she conveyed to Dunn & Co., and there was an overplus left in her hands. If we were constrained to hold that she is entitled to recover back those premises, it would then have to be considered whether she should not be regarded as a trustee *ex maleficio*, and required to convey to the appellees, as representing Glenn, the Culbertson farm, in which the money of Dunn & Co. was invested. *Oliver et al.* v. *Piatt*, 3 How. 333; *May* v. *Le Claire*, 11 Wall. 217.

Again, it is the settled law of Texas that if an infant convey, and after coming of age choose to rescind, he must, as a general rule, restore what he has received, before he will be permitted to recover; and the same rule is applied to married women under like circumstances. *Womack* v. *Womack*, 8 Tex. 397.

But it is necessary to pursue these views, because we find

the propositions of the appellants touching the execution of the deed to Dunn & Co. wholly untenable.

The common-law rights and powers of *feme coverts* have been considerably modified in Texas. There, real estate belonging to her, whether acquired by descent or purchase in the usual way, is termed, though not technically so, her "separate property," and she has in equity all the power to dispose of it which could be given to her by the amplest deed of settlement. The statute regulating conveyances to pass the legal title is not unlike those of most of the other States. It provides that the "husband and wife having signed and sealed any deed or other writing purporting to be a conveyance of any estate or interest in any land, slaves, or other effects, the separate property of the wife, . . . if the wife appear before any judge," &c., "and being privily examined by such officer apart from her husband, shall declare that she did freely and willingly sign and seal the said writing, to be then shown and explained to her, and wishes not to retract it, and shall acknowledge the said deed or writing so again shown to her to be her act, thereupon such judge or notary shall certify such privy examination, acknowledgment, and declaration, under his hand and seal, by a certificate annexed to said writing, to the following effect or substance, viz.," &c. The form is then given. 1 Laws of Texas (4th ed.), p. 261, art. 1003.

In the administration of this statute by the courts of the State a singular anomaly has grown up. The following adjudications will show the changes in the common law and the anomaly to which we have referred.

In *Womack* v. *Womack* (*supra*), a husband and wife conveyed a slave belonging to her, and warranted the title. There was no certificate of acknowledgment. The court said the statute which prescribed the mode of conveying did not declare void any other mode, and that it seemed, "from its terms, to have but one object in view, and that was to secure the freedom of will and action on the part of the married woman. If she was free to act, and so declared it, and that she did not retract, all the circumstances concurred which were made necessary to pass the title to the property." The deed was held to be valid.

In *Wright* v. *Hays* (10 Tex. 130), the husband was from home,

at a distance, for nearly six years. During his absence his wife visited him. At the end of that time he returned home and remained there. In the mean time, the wife bought land, took the title in her own name, and conveyed a part of it to her son by a former husband. After her death, suit was brought to defeat the conveyance. The same objections were made to the deed as here. The court said: "The joining of the husband in the wife's conveyance, her privy examination and declaration that she acts freely, all presupposes that a husband is present and may be exercising undue influence over her. But can these formalities be requisite in cases where the rights of the wife (and they are acknowledged by law) depend upon the supposition that *de facto* she has no husband?" The deed was sustained, and judgment was given for the defendant.

In *Dalton* v. *Rust* (22 id. 133), the vendors had given a title-bond to the vendee for a tract of land described by metes and bounds. The vendee died before making full payment. The vendors filed a petition in the county court for the sale of the premises and the payment of the balance due. A sale was accordingly made, and the amount due paid out of the proceeds. The purchaser sued to recover possession, according to the metes and bounds set forth in the bond. One of the vendors set up as a defence that she was, when she executed the bond, and had continued to be, a married woman, and that she did not acknowledge the bond according to the requirements of the statute. It was held that she was estopped by the proceedings in the county court and the receipt of the purchase-money from denying the validity of the bond, or the right of the purchaser to all the lands within the metes and bounds set forth in the original contract which she had executed. She was treated in all respects as if she had been a *feme sole* from the outset.

In *Clayton's Adm'rs and Others* v. *Frazier* (33 id. 91), the plaintiff sued the heirs of a married woman for the title to land which had been her property, and for the conveyance of which, on the payment of the purchase-money, she and her husband had given a bond. There had been no examination of the wife as to her voluntary execution of the bond. It was held that the case was a proper one for specific performance. *Womack*

v. *Womack* and *Dalton* v. *Rust* were cited and approved. This is the latest authoritative adjudication in that State upon the subject to which our attention has been called.

These authorities require no comment. The propositions which they establish are decisive of the case before us.

Decree affirmed.

GIFFORD *v.* HELMS.

Purchasers from an assignee in bankruptcy of property transferable to or vested in him as such, cannot maintain a suit in equity asserting their title to such property against persons claiming adverse rights therein, if, at the time of the purchase, his right of action was, under the Bankrupt Act (14 Stat. 517; Rev. Stat., sect. 5057), barred by the lapse of time.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee.

The facts are stated in the opinion of the court.

Mr. Montgomery Blair for the appellants.

Mr. C. W. Hornor, *contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

District courts, though constituted courts of bankruptcy, do not possess the power under the twenty-fifth section of the Bankrupt Act to order, in a summary way, the sale of an estate, real or personal, although the same is claimed by the assignee, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual possession of a third person, holding the same as owner, and claiming absolute title to and dominion over the same as his own property, whether derived from the debtor before he was adjudged bankrupt, or from some former owner. *Knight* v. *Cheney*, 5 Nat. Bank. Reg. 305.

Courts of bankruptcy may exercise many of the powers conferred by the first section of the Bankrupt Act in a summary way, as well in vacation as in term time, first giving notice to the party opposed in interest to the prayer of the petition, as in a rule to show cause in an action at law or in a suit in

equity without service of process, the rule being that in such a proceeding neither party is entitled to a trial by jury, and that the only remedy for error is to seek a review under the first clause of the second section of the same act. *Smith* v. *Mason*, 14 Wall. 431.

Power to revise cases and questions which arise in the district courts in such proceedings is conferred upon the circuit courts by that clause of sect. 2, but it is settled law that the power so conferred does not extend to any case where special provision for the revision of the case is otherwise made. *Morgan* v. *Thornhill*, 11 id. 74.

Two trust-deeds were executed by the debtor of the complainant in his lifetime, — one to each of the two trustees named in the bill of complaint; the first embracing several tracts of land which were conveyed to secure his creditors, and the second consisting of an interest in a tract of two hundred acres, arising from a verbal contract to purchase the same, and an advance of $7,000 in part payment of the stipulated consideration, in respect to which the party who agreed to purchase the same, not being able to pay the balance, determined to abandon the contract and assert a lien upon the tract for the amount paid.

Twenty-nine hundred dollars of the amount paid for the tract by the debtor was the money of his wife, which she derived from the estate of her father, and which, by agreement between her and her husband, made while the money was still in the hands of the executor, he was allowed to apply towards paying for the land, the stipulation between them being that in taking title to the land such an interest in the same should be conveyed to her in her own separate right as would be proportionate to the amount of her money applied to the payment of the consideration.

Abundant evidence to substantiate those facts is found in the record; and it also appears that the debtor of the complainant, on the 10th of June, 1867, conveyed to his son all of his equitable interest in the several properties previously transferred to the before-mentioned parties, together with whatever interest he owned in the turnpike therein described, which was not included in either of said trust-deeds. Proof of that

conveyance is placed beyond doubt; but it is equally clear that the chief object of the same was to secure the repayment to his mother of the money belonging to her which the father used and applied towards paying for the prior-described tract of land, the son becoming bound to her for that amount under the agreement.

Eight months and a half later, to wit, on the 28th of February, 1868, the said debtor of the complainant filed his petition in bankruptcy, and in the month of February of the succeeding year received his discharge. On the 6th of May next, after the petition in bankruptcy was filed, the assignee of the estate was appointed, and due conveyance of all the assets of the bankrupt was made to him, as required by law. Schedules of the bankrupt's liabilities were duly filed, but they did not mention the name of the original complainant as a creditor.

Allegations to the effect that the complainant proved debts to the amount of $4,500 are contained in the bill of complaint, which was filed Aug. 31, 1871, and the record shows that his own deposition given in the cause affirms the allegation; but the answer of the respondents denies the fact alleged, and the deposition of the bankrupt fully supports the averment of the answer.

Service was made; and the respondents appeared and demurred to the bill of complaint, and they subsequently filed an answer setting up several defences, including most or all of the causes shown in support of the demurrer. Hearing was had; and the court — the district judge presiding — overruled the demurrer to the bill of complaint. Proofs were subsequently taken; and the parties having been again heard, the court — the circuit justice presiding — entered the final decree as to the merits in favor of the complainant, from which the respondents appealed.

Since the suit was commenced new parties have been made, in consequence of the death of the complainant and the principal respondent, but the questions to be decided are unaffected by that circumstance.

Three of the errors assigned were fully discussed at the bar. They are as follows: 1. That the court erred in holding that the conveyances made by the assignee to the complainant included any of the property sued for in the bill of complaint.

2. That the court erred in holding that the said conveyance was of any validity, even if it did include the property for which the suit is brought. 3. That the court erred in overruling the defence that the suit is barred by the Statute of Limitations.

These several assignments of error were discussed at the bar in the order herein stated; but it will be more convenient to consider the question of limitation first, for the reason that, if that is sustained, the other assignments of error will become immaterial, as sufficiently appears from the prayers of the bill of complaint, of which the following are the most material: 1. That the conveyance from the bankrupt to his son may be decreed to be fraudulent, null, and void. 2. That the equities and personal property therein described may be decreed to the complainant. 3. That if the court should be of the opinion that he, the complainant, is not entitled to all of the equities described, then that his *pro rata* in the same may be decreed to him, and that the $4,000 paid by the son, if found to have been paid out of his own money, may be decreed to have been paid in fraud and with notice that he is not entitled to recover the amount. 4. That all debts included in the deed of trust may be decreed to be invalid as a lien on the estate of the bankrupt, and that all claims against the bankrupt which are unproven, whether secured or not, may be decreed invalid as to the estate of the bankrupt, and not entitled to be paid out of the same in whole or in part. 5. That the cloud caused upon the titles by the conveyance to the son may be removed, and that the titles to the tracts may be decreed to the complainant free from the liens created by the conveyance.

Actions at law or suits in equity may, in a proper case, be brought by the assignee against any person to recover interests of the bankrupt held adversely, or by any person against such assignee touching any property vested in such assignee; but the same section of the Bankrupt Act provides that no suit at law or in equity shall in any case be maintained by or against such assignee, or by or against such person in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee. 14 Stat. 518; Rev. Stat., sect. 5057.

Deeds of trust, as before explained, were executed to certain

trustees, and on the 10th of June, 1867, the equities in controversy were conveyed by the debtor to the son. On the 28th of February of the next year the debtor filed his petition in bankruptcy. Due proceedings followed, and on the 6th of May, 1868, more than two years before the bill was filed, the assignee was appointed, and conveyance was duly made to him of all the assets of the bankrupt.

Speedy administration as well as equal distribution of the assets among the creditors is the policy of the Bankrupt Act, and the former is almost as necessary as the latter to accomplish the beneficent ends for which the law was passed. Impressed with that view, Congress enacted the limitations contained in the second section of the Bankrupt Act, which, like other statutes of limitation, must receive a reasonable construction. Beyond doubt, it applies to all judicial contests between the assignee and other persons touching the property or right of property of the bankrupt, transferable to or vested in the assignee, where the interests are adverse, and have so existed for more than two years from the time when the cause of action accrued for or against the assignee. *Bailey* v. *Glover*, 21 Wall. 346.

Absolute title to the equities in controversy was claimed by the respondent from the moment the deed to him of the same was executed by the bankrupt; and if that conveyance was made in fraud of creditors, as alleged by the complainant, it is clear that the equities were transferred to and vested in the assignee when he was appointed, and of course his right of action to recover the same commenced at the time the instrument of assignment was executed and delivered. Whatever remedy for the supposed fraud the assignee had, it is evident he might have pursued and enforced at any time after he acquired title to the bankrupt's estate. *Ex parte Currie*, 7 Law Times, N. S. 486; *Cleveland* v. *Boerum et al.*, 24 N. Y. 615.

Ignorance of the state of the title is not alleged, nor is there any pretence of concealment. Instead of that, the proof is clear that the assignee knew all the facts, and that he came to the conclusion that the title of the respondent was valid, and that the assignee had no just claim to the equities. *Terry* v. *Anderson*, 95 U. S. 632; *Clark* v. *Hackett*, 1 Cliff. 280.

Nor is there any thing to benefit the complainant in the suggestion that he does not sue as assignee or creditor, as the record clearly shows that he claims as purchaser from and under the assignee.

Pending the proceedings in bankruptcy, the assignee petitioned the court for authority to make sale of the notes, judgments, and accounts of the bankrupt, for the reasons set forth in the petition, not including the equities which the bankrupt had previously conveyed to his son. Enough appears to show that the reason he did not include those equities in the petition was, that he had reported to the court the day previous that the conveyance to the son was without fraud, and valid. Reasonable doubt upon that subject cannot be entertained; but the order entered by the court upon the petition is broader than the prayer of the petition, and includes the interest of the bankrupt in the property conveyed to "the son, and all other property belonging to the estate." Pursuant to that order, dated May 17, 1871, the assignee, on the 13th of June following, sold all the assets of the bankrupt for the sum of $225 to the complainant, he being the highest bidder for the same at the public sale.

Nothing can be plainer in legal decision than the proposition that the complainant did not acquire, by the conveyance made to him under that sale, any greater rights than those possessed by the grantor. Whatever rights the assignee possessed, if any, were acquired May 6, 1868, when he was appointed and qualified as the assignee of the estate of the bankrupt. Throughout the whole period intervening between that date and the date of the purchase by the complainant, the respondent held the equities in controversy adversely to the supposed right of the assignee.

Viewed in the light of these suggestions, it is clear that the right, if any, of the assignee was barred by the Statute of Limitations before purchase of the same by the complainant.

The decree must be reversed with costs, and the cause remanded with directions to dismiss the bill of complaint; and it is

So ordered.

BOWEN *v.* CHASE.

1. The court adheres to its ruling in *Bowen* v. *Chase* (94 U. S. 812), touching the title to certain lands whereof Stephen Jumel was sometime the owner, which were conveyed upon certain trusts to the separate use of Eliza Brown Jumel, his wife, with a general power of appointment during her lifetime, and of the several appointments made thereunder to Mary Jumel Bownes by said Eliza, who survived her husband, which ruling declares that the title to the property situate in New York City passed on her death to said Mary in fee, except a tract of sixty-five acres on Harlem Heights, in regard to which no opinion was expressed.
2. Bowen, claiming to be the heir-at-law of said Eliza, brought ejectment for all the lands against the heirs-at-law of said Mary who were in possession of them, but offered no evidence that said Stephen had transferred the title of said tract, or that said Eliza had ever acquired any interest therein except her estate in dower. The conveyances made by said Eliza to defeat her appointments in favor of said Mary and restore the lands to their original trusts were put in evidence. They recite that the said tract had been originally conveyed upon the same trusts as the remaining lands. The defendants then offered to prove declarations of said Stephen, while residing on and having the seisin and control of said tract, that his wife had sold all the property out of his hands, under a power of attorney given not to dispossess him, but to do business for him; that they had compromised a settlement by which the estate owed him a support for life, and at his death and that of his wife it was to go to their daughter, and he was satisfied. *Held*, that such declarations being in harmony with the deeds that he had executed or authorized, and against his interest in reference to the property not conveyed, or not shown to have been conveyed, were admissible.
3. After the evidence was closed, counsel on both sides agreed that as to the title of said Mary there was no conflict of testimony, and that it was a matter for the court to determine. The court thereupon directed the jury to find specially that said Eliza, "at the time of her death, had no estate or interest in the lands claimed which was descendible to her heirs." *Held*, that if the parties meant that the court should determine whether, as a matter of fact, she had or had not such estate or interest, the direction was in the nature of a finding made at their request, which this court cannot review; that if the title was to be determined as a matter of law, they must have intended that the declarations of said Stephen were to be received as true, and, if so, the direction was proper.

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. Chauncey Shaffer and *Mr. Merritt E. Sawyer* for the plaintiff in error.

Mr. James C. Carter, *contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case was before us in an equity suit at the October Term, 1876, upon the same general state of facts which is embodied in the present record. *Bowen* v. *Chase*, 94 U. S. 812. The bill in that case was filed after the commencement of this, for the purpose of enjoining this and all other suits brought by the plaintiff in error for the property involved in the controversy. The Circuit Court had decreed a perpetual injunction in reference to the whole property. We sustained that decree as to all the property in New York City except a tract of sixty-five acres on Harlem Heights, as to which it did not seem to us that an injunction was proper. Consequently, the present suit, which was on our docket at the time, on writ of error, was continued for argument.

The case was tried by jury in the Circuit Court, in October Term, 1872, and certain errors are alleged as to the admission and rejection of testimony, and as to the charge of the court. In order to understand their bearing, it is necessary to take a general view of the facts of the case, as they are spread upon the record in the bill of exceptions.

The action is ejectment brought to recover possession of various parcels of real estate in the city of New York; viz., *first*, a certain tract of ninety-four acres, situated on Harlem Heights, divided into lots numbered 6, 7, 9, 10, 11, 12, 13, 14, and 15, according to a map of the estate of Leonard Parkinson, made by Charles Loss in 1810; *second*, a lot of thirty-two acres at Harlem Heights, known as the homestead, being part of lot numbered 8 on said map; *third*, two houses and lots on Seventh Avenue and 41st Street, the claim to which was abandoned by the plaintiff on the trial; and, *fourth*, two lots at the corner of Broadway and Liberty Streets.

This property was all in possession of one Eliza B. Jumel, known as Madame Jumel, widow of Stephen Jumel, at the time of her decease in July, 1865; and has ever since been in the possession of the defendants, Nelson Chase, and his chil-

dren by his wife Mary Jumel Bownes (or, as she was called, Mary Jumel), an adopted daughter of Mr. and Madame Jumel, who died in 1843. Their claim to the property is based on a family settlement made in 1828, whereby a life-estate was secured to Madame Jumel, with a remainder to Stephen Jumel for life, remainder in fee to the said Mary Jumel Bownes, their adopted daughter. In 1867, the present suit was brought for the recovery of the property by George W. Bowen, the plaintiff in error, who claims to be an illegitimate son of Madame Jumel, born in Providence in 1794, and as such her heir-at-law under a statute of the State of New York passed in 1855, by which illegitimate children, in default of lawful issue, are made capable of inheriting from their mother. He contends that Madame Jumel died seised of a descendible estate in the property, and that he, as lawful heir, is entitled to the possession of it. The defendants, on the trial, contested both allegations; viz., that the plaintiff was the son of Madame Jumel, and that she died seised of a descendible estate. Other issues were raised by the defence, which it is unnecessary now to notice.

Much of the evidence taken at the trial related to the question of the plaintiff's alleged relationship to Madame Jumel, and most of the errors assigned relate to rulings on the admission and rejection of testimony on that subject. As this branch of the case becomes immaterial, if it be shown (as found by the jury) that Madame Jumel had no descendible estate in the property, we will consider the latter question first.

The marriage of Stephen and Madame Jumel took place in New York in April, 1804; and the adoption of Mary Jumel Bownes, who was a niece of Madame Jumel, took place soon after, when the said Mary was a mere child. Mr. Jumel was a French wine-merchant of considerable wealth, residing in New York, and after his marriage with Madame Jumel they lived in much style for that day in the lower part of the city.

It is conceded that the property in question all belonged to Stephen Jumel. It is so stated in the briefs of both parties, and the conveyances by which Stephen Jumel acquired the different parcels were exhibited in proof on the trial. The tract called the homestead was occupied as a country seat.

The tract of sixty-five acres, which is the only one now in question, was an out-lot in the vicinity, partly covered with wood, and was part of the ninety-four acre tract at Harlem Heights first described in the complaint. This tract of sixty-five acres, with another of thirty-nine acres, was conveyed to Stephen Jumel by one Leonard B. Parkinson, by deed bearing date March 9, 1810, a certified copy of which was put in evidence without objection.

It is not pretended that Stephen Jumel parted with the title to any of the property until about the year 1825 or 1827. At or about the latter period arrangements were made by him, or under his authority, out of which arises the controversy respecting the extent of Madame Jumel's interest, and which formed the subject of examination, and the ground of decision in the equity suit. The defendants insist that they are equally decisive in this.

It appears from the evidence that in 1815 the family, consisting of Mr. Jumel and his wife and their adopted daughter, went to France. Madame Jumel returned in the spring of 1817; but her husband and adopted daughter remained for some period longer, the latter being placed at school. The daughter returned after three or four years, and in 1821 she and Madame Jumel again went to France, and remained there for several years. The documents in the case show that Madame Jumel was still in Paris as late as the spring of 1826, residing with her husband in the Place Vendome. She returned to this country in that or the following year. When in this country she usually resided at the family mansion or homestead on Harlem Heights. Stephen Jumel returned in the summer of 1828, and resided with his family at the mansion-house until his death on the 22d of May, 1832.

The history of the property in question during this period, so far as the documentary evidence shows, is substantially as follows: —

In January, 1815, before the family left for France, Mr. Jumel conveyed the homestead on Harlem Heights, then consisting of thirty-six acres, to a trustee for the life of Madame Jumel, to hold the same in trust for himself during his own life, and after his death for the benefit of Madame Jumel

during her life, and then to convey the property back to Mr. Jumel and his heirs. Nothing further seems to have been done in this direction until Madame Jumel's last visit to France. Whilst she was there, a second settlement was made of the homestead, by a deed dated in January, 1825, whereby it was conveyed to new trustees, for the separate use and benefit of Madame Jumel in fee. About a year later, in January, 1826, Mr. Jumel conveyed the Liberty Street property to a trustee, for the benefit of his wife during her life, subject to a mortgage of $6,000. On the 15th of May, 1826, probably about the time of her leaving for this country, he gave her a general power of attorney, under and by virtue of which several conveyances were subsequently made in his name. By this power he made his wife his attorney to transact and manage his affairs at New York, or at any place in the State of New York, and in his name and for his use and behalf to sell and convey all or any part of his real estate, and to receive the moneys arising from such sales, and give acquittances for the same.

By virtue of this power, various conveyances were made by Madame Jumel in 1827, by which all the property before referred to, except the sixty-five acres now in question, was conveyed in fee-simple absolute to Mary Jumel Bownes, the adopted daughter of Mr. and Madame Jumel. These conveyances purport to be sales for valuable consideration expressed therein. Two of them are dated on the thirtieth day of July, 1827, one for the twenty-nine acre lot, No. 6, part of the ninety-four acre lot, and the other for the thirty-nine acre lot, No. 5; and a third conveyance was executed for the Liberty Street property on the 24th of November, 1827. A fourth conveyance, of the homestead, thirty-six acres, was made on the 1st of January, 1828. Where the property had been conveyed to trustees, they joined in the conveyances.

After the first three conveyances had been made to her, Mary Jumel Bownes, in December, 1827, conveyed the property therein named to one Michael Werckmeister, in trust; and in May, 1828, she conveyed to him the homestead, also in trust. The trust declared in each case was to the effect, first, that the trustee should, during the lifetime of Madame Jumel,

receive the rents and profits and pay them over to her, or at her option permit her to use, occupy, and enjoy the property and receive the rents and profits thereof; secondly, that he should lease, sell, convey, and dispose of the property as Madame Jumel should by writing, executed in the presence of two credible witnesses, order, direct, limit, or appoint, and in case of an absolute sale, to pay to her the purchase-money, or invest it as she should order and direct; thirdly, upon her decease, to convey to her heirs-at-law such of the property as should not have been previously conveyed, and with respect to which no appointment should have been made by Madame Jumel in her lifetime.

The above conveyances to Mary Jumel Bownes, and the deeds of trust made by her to Werckmeister, were all executed before Mr. Jumel's return to this country. On the 21st of November, 1828, after his return, Madame Jumel executed the power of appointment given to her in the trust-deeds. By this instrument, after reciting the trusts, she directed as follows: —

"Now I, the said Eliza Brown Jumel, do hereby order, direct, limit, and appoint, that immediately after my decease the said Michael Werckmeister, or his heirs, convey all and singular the said above-described premises to such person or persons and to such uses and purposes as I, the said Eliza Brown Jumel, shall, by my last will and testament, under my hand and executed in the presence of two or more witnesses, designate and appoint, and for want thereof, then that he convey the same to my husband, Stephen Jumel, in case he be living, for and during his natural life, subject to an annuity to be charged thereon, during his said natural life, of $600, payable to Mary Jumel Bownes, and after the death of my said husband, or in case he shall not survive me, then, immediately after my own death, to her, the said Mary Jumel Bownes, and her heirs in fee."

Thus the matter stood until after Mr. Jumel's death, and after the marriage of Madame Jumel to Aaron Burr, when in 1834, and again in 1842, she made ineffectual attempts (in the equity case we held them to be ineffectual) to defeat the appointment she had made in favor of Mary Jumel Bownes (then the wife of Mr. Chase), and to settle the property absolutely upon herself.

The effect of the different conveyances, including the appointment by Madame Jumel, as determined by us in the equity case, and as we still hold, was to create an estate to the use of Madame Jumel for life, with a power of appointment by deed or will; and with remainder on failure of such appointment to the use of Stephen Jumel for life, with a final remainder to Mary Jumel Bownes in fee. We further held, that whilst, by the terms and legal effect of this settlement, Madame Jumel had power to revoke her appointment in favor of Mary Jumel Bownes for the purpose of making a *bona fide* sale of the property, she could not revoke it for the purpose of substituting another voluntary appointment.

It is evident that the arrangement as finally settled had the approbation of Mr. Jumel. The deeds executed in 1827 may have caused him some anxiety, and may have hastened his return to New York; but the appointment made by Mrs. Jumel after his return evidently had his sanction and approbation. He seems, from the testimony, to have had a sincere attachment to his adopted daughter. The terms on which the family lived during the latter years of his life, as well as after that time, are shown in the testimony of the defendant, Nelson Chase. He says: "I knew Stephen Jumel; was living at his house, and was one of his family when he died. He left no child or relation, to my knowledge, in this country. He was a Frenchman. I married one of his family. I married Mary Jumel Bownes, who was a niece of Madame's; was married on the 15th of January, 1832, at Judge Crippen's residence, in Worcester, Otsego County. My first knowledge of Madame Jumel was while I was studying law with Judge Crippen, in July, 1831. Madame came to Worcester, where I was, to see Judge Crippen, bringing with her a young lady, whom she introduced as her niece. My acquaintance with the young lady continued some time, and until Madame Jumel said to me, I perceive there is a friendship between you and my niece Miss Mary; she added, if I and Mary could agree, she would be happy to have me for a son-in-law; that if we got married she would expect us to come and live with herself and her husband on their place; she said that Mary was her adopted daughter, and was to be her heir. Mr. Jumel died May 22,

1832. This lady whom I married died May 5, 1843. Two children of the marriage are living: one daughter, Mrs. Eliza Jumel Perry was born at the mansion March 25, 1836; one son, William Inglis Chase, was born Aug. 17, 1840. I and my family, and my daughter and her family, and my son and his family, all live in the Jumel mansion, and we have all lived there ever since Madame Jumel's death. My wife returned to the mansion in February next after our marriage, and I followed in the next month, and from that time until the death of Mr. and Madame Jumel I and mine substantially lived with them as one family."

We have been thus explicit in setting forth the history of the Jumel family, and of the property in dispute, as exhibited by the evidence in the case, because of its bearing upon certain evidence about to be noticed, and upon the final disposition of the cause by the court and jury.

On the trial, the defendants contended that, although no deeds or conveyances for that purpose could be found, yet that, in fact, the sixty-five acre tract had passed through the same course of settlement as the rest of the property had done. To show this, they offered to prove by one John Caryl, who had lived in service with the family for several years, a certain statement and declaration made by Stephen Jumel to the witness in the fall or winter of 1828, whilst Madame Jumel and her daughter were on a visit to the South. They put to the witness this question: —

"At that time, did Mr. Jumel make any statement to you as to the ownership of the property whilst he was thus residing on the premises and you were there working on them under him?"

The question was objected to by the plaintiff's counsel, but the objection was overruled and an exception taken.

The witness testified as follows: —

"After Madame Jumel and Mary went south, and while I was living on the place with Mr. Jumel, he stated to me that he had given Madame a power of attorney, not for the purpose that she should dispossess him or disinherit him, but in order that she should do business for him. He said that she sold all the property out of his hands under the power of attorney, and he had nothing left he could call his own; but he said that they

had had a compromise or settlement, by which the estate owed him a support as long as he lived, and in the end, at his decease and Madame's, it was to go to Mary, and with that he was satisfied. In the first place, when he said the property had been sold from under him, I said, 'Mr. Jumel, I knew that fact. It was done in 1827, last year.' He then made other remarks, which I have stated. On another occasion, either Christmas-day, 1828, or New Year's, 1829, he stated to my father in my hearing that the property was sold out of his hands, but that Madame had made a settlement, or something to that effect, whereby they were to enjoy the property while they lived, and that in the end it was to go to Mary, and with that he was satisfied."

One of the errors assigned by the plaintiff is, the admission of this testimony. As it has an important bearing upon what followed in the disposition of the cause, it is necessary to examine the question raised by this exception. The plaintiff contends that the declarations of Stephen Jumel at that time were not competent evidence in the cause: that they were not against his interest; that he was not in possession of the property; that they were not contemporaneous with the acts to which they refer; and, if otherwise admissible, they could only be used as evidence against himself, or his privies in blood or estate. But what were the clear facts of the case as they then stood upon the evidence? The entire property in question had originally belonged to Stephen Jumel. By himself, or by his family, his servants in charge, or his tenants, he had the undisputed possession of the whole of it, at least down to 1825. Their possession was his possession. They had no pretence of possession except through or under him. The homestead had been conveyed by him in 1815 to trustees, for the benefit of himself for life, and after his death for the benefit of his wife for life. Her interest in it was subordinate to his. In 1825, he made another conveyance of the homestead to trustees, for the separate use of his wife in fee. She never had any possession, even of this parcel, except through and under him by a voluntary conveyance on his part. In 1826, he conveyed the Liberty Street property to trustees, for the separate use of his wife for life, remainder to himself and his heirs

in fee. All the rest of the property remained in his actual or constructive possession until the conveyances made by virtue of his power of attorney in 1827. These conveyances were all voluntary on his part; and whatever he may have thought or believed, he retained the power of defeating them at any time by a sale to a *bona fide* purchaser. He returned home in 1828, and resided with his family on the property which he had thus voluntarily subjected to their use. One tract, the sixty-five acre lot now in question, so far as any evidence had yet appeared in the cause, still remained absolutely in him. It stood as it had always stood, in his possession, seisin, and control. Surely as to this tract, if not as to the others, he was in a position in which his declarations were admissible. It is unnecessary to refer to authorities on this subject. They are discussed in 1 Greenl. Evid., sect. 109, and in 2 Taylor, Evid., sect. 617. Declarations contrary to the tenor of the deeds or documents which he had executed or authorized would not be admissible, it is true; but declarations in entire harmony therewith, and against his interest in reference to property not conveyed, or not shown to have been conveyed, were clearly admissible. The statement testified to by Caryl was of this sort; and according to this statement, the entire property had been settled so as to go to his adopted daughter in the end. There was no conflict of evidence on this subject. On the contrary, the conveyances which Madame Jumel procured to be made, after Mr. Jumel's death, to Hamilton and Philleppon, for the purpose of defeating her own appointment made in 1828, recited the fact that the sixty-five acre tract, as well as the others, had been conveyed by Mary Jumel Bownes to Werckmeister upon the same trusts as those were. The plaintiff put these deeds in evidence, and they corroborate Mr. Jumel's statement. The recitals in those deeds cannot be used against the defendants, it is true; but, as far as they go, they are corroborations, on the plaintiff's part, of the statement referred to.

We think the evidence was admissible, and that there was no error in receiving it.

This evidence serves to explain what took place at the close of the trial in giving the case to the jury.

After the evidence was closed, the bill of exceptions proceeds to state what occurred, as follows: "The plaintiff made no claim for the lands on Seventh Avenue, mentioned in the declaration. As to all the other lands mentioned in the declaration, the defendant's counsel insisted that, on the undisputed facts in evidence, the defendant, as a matter of law, was entitled to a verdict, even if the jury should believe that the plaintiff was the heir-at-law of Eliza B. Jumel. The counsel on both sides agreed that, on this branch of the defence, there was no conflict of evidence, and that it was a matter for the court to determine."

The presiding judge then proceeded to charge the said jury, and after giving them directions as to the other issues in the cause, on the subject in question he directed them to find specially "that Eliza B. Jumel, at the time of her death, had no estate or interest in the lands claimed, which was descendible to her heirs." To this charge the plaintiff excepted, and it is assigned for error here.

Now if we lay out of view the declarations of Mr. Jumel, above referred to, there was not a particle of evidence in the case to show, as against the defendants, that the sixty-five acre lot had ever been conveyed by Mr. Jumel, or that Madame Jumel had ever acquired any interest therein, except her estate in dower as his widow. There is no evidence of any adverse possession by her under any other claim of title than that which she asserted to the rest of the property. If, therefore, the declarations of Mr. Jumel are to be laid out of view entirely, the charge of the judge was clearly right.

The evidence, however, was admitted, and went to the court and the jury together with the other evidence in the case respecting Madame Jumel's title to the land in question; and both parties agreed that, on this branch of the defence, there was no conflict of evidence, and that it was a matter for the court to determine. Now they either meant to leave it to the judge, on the whole evidence in the case, including the declarations of Mr. Jumel, as well as the conveyances which were produced, to determine the matter as a question of fact, whether Madame Jumel, at the time of her death, had or had not any descendible interest in the property, or they meant to leave it to him as a question of law, whether upon the whole evidence as it

stood (in which they admitted there was no conflict) she had any such descendible interest. If they meant the former, the judge did determine the question in the only manner in which, by the New York practice, he could do so, — by directing the jury to find that she had not such interest. In this view of the case, the decision of the judge, though given by way of a peremptory direction to the jury, was in the nature of a finding of fact made at the request of the parties, which we cannot review, any more than we could review the finding of a jury on a question of fact fairly submitted to them.

But if the parties meant to leave the question to the determination of the judge as matter of law, assuming that the declarations of Mr. Jumel were to be received as true (which must have been what they intended when they agreed that there was no conflict in the evidence on that branch of the defence), then we are still of opinion that the decision was right. If it was true, as stated by Jumel, that, under the power of attorney made by him, his wife had sold all the property, but that they had had a compromise or settlement, by which the estate owed him a support as long as he lived, and in the end, at his decease and Madame's, it was to go to Mary, — if that statement was true, how could the judge have decided otherwise than he did? That language in a will, or any other document, could never be construed to give Madame Jumel a descendible interest. It is in exact conformity with the known facts of the case as evinced by the documents themselves, so far as the documents go.

But there is another aspect of the case as to what the parties meant in their conference with the court, which leads to the same conclusion. It is to be remembered that at the trial of the cause the entire property was in controversy, and as to most of the parcels there was no question as to the deeds and conveyances which had passed. The parties undoubtedly desired the opinion of the court upon the legal effect of these conveyances, and it is quite apparent (though not expressly so stated) that when both sides made the concession or agreement referred to, and requested the court to determine the question, they assumed, or intended to assume, that all the property had been limited upon the like trusts and appointment. If this was so, the decision called for from the judge

was really as to the effect of the trust-deed executed to Werckmeister, and of the several appointments made thereunder by Madame Jumel. As in this view of the matter the decision was in conformity with the views of this court in the former case, we hold it to be correct.

In every aspect, therefore, in which this branch of the case may be viewed, we think that no error was committed by the court below.

The disposal of this question determines the cause. The other errors assigned become entirely immaterial, if Madame Jumel had no descendible interest in the property for the plaintiff to inherit.

Judgment affirmed

BECKWITH *v.* BEAN.

A., who was an officer of the army, and acting as a provost-marshal in Vermont, arrested B., during the rebellion, on the charge of aiding and abetting deserters from the army. At the time of making the arrest, A. had no warrant, but was acting under orders of his commanding officer, based upon a report made to him by A. B. having brought an action for false imprisonment against A., the latter, for the purpose of satisfying the jury of the misconduct of B., and in support of his own testimony as to the state of facts which he at the time of making the arrest believed in good faith to exist, offered to show, by evidence which was not known to him at the time of B.'s release from imprisonment, that the latter had, during the rebellion, been engaged in procuring men to enlist in the army, and to desert after they had obtained their bounty; but the court, on the ground that the offered evidence did not become known to A. until after the commencement of the suit, excluded it. *Held*, that the evidence was admissible in mitigation of damages.

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

The case was argued by *The Attorney-General* and *The Solicitor-General* for the plaintiffs in error, and by *Mr. E. J. Phelps* for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an action by Andrew J. Bean against Beckwith and Henry, plaintiffs in error, for assault and battery and false imprisonment. It was commenced in the year 1865, in the

County Court of Orange County, Vermont, and was thence removed for trial into the Circuit Court of the United States for that district. The defendants pleaded not guilty, and also filed several special pleas. At a former term, the case was brought to this court upon a certificate of division in opinion between the circuit and the district judge as to the sufficiency of some of those special pleas. We adjudged them to be defective. 18 Wall. 515. Upon a return of the case to the court below, a trial under the plea of not guilty resulted in a verdict in Bean's favor for $15,000. Judgment having been rendered thereon against the defendants, this writ of error is prosecuted.

Before entering upon the discussion of the legal propositions presented for our determination, it is necessary to state the leading facts out of which this litigation arose, and which the evidence before the jury tended to establish.

Bean, the defendant in error, was, in June, 1864, a resident of Coaticoke, in the Dominion of Canada. His ordinary business was that of a harness-maker, but during the period hereinafter referred to he was, to some extent, engaged in the business of substitute brokerage, or in furnishing substitutes for our army. Henry and Beckwith, plaintiffs in error, were officers of the Union army, the former being provost-marshal and the latter assistant provost-marshal of the second congressional district of Vermont. They were appointed, commissioned, and sworn, as required by the statute popularly known as the Conscription Act of Congress, and were subordinates of General Pitcher, who was acting assistant provost-marshal-general for Vermont until October, 1864, when he was succeeded by Major William Austine. All of said officers and subordinates were subject to the authority of Major-General Dix, commanding, by appointment of President Lincoln, the department of the East, which embraced the State of Vermont.

On the 14th of June, 1864, Bean, accompanied by one Jewell and one Buckland, came from Canada to the headquarters of Captains Henry and Beckwith at Woodstock, Vt. They were accompanied by Eldon Brown and John Guptil. Before leaving Canada, Bean had a contract with Brown that the latter should come to the United States and enlist in our army as a substitute for persons drafted under the Conscription Act. In that

contract Buckland had an interest, by stipulation with Bean. While at Woodstock, these five persons occupied the same room. Bean, Buckland, and Jewell proposed to, or through, one J. C. Stevens to enlist Brown and Guptil as substitutes; and thereupon an agreement was made, whereby Stevens was to pay Bean and his associates $600 for Brown and Guptil each, the proposed substitutes to receive out of that sum $200 each. Brown and Guptil, upon examination, were accepted and clothed in the uniform of soldiers, receiving $200 each from Stevens, while Bean, Jewell, and Buckland received $800 between them, and returned the same day to Canada. For the purpose, doubtless, of guarding against immediate desertion, Brown and Guptil were required by the provost-marshal to deposit their bounty with a clerk in the office, as security for their departure, on the following evening, to the recruiting rendezvous at New Haven, Conn. During the next day, each obtained five dollars of their bounty-money, and the same day deserted. On the 23d of June, 1864, all the facts and circumstances connected with the enlistment and desertion of Brown and Guptil were verbally communicated by Captain Henry in person to General Pitcher, who directed that transportation to the northern border of Vermont be furnished to Captain Beckwith, with instructions to arrest the deserters, as well as Bean, Jewell, and Buckland, and bring them to headquarters. Transportation being furnished to Beckwith in pursuance of that order, he endeavored, under written instructions from Captain Henry, to effect the arrest of the parties; but his efforts in that direction were fruitless, until Nov. 11, 1864, when, meeting Bean upon the cars, he arrested him, using no more force than necessary. He informed him at the time that he had no warrant, but was acting under military order, and that the charge against him was that of aiding and abetting Brown and Guptil to desert. Upon the succeeding day, Bean was taken to Captain Henry's headquarters, and by his order was placed in the State prison at Windsor, — that being the usual place for confinement of persons charged with offences against military law, — and he remained there in custody until April, 1865, when he was discharged, under the circumstances hereafter detailed.

The testimony of Bean tended to show that his confinement was prolonged unnecessarily, not only under circumstances of humiliation and severity, but against his protestation of innocence and frequent demands to be tried, by the civil courts, for the offence imputed to him. It further tended to show that such confinement without trial was procured or caused by the plaintiffs in error, and that among the results of such imprisonment was the destruction of his business in Canada, the loss of property, and the expenditure of large sums of money.

Upon the part of the plaintiffs in error, the evidence tended to show that, from the circumstances and such information as they were able to obtain, they each believed, before and at the time of Bean's arrest, that the enlistment and desertion of Brown and Guptil were in pursuance of a previous plan for that purpose formed between the deserters and Bean, Jewell, and Buckland, and that Bean and his associates aided and abetted in such desertion and escape; that, on 20th November, 1864, Captain Henry embodied in his regular tri-monthly report to the provost-marshal-general at Washington a general statement of Bean's arrest upon the charge of "taking part of the money paid for two substitutes," and then "being privy to their desertion," and that he was held for the return of the $800; that, on the 8th of December, Bean wrote to Major Austine, inquiring whether report of his case had been made to him, which letter was referred to Captain Henry for "report on the case;" that, on the 13th of December, Captain Henry made such report, and had delayed a report until that date by the request of Bean; that, on December 16, Captain Henry, by direction of Major Austine, furnished Bean a written statement of the charges against him, and saying, "And it is claimed that you shall pay for the use of the government the $800, with the expense of your arrest;" that, on 20th December, he communicated to Major Austine other facts in the case; that, on 21st December, he again, by written communication, called the attention of Major Austine to the case, expressing the opinion that the evidence then in his possession was insufficient to convict Bean in the civil courts under the Enrolment Act, and suggesting that he be turned over to General Dix or the military authority, rather than to the district attorney; that, on 3d January,

1865, Major Austine was officially advised, from department headquarters, that the case of Bean and his confederates was one of gross fraud upon the government, and authorizing him to collect from them, either individually or collectively, the amount received by them; to take all necessary steps for the arrest of the parties then at large, and keep them in custody until the money and expenses of their arrest were paid, and to discharge them when the money was paid over, — of which order Bean was advised on 6th January, 1865; that, on 21st January, Bean addressed, through Major Austine, a communication to General Dix, protesting his innocence, complaining of Major Austine, and demanding trial before the civil courts; that, on 24th January, an answer came from department headquarters, reiterating the condition of Bean's discharge as set forth in the order of January 3, and directing Major Austine "to cause Bean to be distinctly informed that he was arrested by orders from these headquarters;" that, on 24th February, Major Austine sent all his papers to department headquarters, and they were transmitted to the adjutant-general of the army at Washington, with an indorsement by General Dix, that "Bean was held by mine (his) orders for complicity in a gross fraud against the United States;" that the papers were returned to Major Austine in April, after passing through the offices of Secretary of War, adjutant-general, judge-advocate-general, provost-marshal, and inspector-general, with directions that Bean be turned over to the civil authorities for trial; that, upon receiving the order last mentioned, Captain Henry called the attention of the district attorney to its provisions, and invited his attention to the case; that, on 26th April, 1865, Bean was taken before a justice of the peace, who discharged him upon bond for his appearance before a United States commissioner when called upon; that, on 11th May, 1865, an examining trial was held, and Bean required to give bail for his appearance to answer any indictment before the grand jury, but that tribunal, upon investigation, failed to find an indictment against him.

It is stated in the bill of exceptions that the plaintiffs in error gave no other or further evidence, either oral or written, of any orders from the President of the United States, or their superior

officers, than those just described; that the defendants and General Pitcher were examined as witnesses, and did not claim that said orders had been issued, known to, or approved by the President.

The evidence of plaintiffs in error tended to show that, while imprisoned, Bean was treated humanely; that Beckwith, in all he did, in regard to the arrest and confinement of Bean, acted in good faith and under the command of his superior officer, Captain Henry; that the latter, in all he did, acted in good faith and in obedience to the orders of his superior officers, as hereinbefore detailed; and that from time to time he promptly communicated to Bean the orders he received from his superior officers.

During the trial, the plaintiffs in error offered in evidence the depositions of George W. Kinney and of said Jewell and Brown, to the reading of which the defendant in error objected. The objection was sustained, and plaintiffs in error excepted.

Kinney, in his deposition, details the substance of a conversation held by him with Bean after the latter's discharge. He says: "I was talking with him in regard to this matter, asking if he didn't think it rather rough to be taking those fellows over the other side to get shot, or words to that effect. He replied, he didn't calculate to have them shot; if they were smart, he should have them back in a few days." Witness says that there were a good many persons in Canada, during the war, who were generally known as deserters from the Federal army, and he understood from Bean that his dealings, to some extent, were with that class, and that some persons enlisted by him "had been out already two or three times."

The deposition of Brown shows that in July, 1863, he enlisted in the State of Maine in the Federal army, and within a short time thereafter deserted, and went to Canada; that Bean and others, who, as he thought, knew him to be a deserter, suggested that he should return to the United States and enlist; that, in consequence of the hard times, he concluded to adopt the suggestion; that, after advising with Jewell upon the subject, the latter told him to go on, and he would overtake him upon the road; that he learned at the same time from Jewell that one Isaac Thomas would be sent along with him;

that *en route* to Vermont to enlist, Buckland overtook them, and claimed him (Brown) "as his man;" that farther along in the journey Bean joined the party, and held a conversation with Jewell and Buckland apart from the witness; that there was conversation in the crowd about Thomas and himself enlisting under assumed names; that he concluded not to change his, but Thomas assumed the name of John Guptil; that it was first determined to enlist at Lebanon, and for that purpose Bean, Jewell, and Buckland went to the provost-marshal's office at that place, but failing to enlist there, they all proceeded to Woodstock, where they did enlist.

The deposition of Jewell shows that he was himself a deserter. He details the circumstances under which Bean, Buckland, and himself formed the purpose to place Brown and Guptil as substitutes in the army. It appears in his deposition that some dispute arose between Buckland and Bean about Brown. Bean insisted that Brown "belonged" to him. Their differences were compromised by an agreement "to divide the profits if they put him in." He explains why Brown and Guptil were not enlisted at Lebanon. He says, "We all went from White River Junction to Lebanon, where the provost-marshal's office was, to see what we could get for the men. Not succeeding to our satisfaction there, we concluded to go elsewhere. The reason was they were shipping their men daily direct to Concord. Brown did not want to go to the front so soon, but wanted longer time to get away, he not designing to go to the front at all; went back to White River Junction; took dinner there. We fell in with a man by the name of Stevens. This man was buying men, and said he would give so much for them there, or something more to take them to Woodstock and put them in. We concluded the best way was to take them to Woodstock. We procured a team at the junction. . . . When we came to Woodstock, Bean, Buckland, and myself went to the provost-marshal's office first, and afterwards all went there, but did not enlist the men, for the reason that the men could not get their bounty till they got to camp, and they would not enlist. We drove back to White River Junction; saw Stevens again; I think he gave them some money, can't tell how much, to go back to Wood-

stock and enlist. After they (Brown and Thomas) had received the money, they started to Woodstock the second time with Stevens. I remained at the junction. My being subject to the service, Bean and Buckland advised me to remain there, and they would do the business of enlisting the men at Wood stock. Next day they came back, and we all — Bean, Buckland, and myself — took the train for Canada. I had received nothing out of the bounty before that from Thomas. They said they would fix me all right when we got home. After we got home, I said something to them about it. They said they had nothing for me, that I was lucky to get back myself. . . . I knew from both Brown and Thomas, before we left Canada, they were deserters. It was distinctly understood by us all, including Brown and Buckland, that both Brown and Thomas were deserters, and that was the reason why we were selecting other names by which they were to be enlisted. At least that was the way I understood it, and supposed all understood it so."

Upon the conclusion of the evidence, the court overruled a motion of plaintiffs in error to dismiss the action, refused to instruct the jury as asked by them, and gave an elaborate charge upon the evidence and the law of the case.

The action of the court below in excluding the depositions of Kinney, Brown, and Jewell presents the first question for our consideration. Counsel for defendant in error contends that the facts stated in those depositions are not admissible for any purpose, not even in mitigation of damages.

There can be no rational doubt that the facts detailed by those witnesses, in connection with the evidence before the jury, conduced to show that Brown and Guptil were, at the time of their enlistment as substitutes, known to Bean, Jewell, and Buckland to be deserters from the Federal army, and that Bean, in conjunction with his associates, enlisted them in pursuance of an understanding had before leaving Canada, that they would desert as soon as they received their bounty, and that in such desertion they would receive all the aid which Bean and his associates could render. We express no opinion as to the degree of credit to which these witnesses were entitled. Nor do we say that the jury should have reached the conclusion which their evidence conduced to establish, viz.,

that Bean was, in fact, guilty of the offence for which he was arrested by Beckwith, under the written and verbal orders of his superior officers, — an offence punishable, upon conviction, by a fine not exceeding $500, and imprisonment not exceeding two years nor less than six months. 12 Stat. 735. Was the excluded evidence competent for any purpose in this case? We are of opinion that it was competent in mitigation of damages. It tended to show the state of case which plaintiffs in error testify under oath they believed in good faith existed at the time of the arrest. It conduced to show that plaintiffs in error did not act from mere personal ill-will or from corrupt motives, and were not guilty of a wanton, reckless exercise of power for the mere purpose of humiliating and oppressing one who had not become obnoxious to the laws of the land. It tended to rebut the presumption of malice which might arise from the simple arrest and imprisonment, unaccompanied by any explanation of the reasons therefor. In connection with evidence which was admitted without objection, it seems to present a case which, under the law, did not call for or admit of vindictive or punitory damages against the plaintiffs in error. In determining whether the case demanded such damages, the jury had the right to consider all the attendant facts and circumstances out of which the arrest and imprisonment arose. They could not well ignore the important fact that the arrest occurred at a period in the country's history when the intensest public anxiety for the fate of the Union pervaded all classes. The necessities of the government and the condition of the army had compelled the adoption of the most stringent and, in some respects, harassing regulations for an increase of the national forces. The enforcement of those regulations, in some localities, was made the occasion of tumultuous assemblages which threatened to disturb the peace of the country, at a time when the utmost energy and unity of action were required for the preservation of the government against armed insurrection. Citizens drafted were required to enter the military service, or furnish acceptable substitutes. The plaintiffs in error were charged with delicate and important duties in connection with the enlistment and enrolment of substitutes for that service. It is to be presumed that, independent of the

desire to discharge the obligations of their official oaths, they shared the prevailing anxiety for the safety of the government, and recognized the fact that its safety depended upon speedy additions to the army then engaged in defending it. Neither evidence nor argument is needed to prove that the efforts of the government to strengthen the national forces by draft would have been seriously retarded, and perhaps altogether thwarted, if substitute brokers could, with impunity, and for purposes of private gain, impose fraudulent enlistments upon recruiting officers, and then connive at or aid and abet the desertion of the substitutes as soon as they had received their bounty-money. Whether such considerations influenced, or to what extent they should have influenced, the course of plaintiffs in error was for the jury, when determining whether punishment by exemplary damages should be inflicted. Further, if Captain Henry in good faith believed that Bean was guilty of such misconduct in the enlistment of the two deserters, it was his duty to communicate the facts and circumstances to his superior officer. If the order to Beckwith to arrest Bean was given by him in good faith, believing it to be his duty to obey the command of his superior officer, General Pitcher; if Beckwith executed the order under a like belief, and in like good faith; if the arrest was made and the imprisonment ordered from an honest purpose to guard the public interests and protect the army from the evil consequences of sham enlistments and frequent desertions, — they were entitled, by every consideration of justice, to stand before the jury in a more favorable light upon the question of damages than they would or should have stood had they been actuated by ill-will or sought to oppress one whose conduct had not justified the conclusion that he had violated any law. Every fact, therefore, which served to illustrate the motives which governed the plaintiffs in error in committing the trespasses complained of, and every fact which fairly conduced to prove the existence or non-existence of just grounds for imputing to Bean the fraudulent and illegal acts charged against him, and which were assigned as the cause of his arrest, were competent evidence, not in justification, but in mitigation of damages. It is the settled doctrine that "damages are graduated by the intent of the party committing the wrong." Sedg-

wick, Damages, 455. It is equally well settled that in the absence of gross fraud, malice, or oppression, in cases of trespass to person or estate, the jury should restrict damages to compensation or satisfaction for the actual injuries sustained. Sedgwick, Damages, 39; *Day* v. *Woodworth et al.*, 13 How. 361. They may, when legal justification is not shown, consider the direct expenses incurred by the injured party, his loss of time, his bodily sufferings, under some circumstances his mental agony, his loss of reputation, the degree of indignity involved in the wrong done, and the consequent public disgrace attending the injury. These and similar elements of injury may be made the basis of compensation, and such compensation cannot be diminished by reason of good motives upon the part of the wrong-doer. But when the injured party seeks, as here, to show a case of "great aggravation, cruelty, and injustice," and upon that ground asks for exemplary or vindictive damages, by way of punishment, it was competent, in reduction of such vindictive damages, and for the purpose of restricting the jury to compensatory damages, to give in evidence such facts and circumstances connected with the injury complained of as might show the truth of the whole case, as it existed at the time of arrest. In *Day* v. *Woodworth* (*supra*), this court said that the question of smart-money "has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend upon the peculiar circumstances of each case;" that is, "upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct." Hence it has been held that, where the injury complained of was an arrest without warrant, the defendant could show, in mitigation of damages, and as explaining the arrest, that the plaintiff was justly suspected of felony. 2 Greenl. Evid., sect. 267; 3 Phillips, Evid. 518. The text in Greenleaf seems to rest partly upon the authority of *Chinn* v. *Morris*, 1 Ry. & M. 424, and *Simpson* v. *McCaffrey*, 13 Ohio, 508. The first case was trespass for an assault and false imprisonment. The defendant had given the plaintiff in charge to a constable for felony, and he was taken by the officer to a magistrate, who dismissed the charge. The defendant admitted, on the trial, that he had not sufficient evidence to sustain the charge of felony, but proposed to show that there

was reasonable ground of suspicion. Best, C. J., held the evidence admissible in reduction of damages. That case was cited, with approval, in *Linford* v. *Lake*, 3 H. & N. 276. The case in 13 Ohio was trespass for illegally entering and searching plaintiff's house, tearing up porch, ransacking house, and breaking open desk, without legal authority. Certain evidence was offered in justification as well as in mitigation of damages. The court said: "The evidence ruled out by the justice of the peace, as shown by the bill of exceptions, in no sense constituted a justification of the trespass complained of. But it was competent in mitigation of damages. The principle of permitting damages, in certain cases, to go beyond naked compensation, is for example, and the punishment of the guilty party for the wicked, corrupt, and malignant motive and design which prompted him to the wrongful act. A trespass may be committed from a mistaken notion of power, and from an honest motive to accomplish some good end. But the law tolerates no such abuse of power, nor excuses such act; yet, in morals and the eye of the law, there is a vast difference between the criminality of a person acting mistakenly from a worthy motive, and one committing the same act from a wanton and malignant spirit, and with a corrupt and wicked design. Hence, when a jury are called upon to give smart-money or damages, beyond compensation, to punish the party guilty of the wrongful act, any evidence which would show this difference, or rather all the facts and circumstances which tend to explain or disclose the motives and design of the party committing the wrongful act, are evidence which should go to the jury for their due consideration."

To the same effect is *Roth* v. *Smith*, 54 Ill. 432. That was an action to recover damages for having advised and procured, upon affidavit, the arrest and imprisonment of the plaintiff, by a Federal officer, upon the charge of discouraging enlistments. Evidence was admitted, against the objection of the plaintiff, that he had in fact discouraged enlistments; and upon appeal to the Supreme Court of Illinois that evidence was held to be competent in reduction of damages, upon the ground that it explained the circumstances of the alleged arrest, and tended to show that the defendant was not actuated by malice. That

court, speaking through Chief Justice Lawrence, said: "Admitting that on proof of these facts the plaintiff would have been entitled to a verdict for some amount, he certainly would not have been entitled to nearly as large a sum in the way of damages, if the affidavit was true, as he should have received if it had not been true. If the affidavit was not true, and if the arrest was by procurement of defendant, the jury should presume malice, and award heavy vindictive damages. If the affidavit in fact was true, and the jury could see that the defendant, in making it, even though he voluntarily furnished it to the marshal and advised the arrest of the plaintiff, was acting without malice and in the belief that the public good required the arrest of the plaintiff, and that he could be legally arrested, and that, in causing his arrest, so far as the defendant could be said to cause it, he believed himself to be in the performance of his duty as a citizen, it would clearly, in such a case, be the duty of the jury to give only compensatory and not vindictive damages."

In *McCall* v. *McDowell* (1 Deady, 233), which was an action for false imprisonment brought by McCall against General McDowell, it appeared in evidence that the plaintiff had, in gross and incendiary language, expressed exultation at the assassination of President Lincoln, for which conduct he was arrested and imprisoned under the orders of General McDowell. While this conduct did not, in the opinion of the learned judge trying the case, furnish legal justification for the arrest and imprisonment, it was competent evidence, in mitigation of damages, to go to the jury to show that the arrest was without bad motive, and with the purpose of discharging what the defendant, in the execution of high and responsible public functions, conceived, in good faith, to be his duty at a critical period in the country's history.

A case in point is *Botts* v. *Williams*, 17 B. Mon. (Ky.) 687. That was an action for trespass and false imprisonment. It appeared that the defendants, without warrant, and in violation of the laws of Kentucky regulating the apprehension and detention of fugitives from other States, arrested the plaintiff in that State and took him to Ohio, from which State it was alleged he was a fugitive from justice, having committed a felony there. The defendants, under the plea of not guilty,

offered to prove the declarations of the plaintiff that he had committed a felony in Ohio, and that a reward had been offered for his apprehension. It was held that while such declarations did not establish justification for the apprehension and transportation of the plaintiff beyond the State, they were "admissible in mitigation of damages, as conducing to show that the defendants, in making the arrest, were prompted by honest motives and no ill-will to the plaintiff."

The same general doctrine is announced in Mr. Mayne's Treatise on the Law of Damages. That author says: "Of course, in all cases where motive may be a ground of aggravation, evidence on this score will also be admissible in reduction of damages. Hence, in an action for false imprisonment, evidence may be given of a reasonable suspicion that the plaintiff had been guilty of a felony, without any attempt at setting up a justification." Says the same author: "And if the plaintiff was given in custody for an offence not justifying an arrest, evidence may be given of the offence. It is in the nature of an apology for the defendant's conduct." Mayne, Damages, pp. 74, 75.

Further citation of authority seems to be unnecessary. The rules announced in the authorities cited meet our approval, and we are not referred to any elementary treatise or adjudged case which states the law differently. It results that the court below erred in sustaining objections to the reading of the depositions of Kinney, Brown, and Jewell. The reasons assigned for their exclusion were insufficient. The court, in excluding them, said that it did so "upon the ground that the guilt or innocence of said Bean was not a question for the determination of the jury, but that all the facts and circumstances which were known to the defendants, or with which they in any way became acquainted prior to the imprisonment, could be admitted for the purpose of rebutting malice and showing that they acted in good faith; but that they could not give in evidence circumstances of which they had never heard until after the commencement of this suit." It is true that the guilt or innocence of Bean was not for the determination of the jury, for the purpose of inflicting punishment for the offence imputed to him. But, as already shown, it was the right of the plaintiffs in error to prove, in mitigation of damages, that

they were governed, in their whole conduct, by a sense of public duty, and not by a malignant purpose to oppress and humiliate the defendant in error. It was their right to show that the truth of the case, as it actually existed at the time of arrest, sustained the belief under which they acted.

Such a right would, however, be valueless, and such proof impossible, if the jury were not allowed to inquire whether there were, in fact, just grounds to charge upon Bean the fraudulent and illegal acts which were assigned as the reason for his arrest. The existence or non-existence of such grounds might materially influence the mind of the jury in determining whether the plaintiffs in error acted from a sense of duty, or from malice and sheer wantonness. If evidence of an honest belief, upon the part of plaintiffs in error, that Bean was privy to the desertion of the substitutes was competent in mitigation of vindictive damages, proof that he was, in fact, guilty of that offence would serve to show that such belief was not recklessly or inconsiderately formed, and that "the charge was not a pure invention." *Linford* v. *Lake*, *supra*. The fact of Bean's complicity in the desertion of Brown and Guptil was believed, in good faith, by Henry and Beckwith to exist when the arrest and imprisonment occurred. So they testify under oath. Should they be precluded from establishing such complicity by the admission of Bean himself to the witness Kinney, simply because such admission was not made until after Bean's release from custody? We think not. Had the admission been in writing, its competency could not well be doubted. That it was verbal is an objection, not to its admissibility, but to its value as evidence upon which to find a verdict. Verbal confessions or admissions, made in the presence of the witness alone, constitute, it is true, very unsatisfactory evidence, partly because of the facility with which they may be fabricated. It is, therefore, to be received with great caution; but "where the admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature." 1 Greenl. Evid., sect. 200; *Botts* v. *Williams*, *supra*; *Higgs* v. *Wilson*, 3 Met. (Ky.) 337. "The caution," says the Court of Appeals of Kentucky, "should be applied to the proof of the statement, and not to the statement when proved."

The same considerations apply to the evidence of Brown and Jewell. Most, if not all, of the substantial facts to which they deposed were known to defendants in error at and before the arrest. The excluded evidence was in support and corroboration of that which was known and believed at the time of the arrest to exist. It was cumulative evidence of the same general character as that which was admitted without objection. It introduced no new issue. That plaintiffs in error may not have been advised, until after Bean's discharge, that those facts could be established by the testimony of Brown and Jewell more fully or more clearly than other witnesses could, or in corroboration of what other witnesses would state, constituted no reason for the exclusion of that evidence. Nor is the determination of this question affected by the fact that the defendant in error, upon the trial, complained more of his long confinement in prison than of the original arrest. We should regard all the circumstances attending the imprisonment, and not merely the period during which the imprisonment was continued. *Read* v. *Sowerby*, 2 M. & S. 78; 3 Starkie, Evid. 1452, 1453. One of the issues before the jury, as shown by the charge of the court, was as to the responsibility of the plaintiffs in error for the prolongation of the imprisonment, and the denial to Bean of a speedy trial in the civil courts. While it is true that good faith in the original arrest and imprisonment might have been succeeded by bad faith in unnecessarily continuing the imprisonment, and in preventing a trial of Bean in the civil courts, which alone had cognizance of the specific offence charged, it was for the jury, upon all the legitimate evidence which either side could produce, to determine whether such was the fact. If the excluded evidence was competent upon the issue of good faith in the arrest and the original imprisonment, — and we have held that it was, — the plaintiffs in error were entitled to have it before the jury in their consideration of the whole case, since any failure or deficiency in their proof, in that respect, might have justified the jury in believing that from the very outset they were actuated by improper motives.

A less liberal rule in the admission of evidence than that indicated in this opinion would often work the grossest injustice in cases where, as here, vindictive damages are sought

against mere subordinates, whose testimony, if credited by the jury, would show that they acted in good faith, from a sense of public duty, and in obedience to the orders of their superior officers, who promptly assumed, and upon whom justly rested, the responsibility, not only for the prolongation of the imprisonment complained of, but for the denial of a speedy trial in the civil courts.

Upon this branch of this case it is proper to make one further remark. When the depositions of Kinney, Brown, and Jewell were offered, the objection was that, in their substance, they were not competent evidence, but that if any part of either of them was admissible, "it was so intermingled with inadmissible statements that the whole became inadmissible." The objection was made at the moment they were offered, without calling the attention of the court to the particular portions of the depositions which were claimed to be inadmissible under any view of the case. They were not excluded upon any such ground. They were excluded upon the broad ground that the facts and circumstances detailed by those witnesses were not heard of by the plaintiffs in error until after the commencement of this action. In this condition of the record it would be improper for this court, in view of what has been said, to sustain the ruling of the court below, simply because, in those depositions, there may be, here and there, isolated statements not affecting the substance of what the witnesses testified, and which, upon specific objections, could have been excluded as incompetent under the general rules governing the admission of testimony

Upon the conclusion of the evidence before the jury, the plaintiffs in error moved, in writing, that the case be dismissed, upon the ground that "all the facts proved establish that the acts done by them, for which the plaintiff claims to recover, were done by them as military officers acting under the authority of orders of the President of the United States, during the existence of the late rebellion against the United States." This motion was properly denied, for the reason, if for no other, that there were many disputed facts in the case, disconnected from any question of authority derivable from the general orders of the President. It was the province of the jury to consider those facts in connection with such propositions of law as the

court should announce for their guidance. For like reasons, the court properly refused to charge the jury as requested by plaintiffs in error. That request altogether ignored the evidence introduced by the defendant in error, who testified, substantially, that the plaintiffs in error, under circumstances of oppression and wantonness, and by improper and fraudulent representations, procured their superior officers to continue the imprisonment longer than necessary, and prevented them from having a speedy trial in the proper court for the offence charged. It was the province of the jury to consider that evidence, and if they believed it to be true, and had discredited the opposing evidence, the defendant in error would have been entitled to a verdict by reason of any oppressive or corrupt abuse of authority on the part of the plaintiffs in error in making the arrest and ordering and continuing the imprisonment.

In the argument of the case before us a good deal was said in reference to that portion of the elaborate charge to the jury which discussed the right of the plaintiffs in error to take shelter under the act of March 2, 1863, entitled "An Act relating to *habeas corpus* and regulating judicial proceedings in certain cases," and the act of March 2, 1867, entitled "An Act to declare valid and conclusive certain proclamations of the President, and acts done in pursuance thereof, or of his orders, in the suppression of the late rebellion against the United States," — the former act, it will be remembered, authorizing defence to be made by special plea, or under the general issue. They are known as the Indemnity Acts, passed by Congress for the protection of military officers, and others who, between certain dates, made arrests, or were connected with the imprisonment and trial, under the authority of the orders and proclamations of the President, of persons charged with participation in the late rebellion, or with disloyal practices in aid thereof. Upon the part of the plaintiffs in error it is insisted that the charge was so inflammatory as to prevent a dispassionate and impartial consideration of the defence relied upon. It is further insisted that the court erred in what it said as to the right of the plaintiffs in error to justify under the provisions of the two statutes referred to. It is still further insisted that Beckwith and Henry having acted in good faith under the

directions of their superior officers, both in ordering and making the arrest, and in holding Bean in custody after such arrest, they could not, in any event, be liable for vindictive damages, however illegal their acts may have been. Touching these objections to the charge of the court, it is sufficient to say that they are not presented by the bill of exceptions in such form that we should consider them. The only exceptions to the charge are in these words: "To the omission of the court to charge as requested, and to the charge of the court placing a construction upon said acts of Congress, and to so much of the charge as relates to the attempted justification of the defendants under said act, and the evidence hereinbefore detailed, the defendants excepted."

We have already commented upon the refusal of the court to charge as requested by the plaintiffs in error. The exceptions to the charge as given are too vague and indefinite to raise the questions which were claimed in argument to arise under the acts of 1863 and 1867. *Lincoln* v. *Claflin*, 7 Wall. 132; *McNitt* v. *Turner*, 16 id. 362; *Beaver* v. *Taylor et al.*, 93 U. S. 46. The exception is scarcely more definite than a general exception to the whole charge would have been. We cannot tell what specific portion of the elaborate charge construing the acts of Congress, or what specific portions of the charge concerning the evidence relied upon for justification under those acts, were intended to be covered by this general exception. The exception was to a series of propositions in gross, relating to the construction and to the validity, in certain aspects, of these acts of Congress, and to a mass of evidence introduced for the purpose of establishing the defence allowed by those acts. Some of those propositions seem to be sound in any view of the case; but since the exception did not call the attention of the court below to the specific propositions which were objected to, it cannot be regarded here. For the same reasons, we cannot consider the alleged error of the court in its charge to the jury upon the question of vindictive damages. While some portion of the amount found by the jury may be attributed to the charge of the court upon the subject of vindictive damages, it is sufficient to say that no exception was taken upon that point. We forbear, therefore, any

expression of opinion as to whether the evidence before the jury authorized vindictive damages, or brings this case within the provisions of the statutes of 1863 and 1867. We express no opinion as to the construction of those statutes, or as to the questions of constitutional law which may arise thereunder. We feel obliged to adopt this course, because counsel for defendant in error, assuming that our decision in 18 Wallace as to the sufficiency of certain special pleas settled all the questions under the acts of 1863 and 1867, which could arise upon the evidence in this case under the general issue, did not, in his oral or printed argument, discuss the grave questions of statutory and constitutional law which, perhaps, the general exceptions to the charge were designed to present for our determination. We therefore restrict our decision to the single point properly presented for our determination; viz., that the court erred in excluding from the jury the depositions of Kinney, Brown, and Jewell, and upon that ground the judgment is reversed, with directions for such further proceedings as may be consistent with this opinion.

Upon the whole case, we are of opinion that justice will be promoted by another trial of the case; and it is

So ordered.

MR. JUSTICE MILLER did not hear the argument in this case or take part in its decision.

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE CLIFFORD, dissenting.

I am unable to concur in the judgment of the court in this case, and I will state the reasons for my dissent. The action is for an assault and battery upon the plaintiff, and his imprisonment in the State prison of Vermont for more than six months, without process of law, and under circumstances of great cruelty and oppression. The plaintiff is a citizen of the United States, though in 1864, when the grievances complained of were committed, he was temporarily a resident of Canada.

It appears from the uncontradicted evidence in the record, that on the 11th of November, 1864, whilst returning from

a trip to Boston to his home in the Province of Quebec, he was arrested in a passenger car near Wells River, in the State of Vermont, by the defendant Beckwith, without any warrant or process of law, and taken to Beckwith's residence in Sutton in that State; that he was there detained during the night under the charge of keepers; that his father, who lived at the distance of about fifteen miles, and for whom he had sent, arrived during the night, but that Beckwith refused to allow them to have an interview, except in his presence; that on the following day he was forcibly taken, by order of the defendant Henry, and placed in the State prison at Windsor, where he remained until the 26th of April, 1865, a period of nearly six months, when he was admitted to bail and released from imprisonment; that during this period he was locked up at night, and for the first few days in the daytime, also, in a narrow and scantily furnished cell, being one in which convicts were confined at night; that after the first few days he was allowed, upon his complaint of the coldness of the cell, to spend the day in the shops where the convicts worked, but he was required to go out and to return when they did, and at no time to be out of sight of a keeper, and not to go on the corridors or in the yard for exercise; that the food offered to him was the fare served to the convicts, which he could not eat, and that afterwards he obtained his meals from the keeper's table by paying a small sum each week; and that, during this period, no complaint against him was filed with any magistrate: he was held simply upon the order of the defendants.

And what is the excuse offered for this imprisonment and treatment; for justification there could be none in a country where there were constitutional guarantees against the invasion of personal liberty, — such as are found in the Constitution of Vermont and in the Constitution of the United States? What is the excuse? Simply this: that the defendants, one of whom was provost-marshal, and the other assistant provost-marshal, of a military district embracing Vermont, suspected that the plaintiff had aided or been privy to the desertion from the army of two substitutes, who had been furnished upon a contract with one Stevens, and for whom Stevens had paid

$1,200, of which sum $800 had been received by the plaintiff and two others. Suspecting the plaintiff, as stated, the defendants determined to hold him in the State prison until they should coerce him to the payment not merely of what he had received, but of what his supposed confederates had received also. The defendants claimed that they were acting all this time in the service of the United States; but surely this is a mere pretence, for their duties as enlisting officers did not require them to compel the return of money of which a substitute broker had been defrauded, and in which the United States had no interest, and could not have retained had these officers succeeded in coercing its payment.

After the plaintiff had been in the State prison for a few days, the defendant Henry called upon him, and verbally informed him that he was charged with aiding or being privy to the desertion of the substitutes, but that he would be discharged on payment of the $800, and $25 additional for expenses. The plaintiff protested that he was innocent of the charge, and demanded a trial. He was told in reply by Henry (whose words I quote) that "he could not have a trial, and could not get one," but that his case would be reported to the assistant general provost-marshal. He then requested Henry to make an immediate report, which he promised to do. Later in the day, being in great distress of mind and anxious to return to his family, and thinking that perhaps the money might be paid under protest, he telegraphed to his father to bring him the $800, and requested Henry to withhold the report until his father arrived. On the next day but one his father arrived, and, in an interview with Henry, told him that neither he nor the plaintiff would pay a dollar, and requested him to report the case at once. The record then reads thus (I copy the words): "From that time plaintiff constantly urged that his case should be reported, or that a trial should be given him, or that he be admitted to bail, and protested his innocence; and Henry repeatedly promised to report the case, but frequently told him and his father he could not get a trial, nor be admitted to bail, and that he would be discharged at any time on payment of the $825."

On the 20th of November following, Henry reported to his

superior officers the arrest of the plaintiff, and the reasons for it, stating that he was held for the return of the $800; and in December, Henry informed the plaintiff in writing of the charges against him, claiming that he should pay the $800 for the use of the government, with the expenses of his arrest. All the communications between the different officers of the military district, with reference to the plaintiff, show that he was held upon the charge of aiding or of being privy to the desertion of the substitutes, without any intention to bring him to trial for the offence, but to coerce, by his imprisonment, the repayment of the money which he, with two others, had received from the substitute broker. In one of his letters to the assistant provost-marshal, Henry stated, with reference to turning the case over to the district attorney, that he did not think that the plaintiff could be convicted under any section of the Enrolment Act, from any testimony which he then possessed, but that he had heard of additional facts, which might perhaps be sufficient for that purpose. No such additional facts, however, were obtained.

The record also shows that the plaintiff, throughout his imprisonment, made constant efforts, in various ways, to obtain a trial or a release on bail, which he was able and willing to furnish; and that eleven journeys were made by his father from the northern part of Vermont to Windsor and Brattleborough for that purpose. Among other efforts, the plaintiff appealed by letter to General Dix, the commander of the department, to order him to be brought to trial, and to give him an opportunity to prove his innocence. But no trial was allowed him, — that right which belongs, or ought to belong, to every one, even the humblest in the land, was denied to him, a born citizen of the United States; and not until after the intercession, at Washington, of a member of Congress from Vermont in his behalf were any steps taken for his release. His father and he had pleaded in vain to the defendant Henry, urging, among other things, that his wife, who needed his support, was about to be confined. At last, on the 26th of April, 1865, he was taken before a justice of the peace and discharged on bail.

To add to the enormity of this case, the district attorney of

the United States for Vermont states in his testimony that there were many other cases in his district, during the war, of persons charged with inciting or assisting soldiers to desert, and that they were all turned over to him to be prosecuted, and that they were prosecuted by him, in the civil courts; but that he knew nothing of this case until April, 1865, and that soon afterwards the plaintiff was released on bail. The grand jury of the United States court found no cause for his prosecution, though the defendant Henry told his story to them.

Whilst these things were being done in Vermont, and the plaintiff was, by the action of the defendants, lying in the State prison as absolutely helpless as though he had been immured in the dungeon of an Asiatic despot, there was no rebellion in that State against the laws and government of the United States; there were no military operations carried on within its limits; there was no army there. The courts of justice, both Federal and State, were open, and in the full exercise of their jurisdiction; and the plaintiff was not in the military service, or in any way connected with such service, and for the offence of which he was suspected, or for any other offence, could have been brought before them on any day of the year. By his imprisonment, and the report that he was in the State prison, his business was ruined, his personal property and furniture were seized by creditors and sacrificed at sheriff's sale, and his wife was compelled to leave his home and return to her friends in Vermont.[1]

On the trial of the action, the defendants relied for their defence upon the fourth section of the act of Congress of March 3, 1863, "relating to *habeas corpus*, and regulating judicial proceedings in certain cases" (12 Stat. 756); and upon the act of March 2, 1867, to declare valid and conclusive certain proclamations of the President, and acts done in pursuance thereof, or of his orders in the suppression of the late rebellion, — contending that under them the defendants were to be pre-

[1] As the statement contained in the opinion of the majority does not give any detailed account of the "circumstances of humiliation and severity" mentioned, to which the plaintiff was subjected, an extract from the record showing them is annexed to this opinion. No adequate statement of the case can be made which does not substantially embody the entire bill of exceptions.

sumed to have acted by the orders of the President, and were thereby released from responsibility to the plaintiff. 14 Stat. 432. And if they were not thus released from responsibility, then they sought to give in evidence in mitigation of damages the testimony of certain parties which was discovered long after the arrest and imprisonment of the plaintiff, tending to establish facts which, if known at that time, would have justified, to some extent, their suspicions as to his complicity in the escape of the substitutes. The court below held that the defendants were not released from responsibility under those acts; and that evidence of the possible guilt of the plaintiff, discovered after the commission of the grievances complained of, was inadmissible in mitigation of damages. Its ruling upon both of these positions is assigned as error by the Attorney-General; but it is upon its ruling on the first that he chiefly relies for a reversal of the judgment. It is against that ruling that his argument is mainly directed. This court holds that the testimony offered should have been received; and it overrules the exception to the refusal of the court below to instruct the jury that the defendants were to be presumed to have acted under the orders of the President, and that the statutes in question constituted a full and complete justification for the acts complained of, not on the ground that the statutes were invalid, or that the orders, if issued, would have afforded no justification to the defendants, but on the ground that there was evidence for the consideration of the jury whether the defendants had not by fraudulent representations induced their superior officers to continue the imprisonment of the plaintiff "longer than necessary," and prevented him from having a speedy trial in the proper court for the offence charged.[1]

In considering this case, I shall endeavor to show that the

[1] The charge to the jury which the court was requested by the defendants to give was that the facts which their evidence tended to establish, if believed, "constituted under the aforesaid acts of Congress a full and complete justification for each and both the defendants for the acts complained of. And in the absence of all evidence to prove whether the President issued any order, general or special, for the arrest and detention of the plaintiff, the jury were not only at liberty, but were bound, to presume that he did; that such was the presumption of law, under the act of March 2, 1867, and that such presumption must prevail in this case, as there is no evidence to rebut it."

court below ruled correctly, as well where its ruling is pronounced erroneous as in refusing to give to the jury the instructions requested; and that its refusal in that respect should be sustained, on the ground that neither the statutes mentioned nor any orders of the President under them could constitute any justification for the arrest and imprisonment of the plaintiff. And I shall examine the propositions of law presented by the rulings in the order in which they were discussed by the Attorney-General.

The act of 1863 provided that "any order of the President, or under his authority," made during the rebellion, should "be a defence in all courts to any action or prosecution" for any search, seizure, arrest, or imprisonment under and by virtue of such order, or under color of any law of Congress.

By the act of 1867, all acts, proclamations, and orders of the President, or acts done by his authority or approval, after March 4, 1861, and before July 1, 1866, respecting martial law, military trials by courts-martial, or military commissions, or the arrest, imprisonment, and trial of persons charged with participation in the rebellion, or as aiders or abettors thereof, or as guilty of any disloyal practices in its aid, or of any violation of the laws or usages of war, or of affording aid and comfort to rebels, and all proceedings and acts of courts-martial or military commissions, or arrests and imprisonments in the premises by the authority of the orders or proclamations, or in aid thereof, — are approved, legalized, and declared valid, to the same extent and with the same effect as if the orders and proclamations had been issued, and the arrests, imprisonments, proceedings, and acts had taken place, under the previous express authority and direction of Congress. The act also declares that no person shall be held to answer in any civil court "for any act done or omitted to be done in pursuance or in aid of any of said proclamations or orders, or by authority or with the approval of the President" within the period and respecting any of the matters mentioned; and that "all officers and other persons in the service of the United States, or who acted in aid thereof, acting in the premises, shall be held *prima facie* to have been authorized by the President."

These statutes, as is apparent on their face, extend only to

acts done in compliance with express orders or proclamations of the President. They do not cover acts done by persons upon their own will and discretion, who may have been at the time in the service of the government, simply because they were under the general direction of the President as commander-in-chief. They were not intended to protect against judicial inquiry and redress every act of a subordinate in the military service in suppressing or punishing what he may have regarded as a disloyal practice, no matter how flagrant the outrage he may have thus committed against life, liberty, or property. Such was the purport of the decision of this court when this case was here before. 18 Wall. 510.

It is not pretended that any proof was produced that the arrest and imprisonment of the plaintiff were made under any express order or proclamation of the President; but it is contended by the Attorney-General that under the last clause of the act of 1867 it is to be presumed that their action was authorized by the President, and that they are thus relieved from accountability for it.

The court below held, that assuming the construction placed by the Attorney-General upon the statute to be correct, and that from the commission of the act the presumption arose that it was authorized by the President, — the act thus presumptively establishing its own validity, — the presumption in this case was repelled, inasmuch as it appeared in evidence by whose direction the orders were issued under which the plaintiff was arrested and imprisoned. It appeared that they never originated with or had the sanction of the President.

If, however, the court below erred in this respect, there is another and a conclusive answer to the defence, — one which renders futile and abortive all attempts to justify the action of the defendants under any presumed orders of the President, — and that is, that it was not within the competency of the President or of Congress to authorize or approve the acts here complained of, so as to shield the perpetrators from responsibility. It is to be borne in mind, as already stated, that the plaintiff was not in the military service of the United States; that his arrest and imprisonment were in Vermont, far distant from the sphere of military operations; that there the courts

of the United States and of the State were open and in the full exercise of their jurisdiction, and that the plaintiff could have been brought before them for any offence known to the laws; and that there, if anywhere in the United States, the provisions of the Constitution for the security of one's person from unlawful arrest and imprisonment were not superseded.

Persons engaged in the military service of the United States are, of course, subject to what is termed military law; that is, to those rules and regulations which Congress has provided for the government of the army and the punishment of offences in it. Congress possesses authority under the Constitution to prescribe the tribunals as well as the manner in which offenders against the discipline of the army and the laws for the protection of its men and officers shall be summarily tried and punished; and to the jurisdiction thus created all persons in the military service are amenable. But that jurisdiction does not extend to persons not in the military service, who are citizens of States where the civil courts are open.

It may be true, also, that on the actual theatre of military operations what is termed martial law, but which would be better called martial rule, for it is little else than the will of the commanding general, applies to all persons, whether in the military service or civilians. It may be true that no one, whatever his station or occupation, can there interfere with or obstruct any of the measures deemed essential for the success of the army, without subjecting himself to immediate arrest and summary punishment. The ordinary laws of the land are there superseded by the laws of war. The jurisdiction of the civil magistrate is there suspended, and military authority and force are substituted. The success of the army is the controlling consideration, and to that every thing else is required to bend. To secure that success, persons may be arrested and confined, and property taken and used or destroyed, at the command of the general, he being responsible only to his superiors for an abuse of his authority. His orders, from the very necessity of the case, there constitute legal justification for any action of his officers and men. This martial rule — in other words, this will of the commanding general, except in the country of the enemy occupied and dominated by the army — is limited to the

field of military operations. In a country not hostile, at a distance from the movements of the army, where they cannot be immediately and directly interfered with, and the courts are open, it has no existence.

The doctrine sometimes advanced by men, with more zeal than wisdom, that whenever war exists in one part of the country the constitutional guaranties of personal liberty, and of the rights of property, are suspended everywhere, has no foundation in the principles of the common law, the teachings of our ancestors, or the language of the Constitution, and is at variance with every just notion of a free government. Our system of civil polity is not such a rickety and ill-jointed structure, that when one part is disturbed the whole is thrown into confusion and jostled to its foundation. The fact that rebellion existed in one portion of the country could not have the effect of superseding or suspending the laws and Constitution in a loyal portion widely separated from it. The war in the Southern States did not disturb Vermont from her constitutional propriety. She did not assent to the theory that war and disturbance elsewhere could destroy the security given by her laws and government. The same juridical institutions, and the same constitutional guaranties for the protection of the personal liberty of the citizen, with all the means for their enforcement, remained there as completely as before; and the Constitution and laws of the United States were as capable of enforcement in all their vigor in that State during the war as at any time before or since. The arrest and imprisonment of the plaintiff, even if made by direct order of the President, were, therefore, in plain violation of the fifth constitutional amendment, which declares that no person shall be deprived of his liberty without due process of law. No mere order or proclamation of the President for the arrest and imprisonment of a person not in the military service, in a State removed from the scene of actual hostilities, where the courts are open and in the unobstructed exercise of their jurisdiction, can constitute due process of law, nor can it be made such by any act of Congress. Those terms, as is known to every one, were originally used to express what was meant by the terms "the law of the land" in Magna Charta, and had become synonymous with them. They were intended,

as said by this court, "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." *Bank of Columbia* v. *Okely*, 4 Wheat. 235. They were designed to prevent the government from depriving any individual of his rights except by due course of legal proceedings, according to those rules and principles established in our systems of jurisprudence for the protection and enforcement of the rights of all persons.

"By the law of the land," said Mr. Webster, in his argument in the *Dartmouth College Case*, "is most clearly intended the general law, — a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." Those words have been held in English law to have this potency since the date of Magna Charta.

The clauses of that instrument which declare that no freeman shall be taken or imprisoned, or be disseised of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed, or be passed upon except by the lawful judgment of his peers or by the law of the land, and that justice shall not be sold, nor denied, nor delayed to any man, are considered by English jurists and statesmen to be sufficient to protect the personal liberty and property of every freeman from arbitrary imprisonment and arbitrary spoliation.

"It is obvious," says Hallam, "that these words, interpreted by any honest court of law, convey an ample security for the two main rights of civil society. From the era, therefore, of King John's charter, it must have been a clear principle of our Constitution, that no man can be detained in prison without trial." 2 Hallam, Middle Ages, c. 8, part 2, p. 310. And the same writer, in his Constitutional History of England, mentions among the essential checks upon royal authority, established under Magna Charta as part of her Constitution, "that no man could be committed to prison but by a legal warrant specifying his offence," and that "the officers and servants of the crown violating the personal liberty or other

right of the subject might be sued in an action for damages, to be assessed by a jury, or in some cases were liable to criminal process; nor could they plead any warrant or command in their justification, not even the direct order of the king." 1 Hallam, Const. Hist., c. 1, p. 3.

"The glory of the English law," says Blackstone, "consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment, the reason for which it is made, that the courts upon a *habeas corpus* may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner." 3 Blackst. 133.

As stated by counsel, the last vestige of any claim on the part of the government of England to the right of arrest, except upon such process as was authorized by the general law of the land, was overthrown in 1765, in the celebrated contest concerning the legality of general warrants. The arrests of parties by such warrants from the Secretary of State was condemned by repeated judgments of the highest courts of England as illegal and unconstitutional, and from that day to this such warrants have never been issued. No barrister or judge in England would now have the hardihood to assert that such warrants are due process of law.

To me, therefore, it is a marvel that in this country, under a Constitution ordained by men who were conversant with the principles of Magna Charta, and claimed them as their birthright, — a Constitution which declares in its preamble that it is established "to secure the blessings of liberty to ourselves and posterity," — it could ever be contended that an order of the Executive, issued at his will for the arrest and imprisonment of a citizen, where the courts are open and in the full exercise of their jurisdiction, is due process of law, or could ever be made such by an act of Congress. I certainly never supposed that such a proposition could be seriously asserted before the highest tribunal of the Republic by its chief legal officer. I had supposed that we could justly claim that in America, under our republican government, the personal liberty of the citizen

was greater and better guarded than that of the subject in England. It is only the extraordinary claim made by the counsel of the government in this case which justifies any argument in support of principles so fundamental and heretofore so universally recognized. It may be necessary at times with respect to them, as it is necessary at times with respect to admitted principles of morality, to restate them, in order to rescue them from the forgetfulness caused by their universal admission.

The assertion that the power of the government to carry on the war and suppress the rebellion would have been crippled and its efficiency impaired if it could not have authorized the arrest of persons, and their detention without examination or trial, on suspicion of their complicity with the enemy, or of disloyal practices, rests upon no foundation whatever so far as Vermont was concerned. There was no invasion or insurrection there, nor any disturbance which obstructed the regular administration of justice. A claim to exemption from the restraints of the law is always made in support of arbitrary power whenever unforeseen exigencies arise in the affairs of government. It is inconvenient; it causes delay; it takes time to furnish to committing magistrates evidence which, in a country where personal liberty is valued and guarded by constitutional guaranties, would justify the detention of the suspected; and, therefore, in such exigencies, say the advocates of the exercise of arbitrary power, the evidence should not be required. A doctrine more dangerous than this to free institutions could not be suggested by the wit of man. The proceedings required by the general law for the arrest and detention of a party for a public offence — the charge under oath, the examination of witnesses in the presence of the accused with the privilege of cross-examination, and of producing testimony in his favor, creating the objectionable delays — constitute the shield and safeguard of the honest and loyal citizen. They were designed not merely to insure punishment to the guilty, but to insure protection to the innocent, and without them every one would hold his liberty at the mercy of the government. "All the ancient, honest, juridical principles and institutions of England," says Burke, — and it is our glory

that we inherit them, — "are so many clogs to check and retard the headlong course of violence and oppression. They were invented for this one good purpose, that what was not just should not be convenient."[1] Whoever, therefore, favors their subversion or suspension, except when in the presence of actual invasion or insurrection the laws are silent, is consciously or unconsciously an enemy to the Republic.

If neither the order of the President nor the act of Congress could suspend, in a State where war was not actually waged, any of the guaranties of the Constitution intended for the protection of the plaintiff from unlawful arrest and imprisonment, neither could they shield the defendants from responsibility in disregarding them. Protection against the deprivation of liberty and property would be defeated if remedies for redress, where such deprivation was made, could be denied.

I pass from this subject to the second position of the defendants, that if they were not justified by the acts of Congress, so far at least as to be exempted from responsibility for their treatment of the plaintiff, they were entitled to give in evidence testimony, subsequently discovered, tending to establish the correctness of their suspicions of the complicity of the plaintiff in the desertion of the substitutes. The court below refused to admit the testimony, and this court holds that it thus erred, and, for that reason, reverses its judgment. The testimony consisted of three depositions filled with hearsay, conjectures, understandings, beliefs, and other irrelevant matter which rendered them inadmissible as a whole in any court on any subject; and on that ground they were objected to, and in my judgment ought to have been excluded. They were offered to show the guilt of the plaintiff in aiding the desertion of the substitutes, and though the evidence they furnished was of the vaguest and most unsatisfactory character, the court excluded them, on the ground that the guilt or innocence of the plaintiff was not a question for the determination of the jury; and that for the purpose of rebutting malice and showing good faith, they could not give in evidence circumstances of which they had never heard until after the commencement of the action. As facts not known at that time could not have influenced the conduct

[1] Letter to the Sheriffs of Bristol.

of the defendants, it is difficult to comprehend how proof of those facts could be received to show the motives — of malice or good faith — with which they then acted.[1]

Independently of this consideration, it seems to me that the evidence of the guilt or innocence of the plaintiff was entirely immaterial. Assuming that he was guilty of the complicity alleged, — that he had admitted his guilt to the defendants, — that circumstance would not have justified their conduct in the slightest degree. They would have been equally bound upon that assumption, as they were in fact bound, — no more and no less, — to take the plaintiff before the proper magistrate, to be proceeded against according to law. To keep him for nearly six months in the State prison among convicts, without taking him before the proper officer to be held to bail or brought to trial, was a gross outrage upon his rights, whether he were guilty or innocent. There were magistrates in every county of the State competent to act upon the charge, and the district attorney was ready to take control of all cases against the laws of the United States and prosecute them. The defendants not only omitted this plain, imperative duty, but detained the plaintiff in prison, not with a view to punish him for the offence of which they suspected him to be guilty, but to coerce from him payment of money alleged to be due by him and others to a substitute broker. Where is the law or reason for allowing one, who by force holds another in confinement in order to extort the payment of money, to show in extenuation of his conduct that the man had been guilty of some offence against the law? The answer in all such cases should be that the law attaches the proper penalties to its violation, and appoints the ministers by whom those penalties are

[1] The record reads as follows: —

"The said three depositions were offered for the purpose of satisfying the jury of the guilt of Bean by evidence which was not known to, or did not come to the knowledge of, the defendants prior to said release.

"The court excluded said depositions upon the ground that the guilt or innocence of said Bean was not a question for the determination of the jury, but that all the facts and circumstances which were known to the defendants, or with which they in any way became acquainted prior to the imprisonment, could be admitted for the purpose of rebutting malice and showing that they acted in good faith, *but that they could not give in evidence circumstances of which they had never heard until after the commencement of this suit.*"

to be enforced; and whenever they can act, whoever usurps their authority and attempts to punish supposed offenders in any other mode than that provided by the law, is himself a criminal. For, as it was said by a distinguished statesman and jurist of England, when the laws can act, "every other mode of punishing supposed crimes is itself an enormous crime."

The doctrine announced by the decision of the court in this case is nothing less than this: that a gross outrage upon the rights of a person may be extenuated or excused by proof that the outraged party had himself been guilty of some crime, or, at least, that the perpetrators of the outrage had reason to suspect that he had. This doctrine is pregnant with evil. I know not why, under it, the violence of mobs, excited against guilty or suspected parties, may not find extenuation. Let such a doctrine be once admitted, and a greater blow will be dealt to personal security than any given to it for a century.

If we turn to the adjudged cases, we shall find nothing to support, but every thing to condemn, the doctrine. Thus, in *Delegal* v. *Highley* (3 Bing. N. C. 950), which was an action brought for a malicious charge before a magistrate, the defendant pleaded that he had caused the charge to be made upon reasonable and probable cause, stating what the cause was. Upon special demurrer, the plea was held insufficient in not alleging that the defendant, at the time of the charge, had been informed of or knew the facts on which the charge was made. "If the defendant," said Chief Justice Tindal, "instead of relying on the plea of not guilty, elects to bring the facts before the court in a plea of justification, it is obvious that he must allege, as a ground of defence, that which is so important in proof under the plea of not guilty, viz. that the knowledge of certain facts and circumstances which were sufficient to make him, or any reasonable person, believe the truth of the charge which he instituted before the magistrate, existed in his mind at the time the charge was laid, and was the reason and inducement for his putting the law in motion. Whereas, it is quite consistent with the allegations in this plea that the charge was made upon some ground altogether independent of the existence of the facts stated in the plea; and that the defendant now

endeavors to support the propriety of the charge, originally without cause, by facts and circumstances which have come to his knowledge for the first time since the charge was made."

So, also, the converse of this doctrine is true: if a defendant prove that, at the time of the arrest, he had reasonable cause to believe the plaintiff guilty, this cannot be rebutted by proof that, afterwards, he turned out to be entirely innocent. *Foshay* v. *Ferguson*, 2 Den. (N. Y.) 617.

It will appear from an examination of the adjudged cases, as it must on principle, that when illegal measures have been taken to redress private wrongs, or to punish for offences against the public, it is inadmissible to prove, in mitigation of actual or exemplary damages, that the party injured was guilty of the offence or misconduct constituting the provocation to the illegal measures, except where the provocation is of a personal character calculated to excite passion, and so recent as to create the presumption that the acts complained of were committed under the influence of the passion thus excited. Thus, in an action of trespass for destroying or injuring certain dwelling-houses, it was held by the Supreme Court of Maine incompetent for the defendant to prove in mitigation of damages that they were occupied as houses of ill-fame. *Johnson* v. *Farwell*, 7 Me. 378. So, in a similar action, for shooting into a house in the night-time, it was held by the Supreme Court of Illinois that the defendant could not prove, in mitigation of exemplary damages, the kidnapping and seduction of his daughter by the plaintiff and her husband, done nearly a year previous. *Huftalin* v. *Misner*, 70 Ill. 55. And in trespass for tearing down the plaintiff's house, evidence that it was occupied by disreputable females as a disorderly house, whereby the defendant had suffered serious injury and disturbance, was held by the Supreme Court of New Hampshire inadmissible either to rebut the presumption of malice or in answer to a claim for exemplary damages. *Perkins* v. *Towle*, 43 N. H. 220. See also *Weston* v. *Gravlin*, 49 Vt. 507.

Many other illustrations might be adduced from the adjudications of the State courts. They are founded upon the plain principle that no one can be allowed to undertake the punishment of wrong-doers according to his own notions; that the

administration of punitive justice for all offences is confided by the law to certain public officers, and whoever assumes their functions without being authorized usurps the prerogative of sovereign power, and becomes himself amenable to punishment. He shall not be permitted to set up the real or supposed offences of others to justify his own wrong.

Here, the defendants having, by a gross abuse of their official authority, confined the plaintiff in a State prison among convicts for many months, not that he might be prosecuted for a public offence, but for the avowed purpose of coercing the payment of money, they ought not to be permitted to set up, either in mitigation of actual or exemplary damages, that the plaintiff was guilty of an offence for which the law had prescribed another and different punishment. In the whole range of adjudications in the English and American courts I can find no ruling which sanctions the admission of such testimony for any purpose.

There is nothing in the cases cited in the opinion of the majority from the English Common Pleas, or from the decisions of the courts of Ohio, Kentucky, and Illinois, which has any relevancy to the question here presented, as any one may satisfy himself by their examination. The circumstances of which evidence was there allowed existed and were known when the grievances complained of were committed, and tended to establish probable cause for them. There is no intimation in any of the cases of the novel doctrine, now for the first time announced, that subsequently discovered evidence could be received in extenuation of conduct not founded upon it.

The charge of the court to the jury was, except perhaps in one particular, as favorable to the defendants as the case permitted. It gave a succinct and clear statement of the facts, and declared the law applicable to them with precision and accuracy. It told them that the arrest of the plaintiff was of little consequence as compared with his imprisonment; that had he been taken at once before a United States commissioner, the arrest without a warrant, though an illegal act, would have called for small damages; and that the importance of the case consisted in his imprisonment and the purpose of it. In adding that after the plaintiff was imprisoned it was not the

purpose of the defendants to try him in the civil courts, but to hold him with a strong hand until the money was paid, the court merely stated what the uncontradicted evidence on the trial established, and what was not disputed. For this, said the court, "he is entitled to just damages, to be recompensed for his expenses, to be paid for the suffering to body and mind from confinement in a common cell in the State prison, for the disgrace, for the separation from his family at a time when it was very important that he should not be separated from them, in brief, for the loss of his personal liberty, and for the immediate and necessary losses in his business resulting from his confinement, and to the pecuniary loss which he immediately and directly sustained." To this the court added, that if the defendant Henry was influenced in all his conduct by a determination to prevent the release of the plaintiff, and to hold him after he was ordered to be turned over to the civil authorities, and was thus guilty of malice or ill-will, the jury might give, in addition to remunerative, punitive damages; that is, such sum as would punish him for the malice exhibited, and teach him and others to refrain from similar conduct.

The case here is much stronger than that of *Mitchell* v. *Harmony*, reported in the 13th of Howard. There the property of the plaintiff had been seized by an officer of the army of the United States upon the belief that he was unlawfully engaged in trading with the enemy. It turned out that he had been permitted by the Executive Department of the government to trade with the inhabitants of neighboring provinces of Mexico which were in the possession of the military authorities of the United States. In an action for trespass for seizing the property, the defendant, among other reasons, justified the seizure on the ground that he acted in obedience to the order of his commanding officer, and, therefore, was not liable. But the court answered, Mr. Chief Justice Taney speaking for it, by referring to the case of Captain Gambier, mentioned by Lord Mansfield in his opinion in *Mostyn* v. *Fabrigas* (1 Cowp. 180), and observing, that "upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior. The order may palliate, but it can never

justify." And in that case the court added that the defendant did not stand in the situation of an officer who merely obeys the command of his superior, for it appeared that he advised the order, and volunteered to execute it, when that duty more properly belonged to an officer of an inferior grade.

Here the defendant Henry was especially officious in securing the arrest and in continuing the imprisonment of the plaintiff. He advised the arrest; he insisted upon the imprisonment until the payment of the $800 was coerced, and he urged against turning the case over to the civil tribunals. The spirit which actuated him as well as Beckwith is shown in their telling the plaintiff at Sutton, on the day of his arrest, and afterwards, when in confinement in the State prison, "that if they could not hold him as privy to the desertion, they should take him to Canada, to be prosecuted there under the foreign enlistment acts for enlisting the men, unless he paid over the money."

The case of Captain Gambier, mentioned by Lord Mansfield and referred to by Mr. Chief Justice Taney, was this: By order of an admiral of the English navy he had pulled down the houses of some sutlers in Nova Scotia who were supplying the sailors with spirituous liquors, by which their health was injured. "The motive," says the Chief Justice, "was evidently a laudable one, and the act was done for the public service. Yet it was an invasion of the rights of private property, and without authority of law, and the officer who executed this order was held liable to an action, and the sutlers recovered against him to the value of the property destroyed." "This case," he adds, "shows how carefully the rights of private property are guarded by the laws of England; and they are certainly not less valued nor less securely guarded under the Constitution and laws of the United States."

The only criticism perhaps to which the charge is open is, that it does not distinguish between the conduct of the defendant Beckwith and that of the defendant Henry. The former does not appear from the evidence to have been as officious and persistent as the latter in efforts to hold the plaintiff until the money was coerced from him. But no objection to the charge was made on this ground; nor does it appear that on the trial

any distinction was drawn as to the extent of liability between the two defendants, or that any other than compensatory damages were allowed by the jury. They may well have supposed that the amount awarded was at best but poor compensation. Few, indeed, would consider the verdict given as sufficient for the disgrace, humiliation, and suffering wantonly inflicted upon the plaintiff. As punitive damages, the verdict was not at all excessive. On this last point I will quote from only one case, decided in 1763. It is the case of *Huckle* v. *Money* (2 Wilson, 205), tried before the Chief Justice of the Common Pleas of England. The plaintiff was a journeyman printer, and was taken into custody by the defendant, the king's messenger, upon suspicion of having printed a newspaper called the "North Briton," and was kept in custody six hours; but he was used civilly, so that he suffered little or no damages. The defendant attempted to justify under a general warrant of the Secretary of State to apprehend the printers and publishers of that paper; but the justification was overruled by the Chief Justice, and the plaintiff recovered £300 as damages. A new trial was moved for on the ground that this amount was excessive, it being in evidence that the printer received only weekly wages of a guinea. But the motion was denied, and in giving the decision of the court the Lord Chief Justice said: "That if the jury had been confined by their oath to consider the mere personal injury only, perhaps £20 damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the king's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the king's counsel, and saw the Solicitor of the Treasury, endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner; — these are the ideas which struck the jury on the trial, and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to pro-

cure evidence, is worse than the Spanish inquisition, — a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject: I thought that the twenty-ninth chapter of Magna Charta, *Nullus liber homo capiatur et imprisonetur, etc., nec super eum ibimus, etc., nisi per legale judicium parium suorum vel per legem terræ, etc.*, which is pointed against arbitrary power, was violated."

I am clearly of opinion that the judgment of the court below should be affirmed.

The following statement of the character of the evidence given on the trial touching the treatment of the plaintiff is printed from the record in the case: —

"The plaintiff's evidence tended to show that on the eleventh day of November, A.D. 1864, while on his return from a trip to Boston, to his home in Coaticook, in the Province of Quebec, he was arrested in a passenger-car, near Wells River, in the State of Vermont, by defendant Beckwith, without any warrant or process of law, and taken from thence to Sutton, Vt.

"That Beckwith at first proposed to take plaintiff to St. Johnsbury jail, but afterwards decided to take him to his (Beckwith's) residence at Sutton, to which place he was then on his way, for the purpose of allowing plaintiff to see his father, who lived about fifteen miles from Sutton.

"That said Beckwith kept the plaintiff there through the ensuing night, under charge of keepers; that the plaintiff's father, for whom the plaintiff sent after his arrival at Sutton, came there during the night, but Beckwith refused to allow the plaintiff to have an interview with his father except in his (Beckwith's) presence.

"That on the following day defendant forcibly and against the will of the plaintiff took him, and by order of Gilman Henry, the other defendant, placed him in the State's prison, at Windsor, Vt., where he remained until on or about the twenty-sixth day of April, 1865, when he was admitted to bail, and released from said imprisonment.

"That during all that time he was locked up in the night-time, and for the first few days in the daytime also, in a narrow and scantily furnished cell, being one of those in which convicts in the State's prison were confined at night; that after the first few days he was allowed, upon his complaint of the coldness of the cell in the daytime, to spend the day in the shop where the convicts worked, but was required to go out and return to his cell when they did, and not at any time to be out of sight of a keeper, nor to go upon the corridors or in the yard for exercise; that the food offered him was the fare served to the convicts, and which he could not eat; and thenceforth he obtained his meals to be sent to him from the keepers' table, by paying three dollars per week, which he paid during the whole time.

"The plaintiff's evidence further tended to show that he was informed, at or soon after the time of his arrest, by defendants, that he was charged with being one of three persons who had received $800 of money paid for two men who had enlisted in the army in June previous as substitutes, and had immediately

deserted as more particularly stated hereafter, and with being privy to their desertion.

"That he was imprisoned on Saturday, and saw no one but the keepers till the Monday following, when defendant Henry came to see him; that Henry told him he could be discharged on payment of the $800, and $25 more for expenses; that the plaintiff protested his innocence and demanded a trial; that he was told by Henry he could not have a trial, and could not get one, but that his case would be reported to Major Austine, at Brattleboro', assistant provost-marshal-general.

"That plaintiff thereupon requested him to make immediate report, which he promised to do. That later in the same day the plaintiff being in much distress of mind and anxiety to return to his family, and thinking perhaps the money might be paid under protest, telegraphed to his father to come and bring $800, and sent word to Henry, by the messenger who took the despatch, requesting him not to report the case till his father arrived, which he expected would be on the following day.

"That his father arrived on the next day but one. That his father had an interview with Henry, and said to him that neither he nor the plaintiff would pay a dollar, and requested him to report the case at once.

"He was further told by both defendants, both at Sutton and after his confinement at Windsor, that if they could not hold him as privy to the desertion they should take him to Canada to be prosecuted there under the foreign-enlistment acts for enlisting the men, unless he paid over the money.

"That from that time plaintiff constantly urged that his case should be reported, or that a trial should be given him, or that he be admitted to bail, and protested his innocence. And Henry repeatedly promised to report the case, but frequently told him and his father he could not get a trial, nor be admitted to bail, and that he would be discharged at any time on payment of the $825.

. . . . . .

"The plaintiff's evidence further tended to show that throughout his imprisonment he made constant efforts in various ways to obtain a trial, or a release on bail, which he was able and willing to furnish; that his father made eleven journeys from the northern part of Vermont to Windsor, Brattleboro', &c., for that purpose; that among other efforts he addressed to Major-General Dix, then in command of that department, the following letter: —

"'WINDSOR STATE'S PRISON,
"'Jan. 21, 1865.

"'Maj.-Gen. J. A. DIX.

"'SIR, — I am told by one Daniel Beckwith, a deputy provost-marshal here, by whom I have been committed here on a charge (of which I am entirely innocent) of aiding or being privy to the escape of two substitutes who had received $800 paid them by one Stevens, and that you have ordered my imprisonment here till I pay the $800 and expenses.

"'If I am guilty of aiding a soldier to desert, I ought to be punished, and I cannot see, sir, how (I say it respectfully) you have any right to order my imprisonment for any indefinite time without giving me an opportunity to prove my innocence.

"'I ask nothing but what is right, and the right of every citizen of the United States; that is, a trial.

"'I do not believe, sir, that you have made any such orders, but the fact is, I am kept in prison ever since Nov. 11, 1864, my family suffering and my character defamed, and a trial denied me.

"I am told, sir, there is a United States attorney in Vermont whose duty it is to investigate such matters, and I respectfully ask, sir, if the matter is within your jurisdiction, that he be directed to bring me to trial; and if the government is not ready for trial, I can find any number of respectable people who will become my bail until such time as the government is ready to try me.

"'Again, sir, I ask you candidly and respectfully to order a complaint to be made against me, and, if proved guilty, I must suffer the consequences.

"'Yours respectfully,

"'ANDREW J. BEAN.'

"That said Bean obtained the intercession at Washington of Mr. Baxter, a member of Congress from Vermont.

"His evidence further tended to show that he learned early in April of an order for his release having been sent from Washington, and made, as did his father, urgent efforts to obtain his release, as his wife was then about to be confined; that he did not succeed, though repeated applications were made to Henry, until the 26th of April, and after the confinement of his wife, when Henry brought him before a justice of the peace of Windsor, who took bail for his appearance before a United States commissioner when called on."

LITTLE ROCK v. NATIONAL BANK.

A city issued its bonds, engraved with vignettes on bank-note paper, of various denominations, ranging from $1 to $100, and having the form and appearance of treasury notes of the United States or bank-bills, and it paid them out to its creditors for property sold, materials furnished, and labor performed. It received them for taxes and other dues, and to some extent reissued them. They formed a considerable portion of the circulating medium of the city and vicinity. Under the authority of a statute of the State empowering the city council of any city to issue bonds for the purpose of extending the time of paying its indebtedness, which it was unable to meet at maturity, the city passed an ordinance providing for the redemption of the bonds first described. A., the lawful holder of some of them, which had been issued to other parties in payment of valid claims against the city and were overdue, surrendered them to the city, and received in lieu of the amount due thereon bonds for which the ordinance provided, and a credit on the books of the city. The city failing to pay, A. brought suit against it. A recovery was resisted, on the ground that the bonds engraved on bank-note paper had been issued in violation of law, and that the surrender of them was not a valuable consideration for the bonds and the credit received by A. *Held*, that whether the original bonds were issued in violation of law or not, — a point which this court does not decide, — A. is entitled to recover.

ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

This was an action brought by the Merchants' National Bank of Little Rock, Ark., against the city of Little Rock. The first count of the complaint is upon a bond in the words and figures following: —

"No. 1.] STATE OF ARKANSAS. [$500.

"*Bond of the City of Little Rock.*

"Know all men by these presents, that the city of Little Rock, in the said State of Arkansas, acknowledges itself to owe and be indebted unto the Merchants' National Bank, or bearer, the sum of $500 in lawful money of the United States of America, which sum the said city promises to pay, for value received, at the office of the treasurer of said city of Little Rock, one year from the date hereof, together with interest thereon, at the rate of ten per cent per annum, until this bond shall be paid.

"This bond is issued under and in pursuance of the provisions of sect. 3298, c. 72, entitled 'Incorporations,' Gantt's Digest of the Statutes of Arkansas, and is for indebtedness of said city of Little Rock, incurred previous to the time of the passage of said act.

"In testimony whereof, the said city of Little Rock, by an ordinance of the council of said city, passed Aug. 15, 1873, has caused this bond to be issued and signed by the president of said council and attested by the clerk of said city, and to be sealed with his official seal.

"Dated at Little Rock, in the county of Pulaski, State of Arkansas, this ninth day of October, 1874.

"D. P. UPHAM, *President City Council.*

[SEAL.] "C. M. BARNES, *City Clerk.*"

The bond bears the following indorsement: —

"*Little Rock* $100 *Ten per Cent City Bond.*

"AUDITOR'S OFFICE, STATE OF ARKANSAS.

"I hereby certify that this bond is registered in my office according to law, that it is regularly and lawfully issued, and that the signatures thereto are genuine.

"In testimony whereof, I have hereunto set my hand and affixed the seal of my office, at the city of Little Rock, this twenty-second day of October, A.D. 1874.

[SEAL.] "J. R. BERRY, *Auditor of State.*"

There are one hundred and fifty-five counts of a similar nature describing other like bonds. There is also one count for the recovery of certain amounts, for which the bank had received credit on the books of the city, and which remained unpaid.

The section mentioned in the bond is as follows: —

"The city or town council of any city or town, for the purpose of extending the time of payment of any indebtedness heretofore incurred, and which from the limit of taxation such city or town is unable to pay at maturity, shall have the power to issue the bonds of such city or town, or borrow money, so as to change, but not increase, the indebtedness, in such amounts, not less than fifty dollars, and for such length of time, and at such rate of interest, not more than ten per cent per annum, as such city or town council may deem proper."

In August, 1867, the city provided for the issue and redemption of its bonds which were printed on bank-note paper, in the form and having the ordinary appearance of United States treasury notes, and were in denominations varying from $1 to $100, payable in one, two, three, five, eight, and ten years respectively, with eight per cent interest from maturity.

By issuing this currency the city obtained the means with which it proceeded to build a city hall and school-houses, grade streets and culverts, purchase cemeteries, improve public landings, provide fire equipments, pay interest to several railroad companies, and pay salaries of officers and agents.

The city received in payment of taxes and other dues the bills thus held by others, and to some extent reissued them when its occasions required. From time to time their value diminished, until it became merely nominal; but for a considerable period they formed the local circulating medium in the city and its vicinity in lieu of money.

In 1873, the city council adopted an ordinance "for the redemption of outstanding city bonds on bank-note paper."

The bank was the lawful holder for value of a large number of overdue bonds of that description, issued to other parties in payment of valid claims against the city. In accordance with the provisions of the ordinance, the bonds were surrendered to the council, by whom they were cancelled, and the bank received in lieu of the amount due thereon the bonds

on which this suit was brought. The bank had also other similar bonds, which were surrendered and in like manner cancelled, but for which no new bonds were issued, the city acknowledging its indebtedness by giving the bank credit therefor on the books of the city.

The city, among other defences, pleaded that the bonds surrendered were issued in violation of the statute, and that the bonds given in lieu thereof, as well as the credit entered upon the city books, which forms the ledger account, were without authority of law or valuable consideration.

The jury returned a verdict in favor of the bank for $38,640.40. The court rendered judgment therefor, with a provision that of that amount $28,512.16 should bear interest at ten per cent per annum. The city sued out this writ of error.

The statutes of the State bearing upon the questions involved are set out in the opinion of the court.

Mr. U. M. Rose for the plaintiff in error.

Mr. John McClure and *Mr. T. D. W. Yonley*, *contra*.

MR. JUSTICE HUNT delivered the opinion of the court.

We do not perceive that there is any difference between the right to recover for the amount issued to the bank in bonds and for that credited on the books of the city. If the debt was legally created, the holder had the right to recover the amount of the bills held by him. If it derived a new validity from the surrender of an old debt of a disputed character, it is to be observed that all of the debt was equally given up. New bonds were issued for a portion, but all of the debt was surrendered. It was the surrender of what was claimed to be a legal debt, and the creating a new obligation thereby, that is said to create the liability. If a city has power to bind itself by substituting a new liability for a cancelled one, it may do so by any instrument of acknowledgment which affords sufficient evidence of a debt. We are of opinion that the two classes of obligations are governed by the same rule.

The statutes of Arkansas upon the subject of notes issued for the purposes of currency are complicated and hard to be understood.

On the 25th of November, 1837, was passed the first act to

which we are referred, entitled "An Act to prevent the circulation of private notes in the State," prohibiting the circulation of all money or bank-notes by persons unauthorized by law, and of notes of a less denomination than five dollars.

On the 14th of February, 1838, was passed the act entitled "An Act to compel the payment of change tickets," which provided that the holder of any change ticket, bill, or small note should have the right to sue the issuer or indorser thereof before any justice of the peace, and recover the amount held by him, and providing that the act first above mentioned should take effect from the first day of March, 1838.

The effect of the two statutes would appear to be that the general circulation of private notes was prohibited by law, but the holder of notes thus illegally circulated was authorized to recover the amount from the party issuing or indorsing the same, and to have execution without appeal or delay.

On the 8th of January, 1855, was passed "An Act to restrain the circulation of change tickets," prohibiting the circulation by any person or persons of notes or bills of less denomination than five dollars, to pass as currency, whether first issued within this State or not, punishable by fine and imprisonment.

On the 8th of February, 1859, was passed "An Act to prevent the people from being defrauded with bank paper," and on the 18th of November, 1861, "An Act to repeal all State laws that prohibit the circulation of bank-bills of any denomination." The last act is in these words: "All acts or parts of acts prohibiting the circulation of bank-bills of any denomination or amount and fixing a penalty for such circulation be, and the same are hereby, repealed; but nothing herein contained shall be construed so as to authorize the issuance of shin-plasters, change notes, or other irresponsible paper by individuals, corporations, or others."

"Shin-plasters and change notes" we may assume to be paper-money of a less denomination than one dollar, intended to take the place of small pieces of coin. But what is "other irresponsible paper"?

It would seem that shin-plasters and change notes are irre-

sponsible paper, as not only are they expressly required not to exist, but they are condemned in the company of "other irresponsible paper."

Nor can we treat this subject as paper or notes issued by those who are not solvent in their pecuniary affairs, or not able to respond to the consequences of their actions.

There is no standard known to the law to determine where responsibility or irresponsibility exists.

We apprehend this expression may have been intended to apply to fractional paper, which in its form, character, and nature was considered as a debased and unhealthy circulating medium.

By an act approved Dec. 14, 1875, it was enacted "that all city warrants, scrip acceptances, or money shall be receivable for any city purposes except for interest tax, and for all debts due the municipal corporation, by whom the same were issued, without regard to the time or date of issuance of such warrant, scrip acceptance, or money, or the purpose for which they were issued."

Upon this state of the law the judge at the circuit was of the opinion that the original issue of its notes by the city of Little Rock was illegal. It is not necessary that we concur in this view, or that we should dissent from it. We have referred to the statutes that the actual position of the parties towards each other might be understood, and the point on which the decision in favor of the bank was made be appreciated.

There was evidence that the bonds sued on, and the ledger accounts sued on, were given and allowed on the immediate consideration of the surrender of bonds of the form, character, and material first issued by the city. The court charged as follows, viz.: —

"That the bonds in suit issued by the defendant in lieu of said bonds on bank-note paper — the last-named bonds having been originally issued under the circumstances above stated for valid debts against the city to other creditors of the city than the plaintiff, and the plaintiff not having been connected with their issue — constitute a valid ground of action against the city, and the city is liable thereon to the plaintiff, although the said city bonds on bank-note paper were of such an appear-

ance and of such a form as to be especially adapted to constitute a circulating medium, and were, in fact, used in and about the city as a local circulating medium in lieu of money.

"There is also a claim against the city for the amount of certain city bonds on bank-note paper surrendered by the plaintiff to the city at its request, for which the city issued no new bonds, but placed the amount of the bonds surrendered by the plaintiff and destroyed by the city to the credit of the plaintiff on the ledger of the city. The same principles of law apply to this claim as to the claim on the new bonds."

It can scarcely be doubted that whoever is capable of entering into an ordinary contract to obtain or receive the means with which to build houses or wharves or the like, may, as a general rule, bind himself by an admission of his obligation. The capacity to make contracts is at the basis of the liability. The first liability of the city was disputed by it. It had gone beyond its power, as it said, in making a debt in the form of bank-notes. If it had not denied its power, judgment and an execution might have gone against it, and the creditor would have obtained his money. This privilege of non-resistance every person retains, and continues to retain. He can reconsider at any time and confess, and admit what the moment before he denied.

In 1874, the city of Little Rock did reconsider. It said, we will purge the transaction of its illegality. We had the authority to accept from you in satisfaction of amounts received by us for legitimate purposes the sums in question. We did so receive and expend for legitimate purposes. We erred in making the payment to you in an objectionable form. We now pay our just and lawful debt by cancelling the bank-notes issued by us, and delivering to you obligations in the form of bonds, to which form there is no legal objection.

If the city had borrowed $1,000 of the bank upon its note at a usurious interest, but the bank had subsequently cancelled the illegal note, had refunded the excessive interest, and received a new note for a lawful amount, the new note would be valid and collectible. *Kent* v. *Walton*, 7 Wend. (N. Y.) 256. So where the consideration of a contract declared void by statute is morally good, a repeal of the statute will validate

the contract. *Washburn* v. *Franklin*, 35 Barb. (N. Y.) 599; s. c. 13 Abb. Pr. 140. If the act of Dec. 14, 1875 (*supra*), repealed the restraining laws absolutely as to cities, which we do not decide, the notes first issued by the city were valid from that time.

We think the charge as quoted was right. *Hitchcock* v. *Galveston*, 96 U. S. 341; *The Mayor* v. *Ray*, 19 Wall. 468; *Police Jury* v. *Britton*, 15 id. 566; *Mullarky* v. *Cedar Falls*, 19 Iowa, 24; *Sykes* v. *Laffery*, 27 Ark. 407; *Wright* v. *Hughes*, 13 Ind. 109, are authorities to the point. See also the numerous cases cited in Dillon, Mun. Corp., sect. 407, note.

Judgment affirmed.

BLAKE v. HAWKINS.

1. An appointment under a power is an intent to appoint carried out, and, if made by the last will and testament of the donee of the power, the intent, although not expressly declared, may be determined by the gifts and directions made, and if their purpose be to execute the power, the instrument must be regarded as an execution.
2. A., who had a power to appoint a fund in the hands of B., made her will, wherein she declared her intention thereby to execute all powers vested in her, particularly those created in her favor by certain deeds executed in 1839, whereby she became entitled to appoint that fund. Following this declaration were various gifts of pecuniary legacies for charitable purposes, amounting to $28,500, and also provisions for the payment of certain annuities. Special disposition and appropriation were made of her personal property, which consisted of household furniture, carriage and horses, a growing crop upon a farm, a small sum of cash in hand, some petty debts due her, and about sixty slaves, the latter constituting nearly nine-tenths of the value of the whole. Certain real estate was also to be sold, and the proceeds applied to a specific purpose. The will declared that if it should appear at her decease that the bequests exceeded the amount of funds left, the first five only (those to charities) should be curtailed until brought within the assets. The fund in the hands of B. was not more than sufficient to pay the legacies. *Held*, 1. That it was the intention of the testatrix that the legacies to charitable purposes and to pay annuities should be paid, but not from the proceeds of the personal property which she owned in her own right, and specifically appropriated. 2. That the will was an execution of the power, and it appointed the whole fund to her executors.

3. The "deed of explanation" (*infra*, p. 317) executed in 1845 was effectual, and its operation was to reduce the annuity charged upon the lands in the deed of 1839 proportionately as A. reduced the fund charged by her appointments or outlays, so as to make the annuity in each and every year equal to six per cent interest on so much of said fund as remained unappropriated or unexpended by her in each and every year respectively.

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

George Pollock, who was seised and possessed of a large estate, consisting of lands, slaves, and personal effects, died in 1839. He devised and bequeathed it all to his sister Frances, wife of John Devereux, by whom she had three children, Thomas P., George, and Frances Ann who intermarried with Leonidas Polk. George died leaving his children Elizabeth and Georgina surviving him, the former of whom is the wife of Grinfill Blake, and the latter of John Townsend.

On July 3, 1839, John Devereux and Frances his wife conveyed to Thomas P. Devereux in fee the real estate so devised subject, however, to charges as follows: —

"*First*, that the said Thomas P. Devereux, his heirs and assigns, shall, on the first day of March in each and every year during the life of the said Frances Devereux, pay to the said Frances, into her own hands, or according to her own order, and to her sole and separate use, and subject to her own disposal, as if she were a *feme sole* and unmarried, the yearly sum of $3,000."

"*Thirdly*, that the said Thomas P. Devereux, his heirs or assigns, shall invest for, or pay to, the said Frances, at such times, in such proportions, and in such manner and form as she shall direct and require, to and for her own sole and separate use, and subject to her own disposal by will, deed, or writings in nature thereof, or otherwise, to all intents and purposes (notwithstanding her coverture) as if she were a *feme sole* and unmarried, the sum of $50,000; but if the said sum of money, or any part thereof, shall remain unpaid, or shall not be invested during her life, and if the said Frances shall not by deed, or will, or writing in nature thereof, or by some other act give, grant, dispose, or direct any payment, investment, or application of the same, then the said sum of money, or so much thereof as shall remain not paid, given, granted, disposed, or directed to be invested, paid, or applied, shall be considered as lapsing, and the charge therefor as extinguished for the benefit of the said Thomas."

On the same day John Devereux also conveyed to said Thomas the personalty bequeathed by said Pollock.

John Devereux died in 1844, and in 1845 his widow executed a "deed of explanation," which, after referring to that of July 3, 1839, is as follows: —

"And whereas in and by the same the sum of $50,000 was secured to the said Frances, together with an annuity of $3,000; and whereas the annuity was by the said Frances understood to be the interest of the said sum of $50,000, and not in addition thereto, and was to abate as the principal of the said sum was from time to time paid; and whereas doubts have arisen whether the said deed may not bear a contrary construction, and the said annuity be chargeable on the said estate over and above the said $50,000:

Now, these presents are to declare that the true meaning and intent of the part of the said settlement above referred to is, that the sum of $50,000, with the annual interest thereon, was to be hereby reserved to the said Frances, and that the said interest was to cease *pro rata* as portions of the said principal sum were from time to time paid and discharged, in the same manner as if the same was a debt due by the said estate, and that no annuity except the said interest was intended to be reserved by the said settlement to the said Frances."

In 1849 she died. Her last will and testament, bearing date Dec. 23, 1847, was, after protracted litigation, admitted to probate in August, 1852. The first and introductory clause is as follows: —

"I, Frances Devereux, of North Carolina, . . . do make and ordain this my last will and testament, intending thereby to execute all powers vested in me, and enacted in any deed or deeds heretofore executed, particularly those powers created in my favor by two certain deeds settling and assuring the estate of my late brother, George Pollock, to my son, Thomas P. Devereux, dated some time in the month of July, in the year of our Lord eighteen hundred and thirty-nine, and executed by my late husband and myself."

She bequeathed by the first five items five legacies, of $4,000 each, to five several charitable institutions; by the sixth, $500 to her executors for a charitable purpose; by the eighth,

$7,500 to Thomas P. Devereux, in trust, to apply the income on the same annually to the payment of certain annuities and charities therein specified; by the twelfth, $500 to S. S. Souter, for a charitable purpose specified. There is no other pecuniary legacy, and no residuary devise or bequest. Thomas P. Devereux and others were appointed executors, but did not qualify as such. Seymour W. Whiting, who had been appointed administrator *pendente lite*, was, Nov. 16, 1852, appointed administrator *cum testamento annexo*. Her heirs-at-law and next of kin were her children, Thomas P. and Frances Ann, and her grandchildren, Elizabeth and Georgina. Her property at her death consisted of so much of the aforesaid $50,000 and the annuity of $3,000 per annum as she had not appointed or expended during her lifetime, upwards of sixty negro slaves, the growing crop and farming stock and utensils on her farm in Bertie County in that State, which she was cultivating jointly with a grandson, the household and kitchen furniture at her residence in Raleigh, and some small amount in cash on hand and petty debts due to her.

On March 26, 1859, the complainants, said Elizabeth and Georgina, filed their bill in equity against Thomas P. Devereux, Leonidas Polk and Frances Ann his wife, setting forth the foregoing facts, and further alleging that the said Thomas's pretended renunciation of his executorship, and the appointment of said Whiting as administrator with the will annexed, were as to the complainants wholly void and of no effect; that the said Thomas was accountable to them in equity, as executor, for their share of the assets of the said Frances remaining after the payment of her debts, funeral and testamentary expenses, and the legacies, which last, it was alleged, did not exhaust said assets, but left a large amount in his hands for distribution, to one-third of which they were entitled.

The bill alleges that said Thomas, both before and after his renunciation, intermeddled with her assets, and had the exclusive control and administration thereof; that he took possession of them immediately upon her decease, disposed of them from time to time, and converted them to his own use; especially that on or about the 7th of October, 1852, he, before the appointment of Whiting as administrator with the will

annexed, caused fifty-seven slaves belonging to her estate to be appraised and divided between himself and Frances Ann Polk; and that he had then in his possession, or in the possession of his attorney or agents, the original paper or a copy thereof, containing the details of said appraisal and division; that said Whiting was appointed by the procurement of said Thomas and as a mere form, the latter becoming his bondsman; that Whiting, if he acted at all in the administration of said assets, did so entirely under the direction of said Thomas; that he never returned an inventory, nor rendered an account of his administration, and is now deceased; that said Thomas's renunciation was a contrivance to avoid being called to account; that he procured said renunciation to be accepted by a concealment and suppression of the facts above stated; that he purchased up the pecuniary legacies for about half their amount, and claimed for himself the profit derived therefrom; that he paid debts of the testatrix, and converted the residue remaining in his hands to his own use; and that her estate and effects were in fact administered and disposed of by him before the appointment of said Whiting in November, 1852.

The bill prayed for a discovery and for an account.

The defendants, Leonidas Polk and wife, entered an appearance, but neither demurred nor answered. The defendant Thomas filed his answer, admitting the main facts set out in the bill, but denying all fraud, and insisting that if, upon the proper construction of the deeds made to him, it is somewhat doubtful whether the yearly reservation of $3,000 was not intended to be a stipulation for the annual payment of the interest upon the sum of $50,000, such was the intention of said Frances, and if not expressed, it was a mistake in drafting them; that after the death of her husband she executed an instrument declaring such interpretation and intention; and that he is not liable to account for the said sum of $50,000, nor for the interest thereon, because she did not appoint the same by her will, and therefore the same lapsed for his benefit. He refuses to make any discovery, or to render any account of the same. He denies that he is accountable to the complainants as her executor; alleges that he renounced that office; denies that he intermeddled with the assets in any other manner than

as is set out in his answer; and in this connection gives an account of his purchase of the pecuniary legacies from the several charitable institutions, and of some of the dealings and accounts between himself and Whiting, while the latter acted as administrator *pendente lite*, and after he became administrator with the will annexed. He filed other exhibits, the proceedings connected with the *caveat* of the will, showing his purchase of the legacies, and his conveyance of part of her slaves to the trustee of Frances Ann Polk, all executed before Whiting was appointed. He also filed exhibits showing accounts rendered to him by said Whiting.

The complainants excepted to the sufficiency of the answer, because it failed to set out whether he had not divided fifty-seven slaves of the testatrix between himself and Frances Ann Polk, on the 7th of October, 1852, before Whiting was appointed, and a paper writing evidencing said division; because it failed to set out the disposition made of the $50,000 fund and the $3,000 annuity; because it did not set out the tenor and contents of certain paper writings, in reference to the management of that fund, which he admitted he had obtained from Whiting.

He thereupon further answered, refusing to account for the $50,000 charge and the $3,000 annuity, and to disclose the contents of the paper writings received from Whiting, because they referred to the management of the $50,000 charge; but he exhibited the paper writing evidencing the division of the fifty-seven slaves between himself and Frances Ann Polk.

The plaintiffs filed their replication at the November Term, 1859, but at the June Term, 1860, withdrew it, at request of said Thomas, who filed an amended answer, and the replication was then refiled.

At the November Term, 1860, no depositions having been taken, the cause was set down for hearing upon the pleadings, exhibits, and proofs.

Thomas P. Devereux having become a bankrupt, that fact was suggested, and William J. Hawkins and George W. Mordecai, his assignees, were made parties defendant.

Said Thomas having died, the suit was revived against R. C.

Badger, administrator *de bonis non, cum testamento annexo*, of Frances Devereux, deceased.

At the June Term, 1869, the court passed an order, referring the case to a master to state an account, 1, of the payments out of the annuity of $3,000, or out of the $50,000 in trust, to or by direction of Mrs. Devereux; 2, of the charitable bequests in the will, and of the sums actually paid in satisfaction or purchase of them; 3, of the balances, if any remaining, of the $3,000 and $50,000, after deducting the sums paid to her, or by her direction, during her life, and in satisfaction of legacies since her death; 4, also of the administration of her estate, showing the amount of assets (excluding balances, if any, of the $3,000 and $50,000), and of the debts paid, and the balance, if any.

At the November Term, 1873, the master filed his report.

At the June Term, 1874, the case having been heard upon the pleadings, exhibits, proofs, order of reference, and report of the master, and the exceptions filed thereto, the court decreed, —

1. That Frances Devereux did not by her last will and testament appoint the fund of $50,000, which, by the deed of July 3, 1839, conveying her lands to Thomas P. Devereux, she had power to charge upon said land, to be part of her general personal estate in the hands of her executors; nor appoint the said fund at all, except so far as it is necessary to resort to the same to pay off the pecuniary legacies bequeathed by her in her said will, after exhausting for that purpose what remains of her general personal assets, after payment of her debts and funeral expenses, and the costs of administering her estate.

2. That "the deed of explanation," executed by the said Frances in 1845, was effectual; and that the operation thereof was to reduce the annuity of $3,000 charged upon said lands, in said deed of 1839, proportionably as the said Frances reduced the aforesaid $50,000 by her appointments or outlays, so as to make said annuity, in each and every year, equal to six per cent interest on so much of said fund of $50,000 as remained unappointed or unexpended by the said Frances, in each and every year respectively.

3. That the plaintiffs are not entitled to any account of the said fund of $50,000, except so far as it is necessary to take an

account of the same to ascertain the amount of the aforesaid annuity, in each and every year during the life of the said Frances, but that they are entitled to an account of so much of said annuity as remained unexpended in the hands of Thomas P. Devereux at the date of the decease of the said Frances, and also to an account of so much and such parts of the general personal estate of the said Frances, including the negro slaves divided between the said Thomas P. and the defendant, Leonidas Polk, in October, 1852, as came to the hands of the said Thomas P. after the decease of the said Frances; but the said Thomas P. is not liable to account with the plaintiffs generally, as executor of the last will and testament of the said Frances, for all her personal estate; and especially is he not liable to account with them for so much, or such parts, of said personal estate as came into the hands of said Whiting, deceased, to be administered by him, either as administrator *pendente lite*, or as administrator *cum testamento annexo* of the said Frances.

4. That in taking the account with the estate of the said Thomas P., now in the hands of the defendants, who are his assignees in bankruptcy, the said assignees are to be credited with the amounts which the said Thomas P. expended in purchasing up the pecuniary legacies bequeathed by the said Frances to the several charitable societies, and the said assignees are not to be credited with the full amount of said legacies, unless or except where the said Thomas P. paid the full amount therefor.

5. That, in taking the account last aforesaid, the master shall regard the paper writing bearing date Oct. 2, 1846, signed by Frances Devereux, and accompanying the master's report, as an exhibit, as a stated account between the said Frances and Thomas P. Devereux, deceased, conclusive of all matters of account between them, both in respect to the $50,000 fund and the $3,000 annuity aforesaid, previous to and including the twenty-second day of June, 1846, excepting such matters of account as are, by the express terms of the said paper writing, saved out of its operation, for future adjustment, by reference or otherwise; ascertaining the balance due by the said Thomas P. to the said Frances, subject to the

exceptions and corrections last aforesaid, on the said twenty-second day of June, 1846, to be $29,664.60.

6. That in taking said account the master shall also regard the paper writing made out some time in the latter part of the year 1847, signed by William D. Cooke, and accompanying said report, as an exhibit, as a stated account between the said Frances and Thomas P. Devereux, deceased, conclusive of all matters of account between them, in respect to the $50,000 fund and the $3,000 annuity aforesaid, and all other matters, previous to and including the twenty-first day of June, 1847, saving such matters of account as are, by the note at the foot of said paper writing, expressly excepted out of its operation, for future adjustment, by reference or otherwise; ascertaining the balance due by the said Thomas P. to the said Frances, subject to the exceptions and corrections last aforesaid, on the said twenty-first day of June, 1847, to be $25,036.97.

The complainants having waived a re-reference to the master, the account was forthwith corrected, so as to conform to this decree, and a final decree entered, that the complainants recover $722.14 against the assignees in bankruptcy of T. P. Devereux, deceased; from which decree the complainants appealed to this court, and here assign the following errors: —

The court below erred, because, —

1. Under the circumstances of this case, Thomas P. Devereux, as the executor of said Frances, was liable to account with the plaintiffs for all her personal assets.

2. Her will was an appointment of the whole of the $50,000 charged upon the land, conveyed to him by deed of July 3, 1839, to be part of her general personal assets in the hands of her executors.

3. The instrument styled "the deed of explanation," executed by her in 1845, was ineffectual for any purpose, having no operative words of release or receipt: it was presumptively fraudulent for him, a trustee, to take it from his *cestui que trust*. It cannot be used even as evidence to correct the alleged mistake in the deed of July 3, 1839; and it in no manner affects the annuity of $3,000, so as to reduce the amount thereof.

4. As executor, he ought to be charged with all arrears of the whole of the $3,000 annuity, created by the deed of July 3,

1839, charged on his land, which were unexpended or unappointed by her at her death, as part of her personal assets in his hands.

5. In taking his account as executor, the paper writing bearing date Oct. 20, 1846, signed by her, which was not pleaded or set up in the answer, ought not to be regarded as a stated account, conclusive of all matters of account between him and her, before and including the 22d of June, 1846, the same being at most but her receipt or admission, affording only evidence of no very great weight, under the circumstances proved before the master, of the matters therein admitted.

6. In taking his account as executor, the paper writing bearing date in the year 1847, signed by William D. Cooke, which was not pleaded nor set up in the answer, ought not to be regarded as a stated account, conclusive of all matters of account between the said Thomas and the said Frances, before and including the twenty-first day of June, 1847, the same being, at most, only an admission by her agent, never intended as a memorial of, nor founded upon, an actual accounting by said Thomas.

Mr. Samuel F. Phillips for the appellants.
Mr. A. S. Merrimon, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

It is a common remark, that, when interpreting a will, the attending circumstances of the testator, such as the condition of his family, and the amount and character of his property, may and ought to be taken into consideration. The interpreter may place himself in the position occupied by the testator when he made the will, and from that standpoint discover what was intended. *Brown* v. *Thorndike*, 15 Pick. (Mass.) 388; *Postlethwaite's Appeal*, 68 Pa. St. 477; *Smith* v. *Bell*, 6 Pet. 68. Such a method of procedure is, we think, appropriate to the present case.

Mrs. Devereux's will was made on the twenty-third day of December, 1847, about eighteen months before her death. There is no reason to believe there was any essential change in the nature or the amount of her property between the date of her making the will and her decease, and it may fairly be assumed that what she had in June, 1849, the time of her

death, she had when she made her testamentary disposition. At that time her personal property consisted of her household furniture, her carriage and horses, a growing crop upon a farm she was cultivating jointly with her grandson John Devereux, a small sum of cash in hand, some petty debts due to her, and about sixty slaves. The slaves, as appears in a subsequent appraisement, constituted the principal part in value, very nearly, if not quite, nine-tenths of the whole. In addition to this, she owned a house and lot in Chapel Hill, which she directed to be sold; and she had a power to appoint the unappropriated balance of a fund of $50,000 then in the hands of her son, Thomas P. Devereux. Such was the property of which she attempted to make a disposition. Her will commenced with a declaration of her intention "thereby to execute all powers vested in (her) and enacted in any deed or deeds theretofore executed, particularly those powers created in her favor by two certain deeds settling and assuring the estate of her late brother, George Pollock, to (her) son, Thomas P. Devereux, dated some time in the month of July, in the year of our Lord eighteen hundred and thirty-nine, and executed by her late husband and herself." This was followed by her testamentary dispositions. By the first five she gave five legacies of $4,000 each to five several charitable institutions, to each an equal sum. By the sixth item she bequeathed $500 to her executors for a charitable purpose. By the eighth she bequeathed $7,500 to her son, Thomas P. Devereux, to apply the income annually to the payment of certain annuities and charities therein specified; and by the twelfth item she bequeathed $500 for another specified charity. The will contains no other gifts of pecuniary legacies. The aggregate of these is $28,500. Special dispositions are made of her slaves, horses, cattle, hogs, crops, and farming utensils, and of the proceeds of the sale of her house and lot in Chapel Hill, — generally, indeed, of all that she possessed in her own right.

Whether this will was an execution of the power reserved to her by the deed to her son, referred to in the introductory clause, — whether it was an appointment of so much of the sum of $50,000 made subject to her appointment by the deed, as remained undisposed of by her, is the most important question we have now to consider. It must be admitted that the

avowal by the testatrix in the introductory clause of her will of her purpose thereby to execute the power was not itself an execution. It is important only as it may shed light upon the subsequent dispositions. A previously expressed intention may serve to explain language afterwards used, and show what its meaning is; but it is one thing to intend a future act, and quite another to carry out that intention. While it is true that whether a power has been executed or not is a question involving a consideration of the intent of the donee of the power, it is equally true the intention must be found in the acts or dispositions of the donee, and not alone in any previously expressed purpose. Prior to the English Statute of Wills (1 Vict. c. 26), — which, so far as it relates to appointments by will, has been enacted in North Carolina, — certain things had been generally accepted as indicative of an intention to execute a power, and as sufficient indications. As expressed in repeated decisions, these were: *first*, some reference to the power in the will or other instrument; *second*, some reference to the power or subject over which the power extends; and, *third*, where the provisions of the will or other instrument executed by the donee of the power would be ineffectual or a mere nullity, or would have no operation if not an execution of the power. The first of these indications, however, must be understood as a reference to the power in the dispositions actually made. In *Lowson* v. *Lowson* (3 Bro. C. C. 272), a will expressed to have been made in pursuance of a power which the testator had, was held by the Lord Chancellor not to have been an execution thereof, because the subsequent dispositions were apparently applicable only to his own estate. It may be remarked that Sir Edward Sugden expresses doubts of the correctness of this decision, for the reasons given by Lord Thurlow; but he still lays down the rule, that "although a will be expressed to be made in pursuance of the power, yet if the testator appears to dispose of his own property only, the power will not be executed by the will." Sugden, Powers (2d Am. ed.), 364. On the other hand, if the will contains no expressed intent to exert the power, yet if it may reasonably be gathered from the gifts and directions made that their purpose and object were to execute it, the will must be regarded as an execution. After all, an appoint-

ment under a power is an intent to appoint carried out, and if made by will, the intent and its execution are to be sought for through the whole instrument.

Turning now to the will we have before us, two things are evident. The first is, that the testatrix did not intend that the pecuniary legacies given for charitable purposes, and to pay annuities, should be satisfied out of her own personal property; and the second is, that she did intend that those legacies should be paid. Substantially all her own property she devoted to other uses. Her horses, cattle, hogs, &c., crops and farming utensils, her carriage, wagon, and all personal property except negroes, in the possession of her grandson, John Devereux, she directed to be sold, and the proceeds applied to the payment of her debts; and she appears to have doubted whether they would be sufficient. Her house and lot in Chapel Hill she ordered to be sold, and directed the sum paid for it to be invested in some productive stock, ordering, however, a payment out of it, and out of the funds arising from the sale of some negroes, to satisfy an annuity of $150 during a life or lives. By these specific appropriations she negatived any right to apply these funds to the payment of the pecuniary legacies mentioned in the first, second, third, fourth, fifth, sixth, eighth, and twelfth items in the will. Nothing of her own personal property, of any considerable value, remained, except her slaves. Six of them she specifically bequeathed. One she ordered to be sold, devoting the proceeds to the distribution of tracts and religious books, and three others were directed to be sold at private sale, and a portion of the avails, if not all, she appropriated to the payment of an annuity. The remainder of her slaves she provided might be taken at a valuation by her son-in-law and grandson, upon their giving bonds for payment of the appraised value in ten annual instalments. These bonds, of course, could not be applied to the discharge of the pecuniary legacies as they fell due. Thus it appears that while she gave pecuniary legacies amounting in the aggregate to more than $28,000, she carefully withdrew from any positive application to their payment the personal estate she owned in her own right. It seems necessarily to follow that, if she intended those legacies to be paid at all, she intended them to

be paid out of the fund over which she had the power of appointment. This appears from the testamentary dispositions themselves, independent of any reference to the intention to execute her power, avowed in the introductory clause in the will. And that avowal tends to support the conclusion. It is significant, also, that after she had made a specific disposition of all her own property inconsistent with any application of it to paying those legacies, she refers to their payment again, and uses this language: "Should it appear at my decease that the bequests exceed the amount of funds left, my will is that the first five only shall be curtailed, until brought within the limits of the assets." This provision was a reasonable one, in view of the uncertainty there was in regard to the amount remaining of the funds of which she had the power of appointment. We conclude, therefore, that Mrs. Devereux's will was an execution of the power, and an appointment of the fund to her executors. It converted the fund into her own estate, at least to the extent of $28,500, if there was so much of it remaining.

We have considered the case thus far without reference to the North Carolina statute of 1844–45, which is similar to the act of 1 Vict. c. 26 (Rev. Code of N. C., c. 85, sect. 5), for the reason that it may be doubted whether that statute is applicable to this will. Here there is no bequest of personal property described in a general manner, nor even a general residuary bequest, though there are general pecuniary legacies.

Whether, if the fund which remained in the hands of Thomas P. Devereux at the death of the testatrix had exceeded the sum required to pay the legacies given by her will, — that is to say, the sum of $28,500, — the will would have been a complete execution of the power, covering the whole fund, or only a partial appointment of so much as was needed to pay those legacies, it is unnecessary for us now to decide. In the view which we take of the other questions involved in the case, that fund had been reduced so far that there was not more than enough remaining subject to the power to pay the sums bequeathed by the will. The execution was therefore complete, and it appointed the whole fund to the executors of this will, who took it under the appointment as part of the

personal estate of the appointor. Upon this subject see *Milday* v. *Barnet*, Law Rep. 6 Eq. 196; *Hurlstone* v. *Ashton*, 11 Jur. N. S. 724; *Hawthorn* v. *Shedden*, 3 Sm. & G. 293.

There was, therefore, error in the decree of the Circuit Court so far as it adjudged that the testatrix, Frances Devereux, did not appoint to her executors the fund over which she had the power of appointment, "except so far as it is necessary to resort to the same to pay off the pecuniary legacies bequeathed by her in her said will, after exhausting for that purpose what remains of her general personal assets after payment of her debts and funeral expenses, and the costs of administering her estate."

The other questions raised by the appeal require a less extended consideration. The Circuit Court decreed that the "deed of explanation" executed by Mrs. Devereux in 1845 was effectual, and that its operation was to reduce the annuity of $3,000 charged upon the lands in the deed of settlement of 1839, proportionably as she reduced the $50,000 charged by her appointments, or outlays, so as to make the annuity in each and every year equal to six per cent interest on so much of said fund as remained unappropriated or unexpended by her in each and every year respectively. This, we think, was correct. In 1845 she was *sui juris*. Her husband had died, and she was competent to release whatever rights she had under her deed to Thomas P. Devereux, or to appropriate to him any portion, or even the whole, of the fund of $50,000 then remaining. The deed of settlement gave her power to dispose of the fund, to give, grant, or direct its payment, investment, or application, at her discretion. If, therefore, there was no mistake in the deed, the subsequent paper ought to be regarded as a release *pro tanto* of her right to the annuity, and a partial disposition of the fund over which she had the power. If there was a mistake in the deed, it was quite competent for her to rectify it by agreement; and her "deed of explanation" was a solemn acknowledgment under her seal of the mistake, as effective in equity, if properly obtained, as would have been the decree of a chancellor reforming the instrument. We see not enough in the relation of the parties to each other to justify any presumption that undue influence was exerted over her. The deed of 1839 exhibits the fact that a possi-

ble benefit to her son was even then contemplated. It provided that whatever of the $50,000 fund the mother should not dispose of should lapse for his benefit. It was quite natural, therefore, for her to execute a declaration for his relief.

What we have said disposes of the fourth assignment of error, and shows that it is not sustained.

It is next objected by the appellants that the court erred in directing the paper dated Oct. 20, 1846, and signed by Mrs. Devereux, to be treated as a stated account between her and her son, conclusive of all matters of account between them previous to and including the 22d of June, 1846, respecting the $50,000 fund and the annuity, excepting such matters as are by its express terms excepted out of it and reserved for future adjustment. The paper was, in fact, an account stated by a third person, selected by both parties, agreed to be correct by Mrs. Devereux, except in four particulars reserved for subsequent arbitrament. It bears on its face evidence that it was carefully examined and fully understood. After such examination it was signed, and there is no evidence that Mrs. Devereux ever afterwards questioned its correctness. On the contrary, she, in substance, ratified it and acknowledged its correctness at least twice, more than a year afterwards. It is difficult, therefore, to see why it should not be regarded as the Circuit Court directed it to be. It is urged on behalf of the appellants that because the statement was not pleaded, nor set forth in the answer, the defendants were precluded from making use of it when ordered to account. This is overlooking the fact that it was not a bar to all claim for an account. Thomas P. Devereux's liability to account, if it existed at all, continued after the statement was made, to the extent of all subsequent transactions, and for the balance ascertained by it to be due June 22, 1846. It is not set up as a full accounting, but as a partial settlement. It would have been no answer to the complainant's bill if Thomas P. Devereux had said, I have accounted up to June 22, 1846. He denied his liability to account at all; and it was only when that was adjudged against him that he could avail himself of the fact that he had partially accounted, and that fact he could use only in stating the account ordered. We may add that we see nothing in the

circumstances attending the statement sufficient to cast suspicion upon it, or to call upon the defendants to support it by extraneous proofs. The relation between Mrs. Devereux and her son, created by the deed of 1839, was more like that of debtor and creditor than that of trustee and *cestui que trust.* It was no relation of confidence reposed. Similar remarks may be made respecting the second statement, which ascertained the balance due from June 21, 1847. The decree of the court respecting its effect was right.

The remaining exception to the decree of the court is that it denied the liability of Thomas P. Devereux to account, as executor of the last will and testament of Mrs. Devereux, for "all her personal estate, especially for so much as came into the hands of Seymour W. Whiting as administrator *pendente lite* or *cum testamento annexo.*" We think this part of the decree was correct. He was required to account for all the estate that came to his hands; and correctly so required, for he had made himself an executor *de son tort* by intermeddling with the estate of the testatrix, and by taking most of it into his possession, and undertaking to dispose of it. But he never qualified as executor of the will, or administrator *cum testamento annexo*, nor was he even administrator *pendente lite.* As such, therefore, he did not become responsible, and as executor *de son tort* he was only liable for what came into his hands. *Mitchell* v. *Lunt*, 4 Mass. 653; *Kinard* v. *Young*, 2 Rich. (S. C.) Eq. 247; *Leach* v. *House*, 1 Bailey (S. C.), 42. This is clear, upon both reason and authority.

Our conclusion, therefore, is, after reviewing the whole case, that there has been no error committed, except the single one which we first noticed. For that, however, the decree of the Circuit Court must be reversed, and the case sent back with instructions to direct a new accounting, and to enter a decree in conformity with this opinion; and it is

So ordered.

BANK *v.* MCVEIGH.

A Federal question is not presented by the decision of the Supreme Court of Appeals of the State of Virginia, that by the general principles of commercial law, if, during the late civil war, an indorser of a promissory note left his residence in loyal territory and went to remain permanently within the Confederate lines before the note matured, a notice of protest left at his former residence was not sufficient to charge him, if his change of residence was known, or by the exercise of reasonable diligence might have been known, to the holder of the note when it matured.

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

The Bank of the Old Dominion sued the makers, and W. N. McVeigh, the indorser, of certain promissory notes which were payable at that bank. At the date of the notes the bank had its place of business at the city of Alexandria, Va., and the other parties resided there. Before the paper matured, the forces of the United States had taken possession of that city, which they retained during the rebellion; and the indorser had, with the knowledge of the officers of the bank, gone within the Confederate lines, where his family then was, and where he remained, engaged in business in the city of Richmond, until 1874. The notes were in due time and manner presented at the bank for payment, and, payment not having been made, were protested.

Upon the second trial of the case in the Corporation Court of the city of Alexandria, the controlling question being as to the sufficiency of the notice of dishonor and protest, the proof was, that notice in respect to one of the notes was left at the place of business of the indorser in Alexandria, and that notice as to the others was left at his former dwelling in that city, "in the hands of his white servant." The court charged the jury that "if, on or about the 30th of May, 1861, and prior to the maturity of said notes, W. N. McVeigh, having previously sent his family, went himself within the Confederate lines, with the intention of not returning to Alexandria during its occupation by the United States forces, and remained with them continuously within the Confederate lines throughout the whole period of the war, and until the year 1874, and such absence at the

maturity of said notes, respectively, was known, or by the exercise of reasonable diligence must have been known, to the plaintiff, there is no such evidence of notice of dishonor in the case as is sufficient to fix his liability as indorser, and the jury must find for him as to all except the two notes of May 17 and June 17, as to which notes they will find for the plaintiff."

The jury having found accordingly, judgment was rendered on the verdict, and the bank took the case to the Supreme Court of Appeals of the State of Virginia, where the judgment below having been affirmed, the bank sued out this writ of error.

Mr. Conway Robinson, *Mr. Philip Phillips*, and *Mr. William A. Maury* in support of the motion.

Mr. H. O. Claughton, *contra.*

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

The motion to dismiss this case for want of jurisdiction will be granted upon the authority of *Bethell* v. *Demaret*, 10 Wall. 537; *Delmas* v. *Insurance Company*, 14 id. 661; *Tarver* v. *Keach*, 15 id. 67; *Rockhold* v. *Rockhold et al.*, 92 U. S. 129; *New York Life Insurance Co.* v. *Hendren*, id. 286. All the court below decided was, that by the general principles of commercial law, if, during the late civil war, an indorser of a promissory note abandoned his residence in loyal territory, and went to reside permanently within the Confederate lines before the note matured, a notice of protest left at his former residence in the loyal territory was not sufficient to charge him, if his change of residence was known, or by the exercise of reasonable diligence might have been known, to the holder of the note when it matured. It is true that, upon a former decision of the same cause, something was said in the opinion of the Court of Appeals as to the effect of the ordinance of secession of Virginia upon the rights of the parties, and that upon the last trial in the Corporation Court an effort was made by the plaintiff in error to obtain a ruling upon the constitutionality of that ordinance; but it is equally true that the Corporation Court declined to rule at all upon the question, and that the Court of Appeals, in the opinion filed with the judgment

brought here for review, says: "The court before refused to give any opinion on the constitutionality of the ordinance of secession, as it does now, such question being irrelevant and not involved, as we think, in the decision of the cause. The decision of this court would be the same, whether it held the said ordinance of secession to be constitutional or unconstitutional." A careful examination of the record satisfies us of the correctness of this statement. The case was decided "upon principles of general law alone," and it nowhere appears in the record that the plaintiff in error set up or claimed any "title, right, privilege, or immunity," under the Constitution or authority of the United States, which was denied him by the decision below.

Writ dismissed

UNITED STATES *v.* BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY.

1. The grant of lands made to the Burlington and Missouri River Railroad Company, by the act of July 2, 1864 (13 Stat. 356), embraced ten odd-numbered sections per mile, to be taken on the line of the road and in equal quantities on each side thereof, which had not been sold, reserved, or otherwise disposed of by the United States, and to which, at the time of the definite location of such line, a pre-emption or a homestead claim had not attached.
2. Lands are, within the meaning of the act, taken on such line when they are selected along its general direction or course, within lines perpendicular to it at each end.
3. The grant was made to aid in the construction of the entire road; but the company, on completing each section of twenty miles, had the privilege to receive a patent for lands opposite thereto.
4. The grant having no lateral limits, and the Land Department having for years neglected to withdraw from market lands situate beyond twenty miles from the road, and the lands opposite to certain portions of it having been patented to other parties, it was *held* that the grant to the company could be satisfied by lands elsewhere situate on the line of the road.
5. By the act of July 1, 1862 (12 Stat. 489), and by said act of 1864, which was an amendment thereof, Congress intended to place the Union Pacific Railroad Company, and all its branch companies, upon the same footing as to lands, privileges, and duties, except where special provision was otherwise made; and the grant having been enlarged as to the sections and the distance from the road within which they should be selected, by striking out the numbers in the first act and substituting larger numbers, the first act must thenceforth be read as against the government and the parties

claiming under concurrent or subsequent grants, as though the larger numbers had been originally inserted in it. The Burlington and Missouri River Railroad Company claiming under the act which declared that that of 1862, making the grant to the Union Pacific Railroad Company, should be thus read, must take its right to the lands subject to the claim of the latter company.

6. The Land Department, in executing the act, was not authorized to enlarge the quantity of lands on either side of the road to make up a deficiency on the other. But, at the suit of the United States, patents embracing any alleged excess on one side cannot be adjudged invalid as to any lands which are not identified, so as to be separated from the remainder; nor can any decree be rendered against the company for their value.

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

The facts are stated in the opinion of the court.

Mr. Assistant Attorney-General Smith for the appellant.

Mr. J. M. Woolworth for the appellee.

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit in equity, brought by the United States to annul certain patents issued by them to the Burlington and Missouri River Railroad Company, for lands situated in Nebraska, amounting in the aggregate to one million two hundred thousand acres. It is founded upon alleged errors made by the Land Department in the construction of the statute under which the patents were issued, and presents several interesting questions for determination. These questions, however, are so fully considered by the presiding justice of the Circuit Court, and the views we entertain are so clearly stated in his opinion, that we can add but little to what he has said.

By the eighteenth section of the act of Congress of July 2, 1864, amending the act of 1862, "to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," the Burlington and Missouri River Railroad Company, an existing corporation under the laws of Iowa, was authorized to extend its road through the then Territory of Nebraska from the point where it strikes the Missouri River, south of the mouth of the Platte River, to some point not further west than the one hundredth meridian of west longitude, so as to connect by the most

practicable route with the main line of the Union Pacific Railroad, or with that part of it which runs from Omaha to the said meridian. By the nineteenth section of the act, there was granted to the company, for the purpose of aiding in the construction of this road, every alternate section of public land (excepting mineral land) designated by odd numbers, to the amount of ten alternate sections per mile on each side of the road, on the line thereof, which were not sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim had not attached at the time the line of the road was definitely fixed.

In April, 1869, this railroad company was authorized to assign and convey to a company to be organized under the laws of Nebraska, all the rights, powers, and privileges granted to it by the act of 1864, subject to the same conditions and requirements. The defendant company was thereafter organized and incorporated under the laws of Nebraska, with power to build the railroad mentioned; and to it the Iowa company made the assignment authorized. The new company thereupon proceeded to construct the road from Plattsmouth, on the Missouri River, to Fort Kearney, where it connected with the road of the Union Pacific, a distance of two hundred miles. The work was commenced on the 4th of July, 1869, and was completed on the 2d of September, 1872.

By the twentieth section of the act of 1864, whenever twenty consecutive miles of the road should be completed in the manner prescribed, the President of the United States was to appoint three commissioners to examine and report to him in relation to it; and if it should appear that the twenty miles were completed as required, then, upon the certificate of the commissioners to that effect, patents were to be issued to the company for land on each side of the road to the amount designated. Such examination, report, and conveyance were to be made from time to time, until the entire road should be completed.

In compliance with this provision, as each section of twenty miles of the road was completed, commissioners were appointed by the President to examine and report upon it; and upon their reports patents were issued for land within twenty miles

from the road. But within that distance, on the north and south side, portions of the land, amounting to one million two hundred thousand acres, had been sold, reserved, or otherwise disposed of by the United States, or homestead or pre-emption claims had attached to it at the time the line of the road was definitely fixed. Thereupon the company made application to the Land Department for land outside of the limit of twenty miles in lieu of the land thus disposed of; and accordingly, in 1872, five patents for such land were issued. It is to annul these patents that the present bill was filed, their validity being called in question on the ground that the act of Congress limited its grant to land within twenty miles of the road.

The line of the road was definitely located in June, 1865, and land embracing the odd sections, within the limit of twenty miles, was withdrawn from sale in July following; but land outside of this limit, which was subsequently patented to the company, was not withdrawn until May, 1872. Between the definite location of the road in 1865 and the withdrawal of the land outside of the twenty-mile limit in 1872, the greater part of the land opposite the eastern sections of the road was disposed of by the government; and therefore most of the land covered by the patents lies opposite the western sections. This constitutes another ground of the alleged invalidity of the patents, it being contended that the grant was to aid in the construction of each section of the twenty miles, taken separately, and that it must be of land directly opposite to such section.

By the act of 1862, the Union Pacific Railroad Company was authorized to construct a railroad from a point on the one hundredth meridian of longitude west of Greenwich to the western boundary of Nevada Territory, the initial point of which was to be fixed by the President. To aid in the construction of this road, a grant was made to the company of five alternate sections of land, designated by odd numbers on each side of the road, along its line within the limit of ten miles. By the same act, the company was also authorized to construct a road from a point on the western boundary of the State of Iowa, to be fixed by the President, to the one hundredth meridian of longitude, upon the same terms and conditions prescribed

for the construction of the Union Pacific line. By the act of 1864, the grant of five sections was increased to ten sections, and the limit within which they were to be taken was increased from ten to twenty miles. This enlargement of the grant was not made by the terms of a new and additional grant, but by enacting that the numbers five and ten in the original act should be stricken out, and the numbers ten and twenty substituted in their places.

In March, 1864, the President fixed the initial point of the new road near Omaha, and thereupon the company commenced its construction. This initial point was distant about twenty miles only from the defendant company's road, and the roads of the two companies ran west on nearly parallel lines, so close that the grants to both could not be satisfied. The Union Pacific claimed the whole of the odd sections between the ten-mile and the twenty-mile limit, and its claim in this respect was recognized by the Land Department by the issue of patents or certificates for patents for them. The defendant thereupon selected land more than twenty miles distant from the line of its road, in order to make up the entire number of sections granted to it. It is now contended by the government that the act of 1864 did not enlarge the grant made in aid of the Omaha branch by the original act, and that the defendant was entitled to the odd sections outside of the ten-mile limit, and could not take land elsewhere in lieu of them; and that if the act did enlarge the grant, the defendant, having received its grant by the same act, was entitled to one-half of the land within the enlarged limit, and could not therefore take land to that amount elsewhere. Assuming this construction of the act of 1864 to be correct, these objections are also urged against the validity of the patents.

It also appears by the allegations of the bill that land to the extent of one hundred and fifty thousand acres, which should have been taken, if at all, on the south side of the road, was selected on the north side of the road beyond the twenty-mile limit, and included in the patents to the defendant; and this fact is made an objection to the validity of the patents as to the land thus taken.

Upon the several grounds stated, the United States ask a

decree for the cancellation of the patents, or, if that cannot be granted, a decree that they be declared void as to a portion of the land embraced by them.

The position that the grant to the company was only of land situated within twenty miles of the road, finds no support in the language of the act of Congress: that simply declares that a grant is made of land to the amount of ten sections per mile on each side of the road. The grant is one of quantity, and the selection of the land is subject only to these limitations: 1st, that the land must be embraced by the odd sections; 2d, that it must be taken in equal quantities on each side of the road; 3d, that it must be on the line of the road; and, 4th, that it must not have been sold, reserved, or otherwise disposed of by the United States, and a pre-emption or homestead claim must not have attached to it at the time the line of the road was definitely located. There is here no limitation of distance from the road within which the selection is to be made, and the court can make none. The objection, undoubtedly, has its suggestion from the fact that nearly all, perhaps all, other grants of land in aid of the construction of railroads prescribe a lateral limit within which the land is to be selected; and provide for the selection of land elsewhere to make up any deficiency arising from the disposition of a portion of it within such limit between the date of the act and the location of the road. The reasons for the omission in this case are obvious. The road was to run through a country already partially settled, and likely to be more settled before the line of the road would be definitely located. It was doubtful, therefore, whether any considerable portion of the amount of land intended for the company would be found undisposed of within twenty miles of its road. Moreover, the road of the Union Pacific was to be constructed within a short distance, and its grant would necessarily preclude a selection of land by the defendant if the latter's grant were confined within a similar lateral limit. Congress gave no government bonds to the company: its aid consisted merely in the grant of land; and that this might not fail, it allowed the land to be taken along the line of the road wherever it could be found. And the land was taken along such line in the sense of the statute, when taken along the

general direction or course of the road within lines perpendicular to it at each end. The same terms are used in the grant to the Union Pacific company, in which the lateral limit is twenty miles; and if a section at that distance from the road can be said to be along its line, it is difficult to give any other meaning than this to the language. They certainly do not require the land to be contiguous to the road; and if not contiguous, it is not easy to say at what distance the land to be selected would cease to be along its line.

The position that the grant was in aid of the construction of each section of twenty miles taken separately, and must be limited to land directly opposite to the section, is equally untenable. The grant was to aid in the construction of the entire road, and not merely a portion of it, though the company was not to receive patents for any land except as each twenty miles were completed. The provision allowing it to obtain a patent, then, was intended for its aid. It was not required to take it; it was optional to apply for it then, or to wait until the completion of other sections or of the entire road. The grant was of a quantity of land on each side of the road, the amount being designated at so many sections per mile, with a privilege to receive a patent for land opposite that portion constructed as often as each section of twenty miles was completed. If this privilege were not claimed, the land could be selected along the whole line of the road without reference to any particular section of twenty miles. When lateral limits are assigned to a grant, the land within them must, of course, be exhausted before land for any deficiency can be taken elsewhere. And when no lateral limits are assigned, the Land Department of the government, in supervising the execution of the act of Congress, should, undoubtedly, as a general rule, require the land to be taken opposite to each section; but in some instances good reasons may exist why a selection elsewhere ought to be permitted. If, as in the present case, by its neglect for years to withdraw from sale land beyond twenty miles from the road, the land opposite to any section of the road has been taken up by others and patented to them, there can be no just objection to allowing the grant to the company to be satisfied by land situated elsewhere along the general line of the road.

That the amendment of the act of 1864, enlarging the grant of 1862 to the Union Pacific company, was intended to apply to the grants made to all the branch companies, there can be no doubt. All the reasons which led to the enlargement of the original grant led to its enlargement to the branches. It was the intention of Congress, both in the original and in the amendatory act, to place the Union Pacific company and all its branch companies upon the same footing as to land, privileges, and duties to the extent of their respective roads, except when it was otherwise specially stated. Such has been the uniform construction given to the acts by all departments of the government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential, and as conclusive of the soundness of the construction, as if it had been declared by judicial decision. It cannot at this day be called in question.

Now, the enlargement of the grant by the act of 1864 is not made, as already stated, by words of a new and additional grant, but simply by altering the number of sections granted and the distance from the road within which they are to be taken. The numbers in the first act, says the amendment, shall be stricken out and larger numbers substituted, so that the act of 1862 must thenceforth be read, at least as against the government and parties claiming under concurrent or subsequent grants, as though the larger numbers had been originally inserted in it. The Burlington and Missouri Railroad Company received its grant from the same act which declared that the act of 1862 in its grant to the Union Pacific should be thus read: it must, therefore, take its rights to the land subject to the claim of that company.

"This view," as the presiding justice of the Circuit Court justly observes, "would commend itself to Congress by its intrinsic equity, for by it each road gets the largest quantity of land which the statute permits, while the other construction allows the Burlington and Missouri company to get all it could under any circumstances, the other road losing what the latter took within the lap. This comes out of the fact that the Burlington and Missouri company was not confined within

any lateral limits, while the Union Pacific could not go without its twenty-mile limit to make up deficiencies." "Besides," he adds, "both of these roads have acquiesced in the construction given and acted on by the United States, the officers of the government having prescribed it as the one which should govern all their rights; the patents have been issued under it for the full amount of all the land which could be so claimed under both grants; and innocent purchasers have, no doubt, become owners of much of the land patented to the Union Pacific company; and it is certainly all mortgaged, so that an incalculable amount of injustice would be done by holding all this void and setting aside the patents."

It only remains to notice the further objection to the patents, that land to the amount of one hundred and fifty thousand acres on the north side of the road is included in them in lieu of land deficient on the south side. It is true the act of Congress contemplates that one-half of the land granted should be taken on each side of the road; and the department could not enlarge the quantity on one side to make up a deficiency on the other. But the answer to the objection as presented by the bill, either in its original form or as amended, is that it is not shown what this land was, and the patents cannot be adjudged invalid as to any land not identified, so as to be capable of being separated; nor can any decision go against the company for its value without such identification. It is possible that the land to which the company was entitled is not so described in the patents that it can be separated from that which should not have been patented. If such be the fact, the government may be without remedy; it certainly could not insist upon a cancellation of the patents so as to affect innocent purchasers under the patentees. It is sufficient, however, that it makes no case for relief by the present bill.

Decree affirmed.

UNITED STATES *v.* HALL.

Congress has, under the Constitution, power to declare that the embezzlement or fraudulent conversion to his own use by a guardian of the money which he, on behalf of his wards, has received from the government as a pension due to them, is an offence against the United States, and to vest the proper Circuit Court with jurisdiction to try and punish him therefor.

CERTIFICATE of division in opinion between the judges of the Circuit Court of the United States for the Southern District of Ohio.

The facts are stated in the opinion of the court.

Mr. Assistant Attorney-General Smith for the United States.
Mr. P. C. Smith, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Pensions granted to children under sixteen years of age may, in certain cases, be paid to their guardians, and the act of Congress provides that every guardian having the charge and custody of the pension of his ward, who embezzles the same in violation of his trust, or fraudulently converts the same to his own use, shall be punished by fine not exceeding $2,000, or imprisonment at hard labor for a term not exceeding five years, or both. Rev. Stat., sect. 4783.

Sufficient appears to show that the defendant in the indictment is the guardian of William Williamson, who was at the time mentioned, and long before had been, entitled to a pension from the government of the United States, and that the defendant, as such guardian, had collected pension-money belonging to his said ward as such pensioner, to the amount of $500, for which he had never accounted, and which he had never expended for nor paid to his said ward.

Payment of the money being refused and withheld, an indictment against the defendant was returned by the grand jury of the Circuit Court, in which it is charged, among other things, that he, the respondent, being then and there the duly appointed guardian of William Williamson, who was entitled to a pension from the government of the United States, and having then and there, as such guardian, the charge and custody of the

pension-money belonging to said ward, did unlawfully and feloniously embezzle, in violation of his trust, a large sum of money, to wit, $500, pension-money belonging to his said ward, which he, the defendant, as such guardian, had theretofore collected from the government of the United States.

Due appearance was entered by the defendant, and he demurred to the indictment. Hearing was had; and the following questions arose, upon which the judges of the Circuit Court were opposed in opinion, and the same were duly certified to this court: —

1. Whether the Circuit Court has any jurisdiction over the alleged offence, or any power to punish the defendant for any appropriation of the money after its legal payment to him as such guardian, it appearing that the defendant is the legal guardian of his ward under the laws of the State; and that the money alleged to have been embezzled and fraudulently converted to his own use had been paid over to him by the government, and belonged to his said ward.

2. If the defendant did embezzle the money and convert the same to his own use after it was paid over to him by the government, is he liable to indictment for the offence under the act of Congress, or only under the State law?

3. Is the act of Congress under which the indictment is found a constitutional and valid law?

Preliminary to the examination of the questions certified into this court for decision, it is proper to remark that the court, in reproducing the questions exhibited in the transcript, has not preserved the exact phraseology in which they appear to have been framed, but it is believed that the form here adopted is, in substance and legal effect, the same as the questions certified from the court below. They present only two questions for decision which it is important to answer in any formal manner: —

1. Whether the offence defined by the act of Congress is committed when the embezzlement and conversion charged in the indictment did not take place until the pension-money was paid over by the government to the defendant, as guardian of the ward.

2. Whether the act of Congress defining the offence charged

in the indictment is a valid law, passed in pursuance of the Constitution.

Attempt is made, undoubtedly, to raise a third question, as before explained; but it is so obvious that the act of Congress would be invalid if it defined an offence as punishable in the courts of the United States which is justiceable only in the courts of the State, that it is not deemed necessary to give the question much consideration, it being clear that if the offence charged in the indictment is punishable only by the State law, then the defendant must prevail upon one or the other, or both of the other two questions. Reasonable doubt upon that proposition cannot arise, and it is equally clear that if the answers to the first and third questions certified are adverse to the theory of the defendant, then the answer to the second question must be in the negative, which is all that need be said upon the subject.

Circuit courts have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where the acts of Congress otherwise provide, and concurrent jurisdiction with the district courts of the crimes and offences cognizable in those courts. 1 Stat. 79; Rev. Stat., sect. 629, p. 112.

Such courts possess no jurisdiction over crimes and offences committed against the authority of the United States, except what is given to them by the power that created them; nor can they be invested with any such jurisdiction beyond what the power ceded to the United States by the Constitution authorizes Congress to confer, — from which it follows that before an offence can become cognizable in the Circuit Court the Congress must first define or recognize it as such, and affix a punishment to it, and confer jurisdiction upon some court to try the offender. *United States* v. *Hudson*, 7 Cranch, 32; *United States* v. *Coolidge*, 1 Wheat. 415; 1 Am. Cr. L., sect. 163.

Courts of the kind were not created by the Constitution, nor does the Constitution invest them with any criminal jurisdiction. Even the powers of an express character given to Congress upon the subject embrace only a limited class of well-known offences. Congress may provide for the punishment of

counterfeiting the securities and current coin of the United States, and may pass laws to define and punish piracies and felonies committed on the high seas, and offences against the law of nations. Treason is defined by the Constitution, but it has never been decided that the offender could be tried and punished for the offence until some court is vested with the power by an act of Congress.

Implied power in Congress to pass laws to define and punish offences is also derived from the constitutional grant to Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the land and naval forces, and to provide for organizing, arming, and disciplining the militia and for governing such parts of them as may be employed in the public service. Like implied authority is also vested in Congress from the power conferred to exercise exclusive jurisdiction over places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, and from the clause empowering Congress to pass all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or any department or officer thereof.

Power to grant pensions is not controverted, nor can it well be, as it was exercised by the States and by the Continental Congress during the war of the Revolution; and the exercise of the power is coeval with the organization of the government under the present Constitution, and has been continued without interruption or question to the present time.

Five days after the act passed organizing the judicial system of the United States, Congress enacted that the military pensions which have been granted and paid by the States respectively, in pursuance of an act of the United States in Congress assembled, shall be continued and paid by the United States from the fourth day of March last for the space of one year, under such regulation as the President may direct. 1 Stat. 95.

Before that provision expired, to wit, on the 5th of July of the next year, Congress enacted that military pensions granted and paid by the States in pursuance of former acts of Congress.

or of acts passed in the then present session, to invalids who were wounded or disabled during the late war, shall be continued and paid by the United States for one year from the 4th of March preceding the approval of the act. Id. 129.

Seven years' half-pay of certain deceased officers was granted to their widows or orphans, which grant it was supposed was barred by a subsequent resolution; and the Congress, on the 23d of March, 1792, passed an act that the right to prosecute the claims should be extended for and during the term of two years from the passing of the act giving the extension, and made further provision for placing other officers, commissioned and non-commissioned, and soldiers and seamen disabled in actual military service during the late war, on the pension list during life or the continuance of such disability. Id. 244.

Reference is made to these early acts of Congress in order to show that the pension system of the country had its origin in the Revolution, and beyond all question was sanctioned by the framers of the Constitution who were members of the first Congress, and enacted the laws for putting the new government into operation.

Other acts of Congress of a like character were passed granting pensions to the officers and soldiers disabled in the war of 1812, and in the Mexican war, and in the more recent war of the rebellion. Fresh as these laws are in the memory of every one, it is not necessary to refer to the volumes where they are found, as the public statutes of the United States are full of such provisions; nor should it be forgotten that some of these laws throughout the same period have been passed by Congress in favor of the disabled officers and seamen of the navy.

Suppose that is so, still it is insisted that the Circuit Court had no jurisdiction of the offence alleged in the indictment, which involves both the construction of the act of Congress defining the offence, and the power of Congress to pass the law, which latter point will more appropriately be considered when the third question presented for decision is examined.

Guardians having the charge and custody of the pensions of their wards, who embezzle the same in violation of their trust,

or fraudulently convert the same to their own use, are the material words of the enactment; and the proposition is, that the Circuit Court has no power to punish the defendant for any appropriation by him of said money after its legal payment to him as such guardian, which to a demonstration is a mistake, if the act of Congress is a valid and constitutional act, for several reasons, each of which is sufficient to show that the proposition is unsound: 1. Because the guardian has not, and cannot have, in the nature of things, the charge and custody of the pension-money of his ward until it is paid to him by the government. 2. Because he cannot, within the meaning of the act of Congress, embezzle the pension-money of his ward, or fraudulently convert the same to his own use in violation of his trust, before the same is paid to him as such guardian. 3. Because, if the theory of the defendant is correct, the act of Congress defines certain acts of such a guardian as an offence that in the nature of things is practically impossible, which would show that the act of Congress is an absurdity. 4. Because the plain import and obvious meaning of the language of the provision contradicts the theory of the defendant, and shows that Congress intended to protect the pension-money as a fund for the ward after it was paid to the guardian, and to punish the depositary if he embezzled or fraudulently converted it to his own use before he rendered an account for it or expended it for the benefit of the ward, as the law required.

Viewed in the light of these suggestions, it follows that the offence set forth in the indictment is well defined in the act of Congress, and that the offence as there defined, if the act of Congress is valid and constitutional, consists of embezzling the pension of the ward by the guardian, or of fraudulently converting the same to his own use after the same is paid to him by the government.

Argument to show that the Circuit Courts have jurisdiction of offences against the authority of the United States since the passage of the Judiciary Act is unnecessary, as all the offences cognizable in those courts have been defined since the Judiciary Act went into operation. Grant all that, and still the question is, whether the act defining the offence set forth in the indictment is a valid and constitutional act.

Briefly stated, the objections to the constitutionality of the law are as follows; 1. That it is municipal in its character, operating directly on the conduct of individuals, and that it assumes to take the place of ordinary State legislation. 2. That if Congress may pass such a law, then Congress may assume all the police regulations of the States, and work their entire destruction. 3. That inasmuch as the State law authorized the guardian to receive the pension-money, the defendant cannot be subjected to an indictment under an act of Congress for embezzling it after he lawfully received it. 4. That matters of police regulation are not surrendered to Congress, but are exclusively within State legislation. 5. That a guardian is a State officer, and as such is not subject to the laws of Congress in the performance of his duties.

Power to protect the fund from misappropriation, fraud, and unauthorized conversion to the use of another, and to secure its safe and unimpaired transmission to the beneficiary, has been claimed and exercised through the whole period since Congress, under the Constitution, commenced to grant such bounties.

Provision was made by the sixth section of the act of the 25th of March, 1792, that no sale, transfer, or mortgage of the whole or any part of the pension or arrearages of pension payable to any non-commissioned officer, soldier, or seaman, before the same shall become due, shall be valid; and the same section also provided that every person claiming such pension or arrears of pension, or any part thereof, under power of attorney or substitution, shall, before the same is paid, make oath or affirmation before some justice of the peace of the place where the same is payable, that such power or substitution is not given by reason of any transfer of such pension or arrears of pension; and any person who shall swear or affirm falsely in the premises, and be thereof convicted, shall suffer as for willful and corrupt perjury. 1 Stat. 245.

Three of the sections of that act were repealed by the revisory act of the 28th of February, 1793, but the sixth section, with its penal clause, was left in full force. Id. 324.

Officers of the navy, seamen, and marines, disabled in the line of their duty, were declared to be entitled to pensions for

life or during their disability by the act of the 3d of March, 1803, and by the subsequent act of the 10th of April, 1806, the operation of the act was extended to the widows and children of such officers, seamen, and marines. 2 id. 376.

Rules and regulations for prosecuting applications to obtain the benefits of the act were prescribed, and the eighth section of the act, like the sixth section of the act of the 23d of March, 1793, prohibits the sale, transfer, or mortgage of the whole or any part of the pension before the same becomes due, and requires every person claiming such pension under a power of attorney or substitution to make oath or affirmation, before the same is paid to them, that the power of attorney or substitution is not given by reason of any transfer of such pension; and the provision is, that if the affiant shall swear or affirm falsely in the premises, and be thereof convicted, he shall suffer as for wilful and corrupt perjury.

Regular allowances paid to an individual by government in consideration of services rendered, or in recognition of merit, civil or military, are called pensions. Military pensions are divisible into two classes, — invalid and gratuitous, or such as are granted as rewards for eminent services, irrespective of physical disability. Laws of the kind in this country granting invalid pensions were passed by the States during the Revolution, and were followed by similar provisions passed by the Continental Congress. 1 Laws U. S. (Bioren & Duane's ed.) 687–692; 2 id. 73.

Many of those provisions were in force when the Constitution was adopted, and some of the early laws of the Congress under the new Constitution were passed to fulfil and make good the obligations which were acknowledged by continental legislation. Such laws had their origin in the patriotic service, great hardships, severe suffering, and physical disabilities contracted while in the public service by the officers, soldiers, and seamen who spent their property, lost their health, and gave their time for their country in the great struggle for liberty and independence, without adequate or substantial compensation.

Power existed in the States before the Constitution was adopted, and it would serve to undermine the public regard

for our great charter if it could be held that it did not continue the same power in the Congress. Even the respondent admits that Congress may declare war, raise and support armies, provide and maintain a navy, and make rules for the government and regulation of the land and naval forces; and it is equally clear that Congress may make all laws which shall be necessary and proper for carrying the powers granted by the Constitution into execution.

Concede that, and it follows that Congress may grant such donations to the officers, soldiers, and seamen employed in such public service. Bounties may be offered to promote enlistments, and pensions to the wounded and disabled may be promised as like inducements. Past services may also be compensated, and pensions may also be granted to those who were wounded, disabled, or otherwise rendered invalids while in the public service, even in cases where no prior promise was made or antecedent inducement held out. Enactments of the kind, it is conceded, may be valid; and if so, it is difficult to see why Congress may not pass laws to protect the fund appropriated for such a beneficiary of the government, certainly until it reaches his hands. Congress in many cases has passed such laws, and provided that the money shall not be transferable or subject to attachment, levy, or seizure, even after it has been received by the agent, attorney, or guardian.

Conclusive support to that proposition is found in the fourth section of the act of the 15th of May, 1828, which provides that the pay of the pensioners therein named shall not in any way be transferable or liable to attachment, levy, or seizure by any legal process whatever, but shall inure wholly to the personal benefit of the officer or soldier entitled to the same by this act. 4 Stat. 270.

Exemptions of certain properties of small value, such as personal apparel and tools of trade, existed in the State laws; but no court ever called the Federal exemption in question because it was something in addition to what was contained in the State law, nor because the operation of the act of Congress was extended beyond the time when the money was received by the agent, attorney, or guardian of the pensioner.

Payment of pensions under the second section of the act

passed the next year might be made to the widow of the deceased pensioner or to her attorney, or, if he left no widow or no one then living, to the children of the pensioner or to their guardian or his attorney, and if no child or children, then to the legal representatives of the deceased. Id. 350.

Authority was also given to the Secretary of the Treasury by the act of the 15th of June, 1832, to pay pensions to the pensioners, or their authorized attorneys, at such places and times as he might direct; but the same section provided that the pay of the pensioner should not be in any way transferable or liable to attachment, levy, or seizure by any legal process whatever, and that it should inure wholly to the personal benefit of the individual entitled to the same. Id. 356; 5 id. 128.

Certain duties in that regard, previously devolved upon the Secretary of the Treasury, were, by the resolution of the 28th of June, 1832, transferred to the Secretary of War. Five years' half-pay and pensions were granted to certain widows of the officers and soldiers of the Revolution by the act of the 7th of July, 1838; and the second section of the act provided that no pledge, mortgage, sale, assignment, or transfer of any right, claim, or interest in any annuity, half-pay, or pension granted by the act shall be valid, nor shall the half-pay, annuity, or pension granted by the act, or any former act of Congress, be liable to attachment, levy, or seizure by any process in law or equity, and adds, as in the prior acts cited, that it shall inure wholly to the personal benefit of the pensioner or annuitant entitled to the same. Id. 303.

Ten years later, additional relief was granted to the widows of officers and soldiers of the Revolution, and the second section of the act contains the same prohibition and regulations as those contained in the prior act. 9 id. 266.

Without more, these selections from the almost innumerable list of acts passed granting pensions are sufficient to prove that throughout the whole period since the Constitution was adopted it has been the policy of Congress to enact such regulations as will secure to the beneficiaries of the pensions granted the exclusive use and benefit of the money appropriated and paid for that purpose. Other legislation of Congress may also be referred to confirming that proposition.

Pensioners of the kind are, in certain aspects, wards of the United States, and the legislation of Congress already reviewed shows that the national legislature has been constant and vigilant in endeavors to protect their interest and secure to them the use of the annuities and pensions granted in their behalf. For the same purpose and to the same end, Congress, on the 14th of July, 1862, prescribed the fees to be charged by agents and attorneys for making out and causing to be executed the papers necessary to establish claims for such pensions, bounty or other allowance, and provided that if any agent or attorney in such a case shall demand or receive any greater compensation than the act allows, he shall be deemed guilty of a high misdemeanor, and be punished as therein provided. 12 id. 568.

Stated fees were allowed to agents and attorneys by that act; but Congress, two years later, passed a supplemental act, which allows to such agents or attorneys a fixed sum instead of fees. By that provision they are allowed ten dollars in full for all service in procuring a pension; and the provision is, that if the agent or attorney shall demand or receive any greater compensation for his services, or agree to prosecute any claim for a pension, bounty, or other allowance under the act, on the condition that he shall receive a per centum upon any portion of the amount of such claim, or shall wrongfully take from a pensioner or other claimant the whole or any part of the pension or claim allowed and due to such pensioner or claimant, he shall be deemed guilty of the offence there defined, and be punished as therein prescribed. 13 id. 389.

Regulations somewhat different in certain respects are made in the supplementary act of the 8th of July, 1866, and some of those contained in the two preceding acts are repealed; but every one of the provisions of those acts intended to give protection to pensions or bounties to be paid to the pensioner are either left in full force, or are re-enacted in the supplemental act in the same or equivalent words. 14 id. 56.

Prior regulations having proved inadequate to effect the intention of the law-makers that the pension should inure solely to the benefit of the pensioner, Congress, on the 8th of July, 1870, enacted that hereafter no pension shall be paid to any person other than the pensioner entitled thereto, nor otherwise

than according to that act, and that no warrant, power of attorney, or other paper executed or purporting to be executed by any pensioner to any attorney, claim-agent, broker, or other person, shall be recognized by any agent for the payment of pensions, nor shall any pension be paid thereon, subject to two provisos: 1. That payment to persons laboring under legal disabilities may be made to the guardian of such persons in the manner the act provides. 2. That pensions payable in foreign countries may be made according to the provisions of existing laws.

Provision is also made by the seventh section of the act that the fee of agents and attorneys for the preparation and prosecution of a claim for pension or bounty land, under any act of Congress granting the same, shall not exceed in any case the sum of twenty-five dollars, and the eighth section makes it a misdemeanor to demand, receive, or retain any greater compensation for such services in any particular case. 16 id. 195.

Enough appears in these references to the legislation of the Congress under the Constitution to show that throughout the entire period since its adoption it has been the unchallenged practice of the legislative department of the government, with the sanction of every President, including the Father of the Country, to pass laws to prevent the diversion of pension-money from inuring solely to the use and benefit of those to whom the pensions are granted. With that view, sales, pledges, mortgages, assignments, and every other kind of conveyance have been prohibited. Agents employed to collect the money have been required to make oath that they have no interest in such money by any such pledge, mortgage, transfer, agreement, or arrangement, and that they know of none, and provision has several times been made for their punishment if they swear falsely.

Most of these regulations have been enacted to prevent agents, attorneys, and guardians from withholding the fund or converting the same to their own use before it passes into the hands of the beneficiary; but Congress has gone further, and passed laws exempting the money from attachment, execution, and seizure by any legal process in law or equity. No question of such exemption is involved in the present case; but if Congress

may legislate to protect the fund from the grasp of creditors before it reaches the beneficiary, none, it is presumed, will deny the power of Congress to legislate to the end to prevent the agent, attorney, or guardian from converting the same to his use.

Any other argument is hardly necessary to show that the act of Congress in question is a valid and constitutional law; but if more be needed, it will be found in the decisions of the courts, which are numerous and decisive in support of the same proposition.

State courts in more than one instance have decided that money received as pension from the United States is not liable to attachment, levy, or seizure by or under any legal or equitable process whatever. Congress has the power, says Justice Peters, to attach such condition to the grant of the bounty beyond all doubt; and the court held that the language of sect. 2, in the act of June 6, 1866, was comprehensive enough to exempt such money from any such attachment, levy, or seizure under State laws. *Eckert & Co.* v. *McKee, &c.*, 9 Bush (Ky.), 355.

It is undoubtedly competent for the United States, said Judge Hoar, to attach such conditions as they may see fit to the grant of a pension, and to fix by law the time and manner in which the property shall finally pass to the pensioner. *Kellogg* v. *Waite and Trustee*, 12 Allen (Mass.), 530. But the court in that case held that the rule did not apply to the money after the same had passed into the hands of the pensioner, which is a question that does not arise in this case.

Sects. 12 and 13 of the Pension Act of July 4, 1864, prescribed the fees of agents employed to collect pensions, and imposed a penalty for receiving a greater fee than that prescribed. Marks was indicted for a violation of that provision, and by the report of the case it appears that he had demanded and received an excess of fees beyond what the act allowed, and he contended that the act was unconstitutional. Hearing was had; and Judge Ballard overruled the defence, holding that the power of Congress for the protection of both persons and things was coextensive with their powers of legislation; that if they grant pensions to meritorious officers, soldiers, and sea-

men, or to their widows, they may by all suitable laws guard and protect the fund thus devoted from being diverted from its object by either the craft or the extortion of unscrupulous agents. *United States* v. *Marks*, 2 Abb. (U. S.) 534; s. c. 10 Int. Rev. Rec. 42; *United States* v. *Bennet*, 12 Blatchf. 352.

Armies may be raised and supported by Congress, and under this grant of power, says Judge Withey, Congress may enact laws making it an offence punishable in the national courts to detain from a military pensioner any portion of a sum collected in his behalf as his pension. *United States* v. *Fairchilds*, 1 Abb. (U. S.) 74; s. c. 16 Am. Law Reg. 306.

Pensioners were forbidden by the act of July 29, 1848, to pledge the certificate by anticipation to an agent employed to secure the pension; and Slosson, J., held that such a pledge, no matter for what purpose or to whom made, was wholly void, and that an action would lie against such agent, if he refused to deliver it up, for the recovery of the value or the damages resulting from its detention. *Payne* v. *Woodhull*, 6 Duer (N. Y.), 169.

Moneys due to a debtor from the public authorities, says Daly, J., cannot be reached by a creditor of a pensioner until actually paid over to the debtor. *Nagle* v. *Slagg*, 15 Abb. Pr. N. S. (N. Y.) 348.

Proof of a grant of a pension certificate to the plaintiff, that it is in the possession of the defendants, and that upon a demand made upon the defendants to deliver it to the plaintiff they refused to do so, not only entitles the plaintiff to recover, but makes a case which renders it impossible, in the nature of things, for the defendants to prove any facts which can operate as a bar to the action, or modify in any respect the plaintiff's right to the whole relief sought. *Moffatt* v. *Van Doren*, 1 Bosw. 610.

An agreement between the widow of a soldier of the Revolution entitled to a pension, and an agent, that the latter was to receive a part of the pension-money for his services in obtaining it, says Nash, C. J., is void, and the money received under such an agreement can be recovered back by the pensioner in an action of assumpsit. *Powell* v. *Jennings*, 3 Jones (N. C.), 547.

A widow entitled to arrears of pension dying and leaving children, says Woods, J., cannot dispose of such arrears by will, nor can her executor, having received the same, retain it for purposes of administration, but each child is entitled to an equal share, and may recover it of the executor in an action for money had and received. *Fogg* v. *Perkins*, 19 N. H. 101; *Walton et al.* v. *Cotton et al.*, 19 How. 357.

It is competent for Congress to enforce by suitable penalties all legislation necessary or proper to the execution of power 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. *United States* v. *Fox*, 95 U. S. 670.

Acts of Congress granting such donations to officers, soldiers, and seamen, or to their widows or children, in some cases direct that the payment may be made to the attorney or agent of the beneficiary, and in other acts the direction is that the payment may be made to the guardian of the party, and in still another class of such acts the requirement is that the money shall be paid directly to the beneficiary. 4 Stat. 350; 3 id. 569.

For the defendant, it is insisted that when the payment is made to the guardian the money paid ceases to be within the constitutional control of the United States, and that the act of Congress, which enacts that the guardian who embezzles the money or fraudulently converts the same to his own use is guilty of a misdemeanor, is unconstitutional and void. But the court is unhesitatingly of a different opinion, for several reasons: 1. Because the United States, as the donors of the pensions, may, through the legislative department of the government, annex such conditions to the donation as they see fit, to insure its transmission unimpaired to the beneficiary. 2. Because the guardian no more than the agent or attorney of the pensioner is obliged by the laws of Congress to receive the fund; but if he does, he must accept it subject to the annexed conditions. 3. Because the word "guardian," as used in the acts of Congress, is merely the designation of the person to whom the money granted may be paid for the use and benefit of the pensioners. 4. Because the fund proceeds from the

United States, and inasmuch as the donation is a voluntary gift, the Congress may pass laws for its protection, certainly until it passes into the hands of the beneficiary, which is all that is necessary to decide in this case. 5. Because the elements of the offence defined by the act of Congress in question consist of the wrongful acts of the individual named in the indictment, wholly irrespective of the duties devolved upon him by the State law. 6. Because the theory of the defendant that the act of Congress augments, lessens, or makes any change in respect to the duties of a guardian under the State law is entirely erroneous, as the act of Congress merely provides that the pension may be paid to the person designated as guardian, for the use and benefit of the pensioner, and that the person who receives the pension, if he embezzles it or fraudulently converts it to his own use, shall be guilty of a misdemeanor, and be punished as therein provided.

Viewed in the light of these suggestions, it is clear that Congress possessed the power: 1. To define the offence set forth in the indictment, and that the Circuit Court is vested with the jurisdiction to try the offender and sentence him to the punishment which the act of Congress imposed. 2. That the defendant, under the circumstances disclosed in the record, was liable to indictment in the Circuit Court of the United States. 3. That the act of Congress defining the offence set forth in the indictment is a valid and constitutional law enacted in pursuance of the Constitution.

Answers will be certified in conformity with this opinion; that is, the answer to the first question must be in the affirmative, and the answers to the second and third questions in the negative; and it is

So ordered.

RAILROAD COMPANY *v.* GEORGIA.

1. A provision of the statutory code of Georgia which took effect Jan. 1, 1863, enacts that private corporations are subject to be changed, modified, or destroyed at the will of the creator, except so far as the law forbids it, and that in all cases of private charters thereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter. Two railroad companies created prior to that date, each of which enjoyed by its charter a limited exemption from taxation, were consolidated by virtue of an act of the legislature passed April 18, 1863, which authorized a consolidation of their stocks, conferred upon the consolidated company full corporate powers, and continued to it the franchises, privileges, and immunities which the companies had held by their original charters. *Held*, 1. That by the consolidation the original companies were dissolved, and a new corporation was created, which became subject to that provision of the code. 2. That a subsequent legislative act, taxing the property of such new corporation as other property in the State is taxed, was not prohibited by that provision of the Constitution of the United States which declares that no State shall pass a law impairing the obligation of contracts.
2. The judgment of the highest court of a State, that a statute has been enacted in accordance with the requirements of the State Constitution, is conclusive upon this court, and it will not be reviewed.

ERROR to the Supreme Court of the State of Georgia.

This case came before the Superior Court for Fulton County, Georgia, on an "affidavit of illegality" filed by the Atlantic and Gulf Railroad Company in regard to an execution for taxes which had been issued by the comptroller-general of the State, in pursuance of an act of the General Assembly, approved Feb. 28, 1874, entitled "An Act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liabilities of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this act." The affidavit averred that the company, by the original charters granted to the Savannah, Albany, and Gulf Railroad Company, and to the Atlantic and Gulf Railroad Company, or by the act consolidating them under the name of the last company, was not liable to be taxed more than one-half of one per cent on its annual net income, and that said act of Feb. 28, in so far as it authorized the levy and collection of a higher tax on its property, was in violation of the

tenth section of the first article of the Constitution of the United States, and therefore void.

The court overruled the affidavit, and gave judgment "that the execution proceed." That judgment having been affirmed by the Supreme Court of the State, the company sued out this writ of error.

The remaining facts are stated in the opinion of the court.

The case was argued by *Mr. Robert Falligant* and *Mr. W. S. Chisholm* for the plaintiff in error, and by *Mr. Robert N. Ely*, Attorney-General of Georgia, and *Mr. Robert Toombs*, for the defendant in error.

MR. JUSTICE STRONG delivered the opinion of the court.

The single question presented in this case is whether the act of the legislature of Georgia, approved Feb. 28, 1874, whereby it was enacted that the property of all railroad companies in the State should be taxed as other property of the people of the State, impairs the obligations of the contract contained in the charter of the plaintiff in error. The question compels consideration of the inquiry, what was the contract into which the State entered with the company, and what are the rights which the company holds under it.

Prior to the eighteenth day of April, 1863, there were two railroad companies in the State, one incorporated on the twenty-fifth day of December, 1847, as the "Savannah, Albany, and Gulf Railroad," and the other incorporated on the twenty-seventh day of February, 1856, with the name, "The Atlantic and Gulf Railroad Company," the same name now borne by the plaintiffs. The charter of each of these companies contained a grant of all the rights, privileges, and immunities which had been granted to, or were held and enjoyed by, any other incorporated railroad company or companies, or which had been granted to the Central Railroad and Banking Company, or to the Georgia Railroad Company, or to either of them. Both these latter companies had been incorporated prior to 1840, and each held by its charter the privilege or immunity of not being subject to be taxed higher than one-half of one per cent upon its annual net income in the one case, and in the other, on the net proceeds of its investments. Consequently,

the Savannah, Albany, and Gulf Railroad Company, and the Atlantic and Gulf Railroad Company, severally acquired by their charters an exemption from taxation at any higher rate, or in any different manner. And such an immunity they severally continued to hold down to 1863. This, we think, admits of no reasonable doubt. If their rights are now the same as they were when the original charters of the two companies were first granted, it is quite clear the provisions of the taxing act of 1874 could not be applied to them without impairment of the contracts they had with the State. Neither of the companies, however, is now existing under or by virtue of its original charter. On the eighteenth day of April, 1863, the legislature of the State passed an act whereby they were empowered to consolidate their stocks upon such terms as might be agreed upon by the directors and ratified by a majority of the stockholders; and the act enacted, that when so consolidated they should be known as "The Atlantic and Gulf Railroad Company," with a proviso that nothing therein contained should relieve or discharge either of them from any contract theretofore entered into by either, but that this company should be liable on the same. By the second section it was enacted that the stockholders of said consolidated railroad companies, by such corporate name, and in such corporate capacity, should be capable in law to have, purchase, and enjoy such real and personal estate, goods, and effects as might be necessary and proper to carry out the objects therein specified, and to secure the full enjoyment of all the rights therein and thereby granted, and by said name to sue and be sued, plead and be impleaded, in any court of competent jurisdiction; to have and use a common seal, and the same to alter at pleasure; to make and establish by-laws, and generally to exercise corporate powers.

The third section of the act declared that the several immunities, franchises, and privileges granted to the said Savannah, Albany, and Gulf Railroad Company, and the Atlantic and Gulf Railroad Company, by their original charters and the amendments thereof, and the liabilities therein imposed, should continue in force, except so far as they might be inconsistent with the act of consolidation.

The fifth section repealed all laws and parts of laws militating against the act.

It is conceded that under this act a consolidation took place. It is, therefore, a vital question, What was its effect? Did the consolidated companies become a new corporation, holding its powers and privileges as such under the act of 1863? Or was the consolidation a mere alliance between two pre-existing corporations, in which each preserved its identity and distinctive existence? Or, still further, was it an absorption of one by another, whereby the former was dissolved, while the latter continued to exist? The answer to these inquiries must be found in the intention of the legislature as expressed in the consolidating act. We think that intention was the creation of a new corporation out of the stockholders of the two previously existing companies. The consolidation provided for was clearly not a merger of one into the other, as was the case of *Central Railroad & Banking Co.* v. *Georgia*, 92 U. S. 665. Nor was it a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence, as well as its corporate name. But the act authorized the consolidation of the stocks of the two companies, thus making one capital in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company; and, if so, how could either have a continued separate being? True, the proviso to the first section declared that nothing therein contained should relieve or discharge either of the companies from any contract theretofore entered into by either, adding: "But this company [that is, the company created by the act] shall be liable on the same." It is thus distinguished between the two original companies and the one contemplated to be formed by their consolidation. And the proviso would have been quite unnecessary, had it not been thought by the legislature that the consolidation would work a dissolution of the amalgamated companies. Hence it was considered necessary to preserve the rights of parties who might have contracted with them. Only their contracts were mentioned in the proviso, and that in order to authorize a novation. The third section continued in force the several immunities, franchises, and privileges granted by the original

charters and the amendments thereof, and the liabilities therein imposed, but plainly for the benefit of the consolidated companies. Why speak of original charters, if a later charter was not intended by the act? That such was the intention appears still more clearly in the third section. That conferred upon the consolidated stockholders complete corporate powers. It granted to them, when consolidated, not only a corporate name, but the right under that name to acquire and hold property, to sue and be sued, to have a common seal, to make by-laws, and generally to do every thing that appertains to corporations of like character. This full grant of corporate power must have been intended for some purpose. What was it, if not to create a corporation? For that purpose it was amply sufficient. For any other it was unmeaning. If the two original companies were to continue in being, if it was not contemplated that they should be dissolved by consolidation, a new grant of corporate power and existence was unnecessary. They had it already.

Looking thus at the legislative intent appearing in the consolidation act, we are constrained to the conclusion that a new corporation was created by the consolidation effected thereunder in the place and in lieu of the two companies previously existing, and that whatever franchises, immunities, or privileges it possesses, it holds them solely by virtue of the grant that act made. That generally the effect of consolidation, as distinguished from a union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result. In *McMahan* v. *Morrison* (16 Ind. 172), the effect of a consolidation was said to be "a dissolution of the corporations previously existing, and, at the same instant, the creation of a new corporation, with property, liabilities, and stockholders derived from those then passing out of existence." So in *Lauman* v. *The Lebanon Valley Railroad Co.* (30 Pa. St. 42), the court said: "Consolidation is a surrender of the old charter by the companies, the acceptance thereof by the legislature, and the formation of a new company out of such portions of the old as enter into the new." This court, in *Clearwater* v. *Meredith*

(1 Wall. 40), expressed its approval of what was said in the former of these cases. It is true these expressions have not all the weight of authority, for they were not necessary to the decisions made, but they are worthy of consideration, and they are in accordance with what seems to be sound reason. When, as in this case, the stock of two companies is consolidated, the stockholders become partners, or *quasi* partners, in a new concern. Each set of stockholders is shorn of the power which, as a body, it had before. Its action is controlled by a power outside of itself. To illustrate: The stockholders of the Savannah and Albany Railroad Company could not, after consolidation, have exercised any of the powers or franchises they had prior to their consolidation with the stockholders of the Atlantic and Gulf Railroad Company. They could not have built their road or controlled its management. They could not, therefore, have performed the duties which by their original charter were imposed upon them. Those duties could only have been performed by another organization, composed partly of themselves and partly of others. Their powers, their franchises, and their privileges were therefore gone, no longer capable of exercise or enjoyment. Gone where? Into the new organization, the consolidated company, which exists alone by virtue of the legislative grant, and which has all its powers, facilities, and privileges by virtue of the consolidation act. What, then, was left of the old companies? Apparently nothing. They must have passed out of existence, and the new company must have succeeded to their rights and duties. But the new company comes into existence under a fresh g ant. Not only its being, but its powers, its franchises, and immunities, are grants of the legislature which gave it its existence.

If, then, the old Atlantic and Gulf Railroad Company and the Savannah, Albany, and Gulf Railroad Company went out of existence when their stocks were consolidated under the act of the legislature of 1863, their powers, their rights, their franchises, privileges, and immunities ceased with them, and they have no existence except by virtue of the grant of corporate powers and privileges made by the consolidation act of 1863. That act created a new corporation, and endowed it with the several immunities, franchises, and privileges which had pre-

viously been granted to the two companies, but which they could no longer enjoy.

It necessarily follows that the new company held the rights granted to it under and subject to the law as it was when the new charter was granted. And the code of the State, which came in force on the 1st of January, 1863, before the charter was granted, contained the following provision: —

"SECT. 1051. Persons are either natural or artificial. The latter are creatures of the law, and, except so far as the law forbids it, subject to be changed, modified, or destroyed at the will of the creator; they are called corporations."

"SECT. 1082. In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter."

No such right was negatived in the charter granted to the plaintiffs in error. Consequently the franchise was held subject to a power in the State to withdraw it, and subject to be changed, modified, or destroyed at the will of its grantor or creator. These provisions of the code became, in substance, a part of the charter. *Railroad Company* v. *Maine*, 96 U. S. 499. It is quite too narrow a definition of the word "franchise," used in this statute, to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the legislature. As the greater power includes every less power which is a part of it, the right to withdraw a franchise must authorize a withdrawal of every or any right or privilege which is a part of the franchise. So it was held in *The Central Railroad & Banking Co.* v. *Georgia* (54 Ga. 401), and so it must be held now, especially in view of the statutory provision of the code, that private corporations are subject to be changed, modified, or destroyed at the will of their creator. Hence the exemption from taxation, except to the extent and in the mode designated in the charter, could be withdrawn without any violation of the State's contract with the company, and the act of 1874 was such a withdrawal.

In regard to the position taken by the plaintiff in error, that the sections of the code we have quoted were not laws of the

State in 1863, because the code was not read three times in each house of the General Assembly, as required by the State Constitution, it is sufficient to say the Supreme Court of the State has decided they were, and its decision of such a question is not open for revision by us in a case brought here from a State court. *Pennsylvania College Cases*, 13 Wall. 190.

Judgment affirmed.

NOTE. — *Railroad Company* v. *Georgia*, error to the Supreme Court of the State of Georgia, was argued at the same time and by the same counsel as was the preceding case. The question involved was the validity of the tax for the year 1875, which had been sustained by the court below.

MR. JUSTICE STRONG delivered the opinion of the court affirming the judgment.

CLEVELAND INSURANCE COMPANY *v.* GLOBE INSURANCE COMPANY.

1. The decision in *Sandusky* v. *National Bank* (23 Wall. 289) and *Hill* v. *Thompson* (94 U. S. 322), that this court cannot review the action of the Circuit Court in the exercise of its supervisory jurisdiction over a judgment rendered by the District Court, on a petition praying that a party be adjudged a bank rupt, reaffirmed.
2. No particular form of proceeding is required to remove such a case to the Circuit Court. It is sufficient if some "proper process" is used.
3. A writ of error, employed as "process" for the purposes of that jurisdiction, will not deprive the Circuit Court of its power to proceed.

MOTION to dismiss a writ of 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. Jacob D. Cox and *Mr. John F. Follett*, for the defendant in error, in support of the motion.

Mr. H. L. Terrell and *Mr. S. Burke*, *contra*.

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

On the 2d of May, 1872, the Globe Insurance Company, of Cincinnati, filed a petition in the District Court of the United

States for the Northern District of Ohio, sitting in bankruptcy, against the Cleveland Insurance Company, asking to have the last-named company adjudged a bankrupt. To this petition the Cleveland Insurance Company in due time appeared and filed its answer, and on the 16th of October, 1874, after hearing in the District Court, a judgment was entered dismissing the petition. On the 16th of December, a bill of exceptions was signed by the district judge and filed in the cause, which contained a statement of all the evidence submitted upon the hearing, with the findings of the District Court thereon both as to the facts and the law. On the same day, the following writ of error, omitting the mere formal parts, was sued out of the Circuit Court: —

"Because in the record and proceedings, and also in the rendition of judgment, in a certain matter which is in the said District Court in bankruptcy before you, wherein the Globe Insurance Company is petitioning creditor against the Cleveland Insurance Company, debtor, a manifest error hath happened, to the great damage of the said Globe Insurance Company, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the Circuit Court of the United States for the Sixth Circuit and Northern District of Ohio, together with this writ, so that you have the same at Cleveland, in said district, on the fifth day of January next, in the said Circuit Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done."

On the next day, in obedience to the command of this writ, a transcript of the proceedings and judgment of the District Court, including the bill of exceptions, was sent to the Circuit Court, and on the 27th of November, 1875, the Cleveland Insurance Company appeared in the Circuit Court and moved to dismiss the writ, for the following reasons: —

"1st, Because this being a petition in involuntary bankruptcy, where the bankrupt or debtor demanded no jury, but hearing was had to the court, the case is not removable into this court by writ of error, but by petition for review, or other proper process under the first clause of the second section of the Bankrupt Act.

"2d, Because the debt or damages claimed in the petition herein do not amount to more than $500; in fact, no debt or damages are claimed at all.

"3d, Because the writ of error herein was not sued out or taken within ten days after the entry of the decree or decision of the District Court herein, nor were the statutes regulating the granting of writs of error complied with within ten days after the entry of the decree or decision of the District Court."

This motion was overruled, and on the 15th of June, 1876, the Circuit Court, after hearing, "as well upon the transcript of the judgment and other proceedings between the parties in the District Court; . . . brought here by writ of error from this court to said District Court, as also upon the matters by the said Globe Insurance Company herein assigned for error," entered its judgment as follows: —

"Therefore, it is considered that the judgment aforesaid for the errors aforesaid be reversed, annulled, and altogether held for naught, and that the said Globe Insurance Company be restored to all things which it has lost by occasion of said judgment, and recover against the said Cleveland Insurance Company its costs in this behalf expended, taxed at $60.65.

"And thereupon it is ordered that a special mandate be sent down to said District Court to carry this judgment into execution. And it is further ordered that this cause be remanded to the said District Court by writ of *procedendo*, commanding the judge of said court to proceed according to law to set aside its order dismissing the petition of the said Globe Insurance Company, and thereupon to adjudge the said Cleveland Insurance Company bankrupt, as prayed for in and by said petition of said Globe Insurance Company, and further to proceed in said matter in such manner according to the laws of the land as he shall see proper, the said writ of error to the contrary notwithstanding."

To reverse this judgment the present writ of error has been sued out of this court by the Cleveland Insurance Company, and the Globe Insurance Company now moves to dismiss the suit for want of jurisdiction.

In *Sandusky* v. *National Bank* (23 Wall. 289) and *Hill* v. *Thompson* (94 U. S. 322) it was decided that the only remedy provided for the correction of errors in a proceeding in the District Court for an adjudication in bankruptcy was such as could be had under the supervisory jurisdiction of the Circuit Court, and as to that jurisdiction it is well settled that the action of the Circuit Court is final and not subject to review in this court. The correctness of these decisions is conceded, but the plaintiff in error claims that as the Circuit Court could only take jurisdiction under its supervisory power, and the case was actually taken to that court by writ of error, this court, under the rule laid down in *Stickney* v. *Wilt* (23 Wall. 150), must reverse the judgment of the Circuit Court, and remand the cause with instructions to grant the motion to dismiss the writ.

The section of the Revised Statutes which grants to the Circuit Court its supervisory jurisdiction is as follows: —

"SECT. 4986. The Circuit Court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the District Court for such district when sitting as a court in bankruptcy; . . . and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as in a court of equity; and the powers and jurisdiction hereby granted may be exercised either by the court in term time or in vacation by the circuit justice or the circuit judge of the circuit."

No particular form of proceeding is required in order to take the case to the Circuit Court for review under this jurisdiction. It is sufficient if some "proper process" for that purpose is employed; and in *Insurance Company* v. *Comstock* (16 Wall. 259), which, like this, was a suit in involuntary bankruptcy against an insurance company, this court held that a writ of error was "proper process" when the questions to be re-examined arose upon a bill of exceptions taken at a jury trial under

sect. 5026, Rev. Stat., to ascertain the alleged fact of bankruptcy. In that case the Circuit Court, upon its own motion, dismissed the writ "for want of jurisdiction, holding that a writ of error will not lie in such a case to remove the record from the District Court into the Circuit Court for re-examination." p. 266. In this court it was argued that abundant provision was made for a review of such proceedings under the supervisory power of the Circuit Court, and that a writ of error was improper process; but we held it was clearly wrong to dismiss the writ, and although we could not entertain jurisdiction of the cause, the Circuit Court not having passed upon the merits, we sent it back with the suggestion that the Circuit Court should, under the circumstances, "grant a rehearing and reinstate the case, and proceed to decide the questions presented on the bill of exceptions." It is true some stress was laid upon the fact that there had been a trial by jury; but the point was directly made and decided that the Circuit Court could use a writ of error to bring the case up for review under its general superintendence of bankruptcy proceedings. At that time we had not decided that this court could not re-examine such judgments of the Circuit Court, and that question was purposely left open; but Mr. Justice Clifford, in delivering the opinion, said, "It is clear beyond doubt that the Circuit Court erred in dismissing the writ of error for want of jurisdiction, as it was the right of the excepting party to have the questions, if duly presented by bill of exceptions, re-examined by the Circuit Court." Since it is now settled that this re-examination must be had under the supervisory jurisdiction of that court, this language is to be interpreted to mean, that when a writ of error is employed as "process" for the purposes of that jurisdiction, it will not deprive the court of its power to proceed.

Looking to the writ in this case to see under what jurisdiction it was issued, we find that it was in terms sent down to bring up the record and proceedings in a certain matter pending in the District Court sitting in bankruptcy, wherein the Globe Insurance Company was petitioning creditor and the Cleveland Insurance Company was debtor. Thus it is apparent that the proceeding to be reviewed was in bankruptcy, and not a suit

at law or in equity. The only jurisdiction, therefore, appropriate to the relief which was asked was the supervisory jurisdiction; and as there is nothing in the form of the writ or otherwise to manifest a contrary intent, it will be presumed that the court actually proceeded under that jurisdiction in all that was done. It follows that the Circuit Court had jurisdiction, and that its judgment is final. The proceeding was one which could only be re-examined under the supervisory jurisdiction, and the process employed to bring the case up was proper under the circumstances. The record which went up carried not only the bill of exceptions, but the entire proceedings below and all the testimony.

There is nothing in the case of *Stickney* v. *Wilt* (23 Wall. 150) at all in conflict with this. There, the suit in the District Court was one in equity, and not one in bankruptcy. Such suits can only be taken to the Circuit Court for review by appeal. The case was, however, prosecuted in the Circuit Court, under its supervisory jurisdiction. This was distinctly manifested throughout, and we held that as in that form of proceeding the court had no jurisdiction whatever, we would reverse its decree, and remand the cause with instructions to dismiss the petition for review.

Here, however, the Circuit Court had jurisdiction, and over its judgment we have no control.

The motion to dismiss for want of jurisdiction will be granted; and it is

So ordered.

Mr. JUSTICE CLIFFORD dissenting.

Jurisdiction of the district courts as courts of bankruptcy extends to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy. Rev. Stat., sect. 4972; 14 Stat. 518.

Circuit courts for each district of their respective circuits have a general superintendence and jurisdiction of all cases and questions arising in the district court for such district, when sitting as a court of bankruptcy, which may be exercised by the court in term time or in vacation by the circuit justice or

by the circuit judge of the circuit; and the provision is that such circuit court, circuit justice, or circuit judge may, in term time or vacation, except when special provision is otherwise made upon bill, petition, or other proper process of the party aggrieved, hear and determine the case as in a court of equity. 14 Stat. 518; *Morgan* v. *Thornhill*, 11 Wall. 65.

Apart from those two provisions, the third clause of the second section provides that circuit courts shall also have concurrent jurisdiction with the district courts of all cases at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of such bankrupt transferable to or vested in such assignee. *Smith* v. *Mason*, 14 Wall. 419; *Knight* v. *Cheney*, 5 Nat. Bank. Reg. 305.

Petition in bankruptcy against the defendant company was filed in the District Court by the corporation plaintiffs, and they prayed that the defendant company may be declared bankrupt, and that a warrant may be issued to take possession of their estate. Due proceedings followed, and the District Court sitting without a jury decided that the facts set forth in the petition were not proved, and entered a decree dismissing the petition.

Instead of petitioning the Circuit Court for a revision of the ruling and decision of the District Court, under the first clause of the second section of the Bankrupt Act, as the petitioners should have done, they filed a bill of exceptions as in action at law, and the same was signed and sealed by the district judge as in the trial of an information for a seizure on land under the ninth section of the Judiciary Act.

Application was then made by the original petitioners to the Circuit Court for a writ of error to the District Court, which was granted, and the cause was removed into the Circuit Court just as when an action at law tried before a jury is removed from the court of original jurisdiction into an appellate tribunal pursuant to the common-law bill of exceptions, except that the bill of exceptions contains the court's findings of fact as in common-law cases where a jury is waived.

When the cause was entered and the transcript filed in the

Circuit Court, the defendant company appeared and moved to dismiss the writ of error, for the following reasons: 1. Because the proceeding being a petition in involuntary bankruptcy, where the bankrupt did not demand a jury and the hearing had been by the District Court, the case is not removable into the Circuit Court by writ of error, but by petition for review or other proper process under the first clause of the second section of the Bankrupt Act. 2. Because the debt or damage claimed in the petition does not amount to $500. 3. Because the writ of error was not sued out within ten days after the entry of the decision in the District Court.

Hearing was had; and the Circuit Court overruled the motion to dismiss the writ of error, and reversed the decree of the District Court with costs, and ordered that a special mandate be sent down to the District Court directing that court to carry the judgment of the Circuit Court into execution and to adjudge the defendant company bankrupt, as prayed in the petition, and to proceed in the matter according to law. Exceptions were filed by the defendant company, and they sued out the present writ of error and removed the cause into this court.

Since the cause has been entered here, the plaintiff company has filed a motion to dismiss the writ of error upon the ground that no appeal lies to this court from a judgment or decree of the Circuit Court exercising the supervisory jurisdiction conferred upon it by the first clause of the second section of the Bankrupt Act. *Morgan* v. *Thornhill*, 11 Wall. 65; *Smith* v. *Mason*, 14 id. 419.

Both of these cases affirm that rule beyond all doubt, and the same rule is confirmed by every subsequent case upon the same subject; but the difficulty is, that the Circuit Court did not exercise the supervisory jurisdiction which the first section of the Bankrupt Act conferred. Jurisdiction under that clause of the second section of the act is usually exercised in pursuance of a petition for revision, and it must be exercised in some mode of proceeding which will give the defending party the right to answer the allegations of the pleading, as in a bill of complaint, as is plainly to be inferred from the language of the clause, else the hearing would be a mockery, as it would be practically *ex parte*.

Circuit courts are not courts of bankruptcy, nor have they power to re-examine or review the rulings, decisions, or judgments of the district courts sitting in bankruptcy, except in the cases and in the manner provided by the Bankrupt Act; nor is it pretended that the Bankrupt Act gives the Circuit Court any power whatever in a case like the present, to re-examine the decision or judgment of the District Court by a writ of error.

Suppose the proceedings in the Circuit Court were in every respect erroneous, leaving the losing party without remedy unless the error can be corrected here, still it is insisted that this court is without the power to grant relief. Cases wrongly brought up, it may be admitted, should, as a general rule, be dismissed by the appellate tribunal; but a necessary exception exists to that rule where the effect of a judgment or decree of dismissal will be to give full operation to an irregular and erroneous judgment or decree of the subordinate court in a case where the judgment or decree of such a court is rendered without jurisdiction, or in violation of some legal or constitutional right of the losing party.

Rules of practice are established to promote the ends of justice, and where it appears that a given rule will have the opposite effect from that which it was intended to accomplish, courts of justice have never hesitated to establish an exception to it. Appellate courts, where there is no defect in bringing up a cause, usually affirm or reverse the judgment or decree of the court below; but cases occasionally arise where the proceedings of the subordinate court are so unusual and irregular that the appellate court can neither reverse nor affirm the merits of the case without doing great injustice, and in such cases the appellate court never hesitates to remand the case for a new trial or rehearing, first reversing the judgment or decree in order to open the case for that purpose. *Suydam* v. *Williamson et al.*, 20 How. 427.

Where, as in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the court will not render a judgment upon such an imperfect special finding, but will remand the cause to the court below with directions to award a new *venire.*

Barnes v. *Williams*, 11 Wheat. 415; *Graham* v. *Bayne*, 18 How. 60.

So where the circumstances disclosed in the record rendered it proper, in the view of the court, to remand the case for a further hearing, the court decided to reverse the judgment, in order that the rehearing might be granted. *United States* v. *Cambuston*, 20 How. 59.

Admiralty cases have more than once been appealed to this court in which it appeared that the Circuit Court had no jurisdiction of the case, in consequence of irregularities in the District Court; and in such cases it has been held by this court that it is the regular course to reverse the decree of the Circuit Court, and to direct the Circuit Court to remand the cause to the District Court for further proceedings. *Montgomery* v. *Anderson*, 21 How. 386; *Mordecai* v. *Lindsey*, 19 id. 199; *United States* v. *Galbraith et al.*, 22 id. 89.

Difficulties of the kind frequently occur in cases of seizures, as the district courts have often failed to distinguish between seizures on land and seizures on navigable waters. Mistakes of a like kind have also been made in libels of information under the confiscation acts. Where the seizure is on land, the rule is that the case is triable according to the course of the common law; but seizures, when made on waters which are navigable from the sea by vessels of ten or more tons burthen, are exclusively cognizable in the admiralty, subject to appeal to the circuit courts. Dunlap, Practice, 116; *Cross* v. *United States*, 1 Gall. 26; *Confiscation Cases*, 7 Wall. 454; 3 Greenl. Evid., sect. 396; 1 Kent, Com. (12th ed.) 304.

Want of jurisdiction in the court below, however, does not prevent this court from assuming jurisdiction, on appeal, for the purpose of reversing the decree rendered by the Circuit Court in order to vacate any unwarranted proceedings necessarily standing in the way of the proper proceeding in a case where, in the judgment of this court, other proceedings ought to take place in consequence of the irregularity in either of the subordinate courts. Where the court below has no jurisdiction of the case in any form of proceeding, the regular course is to direct the cause to be dismissed, if the judgment or decree of the lower court is for the defendant or respondent; but if the

judgment or decree is for the plaintiff or libellant, the court here will reverse the judgment or decree, and remand the cause with proper directions, as for example, to reverse the decree of the District Court in a case where that court proceeded irregularly or without jurisdiction, and to remit the cause to the District Court in order that the cause may be dismissed in the court where the error commenced; or this court will reverse the judgment or decree of the Circuit Court, and remand the cause with directions to dismiss the case, or to grant a new trial or rehearing, with or without leave to amend the pleadings, according to the circumstances of the case and as justice may require. *Morris's Cotton*, 8 Wall. 507; *Mail Company* v. *Flanders*, 12 id. 130.

Nor did those decisions announce any new rule of practice, as this court had in repeated instances decided in the same way before that time. *Union Insurance Co.* v. *United States*, 6 id. 759; *Amstrong's Foundry*, id. 766.

Precisely the same question was presented in the case of *United States* v. *Hart* (id. 722), where this court decided that the proper disposition of the case was to reverse the decree, and remand the cause to the court below with directions to enter a decree remitting the case to the District Court, that the case might be tried on the common-law side with a jury, it appearing in that case that the seizure had been made on land and not on waters navigable from the sea. *The Brig Caroline* v. *United States*, 7 Cranch, 496; *The Sarah*, 8 Wheat. 391.

Unless the practice was as explained, great injustice would be done in all cases where the judgment or decree in one or both of the subordinate courts is erroneous and in favor of the party instituting the suit, as he would obtain the full benefit of a judgment or decree rendered in his favor by a court which had no jurisdiction to hear and determine the controversy. Common justice demands a strict adherence to this practice, which requires that this court in all such cases will reverse the judgment or decree of the lower court, and remand the cause with proper directions either to dismiss the case or allow the pleadings to be amended, or grant a new trial, or direct that the cause be remitted to the District Court, as the circumstances

of the case may require, in order that justice may be administered according to law.

Decided cases to that effect are numerous and decisive, showing that the rule must be regarded as founded in the settled practice of the court.

Beyond question, the general rule is that, where the Circuit Court is without jurisdiction, it is irregular to make any order in the cause except to dismiss the suit; but that rule does not apply to the action of the court in setting aside such orders as had been improperly made before the want of jurisdiction was discovered, especially if it appears that the effect of the dismissal would be to leave the moving party in possession of judgment rendered without jurisdiction or authority of law. *Mail Company* v. *Flanders*, 12 Wall. 130.

In such cases, the writ of error or appeal gives jurisdiction not only to dismiss the appeal, but also to remove all the hindrances to justice between the parties that have been created by the irregular acts of the subordinate court, and which were performed without jurisdiction or in violation of legal authority. *Armstrong's Foundry*, 6 id. 766.

Were it not so, the plaintiff would obtain the full benefit of the judgment or decree in the case rendered in his favor by a court which had no jurisdiction to hear and determine the controversy. *Morris's Cotton*, 8 id. 507.

Nor is it any answer of a satisfactory character to that obvious principle of justice to say that the Circuit Court would have had jurisdiction of the case if the party had petitioned the Circuit Court under the first clause of the second section of the Bankrupt Act, instead of resorting to the bill of exceptions and the common-law writ of error, as the conclusive reply to that suggestion is that the case before the court was removed by a writ of error from the District Court to the Circuit Court, and every lawyer knows that the Circuit Court could not acquire any jurisdiction by that mode of proceeding to render any valid decree in such a case.

Suppose that is so, then it follows that the dismissal of the writ of error without reversing the decree of the Circuit Court will leave the defendant company adjudged bankrupt by a court which had no jurisdiction of the case, and without any

remedy on the part of the company to avoid that erroneous decree.

Argument to verify that proposition is quite unnecessary, as the statement of the case shows that the Circuit Court granted a writ of error to the District Court, as in an action at common law, and having removed the cause from the District Court, sitting as a court of bankruptcy, into the Circuit Court, reversed the decree of the District Court dismissing the petition in bankruptcy, and issued a *procedendo* directing the District Court to grant the prayer of the petition, all of which was done as in an action at law; and the record shows that the Circuit Court sent down its mandate to the District Court, as in an action at law, directing the District Court to execute the judgment rendered by the Circuit Court.

None of these proceedings are controverted, nor can they be; from which it follows that, when the judgment of the court dismissing the present writ of error is carried into effect, the defendant company will stand adjudged bankrupt by the Circuit Court, which had no more power to render such a judgment than a State justice of the peace, as every lawyer knows that the Circuit Court has no other jurisdiction than what is conferred by an act of Congress, and that the Bankrupt Act confers no jurisdiction upon the circuit courts, in that mode of proceeding, to reverse such a decree of the District Court.

Cases wrongly brought up, it may be admitted, should, as a general rule, be dismissed by the appellate tribunal; but a necessary exception exists to that rule where the consequence of a dismissal will be to give full effect to an irregular and erroneous decree of the subordinate court in a case where the court was without jurisdiction, and acted in violation of some legal or constitutional right of the party against whom the decree was entered.

Serious embarrassment often arises in such cases where it appears that the subordinate court is without jurisdiction; but that difficulty does not prevent the court here from assuming jurisdiction under the writ of error or appeal for the purpose of reversing the judgment or decree rendered in the subordinate court, in order to vacate the same, when rendered or passed

without authority of law. *The Brig Caroline* v. *United States*, 7 Cranch, 496; *The Sarah*, 8 Wheat. 391.

All other arguments failing, the attempt is made to show that certain remarks of the court in the case of *Insurance Company* v. *Comstock* (16 Wall. 258) support the proposed judgment of the court in the present case; but it is clear that no inference of the kind can properly be drawn from the opinion of the court in that case, for the plain reason that the court held that *mandamus* was the proper remedy in that case, and dismissed the writ of error solely upon that ground.

Prior to certain more recent decisions, it was an unsettled question whether or not a writ of error would lie from the Circuit Court to the District Court, where, in a proceeding in bankruptcy, the bankrupt demanded a trial by jury. Exceptions were taken in that case where the proceeding was in bankruptcy, and the Circuit Court refused to decide the question. Hearing was had here; and this court was of the opinion that *mandamus* was the proper remedy of the party, but did not deem it necessary to issue the writ, as it was suggested that the Circuit Court would at once conform to the views of this court. Since that time, it has been decided that a writ of error will not lie in such a case, which removes all doubt upon the subject and every pretence of inconsistency in our former decisions. *Wiswall et al.* v. *Campbell et al.*, 93 U. S. 347; *Hill* v. *Thompson*, 94 id. 322.

Conclusive support to the proposition that nothing is to be inferred from the case of *Insurance Company* v. *Comstock*, to sustain the theory of the court in the present case, is found in the subsequent decision of the court, which is reported in the same volume. *United States et al.* v. *Huckabee*, 16 Wall. 414. In that case the court say that usually, where a court has no jurisdiction of a case, the correct practice is to dismiss the suit; but a different rule necessarily prevails in an appellate court in cases where the subordinate court was without jurisdiction, and has given a judgment or decree for the plaintiff, or improperly decreed affirmative relief to a libellant. In such cases the judgment or decree in the court below must be reversed, else the party which prevailed there will have the benefit of the judgment or decree, though rendered by a court

which had no authority to hear and determine the matter in controversy. *United States et al.* v. *Huckabee*, *supra*; *Coit* v. *Robinson*, 19 Wall. 274.

Two cases are also reported in the twenty-third volume of Wallace's Reports to the same effect, the opinion of the court in the last of which was given by the present Chief Justice. In the first case, the court say that where the court below has no jurisdiction of the case in any form of proceeding, the regular course, if the judgment or decree is for the defendant or respondent, is to direct the cause to be dismissed; but if the judgment or decree is for the plaintiff or petitioner, the court here will reverse the judgment or decree, and remand the cause with proper directions, which, in the case supposed, must be to dismiss the writ, libel, or petition, as the subordinate court cannot properly hear and determine the matter in controversy.

Viewed in the light of these suggestions, it is clear that the decree of the Circuit Court should be reversed; and inasmuch as that court has no jurisdiction of the subject-matter in that form of proceeding, the directions should be that the writ of error be dismissed.

Instead of a writ of error, an appeal was taken in the second case, in which the Chief Justice said, that in order to sustain the jurisdiction of the Circuit Court in such a case, it must be a case in equity arising under and authorized by the Bankrupt Act, that a proceeding in bankruptcy from the time of its commencement by the filing of a petition to obtain the benefit of the act, until the final settlement of the estate of the bankrupt, is but one suit, and that the District Court, for all the purposes of its bankruptcy jurisdiction, is always open, and that the only remedy for the correction of errors in such cases is to be found in the supervisory jurisdiction of the circuit courts under the provisions of the first clause of the second section of the Bankrupt Act.

Corresponding views are expressed by the Chief Justice in two later cases, both of which are reported in the regular series of reports of the Supreme Court. *Wiswall* v. *Campbell*, 93 U. S. 348; *Hill* v. *Thompson*, 94 id. 322. Both of these cases show to a demonstration that the Circuit Court, in reversing the decree of the District Court, acted without jurisdic-

tion; and yet the effect of the judgment of the court in this case is to leave the judgment of the Circuit Court, rendered without jurisdiction, in full force, which, in my judgment, is error.

Six times, at least, the question in the case has been decided by this court, without a dissent, which would seem to be a sufficient justification of a member of the court who concurred in all of the decisions for adhering to the rule which those cases prescribe. For these reasons, I am of the opinion that the decree of the Circuit Court should be reversed, and that the case should be remanded to the Circuit Court with directions to that court to dismiss the writ of error sued out from that court to the District Court.

UNITED STATES v. NEW ORLEANS.

1. The legislative branch of the government has the exclusive power of taxation, but may delegate it to municipal corporations.
2. When such corporations are created, the power of taxation is vested in them as an essential attribute for all the purposes of their existence, unless its exercise be in express terms prohibited.
3. When, in order to execute a public work, they have been vested with authority to borrow money or incur an obligation, they have the power to levy a tax to raise revenue wherewith to pay the money or discharge the obligation, without any special mention that such power is granted.
4. A limitation imposed by statute upon them, restraining them from creating any indebtedness without providing at the same time for the payment of principal and interest, will not control a subsequent statute, which, without prescribing such limitation, authorizes them to incur a special obligation.
5. Bonds of the city of New Orleans, issued upon a subscription to the stock of a railroad company, under an ordinance which declared that the stock "should remain for ever pledged for the payment of the bonds," are an absolute obligation of the city, the ordinance creating only a pledge of the stock by way of collateral security for their payment.
6. The indebtedness of a city is conclusively established by a judgment recovered against it in a court of competent jurisdiction; and in enforcing payment, the plaintiff is not restricted to any particular property or revenues, or subject to any conditions, unless such judgment so provides.

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

This was a petition presented in April, 1876, by Morris Ranger, the relator, for a writ of *mandamus* to compel the city of New Orleans to pay three judgments. The petition alleges that he had recovered them in the Circuit Court of the United States for an amount exceeding in the aggregate $59,000 against the city, on its bonds and coupons issued under the provisions of acts of the legislature of Louisiana, passed on the 15th of March, 1854, and designated as Nos. 108 and 109; that executions had been issued upon the judgments and returned unsatisfied; and that there was no property belonging to the city subject to seizure thereon.

It also alleges that in June, 1870, the city had sold eighty thousand shares of stock of the New Orleans, Jackson, and Great Northern Railroad Company, which it held, for the sum of $320,000, and that by the act No. 109, of 1854, these shares were for ever pledged for the payment of the bonds issued under its provisions; that the city should therefore be compelled to pay out of their proceeds so much of the judgments as appears on the face of the records to have been rendered upon the bonds; or, in case their payment cannot be enforced in this way, that it should be compelled to levy and collect a tax for that purpose, and also a tax to pay so much of the judgments as was rendered upon bonds and coupons issued under the act No. 108, of 1854; but that the mayor and administrators, who represent and exercise the powers of the city, refuse to pay the judgments out of any funds in their possession or under their control, or to levy a tax for their payment. The relator therefore prays the court to order them to show cause why a writ of *mandamus* should not be issued compelling them to apply the proceeds and to levy a tax as mentioned.

The order to show cause was accordingly issued; and the city authorities appeared and filed an answer to the petition, in which they admitted the recovery of a judgment by the relator, — speaking of the three judgments as one, — the issue of executions thereon, and their return unsatisfied, the sale of the eighty thousand shares of the capital stock of the New Orleans, Jackson, and Great Northern Railroad Company for $320,000, and the receipt of the money by their predecessors;

and set up as a defence to the prayer of the petition that the judgment was recovered upon certain bonds issued by the city to that company under the act of March 15, 1854, No. 109, making no mention of the act No. 108; that no tax for the payment of the principal of the bonds is directed to be levied by that act or any other act of the legislature; that, as respects the interest on the bonds, provision is made for its payment out of the back taxes due to the city, and inserted in its budget for 1876; and that the proceeds arising from the sale of the stock of the railroad company are not in the treasury of the city or under their control, having been used and expended by their predecessors. They therefore prayed that the petition be dismissed.

The relator demurred to this answer. The court overruled the demurrer and refused the writ; and from its judgment the case is brought to this court.

The city of New Orleans was incorporated under the name of "the mayor, aldermen, and inhabitants of the city of New Orleans," by an act of the legislature, approved Feb. 17, 1805, the sixth section of which provides: —

"The said mayor and city council (aldermen) shall have power to raise by tax, in such a manner as to them may seem proper, upon the real and personal estate within said city, such sum or sums of money as may be necessary to supply any deficiency for the lighting, cleansing, paving, and watering the streets of said city; for supporting the city watch, the levee of the river, the prisons, workhouses, and other public buildings, and for such other purposes as the police and good government of the said city may require."

An act approved March 8, 1836, amending that act, constituted in effect a new charter, and divided the city "into three separate sections, each with distinct municipal powers."

The fourth section provided: —

"Each of said municipalities shall possess separate corporate rights, and are hereby declared to be distinct corporations, and *shall possess generally such rights, powers, and capacities as are usually incident to municipal corporations*, . . . and, in general,

shall possess and exercise within their respective limits all such powers, rights, and privileges as are now possessed by the corporation of New Orleans."

The three municipalities thus created were, with the city of Lafayette, consolidated into one, by acts approved Feb. 23, 1852. Acts La., 1852, Nos. 71, 72, pp. 42, 55.

Sect. 1 of the former act provides: —

"All that portion of the parish of New Orleans on the left bank of the river Mississippi shall be the city of New Orleans, and all the free white inhabitants thereof shall be a body corporate by the name of the 'city of New Orleans,' and by that name they and their successors shall be known in law, and shall be capable of suing and being sued," &c.

Sect. 22 provides: —

"That upon the first organization of the common council of the city of New Orleans, as hereinbefore provided, the city of New Orleans, as established by this act, *shall be vested with all the powers, rights, privileges, and immunities incident to a municipal corporation, and necessary for the proper government of the same;* and upon the said organization of said council all the powers, rights, privileges, and immunities possessed and enjoyed by the first, second, and third municipalities of New Orleans, and by the general council of the city of New Orleans, shall cease and terminate so far as regards the said municipalities and general council, and be vested in the city of New Orleans, as established by this act."

Sect. 37 provides that the old city debt (prior to 1836) and the debts of the separate municipalities shall be assumed by the city of New Orleans, and that bonds shall be issued therefor, to be called the "consolidated debt;" and that "from and after the passage of this act no obligation or evidence of debt of any description whatever, except those herein authorized, shall be issued by the city of New Orleans or under its authority; nor shall any loan be contracted, unless the same be authorized by a vote of the majority of the qualified voters of said city, which shall be taken in the manner prescribed by the city council, after ten days' proclamation by the mayor, in the newspaper chosen by the city council; *and no ordinance creating a debt or loan shall be valid unless such ordinance shall*

provide ways and means for the punctual payment of running interest during the whole time for which said debt or loan shall be contracted, and for the full and punctual discharge at maturity of the capital borrowed or debt incurred; and such ordinance shall not be repealed until the principal and interest of the capital borrowed or debt incurred are fully paid and discharged."

In 1854, the legislature passed two acts by which the city was authorized to subscribe to the stock of the New Orleans, Opelousas, and Great Western Railroad Company, and the New Orleans, Jackson, and Great Northern Railroad Company, and to make the subscription immediately payable in bonds of the city, for $1,000 each, having twenty years to run, &c., and requiring the repeal of ordinances authorizing former subscriptions.

The terms of the two last-named acts, *mutatis mutandis*, are identical. Acts La., 1854, Nos. 108, 109, pp. 69, 72.

The act authorizing the subscription to the stock of the New Orleans, Jackson, and Great Northern Railroad Company provided, among other things, as follows: —

"SECT. 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened, that it shall be lawful for the common council of the city of New Orleans to subscribe to the stock of the New Orleans, Jackson, and Great Northern Railroad Company, in a sum not exceeding $2,000,000.

"SECT. 2. Be it further enacted, &c., that any ordinance authorizing such subscription shall contain the following provisions, to wit: —

"1st, A statement of the number and amount of shares for which the city subscribes.

"2d, That the subscription of the city shall be made by the mayor, and shall be payable in bonds of said city for $1,000 each, having twenty years to run, bearing interest at the rate of six per cent per annum, with interest-coupons attached, payable semi-annually in New Orleans or New York, as the company entitled to receive them may prefer, transferable by the indorsement of the president and secretary of said company, and convertible into the stock of said company at the option of the holders, at any time within ten years after their date.

"3d, That a special tax on real estate and slaves shall be levied in January of each year, *sufficient to pay the annual interest on said bonds*, specifying the rates of said tax, which shall be collected at the same time and in the same manner as the consolidated loan tax of said city; and all ordinances, resolutions, or other acts passed by said council, after the first day of January in each year, except an ordinance to impose said consolidated loan tax, and an ordinance to impose a tax for the payment of interest on bonds which may be hereafter issued for subscription to the New Orleans, Opelousas, and Great Western Railroad Company, shall be null and void, unless a resolution imposing a special tax for the payment of the interest on said bonds issued to the railroad company herein named shall have been previously passed: *Provided*, that no levy of a tax for the payment of interest on said bonds shall be made after the payment of dividends of six per cent per annum on the stock of said company held by the city, as hereinafter provided, which dividends shall be applied by the city to the payment of the interest. *And provided, further*, that whenever the dividends on said railroad stock of the city shall amount to more than six per cent per annum, the excess, after the payment of interest, shall be applied to the purchase of the city bonds issued under the provisions of this act; it being understood that when dividends for less than six per cent per annum are received on the railroad stock of the city, a tax for interest shall be levied for the difference only between the amount of said annual dividends and the amount of the annual interest.

. . . . . .

"SECT. 3. Be it further enacted, &c., that the city bonds issued to said railroad company shall be received by it at par value, and said railroad company shall issue to the city of New Orleans therefor certificates of stock for an amount equal to the amount of the bonds received, *and the stock of the said company thus issued to the city of New Orleans shall remain for ever pledged for the redemption of said bonds: Provided, however*, that any holder of said bonds who may desire to convert them into the capital stock of the company to which they may have been issued shall, on application to the treasurer of said city, and on surrender to him of the bonds to be converted, receive from said treasurer a transfer of the stock represented by the bonds surrendered, and said bonds shall be immediately cancelled."

The other sections are not material for the disposition of the present case.

The following act of the legislature was approved March 6, 1867:—

"SECT. 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana, in general assembly convened, that the mayor and administrators of the city of New Orleans, or such other officers, aldermen, or administrators as may hereafter be ordained and established, be and they are hereby authorized and directed to exchange all recognized and valid bonds of the city of New Orleans and the late cities of Jefferson and Carrollton for bonds known as the premium bonds of the city of New Orleans, in accordance with the plan adopted by the city council, and approved by the mayor on the 25th of May and 31st of August, 1875. The said premium bonds shall be dated the 1st of September, 1875, and bear interest at the rate of five per cent per annum, from the 15th of July, 1875; they shall be signed by the mayor, the administrator of finance, and the administrator of public accounts, as commissioners of the consolidated debt, and countersigned, when issued, by such parties as the council have designated heretofore, or may hereafter designate, with the authorization of the supervising committee hereafter named.

"SECT. 2. Be it further enacted, &c., that all outstanding bonds bearing interest shall have the interest computed up to the first day of July, 1875, and thereafter the said bonds, when exchanged, shall bear interest as provided in the ordinance above ratified, which provides for the premium bonds.

"SECT. 3. Be it further enacted, &c., that the allotment of series and premiums which have been made by virtue of ordinance No. 3233, administration series, adopted Aug. 31, 1875, by the city council, are hereby ratified and approved, and that further allotments shall take place on the fifteenth day of April and the fifteenth day of October of each year, and of premiums on the fifteenth day of January and the fifteenth day of July of each year, or on such other date as the council may prescribe: *Provided*, that payments be not made later than the fifteenth day of March and the fifteenth day of September of each year.

"SECT. 4. Unimportant.

"SECT. 5. Unimportant.

"SECT. 6. Be it further enacted, &c., that it shall be the duty of the city council, in the month of December of each year, or in the annual budget annually adopted for the ensuing year, to include an amount sufficient to meet and pay the principal and interest of

the premium bonds, together with premium included, in the several allotments of series and premiums fixed for such year by the aforesaid ordinances and this act. It shall be the duty of the council annually to levy an equal and uniform tax on all the assessed property within the corporate limits of the city, at a rate sufficient to provide the amount included in the budget as aforesaid, and said tax so levied shall constitute a special fund to be used for no other purpose than the payment of said bonds and interest on the said premiums comprised in said allotments, and the funds so raised shall be placed to the credit of an account to be called the premium-bond account, and no money from said fund shall be paid out except on the joint authority of the commissioners of the consolidated debt. The said tax so to be raised shall be denominated the premium-bond tax, and shall be separately mentioned in the tax rolls and receipts: *Provided*, that the taxable power of the corporation of the city of New Orleans for all purposes, including general administration, school, police, lighting, salary of officers, court expenses, and every other purpose of government, including the sum to be raised to pay the premium bonds, as above stated, shall never, until the full complete and final payment of the said premium bonds, exceed the rate of one and one-half per cent on the dollar of all the assessed value of property subject to taxation within the limits of the said city of New Orleans. The above limitation of the taxable power of the corporation is hereby declared to be a contract, not only with the holder of the said premium bonds, but also with all residents and tax-payers of the said city, so as to authorize any holder of said premium bonds, resident or tax-payer, to legally object to any rate of taxation in excess of the rate herein limited. It being also a part of the consideration of this contract that the city of New Orleans shall be incompetent to incur any debt or obligation, as now provided by the Constitution of this State, until the final payment and extinction of the premium bonds aforesaid.

"SECT. 7. Be it further enacted, &c., that no tax for the payment of bonds or interest on bonds other than that authorized by the preceding sections, shall be levied either for the year 1876, or any year or years thereafter by the city of New Orleans, and that all existing laws requiring or authorizing the city council to levy any tax whatsoever for bonds or interest on bonds, other than said premium bonds, be and the same are hereby repealed; and it shall be hereafter incompetent for any court to *mandamus* the officers of said city to levy and collect any interest tax other than that pro-

vided in this act, or in case of such *mandamus*, by a receiver or otherwise, to direct the levy and collection on any such tax.

"SECT. 8. Unimportant.

"SECT. 9. Unimportant.

"SECT. 10. Unimportant.

"SECT. 11. Be it further enacted, &c., that in addition to the obligation of the said city to provide annually the sum required for the execution of the premium-bond plan, at least a tax of one-half of one per cent annually, to be used in the execution of the provisions of this act; and if the product of said half of one per cent be more than adequate for the payment of the drawn premium bonds, and the premiums as above provided, then the surplus to be used in retiring the outstanding bonds; *Provided*, said half of one per cent taxation be considered as part of the one and a half per cent taxation to which the taxing power of the city is limited in this act; the intention of this section being to limit the city taxation to one and one-half per cent annually until the entire extinction of the bonded debt; to authorize the council to levy annually out of the one and one-half per cent taxation a sum adequate to the annual execution of said premium-bond plan, and after the year 1881 to levy at least one-half of one per cent for the carrying out of said plan, and to distribute the surplus realized therefrom, if any, in retiring the outstanding bonded debt.

"SECT. 12. Unimportant.

"SECT. 13. Unimportant.

"SECT. 14. Unimportant.

"SECT. 15. Be it further enacted, &c., that this act in all its provisions and limitations be held a contract between the city of New Orleans, the holders of said premium-bonds, and the taxpayers or residents of said city, so as to authorize any of the contracting parties to resist any and all contracting of debt by the said city, or increase of taxation above the rate limited in the previous provisions of this act.

"SECT. 16. Be it further enacted, &c., that this act take effect from and after its passage; that all laws or parts of laws inconsistent herewith be and the same are hereby repealed, and that all ordinances of the city of New Orleans conflicting with this act be and are hereby repealed."

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

1. Whenever a municipality is expressly authorized to levy a tax for the payment of its obligations, it will, by *mandamus*, be

compelled to do so to satisfy a judgment recovered upon them, where an execution has been returned unsatisfied. *The Board of Commissioners of Knox County* v. *Aspinwall et al.*, 24 How. 376; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535; *Benbow* v. *Iowa City*, 7 id. 313; *Supervisors* v. *Rogers*, id. 175; *The Supervisors* v. *Durant*, 9 id. 415; *County of Cass* v. *Johnston*, 95 U. S. 360.

2. If the statute authorizing or creating debts does not provide the means of paying them, the power to tax in order to raise the means will be held to be *ipso facto* conferred, unless there is an express limitation to that power which forbids such inference. *Loan Association* v. *Topeka*, 20 Wall. 655; *Lowell* v. *Boston*, 111 Mass. 460; *Commonwealth* v. *Commissioners*, 37 Pa. St. 277; *Same* v. *Same*, 40 id. 348; *Same* v. *Same*, 43 id. 403; *Coy* v. *City Council of Lyons City*, 17 Iowa, 1; *Madison County Court* v. *Alexander*, 1 Walker (Miss.), 523; *Gibbons* v. *Mobile & Great Northern Railroad Co.*, 36 Ala. 439; *Ex parte Selma & Gulf Railroad Co.*, 45 id. 730; *City of Chicago* v. *Hasley*, 25 Ill. 595; *Hasbrouck* v. *Milwaukee*, 25 Wis. 122; *Ex parte Parsons*, 1 Hughes, 282.

3. The provision in the act of 1854, that the stock issued to the city should remain "for ever pledged for the redemption of said bonds," does not require the holder of them to first resort to said stock for payment before he can demand it from other funds. On the contrary, only a statutory pledge for the payment of the bonds by way of collateral security was created.

4. It is not alleged in the answer that the statutory limit of taxation has been reached, nor does it appear that any limit existed when these bonds were issued. No limit subsequently imposed can curtail the power or affect the duty of the city in respect to them. *Von Hoffman* v. *City of Quincy*, *supra*; *Butz* v. *Muscatine*, 8 Wall. 575; *Milner's Adm'r* v. *Pensacola*, 2 Wood, 641, and cases there cited; *Commissioners* v. *Rather*, 48 Ala. 446, and cases there cited.

Mr. B. F. Jonas and *Mr. Henry C. Miller* for the defendants in error.

1. The taxing power is vested in the Legislative Department of the government. A *mandamus* is only effective to compel

the levy of a tax, when that department has directed or authorized such tax to be imposed. If no tax has been provided for the payment of the bonds on which the judgments in this case were recovered, granting the *mandamus* would be an assumption of legislative power, and the application for the writ must therefore necessarily fail. *Rigg* v. *Johnson County*, 6 Wall. 166; *Supervisors* v. *United States*, 18 id. 71; *Heine* v. *The Levee Commissioners*, 19 id. 655; *Rees* v. *City of Watertown*, id. 107.

The act under which the bonds were issued provided only for a tax to pay the annual interest on them until the dividends should amount to that interest. An absolute prohibition of any other tax was, therefore, necessarily implied. It was believed that the stock itself, "to remain for ever pledged for the redemption of the bonds," would prove a full equivalent for them, and that before their maturity the dividends on it would not only pay the interest, but produce a surplus. Hence the provision that the excess after paying the interest should be applied to purchase them. A tax for the principal would be repugnant to the manifest intent of the legislature, and it is actually prohibited by evident implication.

2. The relator maintains the doctrine that the power to tax is implied from the power to contract, and that whenever a judgment against a municipal corporation is unpaid, the exercise of the taxing power can be coerced by suit. It is difficult to reconcile that doctrine with the principle, heretofore acknowledged to be axiomatic, that the objects of taxation, the mode in which taxes are to be levied and collected, and the purposes to which they are applied, are subjects under the exclusive control of the Legislative Department. The latter must determine how the public debts are to be provided for; and while taxation is the ordinary means of raising the public revenues, they are often drawn from other sources. But this principle is completely ignored, if the mere power of such a corporation to contract confers on its creditor the right to compel the levy of a tax, when his debt exists in the form of unsatisfied judgments. For if without a law expressly authorizing such levy to pay them, the exercise of the taxing power can be enforced by judicial process, that power will, to a certain extent, be

transferred from the law-making branch of the government and be vested in the courts of the country.

3. The act of March 6, 1876, prohibits the city from levying any tax for bonds, or the interest on them, except that thereby authorized, and excludes the relator's bonds. This legislation gave him no right to the tax he asks. The principal of his bonds has been provided for in the act of 1854. The power of the legislature to modify, change, and repeal taxation is unrestricted, provided the taxes in existence when the debt is created are preserved to the creditor. *Von Hoffman* v. *The City of Quincy*, 4 Wall. 535.

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

The judge of the Circuit Court accompanied the judgment with an opinion giving the reasons of his decision, which were substantially those stated in the answer of the city: that the statute authorizing the issue of the bonds, upon which the judgments were recovered, made no provision for levying a tax to pay the principal, but intended that it should be paid out of the stock of the railroad company and its revenues; and that the proceeds from the sale of the stock had been already expended by the predecessors of the present city authorities. The court, adopting the view of the city authorities as to the construction of the statute, and the supposed intention of the legislature, proceeded on the principle that the power of taxation belongs exclusively to the legislative branch of the government, and that the judiciary cannot direct a tax to be levied when none is authorized by the legislature; and that the issuing of a *mandamus* to apply the proceeds received from the sale of the stock would be a futile proceeding, they having been previously used for other purposes. A writ, said the court, could not issue commanding the performance of an admitted impossibility.

The position that the power of taxation belongs exclusively to the legislative branch of the government, no one will controvert. Under our system it is lodged nowhere else. But it is a power that may be delegated by the legislature to municipal corporations, which are merely instrumentalities of the State

for the better administration of the government in matters of local concern. When such a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of those purposes, its authorities, however limited the corporation, must have the power to raise money and control its expenditure. In a city, even of small extent, they have to provide for the preservation of peace, good order, and health, and the execution of such measures as conduce to the general good of its citizens; such as the opening and repairing of streets, the construction of sidewalks, sewers, and drains, the introduction of water, and the establishment of a fire and police department. In a city like New Orleans, situated on a navigable stream, or on a harbor of a lake or sea, their powers are usually enlarged, so as to embrace the building of wharves and docks or levees for the benefit of commerce, and they may extend also to the construction of roads leading to it, or the contributing of aid towards their construction. The number and variety of works which may be authorized, having a general regard to the welfare of the city or of its people, are mere matters of legislative discretion. All of them require for their execution considerable expenditures of money. Their authorization without providing the means for such expenditures would be an idle and futile proceeding. Their authorization, therefore, implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation. A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose.

For the same reason, when authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess — so seldom, indeed, as to be exceptional — any means to discharge their pecuniary obligations except by taxation. "It is therefore to be inferred," as observed by this

court in *Loan Association* v. *Topeka* (20 Wall. 660), "that when the legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

The doctrine here stated is asserted by the Supreme Court of Pennsylvania in *Commonwealth* v. *Commissioners of Allegheny County*, 37 Pa. 277. That county was authorized by an act of the legislature to subscribe to the capital stock of a railroad company, and to issue its bonds in payment thereof. The interest on them being unpaid, a writ of *mandamus* was applied for to compel the commissioners of the county to make provision to pay it. The return of the officers set up, among other objections to the writ, that the act authorizing the subscription and issue of the bonds provided no means of payment, either of the principal or interest. To this defence the court said: "The act of 1843 authorized subscriptions by certain counties to be made as 'fully as any individual could do,' without prescribing more precisely the terms. But by the fifth section of the act of April 18, 1843, counties subscribing are authorized to borrow money to pay for such subscriptions. We have decided that bonds or certificates of loan issued by a municipal corporation is an ordinary and appropriate mode of borrowing money, and the act of 1853 expressly authorized the issue of such securities. The subscriptions were accordingly made, and the bonds issued. Thus was a lawful debt incurred by the county; and as no other than the ordinary mode of extinguishing it, or of paying the interest thereon, was provided, it follows, of course, that the ordinary mode of raising the means must be resorted to; namely, to provide for it in the annual assessment of taxes for county purposes." Again, in the same case, the court said: "In the next place, it is averred that there is no authority to levy a tax for the payment of the interest by the county. We have already treated of this, and said that the authority to create the debt implies an obligation to pay it; and when no special mode of doing so is provided, it is also implied that it is to be done in the ordinary way, — by the levy and collection of taxes."

In numerous cases, similar language is found in opinions of the State courts, not required, perhaps, to decide the point in judgment therein, but showing a recognition of the doctrine stated. Thus, in *Lowell* v. *Boston* (111 Mass. 460), the Supreme Court of Massachusetts, in speaking of bonds which the legislature had authorized the city of Boston to issue, in order to raise funds to be loaned to individuals to aid them in rebuilding that portion of the city which was burned in the great fire of November, 1872, said: "The issue of bonds by the city, whatever provision may be made for their redemption, involves the possible and not improbable consequence of a necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for payment of the bonds; or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized." To the same purport is the language of the Supreme Court of Wisconsin, in *Hasbrouck* v. *Milwaukee*, 25 Wis. 122. And in the recent case of *Parsons* v. *The City of Charleston*, in the United States Circuit Court, the Chief Justice gave emphatic affirmation to the doctrine. Hughes, 282. Indeed, it is always to be assumed, in the absence of clear restrictive provisions, that when the legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that the payment shall not be left to its caprice or pleasure. When, therefore, a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome except by express words excluding it.

In the present case, the indebtedness of the city of New Orleans is conclusively established by the judgments recovered. The validity of the bonds upon which they were rendered is not now open to question. Nor is the payment of the judgments restricted to any species of property or revenues, or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideration now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pend-

ing, and continued in the judgments. The fact that none is thus continued is conclusive on this application that none existed.

If the question were an open one, our conclusion would be the same. The act of 1854 provided that the railroad company should issue to the city certificates of stock for an amount equal to the amount of bonds received; and that the stock should remain "for ever pledged for the redemption of said bonds." It is plain that this language was intended only to create a statutory pledge by way of collateral security for the payment of the bonds. It does not import that the holders of the bonds were to be thereby precluded from looking to the city, or that they were obliged to have recourse, in the first instance, to the pledge. The city, by the terms of the bonds, was primarily liable; and nothing in the language of the act in any respect affects this primary liability. The bondholder is not compelled to look to the security, but may proceed directly against the city without regard to it. Besides, as was justly observed by counsel, if we could seek the intention of the legislature from other considerations than the words of the statute, it would be still plainer that no such construction could be given to its language. The object of issuing the bonds for the stock was to aid the company in obtaining funds to build its road. If the stock had been available, the bonds would not have been needed; the stock would have been sold. But it was not available; and it is difficult to believe that the bonds would have been any more so, if their payment had been limited to the revenues and proceeds of the stock. The proposal of such a scheme for raising money would not have indicated much wisdom on the part of the legislature; to have assented to it would have indicated less on the part of the bondholders. And even if the bondholders had been required to look for payment of the bonds only to the revenues and proceeds of the stock, it comes with bad grace from the city, not to say evinces an insensibility to its obligations, to allege exemption from liability after its authorities have sold the stock and diverted the proceeds to other uses.

This construction is not affected, as contended by counsel, by the statutes of 1852 and 1853, restraining cities and towns from

creating any indebtedness without providing at the same time for the payment of the principal and interest. Those statutes were not limitations on the power of the legislature to authorize the creation of debts by cities upon other conditions. It does not follow that because it was deemed expedient, as a general rule, to prohibit cities and towns from incurring debts on their own motion, without making provision for their payment, that the legislature might not authorize the incurring of a particular obligation without such provision. And it will be found, upon examination, that the act of 1854 prescribed the details of the ordinance which should be passed by the city in the execution of the authority conferred, and that the ordinance passed conformed to them. *Butz* v. *Muscatine*, 8 Wall. 575; *Amey* v. *Allegheny*, 24 How. 364; *Commonwealth* v. *Pittsburg*, 34 Pa. St. 496; *Commonwealth* v. *Commissioners*, 40 id. 348; *Commonwealth* v. *Perkins*, 43 id. 400; *Fosdick* v. *Perrysburg*, 4 Ohio St. 472.

There is nothing, therefore, in the positions of counsel to impair the validity of the bonds upon which the judgments were recovered, if we were at liberty to consider them on this application. But, as already said, the judgments are conclusive upon this point. Owing the debt, the city has the power to levy a tax for its payment. By its charter, in force when the bonds were issued, it was invested, in express terms, "with all the powers, rights, privileges, and immunities incident to a municipal corporation and necessary for the proper government of the same."

As already said, the power of taxation is a power incident to such a corporation, and may be exercised for all the purposes authorized by its charter or subsequent legislation. Whatever the legislature empowers the corporation to do is presumably for its benefit, and may, in "the proper government of the same," be done. Having the power to levy a tax for the payment of the judgments of the relator, it was the duty of the city, through its authorities, to exercise the power. The payment was not a matter resting in its pleasure, but a duty which it owed to the creditor. Having neglected this duty, the case was one in which a *mandamus* should have been issued to enforce its performance. *Knox County* v. *Aspinwall*, 24 How. 376; *Von*

Hoffman v. *City of Quincy*, 4 Wall. 535; *Benbow* v. *Iowa City*, 7 id. 313; *Supervisors* v. *Rogers*, id. 175; *The Supervisors* v. *Durant*, 9 id. 415; *County of Cass* v. *Johnston*, 95 U. S. 360.

The judgment of the court below must, therefore, be reversed, and the cause remanded with directions to issue the writ as prayed in the petition of the relator; and it is

So ordered.

NOTE. — Three other cases against the city, on the relation respectively of Charles Parsons, of William S. Peterkin, and of James Wadick, were argued at the same time as the preceding case. The city was represented by the same counsel. *Mr. D. H. Chamberlain* and *Mr. William B. Hornblower* appearing for Parsons, and *Mr. Thomas J. Semmes* and *Mr. Robert Mott* for the relator in each of the other cases.

MR. JUSTICE FIELD, in delivering the opinion of the court, remarked, that each of the cases was, in all essential particulars, similar to that of *United States* v. *New Orleans;* and, upon the authority of the decision therein, the judgment below must be reversed, and each cause remanded with directions to issue a writ of *mandamus* to levy and collect a tax, as prayed by the relator, to pay the judgment described in his petition, with lawful interest thereon; and it is

So ordered.

RAILROAD COMPANY *v.* GRANT.

The jurisdiction conferred upon this court by sect. 847 of the Revised Statutes relating to the District of Columbia was taken away by the act of Congress approved Feb. 25, 1879, which enacts that a judgment or a decree of the Supreme Court of that District may be re-examined here "where the matter in dispute, exclusive of costs, exceeds the value of $2,500." This court, therefore, dismisses a writ of error sued out Dec. 6, 1875, to reverse a final judgment of that court where the matter in dispute is of the value of $2,250.

MOTION to dismiss a writ of error to the Supreme Court of the District of Columbia.

This is a writ of error sued out by the Baltimore and Potomac Railroad Company, the defendant below, on the 6th of December, 1875, to reverse a judgment rendered against it for $2,250 by the Supreme Court of the District of Columbia. At that time sects. 846 and 847 of the Revised Statutes relating to the District of Columbia, defining the jurisdiction of this court in that class of cases, were in force.

They are as follows: —

"SECT. 846. Any final judgment, order, or decree of the Supreme Court of the District may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same cases and in like manner as provided by law in reference to the final judgments, orders, and decrees of the circuit courts of the United States.

"SECT. 847. No cause shall be removed from the Supreme Court of the District to the Supreme Court of the United States, by appeal or writ of error, unless the matter in dispute in such cause shall be of the value of $1,000 or upward, exclusive of costs, except in the cases provided for in the following section."

On the 25th of February, 1879, Congress passed "An Act to create an additional associate justice of the Supreme Court of the District of Columbia, and for the better administration of justice in said District," sects. 4 and 5 of which are as follows: —

"SECT. 4. The final judgment or decree of the Supreme Court of the District of Columbia in any case where the matter in dispute, exclusive of costs, exceeds the value of $2,500, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same manner and under the same regulations as are provided in cases of writs of error on judgments or appeals from decrees rendered in a circuit court.

"SECT. 5. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

The defendant in error now moves to dismiss the writ of error, on the ground that the jurisdiction of this court has been taken away.

Mr. Richard T. Merrick and *Mr. William F. Mattingly*, for the defendant in error, in support of the motion, cited *McNulty* v. *Batty*, 10 How. 72; *Norris* v. *Crocker*, 13 id. 429; *Insurance Company* v. *Ritchie*, 5 Wall. 541; *Ex parte McArdle*, 7 id. 506 *Steward* v. *Kahn*, 11 id. 502.

Mr. Enoch Totten, *contra*.

Insurance Company v. *Ritchie* (5 Wall. 541) and *Ex parte McArdle* (7 id. 506), cited by the defendant in error, are not applicable to this case, because the repealing statute in the former case expressly prohibited and took away the entire appellate jurisdiction, and in the latter case was purely a partisan enact-

ment, providing that this court should not possess or exercise any appellate jurisdiction in cases of the character mentioned, where appeals "have been or may hereafter be taken."

Norris v. *Crocker* (13 How. 429) was an action to recover a severe penalty, imposed by statute for the benefit of the owners of fugitive slaves; and the statute having been repealed, the penalty, of course, fell with it.

The sole question seems to be whether the legislature intended by the act of Feb. 25, 1879, to vacate all appeals and writs of error then pending in causes involving less than the value prescribed, or only to establish a new regulation applicable to future cases. All that were pending at the passage of that act were and are here by virtue of the former one. When the amount involved is $2,500, or upwards, there can be no doubt about the jurisdiction. Does the last act repeal the former absolutely, so as to forbid this court to exercise the jurisdiction which had previously vested? If it does, that result is brought about by implication only. Repeals by implication are not favored, and these two acts not being necessarily inconsistent, one may be applied to pending and the other to future appeals.

One statute is not to be construed as a repeal of another, if it be possible to reconcile them. *McCool* v. *Smith*, 1 Black, 459; *Harford* v. *United States*, 8 Cranch, 109; Sedgwick, Stat. and Const. Law, 127; *Bowen* v. *Lease*, 5 Hill (N. Y.), 221; *Wood* v. *United States*, 16 Pet. 342.

The last act is silent as to pending causes. It seems fair to conclude that if Congress had intended to interfere with them, the intention would have been declared in apt and unmistakable terms.

All statutes are to be construed as operating prospectively, unless the language is express to the contrary, or there is a necessary implication to that effect. *United States* v. *Heth*, 3 Cranch, 399; *Harvey* v. *Tyler*, 2 Wall. 347; *Prince* v. *United States*, 2 Gall. 204.

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

The single question presented by this motion is whether

there is any law now in force which gives us authority to re-examine, reverse, or affirm the judgment in this case. Nearly seventy years ago, Mr. Chief Justice Marshall said, in *Durus-seau* v. *United States* (6 Cranch, 307), that this "court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of those powers. Thus a writ of error lies to the judgment of a circuit court, where the matter in controversy exceeds the value of $2,000. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the circuits where the matter in controversy is of less value and implies negative words." There has been no departure from this rule, and it has universally been held that our appellate jurisdiction can only be exercised in cases where authority for that purpose is given by Congress.

It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law. *United States* v. *Boisdore's Heirs*, 8 How. 113; *McNulty* v. *Batty*, 10 id. 72; *Norris* v. *Crocker*, 13 id. 429; *Insurance Company* v. *Ritchie*, 5 Wall. 541; *Ex parte McArdle*, 7 id. 514; *The Assessor* v. *Osbornes*, 9 id. 567; *United States* v. *Tynen*, 11 id. 88.

Sect. 847 of the Revised Statutes, relating to the District of Columbia, is in irreconcilable conflict with the act of 1879. The one gives us jurisdiction when the amount in dispute is $1,000 or more; the other in effect says we shall not have jurisdiction unless the amount exceeds $2,500. It is clear, therefore, that the repealing clause in the act of 1879 covers this section of the Revised Statutes.

The act of 1879 is undoubtedly prospective in its operation. It does not vacate or annul what has been done under the old law. It destroys no vested rights. It does not set aside any judgment already rendered by this court under the jurisdiction conferred by the Revised Statutes when in force. But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may

be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary. The Revised Statutes gave parties the right to remove their causes to this court by writ of error and appeal, and gave us the authority to re-examine, reverse, or affirm judgments or decrees thus brought up. The repeal of that law does not vacate or annul an appeal or a writ already taken or sued out, but it takes away our right to hear and determine the cause, if the matter in dispute is less than the present jurisdictional amount. The appeal or the writ remains in full force, but we dismiss the suit, because our jurisdiction is gone.

It is claimed, however, that, taking the whole of the act of 1879 together, the intention of Congress not to interfere with our jurisdiction in pending cases is manifest. There is certainly nothing in the act which in express terms indicates any such intention. Usually where a limited repeal only is intended, it is so expressly declared. Thus, in the act of 1875 (18 Stat. 316), raising the jurisdictional amount in cases brought here for review from the circuit courts, it was expressly provided that it should apply only to judgments thereafter rendered; and in the act of 1874 (id. 27), regulating appeals to this court from the supreme courts of the Territories, the phrase is, "that this act shall not apply to cases now pending in the Supreme Court of the United States where the record has already been filed." Indeed, so common is it, when a limited repeal only is intended, to insert some clause to that express effect in the repealing act, that if nothing of the kind is found, the presumption is always strong against continuing the old law in force for any purpose. We think it will not be claimed that an appeal may now be taken or a writ of error sued out upon a decree or a judgment rendered before the act of 1879 took effect, if the matter in dispute is not more than $2,500; but it seems to us there is just as much authority for bringing up new cases under the old law as for hearing old ones. There is nothing in the statute which indicates any intention to make a difference between suits begun and those not begun. If, as is contended, the object of Congress was to raise our jurisdictional amount because of the increase of the judicial force in the District, we

see no good reason why those who had commenced their proceedings for review of old judgments should be entitled to more consideration than those who had not. No declaration of any such object on the part of Congress is found in the law; and when, if it had been the intention to confine the operation of what was done to judgments thereafter rendered or to cases not pending, it would have been so easy to have said so, we must presume that Congress meant the language employed should have its usual and ordinary signification, and that the old law should be unconditionally repealed.

Without more, we conclude that our jurisdiction in the class of cases of which this is one has been taken away, and the writ will accordingly be dismissed, each party to pay his own costs; and it is

So ordered.

BOOM COMPANY *v.* PATTERSON.

1. The United States cannot interfere with the exercise by the State of her right of eminent domain in taking for public use land, within her limits, which is private property. But when the inquiry whether the conditions prescribed by her statutes for its exercise have been observed takes the form of a judicial proceeding between the owner of lands and a corporation seeking to condemn and appropriate them, the controversy is subject to the ordinary incidents of a civil suit, and its determination does not derogate from the sovereignty of the State.
2. A controversy of this kind in Minnesota, when carried, under a law of the State, from the commissioners of appraisement to the State court, taking there the form of a suit at law, may, if it is between citizens of different States, be removed to a Federal court.
3. In determining the value of lands appropriated for public purposes, the same considerations are to be regarded as in a sale between private parties, the inquiry in such cases being, what, from their availability for valuable uses, are they worth in the market.
4. As a general rule, compensation to the owner is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.
5. On the upper Mississippi, where sending logs down the river is a regular business, the adaptability of islands to form, in connection with the bank of the river, a boom of large dimensions to hold logs in safety is a proper element for consideration in estimating the value of the lands or the islands when appropriated for public uses.

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

The plaintiff is a corporation created by the laws of Minnesota, known as the Mississippi and Rum River Boom Company, and the defendant is a citizen of the State of Illinois.

The facts are stated in the opinion of the court.

Mr. William Lochren for the plaintiff in error.

Mr. Charles E. Flandrau for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

The plaintiff in error is a corporation created under the laws of Minnesota to construct booms between certain designated points on the Mississippi and Rum Rivers in that State. It is authorized to enter upon and occupy any land necessary for properly conducting its business; and, where such land is private property, to apply to the District Court of the county in which it is situated for the appointment of commissioners to appraise its value and take proceedings for its condemnation. It is unnecessary to state in detail the various steps required to obtain the condemnation. It is sufficient to observe that the law is framed so as to give proper notice to the owners of the land, and secure a fair appraisement of its value. If the award of the commissioners should not be satisfactory to the company, or to any one claiming an interest in the land, an appeal may be taken to the District Court, where it is to be entered by the clerk "as a case upon the docket" of the court, the persons claiming an interest in the land being designated as plaintiffs, and the company seeking its condemnation as defendant. The court is then required to "proceed to hear and determine such case in the same manner that other cases are heard and determined in said court." Issues of fact arising therein are to be tried by a jury, unless a jury be waived. The value of the land being assessed by the jury or the court, as the case may be, the amount of the assessment is to be entered as a judgment against the company, which is subject to review by the Supreme Court of the State on a writ of error.

The defendant in error, Patterson, was the owner in fee of an entire island and parts of two other islands in the Mississippi River above the Falls of St. Anthony, in the county of Anoka,

in Minnesota. These islands formed a line of shore, with occasional breaks, for nearly a mile parallel with the west bank of the river, and distant from it about one-eighth of a mile. The land owned by him amounted to a little over thirty-four acres, and embraced the entire line of shore of the three islands, with the exception of about three rods. The position of the islands specially fitted them, in connection with the west bank of the river, to form a boom of extensive dimensions, capable of holding with safety from twenty to thirty millions of feet of logs. All that was required to form a boom a mile in length and one-eighth of a mile in width was to connect the islands with each other, and the lower end of the island farthest down the river with the west bank; and this connection could be readily made by boom sticks and piers.

The land on these islands owned by the defendant in error the company sought to condemn for its uses; and upon its application commissioners were appointed by the District Court to appraise its value. They awarded to the owner the sum of $3,000. The company and the owner both appealed from this award. When the case was brought before the District Court, the owner, Patterson, who was a citizen of the State of Illinois, applied for and obtained its removal to the Circuit Court of the United States, where it was tried. The jury found a general verdict assessing the value of the land at $9,358.33, but accompanied it with a special verdict assessing its value aside from any consideration of its value for boom purposes at $300, and, in view of its adaptability for those purposes, a further and additional value of $9,058.33. The company moved for a new trial, and the court granted the motion, unless the owner would elect to reduce the verdict to $5,500. The owner made this election, and judgment was thereupon entered in his favor for the reduced amount. To review this judgment the company has brought the case here on a writ of error.

The only question on which there was any contention in the Circuit Court was as to the amount of compensation the owner of the land was entitled to receive, and the principle upon which the compensation was to be estimated. But the company now raise a further question as to the jurisdiction of the

Circuit Court. Objections to the jurisdiction of the court below, when they go to the subject-matter of the controversy and not to the form merely of its presentation or to the character of the relief prayed, may be taken at any time. They are not waived because they were not made in the lower court.

The position of the company on this head of jurisdiction is this: that the proceeding to take private property for public use is an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between parties, — the owners of the land on the one side, and the company seeking the appropriation on the other, — there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State.

The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at

law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court. *Turner* v. *Halloran*, 11 Minn. 253. The case would have been in no essential particular different had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the State to the Federal court, if the controversy were between the company and a citizen of another State, cannot be doubted. And we perceive no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed.

The act of March 3, 1875, provides that any suit of a civil nature, at law or in equity, pending or brought in a State court, in which there is a controversy between citizens of different States, may be removed by either party into the Circuit Court of the United States for the proper district; and it has long been settled that a corporation will be treated, where contracts or rights of property are to be enforced by or against it, as a citizen of the State under the laws of which it is created, within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States. *Paul* v. *Virginia*, 8 Wall. 177. And in *Gaines* v. *Fuentes* (92 U. S. 20), it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation and is presented by the pleadings for judicial determination. Within the meaning of these decisions, we think the case at bar was properly transferred to the Circuit Court, and that it had jurisdiction to determine the controversy.

Upon the question litigated in the court below, the compensation which the owner of the land condemned was entitled to receive, and the principle upon which the compensation should be estimated, there is less difficulty. In determining the value of land appropriated for public purposes, the same considera-

tions are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands.

We do not understand that all persons, except the plaintiff in error, were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use. The clause in its charter authorizing and requiring it to receive and take the entire control and management of all logs and timber to be conveyed to any point

on the Mississippi River must be held to apply to the logs and timber of parties consenting to such control and management, not to logs and timber of parties choosing to keep the control and management of them in their own hands. The Mississippi is a navigable river above the Falls of St. Anthony, and the State could not confer an exclusive use of its waters, or exclusive control and management of logs floating on it, against the consent of their owners. Whilst in *Atlee* v. *Packet Company* (21 Wall. 389) we held that a pier obstructing navigation, erected in the river as part of a boom, without license or authority of any kind except such as arises from the ownership of the adjacent shore, was an unlawful structure, we did not mean to intimate that the owner of land on the Mississippi could not have a boom adjoining it for the reception of logs of his own or of others, if he did not thereby impede the free navigation of the stream. Aside from this, we do not think that the State is precluded by any thing in the charter of the company from giving a license to the defendant in error to construct a boom near his lands. Moreover, the United States, having paramount control over the river, may grant such license if the State should refuse one. The adaptability of the lands for the purpose of a boom was, therefore, a proper element for consideration in estimating the value of the lands condemned. The contention on the part of the plaintiff in error is, that such adaptability should not be considered, assuming that this adaptability could never be made available by other persons, by reason of its supposed exclusive privileges; in other words, that by the grant of exclusive privileges to the company the owner is deprived of the value which the lands, by their adaptability for boom purposes, previously possessed, and therefore should not now receive any thing from the company on account of such adaptability upon a condemnation of the lands. We do not think that the owner, by the charter of the company, lost this element of value in his property.

The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value find support in the several cases cited by counsel. Thus, *In the Matter of Furman Street* (17 Wend. 669), where a lot upon which the owner had his resi-

dence was injured by cutting down an embankment in opening a street in the city of Brooklyn, the Supreme Court of New York said that neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him; but that the proper inquiry was, "What is the value of the property for the most advantageous uses to which it may be applied?" In *Goodwin* v. *Cincinnati & Whitewater Canal Co.* (18 Ohio St. 169), where a railroad company sought to appropriate the bed of a canal for its track, the Supreme Court of Ohio held that the rule of valuation was what the interest of the canal company was worth, not for canal purposes or for any other particular use, but generally for any and all uses for which it might be suitable. And in *Young* v. *Harrison* (17 Ga. 30), where land necessary for an abutment of a bridge was appropriated, the Supreme Court of Georgia held that its value was not to be restricted to its agricultural or productive capacities, but that inquiry might be made as to all purposes to which it could be applied, having reference to existing and prospective wants of the community. Its value as a bridge site was, therefore, allowed in the estimate of compensation to be awarded to the owner.

These views dispose of the principle upon which the several exceptions by the plaintiff in error to the rulings of the court below in giving and in refusing instructions to the jury were taken, and we do not deem it important, therefore, to comment upon them.

Judgment affirmed.

SCULL v. UNITED STATES.

1. The act entitled "An Act for the final adjustment of private land-claims in the States of Florida, Louisiana, and Missouri," approved June 22, 1860 (12 Stat. 85), provides for presenting all such claims in Florida and Louisiana to the registers and receivers of the several land-offices, within their respective districts, and in Missouri to the recorder of land-titles for the city of St. Louis, and for a report on the claims to the Commissioner of the General Land-Office, and through him to Congress. In all such cases Congress reserved the right to confirm or to reject the claim.
2. The eleventh section of the act authorizes the claimants in a defined and

limited class of cases to sue by petition in the District Court of the United States within whose jurisdiction the land is situate.

3. The title on which such a suit can be sustained must be one which had been perfected under the Spanish or the French government before the cession to the United States, and the lands separated from the mass of the public domain by actual survey, or which are susceptible of such separation by a description which will enable a surveyor to ascertain and identify them by the boundaries found in the grant, or in an order of survey or investiture of possession.
4. No person can bring suit under that act who by himself, or by those under whom he claims, has not been out of possession over twenty years.
5. The act thus intended to provide a suit in the nature of ejectment against the United States whether out of possession or in possession, and to remove the bar of the Statute of Limitations.
6. The claim under the grant in this case covers over seven million acres, and it has never been actually surveyed or located; nor do the claimants present any actual survey, or ask for one, to ascertain if it be practicable under the description in the grant made in 1793.
7. An inspection of the maps presented by them, copied from the public surveys extended over the region to which the grant refers, shows that the calls for the boundary of the grant are impossible calls; that the royal surveyor was not on the ground, and was mistaken as to the locality of the natural objects on which he relied for description; and that no surveyor can by those calls locate or identify the land.
8. The suit was not, therefore, authorized by said act of 1860.

APPEAL from the District Court of the United States for the Western District of Missouri.

This is an appeal from a decree dismissing, on demurrer, the bill of the complainants, who, with the exception of one, their alienee, claim to be the heirs-at-law of Captain Don Joseph Valliere, who died intestate in the city of New Orleans in the year 1799. The suit was brought under the act entitled "An Act for the final adjustment of private land-claims in the States of Florida, Louisiana, and Missouri, and for other purposes," approved June 22, 1860. 12 Stat. 85.

The claim in this case is founded on three instruments of writing, of which translations are given in the record.

1. An order of Baron de Carondelet, Spanish governor of Louisiana: —

"11th June, 1793, to Captain Don Joseph Valliere, in the District of Arkansas, a tract of land, situated on the White River, extending from the rivers Norte Grande and Cibolos to the source of the said White River, ten leagues in depth.

"BARON DE CARONDELET."

2. A certificate of survey by Charles Trudeau: —

"DON CARLOS TRUDEAU, *Royal and Private Surveyor of the Province of Louisiana.*

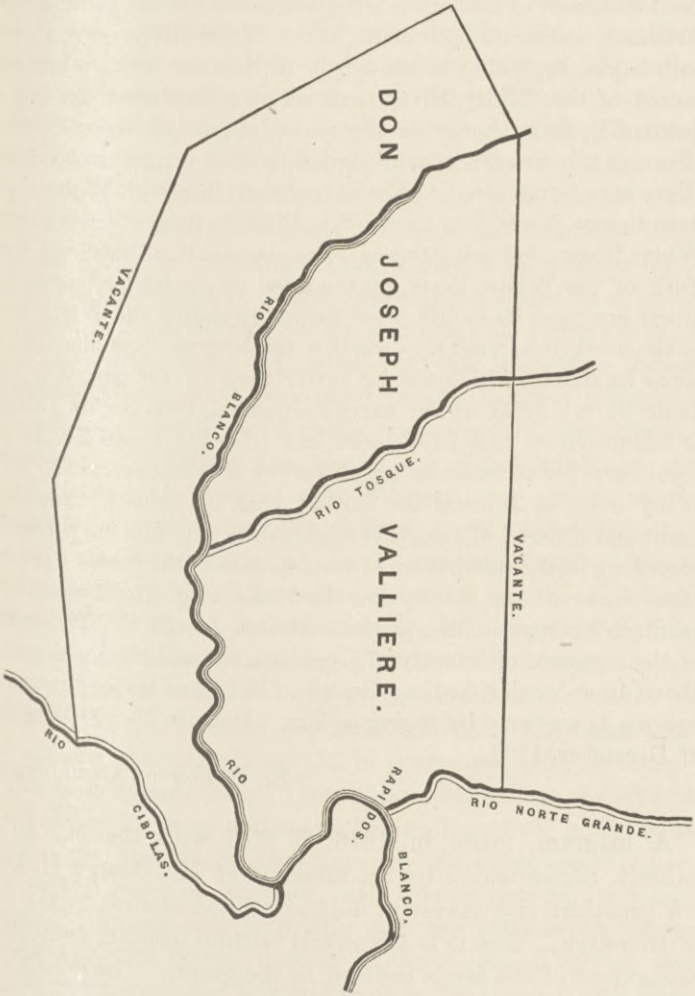
"I certify having measured, in favor and in presence of Don Joseph Valliere, captain of the stationary regiment of Louisiana, a portion of land situated in the jurisdiction of Arkansas, on the north and south banks of Rio Blanco; bounded on the east, or on the inferior limit, by the Rio Norte Grande, the Rio Blanco, and the Rio Cibolos; on the west, or superior limit, by the fountain-head or origin of the most western branch of the said Rio Blanco and by vacant lands of his majesty; separated from said vacant lands by a line beginning at the said fountain-head of the most western branch of Rio Blanco, running southwest ten leagues in depth; on the north by the lands of his majesty, separated from these by a drawn line, beginning at the Rio Norte Grande, commencing at a point ten leagues distant in a direct line from its mouth or confluence with the Rio Blanco, running in a course nearly west until it meets the fountain-head or origin of the most western branch of the Rio Blanco, and on the south side by vacant lands of his majesty, separated from these by a line drawn apart, beginning at a point where ends the southwest limit, ten leagues from the fountain-head or origin of the most western branch of the Rio Blanco, running on a parallel line with said Rio Blanco descending, ten leagues in depth, until it meets Rio Cibolos, at a distance of ten leagues in a direct line from Rio Blanco. All of which is now fully demonstrated in the figurative plan which precedes, — in which are shown the dimensions and courses of the boundaries, the trees and monuments serving as artificial and natural boundaries. The lines and limits have been made at the request of the grantee and in compliance with the order of the governor-general, Baron de Carondelet, of the —— of June of the present year. All of which I certify that it may be everywhere valid. I give these presents, together with the figurative plan which precedes, on the 24th of October, 1793.

"CARLOS TRUDEAU, *Surveyor-General.*"

The figurative plan is in the form following: —

LOUISIANA, 1793.

PUESTO DE ARKANSAS.



3. A cession or grant by Carondelet: —

"For the benefit of the public, and for the greater encouragement of agriculture and industry of the country, I have judged it expedient to take steps for the surveying and granting the royal lands of the provinces:

Therefore, I grant to Don Joseph Valliere, captain of the regiment stationed in Louisiana, a portion of land in the jurisdiction of Arkansas, situate on both banks of the White River, ten leagues on both banks, beginning at the origin of the most western branch or source of the White River, and running southwest ten leagues, descending from thence on the south by parallel line with White River, at the distance of ten leagues, until it intersects the Buffalo River at a point ten leagues in a direct line with White River, from thence descending the Buffalo River to its confluence with the White River; following this as far as the mouth of the Great North Fork of the White River, up the same to a point ten leagues in a direct line from its mouth, from thence ascending the White River to the north in a westerly direction ten leagues from the same as far as its source, which will be better seen on the figurative plan made by my order by the surveyor-general, Don Carlos Trudeau, of this province, 24th of October last (it being impossible for the royal surveyor to make an actual survey at this time), and in virtue of my order in June, of the current year, by which I made him a grant and ordered the surveyor-general to put him in possession, according to the usual form, in consequence of the power which has been conferred on me by our lord the king (God preserve), I grant, in his royal name, to the said Don Joseph Valliere, captain of the regiment of infantry of Louisiana, the said portion described above, in order that he may dispose of it, he and his legitimate successors, as property belonging to him. Done in New Orleans, 22d of December, 1793.

"EL BARON DE CARONDELET."

A diagram, made in 1876, is filed with the bill as an exhibit, accompanied by an affidavit of Mr. George H. Day, "a practical city surveyor, duly appointed as such by the city of Brooklyn," that it is a true and faithful diagram description and extent of the lands covered by the grant. The description as therein set forth is that the tract is "situated on both sides of White River (or Rio Blanco), in the States of Missouri and Arkansas, extending from the north fork of White River

(or Rio Norte Grande) westerly to its source 37⅞ miles in depth on both sides (or ten leagues).

"Beginning at the origin or terminal of main fork of White River in Madison County, Arkansas, in township 13 north, range 25 west, from thence south 37⅞ miles (or ten leagues) to a point in township 7 north, range 25 west; thence continuing on a line drawn parallel with the main courses of the said White River and at a distance of 37⅞ miles therefrom (or ten leagues) on a line drawn north of west 33½ miles to a point in township 8 north and range 31 west; thence northwesterly 52 7/10 miles to a point in the Indian Territory or Cherokee County near Flint Creek; thence north by east 46 7/10 miles to a point in township 23 north, range 34 west, in McDonald County, Missouri; thence northeasterly 60 8/10 miles to a point in township 28 north, range 26 west, in Lawrence County, Missouri; thence easterly 48 miles to a point in township 29 north, and range 18 west, and distant from a point on White River 37⅞ miles (or ten leagues); thence southeasterly 45 6/10 miles to a point on the Big North Fork of White River in township 24 north, and range 12 west, distant 37⅞ miles (or ten leagues) northerly in a direct line from the mouth of the north fork of said White River; thence southerly down the north fork of White River (or Rio Norte Grande) to its mouth in township 18 north, range 12 west; thence southwesterly up the White River to the mouth of Buffalo Fork of White River; thence westerly, following said Buffalo Fork (or Rio Cibolos), to its source in township 14 north, range 24 west; thence southwesterly to the terminal or source of White River, the place of beginning, as more fully shown on the map annexed, containing 11,370 square miles."

The complainants allege that "Rio Blanco" is the White River of the State of Arkansas, having its source in the most westerly part thereof, running through the southwesterly portion of the State of Missouri, and thence through the said State of Arkansas, and emptying into the Mississippi River; that Rio Cibolos is the Buffalo River, a branch of the said White River; that Rio Norte Grande is the Great North Fork River of the State of Arkansas, and a branch of the said White River; that neither they nor any parties holding title under

the original claimant have possessed and cultivated any of said lands for the period of twenty years prior to the filing of the petition; that the lands are partly situated in the counties of Ozark, Douglass, Taney, Christian, Stone, and Barry of the State of Missouri, and are within the jurisdiction of the court below; and that all or nearly all of them have been disposed of by the United States. The complainants pray that they may be allowed upon the trial to show by competent evidence what portion of the lands now remains undisposed of and claimed by the United States; that a patent may be issued therefor; and that warrants or scrip be awarded to them and their legal representatives, as an equivalent for the lands, portion of the said grant, which have been disposed of by the United States; and for such other decree as to the court may seem just.

Mr. William H. Duryea and *Mr. J. Warren Greene* for the appellants.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The history of the relation of the government of the United States to the claims for lands asserted under rights derived from the Spanish and French governments, prior to the cessions of Louisiana and Florida to our government, as it is found in the treaties, the acts of Congress, and the judicial decisions of the American tribunals, is given very fully and with accuracy in the opinion of this court in the case of *The United States* v. *Lynde* (11 Wall. 632), and will be referred to now without repeating it. The necessity and the policy of the act of 1860 are there fully considered. It declares that the registers and receivers of the public land-offices in Florida and Louisiana, within their respective districts, and the recorder of land-titles for the State of Missouri, shall be commissioners to hear the evidence and make report to the Commissioner of the General Land-Office concerning this class of claims. They are directed in their reports to divide the cases into three classes, two of which were to be reported as valid and the third as invalid. The nature and character of these claims, and the evidence on which they are to be held valid or invalid, are fully set out in

the statute. After the reports of these officers are filed with the Commissioner of the General Land-Office, they are to be subject to the examination of that officer, who is to report thereon directly to Congress. In all cases where he and the local commissioner concur in the rejection of the claim, that action is to be final; but where he concurs with these commissioners in holding a claim valid, he shall report the same to Congress for its action. And in cases where he disapproves the report of the commissioners, he shall in like manner report the whole matter to Congress for final action. It will thus be seen that in all cases brought before any of these officers, under this act, except when the Commissioner of the General Land-Office concurs with them in rejecting the claim, the whole proceeding amounts merely to a report to Congress, and the final action of confirming or rejecting the claim rests with that body.

The eleventh section, however, enacts that in a much more limited class of cases, which it specifically defines, the claimants "may at their option, instead of submitting their claims to the officer or officers hereinbefore mentioned, proceed by petition in any district court of the United States within whose jurisdiction the lands or any part of the lands claimed may lie, unless such claim comes within the purview of the third section of this act." It declares that the United States may be made defendant to such a suit, and an appeal allowed prescribes the mode of executing a final decree in favor of the claimant, and provides for other matters. So much of it as excludes claims coming within the purview of the third section evidently has reference to the proviso of that section, that no case shall be reported favorably by the commissioners which has already been twice rejected on its merits by previous boards, or has been rejected as fraudulent, or as having been procured or maintained by fraudulent or improper means.

The difference in these two modes of procedure, and in the results which followed them, are obvious and important. The first, as already observed, is merely a mode of placing before Congress the result of an investigation by the local commissioner, and the Commissioner of the General Land-Office, with their opinion on the merits of the claim. On these reports Congress either rejects or confirms the claim, as it may think

right. Until such action by Congress, nothing is concluded; and if it fails to act, the previous inquiry amounts to nothing.

The suit in the District Court, on the other hand, has all the elements of any other judicial proceeding, among which are the conclusiveness of the judgment on both parties, and the right to an appeal to this court for final decision. Considering the more valuable results which may be obtained in the courts, and the better-defined course of procedure there, it is not strange that parties who have faith in the validity of their claims should prefer that tribunal.

But Congress did not intend to refer all the cases embraced in the act to the courts, at the option of the claimant. It was only claims of a class defined by the eleventh section of the act, which the claimant might bring either before the court or before the commissioner, at his election. If the case before us does not belong to this class, the court did right in dismissing the petition, whatever may be its merits, and though it may be a case which, if brought before a commissioner, would be entitled to a favorable report.

We must, therefore, examine the case in the light of the provisions of the eleventh section, which defines this class in these words: —

"Any case of such a claim to lands as is hereinbefore in the first section of this act mentioned, where the lands claimed have not been in possession of and cultivated by the original claimant or claimants, or those holding title under him or them, for the period of twenty years aforesaid, and where such lands are claimed by complete grant or concession, or order of survey duly executed, or by other mode of investiture of the title thereto in the original claimant or claimants, by separation thereof from the mass of the public domain, either by actual survey or definition of fixed natural and ascertainable boundaries or initial points, courses, and distances, by the competent authority prior to the cession to the United States of the territory in which said lands were included, or where such title was created and perfected during the period while the foreign governments from which it emanated claimed sovereignty over, or had the actual possession of, such territory."

A careful examination shows three distinguishing elements necessary to a suit in the court: —

1. The claimant or those under whom he holds must have been out of possession for twenty years or more.

2. The land must be claimed by a complete grant or concession, or order of survey duly executed, or other mode of investiture of the title in the original claimant by separation from the mass of the public domains, either by actual survey or defined fixed natural boundaries or initial points and courses and distances, by the competent authority, prior to the cession to the United States.

3. Where such title was created and perfected during the period of the actual possession of the prior government under which the claim is asserted.

This is substantially an action of ejectment, with the bar of the Statute of Limitations removed, the United States having a constructive possession for the defendant.

The title must be complete under the foreign government. The land must have been identified by an actual survey with metes and bounds, or the description in the grant must be such that judgment can be rendered with precision by such metes and bounds, natural or otherwise.

There must be nothing left to doubt or discretion in its location. If there is no previous actual survey which a surveyor can follow and find each line and its length, there must be such a description of natural objects for boundaries that he can do the same thing *de novo*. The separation from the public domain must not be a new or conjectural separation, with any element of discretion or uncertainty.

The right to sue here given is not on an inchoate or imperfect title. It is not on a perfected grant for an unknown location, or for a given quantity within defined out-boundaries. All these are left to be pursued, if at all, before the commissioners appointed by the statute. They could pass upon the equities arising from imperfect or incomplete grants. An order of survey was sufficient before them, if otherwise sustained by proof. Permission to settle on the land, or any other written evidence of title emanating from the foreign government prior to the cession. This required no completed title, no actual survey, no twenty years out of possession, no prior segregation from the public domain. In all this class of cases, Congress, which

reserved the right to decide, only required evidence of some equitable claim arising under the former government, on which it could make an intelligent decision.

But in the cases brought before the courts, while removing the bar of the lapse of time, and the want of a defendant in possession, and the defence of a better title by patent from the United States, the act still requires a title completed under the foreign government, evidenced by written grant, actual survey, or investiture of possession, and, in short, evidence of a title on which recovery of possession could be had when these defences were out of the way. This view is confirmed by the provision that the petitioner must have been out of possession for twenty years. The only reason that occurs to us for this is, that having the superior legal title, he could recover from any one in adverse possession without the aid of the statute, where he was not bound by twenty years' limitation.

Does the case before us come within this class?

There was no actual survey. The order of survey made by Governor Carondelet is very indefinite. It is thus translated in the record: —

"11th June, 1793, to Captain Don Joseph Valliere, in the District of Arkansas, a tract of land situated on the White River, extending from the rivers Norte Grande and Cibolos to the source of said White River, ten leagues in depth.

"BARON DE CARONDELET."

On the strength of this order, Trudeau, the surveyor-general, proceeded to make what he calls in his certificate of survey "a figurative plan" by conjecture, and from this gives a certificate of survey. It appears by the paper called a grant and signed by Carondelet that this plan was made by his order because it was impossible for the royal surveyor to make an actual survey at the time.

Based upon this figurative plan, the concession or grant makes an attempt to describe the land granted by certain natural objects, and some general but not specific directions as to the courses and distances. It does not appear that any actual survey has ever been made locating this grant. It does not appear that any attempt has ever been made to do it. We

have in the record copies of Trudeau's sketch. We have a copy of the official map of the surveys of the land into congressional subdivisions, made for the purpose of selling these lands, which have been extended over all the area in which this grant could possibly be found; and we have a map of the State of Arkansas, with county and township subdivisions; and in both these latter the general course of the White River, its branches and affluents, are laid down.

On this latter map we have what Mr. Day, a civil engineer, swears to be a correct location of this grant according to boundaries given in Carondelet's cession. This was not made by any actual survey, but simply taking the sectional map of the State of Arkansas, Mr. Day has made lines on it, which he declares to be a location, on that map, of Valliere's grant. He does this by assuming a point in township 13 north, range 25 west, in Arkansas, to be the origin of the White River, and proceeding directly south from this point ten leagues, or 37⅞ miles, he makes a series of arbitrary lines, with a corresponding number of angles and changes of course, tending first northwest, and then northeast, and then southeast, until he reaches the Great North Fork of said river. He then descends said fork until it intersects the river, descends the main river until he reaches Buffalo Fork, ascends Buffalo Fork until he comes near the initial point or source of White River, and then makes a straight and arbitrary line southwest to the beginning. As regards this survey, the straight lines and the changing courses and distances are wholly arbitrary and artificial, having no natural objects to establish them, and nothing in the descriptive language of the grant. They are intended to be the conjectural or average distances of ten leagues from the White River. That is to say, in a distance of nearly three hundred miles on one side of White River, in order to ascertain definitely what lands are within ten leagues of that river, — one of the most tortuous ever known, — the surveyor makes six new departures and courses, and, running these by straight lines, declares that he has solved the problem and made an accurate survey.

But let us compare this survey with the calls of the grant. The latter describes the land as "situated on both banks of White River, ten leagues on both banks, beginning at the origin

of the most western branch or source of the White River, and running southwest ten leagues, descending thence on the South by parallel line with White River, at the distance of ten leagues, until it intersects Buffalo River at a point ten leagues in a direct line with White River, from thence descending the Buffalo River to its confluence with White River; following this as far as the mouth of the Great North Fork of the White River, up the same to a point ten leagues in a direct line from its mouth, from thence ascending the White River to the north in a westerly direction, ten leagues from the same, as far as its source, which will better be seen on the figurative plan," &c.

Assuming that Day's survey has located the original source of White River as the initial point correctly, the first call in the grant is southwest ten leagues. Mr. Day's line is ten leagues directly south; the next departure in the grant is descending thus on the south by parallel with the White River at the distance of ten leagues, until it intersects the Buffalo River at a point ten leagues in a direct line with White River. Here Mr. Day utterly disregards the call, makes a due west line, taking him directly away from the Buffalo River, and making his artificial courses and distances nearly three hundred miles, not on the south, but on the west and north, of White River, and never gets to Buffalo River until he has run the reverse course of the call, and meets it near the last of his survey at its junction with White River. The reason of this is obvious. The call in the grant is an impossible call. The Buffalo River is not in the direction supposed by Trudeau and Carondelet, and the source of White River is not where it is supposed to be.

The next call in the grant is to descend the Buffalo to its confluence with White River. But the Buffalo would never be reached by the call of the grant. In short, looking at the calls for material objects, courses of streams, and distances, that which might have been predicted occurred. In attempting to make a grant described by rivers of whose courses and location they were ignorant, by given distances which could not be made to conform to the natural objects, making a grant of over seven millions of acres of land by specific boundaries of which they knew nothing, they made a total failure, and gave no

description by which any surveyor could, without the aid of a lively imagination, make any location.

This is clearly manifest by a comparison of Trudeau's plan with Day's location, and with the actual locality and course of the streams as they are now ascertained.

Trudeau's plan and the calls of the grant make the initial point and source of White River in the northeast corner of the plat; Day makes the source of the river and the initial point in the middle south part of his survey. Trudeau runs a waving line in a southeastern direction to Buffalo River, where he supposed it to be; Day runs in a reverse direction northwest, until he meets the North Fork, and comes down it.

Trudeau was mistaken if the source of the river is where Day locates it. But this destroys all Trudeau's plan, and locates the grant in a very different place from where he and Carondelet intended it to be, and where it can never be reached by any survey following the description of the grant.

But on what evidence Mr. Day relies to fix the source of the river, the beginning point of his location, is unknown. He did not go on the ground or trace the stream. He merely takes the map of Arkansas, and says, here on this map I find the origin of the river to be a point in township 13 north, range 25 west, in Madison County.

Whether this map gave the origin of the most western branch of that river correctly is wholly uncertain. How far a surveyor must pursue such a branch or stream to find the fountain from which it flows is left in the dark. If Mr. Day had gone on the ground, ordered to make the survey under oath, he might have felt bound to locate this point many miles from where he finds it on the map. It is almost absurd to suppose that in an ordinary traveller's map of a State, made to be folded into a pocket-case, any reliance can be placed on its location of the source of a stream which would justify its acceptance as a warrant for locating with precision a grant of over seven millions of acres of land. The combined exhibits E and F, which are certified copies of the official surveys of the United States, call this most western branch Buffalo Fork, and do not locate the origin of this western branch within thirty miles of the point which the Arkansas map does, and where Mr. Day does.

We are of opinion that for want of any actual survey at the time the grant was made, or at any other time, by the Spanish government, for want of any other separation of the land granted from the mass of the public domain, and for want of any description of the land granted in the instrument of cession, or order of survey, by which the land can be surveyed and identified, the claim does not come within the eleventh section of the act of 1860, and that the District Court properly rejected it.

Decree affirmed.

UNITED STATES *v.* BALTIMORE.

A mere permission by the commandant to settle on land in Florida, not followed by a grant or by other evidence of title under the Spanish government, will not sustain a claim in a suit in the District Court, brought under the eleventh section of the act of June 22, 1860, 12 Stat. 85.

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

The facts are stated in the opinion of the court.

The Solicitor-General for the United States.

Mr. Edward Janin, *contra*.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a decree confirming as valid a claim of the cities of Baltimore and New Orleans to land in that part of the State of Louisiana which constituted the former Spanish province of West Florida.

The suit was brought under the eleventh section of the act of June 22, 1860, which we construed in *Scull* v. *United States*, *supra*, p. 410.

The foundation of the claim is a petition of Philip Robinson to the commandant Don Thomas Estevan, dated Jan. 20 1804.

This petition recites that Robinson had, in the year 1797, by the permission of Estevan's predecessor, established himself on a tract of land, which he describes, and that he had unfortunately lost the permit by the burning of his house. Fearing

lest some intruder might encroach upon his rights, he begs a renewal of the order or permit.

The reply to this is as follows: —

"GALVESTON, Jan. 20, 1804.

"This party may remain in the possession of the land settled by him under the permit of my predecessor, and he will apply to the intendant-general for his formal title.

"THOMAS ESTEVAN."

No other title, grant, cession, survey, or order of survey was ever issued on this claim. It was a mere permit for possession and settlement, and no more. There was here no perfected title. There was no title at all, nor any thing which purported to give title. The title remained in the Spanish government until transferred to ours; and except the part which has been patented to others, it remains there now. There is nothing on which the claimant, under the eleventh section of the act, as we understand it, is entitled to recover in this suit.

If there is any just claim in this case, it belongs to the class of imperfect, incomplete, equitable rights over which Congress has reserved control, and which could only be confirmed in the mode pointed out before the commissioners under the act of 1860.

The decree of the District Court confirming the claim will be, therefore, reversed, with directions to dismiss the petition; and it is

So ordered.

FOSTER v. MORA.

In ejectment in the courts of the United States the strict legal title prevails.

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

The facts are stated in the opinion of the court.

Mr. Edmond L. Goold for the plaintiffs in error.
Mr. John T. Doyle, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an action of ejectment brought originally in the Cir-

cuit Court for the District of California, by the defendant in error, in which he recovered judgment against the plaintiffs in error.

The parties waived a jury, and the court made a finding of the facts, on which its judgment was rendered. Those which set out plaintiff's title are as follows: —

"1. The lands in controversy are the ancient mission buildings and quadrangle, and the gardens and orchards, of the ancient Mission of San Juan Capistrano, as formerly occupied by the priests of the mission; area, forty-six acres and seventy-four hundredths of an acre ($46\frac{74}{100}$).

"2. That on the nineteenth day of February, A.D. 1853, Joseph S. Alemany, Roman Catholic Bishop of Monterey, filed with the board of commissioners to ascertain and settle private land-claims in California, appointed under the act of Congress of March 3, 1851, his petition in writing, a copy of which (omitting the description of the several parcels of land herein described and claimed) is hereto annexed and made part hereof, and marked 'Schedule A;' and thereupon such proceedings were had before the said board, that the said board, on the 18th of December, A.D. 1855, made a decree confirming to said petitioner the lands described in his petition, to be held by him for the uses and purposes in said petition described. A copy of the decree (omitting the description of the several parcels of land) is hereto annexed and made part hereof, marked 'Schedule B.' That afterwards the United States appealed from the said decree to the District Court of the United States for the Southern District of the State of California, and thereafter the Attorney-General of the United States, having given notice that he would not prosecute such appeal, the same was thereupon, afterwards, on the fifteenth day of March, A.D. 1858, at a regular term of the said court, by its order duly entered, dismissed, and the said Joseph S. Alemany, bishop as aforesaid, was adjudged and decreed to have leave to proceed in the premises under the decree of the land commissioners as under final decree.

"3. That on the eighteenth day of March, A.D. 1865, letters-patent were duly issued by the United States of America to the said Reverend Joseph S. Alemany, bishop aforesaid, a

copy whereof is annexed, and made a part hereof, marked 'Schedule C.'

"4. Afterwards, and before the commencement of this suit, the title of the said Joseph S. Alemany, Roman Catholic bishop as aforesaid, to the said premises became vested in the plaintiff herein, and that they are the same premises described in the complaint and here in controversy."

It also appears that this land had been in possession of the mission ever since the year 1796.

The defendants were admitted to be in possession at the commencement of the action, and their claim of title is in substance founded on these facts, as stated by the court:—

A grant by Pio Pico, governor of California, of the premises in controversy, dated Dec. 6, 1845; a petition to the board of commissioners of private land-claims, dated Oct. 23, 1852; a decree of confirmation of that board, dated July 7, 1855; an appeal, which was dismissed; and a survey of the lands so confirmed by the surveyor-general of the United States.

No patent has been issued to the claimants under these proceedings.

It thus appears that plaintiff has the only title founded on a patent from the United States. The act of Congress of 1857, to ascertain and settle the private land-claims in California, required that every claim to land arising under the Mexican government should be presented to the board of commissioners appointed under it, and that they should reject or affirm the claim.

It also contemplated as the final evidence of title that a patent should issue to the claimant or his representatives when the claim was established, in whole or in part. This patent is declared by the statute to be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

The patent to Bishop Alemany in this case and in this action is conclusive as against the United States that the bishop had a meritorious claim derived from the Mexican government to the land in question, and that the United States conveys to him the legal title to the land.

In actions of ejectment in the United States courts the strict legal title prevails. If there are equities which would show the right to be in another, these can only be considered on the equity side of the Federal courts.

This record shows that plaintiff holds the only legal title which the courts of the United States can recognize. The oldest claim, the oldest possession, the oldest legal title, and the only patent from the United States are with the plaintiff, and in this action these must prevail.

We are invited by plaintiffs in error into the discussion of the canon and civil laws of Mexico concerning the titles to lands held by missions and other ecclesiastical bodies. We must decline to follow this lead.

If there is any equitable reason why the only strict legal title and the older Mexican claim and possession should not prevail, it is not available in a court of law.

Judgment affirmed.

UNITED STATES *v.* PEROT.

1. Spanish grants made in Texas for lands in the "Neutral Ground," east of the Sabine, from 1790 to 1800, are valid.
2. The Mexican league applicable to grants of such lands, being a square of 5000 varas on each side, has always been estimated at 4428.4 acres, the vara being considered 33⅓ American inches.
3. The true Mexican vara is slightly less than 33 American inches; but by use in California it is estimated at 33 inches, and in Texas at 33⅓ inches.
4. The common usage of a country in reference to its measures should be followed in estimating them, when mentioned in grants taking effect there.
5. Where countries have been acquired by the United States, its courts take judicial notice of the laws which prevailed there up to the time of such acquisition. Such laws are not foreign, but those of an antecedent government.

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

The facts are stated in the opinion of the court.

The Solicitor-General for the United States.

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

MR. JUSTICE BRADLEY delivered the opinion of the court.

The claim in this case is for four leagues of land granted by Bernardo Fernandez, commandant of the post of Nacogdoches, under the Spanish government, in the Province of Texas, to Pedro Dolet, on the 27th of December, 1795, and extended in possession on the 14th of January, 1796. The land was situated on the bayou of the Adoise, in the settlement of Bayou Pierre, and in what is known as the Neutral Ground, lying east of the Sabine River, and west of the arroyo Hondo, the Kisachey, and the Calcasieu. This territory was then claimed as belonging to Texas, and was occupied and settled by the Spanish authorities of that province, though claimed by the Province of Louisiana, — the Spanish settlements in Texas having been pushed forward easterly across the Sabine. After the cession of Louisiana to the United States, it became a subject of dispute between our government and Spain, and the Sabine was finally acquiesced in as the boundary line. But as Spain owned both provinces at the time of this grant, there can be no question as to its validity. Such a grant for a large tract of over 200,000 acres of land in the same district was confirmed by this court in *United States* v. *Davenport's Heirs*, 15 How. 1. The grant in that case was made in the same year as the grant in this case, 1795. The court, by Mr. Justice Campbell, said: "The land comprehended in these grants at their respective dates was within the unquestioned dominions of the crown of Spain. The evidence clearly established that the commandants of the posts at Nacogdoches, before and subsequently, were accustomed to make concessions to lands in the neutral territory. This was not at all times an unquestioned jurisdiction, but between the years 1790 and 1800 it seems to have been generally acquiesced in."

We think, therefore, that the grant must be sustained. The evidence produced to authenticate it is, under the circumstances, all that the claimants could be expected to produce.

But the grant is for four leagues only. The claimants obtained a decree below for four American or English leagues; and such leagues may have been inadvertently allowed in some previous cases. But it is evident that no such leagues were in the minds of the parties. The leagues intended were Spanish

leagues, such as were used in land measures and grants in Mexico and Texas at that period. Now we are bound to take judicial notice that the Mexican league was not the same as the American league. The laws of Mexico, of force in Texas previous to the Texan revolution, were the laws not of a foreign, but of an antecedent government, to which the government of the United States, through the medium of the Republic of Texas, is the direct successor. Its laws are not deemed foreign laws; for as to that portion of our territory they are domestic laws; and we take judicial notice of them. *Fremont* v. *United States*, 17 How. 542, 557.

If any doubt existed as to the extent of the Mexican league, an inquiry might be necessary to ascertain it. But no such doubt exists. The old legal league, by the laws of Spain, and which was adopted in Mexico, consisted of 5,000 varas; and a vara in Texas has always been regarded as equivalent to $33\frac{1}{3}$ English inches, — making the league equal to a little more than 2.63 miles, and the square league equal to $4{,}428\frac{4}{10}$ acres. This is perfectly well understood in Texas, where controversies respecting Spanish titles are constantly brought before the courts.

Strictly speaking, the standard vara of Mexico is somewhat less than $33\frac{1}{3}$ inches. Our engineers, at the close of the Mexican war, brought back with them a copy of that standard found in the Mexican archives, being one of a set prepared for distribution among the Mexican States. This standard is still preserved in the Coast Survey office, and by careful comparison with our standards by Professor Bache, was found to be only 32.9682 inches. This agrees very closely with the public reports of the government of Mexico on the subject, which make their vara 838 millimetres, which are equivalent to 32.9927 inches. Humboldt, in 1803, found it to be 839.16 millimetres, or a slight fraction over 33 inches. But it seems that a vara measure of somewhat larger dimensions obtained in Texas from an early period; and the result is, what has been stated above, $32\frac{1}{3}$ inches to the vara, and 4,428.4 acres to the league. The cordel, a cord of 50 varas, or about $137\frac{1}{2}$ feet in length, was the instrument generally used in measuring large tracts, one hundred of these making a league; and it is

probable that the cordel originally employed in Texas had become somewhat lengthened by use. See the Constitution and Laws of the Republic of Mexico and of the States of Coahuila and Texas, New York, 1832; also Yoakum's History of Texas, vol. i. p. 217; Rockwell's Spanish and Mexican Laws, p. 664; Halleck's Report, Ex. Doc. No. 17, Ho. Rep. 1st Sess. 31st Cong. p. 145.

The standard Mexican vara is so near to 33 inches (wanting, according to the best measurements, less than a hundredth of an inch of that quantity), that a standard vara measure laid on an American yard would so nearly correspond with 33 inches, that the difference could not be perceived by the naked eye. Hence, in California, after its acquisition by the United States, a vara came to be considered as exactly equal to 33 inches; and this result was sanctioned by the General Land-Office as early as 1852. The United States surveyor-general of California, in a report to the land-office, dated at San Francisco, Nov. 14, 1851, said: "All the grants, &c., of lots or lands in California, made either by the Spanish government, or that of Mexico, refer to the 'vara' of Mexico as the measure of length By common consent here, that measure is considered as being exactly equivalent to *thirty-three* American inches." He then refers to other estimates found in a recent publication, and adds: "It is important that the relative proportions of their measures should be clearly settled. I, therefore, have to ask the aid of the department in doing so." The commissioner, in an answer to this letter, dated Washington, March 5, 1852, said: "You state that by common consent it [the Mexican vara] is considered in California as exactly equivalent to 33 American inches. I can see no reason why there should be any departure from this ratio, and agree with you that any important change in the length of the 'vara' recognized and acted upon in California would produce confusion."

It is understood that the department has always, since that time, acted upon this standard of value of the vara in respect to surveys in California; which makes the square league of 5,000 varas to the side, equivalent to 4,340.278 acres. In a letter addressed by Mr. Wilson, Commissioner of the General Land-Office, to the late Mr. Justice Catron, of this court, on

the 20th of February, 1855, he says that the practice of the land-office is to consider and allow the vara in California as equivalent to 33 inches, and the league as equivalent to 4,340.27 acres.

It is important that the uniform practice and usage of a country should be observed in the construction of all grants made therein whilst such usage prevailed.

For this reason, we think that in Texas, and in relation to grants emanating from the Mexican government in that province, before its separation from the parent State, the vara and league recognized in land measures there should be respected.

Allowing the claimant, therefore, at the rate of 4,428.4 acres to the league, according to the rate above referred to, he is entitled to a decree for $17{,}713\frac{6}{10}$ acres, instead of 23,040, as decreed by the court below, requiring a deduction of $5{,}326\frac{4}{10}$ acres. If the claimant will remit this excess, he will be entitled to an affirmance of the decree for the balance, namely, for $17{,}713\frac{6}{10}$.

On filing such remitter, a decree may be entered accordingly; and it is

So ordered.

NOTE. — The following table shows the different values given to the Mexican vara and league by different measurements and authorities: —

AUTHORITY.	1 Mexican Vara		1 League = Miles.	1 Sq. League = Acres.
	= Metres.	= Inches.		
Humboldt (1803)	0.839,16	33.03839	2.6071966	4350.384
Mexican Decree (1839)	.838,01	32.99311	2.6036236	4338.464
Orbegozo (1844?)	.838,00	32.99272	2.6035924	4338.363
U. S. Coast Survey (1850)	.837,377	32.96820	2.6016572	4331.917
Bustamente (1851)	.837,33	32.96634	2.6015112	4331.430
Use in California		33.00000	2.6041667	4340.277
Use in Texas		33.33333	2.6304714	4428.402

Vide Diccionario Universel de Historia y de Geografia, article *Medidas y Pesas*, and authorities cited in opinion.

CARR *v.* UNITED STATES.

1. Where the city of San Francisco, prior to the adoption of the Van Ness ordinance, made a conveyance of certain lots within the city to the United States, and another party sets up a claim to them, under the ordinance, — *Held*, that the conveyance barred the claim.
2. The United States filed a bill to quiet the title to certain lots in its possession in San Francisco; the defendant set up, by way of estoppel, judgments in ejectment rendered by the State courts at the suit of his grantor, against officers of the government then in possession as its agents, in whose behalf the district attorney, and additional counsel employed by the Secretary of the Treasury, appeared. The title was contested on the trial. *Held*, that these facts constitute no estoppel against the government, although, in California, a judgment in ejectment is, in ordinary cases, an estoppel against the tenant in possession, and the landlord who had notice of the suit.
3. The United States cannot be estopped by proceedings against its tenants or agents; nor be sued without its consent, given by act of Congress.
4. Without such an act, no direct proceedings will lie at the suit of an individual against the United States or its property; and its officer cannot waive its privilege in this respect, or lawfully consent that such a suit may be prosecuted so as to bind it.
5. The United States can only hold possession of its property by means of its officers or agents; and to allow them to be dispossessed by suit would enable parties always to compel it to litigate its rights. Therefore, when the pleadings or the proofs disclose that its possession is assailed, the jurisdiction of the court ought to cease.
6. The cases in which public property may be subjected to claims against it are those in which it is, by the act of the government, in juridical possession, or has become so without violating the possession of the government, and the latter seeks the aid of the court to establish or reclaim its rights therein. In such cases it is equitable that the prior rights of others to the same property should be adjudicated and allowed.
7. *The Siren* (7 Wall. 152) and *The Davis* (10 id. 15) cited and approved.

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

The facts are stated in the opinion of the court.

Mr. William Matthews for the appellant.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case arises upon a bill to quiet title, filed by the United States against the appellant, Carr, and various other persons, upon which a decree was rendered by the court below in favor of

the plaintiff. Carr appealed from this decree. The controversy relates to certain lands at San Francisco, being two lots, each fifty varas square, on Rincon Point, which are claimed by the government as having, with other adjoining lands, been set apart and reserved for public use in 1847, and as having been conveyed to the United States by the city of San Francisco in 1852. The appellant claims the lots in question under one Thomas White, alleging that said White occupied the same in 1849, and that he and his grantees continued to occupy the same until June, 1855, when the Van Ness ordinance was passed.

It is conceded that the premises in question were once pueblo lands, belonging to the municipality of San Francisco; but as such lands, until conveyed to private parties, were subject to the public uses of the government, both before and after the conquest of the country by the United States, it is evident that the latter had the undoubted right to make such appropriation thereof for public use as it might see fit. It is denied, however, that any such appropriation was ever made by the proper authority. It appears from the pleadings and evidence in the case, that from the first occupation of San Francisco by the United States, in 1847, the military authorities of the government set apart Rincon Point (including the premises in question) for the use of the government; but that after the discovery of gold, in 1849, the officers had much ado to keep them clear of trespassers, who entered upon, and endeavored to appropriate the same. In November, 1849, a lease of this tract, with others, was given by the officer in command at San Francisco to one Thomas Shillaber, apparently for the purpose of keeping possession on behalf of the government. This lease was approved by the Secretary of the Interior. About 1852, a marine hospital was built by the government on the southeast half of the block on Rincon Point, bounded by Folsom, Harrison, Spear, and Main Streets. The whole block was 550 feet in length from Harrison to Folsom Street, and 275 feet in width from Main to Spear Street. The southeast half was 275 feet square, forming four lots, each fifty varas, or 137½ feet, square, numbered 1, 2, 3, and 4. Numbers 1 and 2 adjoined Harrison Street, 3 and 4 adjoined 1 and 2. Lots 3 and 4 are the premises in controversy.

The hospital building was actually constructed on lots 1 and 2, standing within four or five feet of lots 3 and 4; and the latter were occupied by buildings or for yard room, as accessory to the hospital.

As before stated, however, different parties attempted to possess themselves of portions of the property; and amongst others, White, under whom the appellant claims, made such an attempt in 1849, in reference to the whole block which includes the lots in question, but was ejected, as appears by the orders and correspondence set out in the complaint.

The consequence of White's attempt was that adverse claims to the property under him were afterwards preferred from time to time. For the purpose of quieting these claims, when the hospital was being erected, a conveyance to the government was procured from the city authorities. On the 10th of December, 1852, the common council of the city passed a resolution that the mayor be directed to convey to the United States all its right, title, and interest to six fifty-vara lots, bounded on the east by Spear Street, on the south by Harrison Street, on the west by Front Street, and on the north by the beach; which description includes the four lots above referred to. Such a conveyance was accordingly made by the mayor, by deed dated the 11th of December, 1852; and from thencefor ward the United States claimed the property in question, as well by virtue of the said deed as by right of original appropriation for public uses.

The appellant, as before stated, claims the property by virtue of the Van Ness ordinance, passed June 20, 1855, by which, amongst other things, the city of San Francisco did relinquish and grant all the right and claim of the city to the lands within the corporate limits to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance in the common council.

Now, it is too evident to require discussion that the city of San Francisco could not, in 1855, make a valid grant of property which it had already granted in 1852; and which the grantee (in this case the United States) constantly claimed as

part and parcel of premises which were in its undoubted possession. The weight of the evidence in the case is, that the government was in actual possession of lots 3 and 4 as appendant to the hospital, from 1852 to the passage of the ordinance. This would bring it within the terms of the ordinance itself. But we do not deem this material. It had a clear title from the city before, even if the action of the military authorities in 1847 and 1849 was not sufficient to effect an appropriation for public uses.

But the appellant relies on certain judgments rendered in the State courts in actions brought against the agents of the government having possession of the lands in question, which judgments he contends estop the government from claiming any title therein.

The first of these actions was an action for forcible entry and detainer brought in a justice's court in December, 1857, by one Edward Barry against one McDuffie and one Palmer, for ejecting him (Barry) from lot No. 4, which lies on Main Street. The defendants justified under an order of President Pierce, requiring the marshal of the district of California to remove all persons trespassing on said lot. The county court, to which the cause was appealed, found for the plaintiff, and reinstated him in the possession. The only question made in the case was whether the justification was sufficient for ousting a person who was in peaceable possession. This judgment would not have been decisive upon the title, even if the defendants themselves had been the true owners of the land, and had claimed to eject the plaintiff by virtue of said ownership.

The next action was an ejectment brought in the State District Court in February, 1865, by one Wakeman and others (under whom the appellant claims title), against one Hastings and others, to recover possession of the same lot No. 4. The defendants, besides the general issue, pleaded that the premises were the freehold of the United States, and that they, as its officers and employés, and by its authority, entered, &c. The question of title was gone into, and decided against the defendants. A similar action of ejectment was brought in the same court in April, 1865, by one Volney Cushing (under whom the

appellant also claims), against the said Hastings and others, to recover possession of the lot numbered 3, situated on Spear Street. The defendants pleaded the general issue and the Statute of Limitations. The title was also contested in this case, and the judgment was for the plaintiff.

It is proved that the person who was district attorney of the United States for the district of California at the time when said actions were brought and tried, appeared as attorney for the defendants therein; and that Nathaniel Bennett, Esq., attended the trial of one of said causes as counsel for the defendants, being employed and paid by the Secretary of the Treasury of the United States; and, not being able to attend the trial of the other cause, he procured another person to attend in his place.

The appellant contends that this was sufficient to make the United States a virtual party to said actions, and to conclude them by the judgment therein; that by the law of California a judgment in ejectment is an estoppel; and that where a tenant, or other person in privity with the landlord, is sued, and notifies the landlord to defend, the landlord is bound by the judgment pronounced in the action; and to this point the counsel of the appellant cited *Douglas* v. *Fulda*, 45 Cal. 592, *Russell* v. *Mallon*, 38 id. 259; and *Valentine* v. *Mahoney*, 37 id. 389, as well as various cases decided in other States.

Whilst we concede that this may be the law of California as it regards private citizens who are landlords, we are not satisfied that the same law can be applied to the government of the United States. We consider it to be a fundamental principle that the government cannot be sued except by its own consent; and certainly no State can pass a law, which would have any validity, for making the government suable in its courts. It is conceded in *The Siren* (7 Wall. 152) and in *The Davis* (10 id. 15), that without an act of Congress no direct proceeding can be instituted against the government or its property. And in the latter case it is justly observed that "the possession of the government can only exist through its officers; using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with actual possession." If a proceeding would lie against the officers as

individuals in the case of a marine hospital, it might be instituted with equal facility and right in reference to a post-office or a custom-house, a prison or a fortification.

In some cases (perhaps it was so in the present case), it might not be apparent until after suit brought that the possession attempted to be assailed was that of the government; but when this is made apparent by the pleadings, or the proofs, the jurisdiction of the court ought to cease. Otherwise, the government could always be compelled to come into court and litigate with private parties in defence of its property.

It may be contended that the United States consented to have its title determined in these cases, and that such consent was manifested by the employment of the district attorney and additional counsel to aid in the defence. But we do not think that any such inference can be legally deduced from the action of the Secretary of the Treasury. He may have deemed it prudent to assist the officers who were sued, without intending to waive any of the rights of the government. And, in fact, he had no authority to waive those rights. In England it is usual, in the admiralty courts, in proceedings *in rem*, when it is made to appear that property of the government ought, in justice, to contribute to a general average, or to salvage, for the proper officer of the government to consent in court that it may take jurisdiction of the matter. As stated by this court in *The Davis* (*supra*), "this consent is given by authority of the king, who thus submits to be sued in his own courts. The liberal exercise of this authority [there] removes the difficulty presented here, where no power to do this exists in any officer of the government, and prevents any apprehension of gross injustice in such cases in England."

The cases like *The Siren* and *The Davis*, already referred to, and many others therein cited, in which the proceeds of government property, incidentally brought into the admiralty, have been subjected to the liens of claimants against the same, stand upon the principle that when the government itself seeks its rights at the hands of the court, equity requires that the rights of other parties interested in the subject-matter should be protected. The "Siren" was brought into the port of Boston as prize, was libelled, condemned, and sold, and the proceeds paid

into court. In distributing these proceeds amongst those who had claims against the vessel, an allowance was awarded for damages to the owner of another vessel which had been sunk by collision with the "Siren" during her voyage subsequent to the capture. It was held that, inasmuch as the United States had resorted to the aid of the court to procure the condemnation of the "Siren," and had thus placed her proceeds in the course of judicial administration, any proper claims against the vessel itself, prior to that of the government, might well be satisfied out of such proceeds. At the same time, it was conceded that neither the government nor its property can be subjected to direct legal proceedings without its consent; and that whoso ever would institute such proceedings must bring his case within the authority of some act of Congress. 7 Wall. 154. The "Davis" and her cargo were seized for salvage services. Part of the cargo was cotton belonging to the United States, but not in its actual possession, it being in the possession of the master of the ship under a contract of affreightment. The government appeared as claimant; and it was held that the cotton, like other cargo, was justly liable to pay its proportion of the salvage services; the court, at the same time, as before stated, holding that even for salvage services the property of the government could not be taken out of its own possession by any direct proceeding.

Without discussing the matter further, we are clearly of opinion that the judgments in the cases relied on by the appellant constitute no estoppel against the United States. And being of opinion that the title of the United States to the premises in question is undoubted, our conclusion is that the decree of the Circuit Court must be affirmed; and it is

So ordered.

THE "ABBOTSFORD."

1. Under the act of Feb. 16, 1875, which took effect May 1 of that year, entitled "An Act to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes" (18 Stat. 315), the finding of facts by the Circuit Court in admiralty cases is conclusive; and only rulings upon questions of law can be reviewed by bill of exceptions.
2. Where words in an act limiting the reviewing power of this court, in cases where the facts have been found below, "to a determination of the questions of law arising upon the record and to the rulings of the court excepted to," have acquired, through judicial interpretation, a definite meaning, by which that power, on exceptions, is confined to questions of law, they will, when found in a subsequent act, be presumed to be used in the same sense, unless a contrary intention appears from the act.
3. Two schooners were sailing down the Delaware River, when a steamer proceeding in the same direction, at the rate of eight or nine miles an hour, was, in daytime, approaching near enough to them to render it necessary to make calculations to keep out of their way. They were in parallel courses, not far apart, beating upon their starboard tack, and nearing the Jersey bank. Instead of going outside of them, she, without seasonably slackening her speed, attempted to pass between them, and came into collision with and sunk the one nearer the bank, as the latter, having run her starboard tack and come about on her port tack, tacked again before she was under full headway to avoid colliding with the other schooner, which was still properly on her starboard tack. *Held*, that the steamer was liable.

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.

Mr. Morton P. Henry for the "Abbotsford."

Mr. Henry Flanders and *Mr. James B. Roney*, *contra.*

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

This is an appeal from a decree of the Circuit Court for the Eastern District of Pennsylvania, in an admiralty cause on the instance side of the court, rendered April 13, 1876. The case was up for consideration once before at the present term, and remanded for a finding of the facts and the conclusions of law required by the "act to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes" (18 Stat. 315), which went into effect May 1, 1875. The Circuit Court has since complied with the requirements

of that statute, and made its return, stating the facts and the conclusions of law separately. Accompanying this return is a bill of exceptions, which is now a part of the record. This bill of exceptions shows that each of the parties presented to the court requests for findings of fact upon the evidence, and the exceptions are to the effect that the court neglected to find certain facts claimed by the appellant to have been proved. The evidence relied upon to prove what was claimed and not found is set out at length.

The first question to be determined is as to the operation and effect of the bill of exceptions. The act of 1875 provides "that the circuit courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance side of the court, shall find the facts and conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately. And in finding the facts, as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue, and subject to such general rules in the premises as shall be made and provided from time to time, impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law. And the finding of such jury, unless set aside for lawful cause, shall be entered of record, and stand as the finding of the court, upon which judgment shall be entered according to law. The review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the Circuit Court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law."

Under this statute we are clearly of the opinion that the finding of facts in the Circuit Court is conclusive, and that the only rulings which can be presented for review here by bill of exceptions are those made upon questions of law. Such has been the construction given by this court to statutes of a similar character in a long line of decisions, commencing soon after the court was organized. Thus, sect. 19 of the Judiciary Act of 1789 provided that it should "be the duty of the

Circuit Court, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree fully to appear upon the record, either from the pleadings and decree itself, or a state of the case agreed by the parties or their counsel, or if they disagree, by a stating of the case by the court." 1 Stat. 83. In *Wiscart* v. *Dauchy* (3 Dall. 324), decided in 1796, Chief Justice Ellsworth, speaking for the court in reference to the proper practice under this act, said: "If causes of equity or admiralty jurisdiction are removed hither, accompanied with a statement of facts, but without the evidence, it is well; and the statement is conclusive as to all the facts which it contains. This is unanimously the opinion of the court. If such causes are removed with a statement of the facts, and also with the evidence, still the statement is conclusive as to all the facts contained in it. This is the opinion of the court, but not unanimously." Soon afterwards the act of 1803 (2 Stat. 244), allowing appeals, was passed, which directed that, upon an appeal, "a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause," should be transmitted to this court, and consequently the question did not again come up for consideration until after the "act to regulate the mode of practice in the courts of the United States for the district of Louisiana" (4 Stat. 62), passed May 26, 1824. Under the Louisiana practice, which was adopted by this act for the courts of the United States in that district, trials were allowed by the court without a jury, and almost immediately questions arose as to the manner in which such cases should be brought to this court for review by writ of error. There was much difficulty in reaching a settlement of the practice, but in *United States* v. *King* (7 How. 845), it was decided unanimously "that the decision of the Circuit Court upon the questions of fact must, like the finding of a jury, be regarded as conclusive; that the writ of error can bring up nothing but questions of law." Following this was the case of *Bond* v. *Brown* (12 id. 256), where Mr. Chief Justice Taney said: "And whether the fact was rightly decided or not according to the evidence is not open to inquiry in this court. The decision of the court below in this respect is as conclusive as the verdict of a jury when the case

is brought here by writ of error." Other cases to the same effect may be found. Such is now the settled law with reference to trials of issues of fact in Louisiana, when a review is sought in this court by writ of error.

In 1865 an act of Congress was passed (13 Stat. 501), which is as follows: —

"That issues of fact in civil cases in any circuit court of the United States may be tried and determined by the court without the intervention of a jury, whenever the parties, or their attorneys of record, file a stipulation in writing with the clerk waiving a jury. The finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury. The rulings of the court in the cause in the progress of the trial, when excepted to at the time, may be reviewed by the Supreme Court of the United States upon a writ of error, or upon appeal, provided the rulings be duly presented by bill of exceptions. When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment."

This statute has been reproduced in sects. 649 and 700 of the Revised Statutes, and under it we have universally held that a bill of exceptions cannot be used to bring up the evidence for a review of the findings of fact. The facts, as found and stated by the court below, are conclusive. The case stands here precisely the same as though they had been found by the verdict of a jury. *Norris* v. *Jackson*, 9 Wall. 125; *Basset* v. *United States*, id. 38; *Copelin* v. *Insurance Company*, id. 461; *Coddington* v. *Richardson*, 10 id. 516; *Miller* v. *Insurance Company*, 12 id. 295; *Insurance Company* v. *Folsom*, 18 id. 249; *Insurance Company* v. *Sea*, 21 id. 158; *Jennisons* v. *Leonard*, id. 302.

At the December Term, 1865, under the authority we have to prescribe rules by which appeals may be taken from the Court of Claims to this court, we provided that such appeals should be had on the transcript of the record, &c., below, and "a finding of the facts in the case by the said Court of Claims, and the conclusions of law on said facts, on which the court founds its judgment or decree. The finding of facts and conclusions of law to be stated separately, and certified to this court as part

of the record. The facts so found are to be the ultimate facts or propositions which the evidence shall establish, in the nature of a special verdict, and not the evidence on which these ultimate facts are founded." 3 Wall. vii. This rule was changed somewhat in form but not in substance, Oct. 12, 1873. 17 id. xvii. In the case of *De Groot* v. *United States* (5 id. 419), decided in 1866, we took occasion to say that the object of this rule was "to present in a simple form the questions of law which arose in the progress of the case, and which were decided adversely to the appellant. Only such statement of facts is intended to be brought to this court as may be necessary to enable it to decide upon the correctness of the propositions of law ruled by the Court of Claims, and that is to be presented in the shape of facts found by that court, to be established by the evidence, in such form as to raise the legal question decided by the court. It should not include the evidence in detail." This practice has always been strictly adhered to.

From this it is apparent that when the act of 1875 was passed, words in a statute limiting the power of this court in the review of cases where the facts had been found below "to a determination of the questions of law arising upon the record and to the rulings of the court excepted to," had acquired, through judicial interpretation, a well-understood legislative meaning, and that they confined our jurisdiction to the re-examination of questions of law alone. Having that meaning, therefore, it is to be presumed they were used in that sense in this instance, unless the contrary is in some way made to appear. So far from there being any manifestation of such a contrary intention, the reverse is very clearly indicated. Thus, the rulings of the court on which we are authorized to pass are such as may be presented by a bill of exceptions, prepared as in actions at law. It is an elementary principle in the common law that a bill of exceptions "is founded on a matter of law or a point of law arising out of a fact not denied." 1 Saund. Pl and Evid. 640. "The only modes known to the common law to re-examine the facts are the granting of a new trial by the court where the issue is tried, or to which the record is properly returnable, or the award of a *venire de novo* by an appellate court

for some error of law which intervened in the proceedings." *Parsons* v. *Bedford*, 3 Pet. 448. By the Constitution, Amend. VII., no fact tried by a jury can be otherwise re-examined in any court of the United States than according to the rules of the common law. It follows that had this case been tried by a jury it could not be re-examined on the facts in this court, because under the rules of the common law a bill of exceptions could not be used for that purpose. The decision of a court denying a new trial because the verdict of a jury is against the evidence is not reviewable upon error in the courts of the United States. *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall. 592. Since, therefore, the bill of exceptions in this class of cases is to be taken as in actions at law, it follows most unmistakably that only such rulings are to be presented by it for our consideration as could properly be put into a bill of exceptions on the trial of an action at law.

This intention is still further manifested in that part of the act which provides for a trial by jury. The trial is to be had as at common law, and the finding of the jury on such a trial, unless set aside for lawful cause, is to stand as the finding of the court. No distinction is made in respect to our power of review between cases tried by a jury and those by the court; and if the trial is had by a jury, it is clear that the verdict was intended to be conclusive upon us.

Taking the whole statute together, we think it clearly manifests an intention on the part of Congress to relieve us from the great labor of weighing and considering the mass of conflicting evidence which usually filled the records in this class of cases. There is no real injustice in this. Parties to suits in admiralty have now the right to two trials on questions of fact, — once in the District Court, and again on appeal in the Circuit Court. There seems no good reason why they should be entitled to a third trial here. At law there is but one trial, except by leave of the court in the exercise of its supervisory power over verdicts, and in equity only one before an appeal to this court.

Upon the facts as found the decree of the Circuit Court was clearly right. The schooners "Rosanna Rose" and "Gov. Burton" were beating down the Delaware River under sail, and the

"Abbotsford" was following them under steam at half-speed by her engine, which, with the tide, gave her a speed of eight or nine miles an hour. When the steamer had approached near enough to the schooners to render it necessary to make calculations to keep out of their way, the schooners were sailing on parallel courses, not far apart, on their starboard tacks, and nearing the Jersey side of the river. The "Rose" was to the eastward of the "Burton," and having run out her starboard tack by going as near as she could in safety to what is known as the Red Bank Shoal, she came about on her port tack. While on that tack, and before she had got under full headway, she was compelled to tack again to avoid a collision with the "Burton," still on the starboard tack and having the right of way. While engaged in this evolution, and being "in stays," she was run into by the steamer. The court finds that the tack of the "Rose" on the shoal was entirely proper, both for her own safety and in regard to the "Burton" and the steamer, as they were far enough away to allow her to do so with perfect safety. There was plenty of room for the steamer to pass to the westward of both the vessels, and if she had ported her wheel a point or half-point at any time within a distance of two miles, a collision would have been impossible. As it was, she undertook to pass between the schooners without any necessity for so doing, when it must have been apparent to any skilful navigator that the "Rose" was nearing the shoal, and would be compelled to come about and cross the bow of the steamer before she could get by on the course she was steering. In addition to this, there was the complication growing out of the proximity of the "Burton," entitled to keep on her starboard tack after the "Rose" must come about. Notwithstanding all these circumstances, the steamer held her course and speed until she had approached so close to the vessel that there was neither room nor time to overcome her momentum when she became involved in the necessary and proper movements of the "Rose" to keep out of the way of the "Burton." A prudent navigator would have avoided this danger by a change of course or a slackening of speed long before. The collision occurred between nine and ten o'clock in the morning, and there is no pretence that both schooners were not in full view from the steamer for a suffi-

cient time to enable her to make the necessary movement to keep out of their way. The collision was due alone to the fact that the steamer undertook to pass between the schooners when she should have gone outside of them.

Decree affirmed.

UNITED STATES v. BENECKE.

1. An indictment against A., found Sept. 11, 1875, charged that in March, 1868, he, as agent and attorney of B. and C., did withhold, and continued thereafter to withhold from them, certain money which he, as their agent and attorney, had received from the United States by the collection of their respective claims for "pay and bounty" and "arrears of pay and bounty." *Held*, 1. That the acts charged are not an offence under sect. 13 of the act of July 4, 1864 (13 Stat. 389). 2. That sect. 31 of the act of March 3, 1873 (17 id. 575, Rev. Stat., sect. 5485), was not intended to apply to a case where the money had been withheld before its passage.
2. The word "claimant" in said sect. 13 means a person who, under the act of July 4, 1864, has a claim before the pension office.

CERTIFICATE of division in opinion between the judges of the Circuit Court of the United States for the Western District of Missouri.

The facts are stated in the opinion of the court.

Mr. Assistant Attorney-General Smith for the United States.
Mr. Louis Benecke, in propria persona, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The defendant, Louis Benecke, was indicted in the District Court for the Western District of Missouri, and the sixth and tenth counts of the indictment charged him with unlawfully withholding arrearages of pay and bounty from persons for whom, as agent and attorney, he had collected the same from the United States.

In the one case, the date was alleged to be the sixteenth day of March, 1868, and in the other the 17th of the same month and in both continuing thereafter.

On these counts the defendant was found guilty in the Circuit Court; and on motion for a new trial and arrest of

judgment the judges of that court certified six questions of law to this court on which they differed, as applicable to the case.

The first of these is thus stated: —

Is wrongfully withholding back pay or bounty by an agent or attorney from a claimant an offence under sect. 13 of the act of July 4, 1864 (13 Stat. 389), or under sect. 31 of the act of March 3, 1873 (17 id. 575), sect. 5485, Rev. Stat.?

The act of 1864 is entitled "An Act supplementary to an act entitled 'An Act granting pensions, approved July 14, 1862.'" It consists of fifteen sections, the twelfth of which is devoted to prescribing specifically the compensation of agents and attorneys for procuring the allowance of pensions and bounty, or other claims, under the act; and the thirteenth section, to prescribing a punishment for violation of the twelfth. It is as follows: —

"SECT. 13. And be it further enacted, that any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for his services under this act than is prescribed in the preceding section of this act, or who shall contract or agree to prosecute any claim for a pension, bounty, or other allowance under this act, on the condition that he shall receive a per centum upon [, or] any portion of the amount of such claim, or who shall wrongfully withhold from a pensioner or other claimant the whole or any part of the pension or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall, for every such offence, be fined not exceeding $300, or imprisoned at hard labor not exceeding two years, or both, according to the circumstances and aggravations of the offence."

There is here no provision in regard to services for procuring pay, nor any provision in the act regarding it. The pensions to soldiers, their widows and orphans, is not pay, and the provisions for paying them are not under that act. Arrearages of pay were not collected under any pension law, or through the pension office. What is meant by bounty here is said in the briefs to be also passed upon and paid in another bureau. The indictment is perhaps on this point a little obscure. In the sixth count the defendant is charged as guilty of with-

holding *arrearages* of *pay and bounty*, and in the tenth with withholding pay and bounty.

Since the act in which this offence is described makes no provision for pay or for bounty, and the fees regulated and the acts forbidden are those done in regard *to that act*, it seems a reasonable construction of the penal part of the statute that withholding *pay* and *bounty*, which are not mentioned there, are not intended to be punished by the act.

It is not in reference to pay that Congress was legislating. The persons described who may be guilty are those prosecuting claims for *pensions* or bounty before the pension office. The offence described is "withholding from a pensioner or other claimant the whole or any part of the claim allowed and due said pensioner or claimant," and it is but a just limitation of the word "claimant" that he should be a claimant under that act, a claimant before the pension bureau. This part of the section is to be taken in connection with the taking of illegal fees, which manifestly refers to cases before the pension office, and which are described and punished in the same sentence and by the same penalty. The word "bounty" is not used in this sentence, nor the word "pay," but the argument is that the word "claim" includes them. We think this would be an unjustifiable extension of a penal statute beyond its terms and against its purpose.

The first question is, therefore, to be answered in the negative, and we need not inquire if the statute was repealed, since the offence described in the indictment is not within it.

The offences in this indictment are said to have been committed in 1868. The law then in existence did not make the act charged a crime. It is argued by counsel that withholding the money due is a continuous offence, and if the same money was withheld after the act of 1873 did make such withholding punishable, the indictment is good under that act. But without deciding here how far the withholding the money under a law which made that an offence when the wrongful withholding began, can be held to be a continuous offence, we are of opinion that it would be a forced construction of the act to hold that it was intended to apply to a case where the money had already been withheld five years when the statute was passed. The

party might very well be criminally wrong in failing to pay when he received it; but Congress could hardly be supposed to intend to punish as a crime his failure to pay afterwards what was in law but a debt created five years before.

This answers the fifth question, namely, "Can the defendant be punished under sect. 31 of the act of March 3, 1873?' These answers also render unnecessary a reply to the others.

It is, therefore, ordered to be certified to the Circuit Court that the first and fifth questions are answered in the negative, and that answers to the others are thereby rendered unnecessary.

So ordered

UNITED STATES *v.* IRVINE.

An indictment against A., found Sept. 15, 1875, charged that on Dec. 24, 1870, B. demanded of him the sum of $525, which he as her agent and attorney had collected and received from the United States on account of a pension awarded to her, and that he then, and continuously thereafter, wrongfully withheld it from her. *Held*, 1. That the indictment was barred by sect 1044 of the Revised Statutes. 2. That the crime charged was not a continuous one to the time of finding the indictment.

CERTIFICATE of division in opinion between the judges of the Circuit Court of the United States for the Western District of Missouri.

The facts are stated in the opinion of the court.

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

No counsel appeared for Irvine.

MR. JUSTICE MILLER delivered the opinion of the court.

The defendant, Clark Irvine, is charged in the indictment in this case, that on the twenty-fourth day of December, 1870, as the agent and attorney of Mrs. Berkely, he wrongfully withheld from her the amount of her pension, to wit, $525, allowed her under the pension laws, and continuously withheld it until the time of finding the indictment in September, 1875.

The indictment comes within the terms of the act of 1864, which we have considered in *United States* v. *Benecke*, *supra*, p. 447.

But the judges have certified to us, among other questions, whether the act of July 8, 1870, does not repeal the thirteenth section of the act of 1864.

By the third section of the later act, pensions are forbidden to be paid to attorneys and agents any more, and are required to be paid directly to the pensioner. It is not easy to see, therefore, how the attorney is to get possession of the money, and how he can withhold it, or why there should be any longer a law for punishing him for such withholding.

The statute revises the act of 1864 as regards fees of such attorneys, and increases the punishment for exacting more fees than the law allows, but totally omits any penalty for withholding. Sects. 7 and 8, act of July 8, 1870, 16 Stat. 195.

It is argued that this omission was intentional, for the reason above stated; and as the statute repeals all acts in conflict with its provisions, it was intended to repeal the penalty for withholding prescribed by the act of 1864. The argument is not without force; but without deciding that point, we prefer to answer another question, which will decide the present case.

The defendant pleaded the Statute of Limitations of two years as a bar to the indictment, and the court, having refused him the benefit of the bar on trial, now certify other questions on that subject, namely: 2. Is the crime a continuous one down to the time of finding the indictment? 3. Does the Statute of Limitations constitute a bar to this prosecution, the indictment having been found Sept. 15, 1875?

It is not very easy to define for all purposes what constitutes under the statute a withholding of the pension. It cannot commence, of course, until the money is received by the party charged. Nor can it commence then, unless there is a duty of immediate payment to the pensioner. A reasonable time must certainly be allowed for this. What that is must depend in each case on its own circumstances. A refusal to pay on demand without just excuse would constitute withholding at once. Such delay as would show an intention to evade payment would constitute a withholding. If there is nothing but

careless delay, the party might hold the money for some time without incurring this severe penalty of two years imprisonment. In short, there must be such unreasonable delay, some refusal to pay on demand, or some such intent to keep the money wrongfully from the pensioner, as would constitute an unlawful withholding in the meaning of the law.

But whatever this may be which constitutes the criminal act of withholding, it is a thing which must be capable of proof to a jury, and which, when it once exists, renders the party liable to indictment.

There is in this but one offence. When it is committed, the party is guilty and is subject to criminal prosecution, and from that time, also, the Statute of Limitations applicable to the offence begins to run.

It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead; but the fact of his receipt of the money is matter of record in the pension office.

He pleads the statute of two years, a statute which was made for such a case as this; but the reply is, You received the money. You have continued to withhold it these twenty years; every year, every month, every day, was a withholding, within the meaning of the statute.

We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution.

In the case before us, the judges certify that it appeared on the trial that the pensioner demanded her money of defendant on the 24th of December, 1870, and he refused to pay her, and had never paid her up to the finding of the indictment, Sept. 15, 1875; that he requested the judge to instruct the jury to acquit him, because the offence was barred by the Statute of Limitations, which the court refused to do.

We think the statute (Rev. Stat., sect. 1044) was a bar; and we say in answer to the second question, that the crime, as shown in this case, was not a continuous one to the time of the

indictment; and to the third, that the Statute of Limitations constitutes a bar to this prosecution.

The answers to these two questions dispose of the case, and will be certified to the Circuit Court, and it is

So ordered.

JENNISON *v.* KIRK.

1. The ninth section of the act of Congress of July 26, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes," enacted, "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed: *Provided, however,* that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." *Held,* 1. That this section only confirmed to the owners of water-rights and of ditches and canals on the public lands of the United States the same rights which they held under the local customs, laws, and decisions of the courts, prior to its passage. 2. That the proviso conferred no additional rights upon the owners of ditches subsequently constructed, but simply rendered them liable to parties on the public domain whose possessions might be injured by such construction.
2. The origin and general character of the customary law of miners stated and explained.
3. By that law, the owner of a mining claim and the owner of a water-right in California hold their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed.
4. By that law, a person cannot construct a ditch to convey water across the mining claim of another, taken up and worked according to that law before the right of way was acquired by the ditch owner, so as to prevent the further working of the claim in the usual manner in which such claims are worked, nor so as to cut off the use of water previously appropriated by the miner for working the claim, or for other beneficial purposes.
5. Accordingly, where the owner of a mining claim worked by the method known as "the hydraulic process," cut and washed away a portion of a ditch so as to let out the water flowing in it, the ditch having been so con-

structed across the claim previously acquired as to prevent it from being further worked by that method, and to prevent the use of water previously appropriated by him, — *Held*, that the cutting and washing away of the ditch, it having been done in order that the claim might be worked and the water used as before, was not an injury for which damages could be recovered.

ERROR to the Supreme Court of California.

The facts are stated in the opinion of the court.

Mr. B. F. Myres for the plaintiff in error.

No one appearing for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

In 1873, the plaintiff's testator constructed a ditch or canal in Placer County, California, to convey the waters of a cañon and of tributary and intermediate streams to a mining locality known as Georgia Hill, distant about seventeen miles, for mining, milling, and agricultural purposes, and for sale. The ditch was completed in December of that year, and immediately thereafter the waters of the cañon were turned into it. The ditch had a capacity to carry a thousand inches of water, and it is alleged that during the rainy season of the year in California, which extends from about the 1st of November to the 1st of April, the cañon, tributaries, and intermediate streams would supply that quantity, and during the dry season not less than one hundred inches. The intention of the testator, as declared on taking the initiatory steps for their appropriation, was to divert two thousand inches of the waters, by means of a flume and ditch.

In its course to Georgia Hill, the ditch crossed a gulch or cañon in the mountains known as Fulweiler's Gulch, the waters of which had been appropriated some years before by the defendant, who had constructed ditches to receive and convey them to a reservoir, to be used as needed. One of these ditches in the gulch was intersected by the ditch of the testator, and the waters which otherwise would have flowed in it were diverted to his ditch. The defendant thereupon repaired and reopened his own ditch, turning into it the waters which had previously flowed in it, and in so doing cut and washed away a portion of the ditch of the testator, as to let out the waters

brought down from the cañon above and the intermediate streams. It is for alleged damages thus caused to the testator, and to restrain the continuance of the alleged injury to his ditch, and any interference with its use, that the present action was brought.

The defendant not only justified the cutting of the testator's ditch in the manner stated, because necessary for the repair and reopening of his own ditch, and to retain the waters of the gulch previously appropriated and used by him, but on the further ground that the ditch of the testator traversed mining claims owned many years before by him, or those through whom he derived his interest, and would prevent their being successfully worked.

It appears from the answer, which the court finds to be correct in this particular, that for many years prior to this action the defendant, or his grantors and predecessors in interest, had been in the possession of a portion of Fulweiler's Gulch, extending from a point about twelve hundred feet below the crossing of the testator's ditch to a point about twelve hundred feet above it, including the bed of the gulch and fifty feet of its banks, on each side; that during this period the ground was continuously held and worked for mining purposes, and as a mining claim, in accordance with the usages, customs, and laws of miners in force in the district; that in working the claim and extracting the gold the method employed was what is termed "the hydraulic process," by which a large volume of water is thrown with great force through a pipe or hose upon the sides of the hills, and the gold-bearing earth and gravel are washed down, and the gold so loosened that it can be readily separated; and that the ditch of the testator traversed the immediate front and margin of this gold-bearing earth and gravel, rendering the same inaccessible from the outlets of the gulch, down which they would be washed, thus practically destroying, if allowed to remain, the working of the mining ground.

On the argument, it was admitted that the defendant's right of way for his ditch was superior to the testator's right of way for the one owned by him, being earlier in construction, and the waters of the gulch being first appropriated; and, therefore, that the duty rested upon the testator, and since his death

upon his executor, to so adjust the crossings of the ditches as not to interfere with the full use and enjoyment, by the defendant, of his prior right. It was contended that such crossings had been so adjusted by the testator, but were destroyed by the defendant.

It was also admitted that the extension of the testator's ditch, at the place where it was constructed across the claim of the defendant, prevented the successful working of the claim; but as the land over which the ditch passed, and on which the claim is situated, is a portion of the public domain of the United States, it was contended that the right of way for the ditch was superior to the right to work the claim; and that such superior right was conferred by the ninth section of the act of Congress of July 26, 1866. That section enacted, —

"That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed: *Provided, however*, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." 14 Stat., 253.

There are some verbal changes in the section as re-enacted in the Revised Statutes, but none affecting its substance and meaning. Rev. Stat., sect. 2339.

The position of the plaintiff's counsel is, that of the two rights mentioned in this section, only the right to the use of water on the public lands, acquired by priority of possession, is dependent upon local customs, laws, and decisions of the courts; and that the right of way over such lands for the construction of ditches and canals is conferred absolutely upon those who have acquired the water-right, and is not subject in its enjoyment to the local customs, laws, and decisions. This position, we think, cannot be sustained. The object of the section was

to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands. The section is to be read in connection with other provisions of the act of which it is a part, and in the light of matters of public history relating to the mineral lands of the United States. The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and cañons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all contro-

versies, except as against the government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain for ever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through cañons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years — from 1848 to 1866 — the regulations and customs of miners, as enforced and moulded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Until 1866, no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. In that year the act, the ninth section of which we have quoted, was passed. In the first section it was declared that the mineral lands of the United States were free and open to exploration and occupation by citizens of the United States, and those who had declared their intention to become citizens, subject to such regulations as might be prescribed by law and the local customs or rules of

miners in the several mining districts, so far as the same were not in conflict with the laws of the United States. In other sections it provided for acquiring the title of the United States to claims in veins or lodes of quartz bearing gold, silver, cinnabar, or copper, the possessory right to which had been previously acquired under the customs and rules of miners. In no provision of the act was any intention manifested to interfere with the possessory rights previously acquired, or which might be afterwards acquired; the intention expressed was to secure them by a patent from the government.

The senator of Nevada, the author of the act, in advocating its passage in the Senate, spoke in high praise of the regulations and customs of miners, and portrayed in glowing language the wonderful results that had followed the system of free mining which had prevailed with the tacit consent of the government. The legislature of California, he said, had wisely declared that the rules and regulations of miners should be received in evidence in all controversies respecting mining claims, and, when not in conflict with the Constitution or laws of the State or of the United States, should govern their determination; and a series of wise judicial decisions had moulded these regulations and customs into "a comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes." The miner's law, he added, was a part of the miner's nature. He had made it, and he trusted it and obeyed it. He had given the honest toil of his life to discover wealth, which, when found, was protected by no higher law than that enacted by himself, under the implied sanction of a just and generous government. And the act proposed continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by Congress and to local rules. It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached. Cong. Globe, 1st Sess., 39th Cong., part iv., pp. 3225–3228.

These statements of the author of the act in advocating its

adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the act.

Whilst acknowledging the general wisdom of the regulations of miners, as sanctioned by the State and moulded by its courts, and seeking to give title to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining claims, the right of way of owners of ditches and canals across the claims, although then recognized by the local customs, laws, and decisions, would be thereby destroyed, unless secured by the act. And it was for the purpose of securing rights to water, and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners. The section purported in its first clause only to protect rights to the use of water for mining, manufacturing, or other beneficial purposes, acquired by priority of possession, when recognized by the local customs, laws, and decisions of the courts; and the second clause, declaring that the right of way for the construction of ditches and canals to carry water for those purposes "is acknowledged and confirmed," cannot be construed as conferring a right of way independent of such customary law, but only as acknowledging and confirming such right as that law gave. The proviso to the section conferred no additional rights upon the owners of ditches subsequently constructed: it simply rendered them liable to parties on the public domain whose possessions might be injured by such construction. In other words, the United States by the section said, that whenever rights to the use of water by priority of possession had become vested, and were recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them; and that the right of way for ditches and canals incident to such water-rights, being recognized in the same manner, should be "acknowledged and confirmed;"

but where ditches subsequently constructed injured by their construction the possessions of others on the public domain the owners of such ditches should be liable for the injuries sustained. Any other construction would be inconsistent with the general purpose of the act, which, as already stated, was to give the sanction of the government to possessory rights acquired under the local customs, laws, and decisions of the courts.

This view of the object and meaning of the ninth section was substantially taken by the Supreme Court of California in the present case; it was adopted at an early day by the Land Department of the government, and the subsequent legislation of Congress respecting the mineral lands is in harmony with it. Letter of Commissioner Wilson of Nov. 23, 1869; Copp's U. S. Mining Decisions, 24; Acts of Congress of July 9, 1870, and May 10, 1872, Rev. Stat., tit. 32, c. 6.

By the customary law of miners in California, as we understand it, the owner of a mining claim and the owner of a water-right enjoy their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed. In the present case, the plaintiff admits that it was incumbent upon the testator or himself to so adjust the crossing of the two ditches that the use of the testator's ditch should not interfere with the prior right of the defendant to the use of the water of the gulch; and it would seem that, so far as the flow of the water was concerned, this was done. Had there been nothing further in the case, the claim of the plaintiff would have been entitled to consideration. But there was much more in the case. The chief value of the water of the gulch was to enable the defendant to work his mining claim by the hydraulic process. The position of the testator's ditch prevented this working, and thus deprived him of this value of the water, and practically destroyed his mining claim. No system of law with which we are acquainted tolerates the use of one's property in this way so as to destroy the property of another. The cutting and washing away of a portion of the testator's ditch by the defendant, this having been done "in

the exercise, use, and enjoyment of his own water-rights, in the usual and in a reasonable manner," as found by the court, and in order that his claim might be worked as before, was not, therefore, an injury for which damages could be recovered.[1]

Judgment affirmed

[1] The customary law of miners, as stated in the opinion, is not applicable in California to controversies arising between them, or ditch owners, and occupants of the public lands for agricultural or grazing purposes. It has been the general policy of the State "to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner." *Tartar* v. *Spring Creek Co.*, 5 Cal. 398. But at an early day an exception was made to this policy in cases where the interests of agriculturists and of miners conflicted. By an act passed April 20, 1852, a right of action was given to any one settled upon the public lands for the purpose of cultivating or grazing against parties interfering with his premises, or injuring his lands where the same were designated by distinct boundaries, and did not exceed one hundred and sixty acres in extent; with a proviso, however, that if the lands contained mines of precious metals, the claim of the occupant should not preclude any persons desiring to do so from work ing the mines "as fully and unreservedly as they might or could do had no possession or claim been made for grazing or agricultural purposes." Stat. 1852, p. 158.

Under this act the Supreme Court of the State held that miners, for the pur pose simply of mining, could enter upon the land thus occupied, but that the act legalized what would otherwise have been a trespass, and could not be extended by implication to a class of cases not specially provided for. Accordingly, ditches constructed over lands thus held, without the consent of the occupant, though designed to convey water to mining localities for the purpose of mining, were held to be nuisances, and upon the complaint of the occupant were ordered to be abated. *Stoakes* v. *Barrett*, 5 Cal. 37; *McClinton* v. *Bryden*, id. 97; *Fitzgerald* v. *Urton*, id. 308; *Burge* v. *Underwood*, 6 id. 46; *Wermer* v. *Lowery*, 11 id. 104.

Since these decisions, there has been some legislation in the State, permitting water to be conveyed, upon certain conditions, across the lands of others. Such legislation, if limited to merely regulating the terms upon which possessory rights subsequently acquired on the public lands in the State may be enjoyed in the absence of title from the United States, may not be open to objection.

MINING COMPANY *v.* TARBET.

1. Under an act entitled "An Act granting the right of way to ditch and canal companies over the public lands, and for other purposes," approved July 26, 1866 (14 Stat. 251), as well as under that entitled "An Act to promote the development of the mining resources of the United States," approved May 10, 1872 (17 id. 91), the location of a mining claim upon a lode or vein of ore, should be made along the same lengthwise of the course of its apex at or near the surface. If otherwise laid, it will only secure so much of the lode or vein as it actually covers.
2. Each locator is entitled to follow the dip of the lode or vein to an indefinite depth, though it carries him beyond the side lines of the location; but this right is based on the hypothesis that they substantially correspond with the course of the lode or vein at the surface; and it is bounded at each end by the end lines of the location, crossing the lode or vein, and extended perpendicularly downwards, and indefinitely in their own direction.
3. A location laid crosswise of a lode or vein, so that its greatest length crosses the same instead of following the course thereof, will secure only so much of the vein as it actually crosses at the surface, and its side lines will become its end lines, for the purpose of defining the rights of the owners.
4. A locator working subterraneously into the dip of the vein belonging to another, who is in possession of his location, is a trespasser, and liable to an action for taking ore therefrom.

ERROR to the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. J. M. Woolworth* for the plaintiff in error, and by *Mr. Charles W. Bennett* for the defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an action in the nature of trespass *quare clausum fregit*, brought in the District Court of the Territory of Utah for the third district, by Alexander Tarbet, and continued by his assignee, Helen Tarbet, against the Flagstaff Silver Mining Company of Utah (limited), and other persons. The action having been dismissed as to the other persons, judgment was rendered for $45,000 damages upon the verdict of a jury against the company. The latter carried the case to the Supreme Court of the Territory, where the judgment was affirmed on the third day of June, 1878. The company thereupon sued out this writ of error.

The controversy relates to the working of a mine in Little

Cottonwood Mining District in the county of Salt Lake. The defendant in error claims to own, and to have been in possession of, a mining location on a lode called the Titus lode, the location including three claims, and extending six hundred feet westwardly from the discovery, with a width of two hundred feet, and including ten feet on the east side of the discovery belonging to the South Star mine. The plaintiff in error owned and had a patent for another mining location, called the Flagstaff mine, one hundred feet in width and two thousand six hundred feet in length, running in a northerly and southerly direction, and crossing the Titus claims near the west end thereof, and nearly at right angles therewith. In working from the Flagstaff mine the plaintiffs in error worked around subterraneously, to a point some three hundred feet to the east of their location, and on the north side of the Titus mine, and within about one hundred feet of the Titus location. It is for this working that the suit was brought; and the principal question is, whether the plaintiff in error had a right thus to work outside of its location on the east, and whether, in doing so, it interfered with the rights of the defendant in error.

It is conceded that both parties are working on the same lode or vein of ore. The Flagstaff discovery, to which the location of the plaintiff in error relates as its starting-point, is situated nearly due west from that of the South Star and Titus, and about five hundred and fifty feet therefrom. The lode crops out at the two points of discovery, but is not visible at intermediate points. These croppings, however, show that the direction or course of the apex of the vein, at or near the surface, is nearly east and west. The location of the Titus, claimed by the defendant in error, nearly corresponds with this surface course of the vein. The location of the Flagstaff, belonging to the plaintiff in error, crosses it nearly at right angles.

The principal difficulty in the case arises from the fact that the surface is not level, but rises up a mountain in going from the Titus discovery to the Flagstaff. The dip of the vein being northeasterly, it happens that, by following a level beneath the surface, the strike of the vein runs in a northwesterly direction, or about north 50° west. In other words, if by a process of abrasion the mountain could be ground down to a plain, the

strike of the vein would be northwest instead of west, as it now is on the surface; or, at least, as the evidence tended to show that it is. In that case, the location of the defendant in error would leave the vein to its right, and the location of the plaintiff in error would not reach it until several hundred feet to the north of the Flagstaff discovery.

Evidence having been given *pro* and *con* in reference to the condition and situation of the vein, both at and below the surface, and to the workings thereon by both parties, the judge charged the jury as follows: —

"If you find that Alexander Tarbet, during the time mentioned in the complaint, to wit, from Jan. 1, 1873, to Dec. 14, 1875 (being a period of 2 years, 11 months, and 14 days), was in possession of the whole or an undivided interest of Nos. 1, 2, and 3 of the Titus mining claim, and ten feet off No. 1 of the South Star mining claim, holding the same in accordance with the mining laws and the customs of the miners of the mining district, and that the apex and course of the vein in dispute is within such surface, — then, as against one subsequently entering, he is deemed to be possessed of the land within his boundaries to any depth, and also of the vein in the surface to any depth on its dip, though the vein in its dip downward passes the side line of the surface boundary and extends beneath other and adjoining lands, and a trespass upon such part of the vein on its dip, though beyond the side surface line, is unlawful to the same extent as a trespass on the vein inside of the surface boundary. This possession of the vein outside of the surface line, on its dip, is limited in two ways, — by the length of the course of the vein within the surface; and by an extension of the end lines of the surface claim vertically, and in their own direction, so as to intersect the vein on its dip: and the right of a possessor to recover for trespass on the vein is subject to only these restrictions."

Again: "The defendant (plaintiff in error) has not shown any title or color of title to any part of the vein, except so much of its length on the course as lies within the Flagstaff surface, and the dip of the vein for that length; and it has shown no title, or color of title, to any of the surface of the South Star and Titus mining claim, except to so much of No. 3

as lies within the patented surface of the Flagstaff mining claim."

The court refused to give the following instructions propounded by the plaintiff in error, to wit: "By the act of Congress of July 26, 1866, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode, as such, irrespective of the surface area, which an applicant was not bound to claim; it was his convenience for working the lode that controlled his location of the surface area; and the patentee under that act takes a fee-simple title to the lode, to the full extent located and claimed under said act."

Secondly, "In the very nature of the thing, a lode or vein in its unworked and undeveloped stage cannot be known and surveyed so as to plat it and make a diagram of it; the law does not require impossibilities, and must receive a reasonable construction. The diagram required to be filed by the applicant for a patent under the act of 1866 was a diagram of the surface area claimed; and this diagram might be extended laterally and otherwise, as convenience in working this claim might suggest to the applicant."

These instructions and refusals to instruct indicate the general position taken by the court below; namely, that a mining claim secures only so much of a lode or vein as it covers along the course of the apex of the vein on or near the surface, no matter how far the location may extend in another direction.

The plaintiff in error has made the following assignment of error, which indicates the position which it contends for: —

"The plaintiff in error assigns for error the charge of the court and the refusal to give its requests, that is, that the judge instructed the jury that the defendant below had shown no title or color of title to any part of the vein except so much of its length on its course as lies within the surface ground patented; and that he refused to direct the jury that by the act of Congress it was the vein or lode of mineral that was located and claimed, and that the patent granted the lode irrespective of the surface area, which was merely for the convenience of

working the lode; that the diagram required to be filed by an applicant for a patent was of the surface claimed, and might be extended laterally or otherwise, as convenience in working the claim might suggest; that the surface ground patented does not measure the grantee's right to the vein or lode in its course, or control the direction which he shall take; and, lastly, that the Flagstaff company have the right to the lode for the length thereof claimed in the location notice, though it runs in a different direction from that in which it was supposed to run at the time of the location."

Both parties agree in the general rule that the owner of a mining right in a lode or vein cannot follow the course of the vein beyond the end lines of his location extended perpendicularly downwards, but that he may follow the dip to an indefinite distance outside of his side lines. This is undoubtedly the general rule of miners' law, and the true construction of the act of Congress. The language of the act of 1866 (14 Stat. 251) in relation to "a vein or lode" is, "that no location hereafter made shall exceed two hundred feet in length *along the vein* for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein *to any depth*, with *all its dips*, *variations*, *and angles*, together with a reasonable quantity of surface for the convenient working of the same as fixed by the local rules," &c. The act of 1872 (17 id. 91) is more explicit in its terms; but the intent is undoubtedly the same, as it respects end lines and side lines, and the right to follow the dip outside of the latter. We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right

to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

The location of the plaintiff in error is thus laid across the Titus lode, that is to say, across the course of its apex at or near the surface; and the side lines of the location are really the end lines of the claim, considering the direction or course of the lode at the surface.

As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called; which lines are those which are crosswise of the general course of the vein on the surface. The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave him greater or less width according to the dip of the vein. See Rockwell, pp. 56–58, and pp. 274, 275. But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular. This rule the court below strove to carry out, and all its rulings seem to have been in accordance with it.

The plaintiff in error contended, and requested the court to charge, in effect, that having received a patent for two thousand six hundred feet in length and one hundred feet in breadth, commencing at the Flagstaff discovery, on the lode at the surface, it was entitled to two thousand six hundred feet of that lode along its length, although it diverged from the location of the claim, and went off in another direction. We cannot think that this is the intent of the law. It would lead to inextricable confusion. Other localities correctly laid upon the lode, and coming up to that of the plaintiff in error on

either side, would, by such a rule, be subverted and swept away. Slight deviations of the outcropping lode from the location of the claim would probably not affect the right of the locator to appropriate the continuous vein; but if it should make a material departure from his location, and run off in a different direction, and not return to it, it certainly could not be said that the location was on that lode or vein farther than it continued substantially to correspond with it. Of what use would a location be, for any purpose of defining the rights of parties, if it could be thus made to cover a lode or vein which runs entirely away from it. Though it should happen that the locator, by sinking shafts to a considerable depth, might strike the same vein on its subterranean descent, he ought not to interfere with those who, having properly located along the vein, are pursuing their right to follow the dip in a regular way. So far as he can work upon it, and not interfere with their right, he might probably do so; but no farther. And this consequence would follow irrespective of the priority of the locations. It would depend on the question as to what part of the vein the respective locations properly cover and appropriate.

We do not mean to say that a vein must necessarily crop out upon the surface, in order that locations may be properly laid upon it. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein; and locations may be properly made on the surface above it, so as to secure a right to the vein beneath. But where the vein does crop out along the surface, or is so slightly covered by foreign matter that the course of its apex can be ascertained by ordinary surface exploration, we think that the act of Congress requires that this course should be substantially followed in laying claims and locations upon it. Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should correspond with its strike, or the line of a level run through it; but this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed. The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations

and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined.

If these views are correct, the Titus claims, belonging to the defendant in error, were located along the vein or lode in question in a proper manner; and the Flagstaff claims, belonging to the plaintiff in error, were located across it, and can only give the latter a right to so much of the vein or lode as is included between their side lines. The court below took substantially this view of the subject, and ruled accordingly.

As this is really the whole controversy in the case, it is unnecessary to examine more minutely the different points of the charge, or the instructions asked for by the plaintiff in error. The question was presented in different forms, but all to the same general purport.

Judgment affirmed.

AMY *v.* DUBUQUE.

The Statute of Limitations of Iowa begins to run against coupon interest warrants from the time they respectively mature, although they remain attached to the bond which represents the principal debt.

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

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. James Grant* for the plaintiff in error, and by *Mr. O. P. Shiras* for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The question of limitation presented for our consideration upon this writ of error depends for its solution upon the statutes of Iowa. "It is not to be questioned," said this court in *Hawkins et al.* v. *Barney's Lessee* (5 Pet. 457), "that laws limiting the time of bringing suit constitute a part of the *lex fori* of every country: they are laws for administering justice, one

of the most sacred and important of sovereign rights." *McElmoyle* v. *Cohen*, 13 Pet. 312.

It as is little to be questioned that "the courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several States, and give them the same construction and effect which are given by the local tribunals." *Leffingwell* v. *Warren*, 2 Black, 599; *Green* v. *Lessee of Neal*, 6 Pet. 291; *Harpending* v. *The Dutch Church*, 16 id. 455; *Davie* v. *Briggs*, 97 U. S. 628.

Guided by these established rules, we proceed to the consideration of the question before us, in the light both of the statutes of Iowa and of the construction given to them by the highest court of that State.

Our first inquiry is as to the cause of action set out in the petition. The plaintiff in error seeks to recover the amount of sundry interest-coupons annexed to bonds issued by the city of Dubuque in 1857, in payment of a subscription to the capital stock of a railroad company. The bonds are in the usual form of municipal securities, and were made payable on the 1st of January, 1877, at a bank in the city of New York, together with interest thereon at the rate of ten per cent per annum, payable semi-annually on each first day of July and January, on the presentation and surrender of the coupons at such bank as they should respectively become due by the terms thereof. Each bond was secured by a pledge of the shares of stock received in exchange therefor; and the stock pledged was placed in the hands of authorized trustees, who were empowered and required, at the request of the holder of the bond, and when the city was in default in the payment of either principal or interest, or any part thereof, to sell it, at public or private sale, in discharge of the unpaid principal or interest. The coupons sued on had not, at the institution of this action, been severed from the bonds to which they were annexed. Judgment is asked for the several instalments of interest, with interest on each instalment from the time it became due. The city contends that the action is barred by the Iowa Statute of Limitations. In that view the circuit judge concurred, and judgment was rendered for the city.

The code of Iowa declares that actions "founded on written

contracts" may be brought within ten years "after their causes accrue, and not afterwards." Code of 1873, sect. 2529. Such had been the law of that State for many years prior to the adoption of the code of 1873. We find the same provision in the code of 1851. Code of 1851, sect. 1659. What actions are founded on written contracts, and when causes of action accrue, within the meaning of the Iowa code, may be gathered from decisions of the Supreme Court of that State. The earliest decision to which we are referred is *Bahr* v. *Arndt*, 9 Iowa, 39. That was the case of a mortgage executed to secure a note payable ten years after date, with interest, at the rate of ten per cent per annum from date, payable annually. The court held that a foreclosure could be had before the maturity of the note for an instalment of interest due. In *Mann* v. *Cross* (9 id. 327), which was a suit to foreclose a mortgage, given to secure a note bearing ten per cent interest, payable annually, the court said: "Was he [the mortgagee] entitled to six per cent interest upon the interest annually due? We think he was. The respondent was under a legal obligation to pay this interest at the end of the year; it was a sum of money then due, without a contract fixing the rate of interest upon it, and for which he might have been sued. He was, therefore, bound to pay its legal value, which by our law, in the absence of a written agreement reserving more, is fixed at six cents on the hundred." *Hershey* v. *Hershey* (18 id. 24) was the case of a written agreement to purchase an interest in mill property at a valuation by appraisers, and "to pay the principal sum of such purchase on or before five years from the date of the appraisement, and in the mean time to pay interest for the full sum at the rate of seven per cent per annum, the interest to be paid semi-annually." It was held that an action at law could be maintained for any unpaid semi-annual instalment of interest. Said the court: "The payment of interest periodically is expressly stipulated for, and for a breach of this contract plaintiff may recover, just as clearly as for the non-payment of an instalment of principal. By their agreement the parties have made this interest, when it matures, not simply an incident of the debt, but *pro tanto* the debt itself. And plaintiff was not, therefore, bound to wait the expiration

of the five years from the date of the award to recover for the semi-annual instalment of interest." The court said further: "The plaintiff sues at law for the interest precisely as if he had separate notes for the same, and as he might do in case of an ordinary bond." To the same general effect is *Preston* v. *Walker*, 26 id. 205. In the subsequent case of *Baker* v. *Johnson County* (33 id. 151), the inquiry arose as to the time when limitation commenced to run upon a contract whereby Baker was employed to render services in behalf of the county in connection with its claim against the general government for swamp-land money and land scrip. The court held that Baker had a right of action from the date when his services were completed, and that his cause of action accrued at that date. *Callanan* v. *The County of Madison* (45 id. 561) was an action to recover back taxes which had been improperly exacted. The defence of limitation being interposed, the court said that "the cause of action accrues at the very moment of payment of the taxes, if at that time the tax was erroneous or illegal. The right of the plaintiff and the liability of the county do not depend upon the future acts to be done or suffered by either; their relation as creditor and debtor is fixed by the illegality of the tax."

It seems from these authorities to be the settled law of Iowa: 1st, That where interest is, by contract, made payable at stated times, an action may be maintained therefor in advance of the maturity of the principal debt, and legal interest upon such interest recovered. 2d, That within the meaning of the Iowa Statute of Limitations the cause of action accrues when suit may be commenced for the breach of such contract. Both of these propositions are in line with the former decisions of this court. We have held in numerous cases not only that suit may be maintained upon unpaid coupons, in advance of the maturity of the principal debt and without producing the bonds, but that the holder of such coupons is entitled to recover interest thereon from their maturity. *Commissioners of Knox County* v. *Aspinwall et al.*, 21 How. 539; *Gelpcke* v. *City of Dubuque*, 1 Wall. 175; *The City* v. *Lamson*, 9 id. 477; *City of Lexington* v. *Butler*, 14 id. 282; *Clark* v. *Iowa City*, 20 id. 583; *Town of Genoa* v. *Woodruff*, 92 U. S. 502. This court has also had occasion to

consider the question as to when, upon principle, limitation commences to run. In *Wilcox* v. *Plummer's Executors* (4 Pet. 172), it was said: "The ground of action here is a contract to act diligently and skilfully; and both the contract and the breach of it admit of a definite assignment of date. When might this action have been instituted is the question; for from that time the statute must run." Angell, Limitations, sect. 42; 2 Saunders, Pl. and Evid. 309.

This action is, beyond question, founded upon written contracts. The coupons in suit matured more than ten years prior to its commencement. Upon the non-payment, at maturity, of each coupon, the holder had a complete cause of action. In other words, he might have instituted his action to recover the amount thereof at their respective maturities. From that date, therefore, the statute commenced to run against them. The premises conceded, as they must be, there is no escape from the conclusion stated.

But it is insisted that this conclusion is in conflict with the former decisions of this court in *The City* v. *Lamson*, *supra*; *City of Lexington* v. *Butler*, *supra*; and *Clark* v. *Iowa City*, *supra*. In this counsel are mistaken. They misapprehend altogether the doctrines settled in those cases. The first arose under the Wisconsin Statute of Limitations, while the second involved the construction of a Kentucky statute. The decisions in those cases, as we declared in the third case, only established the doctrine that coupons were not mere simple contracts, but, under the local statutes of particular States, were to be regarded as specialties and separate contracts, like the bonds to which they are attached. After an examination of the preceding cases, we said that "it was not the intention of the court to decide that an action upon a coupon, detached from the bond, and negotiated to other parties, was not subject to the same limitations as an action upon the bond itself; much less to hold that the coupons remained a valid and subsisting cause of action not only for the period prescribed for actions on the bond after its maturity, but for the additional period intervening between the maturity of the coupon and the maturity of the bond, however great that might be. The question before the court in those cases was only whether the time

the statute ran against the coupon was the longest or shortest period; — was it six or twenty years in the Wisconsin case, or was it five or fifteen years in the Kentucky case; — and the court held that the statute ran for the longest period, because the coupons partook of the nature of the bonds, and the statute ran for that period as to them."

The case of *Clark* v. *Iowa City* arose under the same Statute of Limitations which is invoked by the city of Dubuque for its protection in this case. It is cited by counsel for plaintiff in error in support of the proposition that limitation, under the Iowa statute, does not commence to run against a coupon until it is detached from the bond. There are some expressions in the opinion in that case which, standing alone, would seem to sustain that construction of the statute. But it is quite obvious, from the whole opinion, that the conclusion reached, upon the point necessary to be decided, did not rest upon the isolated fact that the coupons sued on had become severed from the bond. It did rest, mainly, upon the ground that the coupons sued on were specialties, separate written contracts, capable of supporting actions after their maturity, without reference to the maturity or ownership of the bonds. We distinctly held that all statutes of limitation begin to run when the right of action is complete. We said: "Every consideration, therefore, which gives efficacy to the Statute of Limitations, when applied to actions on the bonds after their maturity, equally requires that similar limitations should be applied to actions upon the coupons after their maturity." Our answer to the specific question certified to us was, "that the statute of Iowa, which extends the same limitations to actions on all written contracts, sealed or unsealed, began to run against the coupons in suit from their respective maturities." So far, then, as that case bears upon the defence of the city, it is an express authority for the position that the limitation of ten years prescribed by the Iowa statute applies equally to bonds and their coupons. The only material respect in which this case differs from that, is that the coupons in suit here have never been severed from the bonds, and are held by the owner of the latter, while in that case they were severed from bonds which had been previously paid off. But this difference cannot logically, or in

view of the Iowa decisions, affect the construction of the statute under examination. The right of the plaintiff in error to sue upon the coupons was complete after their non-payment at maturity, whether they had been previously severed or not from the bond. Upon principle, his failure or neglect to detach the coupon and present it for payment at the time when, by contract, he was entitled to demand payment, could not prevent the statute from running from that date. Such a construction of the statute would defeat its manifest purpose, which was to prevent the institution of actions founded upon written contracts after the expiration of ten years, without suit, from the time "their causes accrue;" that is, from the time the right to sue for a breach attaches. We adhere, therefore, to our decision in *Clark* v. *Iowa City*, that the Statute of Limitations began to run, under the Iowa statute, from the time the coupons respectively matured.

Judgment affirmed.

HARKNESS *v.* HYDE.

1 Process from a district court of Idaho cannot be served upon a defendant on an Indian reservation in that Territory.

2 Illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied, by his answering to the merits. Such illegality is considered as waived only when he, without having insisted upon it, pleads in the first instance to the merits.

ERROR to the Supreme Court of the Territory of Idaho.

The facts are stated in the opinion of the court.

Mr. George H. Williams for the plaintiff in error.

Mr. R. P. Lowe for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action to recover damages for maliciously and without probable cause procuring the seizure and detention of property of the plaintiff under a writ of attachment. It was brought in September, 1873, in a district court of the Territory of Idaho for the county of Oneida. The summons, with a copy

of the complaint, was soon afterwards served by the sheriff of the county on the defendant, at his place of residence, which was on the Indian reservation, known as the Shoshonee reservation.

The defendant thereupon appeared specially by counsel appointed for the purpose, and moved the court to dismiss the action, on the ground that the service thus made upon him on the Indian reservation was outside of the bailiwick of the sheriff, and without the jurisdiction of the court. Upon stipulation of the parties, the motion was adjourned to the Supreme Court of the Territory, and was there overruled. To the decision an exception was taken. The case was then remanded to the District Court, and the defendant filed an answer to the complaint. Upon the trial which followed, the plaintiff obtained a verdict for $3,500. Upon a motion for a new trial, the amount was reduced to $2,500; for which judgment was entered. On appeal to the Supreme Court of the Territory, the judgment was affirmed. The defendant thereupon brought the case here, and now seeks a reversal of the judgment, for the alleged error of the court in refusing to dismiss the action for want of jurisdiction over him.

The act of Congress of March 3, 1863, organizing the Territory of Idaho, provides that it shall not embrace within its limits or jurisdiction any territory of an Indian tribe without the latter's assent, but that "all such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Idaho," until the tribe shall signify its assent to the President to be included within the Territory. 12 Stat. 808.

On the 3d of July, 1868, a treaty with the Shoshonee Indians was ratified, by which, among other things, that portion of the country within which service of process on the defendant was made in this case was set apart for their "absolute and undisturbed use and occupation;" and such other friendly tribes or individual Indians as they might be willing, with the consent of the United States, to admit amongst them; the United States agreeing that no persons except those mentioned, and such officers, agents, and employés of the government as might be authorized to enter upon Indian reservations in discharge of

duties enjoined by law, should ever be permitted "to pass over, settle upon, or reside" in the territory reserved, and the Indians relinquishing their title to any other territory within the United States. 15 id. 674, art. 2. No assent was given by this treaty that the territory constituting the reservation should be brought under the jurisdiction, or be included within the limits, of Idaho. Any implication even of such an assent is negatived by the terms in which the reservation is made, and it is not pretended that any such assent has been signified to the President. The territory reserved, therefore, was as much beyond the jurisdiction, legislative or judicial, of the government of Idaho, as if it had been set apart within the limits of another country, or of a foreign State. Its lines marked the bounds of that government. The process of one of its courts, consequently, served beyond those lines, could not impose upon the defendant any obligation of obedience, and its disregard could not entail upon him any penalties. The service was an unlawful act of the sheriff. The court below should, therefore, have set it aside on its attention being called to the fact that it was made upon the defendant on the reservation. The motion was to dismiss the action; but it was argued as a motion to set aside the service; and we treat it as having only that extent. The code of Idaho considers an action as commenced when the complaint is filed, and provides that a summons may be issued within one year afterwards. Had the defendant been found in Idaho outside the limits of the Indian reservation, he might during that period have been served with process.

There can be no jurisdiction in a court of a Territory to render a personal judgment against any one upon service made outside its limits. Personal service within its limits, or the voluntary appearance of the defendant, is essential in such cases. It is only where property of a non-resident or of an absent defendant is brought under its control, or where his assent to a different mode of service is given in advance, that it has jurisdiction to inquire into his personal liabilities or obligations without personal service of process upon him, or his voluntary appearance to the action. Our views on this subject are expressed at length in the late case of *Pennoyer* v. *Neff* (95 U. S. 714), and it is unnecessary to repeat them here.

The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived.

The judgment of the Supreme Court of the Territory, therefore, must be reversed, and the case remanded with directions to reverse the judgment of the District Court for Oneida County, and to direct that court to set aside the service made upon the defendant; and it is

So ordered.

RAILROAD COMPANY v. VARNELL.

Exceptions to the charge of the court which are in general terms, and do not clearly and specifically point out the objectionable part of it, cannot be sustained as a ground for reversing the judgment.

ERROR to the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. Enoch Totten for the plaintiff in error.

Mr. Thomas T. Crittenden and *Mr. Glen W. Cooper, contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Owners of vessels engaged in carrying passengers assume obligations somewhat different from those whose vehicles or vessels are employed as common carriers of merchandise. Obli-

gations of the kind in the former case are in some respect less extensive and more qualified than in the latter, as the owners of the vehicle or vessel carrying passengers are not insurers of the lives of their passengers, nor even of their safety; but in most other respects the obligations assumed are equally comprehensive, and perhaps even more stringent.

Common carriers of merchandise, in the absence of any legislative regulation prescribing a different rule, are insurers of the goods and are liable at all events and for every loss or damage, unless it happened by the act of God or the public enemy, or the fault of the shipper, or by some other cause or accident expressly excepted in the bill of lading, and without fault or negligence on the part of the carrier. *Propeller Niagara* v. *Cordes et al.*, 21 How. 23.

Carriers of passengers even in street-cars are bound to a higher degree of care, skill, and vigilance in the preparation and management of their vehicles of conveyance than were required of the owners of the stage-coaches, as well on account of the greater number transported at the same time as the constant ingress and egress of the persons entering or leaving the car. Travellers must take the risk necessarily incident to the mode of travel which they select; but those risks in the legal sense are only such as the utmost care, skill, and caution of the carrier in the preparation and management of the vehicle of conveyance is unable to avert. *Pendleton* v. *Kinsley*, 3 Cliff. 420.

Prepayment of the usual fare having been made by the plaintiff, he entered the car of the defendants, as he alleges, for a passage from Washington to Georgetown, and on arriving at the depot of the latter place, and when being in the act of getting off from the car, was thrown from the same upon the ground by the carelessness and negligence of the defendants, and was thereby greatly injured, so that he could not perform the usual duties of his employment; that in consequence of the injuries so received he was compelled to employ a physician at great expense, and was confined to the house for a long time, during which he suffered great pain and anguish. Suitable indemnity being refused, the plaintiff instituted the present suit to recover compensation for the alleged injuries and the

consequent expenses. Service was made, and the defendants appeared and pleaded the general issue, which was subsequently joined by the plaintiff. The preliminary proceedings being closed, the parties went to trial, and the verdict and judgment were for the plaintiff in the sum of $4,000, with costs of suit. Exceptions were filed by the defendants, and they sued out the present writ of error, and removed the cause into this court for re-examination.

Since the case was entered here, the defendants have assigned for error the following causes, for which they claim that the judgment should be reversed: 1. That the instructions of the court set forth in the first three exceptions are erroneous as to the supposed contributory negligence of the plaintiff. 2. That the court erred in the instruction given to the jury as to the measure of damages. 3. That the court erred in refusing the two prayers for instruction presented by the defendants, and in the instructions given in lieu of those prayers. 4. That the instructions given by the court to the jury were incoherent, contradictory, and incomprehensible, and must necessarily have confused and misled the jury to the disadvantage of the defendants.

Evidence was introduced by the plaintiff tending to show that he, on the day and at the place alleged in the declaration, entered one of the cars of the defendants, and that he, having first paid his fare to the conductor, rode in the car to the terminus of the route in Georgetown, at the intersection of High and Bridge Streets; that the car was then stopped at the usual place for passengers to leave and pass out; that several passengers had got off from the car, and that plaintiff started for that purpose, and having passed out of the rear end had stepped on the lower step of the car and was about stepping to the ground when the car was suddenly started with a jerk, which threw him to the ground, his left hip striking the paved street, and that the thigh bone of his hip at the socket was dislocated and fractured by the fall; that the plaintiff was carried to his home, where he was confined to his bed for several weeks, and that he has ever since been compelled to walk with a cane, and has been unable to perform any labor, and that the injured leg is considerably shorter than the other; that he was sixty-four

years of age at the time of the accident, and that up to that time he had always been healthy.

Witnesses were examined by the defendants, and they gave evidence tending to show that the plaintiff, just before the accident, was standing upon the rear platform of the car, and that he jumped from the car before it stopped, and that in jumping from the car he fell and was injured; that at the time of the accident the car had almost reached its usual stopping-place, and that the plaintiff, if he had waited a short time, could have alighted from the car in safety.

Rebutting evidence contradicting that given by the defendants was also introduced by the plaintiff, and the bill of exceptions shows that in cross-examining one of the defendants' witnesses he laid the foundation to admit proof that the witness had made contradictory statements out of court. Proof to that effect was subsequently offered by the plaintiff; and in examining the witness called for that purpose the questions put were leading in form, to which the defendants objected on that account, but the court overruled the objections, and having admitted the answers the defendants excepted. Three or four exceptions of the kind were taken; but inasmuch as the rulings of the court are not assigned for error, it will be sufficient to say upon the subject, that if they had been assigned as error, it could not have benefited the defendants.

More difficulty arises in disposing of the exceptions to the charge of the court, for two principal reasons: 1. Because the instructions are so framed as to render it somewhat uncertain what the principle of law is that the presiding justice gave, or intended to give, to the jury. 2. Because the exceptions are so general and indefinite, that it is impossible to determine with certainty to what part of any one of the instructions any one of the exceptions refers.

Three exceptions are embraced in the first assignment of error, and the complaint is that the court erred in failing to give the defendants the full benefit of their evidence as to the contributory negligence of the plaintiff.

Turning to the record, it appears that the first exception to the charge of the court is addressed to nearly a page of the remarks of the presiding justice, with nothing to aid the in-

quirer in determining what the complaint is, beyond what may be derived from the exception, which is in the following words: "To which instruction the counsel for the defendants then and there excepted."

Much less difficulty would arise if the assignment of error contained any designation of the precise matter of complaint; but nothing of the kind can be obtained from that source. Certain portions of those remarks appear to be unobjectionable; as, for example, the judge told the jury that they must first determine whether the plaintiff was a passenger on the railroad of the defendants, and he called their attention to the testimony of the conductor, that the plaintiff was not in the car in which it seems he claimed that he had been riding just before he received the injury.

Comments were made upon the testimony bearing upon that point, and the judge next stated to the jury to the effect that they must then determine from the evidence whether he fell off or got off, and was hurt in getting off, remarking, that probably there was no dispute that he got hurt in falling from the car, but that the question was whether he, the plaintiff, was in fault, or whether the driver or conductor of the car caused the injury; adding, that if it was the fault of the conductor, the company was responsible. If you come to the conclusion, said the judge, that the plaintiff acted in a neglectful manner in getting off from the car, or that he was in fault, he cannot recover; but if you come to the conclusion that it was the fault of the driver in starting too soon, or in not properly observing that the plaintiff was about to get off, and that the accident occurred in consequence of the too sudden starting of the car, the company is liable, if it was the fault of the driver or conductor.

Inaccurate language and, in some instances, incomplete sentences were employed by the judge; but the court is not able to see that any error of law was committed, or that the errors of language committed were of such a character as to warrant the conclusion that the jury were misled in respect to the legal rights of the parties; nor is the court here able to see that any remarks of the judge were of a character to withdraw any of the evidence from the proper consideration of the jury. Instead of that, he submitted it all to their determination, and

then remarked, that if they found that the injury received by the plaintiff was by the neglect of the railroad, then it would be their duty to ascertain the extent of the injury from the evidence, to which no objection can properly be made.

Reference was then made to the evidence, and comments of a general character followed; and at the close of the judge's remarks upon that subject is another exception, in the words following: "To which instruction the counsel for the defendants then and there excepted." Discussion of that exception may well be omitted, as the remarks made in respect to the preceding exception are believed to be sufficient to show that it is not sufficiently explicit, and that it must be overruled.

Expert witnesses were called and examined in the case, and the third exception has respect to the remarks of the judge upon that subject. Neither the exception nor the assignment of error designates any particular remark of the judge as erroneous, and in view of the fact that the exception is addressed to the entire remarks as an instruction, the court is of the opinion that it requires no further examination.

Extended remarks were made by the judge upon the subject of damages, in case the jury came to the conclusion that the plaintiff was entitled to recover, to which two exceptions are appended, to the effect that the defendants then and there excepted to the remarks which preceded the note of exception. Exceptions put in that general form are certainly not entitled to favor; but it is proper to remark that those under consideration stand in a worse condition than those previously examined, for the reason that the attention of the judge after the charge was concluded was directed to many passages in his remarks as objectionable, every one of which the judge either corrected as requested, or, where the suggestion of error was in respect to the testimony, he referred the question to the recollection of the jury. Such corrections must, of course, be considered in connection with the antecedent remarks of the judge; and when that part of the charge is viewed in that light, the court is of the opinion that the exceptions must be overruled.

Two prayers for instruction were presented by the defendants: 1. That the court should instruct the jury that the plaintiff is not entitled to recover any thing for the services of

the physicians or other expenses, as there was no testimony to show the amount of money, if any, he paid on that account. 2. That the court should instruct the jury that in estimating the damages of the plaintiff they must take into consideration his advanced age as lessening his capacity for earning money.

Responsive to the first request, the judge remarked to the jury that there being no evidence on the subject of the specific amount of the physician's bill, "you will not take that into consideration, unless there is doubt," evidently leaving the sentence incomplete; but his attention was not called to the omission, and the court here is of the opinion that the defendants have no cause to complain of that part of the charge as an error of law.

Both requests were refused, and in response to the second the judge remarked to the effect that the jury acting reasonably must ascertain the proper amount of the damages; that if they found damages, they must be reasonable, as they could not tell whether a man would live one, two, or five years. Probably no one will think that these remarks of the judge were very instructive to the jury; but it is not possible to hold that they show any legal error for which the judgment should be reversed.

Where the charge of the judge to the jury is of a character to mislead the jury, the error is one of law, and may be corrected in an appellate court; but in every such case the part of the charge to which the exception is addressed ought to be distinctly pointed out. Unless that be done, the exception cannot be sustained as a ground for reversing the judgment, as that can only be done for error of law.

For these reasons, the court is of the opinion that there is no error in the record.

Judgment affirmed.

UNITED STATES v. THOMPSON.

The United States, whether named in a State statute of limitations or not, is not bound thereby; and when it sues in one of its own courts, such a statute is not within the provisions of the Judiciary Act of 1789, which declare that the laws of the States, in trials at common law, shall be regarded as rules of decision in the courts of the United States in cases where they apply.

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

The United States sued, Dec. 6, 1875, Clark W. Thompson, and his sureties on his official bond, as superintendent of Indian affairs in Minnesota. The breach alleged was that he, as such officer, had, prior to March 30, 1865, received $10,562.27 of the moneys of the United States, which he had neglected and refused to account for, and had converted to his own use.

The defendants pleaded that the cause of action did not accrue within ten years next preceding the commencement of the suit. The United States demurred. The demurrer was overruled, and judgment rendered for the defendants. The United States has brought the judgment here for review.

The statutes of Minnesota (c. 66, tit. 11, sect. 6) provide that an action upon a contract, express or implied (unless it be founded upon some judgment or decree of a court), shall be barred if not commenced within six years after the cause of action accrues. 2 Minn. Stat. at Large, 782.

The twelfth section of that title further provides that "the limitations prescribed in this chapter for the commencement of actions shall apply to the same actions when brought in the name of the State, or in the name of any officer, or otherwise, for the benefit of the State, in the same manner as to actions brought by citizens." Id. 783.

While a Territory, the following statute was in force in Minnesota: "The limitations prescribed in this chapter apply to actions brought in the name of the United States, in the same manner as to actions by private parties." Rev. Sts. of 1851, c. 70, sect. 13, p. 331; Revision of 1858, p. 533, sect. 13.

This statute was first passed by the territorial legislature of Wisconsin, and was continued in force over that portion of it

which, in 1848, became the Territory of Minnesota. It was modified, several years after Minnesota became a State, to read as it now does. When Wisconsin became a State, its legislation underwent the same change.

Mr. M. S. Wilkinson in support of the judgment below.

The real question here is, not whether the Statutes of Limitations bar the State, where she is not designated, but whether when they extend and apply to actions brought by her, they are "rules of decision" in the Federal courts, where the United States is a party. It is submitted, —

First, That the terms of the thirty-fourth section of the Judiciary Act of 1789 (1 Stat. 92, Rev. Stat., sect. 721) give the same efficiency to the State statutes of limitations in the Federal courts that they have *proprio vigore* in the State courts.

Second, That the Statute of Limitations of the State of Minnesota bars in her courts all plaintiffs, including the sovereign and it therefore, in the Federal courts sitting within that State, operates to bar all plaintiffs, including the sovereign.

There has never been a time since it became possible to institute a suit in Minnesota, when, by the express words of the Statute of Limitations, it did not apply to actions brought by the government to the same extent that it applied to private parties.

The statutes of the Territory had within its limits the force of acts of Congress, because its legislative power was delegated to it by Congress. All its laws were required to be submitted to Congress, and, if not disapproved, were to be in force and effect. Organic Act of Wisconsin, sect. 6, 5 Stat. at Large, p. 12; Organic Act of Minnesota, sect. 6, 9 Stat. at Large, p. 405.

The Statutes of Limitations of the Territory were not disapproved by Congress; and afterwards Minnesota was admitted into the Union, with a constitution which continued those statutes with others in force until repealed. Const. of Minnesota, sect. 2 of schedule.

It is an elementary principle that the Statutes of Limitations constitute a part of the *lex fori*, and this court, in construing them, conforms to the exposition given by the courts of the State.

Third, If the United States is not amply protected by the present exceptions in the Judiciary Act, Congress can at any time remedy the evil by an amendment.

Mr. Assistant Attorney-General Smith for the United States

MR. JUSTICE SWAYNE, after stating the facts, delivered the opinion of the court.

This case turns upon a statute of the State of Minnesota which bars actions, *ex contractu*, like this, within a specified time, and the same limitation is applied by the statute to the State. The United States are not named in it. The court below held that the statute applied to the United States, and rendered judgment against them.

There is no opinion in the record, and we are at a loss to imagine the reasoning by which the result announced was reached. The Federal courts have been in existence nearly a century. The reports of their decisions are numerous. They involve a great variety of questions, and the fruit of much learned research. We have been able to find but two cases in the lower Federal courts in which it appears the question was raised. They are *United States* v. *Hoar*, 2 Mas. 311, and *United States* v. *Williams*, 5 McLean, 133. In both it was held, without the intimation of a doubt, that a State statute cannot bar the United States. The same doctrine has been several times laid down by this court; but it seems always to have been taken for granted, and in no instance to have been discussed either by counsel or the court. *United States* v. *Buford*, 3 Pet. 12; *Lindsey* v. *Miller's Lessee*, 6 id. 666; *Gibson* v. *Chouteau*, 13 Wall. 92.

This state of things indicates a general conviction throughout the country that there is no foundation for a different proposition. There are also adjudications in the State reports upon the subject, but they concur with those to which we have referred. Among the earliest of them is *Stoughton et al.* v. *Baker et al.*, 4 Mass. 521. In that case, Chief Justice Parsons said: "No laches can be imputed to the government, and against it no time runs so as to bar its rights." The examination of the subject by Judge Story, in *United States* v. *Hoar* (*supra*), is a fuller one than we have found anywhere else

He and Parsons are in accord. So far as we are advised, the case before us stands alone in American jurisprudence. It certainly has no precedent in the reported adjudications of the Federal courts.

The United States possess other attributes of sovereignty resting also upon the basis of universal consent and recognition. They cannot be sued without their consent. *United States* v. *Clark*, 8 Pet. 436. If they sue, and a balance is found in favor of the defendant, no judgment can be rendered against them, either for such balance or in any case for costs. *United States* v. *Boyd*, 5 How. 29; *Reeside* v. *Walker*, 11 id. 272. A judgment in their favor cannot be enjoined. *Hill* v. *United States*, 9 id. 386. Laches, however gross, cannot be imputed to them. *United States* v. *Kirkpatrick*, 9 Wheat. 720. There is no presumption of payment against them arising from lapse of time. *United States* v. *Williams* (*supra*). They can maintain a suit in their own name upon a non-negotiable claim assigned to them. *United States* v. *White*, 2 Hill (N. Y.), 59.

The rule of *nullum tempus occurit regi* has existed as an element of the English law from a very early period. It is discussed in Bracton, and has come down to the present time. It is not necessary to advert to the qualifications which successive parliaments have applied to it.

The common law fixed no time as to the bringing of actions. Limitations derive their authority from statutes. The king was held never to be included, unless expressly named. No laches was imputable to him. These exemptions were founded upon considerations of public policy. It was deemed important that, while the sovereign was engrossed by the cares and duties of his office, the public should not suffer by the negligence of his servants. "In a representative government, where the people do not and cannot act in a body, where their power is delegated to others, and must of necessity be exercised by them, if exercised at all, the reason for applying these principles is equally cogent."

When the colonies achieved their independence, each one took these prerogatives, which had belonged to the crown; and when the national Constitution was adopted, they were imparted to the new government as incidents of the sovereignty thus

created. It is an exception equally applicable to all governments. *United States* v. *Hoar*, *supra*; *The People* v. *Gilbert*, 18 Johns. (N. Y.) 227; Bac. Abr., tit. Limitation of Actions; id., tit. Prerog. E. 5, 6, 7; 5 Com. Dig. Parliament, R. 8; Chitty, Law of Prerogatives, 379.

Congress, like the British Parliament, has made a number of specific limitations both in civil and criminal cases. They will be found in the Revised Statutes, and need not be here repeated.

The only argument suggested by the learned counsel for the defendants in error is that the Judiciary Act of 1789, re-enacted in the late revision of the statutes, declares "that the laws of the several States, except where the Constitution and treaties of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

It is insisted that the case in hand is within this statute. To this there are several answers.

The United States not being named in the statute of Minnesota, are not within its provisions. It does not and cannot "apply" to them. If it did, it would be beyond the power of the State to pass it, a gross usurpation, and void. It is not to be presumed that such was the intention of the State legislature in passing the act, as it certainly was not of Congress in enacting the law of 1789. *United States* v. *Hoar*, *supra*; *Field* v. *United States*, 9 Pet. 182.

The Federal courts are instruments competently created by the nation for national purposes. The States can exercise no power over them or their proceedings, except so far as Congress shall allow. This subject was considered in *The Farmers' & Mechanics' National Bank* v. *Dearing* (91 U. S. 29), and we need not pursue it further upon this occasion.

The exemption of the United States from suits, except as they themselves may provide, rests upon the same foundation as the rule of *nullum tempus* with respect to them. If the States can pass statutes of limitation binding upon the Federal government, they can by like means make it suable within their respective jurisdictions. The evils of such a state of things are too obvious to require remark.

But viewing the subject in the light of considerations *ab inconvenienti*, we need not look beyond the consequences of the ruling, if sustained, of the court below. The doctrine is alike applicable to civil and criminal actions. There are thirty-eight States in the Union. The limitations in like cases may be different in each State, and they may be changed at pleasure, from time to time. The government of the Union would in this respect be at the mercy of the States. How that mercy would in many cases be exercised it is not difficult to foresee. The constitutional relations of the head and the members would be reversed, and confusion and other serious evils would not fail to ensue.

The judgment of the Circuit Court will be reversed, and the cause remanded with directions to proceed in conformity with this opinion; and it is

So ordered.

AIRHART *v.* MASSIEU.

1. A Mexican was not, by the revolution which resulted in the independence of Texas, or by her Constitution of March 17, 1836, or her laws subsequently enacted, divested of his title to lands in that State, but he retained the right to alienate and transmit them to his heirs, and the latter are entitled to sue for and recover them.
2. The division of a country and the maintenance of independent governments over its different parts do not of themselves divest the rights which the citizens of either have to property situate within the territory of the other.
3. That Constitution, although declaring generally that aliens shall not hold land in Texas except by title emanating directly from the government, did not divest their title; for it adds, that "they shall have a reasonable time to take possession of and dispose of the same in a manner hereafter to be pointed out by law." Before the title can be divested, proceedings for enforcing its forfeiture must be provided by law, and carried into effect; and hitherto they have not been provided.
4. In Texas, the protocol of a Mexican title is an archive which may be deposited in the General Land-Office at any time, subject to all just implications arising from delay and the circumstances of its history; and when so deposited, a certified copy thereof from the land-office is competent *prima facie* evidence of the title.
5. Until a title is deposited in the land-office, or duly recorded in the proper county, *bona fide* purchasers not having notice thereof, though claiming under a junior Mexican grant, will be protected.

ERROR to the Circuit Court of the United States for the Western District of Texas.

The facts are stated in the opinion of the court.

Mr. John H. Reagan for the plaintiff in error.
Mr. John D. McPherson, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an action of trespass to try title to land, being equivalent, in Texas, to an action of ejectment. The defendants in error were the plaintiffs below, and judgment being given in their favor, the case is brought here by writ of error. The petition in the action was filed on the 3d of June, 1872, and sets out that the plaintiffs are citizens of the Republic of Mexico, residing in the city of Mexico, and that on the 1st of July, 1869, they were seised in fee and possessed of a certain tract of land (containing eleven leagues), situated in the counties of Anderson and Freestone, on the right and left banks of Trinity River, stating the metes and bounds thereof; and that on that day the defendant, Airhart (now plaintiff in error), illegally ousted them, and continues to hold possession of the tract, to their damage.

The defendant demurred, and pleaded, 1st, not guilty; 2d, the Statute of Limitations for three years, in virtue of possession under regular title from the sovereignty of the soil, as to a certain portion of the land, containing 1,855 acres, giving the metes and bounds thereof, being the south part of E. C. Harris's survey; and the same plea as to another portion of the tract sued for (containing about 153 acres), giving the metes and bounds of the same; and disclaiming as to all the rest of the land sued for. The defendant further pleaded, 3d, the Statute of Limitations of five years, and payment of taxes as to the two tracts last named; 4th, the Statute of Limitations of ten years; and, 5th, adverse possession under an entry of title since 1850, and the erection of permanent improvements, for which he claimed compensation. Various amendments of the pleadings were subsequently added, which it is unnecessary to notice.

It appears from the various bills of exception taken in the case that the plaintiffs claimed title, 1st, under an eleven

league grant, made by the government of Coahuila and Texas to one José Ygnacio Aguilera, of the city of Mexico, on the 22d of March, 1830, and possessory title executed thereon by Commissioner Vicente Aldrete on the 26th of November, 1833; 2d, an act of sale of the said eleven leagues, passed on the twelfth day of March, 1836, in the city of Mexico, from the said Aguilera to Anna Matilda Massieu, a citizen of Mexico, then an infant, and who died in August, 1851, under age; and, 3d, descent to the plaintiffs as the heirs-at-law of said Anna Matilda, they being her mother and brothers and sisters, and all citizens of Mexico.

The defendant claimed title to the tract of 1,855 acres, mentioned in his pleas, under a grant from the State of Coahuila and Texas to Edward C. Harris, made Jan. 26, 1835, and through various mesne conveyances from said Harris to himself. He claimed title to the 153-acre tract (the other tract mentioned in his pleas), under a head-right grant made by the State of Texas to one Robert S. Patton, on the 4th of February, 1857, and through various mesne conveyances to himself.

The first question raised for the consideration of this court is that arising upon the alienage of the plaintiffs. This question was raised by the demurrer to the petition, so far as relates to their right to maintain an action for land. The subsequent proceedings raised the further question, whether, being aliens, they could inherit lands in Texas in 1851 from Anna Matilda Massieu, who was also an alien; and, if they could, whether they could continue to hold the title thereof without residing in Texas and becoming citizens. These questions may be conveniently considered together.

Texas, which, with Coahuila, had constituted a State of the Mexican Republic, declared her independence on the 2d of March, 1836; but the Mexican or Spanish law, except as to criminal cases, and except as modified by the congress, was continued as the law of the republic until the 16th of March, 1840, when the common law was adopted. By the common law an alien could indeed take land by purchase, but it would be liable to forfeiture to the king; and he could neither take nor transmit land by inheritance. Co. Litt. 2; 1 Bl. Com. 372; 2 id. 349; 3 Cruise, Dig. 365; Williams, Real Prop. 53;

2 Kent, Com. 53. It is conceded, however, by the counsel of the defendant, that important qualifications of this rule have always existed in the laws of Texas. The precise question is, whether a citizen of Mexico, not being a resident of Texas, but of some other Mexican State, owning lands in Texas at the time of the revolution, lost his title thereto, or his right to convey the same, or to transmit the same to his heirs, by means of the revolution, or by reason of subsequent legislation. The separation of Texas from the Republic of Mexico was the division of an empire. Up to the time of such division, all the citizens of the republic were citizens in every portion thereof, and had full right to hold property, movable or immovable, in every portion. If the revolution in Texas deprived the citizens of Mexico residing in other Mexican States of the right to hold and transmit their property situated in Texas, it amounted to confiscation. Did such confiscation take place by virtue of general international law, or by virtue of legislation adopted by Texas after its independence was declared? That such is not the general consequence of a division of empire, seems to be settled. Mr. Justice Nelson, delivering the opinion of this court in the case of *Jones* v. *McMasters* (20 How. 8), which related to a Texas title, says: "The general principle is undisputed, that the division of an empire works no forfeiture of a right of property previously acquired."

The original constitution of Texas, adopted March 17, 1836, fifteen days after the declaration of independence, did, indeed, provide as follows: "All persons who shall leave the country for the purpose of evading a participation in the present struggle, &c., shall forfeit all rights of citizenship, and such lands as they may hold in the republic." Gen. Provs., sect. 8. But this did not refer to Mexicans residing elsewhere. The tenth section, however, declared as follows: "No alien shall hold land in Texas except by titles emanating directly from the government of the republic; but if any citizen of this republic should die intestate or otherwise, his children or heirs shall inherit his estate; and aliens shall have a reasonable time to take possession of and dispose of the same in a manner hereafter to be pointed out by law." So that, although it was declared that aliens should not hold lands in Texas, a reasonable

time was to be given to them to come in, or dispose of their lands, — the last clause evidently referring to aliens generally, and not merely to the "children and heirs" just referred to.

By an act of the congress of Texas, passed Jan. 28, 1840, it was provided as follows: "In making title to land by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is or hath been an alien; and every alien to whom any land may be devised or may descend shall have nine years to become a citizen of the republic, and take possession of such land; or shall have nine years to sell the same before it shall be declared to be forfeited, or before it shall escheat to the government." Oldham & White, 699, 700.

This statute has continued in force to the present time, being re-enacted in 1848. The State Constitution of 1845 effected no change in rights of property, but expressly established existing rights. Art. 6, sect. 20. By an act passed Feb. 13, 1854 (Pasch. Dig., arts. 45–47), it was further provided, in favor of aliens, that they should have the same rights as are accorded to American citizens by the laws of the nation to which such aliens belong; including the right to take and hold property, real or personal, by devise or descent from any alien or citizen. This law being passed subsequent to the death of Anna Matilda Massieu, cannot affect the present case, but is cited for the purpose of illustrating the spirit and course of Texas legislation on the subject under consideration.

Aguilera became an alien to Texas by virtue of the separation of that State from the rest of the Mexican Republic. His title to the lands in question had been lawfully acquired before this forced alienage commenced, and whilst his rights of citizenship extended to Texas as a portion of the Republic of Mexico.

At that time, as before stated, the Spanish law, as modified by the local laws of Mexico and of the State of Coahuila and Texas, was the general law of the infant State; and in some of the early cases in Texas, as in the *Heirs of Holliman* v. *Peebles* (1 Tex. 673), and in *Yates* v. *Iams* (10 id. 168), it was argued, though not expressly decided, that by the general Spanish law, and if not by that law, at least by the colonization laws of Mexico, and of Coahuila and Texas, a non-resident alien could not hold real estate. The same views were expressed in the case

of *McKinney* v. *Saviego*, 18 How. 235. But the laws referred to had respect to the case of aliens who, when they were such, acquired, or attempted to acquire, lands in Spain or her colonies, and not to the case of citizens or subjects who, on the division of an empire, happened to hold lands in the section in which they did not reside, and therefore had good title thereto when, by operation of law, they became aliens as to such section. It must be admitted that aliens of this class stand on a different footing, in equity at least, from those who, being aliens, attempt, against the law, to acquire real estate in a foreign country. It may be a wise policy to prevent the latter class from acquiring lands, whilst it would be extremely unjust to confiscate the lands of the former class, — lands which they had rightfully and innocently acquired, having only become aliens afterwards by force of law resulting from events beyond their control. This precise question came before this court in the case of *Jones et al.* v. *McMasters* (*supra*), and it was decided that the title of such persons is not divested by their forced alienage resulting from the division of an empire. In that case the plaintiff was a citizen of Mexico, and owned the land in controversy situated in Texas, at the period of the Texan revolution. The defendants claimed under patents from the State, and contended that the plaintiff must fail in her action. But it was sustained by the court below and by this court. Mr. Justice Nelson, in delivering the opinion of this court, said: "Assuming that the plaintiff is an alien, and not a citizen of Texas, the next question is, whether or not she is under any disability that would prevent her from the assertion of her title to the premises in question; in other words, whether her absence and alienage worked a forfeiture of the estate. The general principle is undisputed, that the division of an empire works no forfeiture of a right of property previously acquired. *Kelly* v. *Harrison* (2 J. Cases, 29; 7 Pet. 87). And consequently the plaintiff's right still exists in full effect, unless the new sovereignty created, within which the lands are situate, has taken some steps to abrogate it. The title remains after the revolution, and erection of the new government, the same as before." This case was decided in December Term, 1857, and it is believed that no case in Texas has held the

contrary since that time. The same views were expressed, and many authorities cited in support thereof, in *Kilpatrick* v. *Sisneros* (23 Tex. 130–134), decided in 1859; also in *Sabriego* v. *White* (30 id. 581–584), decided in 1868, — all which cases are recognized in the late case of *Andrews* v. *Spear*, 48 id. 567.

We think, therefore, it may be regarded as settled that the severance of Texas from the Republic of Mexico did not divest the title of Aguilera to the lands in dispute.

This conclusion disposes of another point in the case, — the question as to the validity of the act of sale passed on the twelfth day of March, 1836, from Aguilera to Anna Matilda Massieu. Notwithstanding the existence of hostilities between Texas and Mexico, it was competent for one citizen of Mexico to convey to another, both residing and being in Mexico, lands situated in Texas. This point was settled by the late decision of this court in the case of *Conrad* v. *Waples*, 96 U. S. 279. We may assume, therefore, that at the time when the Constitution of Texas was adopted, on the 17th of March, 1836, the lands in dispute rightfully belonged to Anna Matilda Massieu, who was then an infant, and a citizen of Mexico residing in the city of Mexico.

Then did the Constitution which was adopted on the 17th of March, 1836, divest the title which Anna Matilda Massieu had acquired? We have already quoted its language, and have seen that whilst it declared that aliens should not hold lands in the republic, a reasonable time should be given to them by law to become citizens or to dispose of their lands.

It seems clear, therefore, that the Constitution itself did not, *proprio vigore*, divest the titles of aliens, especially the titles of those Mexican citizens who had become aliens by the course of events. It was left to future legislation to provide the mode and manner in which such divestiture should take place. This view is sustained by the cases already referred to, and by many others that might be cited on the subject. We may assume, therefore, that Anna Matilda Massieu continued to hold the title to the lands in question after, as well as before, the adoption of the Constitution on the 17th of March, 1836.

Then came the act of Jan. 28, 1840, already quoted, remov-

ing the bar of alienage in descents, and giving to aliens, and alien heirs, nine years to become citizens of the republic, and take possession of their land; or nine years to sell the same "before it shall be declared to be forfeited, or before it shall escheat to the government."

This law being passed whilst Anna Matilda Massieu was lawful owner of the land, gave her nine years to become a citizen, or dispose of the same before it could be forfeited by proceedings at the suit of the government. Of course, after the nine years should expire, namely, after Jan. 28, 1849, the land would be forfeitable if the legislature should, in the mean time, provide a proceeding to be taken for declaring such forfeiture. The common law, so far as not inconsistent with the Constitution or the acts of Congress, was adopted as a rule of decision in Texas on the 20th of January, 1840, to take effect on the 16th of March thereafter. But it is not perceived how this could materially affect the case under consideration, which was already provided for. The common-law doctrine respecting alienage as affecting title to land was superseded by the Constitution of the republic and the statute referred to.

The next modification of the law was made by the State Constitution of 1845, which by art. 13, sect. 4, provided as follows: "All fines, penalties, forfeitures, and escheats, which have accrued to the Republic of Texas, under the Constitution and laws, shall accrue to the State of Texas; and the legislature shall, by law, provide a method for determining what lands may have been forfeited or escheated."

This provision only renders it still more clear that the legislature must first act before any proceedings can be taken to annul the title of an alien, or any other escheatable titles. Under this provision, it has been held that, since its adoption, no locations can be made upon lands held by aliens on the ground of their title being void, since no law has been framed to provide the means for declaring forfeitures for alienage. *Hancock* v. *McKinney*, 7 Tex. 384; *Swift* v. *Herrera*, 9 id. 263; *Johnson* v. *Smith*, 21 id. 722; *Luter* v. *Mayfield*, 26 id. 325.

The only law which has been passed relating to proceedings for enforcing forfeitures and escheats is that of March 20, and which went into effect April 29, 1848. But this only relates

to the case of escheat when a person dies without heirs, and cannot apply to the plaintiffs if they were capable of inheriting from Anna Matilda Massieu in August, 1851, at the time of her death.

As to this point, we have seen that the act of January, 1840, declared that, in making title by descent, it should be no bar to a party that any ancestors through whom he derives his descent from the intestate is or hath been an alien. This law would seem to be the legitimate result of the status of aliens with regard to title to lands in Texas; the prohibition to hold lands being provisional only, not operative, unless they failed to become citizens, or to dispose of their lands, within nine years; and not even then, until regular proceedings should be provided for, and should be had, to annul the title. The later cases in Texas have fully established this doctrine. We refer particularly to the cases of *Sabriego* v. *White*, 30 id. 576; *Settegast* v. *Schrimpf*, 35 id. 323; and *Andrews* v. *Spear*, 48 id. 567.

From this review of the law of Texas, it would seem indubitable that the title of the plaintiffs to the land in question is free from objection on the score of alienage.

Then, have the plaintiffs a right to vindicate their title in the courts of justice? Several cases have undoubtedly decided that an alien cannot sue for lands in Texas. The last case referred to is that of *White* v. *Sabriego* (23 Tex. 243), which presented the naked question of alienage as a bar. The court, however, stated that under special circumstances aliens may sue; that is, under circumstances which entitle them to hold land; as, where they have a title emanating directly from the government, or where they acquired land by descent or purchase before the division of the empire and the change of government. In the subsequent case of *Sabriego* v. *White* (30 id. 576), involving the same title, the plaintiff showed that the land was granted to her mother before the revolution; and that her mother (with herself) removed to Matamoras during the revolution, and her mother died there in 1842; and that the plaintiff had ever since continued to reside in Matamoras, remaining a Mexican citizen. The court held that the plaintiff lawfully succeeded to her mother's rights, and retained her title to the property, no office having been found to forfeit it

and hence that she was entitled to maintain her action. The case of *Jones* v. *McMasters* (*supra*) is also a case in point on this question, it being there held that alienage was no bar to an action, if the title of the alien was good; and the title was held good as against third persons until office found, and a judgment of forfeiture.

Our conclusion, therefore, is that the objection to the right of the plaintiffs to vindicate their title in the courts, as well as the objection to the title itself, was properly overruled.

The next question is whether the plaintiffs succeeded in proving the title by which they claimed the lands in dispute.

To prove the original grant from the government of Coahuila and Texas to Aguilera, the plaintiffs, at the trial, offered in evidence a certified copy from the general land-office of the Spanish title, consisting of Aguilera's petition for eleven leagues of land on Trinity River or elsewhere, the act of concession, dated March 20, 1830, the petition for possession in September, 1833, the reference for a survey, the notes of survey, and the title of possession, dated Nov. 26, 1833, executed by Vicente Aldrete, commandant at Nacogdoches and general commissioner of the government, in the presence of two witnesses.

The imperfect condition of the record does not enable us to understand clearly whether or not, in addition to this certified copy, a *testimonio* of the title was also offered in evidence. From a translated copy, and the fact that the Spanish original thereof was waived by the parties and not inserted in the record, we infer that such a *testimonio* was offered. From the translation referred to it appears that this *testimonio* was verified by the signature of Aldrete, and two assisting witnesses, named Rodriguez and Perez.

This paper purported, by certificates thereon, to have been recorded in August and October, 1870, in the counties of Anderson and Freestone, where the land lies. The only authentication of the instrument at the time of recording consisted of an affidavit made by one R. D. Johnson, at Galveston, in 1857, that the residence of the subscribing witnesses was unknown to him; and a joint affidavit of one Taylor and one Edwards, made at Nacogdoches in 1857, deposing to the genuineness of Aldrete's signature.

The defendant objected to the admission of this evidence of the title as an authenticated and recorded instrument. The objection was overruled.

The admission of this evidence forms the basis of one of the errors assigned. If the accessary circumstance of the title having been recorded in the proper counties in 1870 had been a material fact in the determination of the cause, its admission as a recorded title would have made it necessary for us to examine the sufficiency of the affidavits in virtue of which the recording was made. But from the view which was taken of the case by the court below the recording of the instrument became immaterial; the learned judge holding that the defendant could claim no benefit from the fact that the plaintiffs' title was not properly recorded, inasmuch as both parties claimed the principal tract in question under titles emanating from the Mexican government, and therefore as between them the recording acts did not apply. If this position was correct, the recording of the plaintiffs' title was certainly immaterial; if not correct, the judgment should be reversed. It is unnecessary, therefore, to consider the question whether that title was properly authenticated for recording or not, a question which might give us some embarrassment. The correctness of the ruling made by the court will be considered further on.

Whether the *testimonio* was sufficiently authenticated to make it competent evidence of the title, as contradistinguished from its registry, it is also unnecessary to decide. It is clear that the certified copy of the title from the land-office was *prima facie* evidence of its existence; for it would be presumed that the original was an archive of the land-office. For the mere purpose, therefore, of proving title only, without clothing it with the privileges of registry, the certified copy was sufficient.

But after the plaintiffs had rested, the defendant recurred to his attack upon their evidence of the grant to Aguilera. He called as a witness the translator of the land-office, who produced the protocol or original title of said grant, and showed that it had never been deposited in the land-office until July, 1873, after the commencement of this action. The defendant further proved by E. A. Mexia that he, as agent of the plaintiffs, had procured the said protocol in June or July, 1873,

from the governor of the State of Coahuila in the Republic of Mexico, and had deposited the same in the general land-office of Texas in July, 1873. The defendant now moved to exclude the certified copy as evidence on the ground that the protocol was not an archive of the general land-office of Texas, but was an archive of the Mexican State of Coahuila, and was put in said office by a private individual without the authority or sanction of any law, and that there is no law of the State of Texas or of the United States authorizing the use of a copy thereof as evidence in any court or judicial proceeding. This motion was overruled, and the defendant excepted; and the question is again presented here as to the admissibility of the evidence.

We think the certified copy was admissible in evidence.

By an act of the congress of Texas, passed Dec. 14, 1837, it was declared "that it shall be the duty of every person or persons who may have in his or her possession or control any titles or documents whatever which relate to lands, and which, by the laws now or heretofore existing in Texas, have been and are considered archives, to deliver the same to the Commissioner of the General Land-Office, on his order, within sixty days after the final passage of this act." Pasch. Dig., art. 70. The sixth section of the same act constituted the land-office the proper depository of all books, records, papers, and original documents appertaining to the titles of lands denominated archives. Id., art. 71. There can be no doubt that the protocol of the title in question belonged to the class of documents here designated; and it does not appear that any law has ever been passed to prevent such documents from being deposited in the land-office at any time. It is true that a door is thereby left open for the perpetration of frauds; but fraud is always open to investigation, and if titles which have been long kept back from the proper public depository, and whose existence has thereby been unknown, are not allowed to disturb subsequent titles acquired *bona fide* in the mean time, the apprehended evil will be greatly diminished. This consideration renders it important that the position taken by the court below in reference to the question of registry as between persons holding under titles issued by the Mexican government should be carefully considered.

The next question to be considered, therefore, is whether a *bona fide* purchaser claiming under a Mexican title is bound to take notice of a prior Mexican title which is neither recorded in the proper county nor deposited in the land-office.

The defendant, in this case, claimed title to the 1,855-acre tract in question, under a grant of one league of land, dated June 26, 1835, from the government of Coahuila and Texas to one Edward C. Harris, and by the following intermediate conveyances from Harris to himself: 1st, a deed from Harris to one Hotchkiss, dated June 9, 1840; 2d, a deed from Hotchkiss to one Vail, dated April 24, 1844; 3d, a deed from Vail to one Mynott and his wife, dated June 1, 1855; 4th, a deed from Mynott and wife to one Kimbrough, dated Oct. 30, 1856, in pursuance of a title-bond executed in June, 1856; 5th, a deed from Kimbrough to the defendant and another person, dated Nov. 30, 1868, — all of which deeds were duly recorded. This chain of title was duly proved, and there was no evidence that the defendant or any of those through whom he deraigned title had, at the times they respectively acquired their titles, any actual notice of the existence of the said grant to Aguilera. Some proof was offered to show constructive notice, but the ruling of the court renders it unnecessary to consider it.

According to the view taken by the court below, none of the persons who thus acquired title under Harris could claim any benefit from the fact that Aguilera's title was totally unknown and unheard of, and that no trace of it was to be found in any public office of archives or records in Texas. If this be the law of Texas, the owners of lands in that State hold them by a very uncertain tenure.

But we cannot believe that this is a correct view of the law. However, the case may have stood between the original grantees of Coahuila and Texas, namely, Aguilera and Harris (and of this we express no opinion), we think that the subsequent *bona fide* purchasers and possessors under Harris acquired an unquestionable right to contest the unknown and dormant title of Aguilera, though antedating that under which they claimed.

The Texas recording acts are not so clear and explicit as they might be, it is true; but, in our judgment, their tenor and spirit are sufficient to prevent such great injustice and wrong

as must necessarily follow if they do not apply to such a case as this.

The act of Dec. 20, 1836, "organizing inferior courts," &c., provided, amongst other things, as follows: —

"SECT. 37. Any person who owns or claims land of any description, by deed, lien, or other color of title, shall, within twelve months from the 1st of April next, have the same proven in open court, and recorded in the office of the clerk of the county court in which said land is situated; but if a tract of land lies on the county lines, the title may be recorded in the county in which part of said land lies."

"SECT. 40. No deed, conveyance, lien, or other instrument in writing, shall take effect, as regards the interests and rights of third parties, until the same shall have been duly proven and presented to the court, as required by this act, for the recording of land titles. And it shall be the duty of the clerk to note particularly the time when such deed, conveyance, lien, or other instrument is presented, and to record them in the order in which they are presented." Pasch. Dig., arts. 4980, 4983.

The limit of time prescribed in the thirty-seventh section was repealed in 1838.

As most original titles in Texas, originating before the revolution, like that of Aguilera in this case, were public archives, the parties holding only *testimonios* thereof, the following law was passed Jan. 19, 1839: —

"Copies of all deeds, &c., when the originals remain in the public archives, and were executed in conformity with the laws existing at their dates, duly certified by the proper officers, shall be admitted to record in the county where such land lies." Id., art. 4984.

It seems to us that these provisions cover the case under consideration. And such is the judgment of the Supreme Court of Texas. In the case of *Guilbeau* v. *Mays* (15 Tex. 410), the plaintiff claimed under a grant of a league of land from the former government; the defendants pleaded prescription for three years, and that there was no record of the plaintiff's grant in the general land-office nor in the county where the land was situated; that they held by patents issued from the government of Texas and locations of valid certificates, without notice of the plaintiff's title. The proofs corresponded with this de-

fence, and the court held it to be a valid one. After reviewing the laws above referred to, and the manifest policy by which they were dictated, they proceed as follows: "In view of the legislation on this subject, it is believed not to be susceptible of a doubt that the grants upon which the plaintiff bases his right to the lands in question ought to have been recorded, and their failure so to be recorded, or delineated on the maps, or other notice, will postpone them to a junior title, derived from the government, and will place the defendants in the position before the court as innocent purchasers without notice, and in principle not distinguishable from the great class of cases of innocent purchasers without notice of any prior or superior titles." This case is corroborated by the subsequent cases of *Musquis* v. *Blake*, 24 Tex. 461; *Nicholson* v. *Horton*, 23 id. 47; *Wilson* v. *Williams*, 25 id. 54.

Had the grant to Aguilera been deposited in the land-office, the case would have presented a question of very different consideration. It is generally conceded that an archive in the general land-office is entitled to all the privileges of an instrument recorded in the proper county. In the case just cited the court say: "Now, in cases of title emanating from the government, where the patent or *testimonio* had not been recorded in the county where the land lies, the archives of the general land-office and the maps of survey, and the records and maps of the county surveyor, would be regarded as notice that the land was appropriated, and was not a part of the vacant domain of the republic." See also *Byrne* v. *Fagan*, 16 Tex. 391; *Chambers* v. *Fisk*, 22 id. 504; *Wilson* v. *Williams*, 25 id. 54. But here all the transfers of the Harris tract took place before the Aguilera title was either recorded or deposited in the land-office. Under these circumstances, the plaintiffs should have been required to show that the defendant and those under whom he claimed had either actual or at least constructive notice of their title at the time when they respectively purchased; but the court required neither, holding in effect that the elder title was entitled to preference without any notice of its existence.

Of course, buying with actual notice of a previous title, or under circumstances which make it a duty to take notice, is a

fraud, and deprives the purchaser of the immunity arising from the fact that such title is not recorded nor deposited in the land-office. *Crosby* v. *Huston*, 1 Tex. 203; *Grumbles* v. *Sneed*, 22 id. 565.

By a late law, passed Oct. 20, 1866, a title not deposited in the land-office, and not recorded, will no longer avail as against certain descriptions of title without actual notice. The act is as follows: —

"Titles to land which may have been deposited in the general land-office subsequently to the time when the land embraced by such titles had been located and surveyed, by virtue of valid land warrants or certificates, shall not be received as evidence of superior title to the land against any such location or survey, unless such elder title had been duly recorded in the office of the county clerk of the county where the land may have been situated, prior to the location and survey, or the party having such location and survey made had actual notice of the existence of such elder title before he made such location and survey." Pasch. Dig., art. 5825.

Whether this law can properly be extended to protect any other titles than those based on "land warrants or certificates" may be questionable. But it is not necessary for the defendant to invoke the aid of this law: he can stand on the fair construction of the laws of 1836 and 1839. The title which he is called upon to combat was not to be found either in the land-office or in the records of the counties, the only public depositories to which the people could resort to ascertain what lands have been granted, and what are vacant and free; and he may well insist that if he and his several grantors had not actual, they should at least have had constructive, notice of an elder title in order to be affected by it, — something beyond the mere fact of its existence; some legal *indicia* or evidence of that existence, deposited in some proper place, which he was legally bound to find, and which, in the exercise of ordinary diligence, he might have found and relied on.

Many other questions are made in the record; but as this is a controlling one, we have thought it unnecessary to discuss them. We are satisfied that the judgment must be reversed, with directions to award a new trial: and it is

So ordered.

REED *v.* MCINTYRE.

A., in due course of legal proceedings, recovered, March 14, judgment against B., a merchant who, the preceding day, had made an assignment of all his property for the benefit of his creditors. An execution was forthwith sued out upon the judgment, and levied upon certain goods, part of the property so assigned. On the petition of a creditor, filed March 31, alleging that B. had committed acts of bankruptcy by fraudulently suspending and not thereafter resuming payment of his commercial paper due January 1, and by making said assignment, B. was by the proper court adjudged to be a bankrupt, and his estate conveyed in the usual form by the register to the assignee in bankruptcy, who filed his bill against A. to determine the title to the proceeds of the sale of the goods, which by consent had been made without prejudice to the rights, if any, of A. by the levy of the execution. Upon the hearing it appeared by the proofs that the assignment by B. was made in good faith to secure the distribution of his property among all his creditors. *Held*, that A. acquired no priority by the levy, and that the assignee in bankruptcy is entitled to the proceeds.

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

William H. Shuey, a merchant at St. Paul, Minn., executed, March 13, 1874, a deed of assignment conveying his entire property, including his stock in trade, to William S. Combs in trust, for the equal benefit of all his creditors. Upon the same day, immediately after the acknowledgment of the deed, Combs entered upon the discharge of his duties as assignee, and took possession of Shuey's stock. During the succeeding day, Mrs. Reed obtained a judgment in one of the State courts of Minnesota against Barnard and Shuey, for the sum of $5,120.45. An execution was immediately issued, and the sheriff forthwith levied it upon the same goods of which Combs had taken possession. Upon the occasion of the levy, the officer was notified of the assignment and Combs's possession. On the 31st of March, 1874, Mrs. Sanderson, a creditor of Shuey, by petition filed in the proper court, prayed that he might be declared a bankrupt, upon two grounds: 1st, that being a merchant and trader, he had, Jan. 1, 1874, fraudulently stopped and suspended payment of his commercial paper, to wit, the promissory note held by her, and had not resumed payment thereof; 2d, that, March 13, 1874, being then insolvent, he made the

said assignment to Combs with intent to hinder, delay, and defraud his creditors, which she alleged was an act of bankruptcy. Before the return of the rule which issued upon this petition, Shuey, by written stipulation, filed in court, without admitting or denying the alleged grounds of bankruptcy, consented that an adjudication might be entered against him. This was at once done, the order reciting that, in consideration of Shuey's written consent, and of the proofs, in the cause, the facts set forth in the petition were found to be true; and it was therefore adjudged that he was a bankrupt, within the meaning of the act of Congress. McIntyre was duly selected as assignee, and to him the usual conveyance by the register was made. Afterwards, to prevent a sacrifice of the goods at a forced sale, and to save expense, a written agreement was made between Mrs. Reed and McIntyre, whereby the latter took possession of and sold all the property levied upon, but without prejudice to such rights as she had acquired under and by virtue of her execution, or to her right to raise any question in a suit in equity, to be promptly instituted, which she might have raised if that property had remained in the custody of the sheriff.

The present suit was commenced by a bill in equity filed by McIntyre for the purpose of obtaining a judicial determination of Mrs. Reed's rights in the property levied on, or rather in its proceeds. She claimed that to the extent of the judgment against Shuey her rights acquired by the levy are superior to those of the assignee in bankruptcy. That view was controverted by him, and a decree having been rendered in his favor, Mrs. Reed appealed.

Mr. E. C. Palmer for the appellant.

Reed obtained the judgment against Barnard and Shuey in the due course of proceedings at law to recover a *bona fide* subsisting debt, and the execution thereon was duly issued. The levy on the goods in question by the sheriff having been regular, his possession and right of possession thereunder were *prima facie* lawful. *Wilson* v. *City Bank*, 17 Wall. 473; *National Bank* v. *Warren*, 96 U. S. 539.

The adjudication in bankruptcy did not affect the levy or impair the lien acquired thereby. The assignee in bankruptcy took the title to the goods subject to all existing valid liens

and incumbrances on them. *Kelly* v. *Scott*, 49 N. Y. 595; *Cook* v. *Tullis*, 18 Wall. 332; *Hayes* v. *Dickinson*, 16 N. Y. Sup. Ct. 277; *In re Hambright*, 2 Nat. Bank. Reg. 498; *McDonald, Assignee*, v. *Moore*, 15 id. 26; *Dolson* v. *Kerr, Sheriff*, 16 id. 405; *Mitchell* v. *Winslow*, 2 Story, 630; *McLean* v. *Moline*, 3 McLean, 201; *Donaldson, Assignee*, v. *Farwell et al.*, 93 U. S. 631; *Jerome* v. *McCarter*, 94 id. 734; *Goddard* v. *Weaver*, 1 Wood, 260.

Combs is not a party to this suit, and makes no claim to the goods or to their proceeds. The assignment to him of March 14 was declared void, as having been made with the intent to hinder, delay, and defraud creditors, and as an act of bankruptcy. It presents, therefore, no obstacle to the effectual maintenance of Reed's rights under the levy.

Mr. E. G. Rogers and *Mr George L. Otis*, *contra*, cited *Mayer et al.* v. *Hellman*, 91 U. S. 496; *Johnson, Assignee*, v. *Rogers et al.*, 15 Nat. Bank. Reg. 1; *In re Steele et al.*, 16 id. 105; *In re M. J. Nelson*, id. 312; *In re James Croughwell*, 17 id. 338; *In re Arthur A. Hull*, 18 id. 5; *In re John C. Walker*, id. 56; *Dodge* v. *Sheldon*, 6 Hill (N. Y.), 9; *Seaman* v. *Stoughton*, 3 Barb. (N. Y.) Ch. 348; *Everett* v. *Stone*, 3 Story, 446; *Penniman* v. *Cole et al.*, 8 Metc. (Mass.) 496.

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

It is stated in the printed argument of counsel for the appellee, and the statement is not controverted by opposing counsel, that at the date of the assignment to Combs there was no statute of Minnesota relating to assignments by debtors for the benefit of creditors.

In determining, therefore, the validity and effect of the assignment in question, we must look to the doctrines of the common law and to the provisions of the Bankrupt Act.

The assignment to Combs was, according to the evidence in this cause, made in good faith for the purpose of securing an equitable distribution of the debtor's property for the benefit of all of his creditors, including the appellant, and not with any intent to hinder, delay, or defraud them. The right of a debtor at common law to devote his whole estate to the satis-

faction of the claims of creditors results, as Mr. Chief Justice Marshall declares, "from that absolute ownership which every man claims over that which is his own." *Brashear* v. *West and Others*, 7 Pet. 608; *Mayer et al.* v. *Hellman*, 91 U. S. 496. Assignments of property for such purposes, not made with the intent to hinder, delay, or defraud creditors, were upheld at common law, even where certain creditors were preferred in the distribution of the debtor's effects. Nor, according to the doctrines of the common law, could the validity of the assignment to Combs be assailed, simply because its effect was to prevent the appellant from obtaining by judgment and execution a priority and preference over other creditors. An assignment which had the effect to delay a creditor in the enforcement of his demand by the ordinary process of law was not, for that reason alone, fraudulent and void. If not made with the intent to hinder, delay, or defraud creditors, it was sustained at common law. Such an intent was often conclusively presumed, if the assignment contained provisions inconsistent with good faith, or so unreasonable and unusual in their character as to justify the conclusion that it was, in the language of Lord Mansfield in *Cadogan* v. *Kennett* (Cowp. 432, 434), a mere "trick or contrivance to defeat creditors." But where its provisions were consistent with an honest purpose to deal fairly and justly with them, — the deed reserving for the benefit of the debtor or his family no control over or interest in the property, and imposing no improper restrictions upon its speedy sale and distribution in satisfaction of the debts, — the consequent temporary interference with the prosecution by particular creditors of their claims by the ordinary legal remedies, was regarded at common law as a necessary and unavoidable incident in the discharge by a debtor of his duty to creditors. *Mayer et al.* v. *Hellman*, *supra*. Such interference was not regarded as hindrance and delay, within the meaning of the statutes against fraudulent conveyances. This precise question arose in *Pickstock* v. *Lyster*, 3 Mau. & Sel. 371. In that case, a debtor, being sued, made an assignment by deed of all of his effects for the equal benefit of creditors. The jury having been instructed that they must find the deed void if made with the intent to defeat the plaintiff in his execution, returned

a verdict in his favor. But the verdict was set aside upon the ground that the jury were misdirected. Lord Ellenborough held that the assignment was "to be referred to an act of duty rather than of fraud, when no purpose of fraud is proved. The act arises out of a discharge of the moral duties attached to his character of debtor to make the fund available for the whole body of creditors. . . . It is not the debtor who breaks in upon the rights of the parties by this assignment, but the creditor who breaks in upon them by proceedings in his suit. I see no fraud: the deed was for the fair purpose of equal distribution." In the same case, Bayley, J., said: "It seems to me that this conveyance, so far from being fraudulent, was the most honest act the party could do. He felt that he had not sufficient to satisfy all of his debts, and he proposed to distribute his property in liquidation of them; this was not acceded to, for the plaintiff endeavored by legal process to obtain his whole debt, the obtaining of which would have swept away the property from the rest of the creditors." To the like effect are the authorities generally, as will be seen from an examination of the adjudged cases cited in Burrill's Treatise on Voluntary Assignments (3d ed.), sect. 319 *et seq.*, and in 1 American Leading Cases (5th ed.), 71 *et seq.* Our conclusion, therefore, is that the assignment to Combs could not, upon common-law principles, be impeached simply because it had the effect to prevent the appellant, by means of the execution levy, from securing priority over all other creditors.

But it is contended that her right of preference over other creditors in the distribution of the proceeds of the property levied upon can be sustained under the provisions of the bankrupt law, and the adjudication of bankruptcy against Shuey. The argument is, that that adjudication having been made upon the ground, in part, that the assignment to Combs was made with the intent, on the part of Shuey, to hinder, delay, and defraud his creditors, such assignment is to be regarded as fraudulent and void from the moment of its execution, and, therefore, as interposing no obstacle whatever in the way of the levy subsequently made in her behalf. This argument, although plausible and ingenious, is not, in our judgment, sound, or at all consistent with the objects intended to be

accomplished by the bankrupt law. If that law had not been in force, the appellant would not have acquired priority over other creditors by the sheriff's levy, for the obvious reason that the right of property, in the goods seized under the execution, had previously passed, by a valid and unimpeachable deed, to Combs, and they were not, thereafter, subject to execution as the property of the debtor. We have often declared that the *pro rata* distribution of the property of the bankrupt was the main purpose of the bankrupt statute. *Buchanan* v. *Smith*, 16 Wall. 277. A serious defect in that statute would be developed if its provisions received such a construction as would enable the appellant to defeat that purpose by obtaining an advantage over other creditors. We are of opinion that no such construction is demanded, either by its letter or its spirit. Since by the sheriff's levy the appellant acquired no priority of right in or lien upon the goods, how could the subsequent proceedings in bankruptcy have the retroactive effect to give her a preference over the other creditors of Shuey? The argument in support of the opposite view ignores the fact that neither Combs nor the creditors who, under the assignment to him, acquired an equitable interest in the property were parties to those proceedings. Their rights, therefore, under his assignment, were not, and necessarily could not be, conclusively determined by those proceedings. Notwithstanding the adjudication, Combs, the assignee of Shuey, was at liberty to contest with the assignee in bankruptcy the question whether the assignment to Combs was a fraud on the Bankrupt Act, or was made with the intent to hinder, delay, or defraud creditors, or to prevent the property from coming to the assignee in bankruptcy, or from being distributed under that act. That no such issue was made between the assignee in bankruptcy and Combs, representing the creditors of Shuey, is due, doubtless, to the fact that the administration of the debtor's effects in the bankruptcy court would accomplish the same end designed by the assignment to Combs; namely, the distribution of the property for the equal benefit of all the creditors. But the absence of such an issue, and the failure of Combs to assert his rights against the appellee, cannot have the effect to increase the appellant's rights to any extent whatever. She cannot

complain that the creditors submit without contest to the distribution of the property through the assignee in bankruptcy, rather than through Combs, under the assignment to him. If she did not acquire any right by force of the levy, it is of no consequence to her, under the issues in this suit, that the assignee in bankruptcy rather than Combs has possession of the property in question. She cannot use the adjudication in bankruptcy to give vitality to an execution levy, which, when made, was ineffectual for any purpose of priority, and then employ the levy, thus vitalized, to defeat the primary object of the adjudication, which was to distribute the bankrupt's effects for the equal benefit of all the creditors. Whatever may be the respective claims of the assignee in bankruptcy and Combs, it is sufficient for the disposition of this case to say that the appellant acquired no priority of right by the execution levy. The adjudication in the bankruptcy court was for the purpose of bringing the bankrupt's effects into that court for distribution, and the appellant cannot, by force of that adjudication, secure a priority, which, without such adjudication, she would not have had. To hold otherwise would be to make the bankruptcy proceedings the instrument of defeating the wise and beneficent policy which the Bankrupt Act was intended to subserve. Even if it were conceded that the assignment to Combs was an act of bankruptcy, upon the ground that it was made with the intent to prevent the property from coming to the assignee in bankruptcy, and from being distributed under the Bankrupt Act, it was not invalid, except with reference to proceedings under the bankrupt statute, to be instituted by the bankrupt, or by some creditor, for the purpose of bringing the bankrupt's effects into the bankruptcy court. *Everett* v. *Stone*, 3 Story, 446; *Dodge* v. *Sheldon*, 6 Hill (N. Y.), 9; *Seaman* v. *Stoughton*, 3 Barb. (N. Y.) Ch. 348; 15 Nat. Bank. Reg. 228.

Decree affirmed.

MR. JUSTICE BRADLEY dissented.

BRICK *v.* BRICK.

1. Parol evidence is admissible in equity to show that a certificate of stock issued to a party as owner was delivered to him as security for a loan of money. A court of equity will look beyond the terms of an instrument to the real transaction, and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties.
2. The rule which excludes such evidence to contradict or vary a written instrument does not forbid an inquiry into the object of the parties in executing and receiving it.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. W. B. Webb for the appellant.

Mr. Joseph H. Bradley for the appellee.

MR. JUSTICE FIELD delivered the opinion of the court.

In 1864, between the 7th and 27th of September, the appellant, Samuel R. Brick, a resident of Philadelphia, purchased eight hundred and ninety-two shares of stock in the Washington Gas-light Company, a corporation existing in the District of Columbia, charted by Congress, paying for the same $17,277. Of this stock, two hundred and fifty shares were afterwards transferred by his direction on the books of the company to his brother, Joseph K. Brick, a resident of Brooklyn, N. Y., to whom a certificate was issued and from whom a check for $5,250 was received. The question presented is whether this transaction between the brothers was a sale of the stock, or a loan of money on its pledge. Joseph K. Brick is dead, and the evidence as to the character of the transaction is conflicting, as is generally the case when the object of parties in the execution of instruments is not expressed in writing, and is sought years afterwards to be shown by parol. But notwithstanding such conflict, there are certain facts established, indeed not controverted, which must control our judgment.

In the first place, it appears that in September, 1864, the appellant was anxious to purchase stock in the gas company. He had become acquainted with its affairs, and knew that it intended to apply to Congress for power to increase its capital,

and was convinced that with such increase the value of the stock would be greatly enhanced. He expressed this conviction in letters to his son, which the complainants produced; and, acting upon it, he purchased to an extent beyond his means of immediate payment, and gave his note for a portion of the purchase-money.

In the second place, the appellant applied to his brother, Joseph, for a loan of money, at the time he was expressing his anxiety to buy the stock of this company, and his brother replied that the money could be raised on call. It was not many days afterwards when a check for the $5,250 was sent.

In the third place, in May and July, 1866, Joseph stated, under oath, that he was not the owner of the stock. In the previous year he had given to the board of assessors of Brooklyn a statement of his personal property, in which he had specified the stock of the gas-light company, valuing it at $5,000, and was accordingly assessed upon it. In May, 1866, he made oath that he had been thus erroneously assessed, and that the error had arisen from his having inserted in the statement the stock held by him for his brother, in which he had no pecuniary interest. The assessment was accordingly corrected. On the same day, he wrote to his brother what he had done, saying that he had told the assessors he held the stock for the latter's benefit, and requesting him to advise the president and secretary of the company that such was the case. And in the statement of his personal property for that year, made in July following, he omitted the stock in question, and verified the statement with his oath that he had no personal property not included in it.

So far from questioning the character of this testimony, the complainants refer to it in their bill, annex copies of the oaths taken, and observe that the stock was purchased to aid Samuel in some matters of business, and was often spoken of as his, though not so in fact, but that being unproductive, the oaths were made by Joseph in order to get rid of the tax assessed against him and make Samuel pay it, as if this circumstance could possibly extenuate what, if not true, was simple perjury.

This bill is signed by the widow of the deceased, and the

suit is prosecuted by her and the executors of his will; but we do not think that the evidence in the case justifies the reproach they would cast upon his name and character. There are casual observations made by him, sometimes in loose conversation, mostly in friendly letters, which, unexplained, would indicate that he was owner instead of mortgagee of the stock, expressions not at all unnatural where one holds the absolute title to property; but there is nothing in them which overcomes the weight of his affirmation under oath, supported as that is by all the attendant circumstances.

We are satisfied that the certificate of the two hundred and fifty shares was issued to the deceased as security for a loan, and not upon a purchase. It is competent to show by parol what the transaction was. In the late case of *Peugh* v. *Davis* (96 U. S. 336), we stated the doctrine of equity on this subject, where an instrument was in form a conveyance, but was in fact intended as a security; and though the instrument there was a deed of real property, the principle applies when the instrument purports to transfer personal property. A court of equity, we there said, "looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression and to promote justice." *Hughes* v. *Edwards*, 9 Wheat. 489; *Russell* v. *Southard*, 12 How. 139; *Taylor* v. *Luther*, 2 Sumn. 228; *Pierce* v. *Robinson*, 13 Cal. 116.

As in our opinion the appellant is the owner of the stock in question, and his brother held it merely as collateral security for the $5,250 loaned, it is unnecessary to consider what, if any, effect is to be given to the decree obtained in the former case of Samuel Brick against the executors of the deceased. Assuming that the District Court never acquired jurisdiction over the executors resident in the State of New York, the situation of the parties remains as previously; and upon payment of the loan with interest, after proper credits for the dividends received, the appellant will be entitled to the possession of the certificate. The present suit proceeds upon the theory that the stock belongs to the estate of the deceased, and is not held as security. It seeks to enforce a claim of ownership to the property, and not the payment of the loan by its sale.

The decree must, therefore, be reversed, with directions to the court below to dismiss the bill; and it is

So ordered.

DE TREVILLE *v.* SMALLS.

1. Where lands have been sold for an unpaid direct tax, the tax-sale certificate is, under the act of Feb. 6, 1863 (12 Stat. 640), *prima facie* evidence not only of a regular sale, but of all the antecedent facts which are essential to its validity and to that of the purchaser's title. It can only be affected by establishing that the lands were not subject to the tax, or that it had been paid previously to the sale, or that they had been redeemed according to the provisions of the act.
2. The ruling in *Cooley* v. *O'Connor* (12 Wall. 391), that the act of Congress contemplates such a certificate where the United States is the purchaser, reaffirmed.
3. The act of June 7, 1862 (12 Stat. 422), imposing a penalty for default of voluntary payment of the direct tax upon lands, is not unconstitutional. It reserved to the owner of them the right to pay the tax within a specified time, and take a certificate of payment by virtue whereof the lands would be discharged. On his failing to do so, the penalty attached.

ERROR to the Circuit Court of the United States for the District of South Carolina.

This is an action of trespass *quare clausum fregit*, brought by William J. de Treville against Robert Smalls, to try the title to a certain lot of ground in the town of Beaufort, S. C.

The plaintiff having made out a *prima facie* case, the defendant offered in evidence the following paper: —

"UNITED STATES OF AMERICA.

"*Tax-sale Certificate No.* 238.

"This is to certify that at a sale of lands for unpaid taxes, under and by virtue of an act entitled "An Act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," held, pursuant to notice, at Beaufort, in district of Beaufort, in the State of South Carolina, on the thirteenth day of March, A.D. 1863, the tract or parcel of land hereinafter described, situate in the town of Beaufort and State aforesaid, and described as follows, to wit: —

"'Lot B, in block 23, according to the commissioners' plat,' was sold and struck off to the United States for the sum of fifteen dollars and —— cents, being the highest bidder, and that being the highest sum bidden for the same; the receipt of which said sum in full is hereby acknowledged and confessed.

"Given under our hands at Beaufort this second day of April, A.D. 1863.

"WILLIAM E. WORDING,
"WM. HENRY BRISBANE,
"*Commissioners.*"

To the introduction of which the plaintiff objected, on the ground, —

First, It is not in law a certificate, in this, that it does not, upon its face, show that those proceedings have been taken by the said commissioners prior to the alleged sale, which are essential to the regularity and validity thereof, and of which the act of Congress makes a purchaser's certificate *prima facie* evidence.

Second, It is not a proper and legal certificate under the act of Congress, because on its face it shows that the commissioners have not sold the plaintiff's lot of land according to the enumeration of said lot required by the act.

Third, Sect. 13 of the act of June 7, 1862, which, in case of the concealment or the loss of the records of assessments and valuation of the respective lots of land to be assessed, authorizes the commissioners to value and assess the same in their

own judgment, does not include the right to make a new and different enumeration and description of such lots.

Fourth, Said paper was not issued to any person, at said sale, bidding "the sum of the taxes, penalty, and costs, and ten per cent per annum interest on said tax," pursuant to the notice required by the act, nor to any person bidding "a larger sum," who, upon paying the purchase-money in gold and silver coin, or in the Treasury notes of the United States, or in certificates of indebtedness against the United States, "became entitled" under the act "to receive from the commissioners their certificate of sale," and said paper on its face purports not to have been issued by the commissioners to any "purchaser or purchasers," at a sale made under the seventh section of the act, and is not a purchaser's certificate of sale thereunder, but a mere memorandum that the land was struck off to the United States, and as such memorandum is not made evidence by the act, it is not competent evidence in law of the facts which it recites.

The court overruled the objections and admitted the certificate, to which ruling the plaintiff excepted.

The plaintiff, in reply to the evidence of the defendant, offered evidence to prove that the commissioners did not apportion and charge the said tax upon the said lot of ground as the same was enumerated and valued under the last assessment and valuation thereof made under the authority of the State of South Carolina previous to the first day of January, 1861, but did apportion and charge the said tax upon a lot enumerated and designated as lot B, in block 23. Upon inquiry by the court, the plaintiff said that he did not expect to prove that the records of assessment and valuation of the lot made under the authority of the State actually came within the possession of the board of commissioners previous to the making of their valuation and assessment as aforesaid.

To the introduction of this evidence the defendant objected, his objection was sustained, and the plaintiff excepted.

The plaintiff then offered evidence to prove that in the advertisement and notice of the sale of said lot the same was not described as it was enumerated in the last valuation and assessment thereof made under the authority of the State previous to the first day of January, 1861, and that in said advertisement

and notice the said lot was not described as the lot of said owner, nor by its situation and boundaries, nor as enumerated on the old plat of the town of Beaufort, nor by giving the streets and numbers thereon by which said lots were known and recognized, but by the enumeration and designation thereof as lot B, in block 23.

The court, on the objection of the defendant, excluded the evidence, and the plaintiff excepted.

The plaintiff then offered in evidence the following statement of W. E. Wording, one of the commissioners, to wit: "That the sales under act of Congress, 1862, for non-payment of taxes were advertised by the commissioner to be made at Beaufort. On the Saturday preceding the sale, General Hunter, commanding the military district in which the lands advertised were situated, issued an order forbidding the sale. The commissioners, notwithstanding the order, proceeded to sell, and on the day fixed by the advertisement, and at the hour fixed therein, struck off one lot. They then adjourned the sales from day to day, meanwhile reporting the matter to General Hunter, who finally consented not to interfere with the sale, and to revoke his order, but who did not formally revoke it; and under these circumstances the sales actually took place some time in March following, — about the 13th of March, — and after the first day of sale." He also offered to prove that during that period Beaufort County was under martial law.

To the introduction of which evidence the defendant objected, and his objection was sustained by the court; and the plaintiff thereupon excepted.

The testimony on both sides having been closed, the plaintiff requested the court to instruct the jury "that the act of Congress approved 7th June, 1862, under which the defendant claims his title, is in conflict with the fourth clause, ninth section, first article, of the Constitution of the United States, in that the amount of the direct tax theretofore apportioned to the State of South Carolina is increased by the addition thereto of a penalty of fifty per cent, and thus is not in proportion to the census or enumeration directed to be taken in the third section of the same article, whereby all direct taxes are to be

apportioned among the several States." But the court declined so to charge, whereupon the plaintiff excepted.

Judgment was rendered against the plaintiff, who thereupon sued out this writ, and assigns for error the rulings of the court below.

Mr. Theodore G. Barker and *Mr. James Lowndes* for the plaintiff in error.

The Solicitor-General, contra.

Mr. Justice Strong delivered the opinion of the court.

This case presents for our consideration the several acts of Congress of 1861, 1862, and 1863, which provided for the levy and collection of a direct tax, and the contest below was whether, under those acts, the defendant had obtained a valid title to the land in controversy. In support of his possession, he gave in evidence at the trial the tax-sale certificate, to the reception of which exception was taken, for several reasons, most of which are now urged in support of the assignments of error. It is said that the certificate is not evidence of title in the defendant, because it does not on its face show that those proceedings had been taken by the commissioners prior to the alleged sale, which were essential to the regularity and validity of the sale under the acts of June 7, 1862, and Feb. 6, 1863. This objection entirely overlooks the provisions of those acts of Congress. The certificate which by the act of 1863 the board of tax commissioners was required to give to purchasers was simply a certificate of sale. The law did not require it should set forth that a tax had been assessed upon the property; that the tax was unpaid; that the sale had been advertised for a specified time or in a particular manner; nor that it should recite any of the facts which were necessary antecedents to any sale. It made the certificate of sale equipollent with a deed, and cast upon the former owners of the land the burden of showing that the certificate or deed was made without authority. The numerous decisions cited by the plaintiff in error to support his objection are quite inapplicable to the case. No doubt it has been decided that statutes which make a tax-sale deed *prima facie* evidence of the *regularity* of the sale, do not relieve a purchaser from the burden of showing that the pro-

ceedings anterior and necessary to the power to make the sale actually took place. Such a provision has been held to relate only to the conduct of the sale itself. But the act of 1863 declares that the commissioners' certificate shall be *prima facie* evidence not merely of the *regularity* of the sale, but also of its *validity* and of *the title* of the purchaser; and it enacts that it shall only be affected as evidence of the regularity and *validity* of the sale by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previously to the sale, or that the property had been redeemed. How can a deed be *prima facie* evidence of the *validity* of a sale, unless it be such evidence of the transmission of the title of the property? Is any sale *valid* which does not pass title to the subject of the sale? It may be regular in form and in the mode of its conduct, but it cannot be *valid*, unless authorized by law. Now, the act of Congress makes a certificate of sale by the commissioners evidence that the title acquired by the purchaser under the sale was a valid one, assailable only by proof of one or the other of three things. It is not the certificate of an assessment or of an advertisement of a sale, followed by an actual sale, to which such an effect is given, but a certificate of sale alone. We are not at liberty to interpolate in the statutes requisites for the certificate which the statute does not demand.

The second objection to the reception of the tax certificate is that it was not authorized by the statutes, inasmuch as it certified a sale to the United States. It is insisted that the effect of *prima facie* evidence is given only to certificates of sale made to the highest bidder, when such bidder was some person other than the United States, and that no authority was given to the board of commissioners to certify a sale when the government was the highest bidder, and when the property was stricken off to it. To this we cannot assent. The plain object of the statutory provision was to give confidence to purchasers, and thereby to enable the government to obtain the taxes due to it. For these purposes it was quite as important that the government should have evidence of its title, if it purchased, as it was that any other purchaser should have such evidence. Taxes, not lands, were what the government required. If the United States became the purchaser at the commissioners' sale,

it was only to obtain the taxes by a resale, and such a resale, resting as it must have done upon the original sale made by the commissioners, needed the encouragement and support of a commissioners' certificate equally with a purchase by any bidder. It is not, therefore, to be admitted that the statute intended to put the United States in any worse condition than that occupied by any other successful bidder. The argument that it is only that highest bidder who shall, upon paying the purchase-money (and not the United States, who of course do not pay so much as is claimed for taxes), be entitled to the certificate, is plausible, but we think it unsound. The words, "who shall, upon paying the purchase-money," &c., be entitled to this certificate, are not descriptive of the highest bidder entitled, but declaratory of the duty of every purchaser. It is, however, unnecessary to dwell longer on this part of the case. In *Cooley* v. *O'Connor* (12 Wall. 391), we held that the act of Congress did contemplate a certificate of sale in cases where the United States becomes the purchaser, as fully as where the purchase is made by another. In that case, the point now made was distinctly presented, and such was our judgment. We adhere to the opinion we then expressed.

The other reasons urged in support of the objection to the admission of the tax certificate of sale may be considered in connection with the first exception to the rejection of evidence. In substance, they are that the certificate was not legal, because on its face it shows the commissioners did not sell the plaintiff's lot according to the enumeration thereof required by the acts of Congress; and to show that such was the fact, the plaintiff offered evidence which was rejected by the court. What was sold was lot B, "according to the commissioners' plat." Now, if it be assumed, as it must be, in view of the evidence offered, that the enumeration and valuation of lot B was not in accordance with the last assessment and valuation made under authority of the State previous to Jan. 1, 1862, we do not perceive that it affects the validity of the title acquired by the purchaser at the sale. It was foreseen by Congress that the State records of assessments and valuation of the lots of land in insurrectionary districts might be destroyed, concealed, or lost, so as not to come into the possession of the board of

commissioners, whose duty it was to enforce the collection of the tax, and therefore it was enacted by the thirteenth section of the act of 1862 that they should be authorized to value and assess the same upon such evidence as might appear before them, and it was declared that "no mistake in the valuation of the same, or in the amount of tax thereon, should, in any manner whatever, affect the validity of the sale of the same, or of any of the proceedings preliminary thereto." The provisions respecting the mode of valuation were only directory. But if they were more, so far as relates to the admissibility of the certificate of sale, the requisition of the first section of the act was quite immaterial. That certificate was made *prima facie* evidence of the regularity and validity of the sale and of the title of the purchaser irrespective of any recitals it might contain, or of any evidence which might afterwards be adduced to rebut the *prima facies*. It was presumptive evidence of all antecedent facts essential to its validity, and hence admissible as such. The only question, then, is whether the evidence offered tended to rebut this presumption.

Assuming the evidence would have proved that the commissioners did not apportion the tax upon the lot as the same had been enumerated and valued by the State in the last assessment prior to Jan. 1, 1862, their action was at most a mere irregularity, and the evidence by itself did not prove that. The act authorized the board to assess and value lots of ground according to their own judgment, when the State records of valuation and assessments were destroyed, concealed, or lost, so as not to come into their possession. It is a fair presumption that they discharged their duty according to law. The plaintiff did not offer to show, and disclaimed any intention to show, that the State records of assessment and valuation came into the possession of the commissioners previous to their making the valuation and assessment; and in view of the history of the times, to which we cannot close our eyes, it was a reasonable presumption which the jury ought to have accepted, that the State assessments and valuations were withheld or concealed. They were, of course, in the hands of the insurrectionary State government, and hence inaccessible to the commissioners. The evidence offered had no tendency to show the contrary. As we

have seen, the act of Congress declared that no mistake in the valuation or in the amount of the taxes would in any manner affect the validity of the sale, or of any of the proceedings preliminary thereto. Besides, all possible attack upon the *prima facie* of the certificate was limited by the express provisions of the act, which enacted, as before stated, that it should only be affected as evidence of the regularity and validity of sale, by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed. This left to the owner of lands subject to the tax every substantial right. It was his duty to pay the tax when it was due. His land was charged with it by the act of Congress, not by the commissioners; and the proceeding ending in a sale was simply a mode of compelling the discharge of his duty. All his substantial rights were assured to him by the permission to show that he owed no tax, that his land was not taxable, that he had paid what was due, or that he had redeemed his land after sale. He was thus permitted to assert every thing of substance, — every thing except mere irregularities.

We do not feel at liberty to disregard the plain intention of the acts of Congress. We are not unmindful of the numerous decisions of State courts which have construed away the plain meaning of statutes providing for the collection of taxes, disregarding the spirit and often the letter of the enactments, until of late years the astuteness of judicial refinement had rendered almost inoperative all legislative provisions for the sale of land for taxes. The consequence was that bidders at tax sales, if obtained at all, were mere speculators. The chances were greatly against their obtaining a title. The least error in the conduct of the sale, or in the proceedings preliminary thereto, was held to vitiate it, though the tax was clearly due and unpaid. Mr. Blackwell, in his Treatise on Tax Titles, says (p. 71), "that out of a thousand cases in court [of tax sales], not twenty have been sustained." To meet this tendency of judicial refinement very many States have of late adopted very rigid legislation. The acts of Congress we are considering must have had it in view. Hence the stringent provisions they contain. They declare, in effect, that the certificate of

the commissioners' sale shall be evidence of compliance with the preliminary requisites of the sale, and that this evidence shall be rebutted only by proof of one or the other of three specified things. There is no possible excuse for not enforcing such statutes according to their letter and spirit. In *Gwynne* v. *Neiswanger* (18 Ohio, 400), it appeared that the statute of the State prescribed certain preliminaries to a sale of land for taxes, and directed a deed to be made to the purchaser, which should be received in all courts of the State as good evidence of title, adding, "nor shall the title conveyed by said deed to the purchaser or purchasers, his heirs, or their heirs, assignee or assignees, be invalidated or affected by any error previously made in listing, taxing, selling, or conveying said land." The court held that even if there were irregularities in the proceedings, they would not justify declaring invalid a deed which the law under which it was made enacted should not be invalidated for any error in the listing, selling, or conveying.

In *Allen* v. *Armstrong* (16 Iowa, 508), we find a construction of another State statute. It enacted that a county treasurer's deed for land sold by him for taxes should be *prima facie* evidence, 1st, that the property conveyed was subject to taxation; 2d, that the taxes were not paid; 3d, that the property conveyed was not redeemed; and should be conclusive evidence of the following facts: 1st, that the property had been taxed and assessed as required by law; 2d, that the taxes were levied according to law; 3d, that the property was advertised for sale in the manner and for the length of time required by law; 4th, that the property was sold as stated in the deed; 5th, that the grantee was the purchaser; 6th, that the sale was conducted as required by law; and, 7th, that all the prerequisites of the law were complied with by all the officers, from the listing and valuation of the property up to the execution of the deed, and that all things whatsoever required by law to make a good and valid sale, and to vest the title in the purchaser, were done, except in regard to the three points first above named, wherein the deed should be *prima facie* evidence only. This, it will be noticed, was substantially the same as the United States statute, and the court ruled that irregularities preced-

ing the sale were inoperative to defeat it. The case is in many particulars instructive. See also *Tharp* v. *Hart*, 2 Sneed (Tenn.), 569.

In regard to the assignment of the plaintiff, that the court erred in refusing to admit evidence of the order of General Hunter and its revocation, as well as of the fact that Beaufort County was under martial law when the sale was made, it is sufficient to say that we cannot perceive its possible legitimate bearing upon any question really involved in the case, and the assignment has not been seriously pressed.

Nor was there error, of which the plaintiff can take advantage, in refusing evidence to prove that the advertisement and notice of the sale did not describe the property sold as it was enumerated in the last preceding valuation. What we have heretofore said is a sufficient answer to this objection.

One other assignment only remains. It is that the acts of Congress were unconstitutional, because the amount of the direct taxes apportioned to the State of South Carolina was increased by the addition thereto of a penalty of fifty per cent, and therefore was not in proportion to the census or enumeration directed to be taken by the second section of the first article of the Constitution.

The assignment rests upon a mistaken construction of the acts of Congress. It is true that direct taxes must be apportioned among the several States according to the population. The acts of Aug. 5, 1861, June 7, 1862, and Feb. 6, 1863, did so apportion the tax. The fifty per cent penalty was no part of it. The act of Congress of 1861, which levied the tax, provided for no penalty, except for failure to pay it when it was due; and the penalty charged by the acts of 1862 and 1863 was also for default of voluntary payment in due time. A careful reading of the acts makes this very plain. Throughout, a distinction is made between the tax and the added penalty. It is recognized in the first section of the act of 1862, in the second, and in the third, as well as elsewhere. By the third section the owner of the lots or parcels of land was allowed to pay the tax charged thereon (*not the tax and penalty*), and take a certificate of payment, by virtue whereof the

lands would be discharged. It cannot, therefore, be maintained that the tax was in conflict with the Constitution.

We have thus considered all the questions presented by the record, and we discover no error.

Judgment affirmed.

MR. JUSTICE FIELD dissented.

HOOPER v. ROBINSON.

1. A policy upon a cargo in the name of A., "on account of whom it may concern," or with other equivalent terms, will inure to the interest of the party for whom it was intended by A., provided he at the time of effecting the insurance had the requisite authority from such party, or the latter subsequently adopted it.
2. No proof is necessary that the assured had an insurable interest at that time. It is sufficient if such interest subsisted during the risk and when the loss occurred.
3. A policy "lost or not lost" is a valid stipulation for indemnity against past as well as future losses. A contingent interest may be the subject of such a policy.
4. In an action against A. to recover the amount paid to him by the underwriters, who allege that neither he nor his principal had an insurable interest in such cargo, the burden of proof is on the plaintiffs to show that fact.
5. A. having received the money as agent, and promptly paid it over to his principal, without notice of any adverse claim, or reason to suspect it, the plaintiffs, having been guilty of laches, must look to that principal.

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

The British steamer "Carolina" came to Baltimore, consigned to James Hooper & Co. They were also her agents while she remained in that port. The plaintiff in error was a member of the firm. Having taken on board her return cargo, the steamer proceeded on her homeward voyage. While in the Chesapeake Bay she was injured by a collision with another vessel, and put back to Baltimore for repairs. She was repaired, and Hooper & Co. paid all the bills and made other disbursements for her. McGarr, the captain, drew on Good

Brothers & Co., of Hull, England, for the amount in favor of Hooper & Co., and at the same time directed them to protect the drawees by insurance, which was intended to be done by the policy here in question. The draft bore date Oct. 20, 1872; was for £1,611 18*s.* 7*d.*; was payable in London thirty days after sight; and directed that the amount should be charged "to account for advances for repairs and disbursements of steamship 'Carolina' and her freight, to enable the ship to proceed on her voyage."

The policy of insurance was dated on the 26th of October, 1872, and was to "James Hooper & Co., on account of whom it may concern, in case of loss to be paid to their order." The insurance was "lost or not lost," . . . "on merchandise, to cover such risks as are approved and indorsed on the policy." The indorsement set forth the date of the insurance, the name of the vessel, the course of the voyage, the rate of the premium, the amount insured ($8,000), and the remark, "paid advance to cover disbursements and repairs." The names of the agents of the underwriters were affixed. The instrument was a cargo policy. No inquiry was made of Hooper as to whom he was insuring for, and no representation was made by him except as is disclosed in the memorandum indorsed upon the policy. The draft of McGarr was bought by Brown & Sons, bankers, of Baltimore. They transmitted it to their correspondents in London. On the 11th of November, 1872, it was accepted by Good Brothers & Co., and on the 14th of December following they paid it. On the 14th of November, 1872, the steamer foundered at sea. On the 28th of that month notice of the loss was given to the underwriters. On the 6th of December, in answer to a call for proof of loss and interest, Hooper & Co. furnished the Baltimore agent of the underwriters with the protest and a full account of the items of "outfit and disbursements of the British steamer 'Carolina.'" In the statement was the charge, "to cash paid insurance on advances $117.33." On the 15th of January, 1873, the agent in Baltimore drew on the defendants in error, his principals in New York, for $8,012, at five days' sight. The draft was paid on the 24th of that month, and on the 31st Hooper & Co. remitted the amount to Good Brothers & Co. in England. When Hooper & Co. received

the draft of the 15th of January, they gave a receipt setting forth that when the draft was paid it would be "in full for claim for total loss of advancements for disbursements and repairs per steamer 'Carolina,'" . . . "insured 26th of October, 1872, under policy No. 22,706." The receipt concluded with a promise, upon the payment of the draft, "to assign all our right, title, and interest in the above advances for disbursements and repairs to the underwriters." Hooper said at the time to the agent "that he had nothing to assign." On the 10th of February, 1873, Hooper & Co. executed to Robinson & Cox, the attorneys of the underwriters, the promised assignment, which was a printed form filled up by the agent, "such as is taken in all cases of abandonment for total loss." Hooper then again told the agent "that he had no interest in the matter, but as it was customary, he would sign the paper."

During all these transactions Hooper & Co. were not asked whether they had insured for themselves or for others; whether they had been or expected to be repaid their disbursements; whether any one else was interested in the policy, or for whom they were collecting the insurance. More than a month after the loss had been paid and the money remitted to England, a marine adjuster came from New York to Baltimore "to ascertain who owed Mr. Hooper for advances." A full disclosure was thereupon made by Hooper. The adjuster suggested to him "to write his friends on the other side to return the money." Hooper asked if the underwriters did not get the premium for insurance, and if the vessel was not lost. Being answered in the affirmative, he said he "would not have the face to write to the parties to return the money." No offer has been made to return to Hooper & Co., or to Good Brothers & Co., the premium for insurance. This suit was brought by the underwriters on the 30th of October, 1873, more than nine months after the loss had been paid and the money remitted to Good Brothers & Co., and more than seven months after Hooper's disclosure to the adjuster.

When the testimony was closed on both sides in the court below, the defendant, Hooper, asked the court to charge the jury, in effect, that if they believed the advances and the insurance were made; that the draft on Good Brothers & Co. was

drawn, accepted, and paid; that the steamer was lost, proof of loss and payment demanded; that Hooper then furnished the plaintiffs with the account of his disbursements; that the plaintiffs thereupon paid him and took the assignment without having made any inquiry as to whether he was collecting for himself or for others, and that within a few days thereafter he remitted the money to Good Brothers & Co., — all as stated in the evidence, the plaintiffs were not entitled to recover. This instruction the court refused to give, and instructed, in substance, that if the jury believed that when Hooper made his claim for indemnity under the policy he produced the account and subsequently gave the receipt and executed the assignment, and that when he received payment and delivered the assignment he had received notice of the payment of the draft upon Good Brothers & Co., given to him to recover his advances, which fact he did not communicate to the underwriters, then the plaintiffs were entitled to recover the amount of the insurance money which he had received. Hooper excepted to the refusal to instruct and to the instruction given. The jury found for the plaintiffs, and judgment was entered accordingly. The defendant then brought the case here for review.

Mr. Thomas W. Hall for the plaintiff in error.

That advances to cover disbursements and repairs constitute an insurable interest is settled. *Insurance Company* v. *Barings*, 20 Wall. 163, and cases cited.

The present is a stronger one than that case, for neither Hooper, who effected the insurance and to whose order the loss was made payable, nor Good Brothers & Co., for whom it was effected, are suing to recover upon the policy.

If they had an insurable interest in the advances, even "an inchoate and contingent" one, there can be no doubt that it was covered by the policy "on account of whom it may concern."

It is essential to the case of the plaintiffs that they show affirmatively that Good Brothers & Co., to whom Hooper paid over the money as soon as collected, were not entitled to receive it. There is, however, no evidence in the record to support any such view. It is merely an assumption, which the plaintiffs did not attempt to maintain by proof at the trial.

For whom a policy "on account of whom it may concern" is underwritten, is a question of intention on the part of the person procuring it. It is sufficient that it was intended to indemnify any party having an insurable interest, and it will be applied to that of any person subsequently ascertained to have such an interest who adopts the insurance.

It is immaterial whether the person intended to be protected, therefore, authorizes the insurance beforehand or subsequently adopts it. 1 Phillips, Ins. (5th ed.), sects. 383–385; *Buck & Hedrick* v. *Chesapeake Insurance Co.*, 1 Pet. 151; *Insurance Company* v. *Chase*, 5 Wall. 509; *Newsoms' Adm'r* v. *Douglas*, 7 Har. & J. (Md.) 451; *Maryland Insurance Co.* v. *Bathurst*, 5 Gill & J. (Md.) 229; *Franklin Fire Insurance Co.* v. *Coates, &c.*, 14 id. 285; *Routh* v. *Thompson*, 13 East, 285; *Bridge* v. *Niagara Insurance Co.*, 1 Hall (N. Y.), 347; *Blanchard* v. *Waite*, 28 Me. 59; 3 Kent, Com. 260. So the interest covered may itself be inchoate and contingent. *Lucena* v. *Craufurd et al.*, 3 Bos. & Pul. 75; *Hancock* v. *Fishing Insurance Company*, 3 Sumn. 132.

That Good Brothers & Co. were the parties whose interest was intended to be insured and protected is clear. They ratified in the fullest manner all that had been done by Hooper and the master of the vessel for their protection. It is a case for the application of the maxim, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*. *Lucena* v. *Craufurd et al.*, *supra*; *Hancock* v. *Fishing Insurance Company*, *supra*; *Lee* v. *Massachusetts Fire & Marine Insurance Co.*, 6 Mass. 208; 3 Kent, Com. 262.

The court erred in assuming as a conclusion of law that Hooper's omission to communicate to the underwriters, "when he received payment of said insurance, and made and executed said assignment, that he had already received notice of the payment of the draft" (if the jury should find these facts), entitled the plaintiffs below to recover in this action. He was under no obligation, legal or moral, to disclose the fact that he was insuring for Good Brothers & Co., when he took out the policy, or that he was receiving for them the money, which by the terms of the policy was payable to him.

Silence is not concealment, unless disclosure be a duty

Aliud est celare; aliud tacere. Carter v. *Boehm*, 3 Burr. 1905; 1 Smith, Lead. Cas. (7th Am. ed.), 834, and notes to leading case; 2 Parsons, Contracts, 363, and cases cited; *Russell* v. *Union Insurance Co.*, 1 Wash. 409; *Finney* v. *Warren Insurance Co.*, 1 Metc. (Mass.) 166; *Higginson*, v. *Dall* 13 Mass. 96; *Wells* v. *Philadelphia Insurance Co.*, 9 Serg. & R. (Pa.) 103.

In any aspect of the case the court erred in its instruction in withholding from the jury the question of the materiality of Hooper's alleged omission to inform the defendants in error that the master's draft had been paid. Materiality in such cases is always a question for the jury, even when the fact the improper concealment of which is alleged is one which might and reasonably would have influenced the action of the underwriters in entering into the contract, in accepting or rejecting the risk, or in fixing the amount of the premium. *Livingston* v. *Maryland Insurance Co.*, 6 Cranch, 274; *Maryland Insurance Co.* v. *Ruden's Adm'r*, id. 338; *McLanahan* v. *Universal Insurance Co.*, 1 Pet. 170; *Columbian Insurance Co.* v. *Lawrence*, 10 id. 516; *New York Firemen's Insurance Co.* v. *Walden*, 12 Johns. (N. Y.) 513; *Franklin Insurance Co.* v. *Coates*, 14 Md. 299; *Carter* v. *Boehm*, *supra;* 1 Smith, Lead. Cas. (7th Am. ed.), pp. 848, 850, notes to *Carter* v. *Boehm;* 3 Kent, Com. 284, 285.

Viewed, as this action must be, as an ordinary one to recover back money paid under an alleged mistake of facts, the right of the plaintiffs to recover must be determined by the equities of the case and the rules ordinarily applicable to such actions. They will not be permitted to recover if it would be manifestly inequitable to allow them to do so. *Moses* v. *Macfarlane*, 2 Burr. 109; *Insurance Company* v. *Chase*, 5 Wall. 509; 2 Smith, Lead. Cas. (7th Am. ed.) 402, notes to *Marriott* v. *Hampton*.

The plaintiffs are suing to recover back from Hooper money which they paid him without inquiry, and which he, in perfect good faith, paid over to the persons for whom he had collected it, and who, he supposed, were entitled to receive it, long before suit brought, or any notice of any claim or demand on the part of the plaintiffs to have the money refunded

There is no equity in the claim thus set up. They chose voluntarily, with the fullest opportunity for inquiry, to pay the money without inquiry to a person who received it innocently, and with no fraudulent intention at once paid it over to the parties to whom he believed it to belong. *Elliott* v. *Swartwout*, 10 Pet. 137; *Buller* v. *Harrison*, 2 Cowp. 565; *Carter* v. *Boehm*, 3 Burr. 1905; *Milnes* v. *Duncan*, 6 Barn. & C. 671; *Cox* v. *Masterson*, 9 id. 902; *Townsend* v. *Crowdy*, 8 C. B. N. S. 477; *Clarke* v. *Dickson*, El., B. & E. 148.

Mr. Stewart Brown and *Mr. Arthur George Brown*, *contra.*

The instruction granted by the court below was correct *Carpenter* v. *Providence Washington Insurance Co.*, 16 Pet. 495; *Insurance Company* v. *Barings*, 20 Wall. 159; *Insurance Company* v. *Newton*, 22 id. 32; *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527; *Hidden* v. *Slater Insurance Co.*, 2 Cliff. 269; *Allegre* v. *Maryland Insurance Co.*, 6 Har. & J. (Md.) 408; Angell, Insurance, sect. 59; 2 Parsons, Mar. Ins., p. 474.

The underwriters were entitled to the best evidence that Hooper possessed, "so that they might be able to form some estimate of their rights and duties before they were obliged to pay." *Columbia Insurance Co.* v. *Lawrence*, 10 Pet. 507; *Lawrence* v. *Ocean Insurance Co.*, 11 Johns. (N. Y.) 259; 1 Parsons, Mar. Ins. 468, 469; *Smith* v. *Columbia Insurance Co.*, 17 Pa. St. 253.

Having been, by Hooper's concealment and deceit, induced to pay him $8,000, the underwriters were entitled, after discovery of the real facts, to recover that sum in this action. 2 Parsons, Mar. Ins. 489, 490, and the authorities cited and fully referred to in the notes.

By the abandonment accepted by the underwriters they were put completely in the place of the assured, and were entitled to, and had the right to understand and assume that they thereby acquired and were subrogated to, all the rights which Hooper possessed at the time of the loss, including his right to demand repayment of the "advances" which had been made by him. *Chesapeake Insurance Co.* v. *Stark*, 6 Cranch, 268; *Hart* v. *Western Railroad*, 13 Metc. (Mass.) 99; 1 Parsons, Mar. Ins. 229; 2 id. 492, 494; 2 Phillips, Ins., sects. 1511, 2123, 2162;

2 Am. Lead. Cas. 835; *Hall & Long* v. *Railroad Companies*, 13 Wall. 367; *The Falcon*, 19 id. 75; *Atlantic Insurance Co.* v. *Storrow*, 5 Paige (N. Y.), Ch. 285, 294; *Ætna Insurance Co.* v. *Tyler*, 16 Wend. (N. Y.) 385.

The phrase, "on account of whom it may concern," protects only persons who had an insurable interest at the date of the policy, and at the time of loss. 1 Parsons, Mar. Ins. 46, and the authorities cited in note 1, p. 46; 1 Phillips, Ins., sect. 387; *Rider* v. *Ocean Insurance Co.*, 20 Pick. (Mass.) 259; *Garrell* v. *Hanna*, 5 Har. & J. (Md.) 412; 2 Am. Lead. Cas. (5th ed.) 806. Therefore Good Brothers & Co., the drawees of the bill of exchange, had no insurable interest, and no "concern" with the policy.

When the policy was taken out, there is not the slightest evidence that Good Brothers & Co. had authorized the master to draw on them, or knew that he intended to do so, or were under any obligation to accept or pay the bill; and when the loss occurred, they had not paid the bill of exchange which had been drawn. They had therefore no insurable interest either at the date of the policy or of the loss; and the court properly ignored Hooper's testimony as to the master's orders to protect them, and rejected the defendant's prayer, which chiefly relied upon that testimony.

Defendant's prayer was also fatally defective, by reason of the fact that it assumed that Hooper, by direction of Good Brothers & Co., presented proofs of the loss, because there is no evidence of any such direction.

There is no evidence that either the master or Hooper was agent of Good Brothers & Co., or authorized to insure for them. The former was their friend, who, for some reason best known to himself, drew on them a bill of exchange in Hooper's favor. *Seamans* v. *Loring*, 1 Mas. 136. That bill Hooper took, holding on to his lien.

As regards Hooper, however, and his lien and "advances," that bill was conditional payment at the moment it was given, and when paid, Dec. 14, 1872, it became absolute payment, and destroyed the lien, and the advances which had been the subject-matter of insurance. *The Emily Souder*, 17 Wall 666.

Indeed, his advances were, in fact, repaid to him in cash on the day he sold the bill of exchange to Brown & Sons, and thereafter his only risk was a possible liability as indorser. The indorsement and sale of that bill by Hooper to Brown & Sons was equivalent to an assignment to them of his claim to be repaid his advances, and as such it was a material fact which good faith required him to disclose when he applied to the underwriters to indemnify him for his pretended loss, and offered his proofs, and gave the receipt and assignment. Authorities *supra*, and 1 Parsons, Mar. Ins. 243 and note 4.

The contract of the underwriters was to pay on proof of interest and of loss. Hooper was therefore bound to show for whom and in what right he was collecting the money. This, having exclusive possession of the facts, he undertook and pretended to do, by proving, as if for himself, a loss which he had not suffered, under an interest which had long since ceased to exist.

The underwriters have no concern with the disposition that Hooper chose to make of the money which he induced them to pay under this mistake of fact on their part, which was caused by his own concealments and false representations; and they contend that the instruction of the court below was correct, and should on this ground alone be sustained.

MR. JUSTICE SWAYNE, after stating the facts, delivered the opinion of the court.

As the facts of which the instruction given was predicated were all indisputable and undisputed, that instruction was equivalent to a direction to find for the plaintiffs. The same remarks apply *mutatis mutandis* to the instruction asked by the defendant. The case, then, resolves itself into this: Were the plaintiffs entitled to recover upon the case as presented in the record?

A policy like the one here in question, in the name of a specified party, "on account of whom it may concern," or with other equivalent terms, will be applied to the interest of the persons for whom it was intended by the person who ordered it, provided the latter had the requisite authority from the

former, or they subsequently adopted it. 1 Phillips, Ins., sect. 383.

This is the result, though those so intended are not known to the broker who procures the policy, or to the underwriters who are bound by it. Id., sect. 384.

One may become a party to an insurance effected in terms applicable to his interest, without previous authority from him, by adopting it either before or after the loss has taken place, though the loss may have happened before the insurance was made. Id., sect. 388.

The adoption of the policy need not be in any particular form. Any thing which clearly evinces such purpose is sufficient.

"It is now clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient, and that the assured need not also allege or prove that he was interested at the time of effecting the policy; indeed, it is every day's practice to effect insurance in which the allegation could not be made with any degree of truth; as, for instance, where goods are insured on a return voyage long before they are bought." 1 Perkin's Arnould, 238.

This is consistent with reason and justice, and is supported by analogies of the law in other cases. We will name a few of them.

A deed voidable under certain circumstances may be made valid for all purposes by a sufficient after-consideration. A devise to a charitable use may be made to a grantee not *in esse*, and vest and take effect when the grantee shall exist. The doctrine of springing and shifting uses is familiar to every real-property lawyer. They always depend for their efficacy upon events occurring subsequently to the conveyance under which they arise.

Where the insurance is "lost or not lost," the thing insured may be irrecoverably lost when the contract is entered into, and yet the contract be valid. It is a stipulation for indemnity against past as well as future losses, and the law upholds it.

Where a vessel insured for a stated time was sold and transferred, and was repurchased and transferred back within that time, it has been held that the insurance was suspended while

the title was out of the assured, "and was revived again on the reconveyance of the assured during the term specified in the policy." *Worthington* v. *Bearse and Others*, 12 Allen (Mass.), 382.

A right of property in a thing is not always indispensable to an insurable interest. Injury from its loss or benefit from its preservation to accrue to the assured may be sufficient, and a contingent interest thus arising may be made the subject of a policy. *Lucena* v. *Craufurd et al.*, 3 Bos. & Pul. 75; s. c. 5 id. 269; *Buck & Hedrick* v. *Chesapeake Insurance Co.*, 1 Pet. 151; *Hancock* v. *Fishing Insurance Company*, 3 Sumn. 132.

In the law of marine insurance, insurable interests are multiform and very numerous.

The agent, factor, bailee, carrier, trustee, consignee, mortgagee, and every other lien-holder, may insure to the extent of his own interest in that to which such interest relates; and by the clause, "on account of whom it may concern," for all others to the extent of their respective interests, where there is previous authority or subsequent ratification.

Numerous as are the parties of the classes named, they are but a small portion of those who have the right to insure.

Where money is advanced, as in this case, for repairs and supplies to enable a vessel to proceed on her voyage, the lender has a lien, not on the cargo, but upon the vessel, and the amount of the debt may be protected by insurance upon the latter. *Insurance Company* v. *Barings*, 20 Wall. 163, and the authorities there cited. If the owner of a vessel, being also the owner of the cargo, or the owner of the cargo, not being the owner of the vessel, procures a third person to make such advances upon an agreement that he shall be repaid from the cargo, and a bill of lading is furnished to him, he has a lien on the cargo for the amount of his advances, and may insure accordingly. *Clark* v. *Mauran and Others*, 3 Paige (N. Y.), 373; *Dows* v. *Greene*, 24 N. Y. 638; *Holbrook* v. *Wight*, 24 Wend. (N. Y.) 169. The assignment of a bill of lading passes the legal title to the goods. *Chandler* v. *Belden*, 18 Johns. (N. Y.) 157. The assignment of a debt, *ipso facto*, carries with it a lien and all other securities held by the assignor for the discharge of such debt. *The Hull of a New Ship*, 2 Ware,

203; *Pattison* v. *Hull*, 9 Cow. (N. Y.) 747; *Langdon* v. *Buel*, 9 Wend. (N. Y.) 80.

Where a lien subsists either on the vessel or cargo, a third party may pay the debt, and, with the consent of the debtor and creditor, be substituted to all the rights of the latter. Dixon on Subrogation, 163; *Garrison et al.* v. *Memphis Insurance Co.*, 19 How. 312; *The Cabot*, 1 Abb. (U. S.) 150. Where there is neither an agreement nor an assignment, there can be no subrogation, unless there has been a compulsory payment by the party claiming to be substituted. *Sanford* v. *McLean*, 3 Paige (N. Y.), 117.

Recurring to the facts, there are two points upon which we deem it proper particularly to remark: —

First, We find no ground for any imputation of bad faith upon Hooper. We think there was no indirection and no purpose of concealment on his part. Before the insurance was effected, the underwriters had a clear right, if they so desired, to know for whom they were asked to insure. *Buck & Hedrick* v. *Chesapeake Insurance Co.*, *supra*. They made no inquiry. This excused Hooper from making any communication upon the subject. When the insurance money was paid, although the face of the policy and other facts, patent and notorious, which must have been known to the underwriters, showed clearly that the advances were made, and that the insurance was effected by Hooper, not for himself, but for others, the underwriters were again silent. The draft on Good Brothers & Co. had then been sold, and Hooper had received the money. Thereafter he had nothing at stake but the solvency of the drawees. When the adjuster, more than a month later, made the inquiry, which should have been made before, Hooper had paid over the money. He then made a frank and full disclosure. We see no reason to doubt that if the inquiry had been made earlier it would have been answered in the same way. In this respect the underwriters have themselves to blame rather than Hooper. The record discloses no ground upon which, *ex equo et bono*, he can be called upon to pay back the fund in controversy.

Second, It does not appear in the record to whom the vessel and cargo belonged. There is not a ray of light upon the subject. In that respect the case is left wholly in the dark.

The proof as to who were intended to be insured is that they were Good Brothers & Co., and no one else, though, according to the terms of the policy, payment in the event of loss was to be made to Hooper & Co. The former fact is established by the testimony of Hooper, and there is none other upon the subject. He is unimpeached, and his testimony is conclusive. The inquiry then arises, whether Good Brothers & Co. had any insurable interest in the cargo. It does not appear whether they had or had not. We have suggested several ways in which such an interest may have arisen, and have shown that under the policy in question it would have been sufficient if it had subsisted at any time before the loss was known to them. It may possibly have arisen in other modes. This brings us to the question of the burden of proof. Did it rest upon the plaintiffs or upon the defendant? In order to maintain the plaintiffs' case it was necessary to be made to appear that Good Brothers & Co., the assured, *had no insurable interest* in the cargo, the cargo being the thing insured. Upon both reason and authority, we think the *onus probandi* was upon the plaintiffs.

It was for them to make out their case. The premium had been paid, the loss had occurred, and the indemnity money had been received by the agents of the assured and paid over to their principals. The plaintiffs claim the right to go behind all this, and to reclaim from Hooper the fund thus received and parted with. It was incumbent upon them to establish every thing necessary to entitle them to recover, and they have no right to throw upon the defendant any part of the burden that belonged to themselves. For authorities upon this subject see 1 Greenl. Evid., sects. 34, 35, 80, 81, and the notes. Such is the legal result, notwithstanding the negative form of the averment, to be established.

But suppose the case were made out as against Good Brothers & Co., and that a recovery could be had if the action were against them, still it by no means follows that the plaintiff in error was liable.

There was laches on the part of the underwriters, or their agents, which is the same thing. Nothing in the record is clearer than that Hooper received the money as the agent of

the assured. It was his duty immediately to advise his principals and promptly to pay them. 1 Waite, Actions and Defences, 252, 255. This latter duty it appears he performed. He had then received no notice of the adverse claim subsequently made, and had no reason to expect it. His parting with the money is proof of his sincerity and honesty.

Under all the circumstances, we think he is entitled to the benefit of the principle which in such cases gives immunity to the agent and refers the party complaining for satisfaction to the principals who have received and hold the money.

There was error in the instruction given by the court to the jury.

The counsel on neither side referred to the state of the pleadings. We have, therefore, not adverted to that subject, but have considered the case as it was argued, — entirely upon the merits.

The judgment of the Circuit Court will be reversed, and the cause remanded for further proceedings in conformity to this opinion; and it is

So ordered.

RAILROAD COMPANY *v.* COMMISSIONERS.

1. In Nebraska, no demand for taxes is required, but it is the duty of every person subject to taxation to attend at the office of the county treasurer and make payment.
2. Certain lands in that State, the patents for which had been withheld from the Union Pacific Railroad Company by the United States, having been assessed for taxation and the taxes remaining unpaid, the tax-lists, with warrants thereto attached, were issued, authorizing the county treasurer, upon default in the payment of the taxes, to enforce the collection of them by the seizure and sale of the personal property of the company. The company paid them, while protesting in writing that they were illegally and wrongfully assessed and levied, and were wholly unauthorized by law. At that time, they had not been demanded, and no special effort had been made by the treasurer for their collection, nor had he attempted to seize the personal property of the company. Patents for the lands were subsequently issued to the company. After the decision in *Railway Company* v. *McShane* (22 Wall. 444), that the lands were exempt from taxation, the company brought this action to recover the amount so paid. *Held*, that there being no statute giving the right to recover in such cases, the action could not be maintained.

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

The facts are stated in the opinion of the court.

Mr. A. J. Poppleton for the plaintiff in error.
Mr. J. M. Woolworth and *Mr. W. H. Munger*, *contra.*

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

This was a suit to recover back taxes for the years 1870 and 1871, paid by the Union Pacific Railroad Company upon certain lands in Dodge County, Nebraska. The lands were among those granted by Congress to the company to aid in the construction of its railroad (12 Stat. 489), but the patents were withheld until after the taxes had been paid, by reason of the joint resolution of Congress "for the protection of the interests of the United States in the Union Pacific Railroad Company, the Central Pacific Railroad Company, and for other purposes," approved April 10, 1869. 16 Stat. 56.

The lands were returned by the United States land officers to the State auditor and by him to the county clerk for taxation, as required by the General Statutes of Nebraska, and were placed upon the assessment list of the county. The general and the local taxes levied for the respective years were carried out against these lands, with others upon the lists, and the railroad company designated as owner. In due time the tax-lists, with warrants attached for their collection, were delivered to the treasurer of the county. The taxes for the year 1870 became payable May 1, 1871, and those for 1871, May 1, 1872. The warrants authorized the treasurer, if default should be made in the payment of any of the taxes charged upon the lists, to seize and sell the personal property of the persons making the default to enforce the collection.

No demand of taxes was necessary, but it was the duty of every person subject to taxation to attend at the treasurer's office and make payment. During the years 1870, 1871, and 1872, the railroad company was the owner of other lands in the county, and other property, both real and personal, on which taxes were properly levied. On the 11th of August, 1871, the company attended at the treasurer's office, and paid all taxes

charged against it for the year 1870, and on the 20th of July, 1872, all that were charged for the year 1871. Before these payments were made there had been no demand for the taxes, and no special effort had been put forth by the treasurer for their collection. The company had personal property in the county which might have been seized; but no attempt had been made to seize it, and no other notice than such as the law implies had been given that payment would be enforced in that way.

At the time the several payments were made the company filed with the treasurer a notice in writing that it protested against the taxes paid, for the reason that they were illegally and wrongfully assessed and levied, and were wholly unauthorized by law, and that suit would be instituted to recover back the money paid.

This suit was begun Aug. 20, 1875, and on the trial the judges of the Circuit Court were divided in opinion as to the question, among others, "whether the payment of the said taxes under the written protests above appearing, without any demand therefor or effort to collect the same, made the payment a compulsory one in such sense as to give the plaintiff (the railroad company) the right to recover back the amount thereof as at common law, there being no statute giving or regulating the right of recovery in such cases." The presiding judge being of the opinion that the payment was voluntary and not compulsory, judgment was entered against the railroad company, and the case has been brought to this court upon a writ of error for a determination of the question upon which the judges were divided, and which has been duly certified upon the record.

We have no difficulty in answering the question in the negative. We had occasion to consider the same general subject at the last term in *Lamborn* v. *County Commissioners* (97 U. S. 181), which came up on a certificate of division from the Circuit Court for the District of Kansas. As that was a case from Kansas, we followed the rule adopted by the courts of that State, which is thus stated in *Wabaunsee County* v. *Walker* (8 Kan. 431): "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand

illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary."

This, as we understand it, is a correct statement of the rule of the common law. There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances. Thus, in *Elliott* v. *Swartwout* (10 Pet. 137) and *Bond* v. *Hoyt* (13 id. 266), which were customs cases, the payments were made to release goods held for duties on imports; and the protest became necessary, in order to show that the legality of the demand was not admitted when the payment was made. The recovery rested upon the fact that the payment was made to release property from detention, and the protest saved the rights which grew out of that fact. In *Philadelphia* v. *Collector* (5 Wall. 730) and *Collector* v. *Hubbard* (12 id. 13), which were internal-revenue tax cases, the actions were sustained "upon the ground that the several provisions in the internal-revenue acts referred to warranted the conclusion as a necessary implication that Congress intended to give the tax-payer such remedy." It is so expressly stated in the last case. p. 14. As the case of *Erskine* v. *Van Arsdale* (15 id. 75) followed these, and was of the same general character, it is to be presumed that it was put upon the same ground. In such cases the protest plays the same part it does in customs cases, and gives notice that the payment is not to be considered as admitting the right to make the demand.

The real question in this case is whether there was such an immediate and urgent necessity for the payment of the taxes in controversy as to imply that it was made upon compulsion. The treasurer had a warrant in his hands which would have authorized him to seize the goods of the company to enforce

the collection. This warrant was in the nature of an execution running against the property of the parties charged with taxes upon the lists it accompanied, and no opportunity had been afforded the parties of obtaining a judicial decision of the question of their liability. As to this class of cases Chief Justice Shaw states the rule in *Preston* v. *Boston* (12 Pick. (Mass.) 14), as follows: "When, therefore, a party not liable to taxation is called upon peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable, recover it back as money had and received." This, we think, is the true rule, but it falls far short of what is required in this case. No attempt had been made by the treasurer to serve his warrant. He had not even personally demanded the taxes from the company, and certainly nothing had been done from which his intent could be inferred to use the legal process he held to enforce the collection, if the alleged illegality of the claim was made known to him. All that appears is, that the company was charged upon the tax-lists with taxes upon its real and personal property in the county. After all the taxes had become delinquent under the law, but before any active steps whatever had been taken to enforce their collection, the company presented itself at the treasurer's office, and in the usual course of business paid in full every thing that was charged against it, accompanying the payment, however, with a general protest against the legality of the charges and a notice that suit would be commenced to recover back the full amount that was paid. No specification of alleged illegality was made, and no particular property designated as wrongfully included in the assessment of the taxes. The protest was in the most general terms, and evidently intended to cover every defect that might thereafter be discovered either in the power to tax or the manner of executing the power. Three years afterwards, and after the decision in *Railway Company* v. *McShane* (22 Wall. 444), which was supposed to hold that the particular lands now in question were not subject to taxation, this suit was brought. Under such circumstances, we cannot hold that the payment was compulsory in such a sense

as to give a right to the present action. As the answer to this question disposes of the case, it is unnecessary to consider the other questions certified.

Judgment affirmed

HENDRIE *v.* SAYLES.

Where, before the issue of letters-patent therefor, a party assigns his invention, and letters are lawfully issued to the assignee in his own name, the latter is entitled, where the instrument of assignment does not show a different intention, to obtain a renewal of them at the expiration of the original term.

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

Lafayette F. Thompson and Asahel G. Bachelder, claiming to be inventors of a railroad brake, executed, before letters-patent were issued to them therefor, the following assignment, which was duly recorded in the Patent Office: —

"Whereas we, Lafayette F. Thompson, of Charlestown, and Asahel G. Bachelder, now or late of Lowell, in the State of Massachusetts, have invented an improved mode of operating the brakes of railway cars, and have applied, or intend to apply, for letters-patent of the United States of America therefor.

"Now, therefore, this indenture witnesseth, that for and in consideration of $100, in hand paid, the receipt whereof is hereby acknowledged, I have assigned and set over, and do hereby assign, sell, and set over, to Henry Tanner, of Buffalo, in the State of New York, all the right, title, and interest whatever which we now have, or by letters-patent would be entitled to have and possess, in the aforesaid invention, the said invention being described in the specification as prepared and executed by us, or to be prepared and executed by us, for the obtaining of said letters-patent; the whole to be enjoyed and held by the said Henry Tanner and his legal representatives, to the full extent and manner in which the same would have been or could be held and enjoyed by us had this assignment never been made.

"And we do, by these presents, authorize the Commissioner of Patents to issue the said letters-patent to the said Henry Tanner

and his legal representatives, as the assignee of our whole right and title to the same and to the new invention aforesaid.

"In witness whereof, we have hereto set our signatures and seals, this first day of April, A.D. 1852.

"LAFAYETTE F. THOMPSON. [SEAL.]
"ASAHEL G. BACHELDER. [SEAL.]

"Witness, R. H. EDDY."

Letters-patent were issued on the sixth day of the following July to Tanner, who, July 13, 1854, assigned to Thomas Sayles all his remaining right and title in them for the unexpired term thereof, and "any extension thereof that may hereafter be granted," excepting, however, certain reserved territory and specified railroad corporations. Said letters were renewed and extended for seven years from July 6, 1866.

After that date, and until some time in 1873, Hendrie infringed the patents within the territory not so reserved, and Sayles filed his bill for an account, &c., to which Hendrie demurred, upon the ground that Sayles had no legal title to the extended term. The demurrer was overruled, and a decree for want of an answer passed for the complainant. Hendrie thereupon appealed here.

Mr. D. Bethune Duffield for the appellant.

Unless the complainant has the sole legal title to the extended term, he cannot maintain this suit. 1 Barb. Ch. Pr. 39; 1 Dan. Ch. Pr. 241. The whole case depends upon the assignment of April 1, 1852, to Tanner. If it gave him such an interest in that term that the legal title thereto would vest in him the moment the extension should be granted, the demurrer is bad.

The assignment is to be construed like any other contract to carry out the intention of the parties, and to further that intention their situation and the surrounding circumstances may be considered. 2 Pars. Contr. 499; *Shore* v. *Wilson*, 9 Cl. & Fin. 555–569; *Mumford* v. *Getling*, 7 C. B. N. S. 309; *Carr* v. *Montefiore*, 5 B. & S. 427. It was made before the issue of the patent. The inventors then had an inchoate right to the exclusive use of their invention, it being complete; and they could assign it, so that the legal right which would result from the issue of the patent would vest in Tanner. *Gayler* v. *Wilder*, 10 How. 477. And they perhaps had an

inchoate right to an extension, assignable with the same effect as their right to a patent. *Railroad Company* v. *Trimble*, 10 Wall. 367.

The granting clause of the instrument, when taken as a whole, plainly indicates the invention and the letters-patent intended to be conveyed, as described in and to be obtained by the specification, and the latter was not prepared to obtain the extension.

And again, the inventors authorize the issue of "said letters-patent" to Tanner, as the assignee of their "whole right and title to the same," not to any letters-patent, but to "said letters-patent." There is no grant of, and no reference to, an extension. This clearly shows that the original term was alone intended to be conveyed.

This court has never passed directly upon the question whether an assignment of the "invention" necessarily includes both terms of a patent, or clearly shows an intention so to do. The authorities on the circuit rule otherwise. *Clum* v. *Brewer*, 2 Curt. C. C. 520; *Waterman* v. *Wallace*, 13 Blatch. 132.

Mr. Albert H. Walker, *contra*.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Patents or any interest therein may be assigned by an instrument in writing, and the patentee, his assigns or legal representatives, may in like manner grant and convey an exclusive right under the patent; and where the conveyance precedes the granting of the patent, it may be issued to the assignee, the assignment thereof being first entered of record in the Patent Office. 16 Stat. 202, 203; Rev. Stat., sects. 4895, 4896.

Sufficient appears to show that the complainant claims to be the lawful owner of the patented improvement, which consists of a new mode of operating railroad brakes, and that he became such, as he alleges, by virtue of an instrument of assignment, bearing date July 13, 1854, from the assignee of the original inventors.

Prior to the granting of the patent, to wit, on the first day of April, 1852, the inventors conveyed and set over to the assignor of the complainant all the right, title, and interest whatever which they had, or by letters-patent would be entitled to have and possess, in the described invention; and the record shows

that the assignment was duly recorded in the Patent Office, as required by law.

Such an assignment may be made before the patent is obtained; and provision is made that the patent may be issued to the assignee, provided the application is made and duly sworn to by the inventor himself, and the assignment is duly recorded. When so granted, the exclusive interest is vested as a legal estate in the assignee, who thus becomes the lawful holder of the invention, and the inventor himself is divested of the legal title. Curtis, Patents (4th ed.), sect. 168; 16 Stat. 202.

By virtue of the assignment the legal title to the invention vested in the assignee of the inventors, and the record also shows that the patent, on the 6th of July, 1852, was duly issued in his name, it appearing that the application for the same was duly sworn to by the inventors, and that the assignment was duly recorded in the Patent Office, as the act of Congress requires.

Even the respondent concedes that the legal title to the invention was vested in the assignee, as the patentee named in the patent, for the period of fourteen years, which is the term for which the patent was granted. From the date of the assignment to the close of the term for which the patent was granted, it is conceded that the legal title to the invention became vested in the assignee of the inventors, by virtue of the instrument of assignment which they executed to the assignee before the patent was issued. Such an instrument, though executed before the patent is granted, transfers the legal title to the assignee. *Gayler* v. *Wilder*, 10 How. 477; *Rathbone* v. *Orr*, 5 McLean, 131; *Rich* v. *Lippincott*, 2 Fish. 1; *Herbert* v. *Adams*, 4 Mas. 15; *Dixon* v. *Meyer*, 4 Wash. 72.

Assume that the legal title to the invention was in the assignee, and it requires no argument to prove that he could convey the entire interest to a purchaser for a valuable consideration. Well-founded doubt upon that subject cannot arise, and the record shows that the assignee of the inventors, on the 13th of July, 1854, sold, assigned, transferred, and conveyed to the complainant all his right, title, interest, and claim whatsoever which he then had or may have in and to said invention and patent, and any extension thereof that may hereafter be

granted, with certain specified exceptions not material to be noticed in this investigation. Before the term of the original patent expired, due application was made for a renewal and extension of the patent; and it is conceded that it was duly extended and renewed by the commissioner for the further term of seven years from and after the expiration of the first term.

Controversy arising between these parties, the complainant instituted the present suit in the Circuit Court against the respondent. When instituted, the bill of complaint contained many matters which are wholly immaterial in the present controversy, and consequently are omitted. Suffice it to say in this connection that the complainant charges that the respondent has infringed his exclusive right under the extended term of the patent, and prays for process and for an account.

Service was made, and the respondent appeared and demurred to the bill of complaint, showing for cause that the complainant has not in and by his amended bill of complaint made any such title in himself to the extended term of the patent therein set forth as entitles him to any relief. Hearing was had, and the court overruled the demurrer and entered a decree in favor of the complainant, the respondent electing to stand upon his demurrer. Prompt appeal was taken by the respondent to this court, and he maintains the same proposition that he did in the court below, to wit, that the bill of complaint shows no legal title to the extended term in the complainant.

When the patentee assigns the patent to a purchaser, the assignee acquires only the exclusive right to make, use, and vend the patented improvement during the term for which the patent was granted, unless the instrument of assignment contains words showing that the parties intended that the instrument should be more comprehensive and include the extended term in case an extension should be granted by the commissioner. During the term for which the patent is granted the assignee of all the right, title, and interest of the patentee in the same may himself sell, assign, and convey the patent for the residue of the term granted, or he may continue to hold the same during that period, and may make, use, and vend the patented improvement, but his title to the invention terminates when the term of the patent expires; nor will his assignee or

grantee stand in any better condition, as the maxim *Nemo dat qui non habet* applies to the assignee of the patentee. Benjamin, Sales (2d ed.), 5; *Peer* v. *Humphrey*, 2 Ad. & E. 495.

Assignees of the patent from the patentee can only sell and convey what they acquire by virtue of the instrument of assignment, and inasmuch as the presumption is that the grantor contracts to sell and convey only what is secured by the patent, the proper construction of the instrument limits the right conveyed to the term expressed in the patent, unless the instrument contains words to indicate a different intent. Holders of patents may not be the inventors, nor is it true in every case that the patent is issued to the inventor. On the other hand, the inventor is vested by law with the inchoate right to the exclusive use of the invention to every extent that the Patent Act accords, which he may perfect and make absolute by proceeding in the manner which the law requires.

Bona fide inventors' rights are never derivative, and they, even before the patent is issued, have the exclusive inchoate right not only to the original patent that may issue, but to any reissue, renewal, or extension that may thereafter be granted under the Patent Act. Authorities to support that proposition are numerous and decisive, and it is equally clear that they may sell, assign, or convey the invention, including the inchoate right to obtain the patent, and to surrender and reissue it or to procure a renewal or extension of the monopoly from the commissioner, if the instrument of assignment contains apt words to show that such was the intent of the grantor.

Such an inventor has no exclusive right to make, use, and vend the improvement until he obtains a patent for the invention, and that is created and secured by the patent; nor can the inventor maintain any suit for infringing the same before the patent is issued, but the inventor, says Mr. Chief Justice Taney, is vested by law with an inchoate right to the exclusive use, which he may perfect and make absolute in the manner which the law requires. *Gayler* v. *Wilder*, *supra*.

Enough appears in that case to show that the invention had been made and the specification prepared to obtain a patent before the instrument of assignment was executed, and the question was whether the instrument was sufficient to transfer

the inchoate right of the inventor to the assignee, it appearing by the language of the instrument that it was intended to operate upon the perfect legal title which the inventor then had a lawful right to obtain, as well as upon the imperfect and inchoate interest which he also possessed. Speaking to that point, the learned Chief Justice said there would seem to be no sound reason for defeating the intention of the parties by restraining the operation of the assignment to the right to obtain the patent, and compelling them to execute another transfer of the other inchoate right, unless the act of Congress makes it necessary in order to render the transfer complete; and the court held that no such second assignment is required, as the matter to be assigned is the monopoly or the right of property vested in the inventor, so that when the party acquired an inchoate right to it, and the power to make that right perfect and absolute at his pleasure, the whole interest of the inventor, whether the instrument was executed before or after the patent issued, passed to the assignee.

Two other reasons were given by the Chief Justice in support of the construction of the assignment, which the court adopted in that case, both of which are entitled to weight: 1. That no purpose of justice would be subserved by the opposite rule, which would require the execution of a second instrument to accomplish what the parties intended to do by the first. 2. That the construction was the same as had prevailed in such cases under the prior patent acts. *Herbert* v. *Adams*, *supra*.

Views of a like character were expressed by Mr. Justice Curtis at a later period, in a case of great importance. *Clum* v. *Brewer*, 2 Curt. C. C. 520. Prior to obtaining the patent, the inventor conveyed to the assignee one undivided fourth part of the invention, and all his rights and property therein; and the patent having subsequently been obtained and the term extended, the question was whether the assignee held the same interest in the extended term. Both parties were represented by able counsel, and the court, upon the authority of *Gayler* v. *Wilder* (*supra*), held that the extended term passed by the assignment as well as the original term. Discussion, it seems, had taken place at the bar in respect to the extent of the prop-

erty of the inventor in his invention before it is secured by a patent. Preliminary to that subject he adverted to the fact that the instrument of assignment only conveyed one quarter part of the inchoate right. But the inventor, remarked the judge, has not only an inchoate right to obtain a patent securing to him the exclusive right to his invention for the term of fourteen years, but also a further inchoate right to have the term extended on the conditions annexed by the law to the right.

Differences of opinion prior to that time existed in some quarters whether the inchoate right to obtain an extension of the term was the proper subject of purchase and sale; but the court in that case answered the inquiry in the affirmative, and supported his conclusions by the following satisfactory reasons: 1. That the inchoate right to obtain an extension of the patent appertains to the invention as well as the inchoate right to obtain the original patent. 2. That each is incomplete, and its completion depends upon the compliance by the inventor with the statutory conditions and the performance by public officers of certain acts prescribed by law. 3. Though there is an additional condition annexed to the right to obtain an extension of the term beyond what is required to obtain a patent, yet that does not change the nature of the right, and it no more prevents it from being the subject of a contract of sale than any other condition which is attached to it; and he held that the inchoate right to obtain the extension passed by the assignment as well as the inchoate right to obtain the original patent.

Instruments of the kind have more than once been construed by this court, and always in the same way, where the instrument was executed under existing laws. *Railroad Company* v. *Trimble*, 10 Wall. 367; *Nicolson Pavement Co.* v. *Jenkins*, 14 id. 452.

A deed of assignment, says Mr. Justice Swayne, by which a patentee of an invention conveys all the right, title, and interest which he has in the "said invention," as secured to him by letters-patent, and also all right, title, and interest which may be secured to him from time to time, the same to be held by the assignee for his own use and that of his legal representatives to the full end of the term for which said letters-patent are or

may be granted, carries the entire invention and all alterations and improvements and all patents whatsoever, issued and extensions alike, to the extent of the territory specified in the instrument.

Beyond doubt, the assignment in that case was made subsequent to the issuing of the patent; but the case fully supports the proposition that the operation of such an instrument is not limited to the term specified in the patent, where the instrument contains apt words to show that the parties intended that its operation should be more comprehensive.

Decisive support to that view is also found in the second case. An assignment of an invention secured by letters-patent, says Mr. Justice Davis, is a contract, and, like all other contracts, is to be construed so as to carry out the intention of the parties to it; and he adds, that it is well settled that the title of an inventor to obtain an extension may be the subject of a contract of sale, and when it is, the instrument by which the sale was effected is the proper subject of construction, in order to determine whether it secures to the purchaser any subsequent extension of the patent, or merely the patent for the original term.

Conveyance in that case was made of all the title and interest the patentee had in the reissued patent, to be enjoyed by the grantee and his legal representatives to the full end of the term for which the patent is or may be granted. Taking the whole instrument together, say the court in that case, it is quite clear that it was intended to secure to the grantee and his assigns the right to use the invention in the locality specified as long as the patentee and his legal representatives have the right to use it anywhere else. Manifestly, say the court, something more was intended to be assigned than the interest secured by the patent, and the court decided that it included the renewal as well as the residue of the original term.

Apt words are required, where the conveyance is of an existing patent, to show that the conveyance includes more than the term specified in the patent; but where the conveyance is of the invention, whether before or after the patent is obtained, the rule is otherwise, unless there is something in the instrument to indicate a different intention, the rule being that a

conveyance of the described invention carries with it all its incidents, and all the well-considered authorities concur that the inchoate right to obtain a renewal or extension of the patent is as much an incident of the invention as the inchoate right to obtain the original patent; and if so, it follows that both are included in the instrument which conveys the described invention, without limitation or qualification. *Emmons* v. *Sladden*, 9 Off. Gaz. 354; *Gayler* v. *Wilder*, *supra*; *Clum* v. *Brewer*, *supra*; *Carnan* v. *Bowles*, 2 Bro. C. C. 84.

Viewed in the light of these suggestions, the court is of opinion that the entire interest in the invention passed from the inventors to the assignor of the complainant by the instrument of assignment which they executed to him before the patent was granted, and that the patent was properly issued in the name of their assignee. They, the inventors, do not controvert the exclusive right of the complainant, nor does the respondent deny that the terms of the assignment from the assignee of the inventors to the complainant are amply sufficient to convey to him all that he claims, if his assignor at the time held the title to obtain the extended term; and the court being of opinion that the assignor of the complainant did hold that right, it follows that there is no error in the record.

Decree affirmed.

BARNET *v.* NATIONAL BANK.

1. In a suit by a national bank against all the parties to a bill of exchange discounted by it, to recover the amount thereof, the assignees of the acceptor — the latter having made an assignment for the benefit of his creditors — cannot, having intervened as parties, set up by way of counter-claim or set-off that the bank, in discounting a series of bills of their assignor, the proceeds of which it used to pay other bills, knowingly took and was paid a greater rate of interest than that allowed by law.
2. The act of June 3, 1864 (13 Stat. 99, sect. 30), having prescribed that, as a penalty for such taking, the person paying such unlawful interest, or his legal representative, may, in any action of debt against the bank, recover back twice the amount so paid, he can resort to no other mode or form of procedure.

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

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. R. B. Wilson*, *Mr. Samuel Shellabarger*, and *Mr. Jeremiah M. Wilson*, for the plaintiffs in error, and by *Mr. M. B. Hagans* for the defendant in error.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The bank brought this suit upon a bill of exchange, dated Nov. 18, 1873, for $4,000, drawn by David Barnet upon Barnets & Whiteside, in favor of Robert Marshall, and payable ninety days from date, at the Second National Bank of Cincinnati, Ohio. It was accepted by the drawees, indorsed by the payee, and discounted by the Muncie National Bank of Indiana. Before the maturity of the bill the acceptors made an assignment to David Barnet and Isaac E. Craig, the plaintiffs in error. The suit was commenced in the Court of Common Pleas of Preble County, Ohio, against all the parties to the bill. The assignees intervened and made themselves parties. After the pleadings were made up, the case was removed by the bank to the Circuit Court of the United States for that district. There new pleadings were filed on both sides. The assignees set up three defences: 1. That Barnets & Whiteside were borrowers from the bank as early as Jan. 11, 1866; that the indebtedness was continuous and unbroken from April 8, 1866; that it was at no time less than $4,000, and amounted at one time to $36,000; that at the time of the assignment it was $28,000, upon bills of exchange which represented it; that the bank had taken not less than $5,000 in excess of the legal rate of interest; that for evasion the bills were arranged in series, and that each series was terminated from time to time by refusing to renew and the discounting of a new bill, the proceeds of which were applied in payment of the prior terminating one; that the bank had received satisfaction of all the bills but the one in suit, and that there was nothing due from the defendants. 2. That the bill in suit was the last of eight renewals; that illegal interest was taken upon the series to the amount of $1,116, which it was claimed should be applied as a payment upon the bill in question. 3. That fifty-one bills of exchange of $4,000 each, having ninety days to run, were discounted by the bank for

the assignors, the first bearing date March 27, 1872, and the last, July 27, 1873 (the date of each one is given); that illegal interest was taken upon these bills to the amount of $6,324; and that the assignees are entitled to recover double this sum from the bank, to wit, $12,648. There is a prayer for judgment accordingly, and for other proper relief.

Marshall, the payee and indorser of the bills, also filed an answer; but as the record discloses no question raised by him, it need not be more particularly adverted to.

The bank demurred to the several defences set up by the assignees. To the first and third the demurrer was sustained, and overruled as to the second. Upon the latter the plaintiff took issue, and the case was tried by a jury. The jury rendered a verdict in favor of the bank for $4,080.31, and judgment was given accordingly. It does not appear that any thing done by the court touching this trial was objected to by the plaintiffs in error. There is no bill of exceptions in the record.

But one point has been insisted upon by the plaintiffs in error in this court, and it is that the Circuit Court erred in sustaining the demurrers to their first and third defences. That is the only subject before us for examination.

All questions arising under the second defence have been disposed of by the verdict and judgment. How the jury reached their conclusion it is not easy to see, but this is not material, as nothing relating to that part of the case is open to inquiry.

The national currency act of Congress of June 3, 1864 (13 Stat. 99, sect. 30), after prescribing the rate of interest to be taken by the banks created under it, declares: —

"And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged to be a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon; and in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid, from the association taking or receiving the same: *Provided*, that such action is commenced within two years from the time the usurious transaction occurred."

Two categories are thus defined, and the consequences denounced: —

1. Where illegal interest has been knowingly stipulated for, but not paid, there only the sum lent without interest can be recovered.

2. Where such illegal interest has been paid, then twice the amount so paid can be recovered in a penal action of debt or suit in the nature of such action against the offending bank, brought by the persons paying the same or their legal representatives.

The statutes of Ohio and Indiana upon the subject of usury may be laid out of view. They cannot affect the case.

Where a statute creates a new right or offence, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive. *Farmers' & Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29.

The procedure in the case after it reached the Circuit Court, as well as before, was governed by the Ohio Code of Practice. *Indianapolis, &c. Railroad Co.* v. *Horst*, 93 U. S. 291.

The ground of demurrer specified as to both the defences in question is, that the assignees had no legal capacity to defend or prosecute by counter-claim in the case. But this does not take from the plaintiff the right to insist that the facts set forth were insufficient to bar the action. Swan, Plead. and Prac. 234; 1 Nash, Plead. and Prac. 161. Under the New York code, from which the Ohio code is largely copied, it has been held that a demurrer to an answer may be sustained upon a ground not adverted to in the argument by the counsel upon either side. *Xenia Branch of State Bk. of Ohio* v. *Lee*, 2 Bosw. (N. Y.) 694. The demurrer was a waiver of every objection not specified, except the substantial and fatal insufficiency of the pleading to which it related with respect to the facts alleged.

An issue ought not to be tried where it would be a sheer mistrial and a mere waste of time. The court ought *sua sponte* to strike it out or disregard it. If a frivolous issue is left in the record, it does not therefore follow that it is to be seriously treated.

In the first defence, the payment of the usurious interest is distinctly averred, and it is sought to apply it by way of

offset or payment to the bill of exchange in suit. In our analysis of the statute, we have seen that this could not be done. Nothing more need be said upon the subject.

In the third defence as set forth the like payment is alleged, and there is a claim to recover double the amount paid by way of counter-claim in the pending suit on the bill.

This pleading is also fatally defective for the same reason as the first one. The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties.

While the plaintiff in such cases, upon making out the facts, has a clear right to recover, the defendant has a right to insist that the prosecution shall be by a suit brought specially and exclusively for that purpose, — where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case, and mislead the jury to the prejudice of either party.

The point specified in the demurrer we have had no occasion to consider. Both defences, as they appear in the record, are perhaps liable to other objections; but in examining the case we have not gone beyond the points we have discussed, and we decide nothing else.

Judgment affirmed.

RAILWAY COMPANY *v.* LOFTIN.

1. The act of the General Assembly of Arkansas of Jan. 12, 1853, incorporating the Cairo and Fulton Railroad Company, and exempting for ever its capital stock and dividends from taxation, does not so exempt the lands granted by the act of Feb. 9, 1853 (10 Stat. 155), to that State, and by her transferred to the company.
2. The lands, although granted by Congress to aid in constructing the road and used in lieu of capital, to that extent relieving the company from the necessity of raising money through stock subscriptions, do not represent the stock within the meaning of the act of incorporation.
3. *Railroad Companies* v. *Gaines* (97 U. S. 697) cited and approved.

ERROR to the Supreme Court of the State of Arkansas.

The Cairo and Fulton Railroad Company was incorporated by the General Assembly of the State of Arkansas, Jan. 12, 1853, to construct a railroad from the Mississippi River opposite the mouth of the Ohio, in Missouri, by way of Little Rock, Ark., to the Texas State line. The capital stock was fixed at $1,500,000, with power of increase, divided into shares of $25 each, to be held as personal property. The board of directors named in the act were authorized to open books of subscription to the stock, and the directors for the time being had power to require the payment of the sums subscribed in such manner and on such terms as they deemed proper. Sects. 11 and 13 are as follows: —

"SECT. 11. That the capital stock and dividends of said company shall be for ever exempt from taxation. The road, fixtures, and appurtenances shall be exempt from taxation until after it pays an interest of not less than ten per cent per annum."

"SECT. 13. This act shall be deemed a public act, and shall be favorably construed for all purposes therein expressed, and declared in all courts and places whatsoever, 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,' and 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 was inserted herein." Acts of 1853–54, p. 176.

Sect. 25 of the act to incorporate the Mississippi Valley Company is as follows: —

"SECT. 25. That the capital stock of said company, with all the immunities and franchises herein specified, and all machines, cars, engines, or carriages belonging to said company, together with all their works and property, and all profits which shall arise from the same, shall be vested in the respective stockholders of the company for ever, in proportion to their respective shares; and the capital stock of said company and the dividends shall be exempted from taxation until a dividend of six per cent is realized upon the capital stock; and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempted from taxation for the period of twenty-five years from the

completion of the road, and no tax shall ever be levied on said road or its fixtures which will reduce the dividends below ten per cent per annum. Said stockholders shall not be bound or liable for any greater amount than the respective shares of stock which they or either of them own." Acts 1853–54, p. 181.

On the 9th of February, 1853, Congress made a grant of lands to the State of Arkansas to aid in the construction of the Cairo and Fulton road (10 Stat. 155, 156), and on the 16th of January, 1855, the State transferred the grant to the corporation. Sect. 2 of the statute of the State making this transfer is as follows: —

"SECT. 2. That after the expiration of twenty years from the date of the completion of the said Cairo and Fulton railroad from the Missouri line to the Texas boundary line to the point where said road shall cross Red River, near Fulton, said company shall pay into the State treasury an annual tax upon the road, fixtures, lands, tenements, and houses equal to that paid upon other taxable property in this State, for the time being, and for the purposes of taxation the road, fixtures, lands, tenements, and houses shall be considered separate and distinct from the capital stock, whether all the capital stock shall be expended in building said road, fixtures, houses, tenements, or not, and the capital stock shall be exempt from taxation, as provided for in the eleventh section of said Cairo and Fulton railroad charter, approved the 12th of January, 1853." Acts 1854–55, p. 150.

This act was amended Nov. 26, 1856, and this particular provision repealed, but sect. 9 of the amended act is as follows: —

"SECT. 9. That after said Cairo and Fulton railroad shall have been completed, and shall have declared a dividend of ten per cent per annum upon the capital stock of said company, then, and in that event, said Cairo and Fulton Railroad Company shall pay into the State treasury two and one-half per cent upon their net proceeds annually." Acts 1856–57, p. 7.

The road was not completed until Jan. 15, 1874, and no dividend has ever been declared upon the stock of the company. The total quantity of lands included in the grant was about 1,400,000 acres. Only about $300,000 of capital stock

was ever paid in, and the road, which cost about $11,000,000, was built with money borrowed upon bonds and otherwise.

On the 8th of April, 1869, the General Assembly passed an act requiring each railroad company in the State, on or before the first day of January in each year, to furnish the auditor of public accounts a full list of all lands acquired by grant, donation, or subscription in aid of the construction of its road, but provided that such lands should not be listed or subject to taxation until conveyed to actual purchasers. Acts of 1868–69, p. 131. The Cairo and Fulton company made its returns in accordance with the requirements of this act. On the 30th of November, 1875, another act was passed, as follows: —

"SECT. 1. That the assessor in the different counties of this State shall, at the time he assesses the personal property in his county, in the year one thousand eight hundred and seventy-five, assess and place on the tax-book of his county, under the same rule and restrictions as is required in assessing lands in this State, all the lands in his county heretofore donated, granted, or given to any railroad or railroad corporation, when the title to the lands has passed from the United States government, and such lands shall thereafter be assessed and taxed as other lands in this State.

"SECT. 2. That all laws and parts of laws in conflict with this act be and the same are hereby repealed, and this act take effect and be in force from and after its passage." Acts 1875–76, p. 29.

The Cairo and Fulton company has been consolidated, pursuant to laws of Arkansas and Missouri, with the St. Louis and Iron Mountain Railroad Company, under the name of the St. Louis, Iron Mountain, and Southern Railway Company, the plaintiff in this action. The lands granted to the Cairo and Fulton company passed by the consolidation to the consolidated company.

The unsold lands were assessed for taxation under the law of 1875, and the consolidated company filed its bill in equity in the State court against Loftin, the collector of Jackson County, to restrain the collection, on the ground that the act under which the assessment was made impaired the obligation of the contract of exemption contained in the charter of the Cairo and Fulton company. The Supreme Court of the State, upon appeal, decided otherwise, and affirmed the decree of the

court below, dismissing the bill. To reverse this decree of the Supreme Court, the present writ of error has been brought.

Mr. U. M. Rose for the plaintiff in error.

The capital stock represents the property of the company, whatever that may be. *Baltimore* v. *Baltimore & Ohio Railroad Co.*, 6 Gill (Md.), 294; *Rome Railroad Co.* v. *Mayor*, 14 Ga. 275; *Augusta* v. *Georgia Railroad Co.*, 26 id. 661; *New Haven* v. *City Bank*, 31 Conn. 108; *Hannibal & St. Joseph Railroad Co.* v. *Shacklett*, 30 Mo. 550; *Richmond* v. *Richmond & Danville Railroad Co.*, 21 Gratt. (Va.) 604; *State Bank* v. *Brackenridge*, 7 Blackf. (Ind.) 395; *Osborne* v. *New York Railroad Co.*, 40 Conn. 491; *State* v. *Haight*, 34 N. J. L. 319; *Farrington* v. *Tennessee*, 95 U. S. 679.

The lands being a part of the capital stock, were therefore, under the charter, exempt from taxation.

Mr. A. H. Garland, contra.

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

The principal question in this case is whether the eleventh section of the charter of the Cairo and Fulton Railroad Company, which exempts for ever from taxation the capital stock and dividends of the company, carries with it an exemption of the lands in question so long as they remain unsold. We had occasion at the present term, in *Railroad Companies* v. *Gaines* (97 U. S. 697), to construe an exemption clause in a railroad charter almost in the exact language of that now under consideration; and while conceding that ordinarily an exemption of the capital stock is equivalent to an exemption of the property into which the capital has been converted, unless a contrary intention is in some way manifested, we held that as the railroad, with its fixtures and appurtenances, was only exempted from taxation for twenty years, and the capital stock was exempted for ever, it was clear that the road and fixtures could not represent the capital for the purposes of taxation. The twenty-fifth section of the Mississippi Valley charter, even if it was incorporated with that of the Cairo and Fulton company, of which there may be doubt, does not materially change the effect of the eleventh section. It vests the capital stock and

property of the company in the stockholders in proportion to their respective shares, but that is far from making the stock and the property identical for the purposes of taxation. Indeed, taking the whole section together, it is apparent that there was in the case of that company the same intention to separate the taxation of the stock from that of the property as is found in the Cairo and Fulton charter.

But when the land grant was made, the intention not to include the lands granted in the exemption of the stock is still more manifest; for it is there expressly provided that the "road, fixtures, lands, tenements, and houses shall be considered separate and distinct from the capital stock," and while the original exemption of stock was continued, the lands, &c., were to be taxed after twenty years from the date of the completion of the road. It is quite true that this provision of the granting act was afterwards repealed, and a different mode of taxation adopted; but there is nowhere in the repealing act any intention shown of converting the lands into capital stock, and without some express declaration to that effect, no such conversion will be presumed. The lands were used in lieu of capital. They were given in aid of the construction of the road, and to that extent relieved the company from the necessity of raising money through stock subscriptions; but it would be unreasonable to hold that, because they rendered stock to some extent unnecessary, they were on that account stock itself. Exemptions from taxation are never presumed. On the contrary, the presumptions are always the other way; and as in this case the capital stock is alone exempt, the property of the company is not to be included in the exemption, unless it manifestly represents the stock, within the meaning of that term as used by the legislature in the particular act to be construed. As we said in *Railroad Companies* v. *Gaines* (*supra*), whenever property is exempted by reason of the exemption of capital stock, it is because, taking the whole charter together, such appears to have been the intention of the legislature.

On the whole, we are clearly of the opinion that the lands in question are not included in the exemptions of the original charter. None of the other statutes set out in the bill amount to a limitation of the power of future legislatures in respect to

the taxation of the property. They are in no sense contracts, and are not, therefore, irrepealable. *Tucker* v. *Ferguson*, 22 Wall. 527.

Judgment affirmed.

UNITED STATES *v.* SHERMAN.

Where, under sect. 8 of the act of July 28, 1866 (14 Stat. 329), the court grants a certificate that there was probable cause for the acts done by an officer of the United States, for which the judgment was rendered against him, the amount payable out of the treasury does not include any interest which had accrued upon the judgment before such certificate was given.

ERROR to the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. William A. Maury for the relator.

The Attorney-General, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

This was an application to the Supreme Court of the District of Columbia for a *mandamus* to John Sherman, Secretary of the Treasury, commanding him to pay to Alexander McLeod, the relator, the sum of $4,279.94, with interest from the ninth day of November, 1874. The facts of the case, as they are made to appear, are as follows: —

On the eighteenth day of June, 1869, the relator recovered a judgment in the Circuit Court of the United States for the District of South Carolina against T. C. Callicott, a supervising special agent of the Treasury Department, for the sum of $11,700.68, besides $119.30 for costs. On the 5th of July next following a *fi. fa.* was issued upon this judgment. The execution, however, was suspended by a writ of error sent from this court to the Circuit Court, sued out by direction of the Secretary of the Treasury. But the writ was dismissed on the seventeenth day of February, 1871. Nothing further appears to have been done until June 8, 1874, when the relator applied to the Circuit Court for a certificate of probable cause under the act of Congress of March 3, 1863 (12 Stat. 741), and the act of July 28, 1866 (14 id. 329); and the court certified "that

on the trial of said cause (in the Circuit Court) it appeared there was probable cause moving the defendant (Callicott), for the acts done by him whereon the judgment was had and recovered against him," "and, further, that the said acts were done under the direction of the Secretary of the Treasury." The certificate thus obtained was then brought to the Treasury Department, and on the 4th of November next following the first auditor adjusted the account, and certified that there was due from the United States to the relator the sum of $12,039.50, the amount of the judgment recovered in the Circuit Court, with interest from June 8, 1874, the time when the certificate of probable cause was given. This adjustment was confirmed and certified by the controller, and that sum was received by the relator on the 9th of the same month.

He now contends that it was an insufficient payment, and that there is still due to him from the United States the sum of $4,279.94, with interest from November 9, aforesaid. It will be noticed that in the adjustment of the account by the first auditor, and in the payment made, no interest was allowed for the time which intervened between the rendition of the judgment and the date when the certificate of probable cause was obtained. That interest at the rate allowed in South Carolina amounted to $4,279.94, and the principal question now raised is whether the United States is under obligation to pay that. The *mandamus* asked for is to compel allowance and payment of that interest.

We have, therefore, to inquire whether the United States is under obligation to pay interest on the judgment obtained in the Circuit Court from the time when the judgment was rendered, until the certificate of probable cause was given. To this question alone we address ourselves. Several objections to the issue of the *mandamus* asked by the relator — some of them grave — have been interposed by the defendant, but we do not think it necessary to consider them. The twelfth section of the act of Congress of March 3, 1863 (12 Stat. 741), relative to suits against revenue officers, enacted that where a recovery shall be had in any such suit, and the court shall certify that there was probable cause for the act done by the collector or other officer, or that he acted under the directions

of the Secretary of the Treasury or other proper officer of the government, no execution shall issue against the collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury. This section was, by the act of July 28, 1866 (14 id. 328), declared to extend to and embrace all cases arising under the Captured and Abandoned Property Acts of March 12, 1863, and July 2, 1864, whether then pending or thereafter brought, "provided that such acts done, or proceedings under the two acts last mentioned, shall have been done and had under the authority or by the direction of the executive government of the United States."

It was under these acts ostensibly that the certificate of probable cause was obtained.

It was obtained not by the agent of the Treasury Department sued, but on motion of the relator, who was the plaintiff in the suit. Conceding, however, as we do, that the Circuit Court was empowered to give the certificate on the request of either party, it is to be considered what was the liability fastened thereby upon the United States.

The act of Congress enacts that when the certificate of probable cause is given, the amount recovered shall, upon final judgment, be paid out of the appropriation from the treasury. When the certificate is given, the claim of the plaintiff in the suit is practically converted into a claim against the government. But not until then.

Before that time, the government is under no obligation, and the Secretary of the Treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given. The act of Congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by Federal legislation, declared to bear interest. Such legislation, however, has no application to the government. And the interest is no part of the amount recovered. It accrues only after the recovery has been had. Moreover, whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But

delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes. Certainly there was no delay in the present case. The government paid the amount recovered against Callicott, viz. the sum for which the verdict and judgment were given, as soon as its liability accrued. If there has been a loss of interest, it is not due to the government. It is due to the dilatoriness of the relator himself. He might have applied to the Circuit Court for the certificate of probable cause immediately on the rendition of the judgment, as is generally done, though commonly by the defendant. But he waited nearly five years, from June 18, 1869, to June 8, 1874. It would be strange, indeed, if by his own delay he can compel the United States to pay interest on a judgment which it was ready to pay as soon as its liability accrued.

We do not overlook the fact that the plaintiff's execution was suspended by the writ of error directed by the Secretary of the Treasury. But the execution did not suspend his power to obtain the certificate necessary to cast the liability upon the government, and the writ was dismissed in February, 1871. Then there was nothing in the way of a second execution against Callicott. But no step was taken until more than three years had elapsed, when the certificate was obtained. It cannot be admitted that the plaintiff, at his option, may impose upon the United States a liability to pay interest, as long as he pleases, upon a sum of money that, during all the time in which the interest accrues, the government was not bound to pay. Such, we think, is not the requirement of the act of Congress. The "amount recovered," spoken of in the acts of 1863 and 1866, is the sum for which judgment was given, and it does not include the interest which the judgment may bear prior to the time when the certificate of probable cause is made.

It follows that there is nothing due to the relator, and, therefore, he is not entitled to a writ of *mandamus*.

Judgment affirmed.

UNITED STATES *v.* UNION PACIFIC RAILROAD COMPANY.

1. The act of March 3, 1873 (17 Stat. 509), is a valid and constitutional exercise of legislative power. Congress, by requiring the Attorney-General to bring a suit in equity in the name of the United States in any Circuit Court against the Union Pacific Railroad Company and others, intended, not to change the substantial rights of the parties to the suit, but to provide a specific mode of procedure, which, by removing certain restrictions on the jurisdiction, process, and pleading which are in other cases imposed, would give a larger scope to the action of the court, and a more economical and efficient remedy than before existed.
2. The provisions authorizing process to be served without the limits of the district where the suit might be brought, and parties and subjects of controversy to be united which, in an ordinary chancery suit, would render a bill multifarious, are regulations of practice and procedure which are subject to legislative control.
3. Statutes have been frequently passed directing suits for specific objects to be brought by an attorney-general, and regulating the proceedings in them, such as a *quo warranto*, or a bill in equity against a corporation to test its right to the exercise of its franchises, or to declare them forfeited, or, if insolvent, to wind up its business and distribute its assets; and the validity of such statutes has uniformly been recognized.
4. This bill having, on demurrer, been dismissed below, its sufficiency must be determined here by the provisions of said act; for it cannot be supposed that Congress, in laying down in specific terms the subject-matter of the suit, and granting enlarged and peculiar powers to the court, intended that any other matters should be tried in the case.
5. This is confirmed by the fact that the same act provided other remedies for other subjects of controversy with the Union Pacific Railroad Company, and an effectual means of investigating all its affairs.
6. That act authorized a decree in favor of that company for money due for capital stock, for money or property received from it on fraudulent contracts, or which ought in equity to belong to it; and also a decree in favor of it or of the United States for money, bonds, or lands wrongfully received from the latter, which ought in equity to be paid or accounted for.
7. Except in favor of the company or of the United States, there can, under this act, therefore, be no recovery, and none but such as was sanctioned by the principles of equity before it was passed.
8. The company might, by a cross-bill, have availed itself of the act; but it refuses to do so, and demurs to the bill, thereby foregoing any relief in its favor in this suit. As it is conformable neither to the principles of equity nor to those of the common law to render a decree or a judgment in favor of a competent party who asserts no claim and declines to proceed in the case, there can be no recovery in this suit in favor of the company.
9. Though the bill sets up many fraudulent transactions on the part of the direc-

tors of the company and some of its stockholders, for which the other stockholders would be entitled to relief, the latter are not parties, and neither the frame of the bill nor the provisions of the act authorize any relief or recovery in their favor.

10. The United States sustains two distinct relations to the company; namely, that of the government creating it and exercising legislative and visitatorial powers; and that growing out of the contract contained in the charter and its amendment.
11. This bill exhibits no right on the part of the United States to relief founded on that contract. The company has completed its road, keeps it in running order, and carries all that is required by the government. To the latter nothing is due, and it has the security which by law it provided.
12. Nor does the bill show any thing which authorizes the United States as the depositary of a trust, public or private, to sustain this suit.
13. This interference by the Attorney-General with corporations on the ground of such a trust in the government is limited to two classes, to neither of which the present case belongs: 1. Where religious, charitable, municipal, or other corporations whose functions are solely public, and whose managers have destroyed or misappropriated the fund, or otherwise abused their functions; 2. Where other corporations exercise powers beyond those to which they are limited by the law of their organization.
14. While the court does not say that there is no trust in regard to the duties of the company which the United States can enforce in equity, it is of opinion that none such is shown in this bill, and that no case is made for any relief authorized by the act under which it was brought.

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

The act of Congress making appropriations for the legislative, executive, and judicial expenses of the government, approved March 3, 1873 (17 Stat. 509), has the following language in its fourth and last section: —

"The Attorney-General shall cause a suit in equity to be instituted, in the name of the United States, against the Union Pacific Railroad Company, and against all persons who may, in their own names or through any agents, have subscribed for or received capital stock in said road, which stock has not been paid for in full in money, or who may have received, as dividends or otherwise, portions of the capital stock of said road, or the proceeds or avails thereof, or other property of said road, unlawfully and contrary to equity, or who may have received as profits or proceeds of contracts for construction or equipment of said road, or other contracts therewith, moneys or other property which ought, in equity, to belong to said railroad corporation, or who may, under pretence of having complied with the acts to which this is an addition, have wrong

fully and unlawfully received from the United States bonds, moneys, or lands which ought, in equity, to be accounted for and paid to said railroad company or to the United States, and to compel payment for said stock, and the collection and payment of such moneys, and the restoration of such property, or its value, either to said railroad corporation or to the United States, whichever shall in equity be held entitled thereto. Said suit may be brought in the Circuit Court in any circuit, and all said parties may be made defendants in one suit. Decrees may be entered and enforced against any one or more parties defendant without awaiting the final determination of the cause against other parties. The court where said cause is pending may make such orders and decrees, and issue such process as it shall deem necessary to bring in new parties, or the representatives of parties deceased, or to carry into effect the purposes of this act. On filing the bill, writs of subpœna may be issued by said court against any parties defendant, which writ shall run into any district, and shall be served, as other like process, by the marshal of such district."

Following this, and constituting a part of the same section, are certain provisions for the future government of the railroad company and its officers, to wit: that its books and correspondence shall at all times be open to inspection by the Secretary of the Treasury; that no dividend shall be made but from actual net earnings, and no new stock issued or mortgages created without consent of Congress; and punishing directors who shall violate these provisions. Also enacting that the corporation shall not be subject to the bankrupt law, and shall be subject to a *mandamus* to compel it to operate its road, as required by law.

A previous section directs the Secretary of the Treasury to withhold from every railroad company which has failed to pay the interest on bonds advanced to it by the government, all payments on account of freights or transportation over such roads, to the amount of such interest paid by the United States, and also the five per cent of the net earning of the roads due and unapplied as provided by law; and it authorized the companies who might wish to contest the right to withhold these payments to bring suit against the United States in the Court of Claims for the money so withheld.

The Attorney-General, pursuant to said fourth section, filed

a bill in equity in the Circuit Court of the United States for the District of Connecticut against the Union Pacific Railroad Company, the Wyoming Coal Company, the Credit Mobilier Company, and some one hundred and fifty individual defendants.

The bill, after reciting certain provisions of the acts of July 1, 1862 (12 Stat. 480), and July 2, 1864 (13 id. 356), and other acts amendatory thereof, in relation to the Union Pacific Railroad Company, and alleging that the company was organized in October, 1863, and its road opened in 1869; that a board appointed under the joint resolution of April 10, 1869, reported deficiencies of construction, requiring an expenditure of $1,586,100; that the United States issued to the company bonds to the amount of $27,236,512, which, with the interest, after deducting one-half the compensation for services, made its aggregate liability, Jan. 1, 1873, $33,435,221.77; and that under the mortgage it executed Nov. 1, 1865, to secure the payment of its first-mortgage bonds, it has issued and disposed of them to the amount of $27,237,000; charges that, April 16, 1867, it executed a mortgage to secure the payment of its so-called land-grant bonds, providing for the application of the proceeds of all sales of its land from time to time in the redemption of such bonds; that it has issued $10,400,000 of them, at seven per cent interest, $8,811,000 of which remain outstanding and unpaid; that it intends to sell land and apply the proceeds to redeem them, to that extent impairing the security of the United States for the repayment of its bonds issued to the company; that the company, on Sept. 1, 1869, issued $10,000,000 of so-called income-bonds, at ten per cent interest, secured by an indenture pledging the net income for the interest, after paying that on the first-mortgage bonds and land-grant bonds; that it has also issued $2,500,000 of eight per cent bonds, secured by mortgage on its bridge across the Missouri River; that for the redemption of the income-bonds it intends to issue and put in the market eight per cent sinking-fund bonds for $16,000,000, secured by mortgage on the property of the company; that it has a floating debt of $2,000,000, and has issued certificates of stock amounting to $36,762,300; that, July 16, 1868, it entered into an agreement with Godfrey & Wardell, which was assigned.

April 1, 1869, to the Wyoming Coal and Mining Company, purporting, among other things, to lease the coal lands of the Union Pacific Railroad Company for fifteen years; that the stock in said coal company, with the exception of one-tenth thereof, is owned by stockholders and managers of the railroad company; that said contract is a fraudulent method of obtaining for them a monopoly of coal supplies and of the coal trade on the line of the road, and was made in contravention of sect. 3 of the act of 1862; that on Sept. 1, 1869, the railroad company made a contract with the Atlantic and Pacific Telegraph Company to transfer to the latter the entire line of telegraph and appurtenances constructed for the railroad company under the acts of Congress; that the managers of the two companies are in part or in whole the same; and that the arrangement is a fraudulent device to make for said managers illegal profits, and to deprive the United States of its lawful security and advantage from the telegraph line.

The bill sets forth an agreement with the Omaha Bridge Transfer Company, and charges that it is a fraudulent arrangement on the part of the managers and stockholders to transfer to themselves personally profits which equitably belong to the railroad company.

The bill then charges, among other things, that the cost of the road was less than one-half of the sum represented by the stock and other pretended outstanding liabilities; that the larger part of the stock and bonds was issued by certain defendants in the name of the company, to enrich themselves; that the greater portion of the stock was never paid for in cash, or in any other thing of equivalent value; that the company is insolvent; that the government bonds and a portion of the first-mortgage bonds would have been sufficient to construct the road, without any expenditure from stock subscribed, or from land-grant bonds, or from income bonds; and that the stock, if paid in cash or its equivalent, would have been sufficient with less than one-half of the government bonds to complete the road, without the issue of bonds by the company; that at its organization in 1863 $2,177,000 stock was subscribed, on which ten per cent was paid; but no considerable

sum was afterward paid thereon, and no considerable amount of other subscriptions was ever made, except as part of the fraudulent transactions set forth; that at the organization of the company the practical management of its business was committed to the executive committee, whereof one of the defendants, Durant, then vice-president, was elected a member; that in August and September, 1864, he and his associates used the name of one H. M. Hoxie to disguise a contract made by them in the name of the company on one side, with themselves in the name of Hoxie on the other, to construct about two hundred and forty-six miles of the road between Omaha and the one hundredth meridian, at the price of $50,000 per mile, which was known to be in excess of a fair price therefor; that on Oct. 7, 1864, certain defendants, directors, and another, a stockholder, agreed with him to take large interests in this contract, with the design of becoming possessed of all the franchises and property of the company, and to use, manage, and dispose of the same for their private benefit; that in execution of said design they obtained, in November, 1864, control of the charter of the Credit Mobilier of America, a corporation of Pennsylvania, and on March 15, 1865, entered into a contract in writing to conduct its operations in connection with the railroad company, outside of its charter, at an agency in New York; that their intention was to substitute the Credit Mobilier as a contractor in the "Hoxie contract," and that on the same day they assigned to it the entire beneficial interest from the beginning in this contract, when the Credit Mobilier was organized to co-operate with the railroad company, defendant Durant being chosen its president; that they, in 1865 and 1866, purchased in the name of the Credit Mobilier, and had conveyed to it, large numbers of shares of stock of the railroad company, originally subscribed for in good faith at its organization; that they caused to be allotted among themselves, as stockholders in the Credit Mobilier, the shares of railroad stock purchased from the original subscribers, and also large numbers of other shares subscribed by, or in the name of, the Credit Mobilier, on which it was pretended that thirty per cent had been paid, and also to be distributed among themselves a large amount of scrip procured by the Credit Mobilier from the railroad company in

pretended payment for construction under the "Hoxie contract," which scrip, instead of cash, they used in making pretended payments for the stock, certificates of which they procured to be issued to them severally by the officers of the railroad company.

It then states the division among certain defendants, in February, 1867, of one thousand two hundred and fifty first-mortgage bonds ($1,250,000), which they had caused the railroad company, to issue and deliver to the Credit Mobilier, on pretence of payment for road-building under the "Hoxie contract;" that in 1867 they procured transfers to the Credit Mobilier, with few exceptions, of all the outstanding original shares of stock of the railroad company; and that thenceforth they, the holders of all the stock of the Credit Mobilier, became also holders of substantially all the stock of the railroad company, and managed the same without regard to the rights or interests of the United States; that in December, 1867, they fraudulently distributed among themselves, as stockholders of the Credit Mobilier, in the way of dividends, sixteen thousand shares of Union Pacific railroad stock, issued to the Credit Mobilier, as assignee of the "Hoxie contract," on account of fifty-eight miles of railroad west of the one hundredth meridian, already constructed and paid for by the railroad company, and charges that they were from the beginning, and throughout, interested in the whole of the profits of the "Hoxie contract," and that all the work thereunder was done, and all measurements thereof and settlements therefor were made, by them in the double capacity of representatives of the two companies.

It then recites the facts and objects of the so-called "Oakes Ames contract," and charges that after the completion of the road, under the "Hoxie contract," to the one hundredth meridian, in October, 1866, they, as managers of the railroad company, went on, constructed, and paid for, at the price of about $27,500 per mile, a section of about one hundred and thirty-eight miles of road west of the one hundredth meridian, which was completed October, 1867; that they then entered into a series of writings intended in effect to constitute a contract with themselves as stockholders of the Credit Mobilier, for constructing at excessive prices six hundred and sixty-seven

miles of road, beginning at the one hundredth meridian, and including the one hundred and thirty-eight miles already built and paid for at much lower rates; that the objects and effects of this transaction were to despoil the company of $3,000,000 of its stock and bonds, distributed among the defendants, under pretext of a contract to build a portion of its road already built and paid for, and to give them, under the disguise of a contract between parties in different interests, excessive prices for constructing other portions of the road, and to place the control of the company in seven trustees, and withhold its management and direction from the stockholders and directors; that the first three dividends under the "Oakes Ames contract" were received by the defendants named; that on June 3 and 7, 1868, all the trusts in the triplicate agreement (one of the writings connected with the "Oakes Ames contract"), in favor of the stockholders of the Credit Mobilier, were directly declared in favor of defendants individually, who received the dividends personally, and not as stockholders of the Credit Mobilier; that thereafter defendants proceeded, as general copartners in form as well as in fact, with the seven trustees as their general managers, and that the last three dividends or allotments under the "Oakes Ames contract" were: July 3, 1868, $2,812,500, in first-mortgage bonds; July 8, 1868, $1,125,000, in cash; Dec. 29, 1868, seventy-five thousand shares of stock at par value.

It then states the facts in regard to the pretended "Davis contract" in November, 1868, for the construction of about 125.23 miles of the road not embraced in the "Oakes Ames contract," which was assigned to the same persons for the same trusts as in the case of the "Oakes Ames contract;" and that the road to its western terminus was constructed by certain stockholders of the company, acting through the assignees, under cover of the "Davis contract."

After setting forth at large the dates and amounts of the several subscriptions which the defendants caused to be made to the stock of the railroad company by the Credit Mobilier, or to be assumed by it, as required by the "Hoxie contract," and the distribution of the stock among the defendants; also the dates and amounts of the subscription to the stock of the

company made by the trustees under the "Oakes Ames contract" and under the "Davis contract," and its distribution in like manner; that neither the Credit Mobilier nor the trustees ever paid for any portion of their stock, but the excessive contract prices for construction were set off against the subscriptions; that the accounts of the railroad company under the three contracts are unsettled, with large balances claimed against the company; that defendants caused large amounts of money belonging to the company to be expended for unlawful purposes.

Certain alleged fraudulent transactions on the part of one of the defendants, a director, in relation to the sale of bonds, are set forth, in respect of which it is charged he is accountable to the company, which wrongfully refuses to compel him to account.

The bill then charges that the defendants made further divisions and distributions among themselves of the assets of the company, and engaged in other unlawful transactions and dealings with respect to its property, which the complainant is unable to set forth in detail, but which amount to about $17,000,000 in excess of the amounts particularly set forth, and that large amounts of the stock and bonds divided among defendants are still held by them or some of them.

The present condition of the company, with regard to its stock, finances, value of its road, and management, is then set forth, and it is averred to be doubtful whether the road would sell under the first mortgage for more than enough to pay those bonds, and that if the land-grant mortgage is allowed to be administered according to its terms, it will exhaust the security of the United States in the lands; that the company had no right to issue first-mortgage bonds or land-grant bonds or income bonds for distribution among stockholders as profits or for sale to them below their value, and such bonds to the extent so issued and distributed or sold are invalid, unless in the hands of *bona fide* purchasers without notice; that it has no right to exhaust the security of the United States by paying either principal or interest of land-grant bonds or income bonds; that the so-called trustees and assignees, under the "Oakes Ames contract" and "Davis contract," are jointly and sever-

ally responsible for all the stock and bonds issued to them; that the grants to the company in the acts of Congress were grants in aid of a public work of the United States, and are held in trust, to be applied to a public use; and that the property mentioned is also a trust for the payment to the United States of the subsidy bonds; that the present management of the company is in adverse interest to the United States; that the latter is entitled, as further security for its debt, and for the public objects provided for by Congress, to have declared that the management of the company should be subject only to the votes of the stockholders holding full-paid stock; to have the franchises, powers, and means so administered that unreasonable and unnecessary liabilities should not be created, and to have an account of reasonable and necessary expenditures and liabilities as a basis for regulating rates of fare under the eighteenth section of the act of 1862, and for determining the basis for estimating the five per cent of net profits; to have the franchises, powers, and property so administered as to secure the United States for the repayment of its bonds and promote the public objects of the corporation; to have maintained by the corporation, as a security for those objects, the character and credit which would ensue from a lawful administration of the franchises, powers, and means granted; and to have the lien of the United States remain a first lien, except as to the priority given to the first-mortgage bonds within the limits and for the purposes expressed by Congress; that the company neglects and refuses to state or render an account of cost on a lawful or just basis; that the stock of the Credit Mobilier, and the stock, bonds, and cash of the railroad company, held by and allotted, distributed, and divided among several of the defendants, were received in trust for others, whom complainant asks leave to make parties defendant when discovered.

The relief prayed for is, that the grants by the United States be declared to be held by the company for a public use, &c., and the property granted by the United States, &c., to be a trust fund to secure the bonds lent by them, &c.; that the construction contracts, and the land-grant and income mortgages be declared void; that an account be taken of the actual cost, &c., of the Union Pacific Railroad and Telegraph; the United

States bonds issued, &c.; the stock subscribed, sold, issued, &c., and of the lands, &c., obtained from the United States; that persons unlawfully holding stock or other property of the company restore it, &c.

A large number of the defendants resided out of the district and State of Connecticut. Subpœnas directed to them were issued to the marshals of the several districts in which they respectively resided, and service thereof was there duly made upon them. There were three classes: 1. Those sued in their own right; 2. Those sued as executors of the estates of deceased persons domiciled at the time of their death out of said State; and, 3. Corporations organized under laws of some other State.

The railroad company demurred, alleging "that the complainant hath not, by its said bill, made such a case as entitles it in a court of equity to any discovery or relief from or against this defendant touching the matters contained in the said bill, or any of such matters."

The defendants who were served with process in the district of Connecticut likewise appeared, and filed demurrers to the bill for want of equity and for multifariousness.

A large number of those defendants who were served with process out of the district of Connecticut appeared *de bene esse*, and filed motions to dismiss the bill as to them, respectively, stating as the grounds of their motion that by the averments of the bill they were respectively non-residents of Connecticut, and that the process showed that it was served upon them out of the district.

Some of the defendants, residing out of Connecticut, demurred to the bill for want of equity and for multifariousness; others, who were non-residents of Connecticut, filed answers with clauses of demurrer.

The case was argued upon the bill and the pleadings, and the motions to dismiss. The demurrers were sustained, and an order entered overruling the motions.

The several non-resident defendants whose motions to dismiss were thus overruled, thereupon, under a *protestando*, demurred for want of equity and for multifariousness.

Several defendants, who had answered, withdrew their an-

swers after the decision of the court on the demurrers, and demurred.

At the April Term, 1874, the court below entered a general and final decree upon the bill, demurrers, and answers so filed, dismissing the bill as to all the defendants duly served with process. Whereupon the United States appealed to this court, and here assigns the following errors: —

The court below erred, —

1. In sustaining the demurrers.

2. In dismissing the bill as to certain defendants who had answered.

3. In dismissing it as to parties who had neither pleaded, answered, nor demurred.

The case was argued at the October Term, 1876, *The Solicitor-General*, *Mr. Aaron F. Perry*, and *Mr. J. Hubley Ashton* appearing for the United States, and *Mr. Sidney Bartlett* and *Mr. William M. Evarts* for the appellees.

A reargument having been ordered, it was again heard at the present term.

The Attorney-General and *The Solicitor-General* for the United States.

The objections taken by motion to the jurisdiction of the court below have not been duly brought before this court, inasmuch as the defendants did not object to the jurisdiction over their persons by plea (either instead of their motions or after these had been denied), but demurred for want of equity, and thereby waived their supposed personal privilege of being served within the district. The protest attached to the demurrers cannot impart to the proceeding by motion an effect which it did not otherwise possess, although it may save any objection duly made and entered.

However, in case it shall be considered that the question is duly presented here, we submit that process was lawfully served.

This proposition depends, of course, upon the validity of the act of March 3, 1873, the constitutionality of which is questioned not only by the motions but by the demurrers. It therefore seems convenient to consider all of these questions together.

I. It is suggested that in compelling the defendants alone, in contradistinction to the great mass of citizens, to obey process served outside of the State and district of the court which issued it, especially where such persons are executors or administrators authorized by some other State, the act is unconstitutional, because it deprives them of their property without due process of law, and sets up a special court different from those ordained and established by the general legislation of Congress.

It may be admitted that Congress cannot, by retrospective legislation, constitutionally make a substantial difference between citizens taken individually as regards the process to which these are either entitled or amenable; and also that the word "substantial," so used, includes other rights than such as are elsewhere conferred by the Constitution. Courts understand, as matter of law, that certain rights of suitors are important, and that others are not so, and discriminate accordingly. It is competent for Congress, and for the legislature of every State the constitution of which contains that guaranty, to make any provision as to process for a particular suit which does not materially affect the parties thereto. Upon the general topic of due process, see *Murray's Lessee et al.* v. *Hoboken Land and Improvement Co.*, 18 How. 272.

In the present instance, the variation against the defendants, as regards service of process, is unimportant; for it is indifferent to a suitor in equity whether he be sued in one district or in another, because —

1. The Constitution regards political or geographical limits as important for criminal, and perhaps other, trials at common law, but is significantly silent in this respect as to suits in equity.

In this connection, it is submitted that those who framed that instrument, and those who in a temper severely critical proposed the earliest amendments to it, turned their attention to the matter of the place where trials should be held, and that their repeated consideration and action resulted in an express provision in that respect for the trial of persons charged with crimes, — a qualified one for trials at common law, and an entire omission to regulate the trial of equity causes.

There also may be a qualified regulation of suits at common law, because it seems that trial by jury does, in the nature of things, savor of locality, so that it might well be suggested that a retrospective law subjecting a person to trial by a jury drawn from a place other than that of juries who by law try such matters for citizens in general, would violate one of his important rights.

It is otherwise where a trial by the court is competent. There, both principle and authority show that under our system venue is immaterial.

In *Burnam* v. *The Commonwealth* (1 Duv. (Ky.) 210), the court considered certain special provisions for the service of process created by the Kentucky act of 1862, c. 564, which authorized an action against the officials of the provisional government of that State. Those provisions operated retrospectively upon a definite number of individuals, yet the court said: "We cannot adjudge any provision of the act to be unconstitutional. As in other cases, when actual notice cannot be given to absent defendants, there must either be no remedy, or constructive notice must be substituted as sufficient; and what constructive notice shall be given is a question of legislative discretion rather than of power. We see no abuse of sound discretion in the mode of service prescribed in this statute."

That decision seems entirely in point here. The only difference in regard to service of process is that Kentucky, having no political jurisdiction over the territory in which the defendants were supposed to be, was confined to a summons by publication; whereas here the United States has such jurisdiction, and therefore could authorize actual service.

2. The method of taking testimony in courts of equity renders subordinate geographical limits in that connection unimportant.

3. So also does their method of deciding upon issues of fact.

4. Courts of the United States, no matter where sitting, take notice of, and, whenever applicable, administer in behalf of suitors the laws of every other State. *Owings* v. *Hull*, 9 Pet. 607.

Therefore executors and administrators are at no special disadvantage in being sued outside of the State from which they derive their appointment. A New York executor or administrator has in the courts of the United States in Connecticut every advantage and protection which he possesses in those of his own State. *Green's Administratrix* v. *Creighton et al.*, 23 How. 90.

II. The act of 1873 is said to be unconstitutional in empowering the United States to bring the suit. The United States can only recover the moneys and property to which in equity it is entitled; and the general principles of equity jurisprudence as heretofore upheld and applied must ascertain and determine its title to relief. A remedy only is furnished to enforce an existing right.

Among the parties against whom suit is authorized are those who, under pretence of having complied with the act to which this is an addition, wrongfully and unlawfully received from the United States bonds, moneys, or lands, which ought in equity to be accounted for and paid to it or to the company.

The bill states that certain persons, defendants, conspired to obtain, for their own corrupt purposes, and did obtain, control of the company, in its transactions with the United States, and in this way received bonds and lands. If this be established, there may be something to be restored to the United States. It is true that the special purpose of the act is the relief of the company and its restoration to the *statu quo* contemplated by the charter. But if, upon taking the accounts, something is to be restored to the United States, it seems that the above particular state of facts, together with the general prayer, will authorize such relief. *English et al.* v. *Foxhall*, 2 Pet. 595. The probability of such a state of things seems anticipated by the act.

As to other matters, the act leaves the right of recovery where it originally was, — in the company. It is true that the company is formally a defendant, but it is not uncommon for such parties to assume by appropriate pleading the relation of complainants in equity suits, and thereupon to partake in the relief decreed against their original co-defendants.

The United States is made the complainant in a suit the main

object of which is to give relief directly to the company and indirectly to the complainant, but which, in a certain event, contemplates direct relief also to the latter. The act relates to the remedy alone, and at most authorizes virtually one sort of multifariousness or misjoinder. That is a matter of form, which Congress can, at its pleasure, regulate and control.

Excluding from consideration the special sort of multifariousness above mentioned, — that is, taking for granted that the United States claims nothing here for itself, — the peculiarity of the act lies in authorizing the United States to bring a suit in which it is to recover nothing, the litigating parties on both sides being made defendants, and it being actor only so far as to ask intervention by the court among the defendants, according to the principles of equity; *i. e.*, by a sort of statutory interpleader which the United States is interested in bringing about and superintending until it becomes effective. The question, who shall be the complainant of record, is not, therefore, one of substance. It has been not unusual in the different States to provide by special statutes that debts may be sued upon and recovered, for the benefit of those really interested, in the name of some one designated by the act and not privy to the contract. *Cuyahoga Falls Co.* v. *McGaughey*, 2 Ohio St. 152; *Carey* v. *Giles*, 9 Ga. 253; *Crawford* v. *Branch Bank of Mobile*, 7 How. 279; *Hurdman* v. *Piper*, 50 Mo. 292. See also a like principle asserted in such cases as *Livingston's Lessee* v. *Moore*, 7 Pet. 469; *Watkins* v. *Holman's Lessee*, 16 id. 25; *Edwards* v. *Pope*, 3 Scam. (Ill.) 465; *Hepburn* v. *Curtis*, 7 Watts (Pa.), 300; *Kilby* v. *Chitwood*, 4 B. Mon. (Ky.) 91.

The circumstance that the United States is not a stranger to the company, but has always been represented within it by directors appointed by the President, has been from the first a standing suggestion of a sort of guardianship by it, and therefore of its right to apply to equity to enforce any course of honest or lawful dealing which it, being in a minority in the direction, may have been prevented from otherwise securing. The act of 1873 is no surprise, but is according to due process.

Again, considering the act to be an amendment to the charter, as it plainly is, it appears to be according to reasonable expectations founded upon the pecuniary and other extraordinary interests of the United States which are involved, that, if unlawful and fraudulent occurrences like those specified in the act should take place, the government would intervene, as complainant, to have the general condition of the company restored as far as practicable to that originally contemplated. Notice to this effect must be regarded as having by this state of things been served upon everybody.

The act evidently has in view a case in which the company if ever it were so, may not be *sui juris*, nor be able or willing to bring suit against its masters, or at least cannot be relied upon to maintain such a suit to its legitimate end. If this be true, the bill in question is a mere repetition in technical form of certain circumstances contemplated by the act, which, being the organic law of the suit, deals in generalities only.

Therefore, while the act of 1873 affords our only rule of allowance, that rule is expressed organically; and, moreover, a suit brought under it need not take all the risks against which it insures.

It is said that the act deprives the defendants of due process, in allowing decrees against one or more parties, before the final determination of the case. The direction is that such partial decree may be given. Considering the context, the meaning is that this may be done, where otherwise it will be according to the substantial equities among the parties. Under such circumstances, it seems that no other party than that whose connection with the case is so ended could object; if otherwise, however, the matter is one merely of form, in relation to which Congress is competent to give directions.

III. A chief end of the creation and endowment of the Union Pacific company was the accomplishment of governmental purposes.

This is manifested in the title of the act of 1862; the special provisions for vesting the franchises in it; the appointment and the duties of the directors on the part of the United States

the requirement of a continuous road for the use of the government for postal, military, and other purposes; the absolute and preferential character of the right of the United States to use the road; the reserved right to control the profits of the company's business. In addition to its rights as sovereign, the United States reserved certain rights as creditor, viz.: That the subsidy bonds should be paid by the company at their maturity, and in the meanwhile should be secured by mortgage; that five per cent of the net earnings should annually be applied to the principal and interest of such bonds; that one-half of the compensation payable to the company for public services should also be so applied. The company was not empowered by its charter to include its franchises in its first mortgage, or to make mortgages of its land grants or of its income.

IV. The endowment of the company is held as a public trust, and not as a mere donation. *Olcott* v. *The Supervisors*, 16 Wall. 691; *Worcester* v. *The Western Railroad Co.*, 4 Metc. (Mass.) 560; *Railroad Commissioners* v. *Railroad Company*, 63 Me. 269.

The company, however, by its charter has specific and extraordinary relations and duties of that sort. *Denison* v. *Union Pacific Railroad Co.*, 9 Wall. 579; *Union Pacific Railroad Co.* v. *Penniston*, 18 id. 5; *Tucker* v. *Ferguson*, 22 id. 572; *Rice* v. *Railroad Company*, 1 Black, 358.

V. Property held for public purposes becomes a trust-fund subject to the ordinary jurisdiction of equity. *Attorney-General* v. *Brown*, 1 Swans. 265; *Attorney-General of Ireland* v. *Mayor of Dublin*, 1 Bli. N. S. 312; S. C. 2 Cl. & Fin. 289; *Attorney-General* v. *Aspinall*, 2 My. & Cr. 613; *Parr* v. *Attorney-General*, 8 Cl. & Fin. 409; *Skinners' Company* v. *The Irish Society*, 12 id. 482.

Such jurisdiction is not visitatorial. *Dartmouth College Case*, 4 Wheat. 676.

VI. The obligations assumed by the company under the charter raise a trust in favor of the United States.

The charter is a contract affecting specific property, and this fastens a trust upon such property. *Legard* v. *Hodges*, 1 Ves. 477; 1 Perry, Trusts, sect. 82; *Seymour* v. *Freer*, 8 Wall. 214;

Barings v. *Dabney*, 19 id. 9; *Evans* v. *Coventry*, 5 DeG., M. & G. 920.

The word "condition" (see act of 1862, sect. 6) creates a trust. *Stanley* v. *Colt*, 5 Wall. 165; *Sohier* v. *Trinity Church*, 109 Mass. 1; *Wright* v. *Wilkins*, 2 Best & Sm. 248.

So the assets of corporations are said to be a trust fund for creditors. *Curran* v. *Arkansas*, 15 How. 307; *Railroad* v. *Howard*, 7 Wall. 409.

The objects to which the company was required by its charter to devote its entire property were the construction, operation, and maintenance of the road as an agency in governmental matters, and the security and ultimate payment of the bonds lent by the United States. A diversion of its property from these ends was a breach of trust. *Burke* v. *Smith*, 16 Wall. 395.

In this connection see the provisions in the following sections of the charter; viz., act of 1862, sects. 1, 3, 5, 6, 17, and 18; and act of 1864, sects. 2, 5, and 10.

VII. The property of the company and its proceeds were a trust fund for the payment of the bonds loaned by the United States to the company.

These bonds were secured not only by a condition to that effect (act of 1862, sect. 6), but also by a mortgage; and by stipulations that five per cent of the net profits, and one-half of the compensation for services to the United States, should be applied to pay them, and that the subscriptions for stock should be paid in cash.

VIII. The court has jurisdiction on the ground that the transactions were *ultra vires*. *Hare* v. *Railroad Company*, 2 Johns. & H. 111; *East Anglian Railroad Co.* v. *Eastern Counties Co.*, 11 C. B. 812; *Solomons* v. *Laing*, 1 R. I. 351, and 3 id. 14; *Zabriskie* v. *Railroad Company*, 23 How. 381; *Bissel* v. *Railroad Company*, 22 N. Y. 288; *Holmes* v. *Abattoir Company*, Law Rep. 1 Ch. 682.

As to the parties entitled to sue in order to correct action *ultra vires*, see *Bagshaw* v. *Railroad Company*, 2 Mac. & G. 389; *Spackman* v. *Lattimore*, 3 Gif. 15; *Kearns* v. *Leaf*, 1 Hem. & M. 681; *Hare* v. *Railroad Company*, *supra*.

For observations pertinent to the right of the United States,

considering its special relations to this company, to obtain relief in equity against its transactions *ultra vires*, see *Walworth* v. *Holt*, 4 My. & Cr. 635.

IX. Jurisdiction of equity to protect public interests against violations of charters. *Attorney-General* v. *Detroit*, 26 Mich. 266; *Attorney-General* v. *Tudor Ice Co.*, 104 Mass. 239; *The State* v. *Saline County Court*, 51 Mo. 366; *Attorney-General* v. *Mid. Kent Railway Co.*, Law Rep. 3 Ch. 100, &c.; *Commissioners* v. *Smith*, 10 Allen (Mass.), 435; *Attorney-General* v. *Railroad Companies*, 35 Wis. 511; *Dodge* v. *Woolsey*, 18 How. 331.

X. Jurisdiction to decree specific performance of the obligations of the charter as to the use of the property.

XI. Jurisdiction on the grounds of waste and fraud. *Clagett* v. *Salmon*, 5 Gill & J. (Md.) 334; *Maryland* v. *Railroad Company*, 18 Md. 193; *Kearney* v. *Leaf*, 1 Hem. & M. 708; *Jackson* v. *Ludeling*, 21 Wall. 616; *Jones* v. *Bolles*, 9 id. 364.

It is therefore submitted, in conclusion: —

1. That the United States has beneficial or property interests involved in the transactions complained of, which might be enforced at the suit of an individual, and concerning which it stands toward the railroad company as a third party. It may enforce its rights in the same way and has the same rights as such party.

2. That the act of 1873 authorizes a suit in equity without express restrictions, specifying several purposes, but not excluding others, and not requiring the cause of action to be split. It joins only such parties and such causes of action as would be joined in an ordinary equity suit to accomplish the purpose, and looks only to the ordinary incidents of a chancery suit. The provision for process is necessary, and the only provision in the act which is necessary to the relief asked. But if there should be greater departure from ordinary procedure than is supposed, there is none involving constitutional objections.

3. That the United States having the two kinds of interest described, the relief which would be granted in an equity suit, without a statute, is coextensive with the relief specified in different terms by the statute. It is inadmissible under such

circumstances to construe the statute as an arbitrary one, conflicting with rights of property; and without such construction there is no constitutional objection to it.

4. That, construed however rigorously, the constitutional objections supposed to exist against the relief prayed, as to past transactions, do not apply to the preventive remedies sought, which are themselves important to the ends of justice.

5. That the demurrers are untenable, in any view of the case, and should be overruled.

Mr. Sidney Bartlett and *Mr. W. G. Russell, contra.*

I. As to the constitutionality of the act of March 3, 1873.

1. The act under which this suit was brought violates the fundamental right of citizens under a free government to "equality before the law," and may, therefore, be held void, without reference to any express constitutional limitation or prohibition. The doctrine that there are implied reservations of individual rights, even in the broadest grant of legislative power, has been judicially recognized and asserted; and among them that of equality before the law has been, and must be, included. *Wilkinson* v. *Leland*, 2 Pet. 627; *Calder* v. *Bull*, 3 Dall. 386; *Taylor* v. *Porter*, 4 Hill (N. Y.), 140; *Holden* v. *James*, 11 Mass. 396; *Durkee* v. *Janesville*, 28 Wis. 464; *Bagg's Appeal*, 43 Pa. 512; *Loan Association* v. *Topeka*, 20 Wall. 655; Cooley, Const. Lim., pp. 487–490.

The express grants of constitutional power by which the validity of the act in question is to be determined are to be found in art. 1, sects. 1 and 8, of the Constitution. Admitting that under them the power to constitute tribunals inferior to the Supreme Court includes that of ordaining the extent and mode in which the judicial power shall be exercised, subject to the provisions defining its limits, we yet submit that the grants are subject to the limitation that they are not to be so construed as to imply a surrender by the people of "those reserved individual rights which grow out of the nature of a free government," a grant of which cannot be assumed to "lurk under any general grant of legislative power;" and that under such interpretation any act which undertakes to destroy or impair the great reserved right of equality before the law cannot be deemed an exercise of legislative power.

It is not claimed that the act is void and unconstitutional merely because it is retrospective in its action, or is special legislation affecting only a single case, or confers upon the plaintiff in judicial proceedings new and material privileges and exemptions from existing rules of law, or that it imposes upon the defendants in conducting their defence new and onerous conditions at variance with pre-existing rules of law; but because it combines all these objectionable elements, and thus passes the limits of constitutional legislation, and exercises a power everywhere recognized as arbitrary and tyrannical.

2. The act is unconstitutional and void, as repugnant to the Fifth Amendment to the Constitution of the United States. "Nor shall any person . . . be deprived of life, liberty, or property without due process of law."

In construing this clause, its history and the circumstances under which it was adopted and the purpose for which it was designed may be considered.

It is matter of common knowledge that equality before the law was then recognized as a fundamental principle; that much solicitude was expressed that it had not been sufficiently guarded in the Constitution then proposed; and that the amendment in question was, with others, adopted at the earliest possible date, for the purpose of protecting the citizen in this right against legislative encroachments. Federalist, No. 84; Journal of Congress (1787, 1788), vol. xiii., Appendix, pp. 64–94.

If it be capable, the language is to be so construed, so that the words "due process of law" shall be extended to the whole course of judicial "proceedings, shaping, regulating, and enforcing remedies which affect the rights and safety of the citizen, or his means or facilities of defence, and to preclude all possible special legislation which should attempt in relation thereto to discriminate between one citizen and another."

The adjudicated cases in which the terms of the Fifth Amendment and equivalent or analogous terms of constitutional limitation have been considered and applied, support our construction. *Wayman* v. *Southard*, 10 Wheat. 1; *Murray's Lessee* v. *Hoboken, &c., Company*, 18 How. 272; *Davidson* v. *New Orleans*, 96 U. S. 97; *Merrill* v. *Sherburne*, 1 N. H. 199; *Bates* v. *Kimball*, 2 Chip. (Vt.) 77; *Lewis* v. *Webb*, 3 Me. (Greenl.) 326; *Dur*

ham v. *Lewiston*, 4 id. 140; *Holden* v. *James*, 11 Mass. 396; *Picquet, Appellant*, 5 Pick. (Mass.) 65; *Davison* v. *Johonnot*, 7 Metc. (Mass.) 388, 393; *Simonds* v. *Simonds*, 103 Mass. 572; *Taylor* v. *Porter*, 4 Hill (N. Y.), 140; *Westervelt* v. *Gregg*, 12 N. Y. 202; *Wynehamer* v. *The People*, 13 N. Y. 378; *O'Conner* v. *Warner*, 4 Watts & S. (Pa.) 223; *Greenough* v. *Greenough*, 11 Pa. 489; *De Chastellux* v. *Fairchild*, 15 id. 18; *Ervine's Appeal*, 16 id. 256; *Bagg's Appeal*, 43 id. 512; *Huber* v. *Riley*, 53 id. 112; *Wally's Heirs* v. *Kennedy*, 2 Yerg. (Tenn.) 554; *Bank of State* v. *Cooper*, 2 id. 599; *Budd* v. *State*, 3 Humph. (Tenn.) 483; *Teft* v. *Teft*, 3 Mich. 67; *Bull* v. *Conroe*, 13 Wis. 233; *Durkee* v. *Janesville*, 28 id. 464; Journal of Congress (1787–88), vol. xiii., Appendix, pp. 64–94; 2 Kent, Com. 13; Story, Const., sect. 1945; Cooley, Const. Lim., pp. 438, 441, 490.

By the general law of the land applicable to all cases at the date of the act, and still applicable to all other like cases, certain established rules and principles of equity jurisprudence were and are of binding force, governing, as to the joinder of parties and the joinder of causes of action; and among them the rule that "uniting in one bill several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill," is inconsistent with the right of defence, and cannot be upheld in a court of equity.

Equally established is the rule that there shall be but one final decree in which the rights and interests of the parties are to be settled.

These rules are by the terms of this act suspended and annulled.

The act is at variance with the right to due process of law, in another respect still more important.

By the law as it then existed, and still exists as to all other cases, the jurisdiction of each circuit court over the persons against whom its process issues was confined to the district in which the court sits.

That the jurisdiction and process of these courts were confined by their organization itself within the limits of their respective districts, without regard to the limitation imposed by

the eleventh section of the Judiciary Act, was laid down by Mr. Justice Washington, as follows: —

"The division and appointment of particular courts for each district necessarily confines the jurisdiction of the local tribunals within the bounds of the respective districts within which they are directed to be holden." *Ex parte Graham*, 3 Wash. 456. See also *Picquet* v. *Swan*, 5 Mas. 35; *Toland* v. *Sprague*, 12 Pet. 300; *Day* v. *Newark Co.*, 1 Blatch. 628; *Pomeroy* v. *New York & Hudson River Railroad Co.*, 4 id. 120.

But from abundant caution, Congress, by the eleventh section of the Judiciary Act, provides expressly that "no civil suit shall be brought before either of said courts (the Circuit or District Court) against an inhabitant of the United States, by any original process, in any other district than that whereof he was an inhabitant, or in which he shall be found at the time of serving the writ."

In this condition of the statute law Congress intervenes, and provides for this one case against certain defendants, not only a mode of procedure unknown to the general rules of law, but a special and isolated jurisdiction, vested in some one circuit court to be designated by the Attorney-General, to which, by the law then and still in force, as to all other citizens, they could not be subjected, and to which by possibility no one of them was, but for this act, subjected.

Under authority of the act providing that, "on filing the bill, writs of subpœna may be issued by said court against any parties defendant, which writ shall run into any district, and shall be served as other like process by the marshal of such district." Writs of compulsory process in a suit commenced in the Circuit Court for the District of Connecticut have been issued from said court into different States, and served upon persons not inhabitants of said district nor found within its limits.

In judging of the character of the act as affecting its constitutional validity, we are entitled to look to the act itself, and not merely to the course which has been pursued under it.

It is obvious that, under its provisions, suit might well have been brought in a district where, by general law, no one of the defendants was subject to the jurisdiction, and that to the act

itself this objection lies with equal force on behalf of all the defendants alike.

Equally obvious is it that the act, with reference to its constitutional validity, is to be tried by the same tests which should be applied to any similar act conferring in favor of a particular individual a like peculiar jurisdiction against particular designated defendants, against whom a cause of action might exist.

Under it, at the discretion of the Attorney-General, each of these defendants might be summoned, and, in order to defend his right, be compelled to appear, before a circuit court of the United States in a district remote from his home and his means of defence, into which but for this act he could not be summoned, and into which no other citizen can be compelled, which is in the nature of things a pecuniary burden and something more.

This is imposing upon him an onerous condition as to his defence. *Ex parte Graham*, *supra*.

This objection applies with added force in favor of the corporations made defendants; for they being, for purposes of jurisdiction, citizens and inhabitants of the several States in which they are established and under whose laws alone they exist, not only cannot have a domicile elsewhere, but are incapable of being away from home, and hence are in no event subject to process except in the State or district where they are created or have their domicile. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Baltimore & Ohio Railroad* v. *Harris*, 12 Wall. 65; *Railway Company* v. *Whitton*, 13 id. 270; *Day* v. *Newark India-rubber Manufacturing Co.*, 1 Blatch. 628; *Pomeroy* v. *New York & Hudson River Railroad Co.*, 4 id. 120; *Sayles* v. *Northwestern Insurance Co.*, 2 Curt. 212.

3. The act is unconstitutional and void in its provisions affecting the jurisdiction and mode of procedure in the present suit, because it is in violation of sect. 1 of art. 3 of the Constitution of the United States, and is an exercise of judicial power by the Legislative Department.

By that article, in connection with arts. 1 and 2, declaring how the legislative and executive powers shall be vested, it cannot be questioned that the partition and separation of these

powers is distinct and complete. *Dash* v. *Van Kleeck*, 7 Johns. (N. Y.) 477; *Merrill* v. *Sherburn*, 1 N. H. 199.

Congress deals directly with a cause between adverse parties, and prescribes certain rules of procedure, or, in other words, issues its mandate to the court as to the manner in which a cause shall be conducted and determined.

It declares that facts which, under the ordinary administration of the rules of equity jurisprudence, would justify the defence of multifariousness shall be held by the court not to sustain that defence, and thus in a particular case itself exercises the judicial function.

In *O'Connor* v. *Warner*, 4 Watts & S. (Pa.) 223, Gibson, C. J., says: "A legislative direction to perform a judicial function in a particular way would be a direct violation of the Constitution, which assigns to each organ of the government its exclusive function and a limited sphere of action. No one will assert that a court would be bound by a mandate to decide a principle or a cause a particular way. Such a mandate would be a usurpation of judicial power." p. 227.

A legislative mandate, that in a particular case the court shall decide as to one defence in a particular way, is obviously open to the same objection as an order so to decide the case itself. *Picquet, Appellant*, 5 Pick. (Mass.) 65; *Bates* v. *Kimball*, 2 Chip. (Vt.) 77; *Lewis* v. *Webb*, 3 Me. 326; *Merrill* v. *Sherburn*, 1 N. H. 199; *Greenough* v. *Greenough*, 11 Pa. 489; *De Chastellux* v. *Fairchild*, 15 Pa. 18; *Waters* v. *Stickney*, 12 Allen (Mass.), 1.

4. The act is unconstitutional, and inoperative to maintain jurisdiction in this suit, because it fails to confer that jurisdiction on the Circuit Court of the District of Connecticut, or on any other court.

The power to ordain and establish courts inferior to the Supreme Court is vested in Congress. Setting aside the objection to special legislation for a particular case, we may admit the power of Congress to confer additional jurisdiction on any one or on all the inferior courts it has established, in such manner as to include the present suit. To do so, however, involves directly the increase of territorial jurisdiction of all or of some one of such courts; for neither all nor any of them had, with-

out the aid of the act, power to issue the process for which it provides.

Congress then might have conferred the required additional territorial jurisdiction on all or on any one of said courts. It has in fact done neither.

The action of the Attorney-General was required not to determine in which of the circuit courts he should bring his bill, but which should have jurisdiction of it when brought.

This constitutes a case of delegated legislative power which Congress was not competent to grant, or the Attorney-General to exercise.

It is by his will that this act becomes operative, if it operates at all, to confer jurisdiction on the Circuit Court for the District of Connecticut. Congress described and defined the jurisdiction, and declared that some one circuit court of the United States should possess it, but omitted to designate that one court. The power to ordain, establish, or determine the jurisdiction of the inferior courts is one which it is not left to an executive officer to exercise in whole or in part.

5. The act is void and inoperative as to those defendants who are made parties to the bill as executors or administrators. It is not competent for Congress to subject them to the jurisdiction of the court in this suit, because an enactment to that effect is at variance with their established common-law right to be exempt from suit or liability except in that State from which their powers are derived. Their authority to appear and defend, and their liability to be compelled so to do, are limited to such State. The limit of their liability is the subject of State legislation only, which Congress can neither increase nor diminish. *Vaughan* v. *Northup*, 15 Pet. 1; *Dixon's Executors* v. *Ramsay*, 3 Cranch, 319; *Armstrong* v. *Lear*, 12 Wheat. 169; *Low* v. *Bartlett*, 8 Allen (Mass.), 259.

II. As to the case made by the bill.

The entire object to be accomplished by the act is to procure restoration or pecuniary compensation for past wrongs or frauds suffered by the company during its early history, which, it is alleged, were committed by a portion of its directors and by others, members of as well as strangers to it.

There is thus raised the question, Does the government

stand in the attitude or fill such relations to the company as would enable it, upon legal principles, without the act, to maintain such a suit?

A scrutiny of the decided cases and an examination of the principles on which they rest warrant the assertion of the following propositions: —

1. Such wrongs are to be redressed by the action of the corporation itself, or, on its neglect or refusal, by any one or more of its shareholders.

2. The only exceptions to this rule are either when such corporation holds its property to charitable uses, or when, by legislation, its property is impressed with a public trust.

In the case of charitable uses, the government, as *parens patriæ*, has the prerogative right and duty to redress such wrongs, because, from the contingent character of the possible beneficiary, there is no *cestui que trust* capable in law of redressing the same; and by statute the other class of corporations hold their property on a declared, expressed public trust, for the violation of which it is the prerogative right of the State to recover. *Attorney-General of Ireland* v. *City of Dublin*, 1 Bli. N. S. 306, 347.

The only other remaining class of corporations whose past wrongs or injuries can by the law of England be now the subject of suit by the State consists of municipal or other public corporations. It is settled that the right of the State thus to interpose had no existence until the same was created by the statute of William IV. (1835).

The prior condition of the law in England is displayed by counsel, and conceded by the court, in *Attorney-General* v. *Corporation of Liverpool*, 1 Myl. & Cr. 201. The doctrine is thus stated by Lord Campbell in *Parr* v. *Attorney-General*, 8 Cl. & Fin. 431: "Before the Municipal Corporations Act passed, corporate property was not subject to any trust: the corporations might do with it what they pleased, and, generally speaking, no relief could be obtained at law or in equity for any misapplication of it." See also *Attorney-General* v. *Aspinall*, 2 Myl. & Cr. 613; *Attorney-General* v. *Poole*, 4 id. 17; *Attorney-General* v. *Wilson*, Cr. & Ph. 1.

The question of the right of a State, by suit in its name, to

redress and restore pecuniary losses of political corporations arising from the frauds of their officers was thoroughly discussed, and, it is believed, all the authorities now cited by the government collected by eminent counsel in *People* v. *Ingersoll*, 58 N. Y. 1. And it was determined that the State could not maintain the action, but that redress must be sought by the corporation.

If it be held that the doctrine of the English courts, that, prior to the statute of William IV., property of political or municipal corporations is not so held in trust as to warrant the interference of the State for its recovery, has no application under our institutions; that not only are such corporations to be deemed public corporations, but that all frauds or wrongs by which their property is diminished or lost are to be redressed and restoration obtained, not by the corporation but by the State (for it would seem the right cannot exist in both), the inquiry then arises, Can this railroad company be held to belong to the same class as municipal or political corporations?

If its character had not been discussed and determined by this court to be one where the property is "neither in whole nor in part the property of the government. The ownership is in complainant, a private corporation, though existing for the performance of public duties" (*Railroad Company* v. *Peniston*, 18 Wall. 5), this point might call for a more extended discussion.

That the company exists for a public purpose, and could only be created on that ground, by no means constitutes it a public corporation. To use the language of Mr. Chief Justice Marshall, "Corporations are only public when the whole interest and trust franchises are the exclusive property and domain of the government itself." See *National Bank* v. *Commonwealth*, 9 Wall. 353.

Assuming that the company does not belong to the class of public or charitable corporations, holding all its property in trust, it is submitted that the perusal of the cases relied on by the government to maintain its bill will show with distinctness, —

First, That although the power of the government has in

England been recently extended to the restraint by information in equity of excesses or abuses of corporate franchises (see *Attorney-General* v. *Great Northern Railway Co.*, 1 Drew & Sm. 154), — a doctrine which is in controversy in this country (see cases cited at the end of sect. 927, 2 Story, Eq.), — yet no case has been or can be cited where, in any proceeding in equity by the State alone against a corporation, except in the cases of public charity or public trust, any attempt has ever been made to recover to its own use or that of the corporation compensation or restoration for losses suffered by maladministration.

Second, That not only is there an absence of any such case or cases, but the authorities show that the only method known to the law by which such restoration or compensation can be attained is for the government to permit the corporation or party injured and seeking redress or compensation to join with the information of the Attorney-General, filed in behalf of the government, seeking to enjoin and restrain an existing abuse, a bill in behalf of the injured corporation or party seeking compensation for such loss. *Attorney-General* v. *Wilson* (Cr. & Ph. 1) is an illustration of this rule, and contains an exposition of the doctrine. See also *Attorney-General* v. *Johnson*, 2 Wils. Ch. 87; *Attorney-General* v. *Forbes*, 2 Myl. & Cr. 123; *Soltan* v. *De Helds*, 2 Sim. N. S. 151; *Attorney-General* v. *Sheffield*, 3 De G., M. & G. 304.

If this assumed right of action depends upon the inaction of the corporation or the complicity of its present managers, seemingly such right exists only in favor of stockholders or of some party who fills substantially that relation.

If it is asserted to result from trust, or from the relation of the government as mortgagee or as creditor, then it in no manner rests on the inaction or refusal of the corporation or its officers to pursue its remedies; but the direct right exists independently of such inaction or refusal, so that all the allegations of the bill, in that regard, may be stricken out as valueless.

If it is placed on the ground of trust, then, since it seeks to follow trust property into the hands of third parties, by reason that their holding and possession are derived from fraud, to

which the managers of the corporation were parties, the asserted trust must be shown to be one in which the title to the whole property of the corporation is held by it in trust for the government, of which trust, aside from any alleged actual notice, the parties have by the public charter notice.

There can be no such trust derived from this charter.

Perhaps it may be conceded that, as the result of the agreement contained in the charter, the road of the company, upon its completion, and all its appurtenances, are, as between the parties, held in what may perhaps be called a *quasi* trust to carry out and give effect to all its declared duties to the government in relation to the construction and use of the road, and that the government might on neglect or refusal, by proceeding in equity, compel the execution of that trust, and that its redress for the violation of the trust is not limited to the forfeiture set forth in the charter. *Knox* v. *Guy*, Law Rep. 5 H. L. 667.

But neither the act nor the bill is framed to enforce the performance of such trusts. The road has been completed to the acceptance of the government, and the company has heretofore, at all times, fulfilled each and all of its duties.

To sustain this act and bill, there must be shown, as resulting from the charter, a further agreement, under which not only is the property of the company held in trust to secure the completion and use of the road by the government, but that although the company has completed the work and is discharging all its duties to the government, yet, lest in some future contingency the performance of those duties may be imperilled, all its assets are to be for ever held in trust, so that at all times whensoever by the misapplication or the fraudulent abstractions of its property by its managers (or strangers with notice of the trust), the same shall be diminished, the State may interfere, not merely to restrain, but by suit to enforce restoration from the wrong-doers, be they managers or third parties.

The seemingly conclusive argument against the existence of any such trust is to be found in the fact that the endowments are, by the same act creating the company, bestowed upon the same terms and like conditions, in all respects, upon several State corporations who can hardly, by the acceptance of the

endowments, be deemed to have subjected their entire property to a trust of this character.

It has been suggested by the counsel for the government that although it shall be held that the causes of action are limited by the act on which the bill rests, yet, within that act, the United States may maintain this bill: 1, as mortgagee; 2, as creditor; 3, as being authorized, under sect. 18 of the act of 1862, whensoever the income of the road shall exceed ten per cent, to reduce its tolls; 4, as being entitled, under the sixth section of the same act, to five per cent of net income.

The results aimed at by the act are the restoration of money or property of which the company has in times past been despoiled, and to this it is in terms confined.

It nowhere contemplates a suit for an account of the actual cost of the road, or what would have been such actual cost if its assets had not been abstracted or diminished by the alleged wrongs set forth in the act, so that it may be determined whether its power of reducing tolls may or not now, under the eighteenth section, be exercised. Nor does the act authorize a suit to determine whether the net earnings have not been effected or reduced, and the five per cent diminished, by the frauds or abstractions for which it directs suit to be brought. It discloses no controversy between the company and the government as to the cost or as to the five per cent. The wrongs set forth in the act, for which suit is authorized, have no connection with either of these subjects.

As to the rights of the government as mortgagee or as creditor, it is to be noted that the assets or property alleged to have been wasted or abstracted are not embraced by the mortgage. That mortgage does not comprehend the shares of the company, its bonds, or its choses in action, which are to be reclaimed or restored under the act.

But if it were true that the act was framed to vindicate and protect the rights of the government as a mortgagee whose debt has not matured, it will be impossible, we think, to find authority to recover back from the mortgagor or a third party, by a bill or information in equity, the pecuniary value of past waste. It would be alike impossible to recover as against third parties who profited by the waste.

The rights of the government as a creditor (and a creditor no part of whose debt has matured) even to restrain waste by its debtor of his general assets would hardly seem to require discussion.

MR. JUSTICE MILLER delivered the opinion of the court.

The Union Pacific Railroad Company brought the suit provided for in the second section of the act of March 3, 1873, 17 Stat. 508. The case was argued before us on appeal from the judgment of the Court of Claims. All the questions which concern the obligations of the company to pay money to the government, either by way of freight or government transportation, or for the five per cent on the net income of the road, were raised in that suit.

The Attorney-General, in pursuance of the directions of the fourth section of the act, filed this bill in equity. Many of the defendants demurred to the bill generally, and at the head of this class is the railroad company.

The Circuit Court sustained this demurrer and dismissed the bill, and the case is before us on appeal from that decree.

No suggestion is made either here or in the court below of any defect in the bill which can be remedied by amendment. The bill is very elaborate, very ably drawn, and no doubt presents in a very intelligible manner every thing which the facts known or suspected justified the pleader in placing in any bill which can be framed under the special statute authorizing the suit.

The question for decision is, therefore, squarely presented to us, as it was to the Circuit Court, whether, by the aid of that statute, and within the limits of the power it intended to confer, this bill can be sustained under the general principles of equity jurisprudence.

We say by the aid of that statute, because it is conceded on all sides that without it the bill cannot stand. The service of compulsory process on a party residing without the limits of the district of Connecticut who is not found within them, is expressly forbidden by the general statute defining the jurisdiction of the circuit courts. Parties and subjects of complaint having no proper connection with each other are grouped

together in this bill, and they, by the accepted canons of equity pleading, render it multifarious. This, and other matters of like character, which are proper causes of demurrer, are fatal to it, unless the difficulty be cured by the statute.

When we recur to its provisions, which are said to authorize these and other departures from the general rules of equity procedure, counsel for the appellees insist that it is unconstitutional, not only in the particulars just alluded to, but that it is absolutely void as affecting the substantial rights of defendants in regard to matters beyond the power of Congress.

If this be true, we need inquire no further into the frame of the bill, and we therefore proceed, on the threshold, to consider the objections to the validity of the statute.

The Constitution declares (art. 3, sect. 2) that the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; and to controversies to which the United States shall be a party.

The matters in regard to which the statute authorizes a suit to be brought are very largely those arising under the act which chartered the Union Pacific Railroad Company, conferred on it certain rights and benefits, and imposed on it certain obligations. It is in reference to these rights and obligations that the suit is to be brought. It is also to be brought by the United States, which is, therefore, necessarily the party complainant. Whether, therefore, this suit is authorized by the statute or not, it is very clear that the general subject on which Congress legislated is within the judicial power as defined by the Constitution.

The same article declares, in sect. 1, that this "power shall be vested in one supreme court and in such inferior courts as the Congress may, from time to time, ordain."

The discretion, therefore, of Congress as to the number, the character, the territorial limits of the courts among which it shall distribute this judicial power, is unrestricted except as to the Supreme Court. On that court the same article of the Constitution confers a very limited original jurisdiction, — namely, "in all cases affecting ambassadors, other public ministers, and consuls, and cases in which a State shall be a party," — and an

appellate jurisdiction in all the other cases to which this judicial power extends, with such exceptions and under such regulations as the Congress shall make.

There is in this same section a limitation as to the place of trial of all crimes, which it declares shall (except in cases of impeachment) be held in the State where they shall have been committed, if committed within any State.

Article 6 of the amendments also provides that in all criminal prosecutions "the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." These provisions, which relate solely to the place of the trial for criminal offences, do not affect the general proposition. We say, therefore, that, with the exception of the Supreme Court, the authority of Congress, in creating courts and conferring on them all or much or little of the judicial power of the United States, is unlimited by the Constitution.

Congress has, under this authority, created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Constitution. It has also regulated the appellate jurisdiction of the Supreme Court.

The jurisdiction of the Supreme Court and the Court of Claims is not confined by geographical boundaries. Each of them, having by the law of its organization jurisdiction of the subject-matter of a suit, and of the parties thereto, can, sitting at Washington, exercise its power by appropriate process, served anywhere within the limits of the territory over which the Federal government exercises dominion.

It would have been competent for Congress to organize a judicial system analogous to that of England and of some of the States of the Union, and confer all original jurisdiction on a court or courts which should possess the judicial power with which that body thought proper, within the Constitution, to invest them, with authority to exercise that jurisdiction throughout the limits of the Federal government. This has been done in reference to the Court of Claims. It has now jurisdiction only of cases in which the United States is defendant. It is just as

clearly within the power of Congress to give it exclusive jurisdiction of all actions in which the United States is plaintiff. Such an extension of its jurisdiction would include all that the statute under consideration has granted to the Circuit Court.

It is true that Congress has declared that no person shall be sued in a circuit court of the United States who does not reside within the district for which the court was established, or who is not found there. But a citizen residing in Oregon may be sued in Maine, if found there, so that process can be served on him. There is, therefore, nothing in the Constitution which forbids Congress to enact that, as to a class of cases or a case of special character, a circuit court — any circuit court — in which the suit may be brought, shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision.

Whether parties shall be compelled to answer in a court of the United States wherever they may be served, or shall only be bound to appear when found within the district where the suit has been brought, is merely a matter of legislative discretion, which ought to be governed by considerations of convenience, expense, &c., but which, when exercised by Congress, is controlling on the courts.

So, also, the doctrine of multifariousness; whether relating to improperly combining persons or grievances in the bill, it is simply a rule of pleading adopted by courts of equity. It has been found convenient in the administration of justice, and promotive of that end, that parties who have no proper connection with each other shall not be compelled to litigate together in the same suit, and that matters wholly distinct from and having no relation to each other, and requiring defences equally unconnected, shall not be alleged and determined in one suit. The rule itself, however, is a very accommodating one, and by no means inflexible. Such as it is, however, it may be modified, limited, and controlled by the same power which creates the court and confers its jurisdiction. The Constitution imposes no restraint in this respect upon the power of Congress. Sect. 921 of the Revised Statutes, which has been the law for fifty years, declares that when causes of like nature or relating to the same question are pending, the court may consoli

date them, or make such other orders as are necessary to avoid costs and delay. It is every-day practice, under this rule, to do what the statute authorizes to be done in the case before us.

But it is argued that the statute confers a special jurisdiction to try a single case, and is intended to grant the complainant new and substantial rights, at the expense and by a corresponding invasion of those of the defendants.

It does not create a new or special tribunal. Any circuit court of the United States where the bill might be filed was, by the act, invested with the jurisdiction to try the case. Nor was new power conferred on the court beyond those which we have regarded as affecting the mode of procedure. It seems to us that any circuit court, sitting as a court of equity, which could by its process have lawfully obtained jurisdiction of the parties, and considered in one suit all the matters mentioned in the statute, could have done this before the act as well as afterwards.

But if this be otherwise, we are aware of no constitutional objection to the power of the legislative body to confer on an existing court a special jurisdiction to try a specific matter which in its nature is of judicial cognizance.

The principal defendant in this suit, the one around which all the contest is ranged, is a corporation created by an act which reserved the right of Congress to repeal or modify the charter. To this corporation Congress made a loan of $27,000,000, and a donation of lands of a value probably equal to the loan.

The statute-books of the States are full of acts directing the law officers to proceed against corporations, such as banks, insurance companies, and others, in order to have a decree declaring their charters forfeited. Special statutes are also common, ordering suits against such corporations when they have become insolvent, to wind up their business affairs, and to distribute their assets, and prescribing with minuteness the course of procedure which shall be followed and the court in which the suit shall be brought.

This court said, in the case of *The Bank of Columbia* v. *Okely* (4 Wheat. 235), in speaking of a summary proceeding given by the charter of that bank for the collection of its debts: "It is the remedy, and not the right, and as such we have no doubt

of its being subject to the will of Congress. The forms of ad ministering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is unalienable, so as to bind subsequent legislatures." And in *Young* v. *The Bank of Alexandria* (4 Cranch, 397), Mr. Chief Justice Marshall says: "There is a difference between those rights on which the validity of the transactions of the corporation depends, which must adhere to those transactions everywhere, and those peculiar remedies which may be bestowed on it. The first are of general obligation; the last, from their nature, can only be exercised in those courts which the power making the grant can regulate." See also *The Commonwealth* v. *The Delaware & Hudson Canal Co. et al.*, 43 Pa. St. 227; *State of Maryland* v. *Northern Central Railroad Co.*, 18 Md. 193; *Colby* v. *Dennis*, 36 Me. 1; *Gowan* v. *Penobscot Railroad Co.*, 44 id. 140.

Statutes of this character, if not so common as to be called ordinary legislation, are yet frequent enough to justify us in saying that they are well-recognized acts of legislative power uniformly sustained by the courts.

It may be said, and probably with truth, that such statutes, when they have been held to be valid by the courts, do not infringe the substantial rights of property or of contract of the parties affected, but are intended to supply defects of power in the courts, or to give them improved methods of procedure in dealing with existing rights.

This leads to an inquiry indispensable to a sound decision of the case before us; namely, does this statute, by its true construction, do any thing more than this?

We might rest this branch of the case upon the concession of counsel for appellants, made both in their brief and in the oral argument, but we proceed to examine the proposition for ourselves.

The first suggestion of the legal mind on this inquiry is, that it will not be presumed, unless the language of the statute imperatively requires it, that Congress, by a retrospective law, intended to create new rights in one party to the suit at the expense, or by an invasion of the rights, of other parties; or,

where no right of action founded on past transactions existed, that Congress intended to create it.

The United States was to be sole complainant in a suit in equity, and though there may be other defendants, the Union Pacific Railroad Company is the only one named in the act. The relief to be granted is the collection and payment of moneys and the restoration of property, or its value, "either to said railroad corporation or to the United States, whichever shall in equity be entitled thereto." The decree, therefore, can only be made on the ground of some relief to which the United States or the company is entitled by the general principles of equity jurisprudence. It is no objection to granting such relief that the company is a defendant, for by the flexibility of chancery practice a person whose interests in the subject of litigation are on the same side with the complainant may be made a defendant. The corporation could also in such a suit file a cross-bill against the complainant, and, by virtue of this statute, against any co-defendant of whom it could rightfully claim the relief which the statute authorizes.

But whatever be the relief asked, it could only, by the express terms of the act, be granted to that party who was in equity thereunto entitled. It is very plain that there was here no new right established. No new cause of equitable relief. No new rule for determining what were the rights of the parties. That was to be decided by the principles of equity; not new principles of equity, but the existing principles of equitable jurisprudence.

But the statute very specifically defines the matters which may be embraced in this suit as foundations for relief, and classifies them under a very few heads, by declaring who besides the corporation may be sued. They are persons who have received, —

1. Capital stock of the company without paying for it in money;

2. Other property of the company unlawfully and contrary to equity;

3. As profits or proceeds of contracts for construction, money or other property which ought in equity to belong to the corporation; or,

4. Persons who have wrongfully received from the United States bonds, moneys, or lands which ought in equity to be accounted for, or paid to it or to the company.

There is in this description of the class of persons who may be sued an implied condition that they are already subject to be sued for causes which render them equitably liable. The relief to be granted is also such as to equity belongs.

We are of opinion, therefore, that the act in question was intended not to change the substantial rights of the parties to the suit which it authorized, but to provide a specific method of procedure, which, by removing restrictions on the jurisdiction, process, and pleading in ordinary cases, would give a larger scope for the action of the court, and a more economical and efficient remedy than before existed; and that it is a valid and constitutional exercise of legislative power.

If in passing on its constitutional validity we have given the subject much consideration, it will be seen that we have at the same time been compelled to give a construction to its language which will go far to enable us to decide whether it authorized the bill that was filed; for we are of opinion that nothing other than what is found in the act, by express language or by fair implication, can be introduced into this suit as a foundation for the action of the court.

The Attorney-General is peremptorily ordered to bring the proceeding. The filing of the bill and its subject-matter are both removed from the domain of discretion. For the purposes of this suit, the court wherein it is brought is vested with powers and aided by modes of procedure which it can apply to no other. Parties are subjected to a jurisdiction by process to which the same court cannot subject them in any other suit, and they are required to litigate their rights in a suit common to them and others with whom they could not be joined under the rules governing such matter in any other case.

We are bound, therefore, to presume that Congress did not intend that this special remedy should include any thing beyond the matters which we have seen were so carefully and so specifically mentioned as grounds of relief.

Other provisions of the act show that Congress had, or believed that it had, other grievances against this company for

which other remedies are furnished. Any director or officer who violates certain provisions is to be punished criminally. By *mandamus* in the proper court, but not in this suit, the company is to be compelled to operate its road as required by law. The second section directs the Secretary of the Treasury to withhold payment for transportation for the United States until what is due for interest paid shall be satisfied, and the matter, if disputed, is to be settled by suit brought by the company in the Court of Claims.

This consideration makes it clear that any bill brought by the Attorney-General under the fourth section of the act of 1873 must be limited by the provisions of that act, both as to the grievances on which it counts and the relief which it seeks.

With these views of the statute under which this bill is brought, and by which its sufficiency on demurrer must be tested, we approach the examination of the bill itself.

It consists of forty-seven pages of printed matter, divided into forty-eight separate paragraphs, each of which undertakes to set forth a distinct ground of relief, or points out the relief which is sought.

It will, therefore, be impossible to give in this opinion the results of the separate examination of each of these paragraphs; nor is this at all necessary. A consideration of the principal grounds of relief, grouped as they can easily be under a few heads, will indicate the views which we believe to be sufficient to decide the whole.

We will consider together the allegations of the bill against the Wyoming Coal Company, the Credit Mobilier Company, the Pullman Palace Car Company, and the three construction contracts of H. M. Hoxie, Oakes Ames, and James W. Davis. These are by far the most important as regards the sum involved as well as the principles which must decide the case.

The substance of the charge is, that the board of directors of the railroad company made contracts for building the road, and for running the Pullman cars on it, and for mining its coal lands and purchasing the coal so mined, which were a fraud upon the company; that these contracts allowed exorbitant prices for work done and material furnished; that otherwise

they were very advantageous to the other contracting parties and injurious to the company; that in all of them the directors, or a controlling majority of them, were interested adversely to the company; that in fact they were, in the name of the company, making contracts with themselves as the other party. In short, it may be taken for granted that if these allegations are true, as they must be held to be on demurrer, frauds more unmitigated than those set forth in this bill were never perpetrated on a helpless corporation by its managing directors.

That these frauds are such as a court of equity would relieve against in a proper case, may be seen in the opinion of the Circuit Court for the Nebraska district, in a suit growing out of the Wyoming Coal Company's contract. *Wardell* v. *The Union Pacific Railroad Co.*, 4 Dill. 330.

The first inquiry arising on these facts is, What relief can be given, and who is entitled to it?

The obvious reply to the first branch of the question is, that the parties who made this contract and received the pecuniary benefit of it can at law be made responsible in damages, or held in equity to compensation for the loss suffered. There would be no difficulty in adjudging in a proper suit that such contracts were void, and then ordering an accounting, on the basis of a fair compensation for what had been done in the way of construction, building, opening mines, furnishing coal, &c., and what had been received for such work and materials. The difficulty is, to whom shall this money be paid when recovered, and can it be recovered in this suit? If the railroad company, falling into purer hands, had brought such a suit, the bill might be sustained.

But the company is not the complainant here. It seeks no relief for these wrongs. It may have been the design of the law to give the corporation an opportunity by a cross-bill to obtain relief against the other defendants, who are charged with these frauds. Such a bill, if not strictly within the rule of equity procedure, which only allows a defendant to file a cross-bill against a complainant, might be sustained under the provisions of this statute. But the company files no such bill. It desires no such relief. On the contrary, it resists by demurrer any further proceeding in the matter. Can it be compelled in

this mode to prosecute such a suit? So long as it exists in the possession and unrestrained exercise of all its corporate powers, its board of directors, unless under judicial prohibition or compulsion, is vested with the sole authority to decide whether it will assert its right of action for a supposed injury, or will condone it.

The circumstances of the alleged fraud, the probability of success in the suit, the extent of the injury, the amount which may be recovered, the expense of the proceeding, and the danger of injury to the company itself, are all matters which address themselves to them as grounds for the exercise of the discretion of the directors. They have decided to have nothing to do with it. How, then, can a decree be rendered in their favor, or relief be given them which is not asked? With what hope of advantage can the court enter upon the inquiry touching the frauds alleged, and the amount of the injury sustained, when the party aggrieved refuses to proceed?

On the other hand, if the court does proceed, shall the decrees, if rendered against the defendants, be in favor of the company? If so, what good results would follow? Since the company resists any decree in its favor now, it would probably enter satisfaction or releases of the decrees as fast as they are rendered. If it did not do this, how would the moneys, if collected and paid into its treasury, be applied? It is alleged to be insolvent and in debt, but except the claim of the government, which will be presently considered, there is no allegation showing to what use the court can decree the application of these moneys. They must, therefore, go into the treasury of the company, to become subject to the control of its directors, who are now resisting this action. Not only this, but it is obvious that the amount recovered would come mainly out of the same men who now as directors or as stockholders would control the fund, and would probably order its redistribution to the parties who paid it, or give receipts or releases in advance.

The truth is, that the persons who were actually defrauded by these transactions, if any such there be, were the few *bona fide* stockholders who took no part in them, and had no interest in the fraudulent contracts. But it is not alleged that

there are such. If there be, they are not made parties to this bill, nor does it provide any relief for them. Yet a moment's consideration will show that they alone (to say nothing of the complainant for the present) suffered any legal injury, or are entitled to any relief. As to the directors and stockholders who took part in these fraudulent contracts, they are *participes criminis*, and can have no relief. This class probably included nine-tenths in value of the shareholders. It is against all the principles of jurisprudence, whether at law or in equity, to permit them to litigate this fraud among themselves. If the innocent stockholders are not parties here, we have already seen that, with the power of the directors over the money recovered, they would get no relief by the suit.

The statute, however, did not permit them to be made parties. Their interest is not the same as that of the company. The statute provides only for the collection and payments of money, or the restoration of property, or its value, to the railroad company, or to the United States, as either of them may be in equity held entitled thereto. This does not embrace what a defrauded stockholder may be entitled to in his individual right.

We are of opinion, therefore, that no decree can be rendered in favor of the railroad company on account of these transactions, or for the value of the stock not paid for by those who received it. Although issuing it without payment may have been in violation of law, and an implied contract may exist on which the company could compel payment, the United States cannot in this suit recover it, and the company refuses to assert its right thereto.

The same principle applies to the arrangements made by the railroad company with the Atlantic and Pacific Telegraph Company, and with the Omaha Bridge Company, which are here assailed. These are existing contracts under which the business of the principal corporation with the others is conducted, and with which it is satisfied. It asks no rescission, and is content to comply with them. It is not within the power of the court to annul them, or to make new ones for the parties.

No decree can therefore be rendered on this bill in favor of

the Union Pacific Railroad Company, because it is not the complainant, but a defendant, and, asking no affirmative relief or any other, it resists being brought into this suit, and refuses to plead in it any further than compelled by the court.

If there is any relief to which the United States is entitled against the company, the latter, being a defendant, must remain and answer to the claim. But it is conformable to the principles neither of the common law nor of equity to compel it to prosecute a suit as complainant which it disapproves, or to establish a claim which it denies, or take a decree where it asserts nothing to be due.

We must now inquire whether the bill makes a case in which the United States, the complainant, is entitled under the terms of the statute to relief.

The United States is not, and never has been, a stockholder in this company. It is a creditor.

The government sustains two distinct relations to the railroad company, and, in considering her rights under this statute, it is important to keep them separate. The company is organized under, and owes its corporate existence to, an act of Congress. The government has all the rights which belong to any other government as a sovereign and legislative power over this creation of that power. That this power should not be too much crippled by the doctrine that a charter is a contract, the eighteenth section declares that Congress may at any time, having due regard for the rights of the companies named therein, add to, alter, amend, or repeal the act. The power of Congress, therefore, in its sovereign and legislative capacity over this corporation is very great.

The government, however, holds another very important relation, namely, that of contract. It has loaned to the company $27,000,000, and granted to it on certain terms many million acres of land. The government is paying all the time the semi-annual interest on its own bonds, loaned to the company. The company is bound by contract to pay them, principal and interest, at their maturity. The government by the contract has a lien on the road and its appurtenances to secure this payment. The company is also bound by the contract to perform for the government all the transportation and tele-

graphing that may be required of it, and to keep its road and line always in order and readiness to render these services. It may have other contract obligations to the government not here mentioned, but these are all that are important to our inquiry. The government has delivered its bonds to the company. The company has built the road, owns it, and operates it. Does the bill allege any thing which, growing out of this contract, entitles the United States to relief?

One of its allegations is that there is due to the United States and unpaid, on account of interest on the bonds, the sum of $6,198,700, and that the balance of interest for which the company is liable is rapidly accumulating. It was filed in May, 1873, and this court, at its October Term, 1875, decided, in *United States* v. *Union Pacific Railroad Co.* (91 U. S. 72), that the company was not bound to pay this interest until the bonds mature, except so far as the act made in that regard two special provisions. One was that half the compensation for transportation performed for the United States should, as provided by the subsequent amended charter of 1864, be withheld by the government for that purpose; the other was that after the completion of the road five per cent of its net earnings were to be applied annually to extinguish the debt to the United States.

The second section of the act of 1873, as we have seen, provides for the first of these cases, and as to the other, the government has brought suits, which are now ripe for decision in this court.

There is, therefore, no ground for relief on account of money due by the company to the United States.

It is said that the latter, as a creditor whose lien is endangered by the extravagance of the company, and the misappropriation of its means, has the right to come into equity for preventive relief to secure the collection of the sums of which the company has been defrauded.

The government made its contract and bargained for its security. It had a first lien on the road by the original act of incorporation, which would have made its loan safe in any event. But in its anxiety to secure the rapid prosecution of the work, — an end more important to it than to any one else,

and still more important to the people whom it represented, — it postponed this lien to another mortgage, that the means might be raised to complete the road. It has the second lien, however, and the right to appropriate one-half of the price it annually pays for the use of the road, — a very large sum, — and five per cent of the net earnings of the road, which may become much larger, to the extinction of this debt. It is not wholly unreasonable to suggest that the amount which the company may be compelled to pay annually, under these two provisions, will be sufficient as a sinking fund to pay the entire debt, principal and interest, before it falls due.

It is difficult to see any right which as a creditor the government has to interfere between the corporation and those with whom it deals. It has been careful to protect its interests in making the contract, and it has the right which that contract gives. What more can it ask? It is true that there is an allegation of insolvency. But in what that insolvency consists is not clearly shown. It has a floating debt. What railroad company has not? It is said it does not pay the interest on its debt to the United States. We have shown that it owes the United States no money that is due. There is no allegation that it does not pay the interest on all its own funded debt. The allegation as it is would be wholly insufficient to place the corporation in bankruptcy, even if that was not forbidden by the act under which this bill is drawn. The facts stated are utterly insufficient to support a creditor's bill by the United States. That requires a judgment at law, an execution issued, and a return of *nulla bona*. Here there is no judgment, no money due, and no sufficient allegation of insolvency.

We are unable, therefore, to see any relief to which under this bill the United States, on account of its contract relations with the company, would be entitled in a court of equity.

If we look at the statute this is still clearer. The moneys due for unpaid stock, or for property of the company unlawfully received, or as profits in fraudulent contracts for construction, are all described in the act as belonging to the corporation, and to be restored to it. Those who may have wrongfully and unlawfully received from the United States bonds, moneys, or lands which ought in equity to be accounted for and paid to it or to

the company, may be compelled to pay the moneys or restore the property to the party, which shall in equity be entitled thereto.

But, in this connection, no one but the company has received property, lands, or moneys from the United States. There is no allegation that the moneys were not used to build the road. If there was, there is nothing now due, and the company is performing all its obligations to the government under the contract.

The bill establishes no right in the government, under this or any other clause of the act, to recover in its own right any property or money from the company.

In its sovereign or legislative relation to the company, the United States has powers the extent of which it is unnecessary to define in this case. The two sections of the act, under one of which this suit was instituted, are instances of the exercise of these powers, and they affect the interest of the company in important particulars. Congress might also have directed the Attorney-General, either as part of this proceeding or as an independent one, to ask the court to declare the franchises of the company forfeited. It might have ordered a bill to inquire if the company was insolvent, and if so, to wind up its affairs and distribute its assets. In short, there are many modes in which the legislature could have called into operation all the judicial powers known to the law. But it has not done so, and that is the constantly recurring answer to this bill. It provided in the statute for a mode of securing a full inquiry into the affairs of the company, by enacting that the Secretary of the Treasury should have free access to all its books and correspondence, — a mode of obtaining information far more effective than a bill of discovery. The statute, therefore, did not authorize a bill of discovery. Not wanting the company declared bankrupt and closed out by a decree of the court, Congress enacted that it should not be subject to the bankrupt law, as other corporations were, but should continue to exercise its franchises and perform its duties, and that it might be compelled to do this by a writ of *mandamus* from the proper court. It limited the relief to be granted under this act, therefore, both by the terms in which it was granted and by other provisions, to the recovery of a moneyed decree, or a restoration

of specific property to which the United States or the company was by law entitled.

It is useless, therefore, to inquire what might have been done by some other legislation, or what, independently of legislation, are the rights of the government; for we can only act on such as are recognized by the act under which the Circuit Court proceeded.

This brings us to the consideration of the last ground of relief which we propose to notice, and which, with the alleged right to a decree in favor of the company against the individuals and corporations who have defrauded it, is most earnestly insisted on here.

The proposition is that the United States, as the grantor of the franchises of the company, the author of its charter, and the donor of lands, rights, and privileges of immense value, and as *parens patriæ*, is a trustee, invested with power to enforce the proper use of the property and franchises granted for the benefit of the public.

The *legislative* power of Congress over this subject has already been considered, and need not be further alluded to. The trust *here* relied on is one which is supposed to grow out of the relations of the corporation to the government, which, without any aid from legislation, are cognizable in the ordinary courts of equity.

It must be confessed that, with every desire to find some clear and well-defined statement of the foundation for relief under this head of jurisdiction, and after a very careful examination of the authorities cited, the nature of this claim of right remains exceedingly vague. Nearly all the cases — we may almost venture to say all of them — fall under two heads: —

1. Where municipal, charitable, religious, or eleemosynary corporations, public in their character, had abused their franchises, perverted the purpose of their organization, or misappropriated their funds, and as they, from the nature of their corporate functions, were more or less under government supervision, the Attorney-General proceeded against them to obtain correction of the abuse; or,

2. Where private corporations, chartered for definite and limited purposes, had exceeded their powers, and were restrained

or enjoined in the same manner from the further violation of the limitation to which their powers were subject.

The doctrine in this respect is well condensed in the opinion in *The People* v. *Ingersoll*, recently decided by the Court of Appeals of New York. 58 N. Y. 1. "If," says the court, "the property of a corporation be illegally interfered with by corporation officers and agents or others, the remedy is by action at the suit of the corporation, and not of the Attorney-General. Decisions are cited from the reports of this country and of this State, entitled to consideration and respect, affirming to some extent the doctrine of the English courts, and applying it to like cases as they have arisen here. But in none has the doctrine been extended beyond the principles of the English cases; and, aside from the jurisdiction of courts of equity over trusts of property for public uses and over the trustees, either corporate or official, *the courts have only interfered at the instance of the Attorney-General to prevent and prohibit some official wrong by municipal corporations or public officers, and the exercise of usurped or the abuse of actual powers.*" p. 16.

To bring the present case within the rule governing the exercise of the equity powers of the court, it is strongly urged that the company belongs to the class first described.

The duties imposed upon it by the law of its creation, the loan of money and the donation of lands made to it by the United States, its obligation to carry for the government, and the great purpose of Congress in opening a highway for public use and the postal service between the widely separated States of the Union, are relied on as establishing this proposition.

But in answer to this it must be said that, after all, it is but a railroad company, with the ordinary powers of such corporations. Under its contract with the government, the latter has taken good care of itself; and its rights may be judicially enforced without the aid of this trust relation. They may be aided by the general legislative powers of Congress, and by those reserved in the charter, which we have specifically quoted

The statute which conferred the benefits on this company, the loan of money, the grant of lands, and the right of way, did the same for other corporations already in existence under State or territorial charters. Has the United States the right

to assert a trust in the Federal government which would authorize a suit like this by the Attorney-General against the Kansas Pacific Railway Company, the Central Pacific Railroad Company, and other companies in a similar position?

If the United States is a trustee, there must be *cestuis que trust.* There cannot be the one without the other, and the trustee cannot be a trustee for himself alone. A trust does not exist when the legal right and the use are in the same party, and there are no ulterior trusts.

Who are the *cestuis que trust* for whose benefit this suit is brought? If they be the defrauded stockholders, we have already shown that they are capable of asserting their own rights; that no provision is made for securing them in this suit should it be successful, and that the statute indicates no such purpose.

If the trust concerned relates to the rights of the public in the use of the road, no wrong is alleged capable of redress in this suit, or which requires such a suit for redress.

Railroad Company v. *Peniston* (18 Wall. 5) shows that the company is not a mere creature of the United States, but that while it owes duties to the government, the performance of which may, in a proper case, be enforced, it is still a private corporation, the same as other railroad companies, and, like them, subject to the laws of taxation and the other laws of the States in which the road lies, so far as they do not destroy its usefulness as an instrument for government purposes.

We are not prepared to say that there are no trusts which the United States may not enforce in a court of equity against this company. When such a trust is shown, it will be time enough to recognize it. But we are of opinion that there is none set forth in this bill which, under the statute authorizing the present suit, can be enforced in the Circuit Court.

There are many matters alleged in the bill in this case, and many points ably presented in argument, which have received our careful attention, but of which we can take no special notice in this opinion. We have devoted so much space to the more important matters, that we can only say that, under the view which we take of the scope of the enabling statute, they furnish no ground for relief in this suit.

The liberal manner in which the government has aided this company in money and lands is much urged upon us as a reason why the rights of the United States should be liberally construed. This matter is fully considered in the opinion of the court already cited, in *United States* v. *Union Pacific Railroad Co.* (*supra*), in which it is shown that it was a wise liberality for which the government has received all the advantages for which it bargained, and more than it expected. In the feeble infancy of this child of its creation, when its life and usefulness were very uncertain, the government, fully alive to its importance, did all that it could to strengthen, support, and sustain it. Since it has grown to a vigorous manhood, it may not have displayed the gratitude which so much care called for. If this be so, it is but another instance of the absence of human affections which is said to characterize all corporations. It must, however, be admitted that it has fulfilled the purpose of its creation and realized the hopes which were then cherished, and that the government has found it a useful agent, enabling it to save vast sums of money in the transportation of troops, mails, and supplies, and in the use of the telegraph.

A court of justice is called on to inquire not into the balance of benefits and favors on each side of this controversy, but into the rights of the parties as established by law, as found in their contracts, as recognized by the settled principles of equity, and to decide accordingly. Governed by this rule, and by the intention of the legislature in passing the act under which this suit is brought, we concur with the Circuit Court in holding that no case for relief is made by the bill.

Decree affirmed.

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

I concur in the opinion, so far as it relates to the constitutional validity of the act of Congress which lies at the foundation of the case. In the residue I cannot concur.

NATIONAL BANK *v.* MATTHEWS.

A. executed a promissory note to B., and, to secure the payment thereof, a deed of trust of lands, which was in effect a mortgage with a power of sale thereto annexed. A national bank, on the security of the note and deed, loaned money to B., who thereupon assigned them to the bank. The note not having been paid at its maturity, the trustee was, pursuant to the power, proceeding to sell the lands, when A. filed his bill to enjoin the sale, upon the ground that, by sects. 5136 and 5137 of the Revised Statutes, the deed did not inure as a security for a loan made by the bank at the time of the assignment of the note and deed. *Held*, that the bank is entitled to enforce the collection of the note by a sale of the lands.

ERROR to the Supreme Court of the State of Missouri.

On the 1st of March, 1871, Hugh B. Logan and Elizabeth A. Matthews executed and delivered to Sterling Price & Co. their joint and several promissory note for the sum of $15,000, payable to the order of that firm two years from date, with interest at the rate of ten per cent per annum. The payment of the note was secured by a deed of trust, executed by her, of certain real estate therein described, situate in the State of Missouri.

On the 13th of the same month, the note and deed of trust were assigned to the Union National Bank of St. Louis. Price & Co. failed to pay the loan at maturity. The bank directed the trustee named in the deed of trust to sell. Said Elizabeth thereupon filed this bill in the proper State court to enjoin the sale. The bank in its answer avers that it "accepted the said note and deed of trust as security for the sum of $15,000, then and there advanced and loaned to said Sterling Price & Co. . . . on the security of said note and deed of trust." A perpetual injunction was decreed, upon the ground that the loan by the bank to Price & Co. was made upon real-estate security; that it was forbidden by law; and that the deed of trust was, therefore, void. The decree was made upon the pleadings. No testimony was introduced upon either side The bank removed the case to the Supreme Court of the State, where the decree was affirmed. The bank then sued out this writ of error.

Mr. Philip Phillips for the plaintiff in error.

This case does not fall within the limitations imposed by Rev. Stat., sect. 5137. No mortgage or conveyance of real estate was made *to* the bank. Price & Co. had only a lien which could be enforced in default of payment. This was all that they passed to the bank: *Potter* v. *McDowell* (43 Mo. 93); *Watson* v. *Hawkins* (60 id. 550); and it was a mere incident to the note, securing its payment to the holder thereof in good faith, although he was ignorant, at the time of taking it, of the existence of the lien. Had the mortgage not been delivered nor any thing said about it, the bank, on failure of the maker to pay the note, would have been entitled to the lien: *Green* v. *Hart* (1 Johns. (N. Y.) 590); *Chappell* v. *Allen* (38 Mo. 213); and its right to assert it could not have been successfully resisted on the ground that to permit it to do so would authorize a violation of its charter.

The act, by authorizing loans to be made "on personal security," cannot be held as limiting the transaction to the personal undertaking of the parties to the note; and it would not be violated if the bank should require as collateral a deposit of bonds or of stocks, either of States, municipalities, or incorporated companies. *Shoemaker* v. *National Bank*, 2 Abb. (U. S.) 416; Schouler, Personal Property, pp. 87, 94; *Pittsburg Car Works* v. *Bank*, Thompson's Nat. Bank Cases, 315. In many of these instances the bonds or stocks are secured by real estate. This, however, does not change the character of the collateral, or make it other than personal security. See also *First National Bank of Fort Dodge* v. *Haire*, 36 Iowa, 443, *Merchants' National Bank* v. *Mears*, Thompson's Nat. Bank Cases, 353.

The decision of the learned court below questions neither the right of the bank to recover the contents of the note by suing the parties thereto, nor the validity of the lien created by the mortgage. Here there are a *bona fide* subsisting debt, evidenced by the note, whereof the bank is the lawful holder, and a lien which Price & Co., before their attempted transfer of it, could have made available. It does now inure to their benefit, because they have assigned the note, and it cannot be enforced by the bank, as it was made void in its hands. Is the

lien then vacated? It certainly is, for all practical purposes, if the extraordinary position taken below should be sustained here.

Can the defendant in error, by a strained construction, be permitted to make the objection and cancel a contract which the statute does not declare to be void? There is some contrariety of opinion upon this question, and the court is referred to some of the numerous cases which answer it in the negative. *Smith* v. *Sheely*, 12 Wall. 360; *Gold Mining Company* v. *National Bank*, 96 U. S. 640; *Silver Lake Bank* v. *North*, 4 Johns. (N. Y.) Ch. 370. The decision in the last case is, that if the bank had passed "the exact line of its power, it would rather belong to the government to exact a forfeiture of the charter, than to the court in this collateral way to decide a question of misuser by setting aside a just and *bona fide* contract." The same doctrine is repeated in *Steam Navigation Company* v. *Wood*, (17 Barb. (N. Y.) 380), and supported by the judgments of the courts of Massachusetts, Pennsylvania, and other States. Ang. & A. Corp., sect. 153.

Mr. J. A. Hunter, *Mr. John W. Noble*, and *Mr. John C. Orrick*, for the defendant in error.

The deed of trust is in effect a mortgage with a power of sale thereto annexed. Although a third person is named as trustee, and vested with that power, the grantor has an equity of redemption, which may be judicially foreclosed and sold. The *cestui que trust* has a beneficial interest in the lands. *Kennett* v. *Plummer*, 28 Mo. 142; *Chappell* v. *Allen*, 38 id. 213; *Potter* v. *Stevens*, 40 id. 229. In the absence of any statutory prohibition, the assignments would have vested that interest in the bank, but as the latter is permitted (Rev. Stat., sect. 5137) to "purchase" or "hold" real estate in certain specified cases, — of which this is not one, — and in "no other," the assignments passed no interest in the lands, and conferred no right to subject them to sale to pay the note.

The words "purchase" and "hold," where they occur in that section, are not confined to cases where the absolute title to the fee has been conveyed. The provision allowing the bank to take a mortgage, by way of security for debts *previously contracted*,

would be superfluous, if the general prohibitory words did not forbid it to purchase such an interest in real property as a mortgage transfers. Looking at the mischief which the statute had in view, it is immaterial whether the mortgage is made directly *to* the bank, or is assigned to it. The interest acquired is in each case the same.

The preceding section allows the bank to loan money on personal security. This virtually prohibits loaning it on any other. *Expressio unius est exclusio alterius.*

The decided cases, without a dissent, affirm that all grants of corporate power are to be construed favorably to the public at large and most strongly against the corporation; that it has only the powers expressly given or necessarily implied; that the specification of certain powers prohibits by implication the exercise of other substantive powers, and that the intention of the law-maker is to be gathered from the whole statute. Governed by these fundamental rules, it must be held that the transaction on the part of the bank was *ultra vires*, not allowed by, but in palpable violation of, the statute to which it owes its existence, and consequently void. The injunction was therefore properly awarded. *Fowler* v. *Scully*, 72 Pa. St. 456; *Kansas Valley National Bank* v. *Rowell*, 2 Dill. 371; *Ripley* v. *Harris*, 3 Biss. 190; *Commonwealth Bank* v. *Clark*, 4 Mo. 59; *Griffith* v. *Commonwealth Bank*, id. 255; *Bank of Lawrence* v. *Young*, 37 id. 398; *Downing* v. *Ringer*, 7 id. 585; *White* v. *Franklin Bank*, 22 Pick. (Mass.) 181; *Brown* v. *Farkington*, 3 Wall. 381; *Beasley* v. *Bignold*, 5 Barn. & Ald. 335; *Forster* v. *Taylor*, id. 887; *Cope* v. *Rowlands*, 2 Mee. & W. 149.

MR. JUSTICE SWAYNE, after stating the facts, delivered the opinion of the court.

This case involves a question arising under the national banking law, which has not heretofore been passed upon by this court. We have considered it with the care due to its importance.

Our attention has been called to but a single point which requires consideration, and that is, whether the deed of trust can be enforced for the benefit of the bank.

The statutory provisions which bear upon the subject are as follows: —

"SECT. 5136." Every national banking association is authorized "to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title.

"SECT. 5137. A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: *First*, such as may be necessary for its immediate accommodation in the transaction of its business. *Second*, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. *Third*, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. *Fourth*, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years." Rev. Stat. 1999; 13 Stat. 99.

Here the bank never had any title, legal or equitable, to the real estate in question. It may acquire a title by purchasing at a sale under the deed of trust; but that has not yet occurred, and never may.

Sect. 5137 has, therefore, no direct application to the case It is only material as throwing light upon the point to be considered in the preceding section. Except for that purpose it may be laid out of view.

Sect. 5136 does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed. As the transaction is disclosed in the record, the loan was made upon the note as well as the deed of trust. *Non constat*, that the maker who executed the deed would not have been deemed abundantly sufficient without the further security. The deed, as a mortgage would have been, was an incident to the note and a right

to the benefit of the deed, whether mentioned or delivered or not, when the note was assigned, would have passed with the note to the transferee of the latter.

The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real-estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances, the defence of *ultra vires*, if it can be made, does not address itself favorably to the mind of the Chancellor. We find nothing in the record touching the deed of trust which, in our judgment, brings it within the letter or the meaning of the prohibitions relied upon by the counsel for the defendant in error.

In *The First National Bank of Fort Dodge* v. *Haire and Others* (36 Iowa, 443), the bank refused to discount a note for a firm, but agreed that one of the partners might execute a note to the other, that the payee should indorse it, that the bank should discount it, and that the maker should indemnify the indorser by a bond and mortgage upon sufficient real estate executed for that purpose, with a stipulation that, in default of due payment of the note, the bond and mortgage should inure to the benefit of the bank. The arrangement was carried out. The note was not paid. The maker and indorser failed and became bankrupts. The bank filed a bill to foreclose. The same defence was set up as here. In disposing of this point, the Supreme Court of the State said: "Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors; and unless the title by mortgage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute. The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction. Some of the cases upon quite analogous statutes go much further than this. *Silver Lake Bank* v. *North*, 4 J. C. R. 370."

But it is alleged by the learned counsel for the defendant in error that in the jurisprudence of Missouri a deed of trust is the same thing in effect as a direct mortgage, — with respect to a party entitled to the benefit of the security, — and authorities are cited in support of the proposition. The opinion of the Supreme Court of Missouri assumes that the loan was made upon real-estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined.

In *Harris* v. *Runnels* (12 How. 79), this court said that "the statute must be examined as a whole, to find out whether or not the makers meant that a contract in contravention of it was to be void, so as not to be enforced in a court of justice." In that case, a note given for the purchase-money of slaves, taken into Mississippi contrary to a statute of the State, was held to be valid.

Where a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances, but does not declare the marriage void, the marriage is valid; but the penalty attaches to the officer who did the prohibited act. *Milford* v. *Worcester*, 7 Mass. 48; *Parton* v. *Hervey*, 1 Gray (Mass.), 119; *King* v. *Birmingham*, 8 Barn. & Cress. 29.

Where a bank is limited by its charter to a specified rate of interest, but no penal consequence is denounced for taking more, it has been held that a contract for more is not wholly void. *The Planters' Bank* v. *Sharp et al.*, 12 Miss. 75; *The Grand Gulf Bank* v. *Archer et al.*, 16 id. 151; *Rock River Bank* v. *Sherwood*, 10 Wis. 230.

The charter of a savings institution required that its funds should be "invested in, or loaned on, public stocks or private

mortgages," &c. A loan was made and a note taken, secured by a pledge of worthless bank-stock. The borrower sought to enjoin the collection of the note upon the ground that the transaction was forbidden by the charter, and therefore void. The court held the borrower bound, and upon a counter-claim adjudged that he should pay the amount of the loan with interest. *Mott* v. *The United States Trust Co.*, 19 Barb. (N. Y.) 568.

Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Leazure* v. *Hillegas*, 7 Serg. & R. (Pa.) 313; *Goundie* v. *Northampton Water Co.*, 7 Pa. St. 233; *Runyon* v. *Coster*, 14 Pet. 122; *The Banks* v. *Poitiaux*, 3 Rand. (Va.) 136; *McIndoe* v. *The City of St. Louis*, 10 Mo. 577. See also *Gold Mining Company* v. *National Bank*, 96 U. S. 640.

The authority first cited is elaborate and exhaustive upon the subject. So an alien, forbidden by the local law to acquire real estate, may take and hold title until office found. *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 604.

In *Silver Lake Bank* v. *North* (4 Johns. (N. Y.) Ch. 370), the bank was a Pennsylvania corporation, and had taken a mortgage upon real estate in New York. A bill of foreclosure was filed in the latter State. The answer set up as a defence "that by the act of incorporation the plaintiffs were not authorized to take a mortgage except to secure a debt previously contracted in the course of its dealings; and here the money was lent after the bond and mortgage were executed." The analogy of this defence to the one we are considering is too obvious to need remark. Both present exactly the same question. Chancellor Kent said: "Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the government of Pennsylvania to exact a forfeiture of their charter, than for this court in this collateral way to decide a question of misuser, by setting aside a just and *bona fide* contract." . . . "If the loan and mortgage were concurrent acts, and intended so to be, it was not a case within

the reason and spirit of the restraining clause of the statute, which only meant to prohibit the banking company from vesting their capital in real property, and engaging in land speculations. A mortgage taken to secure a loan advanced *bona fide* as a loan, in the course and according to the usage of banking operations, is not surely within the prohibition."

It is not denied that the loan here in question was within this category. This authority, if recognized as sound, is conclusive. See also *Baird* v. *The Bank of Washington*, 11 Serg. & R. (Pa.) 411.

Sedgwick (Stat. and Const. Constr. 73) says: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains."

What is said in the text is fully sustained by the authorities cited.

We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defence whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress.

That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government.

The decree of the Supreme Court of Missouri will be reversed, and the cause remanded with directions to dismiss the bill; and it is

So ordered.

MR. JUSTICE MILLER dissenting.

I am of opinion that the National Banking Act makes void every mortgage or other conveyance of land as a security for

money loaned by the bank at the time of the transaction to whomsoever the conveyance may be made; that the bank is forbidden to accept such security, and it is void in its hands.

The contract to pay the money, and the collateral conveyance for security, are separable contracts, and so far independent that one may stand and the other fall.

In the present case, the money was loaned on the faith of the deed of trust, and that instrument is void in the hands of the bank, but the note, as evidence of the loan of money, is valid against Mrs. Matthews personally. With this latter contract the State court did not interfere. It enjoined proceedings under the deed of trust against the land, and did no more.

Its judgment in that matter ought, in my opinion, to be affirmed.

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