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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

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ROBERT DESTY, EDITOR.

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UNITED STATES

CIRCUIT AND DISTRICT COURTS

WITH THE

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ERRATA.

On page 181, for "The Mill Bay" read "The Mill Boy."

On page 528, for—

Section 5977 of the Revised Statutes of Missouri is as follows:

"In suits brought upon," etc.,

read—

Section 5976 of the Revised Statutes of Missouri is as follows:

"No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury."

CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

LAWRENCE *v.* NORTON and others.

(*Circuit Court, N. D. Texas.* 1882.)

1. REMOVAL OF CAUSE—QUESTIONS ARISING UNDER UNITED STATES LAWS.
   Where the petition of the plaintiff presents a question which arises under the laws of the United States, the cause is removable under section 2 of the act of March 3, 1875, without regard to the citizenship of the parties.
2. SAME—CONDITION IN MARSHAL'S BOND—SECTION 783, REV. ST.
   Where the condition of a marshal's official bond is in strict conformity with the condition prescribed by section 783 of the Revised Statutes, and the exceptions filed raise the question of what is the proper construction of the condition, and the construction of the language of the section is brought in question, the cause is removable.

Heard on Motion to Remand.

The Revised Statutes of the United States, § 783, require that every marshal, before he enters upon the duties of his office, shall give bond, with two good and sufficient sureties, for the faithful performance of said duties by himself and his deputies.

In pursuance of this statute, A. Banning Norton, one of the defendants, having been nominated and appointed marshal of the United States for the northern district of Texas, executed his official bond, dated May 1, 1879, in the penalty of $20,000, with the other defendants as sureties, conditioned as required by the statute. During Norton's term of office, Lawrence, the plaintiff in this action, brought suit in the district court of Kaufman county, Texas, against

Norton and his sureties, on the official bond of the former. He alleged, in his petition, the appointment of Norton as marshal; the execution by him and his sureties of the official bond sued on, and then averred that Norton, acting by his deputy, Robert Clarke, by virtue of a writ of attachment against the goods and chattels of one Samuel W. Wallace, issued out of the United States circuit court for the northern district of Texas, in a cause pending therein, in which Naumberg, Kraus, Lauer & Co. were plaintiffs, and said Samuel W. Wallace was defendant, had unlawfully levied upon and seized certain goods, the property of plaintiff and in his rightful possession, and had deprived the plaintiff of the possession and use thereof; that by reason of said unlawful acts of Norton, and Clarke, his deputy, the condition of said bond had been broken, and an action had accrued to the plaintiff on said bond against Norton and his securities thereon. He therefore prayed judgment against the defendants for the sum of $10,000. Both the plaintiff and the defendants were citizens of the state of Texas.

The defendants excepted to the petition on the following grounds, among others:

(1) Because the sureties on the marshal's bond were joined as defendants, the petition not showing in what way they were liable, or that they had in any manner aided the marshal, or his deputy, in committing the trespasses set out in the petition. (2) Because the petition averred that said alleged trespasses were committed by Clarke, the lawful deputy of the marshal, and alleged that the defendants were liable for the acts of the deputy marshal in seizing and taking possession of said goods.

After the filing of their exceptions, and within the time prescribed by the statute, the defendants filed a petition for the removal of the cause to the United States circuit court for the northern district of Texas, Kaufman county, where the action was commenced, lying within that district. The state court made an order for the removal of the case, and defendants in due time filed a transcript of the record in the United States circuit court. Thereupon the plaintiff moved the court to remand the cause to the state court.

Olin Wellborn, W. W. Leake, and *John L. Henry,* for the motion.

W. L. Crawford, M. L. Crawford, and *L. F. Smith, contra.*

Woods, Justice. The motion to remand must be overruled. It is clear that by the exceptions filed to the petition of the plaintiff a question is presented which arises under the laws of the United States, and consequently that under section 2 of the act of March 3, 1875, (Supp. to the U. S. Rev. St. vol. 1, p. 174,) the cause is remov-

able without regard to the citizenship of the parties. The condition of the bond sued on is in strict conformity with the condition prescribed by section 783 of the United States Revised Statutes. The exceptions filed raise the question, what is the proper construction of the condition, and consequently what is the proper construction of section 783? The court, in passing upon the exceptions, is required to decide what is meant by the words, "the faithful performance of said duties by himself and his deputies," as used in section 783, and to declare whether the acts complained of in the petition are or are not a violation of the condition of the bond prescribed by the statute.

There can, therefore, be no doubt that the case is a removable one, and that the motion to remand should be overruled.

NOTE. See *Jackson* v. *Simonton*, 4 Cranch, C. C. 255; *Killpatrick* v. *Frost*, 2 Grant, 168.

McCoy *v.* C., I., St. L. & C. R. Co. and another.*

(*Circuit Court, S. D. Ohio, W. D.* July 31, 1882.)

1. ACTIONS AGAINST FOREIGN CORPORATIONS IN UNITED STATES COURTS—SERVICE OF PROCESS UPON AGENTS.

   Where foreign corporations engage in business in a state whose laws provide that they may be summoned by process served upon an agent in charge thereof, they are "found" in the district in which such agent is doing business, within the meaning of the act of congress of March 3, 1875, (18 St. at Large, 470,) and may be served in that manner in suits brought in the United States courts.

   Mohr & Mohr Distilling Co. v. *Ins. Cos.* 12 FED. REP. 474, followed.

2. PUBLIC NATURE AND DUTIES OF RAILROADS.

   Railroad corporations are *quasi* public corporations, dedicated to the public use. In accepting their charters they necessarily accept them with all the duties and liabilities imposed upon them by law. Thus a *quasi* public trust is created which clothes the public with an interest in the use of railroads, which can be controlled by the public to the extent of the interest conferred therein.

3. JURISDICTION OF EQUITY—RAILROADS—INJUNCTION.

   In the absence of some statute providing another and different remedy, courts of equity have jurisdiction to enforce this *quasi* public trust, and compel railroad corporations to discharge the duties imposed upon them by law; and persons injured by the wrongful action or non-action of such corporations may seek redress by injunction, and are not bound to resort to proceedings in *mandamus* or to an action at law for damages.

4. RAILROADS—DISCRIMINATION IN DELIVERING LIVE-STOCK TO STOCK-YARDS—REMEDY.

   A railroad company cannot bind itself to deliver to a particular stock-yard all live-stock coming over its line to a certain point, but it is bound to trans-

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

port over its road and deliver to all stock-yards at such point, reached by its tracks or connections, all live-stock consigned, or which the shippers desire to consign, to them, upon the same terms and in the same manner as under like conditions it transports and delivers to their competitors; and the performance of this duty may be compelled by injunction at the suit of the proprietor of the stock-yards discriminated against.

In Equity. Motion for preliminary injunction.

Ramsey & Matthews, for complainant.

Hoadly, Johnson & Colston, for defendant Cincinnati, Indianapolis, St. Louis & Chicago Railroad Company.

Paxton & Warrington and *Stallo, Kittredge & Shoemaker*, for defendant United Railroads Stock-Yards Company.

BAXTER, C. J. The facts in this case are few and simple. After averring that he is a citizen of Kentucky, and that the United Railroads Stock-Yards Company is an Ohio corporation, and that the defendant the Cincinnati, Indianapolis, St. Louis & Chicago Railroad Company is a corporation organized under the laws of Ohio, Indiana, and Illinois, the complainant charges that he is lessee of certain stock-yards, referred to in his bill, situated on the line of the Cincinnati & Baltimore Railroad Company's road, in Hamilton county, Ohio; that his yards are connected with said railroad by a suitable switch; that he is there engaged in the business of receiving, feeding, housing, and shipping live-stock; that the Cincinnati, Indianapolis, St. Louis & Chicago Railroad Company's road connects with the Cincinnati & Baltimore Company's road two miles south of complainant's yards; and that the said defendant is, by contract, in the use of that portion of said Cincinnati & Baltimore Railroad Company's road lying between said point of junction and complainant's yards, over which it is carrying on the business of a common carrier of live-stock, making regular deliveries to, and receiving stock from, its co-defendant, loaded in cars standing on the track. He furthermore alleges such receipt and delivery of stock in cars on the track is necessary to the successful prosecution of his business, but that, in disregard of the obligations imposed on it by law, said defendant has entered into a contract with the United Railroads Stock-Yards Company, its co-defendant, whereby it has covenanted to make said United Railroads Stock-Yards Company's yards its depot for the receipt and delivery of all live-stock carried by it to and from Cincinnati, and obliged itself, in so far as it could lawfully do so, to deliver all live-stock carried by it to, or received for shipment from, Cincinnati to and from its co-defendant, and that, relying on said contract as a valid obligation and a sufficient justification of its action

in the premises, said defendant unlawfully and wrongfully refuses to receive stock from, or deliver stock to, complainant, except through the United Railroads Stock-Yards Company's yard, whose yards, it appears, adjoin the complainant's yards.

Complainant thereupon prays for an injunction to restrain said defendant from so discriminating against it, and to compel it to receive and make deliveries of stock to him in the same manner and on as favorable terms as it receives from and delivers to complainant's said competitor.

The application for a preliminary injunction came on for argument before me at Knoxville on the twelfth of July, 1882, when the Cincinnati, Indianapolis, St. Louis & Chicago Railroad Company filed its plea denying the jurisdiction of this court, because, as the plea avers, it is not a corporation of Ohio, as it alleged, but that it is a corporation under and in virtue of the laws of the state of Indiana alone. It does not, by its plea, deny service of process or raise any question in regard to its regularity or legal sufficiency. But the counsel insisted in argument that as defendant was an Indiana corporation, and a citizen of that state, it could not be lawfully served with process in this jurisdiction, and that it was, therefore, not legitimately before the court.

We need not stop to demonstrate that the question argued by counsel is broader than the plea, inasmuch as if such question was raised by the plea I would not hesitate to overrule it.

We concede that corporations—mere legal entities—can only legally exist within the territorial limits of the sovereignty creating them; that they must dwell in the places of their creation, and can not migrate to other sovereignties. But it is as equally well settled that they can do business, if not inhibited by law from so doing, in foreign states and countries, and that they may be there sued in relation to the same. 1 Redfield, Railw. p. 63, § 4.

Hence, if it were conceded that the defendant is an Indiana corporation, as alleged in its plea, it appears that it owns and operates a railroad in Ohio, where its president resides and its principal office is located, and that it is there, by legislative permission, engaged in the business of a railroad carrier. If so, it is liable to be served with process in this jurisdiction. "This court," says Judge Force, of the superior court of Cincinnati, in a case recently decided by him, "has, by statute, jurisdiction of an action against a foreign corporation when such corporation can be found within the city. A corporation can be found where it can be served with a process according to

law. A foreign corporation can be served with a summons according to law (in Ohio) by service upon a managing agent." And about the same time Mr. Justice Matthews said, in a similar case, pending in this court, that "where foreign corporations establish an agency in a state whose laws provide (as in this) that they may be summoned by process served upon an agent, they are 'found' within the district in which such agent is doing business, within the meaning of the act of congress of March 3, 1875, and may be served in the same manner in suits brought in the United States court." *Mohr & Mohr Distilling Co.* v. *Ins. Co.* 12 FED. REP. 474, and authorities cited in the note thereto. These adjudications are conclusive of the question attempted to be raised in this case. The defendant is duly before the court, and it only remains to be determined how far, if at all, the complainant is entitled to relief upon the facts herein stated.

Railroads are potential agencies, constitute a very considerable part of the national wealth, and deserve to be fully protected in all their chartered rights. But while they are essential to the continued prosperity and to the further development of the varied resources of this great country, they are susceptible, when manipulated in the interest of selfish schemes, of being perverted to the most unjust and oppressive uses. They necessarily monopolize all inland carrying business, and if unrestrained can, by unjust discriminations, favor some individuals and communities to the very serious detriment of others. Hence the frequent efforts made to control them in the interests of individuals and communities. By establishing or abandoning a depot they can depreciate or enhance the value of private property, and by extending or withholding facilities increase the profits or inflict losses on all persons engaged in commercial or other pursuits dependent on their favor. An advance of two cents per bushel on the grain annually carried from the grain-producing west to the eastern cities, with a corresponding increase upon all other classes of freight, would impose a tax upon the industry of the country exceeding in amount the annual levies made by congress for the support of the national government. If permitted, they can so regulate their freight charges as to exact from each locality dependent upon them the utmost farthing which the circumstances of each particular case and the absence of wholesome competition enable them to impose. For instance, where competition is sharp, they can carry passengers and freight over their entire lines for less than they charge for short intermediate distances, simply because in the one case they are controlled by competition, and in the other, in absence of such competition, they have

it in their power to extort the utmost farthing which such intermediate business is capable of bearing. Those who have them in charge can organize side or collateral business enterprises, and so manipulate their roads as to seriously cripple their competitors and add to their own profits. These are but some of the possibilities incident to railroad management. Nevertheless, with all their capacity for injustice, they cannot be dispensed with. But are their duties and obligations to individuals and to the public to be measured by the judgment of the interested parties, using them to further their own selfish schemes, or by the courts? And if by the latter, to what extent may the courts go in supervising their actions and in restraining abuses? These are grave questions, which we will now endeavor to answer.

The great and fundamental principle on which we rest the conclusions hereinafter stated is the conceded fact that railroad corporations are *quasi* public corporations dedicated to the public use. It is upon this idea that they have been invested with the power of eminent domain,—the authority to take and appropriate private property to their use by paying a just compensation therefor. They have been created for the purpose of exercising the functions and performing the duties of common carriers. Their duties and liabilities are defined by law. In accepting their charters they necessarily accept them with all the duties and liabilities annexed; that is to say, they undertake to construct the roads contemplated by their several charters; to keep them in good condition; equip them with suitable rolling stock and safe machinery; employ skilled and trustworthy laborers; provide suitable means of access to and egress from their trains; erect depots and designate stopping-places wherever the public necessities require them; supply, to the extent of their resources, necessary and adequate facilities for the transaction of all the business offered; deal fairly and impartially with their patrons; keep pace with improvements in railroad machinery, and adapt their service to the varying necessities and improved methods of doing business.

The granting and acceptance of such charter creates a *quasi* public trust, and clothes the public with an interest in the use of railroads, which can be controlled by the public to the extent of the interest granted therein. *Munn* v. *Illinois*, 94 U. S. 126 to 134, inclusive. But how and by whom can this *quasi* public trust be administered?

The defendant insists that relief cannot be given by this court. The contention is that all persons injured in their property or persons by the wrongful action or non-action of a railroad corporation

can have adequate relief in a court of law by a suit to recover damages for the wrong done, or by *mandamus* to compel a fulfillment of its corporate obligations. These remedies undoubtedly exist; but is there no other and better remedy for the redress of such wrongs? Suppose defendant should entirely suspend its operations and refuse to run trains upon its road, it would be in default, and everybody injured thereby could sue and recover the specific damages sustained. But is the public without redress, and are the courts without power to interfere, at the instance of one or more individuals, and protect the public as well as individuals from the threatened deprivation of the benefits and advantages intended to be provided by the building of the road? Or suppose the defendant should ignore the claims of some populous neighborhood, whose business justified and whose necessities required depot accommodations for the receipt and discharge of passengers and freight, and in this way force the people of such locality to transact their business through a depot eight or ten miles distant—is there no redress except through a multiplicity of suits to be prosecuted at law by each injured party, or such relief as could be obtained through the tardy and inadequate process of *mandamus*? These remedies exist. But they are not the only means of relief. The defendant, by accepting its charter, assumed certain obligations in favor of the public in the nature of a *quasi* public trust, and the duty of enforcing the execution of this trust, in the absence of some statute providing another and different remedy, devolves upon courts of equity. All matters of confidence and trust are within their peculiar cognizance. They may restrain or command, remove a trustee and substitute another in his stead, or execute the trust themselves, as the exigencies of each particular case may require. Their jurisdiction has been well established and defined. No court, I presume, exercising equity powers would hesitate, upon proper application, to command the defendant, in the contingencies supposed, to provide a depot or operate its road, for the obvious reason that the road was authorized and built for and dedicated to the public, and the public has a right to use it; and if the officers representing the corporation were to refuse to execute the trusts reposed in them, in the particulars mentioned, or in any other respect, it would be the imperative duty of the courts of equity, on due application, to interfere, and by an exercise of their extraordinary powers compel a faithful observance and discharge of all of its obligations. If these courts can lawfully do this, their supervising authority over such corporations to the extent of the public interest

in them is vindicated; that is, they can compel them to keep their roads, rolling stock, and machinery in good condition; force them to establish and maintain depots at suitable points where the business and public necessities require them; provide suitable means of access to and egress from their trains; forbid injurious discriminations; and, to the extent of their means, supply all the facilities for the safe transmission of persons and property contemplated by their charters. Their authority to do this was affirmed and applied in the recent litigation between the express and the railroad companies, in which the railroad companies admitted an obligation to receive, carry, and deliver express freight, but contended that they were only bound to do so when the freight to be carried was delivered into their custody to be carried in the usual way at their risk and on their freight trains, to be delivered by them to the consignees. But every court before which the question was argued held otherwise.

In the last of these cases, recently decided by Mr. Justice Miller and Judge McCrary at St. Louis, Missouri, the court ordered the railroad company, upon a motion for a preliminary injunction, to furnish the express company with suitable freight cars to be attached to its passenger trains for the transportation of its freight in care of its own messengers, and at the rates fixed by the court, thus recognizing in the fullest possible manner the authority of the court to supervise and control the action of the railroad company in the public interest.

Now, if it was competent for the court to thus interfere and control the railroad company in a matter of detail in its business affairs, why may I not, if the facts of this case justify relief, compel the defendant railroad company to make deliveries of live-stock consigned to complainant on the same terms and in the same manner as under like conditions deliveries are made by it to its co-defendant?

The business of receiving, feeding, dealing in, and forwarding live-stock is legitimate and necessary. To do so on a scale commensurate with the trade of Cincinnati in that line necessitates large expenditures in the erection of buildings and equipment of suitable yards; and, being both legitimate and useful, everybody engaging in it is entitled to equal facilities in the use of railroads, upon which they are largely dependent for success; for it is obvious if the railroads centering at Cincinnati, or the officials who control them, are permitted to combine and establish a stock-yard as a private enterprise, and by contract make it *the* depot of the roads for the receipt and delivery of all the stock brought to or carried through the city, and withhold like

accommodations from their competitors, they can suppress competition, and establish and maintain a monopoly in that particular department of trade, and subject the public to the payment of undue and unreasonable exactions for the services rendered.

I am very clear that no such right exists. Where a railroad company assumes to receive, take care of, water, feed, and forward stock as a part of its undertaking to transport them, as it may lawfully do, they are at liberty to select such agencies as they may choose to employ for the purpose, and the exercise of the right is no wrong to any one else. But that is not the question here. The complainant does not complain of defendant's transacting its business through its own agents. Its complaint is that the defendant refuses to deliver stock consigned to his yard to him, except through the yards of co-defendant, and it is against this unauthorized and injurious discrimination that he seeks relief. The two yards are contiguous. They are both connected with the Cincinnati & Baltimore Railroad Company's road (over which the defendant is running its trains) by suitable switches. The railroad defendant can receive stock from and deliver stock to the one as easily as to the other, but refuses to do so. The discrimination is contrary to a sound public policy and injurious to the complainant. It gives to the United Railroad Stock-Yards Company important advantages in the receipt and shipment of stock, over the complainant—an injustice which no railroad company, in the exercise of its *quasi* public functions, ought to be permitted to inflict upon any one engaged in a lawful and necessary pursuit. The power to prevent such an abuse is, as we have already affirmed, vested in courts of equity until the legislature shall provide another and different remedy.

A preliminary injunction, corresponding in its scope with the restraining order heretofore issued, is therefore granted, on complainant's entering into a bond in the penalty of $20,000, with securities to be approved and accepted by the clerk, conditioned to prosecute the suit with effect, or in the event he fails to do so that he will pay the defendants all such damages respectively sustained by reason of the wrongful suing out of said injunction.

NOTE. The temporary restraining order was as follows: "It is therefore ordered by the court that the defendant railroad company shall, so long as said company shall continue to deliver stock to the United Railroads Stock-Yards Company, until the further order of the court, desist from making any discrimination between the complainant's yards and those of the United Railroads Stock-Yards Company, and shall receive all the stock consigned, or which

the shipper shall desire to consign, to said complainant's yards, and transport and deliver the same upon the same terms and in the same manner that stock is received and transported and delivered unto the United Railroads Stock-Yards Company, upon giving bond in the sum of $20,000."

It may be noted, as a part of the history of this controversy, that the Marietta & Cincinnati Railroad Company, operating the Cincinnati & Baltimore Railroad, had established a switch to the United Railroads Stock-Yards, and made that its live-stock station for the city of Cincinnati, and refused to establish or permit the establishment of a switch to, or station at, the stock-yards of the complainant in the principal case. That being the only road reaching the stock-yards of the complainant he was practically cut off from access to or from the railroads of the city. The Marietta & Cincinnati Railroad Company was in the hands of receivers appointed by the common pleas court of Ross county, Ohio. An application was made to Judge Baxter to compel the receivers to afford the complainant equal facilities with those accorded his competitor. As the receivers had been appointed by the state court, and its road and property were therefore under its control, his honor refused the application and remitted the complainant to the state court for redress. Afterwards application was made to the Ross county court, and, after full hearing, an order entered directing the receivers to afford to the complainant equal facilities with those granted to the rival yard. For a report of the decision of the Ross county common pleas court, which was delivered by Judge Minshall, see 7 Cincinnati Weekly Law Bull. 295.

See, on the subject of railroad discrimination, *Hays* v. *Pennsylvania Co.* 12 FED. REP. 309, and note thereto. Also the *Express Company Cases*, before Justice Miller and Judge McCrary, 10 FED. REP. 210, 869.—[REP.

DUNSCOMB and others *v.* HOLST and others.

(*Circuit Court, W. D. Tennessee.* June 21, 1882.)

1. JUDICIAL SALE—RIGHT OF PURCHASER TO DEMAND GOOD TITLE—WILL.

   At a sale of land at public auction by an officer of the court, where the title to the land was acquired by the defendant under the following devise in a will: "I bequeath to my daughter [the land in question] for her and her children's sole and separate use, free from any claim or control of her husband,"—and the purchaser at the sale declined to comply with the terms of his purchase, alleging a defect of title, *held*, that a title acquired by such a devisee is not of such clear and indisputable character as the purchaser has a right to demand, and that a court of equity will relieve the purchaser from complying with his bid made at the sale.

2. SAME—SAME—PRACTICE—RESALE.

   That under such circumstances, and after an investigation of the title by the master, the court will order a resale of such interest in the land as the defendants to the suit may have.

In Equity.

Under a decree of sale in this cause the marshal was ordered to sell at public auction the interest of the bankrupts in certain real estate and leasehold property in Memphis, the terms of sale being one-third cash, the balance in equal payments, on a credit of six and twelve months. Among other property was a tract known as the east 100 feet of lot 4, in block 50, South Memphis, 75 feet deep. At the marshal's sale Robert R. Church became the purchaser of this land at a bid of $260, but under the advice of counsel, who examined the title to this land for him, Church declined to comply with the terms of his purchase for an alleged defect in the chain of title, and his action was reported to the court.

On April 10, 1882, an order of reference was made to the master in chancery of this court to investigate this title, and make report whether said purchaser ought to comply with his bid.

On May 26th John B. Clough, Esq., the master, filed his report in the case, the material portion of which is as follows:

"I find and report that the said purchaser declines to comply with the terms of his purchase for an alleged defect of Mrs. Margaret Holst's title to the said land. This defect, as claimed before me, arises under the will of Narcissa Brooks, under which Mrs. Holst's immediate grantor, Mrs. Amelia E. Rogers, derived title; and it is admitted that if, under the said will, Mrs. Rogers took a fee-simple title, Mrs. Holst took the same under her deed from Mrs. Rogers, dated September 23, 1868. * * * It is further admitted on this reference that the said purchaser, Robert R. Church, is desirous to comply with his bid made for this land at the marshal's sale herein, provided he obtains a good title in fee-simple to the same, and that his refusal to comply therewith is made solely on account of the supposed defect of title.

"The devise to the said Amelia Rogers in the said will is in these words: '*I bequeath to my daughter, Amelia,* [*the said land,*] *for her and her children's sole and separate use, free from any claim or control of her husband.*' By another and the following clause of said will the testatrix devises other and adjoining land to the above devisee and another daughter by this language: 'I also bequeath the residue of my lot * * * to my two daughters, Amelia Rogers and Ellen Holst, and their children, forever, for their sole and separate use, free from any control of their husbands; and in case of the demise of one or either of my daughters without children, then the portion inherited by her is to revert to the other and her children, retaining all the original conditions.' These are the only bequests made by the will, and William Rogers, the husband of Amelia, was named executor. The will was made and executed May 3, 1866, and was filed in the probate court May 5, 1868, the testatrix having died in the preceding April.

"At the date of Mrs. Brooks' death, Amelia E. Rogers and her husband, William, were both living, and had at that time six daughters living, all minors, the eldest being some sixteen years of age and the youngest only one or two years old. Subsequently a son was born, who died in infancy. The

mother, Amelia E. Rogers, is now living, together with her six daughters, three of whom are married and three unmarried, their ages being now respectively about 14, 15, 21, 23, 26, and 30 years. I assume, and it has not been controverted, that since the date of her deed, September 23, 1868, Mrs. Margaret Holst has been in actual, continued, and uninterrupted possession of this property.

"The case of *Beecher* v. *Hicks*, 7 Lea, 207, was the construction of a deed to 'Sarah ——, the wife of James ——, for her sole and separate use and benefit, and free from all the debts, liabilities, and contracts of her said husband, and to the children of the said Sarah upon her body begotten by her said husband;' and it was held by the supreme court of this state that 'the mother did not take a fee in the land, but only a separate life estate,' and that on her death the entire estate passed to her children by the terms of the deed.

"The will construed by the same court in *Bowers* v. *Bowers*, 4 Heisk. 293, was in these words: 'I bequeath to my daughter Caroline' (wife of Bowers) certain land described in the will, 'to have and to hold the same to her and her children, to their special use and benefit, forever;' and the court held that 'the legal title was vested in the daughter, but she was to hold it as trustee for the joint use and benefit of herself and her children. The daughter, therefore, had the legal title to the whole property, and an equal equitable interest therein with each of her children. * * * The testator intended that his daughter and all of her children should enjoy the use and benefit of the property until the legal and equitable title should be vested in the children when his daughter should die. It was further the intention of the testator to give to his daughter the sole and separate use of the property for herself and children, excluding the right of the husband. * * * It is well settled that the term 'children,' as well as all other similar terms descriptive of classes or relations, must always be understood in wills in its primary and simple signification when it can be done; in short, where there are any persons in existence at the time of the will, or before the time of the devise or legacy takes effect, answering the meaning of the terms, such persons will be intended to be designated.' See, also, *Stubbs* v. *Stubbs*, 11 Humph. 43; *Williams* v. *Sneed*, 3 Cold. 538; *Booker* v. *Booker*, 5 Humph. 505.

"In *Turner* v. *Ivie*, 5 Heisk. 222, the devise in the will was as follows: 'I give to my son John, in trust, for the sole use and benefit of my daughter Sarah and to her children, if she should have any, a tract of land; * * * and should my daughter, the said Sarah, die without any child or children, the property to return to my children.' At the death of the testator Sarah was but 11 years old. She afterwards married and had children, and she and her husband conveyed the land to the defendants. After her death the children brought suit, and, in deciding in their favor, the court says: 'There can be no doubt that the intention of the testator was to give to his daughter the equitable title to the land during her life, and at her death to give the legal title to any child or children she might then have.'

"*Pierce* v. *Ridley*, 1 Bax. 145, involved a construction of the following final clause of a will: 'The balance of my estate to be equally divided among the heirs of my body. The portion that goes to my sons I give to the heirs of their bodies, and hereby appoint each of my sons trustees, without bond, of

his respective portion;' and it was held that the legal title was vested in the sons respectively as trustees of their children, who took the beneficial interests.

"In the case of *Belote* v. *White*, 2 Head, 703, the will gave real and personal property to three trustees 'for the use and annual support of my daughter Elizabeth and her children;' the concluding clause providing that the trustees were to hold the same 'in trust for the use and benefit of my daughter Elizabeth and her children, present and future, * * * and after her death the whole to be equally divided between all her living children and the heirs of those who may be dead;' and the court, in construing the rights of the parties under that will, held that 'the trustees took the legal title of the whole property during the life of Elizabeth, and at her death the entire estate became invested in her children; that at the testator's death Elizabeth and her children took an equitable estate as tenants in common in equal shares, her interest being for life only, with remainder as to that interest to them and their interests in fee.'

"In *Ellis* v. *Fisher*, 3 Sneed, 230, the testator made a devise in these words: 'I give to my sons, W. and J., as trustees, in trust for the use and benefit of my daughter Nancy, a tract of land,' with $1,000 in money, the interest on which was to be 'for her separate use and benefit during her natural life. * * * The land is to vest in my said sons * * * in trust for the use and benefit of my said daughter during her natural life, and at her death to the use of the heirs of her body, if she have any, and in default of the heirs of her body, then to my own right heirs.' Nancy died in 1850, leaving a husband and three minor children surviving her. *Held*, 'that the trustees took the legal estate only for the life of Nancy, the trust being merely to protect the property against the marital rights of her husband. Upon the death of Nancy the absolute title vested in the heirs of her body. * * * On Nancy's death the limitation to the heirs of her body was instantly executed in them, consequently they became vested with the legal estate, not as heirs, but as purchasers.'

"But in *Middleton* v. *Smith*, 1 Cold. 144, the devise was to Jane, 'for the benefit of my daughter Jane and her bodily heirs;' and the court held she took an estate tail, or conditional fee at common law, which under our statutes became an estate in fee-simple in Tennessee.

"The deed construed in *Kirk* v. *Furgerson*, 6 Cold. 479, was as follows: 'Which said lot I give, grant, and convey to the said Rachel, and to her heirs, —the natural issue of her body,—forever; if there should be no issue, then the said lot to descend to my grandchildren;' and the court decided that the limitation to the grandchildren was void, and that the grantee took an absolute title, subject to her husband's life estate.

"*Skillin* v. *Loyd*, 6 Cold. 563, involved the construction of a will in the following language: 'I give and bequeath to Julia (wife of S.) and the heirs of her body, for her sole and separate use during her natural life,' certain real and personal property therein described; and the decision followed that of the preceding case of *Kirk* v. *Ferguson*, the court holding that Julia took an estate in fee-simple, in which the marital rights of her husband were excluded. See Tennessee Code, §§ 2006, 2008.

"The following cases are cited for the convenience of the court and counsel, as bearing upon the construction of the will in question here: *Moyston* v. *Bacon*, 7 Lea, 236; *Ragsdale* v. *Mabry*, 8 Bax. 300; *Wyyne* v. *Wyyne*, 9 Heisk. 308; *Alexander* v. *Miller*, 7 Heisk. 81; *Owen* v. *Hancock*, 1 Head, 563; *Smith* v. *Metcalf*, Id. 64; *Woodrum* v. *Kirkpatrick*, 2 Swan. 224; *Petty* v. *Moore*, 5 Sneed, 127; and *Hamilton* v. *Bishop*, 8 Yerg. 41. I have not consulted authorities outside the decisions of our own state supreme court, as the Tennessee adjudications, it seems to me, must control the question made here.

"As a result of the foregoing cases, and my investigation, I report that Mrs. Amelia E. Rogers did not take a fee-simple title under the will of her mother; that she could not, therefore, and did not, convey such a title to Mrs. Margaret Holst by the deed of September 23, 1868, and that, consequently, at the marshal's sale the purchaser, Mr. Church, by complying with his bid, could not obtain a good title in fee to the said land, and should not be compelled to pay the amount of his bid.

"Yet the decree of sale made in the cause contemplates the disposal of all Mrs. Margaret Holst's interest in this land, and whatever interest she has, if of any value, may yet be sold, and such I assume was the intention of the court on the decree ordering this reference, should it be finally determined that said Mrs. Holst has any interest therein less than the fee.

"Whatever interest or title Mrs. Amelia Rogers took under her mother's will, it is conceded, passed to Margaret Holst by the last-mentioned deed of this lot, and the case of *Bowers* v. *Bowers, supra*, in my opinion, is entirely conclusive of what that interest is. I can see little, if any, difference between the will in that case and this one, the language being almost identically the same in both, and I think of the same legal effect; and I therefore report that under her mother's will Amelia E. Rogers took the legal title for the joint use and benefit, in common, of herself and her six daughters; and that upon her death, her interest being for life only, the entire estate will pass to her said daughters. The interest in this land which passed to Margaret Holst was therefore only the life interest of Mrs. Rogers, as above stated, and I so report."

Gantt & Patterson, for R. R. Church.

Calvin F. Vance, for plaintiffs.

HAMMOND, D. J. This cause comes again before me on the report of the master as to the title of the land purchased and bid in by R. R. Church at a public sale by the marshal under a previous decree. No formal exceptions have been filed to this report; and while I have not critically examined the question of the alleged defects in Mrs. Margaret Holst's title to this land, I am satisfied from the master's report that she did not take such a title as the purchaser is bound to accept, and that neither a deed from the marshal nor one from Margaret Holst would convey to this purchaser the clear and undoubted character of title he has a right to demand. It is, perhaps,

not necessary to now determine just what interest she has in the property, it sufficiently appearing that she has some interest.

From the statements of counsel at the bar, and, indeed, from the report itself, it appears that the purchaser is desirous of complying with his bid, and is perfectly responsible for the amount, if he can thereby acquire a good and indefeasible title to this land, and that his bid was made in good faith. Under such circumstances a purchaser has a right to require a good title, and will not be compelled to complete his purchase if such title cannot be given. The usual course in such cases is to direct a reference, as has been done here, and if it appears that the title is not good, and cannot be made perfect by deeds from the parties in the suit before the court, to relieve the purchaser from his bid and order a resale of the property. 2 Daniell, Ch. Pl. & Pr. 1276–1285, and cases cited in notes.

Let a decree be entered relieving the purchaser from complying with his bid, and ordering a resale of such interest as the defendants have in the property.

SMITH and others, Adm'rs, *v.* HARVEY.

(Circuit Court, N. D. Illinois. July 7, 1882.)

ESTATES OF DECEASED—INVESTMENT BY LEGATEE.

A legatee, being also executor, of the estate of a decedent purchased an interest in a firm, using for that purpose certain funds derived from that estate, one-third of which belonged to him as legatee, one-third to a sister, and one-third to the children of a deceased brother. When he entered the firm he stipulated to become liable with the partners for its debts. He subsequently died, and *his* executor became a member of the same firm, and not only allowed the interest of his testator in that firm to remain, but, upon the basis of certain notes payable to his testator, negotiated loans from Ayer and from a bank for the use of the firm. In an action brought by the personal representatives of the original decedent the supreme court decided that the notes in question, in fact, belonged to the estate of such decedent, and they were accordingly delivered up to his personal representatives by the parties to whom they were passed as collateral security for said loans. Thereupon the personal representatives of the original decedent brought an independent suit against the maker of the notes to enforce their payment, and in the progress of the suit the entire amount due on the notes was paid into court. *Held—*

(1) That the judgment of the supreme court deciding that the notes belonged to the estate of the original decedent, and the decree in pursuance of the mandate requiring their delivery to his personal representatives, do not prevent the creditors of the firm, of which his legatee was a member, from asserting in this independent suit any equity they or either of them may have, to have their debts paid out of the proceeds of the notes.

(2) That the parties who had loaned money upon the said notes as collateral, and to the extent such money had been paid by the legatees of the original decedent, are entitled to be subrogated to the rights of the latter, less the sum paid on the notes by the parties originally liable thereon, and interest.

(3) That the legatee and executor of the original decedent, having had no authority to invest in the business of the firm the interest of his sister and the children of his deceased brother in the proceeds of the notes, the latter cannot be held liable for the debts of the firm, and the administrators of the estate of the original decedent are entitled to all the fund in court except the one-third going to the estate of the legatee and partner in the debtor firm, under the will of the original decedent.

(4) That the defendants are entitled to subject to their claims against the firm the interest which the estate of T. T. Renick may have in the proceeds of the notes, but to the extent only that the money borrowed on the Harvey notes, as collateral, was applied to debts of that firm for which T. T. Renick was responsible.

Bill and Cross-bill.

Miller, Lewis & Bergen, for complainants.

Goudy & Chandler, for defendant.

HARLAN, Justice, (*orally.*) The present bill and cross-bills are the outgrowth of certain suits commenced in this court, decided in the supreme court of the United States, and reported in 101 U.S. 320, under the title of *Smith* v. *Ayer*. As stated in the opinion of the supreme court, their object was to compel the delivery to the administrators *de bonis non* of Renick Huston of two promissory notes, each for $39,250,—one of which had been delivered to and was held by J. C. Ayer & Co. as collateral security for a loan by them of that amount to the firm of B. F. Renick & Co., and for which they held the note of that firm; and the other held by the First National Bank of Westboro, Massachusetts, as collateral security for a loan by it to the same firm of $30,000, and for which they held that firm's notes. The notes of $39,250 were each executed by J. D. Harvey, and were made payable to Thomas T. Renick, of whose estate B. F. Renick was executor. Thomas T. Renick was one of the legatees, as well as the executor of the estate of Renick Huston. After the death of the latter, Thomas T. Renick purchased an interest in the firm of Tower, Classen & Co., using for that purpose certain funds derived from Renick Huston's estate, one-third of which belonged to him, (T. T. R.,) one-third to a sister, now deceased, and one-third to the children of a deceased brother. The interest so purchased stood in the name of T. T. Renick. Under the arrangement made by him when he entered the firm of Tower, Classen & Co. he became liable with the other partners for its debts then existing, as well as those created during his life-time. B. F.

Renick, executor of T. T. Renick himself, after the death of his testator became a member of that firm, and subsequently, and in pursuance, as he supposed, of authority conferred by the will of his testator, he not only permitted the interest in that firm, standing in the name of T. T. Renick, to remain, but, upon the basis of the Harvey notes as collateral security, negotiated the before-mentioned loans with Ayer & Co. and the Westboro bank. He borrowed the money chiefly for the purpose of using, and he did chiefly apply it, in the business of Tower, Classen & Co., except the sum of $10,-000, which was paid through Fay to Smith, one of the personal representatives of Renick Huston, and was by the latter divided equally among the before-mentioned legatees of Renick Huston. The supreme court decided that the Harvey notes, although payable to T. T. Renick, belonged to the estate of Renick Huston, and that Ayer & Co. and the Westboro bank could not hold them as against the representatives of that estate. Upon the return of the cause a decree in pursuance of the mandate of the supreme court was entered, requiring the surrender of the Harvey notes to the personal representatives of Renick Huston, and they were so surrendered by Ayer & Co. and the bank.

The present suit was instituted by the personal representatives of Renick Huston to enforce the payment to them of the amount due on the Harvey notes, and to protect their rights to the proceeds against adverse claims asserted by others to an interest therein. In the progress of the suit the entire amount due on both of the Harvey notes was paid into court—$106,686—all in cash, except $21,980, which was in the form of a certificate of deposit. It was paid into court to be disposed of as the court might adjudge was proper. No formal opinion has been prepared, but after a patient examination of the case I have reached these conclusions:

1. The cases of *Smith* v. *Ayer* determined that the Harvey notes constituted a part of the assets of Renick Huston's estate, and that the personal representatives of that estate were entitled to the possession of them.

2. The decree in that case has been fully executed by the surrender of the notes to the personal representatives of Renick Huston.

3. The opinion in *Smith* v. *Ayer*, construed in the light of the opinion subsequently delivered by the supreme court upon an application for rehearing, does not prevent Ayer & Co. and the bank from asserting, in this new and independent suit brought by the personal

representative of Renick Huston, any equity they, or either of them, may have, for their debts to be paid out of the proceeds of the notes.

4. Of the money received by B. F. Renick from Ayer & Co. the sum of $10,000 was paid by him through Fay to Palmer C. Smith, one of the administrators of Renick Huston, and was by him paid over to those entitled to it under the will of Renick Huston,—one-third to T. T. Renick, one-third to Mrs. Gregg, and one-third to the Renick children. To the extent of $10,000, and such of the interest thereon as constitutes a part of the fund in court, Ayer & Co. are entitled to be subrogated to the rights of the legatees who had received the benefit of the money obtained from Ayer & Co.; but out of this sum the parties originally liable on the Harvey note held by Ayer & Co. are entitled to the sum of $3,140, which was paid through Fay to Ayer & Co. on that note, and interest thereon from the date of such payment, so far as that interest has been paid into court.

5. As there is no ground to suppose that T. T. Renick had authority to invest in the business of Tower, Classen & Co. the money going, under the will of Renick Huston, to his sister, and to the children of his deceased brother, their interest in the proceeds of the Harvey notes cannot be held liable for the debts of that firm. Consequently the administrators of Renick Huston are now entitled to receive all of the fund in court except the one-third going to the estate of Thomas T. Renick as a legatee under the will of Renick Huston.

6. If upon the settlement of the estate of Renick Huston it is found that the estate of T. T. Renick is entitled to receive any money from that source, Ayer & Co. and the Westboro bank will be entitled to be paid out of the proceeds of the respective notes surrendered by them which may remain in court, such sum as will be equal to the aggregate of the debts of Tower, Classen & Co. for which the estate of Thomas T. Renick was responsible, and which were liquidated by the money obtained from them respectively on the faith of the Harvey notes as collateral security. In other words, they are entitled to subject to their claims against B. F. Renick & Co. the interest which the estate of T. T. Renick may be ascertained to have in the proceeds of the Harvey notes.

7. The court is not bound to send the parties to another state to litigate their rights in and to the fund which will remain here under this order. It is competent to give in this suit all the relief to which any of the parties are entitled. The complainants have leave to amend their pleadings so as to bring all necessary parties before the court.

8. In reference to the question of interest raised by counsel for Harvey and others, the court is of the opinion that Harvey and those united with him are bound for interest at the rate of 8 per cent. from maturity of the note until the money was paid into court. Interest stopped when the money was so paid. If interest has been paid in excess of the amount here indicated it will be refunded.

SELLERS *v.* PHŒNIX IRON CO.*

(*Circuit Court, E. D. Pennsylvania.* July 1, 1881.)

CORPORATION—STOCKHOLDER'S BILL—EQUITABLE RELIEF—FAMILY COMBINATION.

It is sufficient ground for equitable interference that complainant, who is a stockholder of a corporation, alleges that the officers of the corporation, who are members of one family and own a majority of the stock, have combined to appropriate the profits of the corporation in the form of salaries, and through a contract with a firm of which they are members, and have also combined to keep complainant in ignorance with regard to these transactions.

Demurrer to Bill in Equity.

This was a bill by George H. Sellers against a corporation known as the Phœnix Iron Company, and against its officers and directors individually. The allegations of the bill were in substance:

That the Phœnix Iron Company was originally organized out of the firm of Reeves, Buck & Co., which was composed of David Reeves, Samuel J. Reeves, Robert S. Buck, and Samuel A. Whitaker, and that at the time of the incorporation the said Robert S. Buck withdrew, the stock being divided among the remaining members of the firm, with the exception of a few shares transferred to employes to provide for filling the offices and the board of directors; that David and Samuel J. Reeves afterwards died, but that their stock continued to be held, and was still held, by their families; that complainant had become the owner by purchase of the stock originally owned by Samuel A. Whitaker, but that all the other stock was held by the families of said David and Samuel J. Reeves, most of it, amounting to a large majority of the whole capital stock, being held or controlled by David Reeves, son of Samuel J. Reeves, and by William H. Reeves, either in their own names or as trustees under the will of Samuel J. Reeves; that said David Reeves was president of the corporation, and William H. Reeves one of the directors; that the business of the corporation was extensive and prosperous, but that the profits were absorbed by excessive salaries to the officers; that instead of making its contracts for bridge building, which was an extensive branch of its business, directly with its customers, the corporation had entered into an agreement with the firm of Clarke, Reeves & Co., of which firm David Reeves and Will-

*Reported by Frank P. Prichard Esq., of the Philadelphia bar.

iam H. Reeves were partners, the terms of which agreement were concealed from complainant, but which obliged the corporation to take all contracts for bridge building in the name of the firm, and to divide the profits with the firm in a proportion not known to complainant; that the corporation had spent large sums in unnecessary and costly improvements; that although it had made large profits the dividends declared were very small; that complainant was refused all information with regard to the affairs of the corporation, and denied access to the books and papers; and that although he had attended the meetings of the stockholders and endeavored to obtain information, he had been defeated by the majority of the stock controlled by the Reeves family.

The bill prayed—

(1) For an account of the assets and liabilities of the corporation and of the receipts and disbursements since complainant became a member; (2) that the president and board of directors be compelled to divide the profits *pro rata* among the stockholders; (3) that they be enjoined from expending in capital improvements sums which ought to be divided as profits; (4) that they make discovery by production of the books and papers of the corporation; (5) that the sums improperly drawn from the corporation might be returned; (6) that disclosure be made of all sums made out of dealings with the corporation by any firm of which its directors were partners; (7) that all dealings between the corporation and such firm be enjoined; (8) that all moneys due by the president or directors be paid to the corporation.

To this bill respondents demurred.

Samuel W. Pennypacker and *John G. Johnson*, for complainant.

Carroll S. Tyson, *R. C. McMurtrie*, and *Wayne MacVeagh*, for respondents.

BUTLER, D. J. While the bill in this case is inartificially and loosely drawn, and contains much irrelevant and impertinent matter, it substantially charges that the stock of the corporation, in which the plaintiff is a shareholder, is mainly owned by the members of one family, who combine to manage the affairs of the corporation in such way as to subserve their own individual interests, to the prejudice of the plaintiff's rights; that David Reeves is president, and William H. Reeves, Carroll S. Tyson, Charles R. Scull, and John Griffin are directors; that the directors pay to themselves large and excessive salaries as officers of the company; that notwithstanding the chief business of the corporation is, or was intended to be, the building of bridges, the president and directors have entered into an agreement with the firm of Clarke, Reeves & Co., under which agreement contracts for bridges are taken in the name of the firm, and the benefits divided between it and the company, in proportions unknown to the plaintiff; that a majority of the members of said firm are

managers and officers of the corporation,—to wit, David Reeves, the president, John Griffin, director and superintendent, and William S. Reeves, director and assistant superintendent,—who as such members of said firm make large profits at the expense of the corporation, by means of unlawful contracts which they as such managers and officers enter into, to the prejudice of the corporation; that the plaintiff has sought information respecting the affairs of the company—the salaries paid to its officers, and the character of its dealings with the said firm, but the defendants, members of the said family, or subject to its control, have combined to keep him in ignorance, by withholding such information and refusing access to books and papers from which it might be obtained; that the plaintiff attended a meeting of stockholders and there sought redress, but that his efforts were rendered fruitless by reason of the conduct of the defendants, who combined against him for that purpose.

The foregoing statement embraces legitimate ground for equitable interference,—in substance, that the defendants, members of one family, and principal owners of the stock, have unlawfully combined to abstract the property of the corporation and apply it to their own use in the form of salaries, and profits of the firm of Clarke, Reeves & Co., and to keep the plaintiff in ignorance of their transactions in this respect. To this extent, and to this only, the bill must be allowed to stand.

So much of the demurrer as relates to the first, second, third, and seventh prayers of the bill, and the statements touching the same, is therefore sustained. As respects all other causes of demurrer assigned, the said demurrer is overruled, without prejudice, however, to the defendants hereafter.

A. C. & A. B. Treadwell & Co. *v.* Anglo-American Packing Co.

Fowler Brothers *v.* A. C. & A. B. Treadwell & Co.

(*Circuit Court, W. D. Tennessee.* July 26, 1882.)

1. Sales—Terms of Contract—"Cured Meat."

Where a sale of "cured meat" was made by a broker to a merchant at Memphis, that term is to be interpreted according to the understanding of the trade at Memphis, and not according to that where the seller resided, if there be any substantial difference between the two.

2. SALES—BILL OF LADING WITH DRAFT ATTACHED—DELIVERY—RISK OF TRANSPORTATION.

Where goods are sold and delivered to a carrier, with bill of lading in the name of the shipper indorsed to the purchaser, to be delivered only when the draft is paid, the ownership remains with the seller until the draft shall be paid, and the goods are at his risk. But when the payment is made, the ownership and risk change to the purchaser.

These two cases were heard together, but only so much of the charge of the court and the facts relating to the points of law that were disputed by counsel are reported here.

In October, 1880, the Treadwells purchased through a broker, at Memphis, one car load of meat, from the Anglo-American Packing & Provision Company, which, according to the memorandum of contract, was to be "cured meat," to be delivered at Atchison, Kansas, "free on board," freight not more that 42 cents. The bill of lading was to the order of the Anglo-American Company, indorsed "Deliver, to A. B. & A. C. Treadwell & Co.," to which was attached a draft, payable at sight, for the price of the meat. This was sent to a bank at Memphis, with instructions to deliver to the Treadwells only in payment of the draft. The draft was paid November 3, 1880, and the bill of lading delivered.

When the meat arrived it was alleged to be spoiled, whereupon the purchasers notified the shippers that they held it subject to their orders, and demanded the refunding of the money and expenses, which was refused. The Treadwells brought suit by attachment, in the state court, and the meat being attached, was sold. The Treadwells, in the mean time, having through another broker ordered a car load of meat from Fowler Brothers, of Chicago, it came billed by the Anglo-American Company, and a draft from them for the price on account of Fowler Brothers. The Treadwells refused to pay the draft, and attached this car load as the property of the Anglo-American Company, whereupon the Fowlers brought suit for the price of the meat. The suits were removed to the United States court by the non-resident parties. The jury found on the facts that the meat was not cured according to the contract, and gave a verdict for the Treadwells for $2,129.75, and that the second car load of meat belonged to Fowler Brothers, and not the Anglo-American Company, and gave a verdict in their favor for the price, $1,962.32, against the Treadwells. The defence contended that if the meat was spoiled on arrival it was because of negligence in transportation or natural causes after shipment, and that the meat was at the risk

of the purchaser. They introduced proof tending to show that the meat was "cured," according to the understanding of that term in Kansas, when it left the shipper. The plaintiff introduced proof tending to show that "cured meat," as that term is understood in the trade at Memphis, would not spoil in a transportation of 14 days.

The two cases were heard together.

Clapp & Beard, for the Treadwells.

Taylor & Carroll, for Packing Co. and Fowler Bros.

HAMMOND, D. J., (*charging jury.*) The agreement contemplated "cured meat." The meaning of this term is to be interpreted by you according to the understanding of the trade at Memphis, if there be any difference between that term as it is used there and at Atchison, Kansas. The agreement was made at Memphis between a purchaser and a broker acting as the agent of the seller, although he may have been the agent of both parties. The meat was to be used in the Memphis market, and I think there can be no doubt that it was to be "cured" according to the understanding of the parties at Memphis. But if the meat was properly cured, and spoiled in transit, where does the loss fall? I think there is no reasonable doubt, under the decisions of the supreme court of the United States, which I shall call to your attention, that if you find, as there is no dispute, that this meat was not to be delivered to the purchasers until they paid the draft attached to the bill of lading, the ownership remained in the sellers and at their risk until the draft was paid on the third day of November. After that payment, the ownership changed to the purchasers, and the meat was at their risk.

If, therefore, the meat left Kansas properly cured according to the contract, and was spoiled while in transit prior to the third day of November, the loss is that of the seller; but if afterwards, on the purchaser. *Dows* v. *Nat. Exchange Bank,* 91 U. S. 619; *The Merrimack,* 8 Cranch, 317; *The Venus,* Id. 253; *The Frances,* Id. 359; S. C. 9 Cranch, 183; *The St. Joze Indiano,* 1 Wheat. 208. However this point may be found under the English authorities cited by counsel, or the state cases relied on, I am of opinion that the supreme court has ruled the principle as I have indicated. They cite approvingly the sections of Mr. Benjamin's work on Sales, where he criticises and seeks to reconcile the apparent conflict in the cases, and I have no hesitancy in ruling according to the principle thus established, although the cases may not be exactly precedents for this one. The older cases arose under the law of prize, and it was estab-

lished that where the foreign seller attached as a condition that the goods were not to be delivered until the price was paid, they remained enemy goods, and subject to capture as such. I see no distinction in principle between those cases and this.

In re SMITH, Petitioner, etc.

(*Circuit Court, D. Massachusetts.* July 26, 1882.)

CRIMINAL LAW—TRIAL—STANDING MUTE—PRACTICE.

The law, section 1032 of the Revised Statutes, which provides that when one who is "indicted" for any offense against the United States stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter a plea of not guilty in his behalf, and proceed to try him by a jury, should be liberally construed to bring within its scope persons arraigned upon information or complaints, as well as persons indicted.

Petition for Writ of *Habeas Corpus.*

E. W. Burdette, for petitioner.

LOWELL, C. J. The merits of this case have been argued on the petition, the allegations of which are admitted to be true. The petitioner was indicted for beating and wounding certain of the crew of the vessel of which he was an officer. Rev. St. § 5347. The district attorney, discovering some misstatements of fact in the indictments, which might be considered variances, discontinued them, and as the grand jury had been discharged, filed complaints under Rev. St. § 4300. The petitioner being called upon to plead, stood mute, by advice of the counsel, and the district judge entered a plea of not guilty, and ordered the issue to be tried by a jury. Against this order the petitioner protested. The jury returned a verdict of guilty, and the petitioner, before sentence, submitted to imprisonment rather than give bail, and brought this petition for *habeas corpus.*

The argument for the petitioner is that by section 4301 of the Revised Statutes a trial by jury is to be had only when the defendant demands it; and in other cases by the court. This is true of the mode of trial after an issue of fact is made up; but if the defendant refuses to make an issue, the section, like the defendant in this case, is silent.

The petition, therefore, does not raise the question whether the court may lawfully try the issue of fact. The law which dispenses with an indictment for petty offenses on the high seas has been found

very useful both to the goverment and the accused. The district judges who have sat here since this law was first passed in June, 1864, have had very grave doubts of the constitutionality of that part of section 4301 which provides for a trial by the court; and it has been usual to try all contested cases by jury. It has been considered that the law is valid, excepting as to the mode of trial, and up to this time no question has been made about it. For the reason already given the question is not before me, and I shall content myself with saying that I share the doubt whether the legislature can require the court to try the main issue of facts in a criminal case; and that I fully agree that the remainder of the statute is valid and can be availed of, whether that particular feature of it is constitutional or not.

The only question in this case is, what should be the practice when the defendant declines to plead or answer? There is a law which provides that when one who is "indicted" for any offense against the United States stands mute or refuses to plead or answer thereto, it shall be the duty of the court to enter a plea of not guilty in his behalf and proceed to try him by a jury. Rev. St. § 1032. It would seem that this law might be liberally construed to bring within its scope persons arraigned upon information or complaint as well as persons indicted. Such has been the practice in Massachusetts under a similar statute. *Ellenwood* v. *Com.* 10 Metc. 222; *Com.* v. *McKenna*, 125 Mass. 397.

But there is one course of reasoning which shows conclusively that the petitioner has no just ground of objection to the mode of proceeding in the district court. Formerly the law of England and of the several colonies was that in capital felonies a defendant standing mute was to undergo the *peine forte et dure;* that is, to be pressed to death in prison. Giles Corey suffered in this way, in Massachusetts, in the time of the witchcraft madness. The punishment was inflicted in England, as I am informed by a learned friend, so late as the early part of the last century.

In 1772 an act was passed in England, which was to extend to the colonies and plantations in America, by which, if any person arraigned upon an indictment for felony or piracy should stand mute, he should be convicted of the felony or piracy, and the court should award judgment and execution as if such person had been convicted by verdict or confession. 12 Geo. III. *c.* 20. This had always been the law in respect to treason, petty larceny, and misdemeanor. See 4 Bl. Comm. 435; 2 Hawk. *c.* 30, § 14; 1 Chit. Cr. Law, 424; 1

East, P. C. 135. It is to be understood, of course, that the conviction or punishment in any of these cases took place only when the refusal to plead was willful. If it was through defect of understanding, the defendant was remanded; and this preliminary point was tried by the jury. See *Rex* v. *Pritchard,* 7 Car. & P. 303; *Reg.* v. *Berry*, L. R. 1 Q. B. Div. 447; *Com.* v. *Braley*, 1 Mass. 103; *Same* v. *Hill*, 14 Mass. 207; *Dyott* v. *Com.* 5 Whart. 67; *U. S.* v. *Hare*, 2 Wheeler, C. C. 283. Congress in the first crimes act, passed in 1790, adopted the humane rule that in all capital cases defined by that act standing mute should be equivalent to a plea of not guilty. This was followed by Pennsylvania in 1791; by Massachusetts in 1795; by Maryland in 1807. It is now the law, so far as I know, in all the United States and in England not only in felony, but in every grade of crime. But it has been applied in cases not capital since our constitution was adopted. The law of Massachusetts in 1789 and until 1836 was that a defendant charged only with a misdemeanor, who willfully and intelligently stood mute, was to be dealt with as if he had pleaded guilty. *Com.* v. *Moore*, 9 Mass. 402. This, therefore, was the law of this district. *U. S.* v. *Reid*, 12 How. 361. The alternative, then, is simple. Either the defendant was properly dealt with under Rev. St. § 1031, as one indicted; or, being already convicted by his own confession, he has no ground to complain that a second chance of escape was given him by the judge in ordering a trial by jury. *Ellenwood* v. *Com.* 10 Metc. 222. Indeed, the trial in this view was rather an inquiry than a trial, and, being a matter of grace, might have been by either court or jury without vitiating the proceedings. It is admitted that the refusal to plead was willful and intelligent, by advice of counsel, and therefore there was no occasion to try the preliminary question of sanity.

It follows that the entry must be, Petition denied.

SMITH, Receiver, etc., *v.* LEE.

(*District Court, N. D. New York.* 1882.)

ARREST AND BAIL—REDUCTION OF BAIL.

A party arrested in a civil action for damages for the wrongful conversion of the moneys and credits of a bank while acting as its president, and held to bail in a large amount, where it is shown that he has been tried on a criminal charge connected with the same transaction, and the jury disagreed; and where he is already held to bail on other charges growing out of the same transactions, and where he has made an assignment of all his property for the benefit of creditors,—is entitled to a reduction on the amount of bail.

Morey & Inglehart, for motion.

Crowley & Movious, opposed.

COXE, D. J. This is a motion to reduce bail. The action is by the receiver of the First National Bank of Buffalo to recover damages for the alleged wrongful conversion of the money and credits of the bank by the defendant while acting as its president.

The papers used on the original application were the complaint and affidavit of Linus M. Price, a bank examiner, stating in detail the transactions with Herman J. Hall and others, in which it is insisted that property to a large amount was fraudulently abstracted and embezzled.

It also appeared that the defendant had executed a conveyance of the greater part of his real property to one George Howard, to indemnify him against loss as bondsman; and that the defendant was possessed of valuable personal property, which he was endeavoring to secrete and dispose of with the intent to defraud his creditors. The latter allegation is on information and belief. There were also two brief confirmatory affidavits. Upon these papers, presented *ex parte* to the circuit judge, the defendant was, on the sixteenth day of May, 1882, held to bail in the sum of $100,000, the condition being that he should render himself amenable to any mandate on final judgment. Since that time events have greatly modified the circumstances in which bail in a sum so large was required. The defendant afterwards interposed an answer, in which he denies on oath all the material allegations of the complaint. He admits, in an affidavit read on this motion, the transfer of his real estate to indemnify his bondsmen in the criminal proceedings, but he insists that the time for which his bondsmen were bound having expired, the title reverts, and the property conveyed is now applicable to the payment of his debts.

It further appears that the defendant has made a general assignment for the benefit of creditors, without preferences. In the schedules filed by his assignee the property is estimated at $35,000.

The affidavit also states that, with the exception of the property so assigned, he has nothing whatever with which to pay any judgment that may be awarded against him; that from the day the bank suspended—April 14, 1882—until May 18th, the date of the arrest in this action, he was, with the exception of one day, at large in the city of Buffalo, making no attempt to depart; that he has now no property to offer as security, and it will be absolutely impossible for him to procure bail unless the same be mitigated; that if reduced to a nominal sum in this action, it may be possible, through his friends, to secure bail in the criminal actions to the amount of $15,000.

This affidavit, in so far as it relates to the general assignment, the value of the defendant's property, and his fruitless efforts to obtain bail, is fortified by an accompanying affidavit of Mr. Inglehart, the attorney who drew the assignment. Neither affidavit, in its essential particulars, is disputed. But time has given the defendant another cogent argument. He has been indicted for embezzlement, abstraction, and willful misapplication of the funds of the bank, and tried, at his own request, at the same term at which the indictment was found. The trial occupied four days, and involved an investigation of the identical transactions referred to in the complaint and affidavits. No evidence offered to establish guilt was excluded; the prosecution was conducted with much ability and zeal; and yet the trial resulted in a disagreement of the jury—a jury composed of men of standing and discernment. A large majority of the jury is understood to have favored acquittal.

These are facts which the court has no right to ignore. To assert that they do not greatly lessen the chances that the defendant will abscond would not be warrantable. Had the verdict been one of acquittal, the reason for the modification of the order of May 16th would have been obvious to the most unobserving. In a less degree, the disagreement of a jury, impaneled to pass upon the guilt or innocence of an accused person, has from time immemorial been recognized as a sufficient and an imperative reason for the reduction of bail. So familiar and universal is this rule that hardly an instance can be cited in which the court has disregarded it. This defendant is entitled to the same consideration that other parties charged with crime receive; no more and no less. It would be an abuse of power for the court, after such a result,—whatever its own views of the mer-

its may be,—to treat the defendant like a proven criminal, and, by allowing the bail to remain at a sum which it is conceded he cannot give, compel him to continue in hopeless imprisonment.

In civil actions the sole object of arrest and bail is to secure the presence of the defendant where final process issues. The abolition of statutes which tolerated imprisonment for debt has given a direction to jurisprudence, in all kindred regards, opposed to oppressive measures and enactments. It is now well settled that the court has no right to fix bail at a sum so large as intentionally to oppress the defendant and prevent his release.

In view of the result of the recent trial, and in view of the further facts that the defendant is now under bonds on pending indictments in the sum of $10,000; that he has executed a general assignment; that a great part of his property consists of real estate situated in Buffalo; and that the papers contain no averment that he intends to abscond,—it is thought that to require the additional sum of $100,000 is unreasonable. It would seem to be directly within the prohibition of the constitution of the United States that "excessive bail shall not be required." Few men, even in official or business transactions, where no crime is alleged, or accusation made, can command friends wealthy enough, or numerous enough, to justify in such an amount. When crime is charged suspicion is aroused, and the difficulty proportionately increased. A reasonable opportunity to secure his liberty, pending trial, should be afforded the defendant, if it can be given without endangering the rights of the plaintiff.

The papers submitted on this motion have been carefully examined; and after consideration of all the facts presented, and consultation with the circuit judge who signed the original order, it is thought that the order should be modified by reducing the bail to the sum of $25,000.

In re WILLIAMS & LEIDIG, Bankrupts.*

(*District Court, E. D. Pennsylvania.* June 27, 1882.)

BANKRUPTCY—DISCHARGE—FAILURE TO KEEP PROPER BOOKS.

A firm, during less than three years prior to their bankruptcy, had received from an individual notes and drafts to the amount of $42,881.79, which they had procured to be discounted. Neither their ledger nor cash-book contained any entries of these transactions, nor did the name of the party from whom

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

the notes were received appear therein. The bill-book contained nothing relating thereto, except some lead-pencil entries in the back of the book. The bankrupts had lost over $30,000 in less than three years, and their goods were, at the time of their bankruptcy, under execution upon a judgment confessed to the creditor from whom they had received the notes. *Held*, that the failure to enter these note transactions in their books was a failure to keep proper books of account, and would prevent their discharge.

Exceptions to the report of a register upon an application for a discharge.

The register had reported that the bankrupts had commenced business October 1, 1873, with a capital of $8,000, and stopped July 5, 1876; that when they failed they owed one Christopher Heebner $8,500, on acceptances; that they had received from said Heebner and had procured to be discounted notes and drafts to the amount of $42,881.79, of which the said sum of $8,500 was unpaid at the time of their failure; that neither their ledger nor cash-book showed either the receipt of any such sum of money or the disbursement thereof, nor did Heebner's name appear therein; that of the sum of $42,881.79 received from Heebner, $23,581.79 thereof was said to be composed of certain lead-pencil entries made in the back of the bill-book; that nothing appeared in connection therewith on the book to show Heebner's relation thereto; that in view of the fact that the bankrupts failed for $23,900, and lost $8,000 capital in addition, in less than three years, and were under a levy of Heebner's, having confessed judgment to him, their stock of goods on hand at the time not amounting to over $7,000, the register was of opinion that their failure to enter on their books the disposition of so large a sum as $42,881.79 was ground for refusing them their discharge, as not having kept proper books of account. To this report the bankrupts excepted.

David C. Harrington, for bankrupts.

Richard P. White, for assignee.

BUTLER, D. J. Looking at this case with a desire to relieve the bankrupts, if it be done consistently with justice to others, I find myself compelled to sustain the register's report against them. Very great liberality has been exercised by the courts in construing and applying the statutory provision requiring merchants and tradesmen to "keep proper books of account,"—so great in some instances as almost to nullify the law. There is no hardship in enforcing this provision. Its purpose is to require dealers to keep such accounts as will exhibit their business and standing not only to themselves, but also to their creditors, before and after failure. This is not

much to require of a man who asks to be discharged from his debts without paying them. In this instance the bankrupts have not observed the requirement. Their books fail to show their business in an important particular, and to a large extent. We are therefore compelled to dismiss their exceptions to the register's report, and refuse their application for a discharge.

DELONG v. BICKFORD and another.

(*Circuit Court, N. D. New York.* 1882.)

1. PATENTS FOR INVENTIONS—SEEDING-MACHINES.
   Where the grooves in the machine of the defendants were straight, or nearly so, while those in the machine of complainant were oblique, it is not an infringement.
2. SAME—VARIANCE.
   A departure of one sixty-fourth of an inch from a straight line in defendant's grooves is not a sufficient divergence to constitute an infringement of oblique grooves. A patentee must be held strictly to the language of his claim.
3. INFRINGEMENT—RESPONSIBILITY OF MANUFACTURER.
   A manufacturer cannot be held responsible for any change in the form of his machine made by third parties after it has left the manufactory.

Duell & Hey, complainant's solicitors. *George W. Hey*, of counsel.

F. L. Brown, defendants' solicitor. *Wood & Boyd*, of counsel.

COXE, D. J. This is an equity action for infringement, by the patentee of an alleged improvement in seeding-machines, against Lyman Bickford and Helen M. Kirkpatrick, who are copartners, engaged in the manufacture of agricultural implements, at Macedon, New York. The patent was issued to complainant on the third day of June, 1879, his claim being described therein in the following words:

"In combination with a seed-box or hopper, provided with a series of discharge-openings, a rock-shaft arranged longitudinally through the seed-box, and provided at each discharge-opening with a segmental sweep, *e*, having in its peripheral face oblique, parallel grooves of uniform width, constructed and operating substantially in the manner herein described."

Complainant's Exhibit No. 3 is apparently constructed in exact accordance with the specifications of the patent, the only appreciable difference being that in the patent the thrust of the seed from end to end of the hopper, when the machine is on a lateral incline, is prevented by the circular sweeps; in the exhibit the same result is

attained by partitions placed at regular intervals along the interior of the hopper. This exhibit (No. 3) was made by the defendants, and was made subsequently to the date of the patents.

Complainant's alleged invention first assumed tangible shape and form in the winter of 1878–9. He insists, however, that the idea which afterwards developed into the patented device, occurred to him during the previous winter. During both winters he was in the employ of the defendants, as pattern-maker, at their works at Macedon. Defendants were first informed of complainant's patent by a letter from his solicitor in July, 1879. Since that time it is admitted that very few seeders like Exhibit 3 have been constructed by them.

The proof establishes the further facts that the complainant had made no objection to the use of his device by the defendants until about the time of the formal notification, and that he had not, prior to that time, as against them, asserted any right as inventor. In August, 1879, the defendants commenced the manufacture of seeders with straight instead of oblique grooves on the periphery of the sweeps. A model showing their device was introduced in evidence as "Bickford Seeder of 1880." As no obliquely-grooved sweeps were manufactured by the defendants, except at a time when they had a constructive license to use them, and as the number of seeders so made hardly exceeded 12 in all, it will readily be perceived that the question of infringement has reference alone to the "Bickford Seeder of 1880."

The defendant introduced a number of prior letters patent to show the state of the art, and for the purpose of disputing the novelty of complainant's design.

The Kuhns patents for grain drills, issued in the years 1876 and 1877, and the Stoner, in 1861, show seed-wheels revolving, instead of oscillating, with oblique parallel grooves or partitions, of uniform size, but open at only one end.

The Westcott patent for seeding-machines (1876) shows a revolving seed-wheel, with straight flutes, allowing the free access of the grain both to the periphery and to the ends of the flutes, and with an oblique discharge orifice.

The McSherry patent (1864) covers a seed-wheel with oblique flutes. In this patent the inventor says of his device, *inter alia:* "I do not claim a spiral-threaded feeder, placed at or near the bottom of the seed-hopper, this having been before used."

In the Keeler and Barthel patent, 1862, on seeders, having revolving seed-wheels with oblique grooves, the following language of the patentees is suggestive:

"We are aware that rollers or cylinders having a flange fixed on one side and diagonal ridges or partitions on their face open on the other side, unprotected by an adjustable outer flange, have been used, as well as others having spiral flanges placed in a reverse position open and unprotected on both sides, * * * neither of which devices we claim."

All of the devices covered by the foregoing patents are provided with oblique or parallel grooves on the seed-wheels.

The Crowell patent, 1865, the Ingels patent, 1859, and the Keeler patent, 1864, all show a rocking shaft working in a concave trough or hopper.

The Thomas and Mast patent, 1866, for seed-planters covers an invention almost exactly identical in all its essential particulars with the complainant's contrivance. The description, so far as it refers to the rock-shaft and hopper, would hardly seem out of place if found in the complainant's patent as descriptive of his device. It is conceded by his counsel that "this patent shows all the features of complainant's invention, excepting the segmental sweep provided upon its peripheral face with oblique parallel grooves of uniform widths, whereby the seed is conveyed in a uniform stream to the discharge openings from both sides thereof."

Criticism is made that the Thomas and Mast patent was not pleaded by the defendants. It was admitted by stipulation, subject to all objections, one of the objections being that it cannot be used to anticipate complainant's patent for the reason that there is no allegation to that effect in the answer. Doubtless the learned counsel for the complainant is strictly right in this view, and yet it is admitted that the patent is properly in evidence to restrict complainant's claim, and to show the state of the art. The foregoing facts are, it is thought, sufficient to present a clear understanding of the various questions involved.

The defendants interpose five separate defenses, viz.: *First*, that the complainant is not the inventor of the device in controversy; *second*, that the defendants have acquired a constructive license to manufacture under the patent, assuming it to be valid; *third*, that in view of the state of the art the device in question did not involve invention; *fourth*, that the patent is not practical, and is worthless; *fifth*, that the defendants have not used the patented device.

It seems clear that Delong's patent must be restricted to the oblique parallel grooves on the face of the sweep; and, without deciding the somewhat doubtful question of the originality of the alleged invention, I shall confine myself to a consideration of the last of the above-named defenses, viz., assuming the patent to be valid, have the defendants used the patented device? The discussion of this question, as before stated, must be confined to the "Bickford Seeder of 1880." It was so treated by counsel both in their oral and printed arguments.

Does the defendants' seeder constitute an infringement? It seems plain that it does not. The only feature of complainant's device that was not known in the art long prior to his patent, whether the component parts are segregated or considered in combination, is the obliquity of the grooves on the face of the sweeps. The complainant has endeavored to show that the Bickford seeder is provided with obliquely-grooved sweeps. The defendants, on the contrary, contend that the grooves are straight. I think counsel are right in so construing the patent, which makes no claim for straight grooves; and the patentee must be confined to the language of his claim. Are the grooves on the defendants' sweeps straight? Mr. Gallup and Mr. Bickford both testify that the seeders manufactured by them are constructed with a segment of a wheel having corrugations running squarely and straight across its face. They then present a rough model representing a section of the seed-box, rocker, and sweeps manufactured by them, on which the grooves certainly appear straight to the eye. A great part of the evidence of complainant in rebuttal, however, was directed to showing that the grooves in this exhibit were not in fact straight, but were in some instances out of true, there being more or less divergence about them all, which, it is insisted, constitutes a colorable evasion of the patent. The test was made by placing a straight-edge in the grooves of the inverted sweep, and it was thus ascertained that in the first segment there was a very slight divergence from a line drawn parallel with the axis of the shaft; in the second the grooves were nearly straight; in the third the divergence was one thirty-second of an inch, and in the fourth and fifth one sixty-fourth of an inch, on the face of the sweep, which is less than an inch in width. With one exception, the variations might have been occasioned by poor casting; but in any view they are so infinitesimal that I could not regard them as sufficient to constitute an infringement, even if all the seeders manufactured by the defendants were similarly constructed. Complainant, as shown by drawings

attached to his patent, most surely contemplated a very different degree of obliquity than is here found. In my judgment the sweeps in the exhibit do not diverge sufficiently to lose whatever advantage may be derived from having the grooves straight, or to gain any benefits asserted for those that are oblique. If, in the complainant's claim and specifications, the word *oblique* were stricken out, and the word *straight* substituted in lieu thereof, there would then be foundation for the argument that the Beckford seeder of 1880 was an infringement. As it is, however, the defendants are much nearer to the Thomas and Mast design than to the design of the complainant.

It was further argued that because defendants' sweeps were attached to the shaft by a single screw, it might in operation become loosened and form a pivot; thus in fact giving a spiral or oblique direction to the flutes; or that the person operating the machine might, by intentionally loosening the screw, produce a similar result. Whether a sweep with straight grooves so vibrating, would infringe one with oblique grooves held stationary, it is not necessary to decide, for it cannot be said, in the absence of evidence, that the defendants' machines are improperly or negligently constructed, or that the defendants should be held accountable for something that may be done to their seeders after they have left the manufactory. Their straight sweeps might, in these circumstances, be entirely removed and complainant's oblique sweeps substituted, but the person who so changes the machine, and not the defendants, should be held responsible. It would seem that a single screw is amply sufficient to hold these small sweeps in position; they work slowly in yielding grain, and are not subjected to any violent resistance or sudden shock. Upon this branch of the case, then, my conclusion is that the complainant's patent, assuming it to be valid, covers only the oblique grooves, and these defendants do not use.

It follows that the bill must be dismissed.

MILNE v. DOUGLASS and others.*

(*Circuit Court, E. D. Missouri.* April 26, 1882.)

COMMON CARRIERS—JOINT CONTRACTS.

Where three railroad companies having connecting lines of road, and a steam-ship company connecting with the terminal line, entered into a contract with A. to transport certain property over their roads and upon said steam-ship company's vessels from X. to Z., and A. suffered loss through the negligence of one of said contracting parties in transporting said property, *held*, that said companies were jointly liable, notwithstanding the fact that the bills of lading under which said property was shipped were signed by the agent of said companies "severally but not jointly," and although said bills of lading provided that "in case any loss, detriment, or damage is done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage;" that the liability of said roads should cease upon their delivering said property to said steam-ship company in safety, and although said bills of lading contained the the following clause, viz.: "NOTICE. In accepting this bill of lading, the shipper, or agent of the owner of the property carried, expressly accepts and agrees to all its stipulations and conditions."

Demurrer to Answer.

This is a suit brought by John Milne against John M. Douglass, receiver of the Ohio & Mississippi Railway Company, and the New York, Pennsylvania & Ohio Railroad Company, the New York, Lake Erie & Western Railroad Company, and the Red Cross Line of steam-ships. The petition states that plaintiff is a commission merchant, doing business at Dundee, Scotland; that said steam-ship line and railroad companies are corporations; that said Douglass is receiver of the company first aforesaid; that defendants had received certain shipments of flour in the city of St. Louis for and on account of plaintiff, to be transported by them to Dundee, Scotland; that defendants failed to transport said flour within a reasonable time to its said destination; and that plaintiff was thereby damaged in a sum stated. Defendant Douglass filed a separate answer stating that said flour had been shipped under bills of lading attached to the answer; that it had been transported by the Ohio & Mississippi Railway Company to the end of its line without delay, and then delivered in safety to the New York, Pennsylvania & Ohio Railway Company, and that its liability under said bills of lading thereupon ceased. The New York, Pennsylvania & Ohio Railroad Company and the

*Reported by R. F. Rex, Esq., of the St. Louis bar.

New York, Lake Erie & Western Railroad Company filed similar answers, each alleging that the flour had been transported over its road without delay, and turned over to the connecting line in safety. The bills of lading referred to by defendants' answers were each, so far as they need be here set out, as follows:

"Through bill of lading, No. —, of the Ohio & Mississippi Railway, New York, Pennsylvania & Ohio Railroad, and New York, Lake Erie & Western Railroad, and the Red Cross Steam-ship Line, from St. Louis to Dundee. Shipped * * * per Ohio & Mississippi Railway, New York, Pennsylvania & Ohio Railroad, and New York, Lake Erie & Western Railroad, to New York, to be there delivered to the steam-ship pier for transportation by the Red Cross Line of steam-ships, or other steamers, from New York to Dundee, Scotland, the following property: * * * To be delivered in like good order and condition at Dundee unto order * * * under the following terms and conditions, viz.:

* * * * * * * * *

"It is further stipulated and agreed that in case any loss, detriment, or damage is done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage.

* * * * * * * * *

"It is further agreed that the said Ohio & Mississippi Railway, New York, Pennsylvania & Ohio Railroad, and New York, Lake Erie & Western Railroad have the liberty to forward the goods or property to port of destination by any other steam-ship company than that named herein, and this contract is executed and accomplished, and the liability of the Ohio & Mississippi Railway, New York, Pennsylvania & Ohio Railroad, and New York, Lake Erie & Western Railroad, as common carriers thereunder, terminates on the delivery of the goods or property to the steamer or steam-ship company's pier at the port of New York, when the responsibility of the steam-ship company commences, and not before.

* * * * * * * * *

"NOTICE. In accepting this bill of lading, the shipper, or agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions.

"In witness whereof, the agent, signing for the said railway lines and steam-ship company, hath affirmed three bills of lading. * * *

"C. L. DEAN,
"Agent severally, but not jointly."

No answer was filed by the Red Cross Line of steam-ships.

Plaintiff demurred to all three answers on the ground that the matter and things therein contained constitute no defense to the plaintiff's action, or show any relief from the liability incurred when

the bills of lading referred to therein were signed and the flour received for shipment.

G. M. Stewart and *Paul Bakewell*, for plaintiff.

Garland & Pollard, for defendants.

TREAT, D. J. The purpose of these demurrers is to call for an interpretation of the bills of lading, and the liabilities of the respective parties thereunder. Possibly the question presented may not, for technical reasons, fully arise on the demurrers, yet as the defendants stand on the contracts exhibited and count thereon, the court states that the contract as executed, despite some inconsistent terms therein printed, and despite the designation by the agent that he signed the same, "agent severally, but not jointly," bind each and all of the parties for the safe delivery at the place of destination of the property shipped. Such it is held is the true construction, in the light of the better authorities, now put on contracts like these here presented. See *Railroad Co.* v. *Mills*, 22 Wall. 594; Hutch. Carr. §§ 146, 152; *Bank, etc.*, v. *Adams Ex. Co.* 93 U. S. 174; *Myrick* v. *Michigan Cent. R. Co.* 7 Rep. 229; *Ry. Co.* v. *Pratt*, 22 Wall. 123, 130; Lawson, Cont. Carr. 343. See, also, note to *Snider* v. *Express Co.* 4 Cent. Law. J. 179, 180, 181; *Hooper* v. *Wells*, 5 Am. Law Reg. (N. S.) 16, with notes by Judge Redfield; 2 Am. Law Rev. 426.

Reference is made by defendants to *Citizens' Ins. Co.* v. *Kountz*, 10 FED. REP. 768, which it is supposed presents a different view. So far as the statute of Missouri (Rev. St. 1879, p. 95) may or may not affect the rights of parties under circumstances like these here presented, it must suffice to state that it is in accord with the general doctrine here announced.

The demurrers are sustained.

THE DEVONSHIRE.

(Circuit Court, D. Oregon. July 28, 1882.)

1. BERTHS ON STEAM-VESSELS.

   The provisions of section 2 of the act of March 3, 1855, (10 St. 716; section 4255, Rev. St.,) relating to the construction and occupation of berths on vessels carrying passengers from foreign ports to the United States, are not deemed applicable to steam-vessels.

2. RE-ENACTMENT OF STATUTE—FORMER CONSTRUCTION OF IT.

   Where a statute has received a judicial construction and is afterwards re-enacted by the legislature of the same or another country, it is presumed to have been passed as construed.

In Admiralty.

James F. Watson, for the United States.

John W. Whalley, for claimants.

DEADY, D. J. This is a suit *in rem* brought by the United States to enforce a lien against the British steam-ship Devonshire for $4,-130 of penalties alleged to have been incurred by the master and owners by violation of section 2 of the act of March 3, 1855, (10 St. 716; section 4255 of the Rev. St.,) entitled "An act to regulate the carriage of passengers in steam-ships and other vessels."

The libel alleges that on June 12, 1882, the said steam-ship, at the port of Hong Kong, China, took on board 826 passengers, and on July 7, 1882, brought the same to the port of Astoria, and within the jurisdiction of the United States and this court; that the berths used by the passengers on said voyage were not constructed parallel with the sides of the vessel or separated by partitions, or two feet in width, as required by said section 4255 of the Revised Statutes, and were occupied by more than one passenger, contrary thereto, whereby said master and owner of said steam-ship, severally, became liable to pay to the United States a penalty of five dollars for each of said passengers, and that the libelant has a lien upon said steam-ship for the amount thereof.

The claimants except to the libel, and allege that the Devonshire is a steam-ship, and the passengers in question were steerage passengers, and therefore said section 4255 of the Revised Statutes upon which the libel is founded, does not apply to her, and pray that the libel may be dismissed.

The first section of this act (sections 4252–3–4 of the Rev. St.) provides that "no master of any vessel," foreign or domestic, shall take on at any foreign port in a territory not contiguous to the United States, with intent to bring thereto, a greater number of passengers than in the proportion of one to every two tons of said vessel, and that "the spaces appropriated for the use of said passengers, and which shall not be occupied by stores or other goods, not the personal baggage of such passengers," shall be in a certain specified proportion to the whole number of passengers allotted to such space.

The second section (section 4255 of the Revised Statutes) provides that "no *such* vessel shall have more than two tiers of berths;" and prescribes "the interval between the lowest part thereof and the deck or platform;" and that "the berths shall be well constructed, parallel with the sides of the vessel, and separated from each other by partitions;" and be of a certain length and width, and each only occu-

pied by one passenger; with a provision for double berths to be occupied by more than one person under certain circumstances and restrictions. For any violation of this section it is declared that the master of the vessel and the owners thereof shall severally be liable to a penalty of five dollars for each passenger on board of such vessel on such voyage, to be recovered by the United States in any port when such vessel may arrive or depart.

The fifteenth section (section 4270 of the Revised Statutes) declares that "the amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels shall be liens on the vessel violating those provisions; and such vessels shall be libeled therefor in any district or circuit court of the United States where such vessel shall arrive."

Each of these sections uses the word "vessel" without in any way limiting its application to a sail-vessel. Standing alone and without qualification, they would include in their provisions a steam as well as a sail-vessel. A vessel is none the less one on account of the manner of her propulsion, whether by oars, sails, or steam; and the Revised Statutes (section 3) declare that the term "includes every description of water-craft, or other artificial contrivance used or capable of being used as a means of transportation on water."

But the tenth section of the act (section 4264, Rev. St.; Act Feb. 27, 1877; 19 St. 250) provides that "the provisions, requisitions, penalties, and liens of this act relating to the space in vessels appropriated to the use of passengers are hereby extended and made applicable to all places appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to, and between the ports, and in manner as in this act named, and to such vessels and the masters thereof;" and repeals so much of the steam-boat act of August 30, 1850, (10 St. 61,) as conflicts therewith; and further provides that "the space appropriated to the use of steerage passengers" on steam-vessels shall be "subject to the supervision and inspection of the collector of customs," as provided in section 9 of the act, in the case of other vessels.

In January, 1868, this statute came before the district court for the southern district of New York for construction, in the case of *The Steamship Mahattan* 2 Ben. 88, which was libeled on account of penalties alleged to have been incurred by the master and owner in the violation of this same section 2.

Judge Blatchford held that the section was not applicable to steamships, upon the familiar rule that the statute must be so construed

as to give effect to every significant clause, sentence, or word in it, (Smith, Comp. § 575;) and, if the provisions of the second section extended to steam-vessels *proprio vigore*, notwithstanding the tenth section, then the provisions of the first section do also, and the tenth is altogether useless and nugatory. This decision was affirmed on appeal to the circuit court, and the judge who made it has since been placed on the supreme bench. No other decision upon the act has been cited or come to my knowledge.

In the revision of the statutes this section 10 was omitted, and the whole act left applicable to steam-vessels. But afterwards it was re-enacted as an amendment to section 264 of the Revised Statutes, by the act of February 27, 1877, (19 St. 250,) "to perfect the revision of the statutes of the United States" etc. By reason of this amendment the statute now stands as when the second section was construed, in the case of *The Manhattan* not to be applicable to steam-vessels, with this additional and material circumstance in favor of such construction, namely: that congress, by the deliberate replacement of section 10, have not only declared it shall have effect as a part of the statute, but presumably that it shall have such effect according to the then known construction given to it in that case. *Pennock* v. *Dialogue*, 2 Pet. 18; *Kirkpatrick* v. *Gibson's Ex'rs*, 2 Brock. 391; *Com.* v. *Hartnett*, 3 Gray, 451; *Cathcart* v. *Robinson*, 5 Pet. 279.

The argument of the district attorney in favor of the libel is that the provisions in section 2 are regulations relating to the "space" appropriated to passengers, and therefore made applicable to steam-vessels by the operation of section 10, because by them the "space" between each berth and that appropriated to each passenger therein is prescribed. And when we consider that the evils intended to be prevented by section 2 are as likely to exist in the case of steerage passengers carried in steam-ships as those against which section 1 is intended to guard, it is not without force.

There is quite as much need that a steerage passenger shall have the "space" and privacy provided in section 2 when he lies down to sleep, or is prostrated with sickness, as that he shall have the general moving and breathing "space" between decks provided in section 1. And although the word "space" is not used in section 2, still, that is the subject of it, and its division and appropriation among the passengers, for the purpose of berths, is thereby carefully and minutely regulated.

But, in the light of the decision in the case of *The Manhattan*, and particularly the unqualified re-enactment by congress of section 10 in

1877, after the construction there given to it in 1868, I do not feel at liberty to hold otherwise. The exception is sustained and the libel dismissed.

And it may not be amiss to remark that this conclusion is not in conflict with what may be called the justice of the case. These Chinese immigrants are all males, and generally adults, and there is very little need, in their case, in the division of berths as required by said section 2.

This regulation was made to meet the case of European immigrants, consisting of both sexes, married and unmarried.

It is not pretended that any particular harm or inconvenience has resulted from the want of a division of berths in this case, and the enforcement of the law, even if it were applicable, would be more for the punishment of the shipper than for the protection of the immigrant.

The Victoria.

(*Circuit Court, D. Massachusetts.* August 1, 1882.)

Negligence—Personal Injury—Fault of Fellow-Servant.

Where a workman upon a vessel was injured by falling through an open hatchway negligently left open by the stevedore having charge of the discharging and loading of the vessel, and the actual negligence that caused the accident was the removal of a lamp by a fellow-workman employed at the same job with the libelant, the common employer is not liable for the injury.

E. L. Barney and *E. J. Hadley*, for libelant, appellant.

Ball, Storey & Towers, for steam-ship.

Lowell, C. J. The libelant was seriously injured by falling down the main hatchway of the third deck of the steam-ship Victoria, on his return from supper, just after he had reached that deck by a ladder placed in a smaller hatchway or scuttle, which is alleged to have been so dangerously near the main hatch that it was negligence to leave that hatch open. Whether it is usual to close the hatches on the third deck after the day's work is done is a disputed question in the case. The preponderance of the evidence is that it is not usual; and see *Dwyer* v. *Nat. Steam-ship Co.* 17 Blatchf. 472. The libelant had been working during the day not far from the open main hatch, and had been up and down this ladder once or twice, and had no reason to suppose that the hatch had been closed. If it was negligently left open, the negligence was that of the stevedore having

charge of discharging and loading the ship, which cannot be attributed to the owners. *Dwyer* v. *Nat. Steam-ship Co. supra; The Germania*, 9 Ben. 356.

The actual negligence, however, was in removing a lamp which had hung near the foot of the ladder, and not replacing it. Rose testifies that he came down through the scuttle a short time before the plaintiff came back, found that the lamp had gone out, relighted it, and carried it aft. If that lamp had remained where it had been during the day, and had been lighted, it seems impossible that the accident should have happened; for the main hatch was forward of the scuttle, and the libelant's place of work was aft of the scuttle, and it must have been through some confusion caused by the want of light that he took the direction he did. This fault was committed by a fellow-workman who was employed on the very same job with the libelant, and the law is too well settled to be changed, excepting by congress or the supreme court, that the common employer is not liable for an injury occurring to a workman under such circumstances.

For these reasons I have felt bound to affirm the decree below. In consideration of the great hardship to the libelant, I suppose costs would not be asked against him from a court of admiralty.

Decree affirmed, without costs.

THE WOLVERTON.*

(Circuit Court, E. D. Pennsylvania. June 27, 1882.)

ADMIRALTY—COLLISION—BURDEN OF PROOF ON LIBELANT.

The libelant must show that the vessels were approaching in the way he describes.

Libel by the master of Cross Creek Barge No. 5 against the tug Dr. John Wolverton, to recover damages for a collision. The testimony disclosed the following facts:

The Wolverton, having the barge Atlanta in tow astern by a hawser, started from Robert's stores, Brooklyn, bound for a dock in the North river. When near the Battery she met the tug Packer, with libelant's barge lashed to her port side, coming up the East river, after rounding the Battery. The Packer blew two whistles, indicating that she wished to go inside, or on the New York side of the Wolverton. To this the Wolverton made no reply, and immediately thereafter the libelant's barge struck the Atlanta, damaging

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

both vessels. Libelants claimed that the Wolverton was steering diagonally across the East river, so as to just clear the Battery in rounding it; and that she caused the collision by improperly attempting to cross the bows of the Packer, which was coming up the East river close to the shore. Respondents claimed that the Wolverton was proceeding down the East river close to the shore, being on the port side of the Packer, or nearer to the New York shore; that the Packer blew two whistles, to which the Wolverton did not reply, because the Packer immediately put her wheel to starboard and attempted to go across the Wolverton's bows, and that this latter movement caused the collision.

E. D. McCarthy and *Morton P. Henry*, for libelant.

Alfred Driver, J. Warren Coulston, and *H. R. Edmunds*, for respondents.

Butler, D. J. The burden of proof is on libelant. He must show that the vessels were approaching in the manner he describes, or submit to an adverse decree. If they were not thus approaching —if the respondent was not distinctly to starboard—the Packer could not expect her to pass on that side, and she was blameless in going where she did. Under such circumstances the Packer's signal was unimportant, and required no answer. Looking at the evidence on both sides it seems impossible to say that the vessels were approaching as the libelant asserts. It is quite as probable the respondent was directly ahead, or a little to port. I incline to think the weight of the evidence justifies a belief that she was, and that the collision resulted from the Packer's desire to run further in, on account of the tide, and improperly undertaking to do so. It is sufficient, however, that the libelant's position is not proved. As this view disposes of the case it would be unprofitable to discuss it further.

THE T. L. WADSWORTH.

(District Court, E. D. New York. June 26, 1882.)

VESSELS AND BOATS—LIEN FOR SUPPLIES.

Where family supplies and hay and oats were furnished by a dealer in Buffalo on board a canal-boat lying up there for the winter, and the boat, having departed before the bills were paid and come into the eastern district of New York, was there libelled by the provision dealer, claiming a lien upon the boat as for maritime supplies, and it appeared on trial that the horses and man were employed at work on the streets of Buffalo, and that the captain of the boat had not ordered the supplies, nor the woman who owned the boat, and whose husband was so at work on the streets with his horses, *held*, that the supplies were furnished on personal credit, and no lien on the boat arose out of the transaction.

Beebe, Wilcox, & Hobbs, for libelant.

L. R. Stegman and *E. G. Davis*, for respondent.

BENEDICT, D. J. The libelant cannot recover in this action for two reasons: *First*, The supplies in question were not ordered by the captain or the owner of the boat, but by David Hulsapper, husband of the master, and he, with his horses, was then employed in working on the streets of Buffalo for a contractor. The articles sued for were purchased for the food of this man's family, the food of his horses, and the food of a man hired to drive the horses in the streets of Buffalo during the time when David Hulsapper was so employed on the streets. They were not to enable the boat to earn freight, nor purchased for that purpose. No lien upon the boat arises out of provisions and stores furnished under such circumstances. In the *second* place, the bill sued for constitutes a part of an account of some $200, run up by David Hulsapper during the time he was working for the contractor upon the streets; and while it is no doubt true that these items were placed in a separate account and charged to the boat, the whole account was furnished with knowledge that the boat was not running, and that Hulsapper and his horses were working on the streets, and the attendant circumstances were such as to indicate with sufficient certainty that the articles sued for were furnished on the personal credit of David Hulsapper, as confessedly was the rest of the account.

The libel is therefore dismissed, and with costs.

THE CITY OF TROY, etc.

(District Court, N. D. New York. 1882.)

COLLISION—DAMAGES—REPORT OF COMMISSIONER.

The estimate of damages as reported by the commissioner in a cause of collision adopted by the court.

In Admiralty.

P. C. J. De Angelis, for motion.

E. D. Mathews, opposed.

COXE, D. J. This is a motion to confirm the report of the commissioner, and for a final decree in favor of the libelant. The respondents have filed exceptions and oppose the motion, insisting that the commissioner has placed the damages at too high a figure. The commissioner reports that the amount of damage sustained by the libelant by reason of the matters set forth in the libel is the sum of $575. I have read all the evidence taken by the commissioner, and do not feel justified in interfering with his conclusions. Three witnesses were sworn for the libelant, who place the damage to the injured boat at $800, $1,000, and $800, respectively. Two witnesses for the respondent place the damage at $250, and from $200 to $300, respectively. Their evidence, however, indicates that they did not see the boat until partial repairs had been made, some time after the collision.

If the question of damages, as an original proposition, was to be here decided, I do not see how, upon this evidence, they could be placed at a sum much below the amount stated in the report, assuming that the witnesses are entitled to equal credit. The commissioner, from personal observation of the witnesses, having had an opportunity to note their manner while testifying, is much better able to estimate correctly the weight to be given to their opinions than one who simply reads the written testimony.

The motion should be granted.

Presumptions.

LINCOLN and others *v.* FRENCH. In error to the circuit court of the United States for the district of California. This case was determined in the supreme court of the United States at the October term, 1881. Mr. Justice *Field* delivered the opinion of the court, reversing the judgment of the circuit court, and remanding the cause, with directions to enter judgment in favor of the plaintiffs in error.

Although a duty to reconvey land conveyed for the purpose of building a railroad arose when, by the terms of the trust deed, the time had passed within which the work was to be done, and the conditions upon which the trust was to be executed had become impossible, a reconveyance was to be presumed only in the absence of proof to the contrary. Like other presumptions, it is sufficient to control the decision of the court if no rebutting testimony is produced. But all presumptions as to matters of fact, capable of ocular or tangible proof, such as the execution of a deed, are in their nature disputable. No conclusive character attaches to them. Presumptions are indulged to supply the place of facts, but they are never allowed against ascertained and established facts. When these appear, presumptions disappear.

J. H. McKune, A. T. Britton, and J. H. McGowan, for plaintiffs in error.

John Reynolds and S. O. Houghton, for defendant in error.

Admiralty—Jurisdiction—Maritime Tort.

LEATHERS *v.* BLESSING, U. S. Sup. Ct., Oct. Term, 1881. Appeal from the circuit court of the United States for the district of Louisiana, decided in the supreme court of the United States, May 8, 1862. Mr. Justice *Blatchford* delivered the opinion of the court, affirming the decree of the circuit court.

Where the master and officers of the vessel, just arrived and moored to the wharf, were accustomed to permit persons expecting to find on the vessel freight consigned to them, as soon as she had landed and her gang-plank run out, to go on board of her to examine the manifest, or transact any other business with her master or officers, and libelant went on board to ascertain whether a consignment of cotton seed had arrived on her, under such circumstances the relation of the master and of his co-owner, through him, to libelant is such as to create a duty on them to see that libelant is not injured by the negligence of the master; and if he is injured by a bale of cotton being negligently allowed to fall on him, it is a maritime tort, and cognizable in admiralty.

J. G. Carlisle, for appellant.

Durant & Hornor, for appellee.

Cases cited: Waring v. Clark, 5 How. 441; Phila., W. & B. R. Co. v. Phila., etc., Co. 23 How. 209.

WEBBER v. BISHOP and another.

(*Circuit Court, N. D. New York.* 1882.)

REMOVAL OF CAUSE—CONDITONS IN BOND.

It is essential that the bond contain a provision for the payment of costs, and the objection that it does not may be taken at any time.

James Wood, for motion.

George Truesdale, opposed.

COXE, D. J. This action was commenced in the supreme court of the state of New York. In June last, proceedings to remove it into this court were taken. This motion is to compel the treasurer of Monroe county to pay to the plaintiff the sum of $250, deposited as security for defendants' costs, pursuant to an order of the state court. Opposition is made solely on the ground that the cause was not properly removed. Various alleged irregularities are pointed out, only one of which will be considered. The bond filed with the petition of removal in the state court was drawn pursuant to section 639 of the Revised Statutes; it does not contain the provision as to costs required by section 3 of the act of 1875.

The defendants contend that this is a fatal omission, affecting the jurisdiction of this court; that it is not a mere irregularity, or a defect that can be cured by amendment.

The case of *Torrey* v. *Grant Works*, 14 Blatchf. 269, clearly sustains this view. In his opinion Judge Blatchford says, at page 270:

"The limitation of time within which the petition may be filed, and the fact that, under section 639, it may be filed at a later period than it can be under the act of 1875, has nothing to do with the character of the bond. The present suit is one which falls within the provisions of section 3 of the act of 1875, in regard to the terms of the bond required. It is a suit at law of a civil nature, brought in a state court, in August, 1875. The matter in dispute exceeds, exclusive of costs, the sum or value of $500, and it is a suit in which there is a controversy between citizens of different states. It is, therefore, a suit mentioned in section 2 of the act of 1875, and one of the parties to it has undertaken to remove it by filing his petition for removal in the state court. He may be in time, because within the time limited by subdivision 3 of section 639, although not within the time limited by section 3 of the act of 1875; but, even if he claims the benefit of the longer time allowed by section 639, he must give the bond prescribed by the act of 1875. He has not given such a bond. The bond he filed contained no provision for costs."

The learned judge further held, following a decision of Judges McKennon and Cadwalader, (9 Chi. Leg. News, 324,) that the require-

ment of section 3 of the act of 1875, in regard to the nature of the bond, extends to a case sought to be removed under section 639 of the Revised Statutes, and to that extent, at least, the act of 1875 repeals all prior acts on the subject; and that if the required bond has not been filed the court has no jurisdiction. See, also, *Burdick* v. *Hale*, 7 Biss. 96.

There is, apparently, no distinction in principle between the case of *Torrey* v. *Grant Works* and the case at bar. The reasoning in that case is decisive of the question here involved.

It is insisted that no advantage can be taken of a defect in the bond upon a motion of this character; that in order to avail themselves of it defendants must make a formal motion to remand the cause. Even if the plaintiff is correct in this view, it would, it seems, be the duty of the court, if convinced that the cause was improperly removed, to stay the proceedings until the defendants have had a reasonable opportunity to make this motion. But, upon the authority of the *Torrey Case*, the position is not well taken. The question there arose, not upon a motion to remand, but upon a motion, in effect, not unlike the motion here. The question being one of jurisdiction, the defendants can at all times take advantage of the defect. Should the case remain and the plaintiff succeed, if confronted with the same objection in the supreme court, it might lead to a reversal of his judgment.

The motion must be denied.

DWIGHT and others *v.* SMITH and others.

(*Circuit Court, D. Vermont.* July 22, 1882.)

1. RAILROADS—FIRST-MORTGAGE BONDS.

   When money applicable to the payment of first-mortgage bonds of a railroad company has come into the hands of the trustees for the bondholders, each holder at that time becomes immediately entitled to the share of the money applicable to his bond, and can immediately recover the same.

2. SAME—RIGHTS OF BONDHOLDERS.

   The question whether the bondholders, who have acquired their bonds since money in the hands of the trustees applicable to the bonds accrued, are entitled to share in that money, depends upon the nature of the right, and of the transaction by which they acquired the bonds.

3. SAME—EQUITABLE RELIEF.

   The debt for which the bonds issued was a debt of the company, and property in the hands of the trustees is security for that debt, and when the debts pass the securities pass also, unless a contrary intention is shown, and the time when

the parties secured their bonds is not material; and where there has accrued a large amount of money applicable and not applied on the bonds after satisfying prior liens, the bondholders are entitled to relief against those having the money.

In Equity.

Francis H. Brooks and *Edward J. Phelps*, for orators.

Daniel Roberts, for defendants.

WHEELER, D. J. This cause has now been heard on demurrer to the amended bill. The bill states many things not material or pertinent to the case actually made, and many conclusions of law, without the facts leading to such conclusions. As it is, however, it shows in substance that the orators are severally holders, to a large amount in all, of the first-mortgage bonds of the Vermont Central Railroad; that the trustees of the mortgaged estate for the bondholders have been in possession of the property for a long time, and received therefrom money applicable to the bonds, and have not paid it over to the bondholders, but have diverted it to their own private uses, or otherwise, and have, in alleged violation of their trust, turned over the property to the Central Vermont Railroad Company, of which the trustees are leading officers and stockholders, and which has also received money therefrom applicable to the bonds and not paid over, whereby the trustees have become hostile in interest to the bondholders. The trustees, the Central Vermont Railroad Company, and the officers of that company actively engaged in the management of the property, are all made defendants.

The principal questions raised by the demurrer and not before disposed of in this litigation, either in this case or some other, are whether the orators can properly unite in bringing and maintaining this bill; whether they show any right to relief without showing that they were owners of the bonds at the time when the avails of the property applicable to the bonds accrued; and whether the bill shows any sufficient ground for relief.

It is doubtless true, as has been now argued and before held in this case, that when money applicable to the payment of the bonds has come to the hands of the trustees for the bondholders, each holder at that time became immediately entitled to the share of the money applicable to his bond, and could immediately recover the same to himself. If nothing was involved but the recovery from the trustees of such money, the right of each bondholder to the share of the money belonging to him would be several, and exclusive of the other

bondholders, and the suits would necessarily be separate, and probably would be required to be at law and not in equity. As this bill stands, the money accruing to the bondholders has not for a long time been paid over to the bondholders, but has remained in the hands of the trustees, unaccounted for to the bondholders and belonging to the body of them, as security for the bonds, which are the original debt of another party. The mortgaged property itself is also involved, in which all the bondholders have a common interest, and to which neither has any separate right exclusive of the others.

The question whether the trustees, or those who have received the trust property from the trustees, are chargeable for it, or its avails, and to what extent as to either or both, is or may be involved; and in that all the bondholders have common concern, and upon familiar principles of equity procedure not only properly can, but ought to, join in proceedings for the prosecution and protection of their common rights.

So far as reaching the avails of the property in money which has come to the hands of the trustees is concerned, if the action was at law, where judgment could only be recovered for a certain sum, in which all the plaintiffs shall have a common right, the orators could not recover upon the case made, for the bill does not show that they all were holders of bonds for any one space of time, so that all would have a common right to any of the money. But proceedings in equity are much more flexible and capable of being adapted to the exigencies of the case, and when all the rights are adjusted the particular rights of each can be decreed to them as they may appear entitled to them.

The question whether the bondholders, who have acquired their bonds since money in the hands of the trustees applicable to the bonds accrued, are entitled to share in that money, depends upon the nature of the right, and of the transaction by which they acquired the bonds. The bonds are the debt of the Vermont Central Railroad Company, and not of the trustees. The property in the hands of the trustees was there for security of the debt, and all avails of it which came to their hands came there for the same purpose. It was all security for, and incident to, the debt, which was the principal thing. The principal draws to itself the accessories. This is very applicable to secured debts. When the debts pass, the securities pass also, unless some contrary intention of the parties to the transaction is shown. No contrary intention appears here. The holders of these bonds are therefore, so far as is now apparent, at least, entitled to all the

money in the hands of the trustees or other parties belonging to their bonds, whenever it accrued. Therefore, the time when the orators acquired their bonds is not so material as was supposed and held in the decision upon the former demurrer. The bill now shows that there has accrued a large amount of money applicable and not applied to the bonds, after satisfying prior liens. So it shows good ground for relief in favor of the holders of bonds against those who have the money. The bill also shows sufficient ground for the removal of the trustees to call for an answer in that behalf.

The circuit justice concurs in this opinion.

The demurrer is overruled; the defendants to answer over by the September rule-day.

REBER, Assignee, etc., v. GUNDY.

(*District Court, W. D. Pennsylvania.* May Term, 1882.)

1. JUDGMENT BY CONFESSION—COLLATERAL INPEACHMENT.

   A judgment to secure the purchase money of real estate consisting of three pieces of land, entered upon a warrant to confess judgment, given about one month after the delivery to the bankrupt of a deed for one of the pieces, but simultaneously with the delivery to him of the deeds for the other two pieces, cannot be impeached, either in whole or part, as an unlawful preference by the assignee in bankruptcy to whom the real estate passed, it appearing that it was substantially one transaction, consummated when the two latter deeds were delivered and the warrant to confess the judgment was given.

2. EXECUTORS—JOINT LIABILITY.

   When two executors settled a joint account, charging themselves jointly with all the assets of the estate and exhibiting a general balance in their hands, but, by a statement appended to the account, it appeared (as the fact was) that they had actually received the assets and held the proceeds individually in stated proportions, *held*, that while jointly liable to the legatees for the general balance, they were not joint debtors *inter se*, and one of them having paid the legatees more than his individual proportion, was entitled to be subrogated to the lien against the real estate of the other, which the legatees had acquired by docketing the general balance.

3. BANKRUPTCY—JUDGMENT BY CONFESSION.

   A confessed judgment for a debt already fully secured by a prior valid lien against the bankrupt's real estate, to which the judgment creditor had the equitable right of subrogation, is not impeachable as a fraudulent preference under the bankrupt law, for it takes nothing from the general creditors and impairs not the value of the bankrupt's estate.

In Equity.

J. Merrill Linn, *Andrew A. Leiser*, and *Chas. S. Wolff*, for complainants.

Andrew H. Dill, *Alfred Hays*, and *Kennedy & Doty*, for respondents.

ACHESON, D. J. This case arises upon a bill in equity filed by John Reber, assignee in bankruptcy of Charles Penny, to set aside a judgment of the court of common pleas of Union county, Pennsylvania, for $5,000 in favor of John A. Gundy, the defendant in the bill, entered against the bankrupt by confession on March 13, 1878, upon a warrant of attorney dated and given March 11, 1871, within two months of the adjudication in bankruptcy. The bill charges that the judgment "was in part without any consideration, and as to the balance was for a past and antecedent consideration," and alleges it to be a fraudulent and void preference under the bankrupt law.

From the evidence the following facts appear:

The brothers, Thomas and Alexander Penny, were equal owners in common of several pieces of land in Union county. Thomas made his will July 22, 1868, constituting his brother Charles (the bankrupt) executor thereof. He directed his executor to sell his real estate, and bequeathed the proceeds. He soon died, and Charles entered upon his trust. Alexander made his will February 2, 1872, constituting as executors thereof the bankrupt and John A. Gundy, the present defendant. Alexander's will was proved, and letters testamentary issued to the executors named therein, November 16, 1874. His will directs his executors to sell his real estate, and the proceeds are bequeathed to certain named legatees.

In the fall of 1876 Charles Penny and John A. Gundy, as executors of Alexander Penny, and Charles, as executor of Thomas Penny, united in the sale of the several pieces of real estate of which their testators had died jointly seized. Tract No. 3 was sold to Thomas Church for $6,166.63, or $3,058.31 for each estate; tract No. 4 to D. D. Meyer for $2,137.50, or $1,068.75 for each estate; and tract No. 5 to D. D. Meyer for $420, or $210 for each estate. It subsequently transpired (although Gundy was then ignorant of the fact, and did not learn it until long afterwards) that Church and Meyer purchased, not for themselves, but for Charles Penny. The prices, however, seem to have been fair, and all parties in interest have acquiesced in Charles' purchase. The land passed to his assignee in bankruptcy, who, under an order of court, sold it discharged of liens, and holds the proceeds for distribution among the creditors of the bankrupt.

On the twenty-first of April, 1877, Charles Penny and John A. Gundy, as executors of Alexander Penny, deceased, joined in settling an account of their trust, charging themselves jointly with all the assets, including the testator's share of the purchase money, of tracts 3, 4, and 5. The account shows "a balance in the hands of the accountants" of $9,097.02. But at the foot of the debit side is appended a statement showing that the "total amount received by J. A. Gundy" was $3,346.61 only. And at the foot of the credit side of the account is the following statement:

"Out of the above amount J. A. Gundy paid out as follows:

Amount receipted for as filed, including register's fees and collateral tax, - - - - - - -	$ 712 87½
Amount not receipted for, charges, etc., - - - -	139 90
Total amount paid out by J. A. Gundy, - - - -	$ 852 77½
Balance in hands of J. A Gundy, - - - - -	2,493 83½
	$3,346 61"

This account was confirmed absolutely by the orphans' court of Union county, on May 26, 1877, and subsequently the court directed distribution of the balance in the hands of the accountants among the legatees. The statements from the account above referred to are shown to be truthful, and it also appears that Gundy at no time received any further assets of the estate, and that no part of the purchase money of the tracts 3, 4, and 5 ever came to his hands.

On November 26, 1877, a certified transcript from the orphans' court showing a balance of $9,097.02 to be in the hands of the accountants, and due from them jointly to the estate of Alexander Penny, was filed in the court of common pleas of Union county, and docketed as a lien against their real estate. Charles Penny was then the owner of other real estate,—besides said tracts 3, 4, and 5,—which passed to his assignee in bankruptcy. No deed for tract No. 3 was made until February 14, 1878, when the executors executed and acknowledged a deed to Thomas Church, who, on the same day, executed and acknowledged a deed therefor to Charles Penny. The deeds for tracts Nos. 4 and 5 were not made until March 11, 1878, when the executors executed deeds therefor to D. D. Moyer, and he executed deeds to Charles Penny. On the same day (March 11, 1878) Charles Penny executed and delivered to John A. Gundy the warrant of attorney for the confession of the judgment, which is the subject of the present controversy. Prior to that date Gundy had paid to the legatees of Alexander Penny, of the balance due them under the executors' account and order of distribution, over $5,000, and he was liable to them for whatever then remained unpaid. At the time he received the warrant of attorney he gave Charles Penny the following written agreement:

"In consideration of a judgment bond for $5,000, dated March 11, A. D. 1878, executed in favor of J. A. Gundy by Charles Penny, I hereby agree to enter on record the following papers, viz.:

Release of	Eliza G. Gundy	for A. Penny's	legacy.
"	James B. Stewart	" "	"
"	"	" T. Penny's	"
"	"	" J. E. Penny's	"
"	A. B. Fowler	" A. Penny's	"
"	T. P. Fowler	" "	"
"	A. M. Harter	" "	"
"	Mary Burd	" "	"
"	W. L. Gundy and wife	"	"

—And to deliver to said Charles Penny a bond of indemnity for the amount of Eliza G. Gundy's legacy from T. Penny's estate; and also, within 60 days from date, either procure the following releases, or deposit, either in banks or with a justice of the peace, the amounts due them as below:

F. N. Penny,	interest due from A. Penny's legacy, -	$239 24
F. A. Davidson and wife,	" " " " -	314 65
James Sweeney, amount of A. Penny's legacy, - - -		364 65
M. J. Housel, balance due " " - - -		53 71
J. E. Penny, balance on T. and A. Penny's legacy, - -		7 78

—And also pay the following claims:

"W. B. Shaffer, auditor's fee for A. Penny's estate, $25; other costs of audit on account of Alexander Penny's estate, except $2 to Charles Penny and $2 to J. A. Gundy, amounting to $12; T. P. Wagner, and prothonotary costs, (four cases,) $25.30; and the sum of $13 to any parties the said Charles Penny may direct.

"In witness whereof I have hereunto set my hand this eleventh day of March, A. D. 1878. J. A. GUNDY."

There is nothing in the evidence tending to show bad faith on the part of John A. Gundy in any of the above transactions. He seems to have been somewhat careless of his own interests, and too confiding in his co-executor, but he has held fast his integrity, and certainly, outside of the bankrupt law, there is no ground for impeaching his judgment. With a trivial exception it represents moneys which the bankrupt should have paid, but which Gundy had either paid or was liable to pay for him.

In his answer to the bill the defendant denies that he knew or had reasonable cause to believe, at the time when he received the warrant to confess the judgment, that the bankrupt was insolvent, or knew that it was given in fraud or to defeat the provisions of the bankrupt law. And were this the turning point of the case, I might, under the pleadings and evidence, well pause before adopting the conclusion that the defendant had such knowledge as under the bankrupt law would avoid a security. *Grant* v. *Nat. Bank*, 97 U. S. 80.

But if such knowledge be assumed, it by no means follows that the defendant's judgment is impeachable by the assignee in bankruptcy. Nothing surely is better settled than the doctrine that such assignee takes title subject to all equities which existed against the property in the hands of the bankrupt. *Gibson* v. *Warden*, 14 Wall. 248; *Yeatman* v. *Savings Inst.* 95 U. S. 764. Now, the judgment in question, in the bulk, represents—and the parol evidence evinces that the parties thereto intended it should stand for—the purchase money of the real estate of the decedent, (Alexander Penny,) which the bankrupt had bought through Church and Moyer. So long as John A. Gundy, as executor, retained the legal title to that real estate, he had an ample security for the purchase money, available as well to the legatees as to himself. It would seem, however, that on February 14, 1878, he parted with this security so far as concerned the

tract (No. 3) sold nominally to Church; but the whole transaction touching the real estate was not closed until the execution of the conveyances by the defendant to Moyer, and by the latter to the bankrupt on March 11, 1878, presumptively at the same time when the warrant to confess judgment was delivered to the defendant. The case, then, is this: At the conclusion of the real estate transaction, the bankrupt, by means of the defendant's deeds for the tracts knocked down to Moyer, completes his title to Alexander Penny's real estate, and simultaneously gives his warrant of attorney to confess judgment in favor of the defendant,—a judgment which unquestionably was available as a security to such of the unpaid legatees of Alexander Penny as are named in the defendant's written agreement already quoted at large. The assignee in bankruptcy succeeds to this real estate, converts it into money, and proposes to hold on to the proceeds, and yet asks the court to strike down the judgment. If there is any equity in this demand I confess it is not apparent to me.

But, furthermore, I think the defendant takes an impregnable position when he claims that he was invested with the equitable right of subrogation to the assured lien which the legatees have acquired against the real estate of the bankrupt by the filing and docketing in the court of common pleas of the transcript from the orphans' court, and shows that the confessed judgment in the main represents and secures the same debt. Why may it not well stand as a valid cumulative security to the defendant, as claimed by him? Clearly, in so far as it is a mere cumulative security, the confessed judgment contravenes no provision of the bankrupt law, for it takes nothing from the creditors, and impairs not the value of the bankrupt's estate. *Sawyer* v. *Turpin*, 91 U. S. 114; *Stewart* v. *Platt*, 101 U. S. 731.

But the defendant's right of subrogation is stoutly denied, and the plaintiff produces authorities to show that, as between principal and debtor jointly liable, there can be no subrogation. *Mehaffy* v. *Share*, 2 Pen. & W. 361; *Griener's Appeal*, 2 Watts, 414; *Singizer's Appeal*, 28 Pa. St. 524. But *Watson's Appeal*, 90 Pa. St. 426, proves that the above proposition is not universally true. There it was held that joint obligors in bonds secured by mortgage are entitled, as against each other, to subrogation. And in *Lidderdale* v. *Robinson*, 12 Wheat. 594, it was decided that the principle of substitution is not confined to cases arising between surety and principal, but applies as between co-sureties. Hence, one of two joint sureties, having paid the whole debt, has been permitted to enter judgment on their obligation in the

name of the creditor, and have execution therein against his co-sureties for his proportion. *Wright* v. *Grover & Baker S. M. Co.* 82 Pa. St. 80.

Charles Penny and John A. Gundy, however, did not stand simply in the relation of joint debtors. Doubtless they had become jointly liable to the legatees for the entire balance of $9,097.02, but as between themselves they were jointly liable. Their account upon its face showed that of this balance but $2,493.82 had actually come into Gundy's hands, and that Charles Penny was personally answerable for $6,603.19. These sums were the measure of their liability *inter se*. Of the balance due the legatees, Charles Penny, in good conscience, was bound to pay the last-mentioned sum, and to indemnify Gundy from liability therefor. Unquestionably, as between the executors, Penny was under a superior obligation to pay that amount. Why, then, was not Gundy entitled to subrogation in respect to the lien entered in the common pleas upon the certificate from the orphans' court? It is true, he did not stand strictly in the relation of a surety to Penny, but for the purposes of a subrogation he had the equitable right of a surety. *Gearhart* v. *Jordan*, 11 Pa. St. 325.

"The familiar doctrine of subrogation," says Mr. Justice Strong, in *McCormick's Adm'r* v. *Irwin*, 35 Pa. St. 117, "is that when one has been compelled to pay a debt which ought to have been paid by another, he is entitled to a cession of all the remedies which the creditor possessed against that other. To the creditor both may have been equally liable; but if, as between themselves, there is a superior obligation resting on one to pay the debt, the other, after paying it, may use the creditor's security to obtain reimbursement." It was therefore held in *Scott's Appeal*, 88 Pa. St. 173, that a partner who goes out of a partnership, and for a valuable consideration is indemnified by his partners against all debts of the firm, is entitled to subrogation to a judgment obtained against the firm and paid by him, for which, under the agreement of indemnity, he was not liable as between himself and partners.

The assignee, whose position is simply that of the bankrupt himself, has no countervailing equities to defeat the defendant's right of subrogation. The legatees have either been paid or are secured, and they do not gainsay the defendant's equitable right. I do not see that he has done anything to mislead other creditors, or of which they have any just reason to complain. Nor can laches fairly be imputed to him. It was, indeed, urged at the argument that he had not fully complied with the terms of his agreement of March 11,

1878. But to this suggestion there are several answers. Nothing of the kind is alleged in the bill, and the evidence was not directed to the inquiry whether the defendant was thus in default, and the facts in this regard are not sufficiently clear. But if in default, it is not shown that the bankrupt or his estate has sustained any injury thereby; and, finally, the appropriate remedy for such injury is an action at law.

Upon the whole I have reached the conclusion that the substantial justice of the case is with the defendant, and that the plaintiff has failed to establish any ground for equitable relief. This court, sitting in bankruptcy, will, of course, see to it that the defendant makes no inequitable use of his cumulative securities.

Let a decree be drawn dismissing the plaintiff's bill, with costs, to be paid out of the bankrupt's estate.

ROGERS v. MARSHALL and others.

(Circuit Court, D. Colorado. 1882.)

1. ATTORNEY AND CLIENT—PURCHASE OF PROPERTY IN LITIGATION.
   An attorney at law cannot purchase from his client the subject-matter of litigation in which he is employed and acting, if, as a part of his negotiations for the purchase, he advises his client as to the probable outcome of the litigation, and its effect upon the value of the property he is seeking to purchase.
2. PLEADING—ALLEGATIONS—TO BE PROVED.
   In cases where the answer neither admits nor denies some of the material allegations of the bill, they must be proved upon the final hearing.
3. REHEARING—APPLICATION, WHEN DENIED.
   An application for a rehearing, upon the ground of newly-discovered evidence, where the affidavits filed in support of the motion show that the newly-discovered evidence is merely cumulative, will be denied.

Luther S. Dixon and *W. B. Felker*, for complainant.

John F. Dillon, J. B. Henderson, Geo. W. Kretzinger, and *N. A. Cowdrey*, for respondents.

MCCRARY, C. J. This important case has been exhaustively reargued by eminent counsel upon a petition for rehearing, based (1) upon the record as it stood at the former hearing, and (2) upon alleged newly-discovered evidence. The questions raised, some of them now for the first time, have been carefully considered, and the conclusions reached are as follows;

1. On the former hearing it was held, as will be seen by the opinion then announced, that an attorney at law cannot purchase from his client the subject-matter of litigation in which he is employed and acting, if, as a part of his negotiations for the purchase, he advises his client as to the probable outcome of the litigation, and its effect upon the value of the property he is seeking to purchase. Counsel for respondents, both upon the former hearing and upon the reargument, have insisted that such is not the law, and that if under such circumstances the attorney can show that he gave honest and sound advice concerning the pending litigation, and otherwise discharged the duties imposed upon him by fully disclosing all his knowledge of the value, etc., the sale is valid. There are certainly some respectable authorities holding that a purchase by an attorney from his client of the subject-matter of the litigation *pendente lite* is void not only for champerty, but also on grounds of public policy. *West* v. *Raymond*, 21 Ind. 305; 4 Kent, Comm. (10th Ed.) 530; *Simpson* v. *Lamb*, 17 Com. B. 306; *Hall* v. *Hallett*, 1 Cox. 134; *Wood* v. *Downes*, 18 Ves. 120. I will assume, however, (without deciding,) that the rule is the other way, and that an attorney may purchase from his client the subject-matter of the suit in which he is employed and acting, provided before the negotiations are opened the relation of attorney and client is ended, or at least for the time being suspended, and the client placed in a position to deal with the attorney upon terms of perfect equality. It may be conceded that such is the rule, and still the doctrine heretofore announced in this case may be perfectly sound.

According to all the authorities, it is, at all events, clear that in order to uphold such a transaction the client must be placed in a position such as to enable him to deal with the attorney at arm's length, and upon terms of perfect equality. The relation of attorney and client must be, so far as the transaction of purchase and sale is concerned, dissolved and ended. In that transaction the attorney cannot act as such. If it becomes necessary or desirable for the client to be advised as to the nature of the pending litigation, and the danger to his title to be apprehended therefrom, as a means of determining the question of selling or of fixing the price, the attorney must decline to give him advice upon those points, and the client must employ other counsel, or act upon his own judgment. There is a plain and necessary distinction between the right of the attorney under such circumstances to give the client information touching the value of the property in the market, and his right to advise him upon

the legal questions involved in the pending litigation. As to the former he and his client may be equally well advised, and when they are so advised they may stand on an equality and at arm's length; but as to the latter this is not so. The questions of law presented by a litigation in which the attorney has been employed are matters within his peculiar knowledge; he deals with them as an expert; they are frequently questions of a technical, and always a professional, character. They are often questions which go to the very root and marrow of the inquiry which the seller must make in determining the price at which he will sell. This is well illustrated by the present case, since it appears that Marshall, the attorney, was defending for the complainant and others certain suits involving the validity of her title, and which, if decided adversely to her, would have destroyed every vestige of her property in the mine. It follows, therefore, that to decide the question whether these suits were well grounded, or whether there was danger of a decision therein adverse to complainant, was to decide upon the question of the value of complainant's interest. To allow Marshall to advise her or her agent upon this question was to enable him to influence materially the fixing of the value of the property while negotiating for its purchase. The law will not permit an attorney to deal with his client in this way. Such dealing is manifestly against the policy of the law—as much so as a purchase by a guardian from his ward, or that of a trustee from his *cestui que trust*. Such transactions are not held to be void upon the ground of intentional fraud, or proven bad faith, but because the relations of the parties are such that the one may make use of his position of power and influence over the other, or of his superior knowledge derived while in the employment of the other, to take an unfair advantage of him. The law, upon grounds of high public policy, seeks to destroy the temptation to abuse such opportunities, and therefore does not inquire whether the transaction was fraudulent or not. In such a case the attorney, by continuing to advise the client about the pending litigation, while at the same time negotiating for the purchase of the property in controversy in such litigation, confounds his position as attorney with that of purchaser, and, however honest he may be, the purchase is not permitted in any case.

"The general interests of justice requiring it to be destroyed in every instance, and no court is equal to the examination and ascertainment of the truth in much the greater number of cases." *Hawley* v. *Cramer*, 4 Cow. 737.

"Where fidelity is required, the law prohibits everything which presents a temptation to betray the trust. The orison which deprecates temptation is the offspring of infinite wisdom, and the rule of law in accordance with it rests upon most substantial foundations." *Henry* v. *Raiman*, 25 Pa. St. 359.

"Where the law creates fiduciary relations it seeks to prevent the abuse of confidence by insuring the disinterestedness of its agents. It holds the relations of judge and party, of buyer and seller, to be entirely inconsistent. The temptation to the abuse of power for selfish purposes is so great that nothing less than incapacity is effectual, and thus a disqualification is wrought by the mere necessity of the case. Fullness of price, absence of fraud, and fairness of purchase are not sufficient to countervail this rule of policy. To give it effect it is necessary to recognize a right in the former owner to set the sale aside in all cases on repayment of the money advanced." *Armstrong* v. *Huston's Heirs*, 8 Ohio, 554.

Upon this branch of the case, after full reconsideration of the question, I am constrained to adhere to the rule announced upon the former hearing.

2. It is insisted that the relation of attorney and client did not in fact exist between the complainant and Marshall at the time of the sale. The proof shows, to my entire satisfaction, that the relation did exist at that time. Without recapitulating the evidence upon this point, it is sufficient to say that, in my judgment, it clearly shows that Marshall was employed by the persons known as the "Colorado Springs parties," of which complainant was one. These persons were joint owners of the same interest in the mine. Nothing was more natural than that the same counsel should be retained for all. The record shows that Marshall appeared for the complainant as well as for the others. That complainant was aware of this arrangement and acquiesced in it is abundantly shown, and nothing more was necessary to constitute the relation of attorney and client. I think it is also clear that, while other attorneys were consulted, Marshall, who resided at Leadville, where the mine is situated, was chiefly relied upon. I am also satisfied that the attorney's fees were to be paid, and were paid, out of the proceeds of the mine. The original evidence tends to show this, and if it were not so it would have been distinctly denied by some or all of the respondents. Add to these considerations the fact that the relation is distinctly admitted by all the respondents in their amended answer, and I think the fact must be regarded as settled. It is true that the suits against the complainant and others had, at the time of the sale, been suspended with the understanding that, in case of a compromise, they should be dis-

missed; but they had not been dismissed, and it was well understood that if the settlement was not accomplished the suits must go on. So that the relation of attorney and client existed in full vigor. If complainant did not sell, she had to contemplate a continuance of the litigation as, at least, possible. The questions involved in the litigation, in case it did go on, were of the gravest importance to her, and it was upon the nature and character of those questions, and the danger to be apprehended from an adverse decision of them, that the advice of Marshall was sought and obtained upon her behalf as a part of the negotiations for the sale.

3. It is insisted that complainant has not shown that she ever had a valid title to a share in the mine, or that the respondent, the Robert E. Lee Mining Company, bases its claim of title upon the conveyance executed by her to Marshall. This is a very material question in the case, and it is now for the first time presented. It has been heretofore assumed that the complainant was the owner, in equity at least, of the undivided one-third of the mine at the time of her sale and conveyance to Marshall. The title to the mine is now in the respondent, the Robert E. Lee Mining Company, conveyance to that company having been made some time after the purchase by Marshall. If that company is a subsequent purchaser, with notice of the rights of the complainant, it may be charged as trustee for complainant to the extent only of the interest which she had, and which the company had acquired. But if the complainant had no title, and the company acquired nothing by virtue of her conveyance to Marshall, she cannot, of course, subject to her use any title it derived from another source. It is now said that complainant held under an option bond; that all her rights under said bond had been forfeited; that she had no title; and that the company derived a perfectly good title from the patentee. If so, the fact may be shown; and if shown, the complainant cannot recover as against the company. Further consideration of this defense will be reserved until proof applicable to it has been produced and the parties are heard thereon.

4. It is insisted that the respondent, the Robert E. Lee Mining Company, is a *bona fide* purchaser for value and without notice. Upon the consideration of this part of the defense some very important questions may arise respecting the rights of the corporation, and as to how far and under what circumstances notice to the incorporators, stockholders, or directors will constitute notice to the corporation. The further consideration and final determination of these questions may well be postponed until the final hearing.

5. It is insisted that complainant should be denied relief on the ground of laches. As at present advised, I should be inclined to hold that the complainant's delay in bringing suit, and her failure promptly upon discovering the fraud to give notice of her purpose to rescind the contract of sale, are fatal to her right of recovery, at least as against the respondents who are not named in the original bill. I shall, however, reserve the determination of this question until the final hearing.

6. Some of the material allegations of the bill are not denied by the answer, and the question is made whether such allegations stand admitted or must be proved. Upon re-examination of the authorities I have reached the conclusion that in cases where the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing. *Young* v. *Grundy*, 6 Cranch, 51; *Brown* v. *Pierce*, 7 Wall. 211; *Brooks* v. *Byam*, 1 Story, 297.

7. It is insisted that the complainant has not shown that Marshall secretly purchased on behalf of Howbert and his associates. The conclusion reached upon the former hearing, that Howbert, Sigafus, Crowell, and Humphrey were secretly interested in the purchase made by Marshall, was based partly upon the pleadings, and the failure of the respondents distinctly to deny the allegations of the bill upon this subject, and partly upon the evidence and the facts and circumstances which, in the judgment of the court, clearly pointed to this conclusion. Leaving out of view any consideration of the pleadings in the case, I am still inclined to adhere to the conclusion originally announced. As, however, it may not be entirely clear that all of the defendants here named were advised of Marshall's intended purchase, and promised an interest therein before it was consummated, I am disposed to leave this question open for further consideration upon the final hearing.

8. The application for rehearing upon the ground of newly-discovered evidence is next to be considered. The affidavits filed in support of this application show that the newly-discovered evidence is directed mainly, if not wholly, to the following questions: (1) What was the actual value of the complainant's interest in the mine at the time of her sale to Marshall? (2) Was there actual fraud or concealment practiced by Marshall in making said sale? (3) Did the relation of attorney and client exist between complainant and Marshall at that time? Upon all of these points the proposed testimony, even if newly discovered and material, is only cumulative. These points were fully litigated upon the former hearing, and accord-

ing to the well-settled rule in such cases they cannot now be reopened for further consideration. The objection to the admission of the alleged newly-discovered evidence, on the ground that it consists of the testimony of witnesses who have been once examined, is also well taken. A court of equity cannot afford to establish a precedent which will allow the defeated party, after discovering where the cause pinches, to look out witnesses to bolster up the faulty parts of his cause. To allow this would be to make litigation practically interminable, and would also lead to perjury. *Ruggles* v. *Eddy*, 11 Blatchf. 524; *Page* v. *Tel. Co.* 18 Blatchf. 118; *Jones* v. *Purefoy*, 1 Vernon, 45; *Finley* v. *Tyler*, 3 T. B. Mon. 400; *Brewer* v. *Bowman*, 3 J. J. Marsh. 492.

The application for rehearing upon the questions above stated, on the ground of newly-discovered evidence, is overruled.

The result of the foregoing views is that the interlocutory decree heretofore rendered must be set aside, and that the case must be considered as reopened for further hearing upon the following questions only:

(1) Whether the complainant must fail in this action upon the ground that she had no title to the one-third interest in the mine which she sold and conveyed to Marshall. (2) Whether the respondent, the Robert E. Lee Mining Company, is, as against the complainant, an innocent purchaser for value and without notice. (3) Whether the complainant must fail in this action upon the ground of laches.

The respondents may amend their answer on or before the September rules, by making any allegations proper to put in issue the matters of defense above stated, and the complainant may reply *instanter*, or under the rules. Both parties are at liberty to take further testimony upon the points here indicated.

DUFF, Assignee, etc., *v.* FIRST NAT. BANK OF WELLSVILLE, OHIO, and others.

(Circuit Court, W. D. Pennsylvania. August 5, 1882.)

1. PLEADING—MULTIFARIOUSNESS.

Where the purpose of the bill and the alleged foundation for relief are not so distinct in their nature as to make their joinder in one bill objectionable, but are intimately related as parts of a fraudulent scheme, and the bill so connects the defendants as to make them proper joint defendants, the bill is not multifarious.

2. JURISDICTION—NATIONAL BANKS.
   Where service upon the defendant, a national bank, located and doing business in another state, was made under an order of court pursuant to the act of March 3, 1875, in a suit to relieve the bankrupts' real estate, situated in this district, from the lien of certain judgments, and to remove a cloud upon the title, the bank is an "absent defendant," within the purview of that act, and jurisdiction attaches.

3. EQUITY—ADEQUATE REMEDY AT LAW.
   Where some of the matters charged in the bill are peculiarly of equitable cognizance, while allegations of fraud pervade every part of it, the case is one for equitable relief.

4. LIMITATIONS—IN BANKRUPTCY CASES.
   Where the foundation of the bill is fraud of a nature to conceal itself, and the fraudulent scheme charged is continuous, and now actively on foot, in a suit brought by the present assignee of the bankrupts, within two years after his appointment, an averment of the absence of knowledge of the fraud by the former assignee in bankruptcy is sufficient to avoid the bar of the statute of limitations.

In Equity.

Sur demurrers to the bill of complaint.

Brown & Lambie, for demurrers.

Levi Bird Duff, contra.

ACHESON, D. J. The grounds of demurrer may be reduced to four heads:

1. That the bill is multifarious. But in view of the purpose of the bill, and the alleged foundation for the relief sought, I think the matters charged are not so distinct and separate in their nature as to make their joinder in one bill objectionable. As set forth, they are intimately related as parts of a fraudulent scheme. So, too, the bill —especially in view of the agreement embodied in Exhibit A, and the allegations touching it—so connects the defendants together as to make them proper joint defendants.

2. That the First National Bank of Wellsville, Ohio, being located and doing business in the state of Ohio, is without the jurisdiction of the court. The service upon the bank was made under an order of court pursuant to the act of congress of March 3, 1875. The suit is to relieve the bankrupts' real estate, situate in this district, from the lien of certain judgments, and to remove a cloud upon the title, and I think the bank is an "absent defendant," within the purview of that act. Moreover, the bank is the plaintiff in the judgments of this court alleged to be fraudulent, and which the bill seeks to have declared null and void, or set aside. As respects said property and judgments, the jurisdiction of this court over the bank is, I think, clear.

3. That the plaintiff has a full, complete, and adequate remedy at law. But I do not think this objection well taken. Some of the matters charged in the bill are peculiarly of equitable cognizance, while allegations of *fraud* pervade every part of the bill. That the case is one for equitable relief is clear. The extent of that relief is, of course, not now to be determined.

4. The statute of limitations. Section 5057, Rev. St.

In *Bailey* v. *Glover*, 21 Wall. 342, Justice Miller says:

"In construing this statute, passed by the congress of the United States as part of the law of bankruptcy, we hold that where there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him." Id. 349, 350.

In the present case, the foundation of the bill is fraud of a nature to conceal itself; fraud originally in the judgments obtained before the bankruptcy, and fraud actively practiced in the revival of those judgments, and the use made of them since the bankruptcy. The bill charges continuous and existing collusion between one of the bankrupts and the plaintiffs in the judgments, and other of the defendants, to cheat and defraud the creditors of the bankrupts by the use made and to be made of the fraudulent judgments. If the allegations of the bill are true—and under the demurrers they must be so taken—the fraudulent scheme charged in the bill is now actively on foot.

This suit was brought by the present assignee within two years after his appointment, and in view of the secret character of the fraud alleged, I think the bill sufficiently avers the absence of knowledge thereof by Richard Arthurs, the former assignee in bankruptcy.

And now, August 5, 1882, the demurrers are overruled, and leave is granted to the defendants to answer the bill within 30 days.

NOTE. This section applies to actions and suits generally. *Archer* v. *Duval*, 1 Fla. 219; *Harris* v. *Collins*, 13 Ala. 388; *Paulding* v. *Lee*, 20 Ala. 753. The limitation is applicable to an action brought by the assignee to collect debts owing to the bankrupt (*Doty* v. *Johnson*, 6 FED. REP. 481) or due to the estate, (*Walker* v. *Towner*, 4 Dill. 165; *Lathrop* v. *Drake*, 91 U. S. 566; *Claflin* v. *Houseman*, 93 U. S. 130;) but that it does not apply to ordinary debts due the bankrupt prior to the adjudication, see *Sedgwick* v. *Casey*, 4 Bank. Reg. 497; *Smith* v. *Crawford*, 9 Bank. Reg. 38; *Bachman* v. *Packard*, 7 Bank. Reg. 353. As to the general policy of the bankrupt act, to make a speedy settlement of the estate, see *Mitchell* v. *Great Works Co.* 2 Story, 659;

Norton v. *De La Villebeuve*, 1 Woods, 168. The limitation of the statute applies to all claims (*Geisreiter* v. *Sevier*, 33 Ark. 522; *Norton* v. *De La Villebeuve*, 1 Woods, 163) and suits by the assignee to collect the debts and assets of the estate, as well as to recover specific property, (*Payson* v. *Coffin*, 4 Dill. 386; *Comegys* v. *McCord*, 11 Ala. 932;) as a suit to recover money paid as counsel fees by persons acting without authority, (*Millenberger* v. *Phillips*, 2 Woods, 115;) or by the assignee of a bankrupt corporation against stockholders to enforce the payment of their unpaid shares, (*Payson* v. *Coffin*, 5 Dill. 475; *Walker* v. *Townsend*, 4 Dill. 165; *Foreman* v. *Bigelow*, 18 Bank. Reg. 457;) or a claim for cotton captured by the military forces of the United States, (*Erwin* v. *U. S.* 97 U. S. 392.) This section applies to all judicial contests between the assignee and any persons whose interests are adverse to his, and the only modification is where an action was intended to obtain redress against concealed fraud, (*Smith* v. *Cincinnati, H. & D. R. Co.* 11 FED. REP. 289;) to suits against parties having adverse interests in property, (*Scoville* v. *Shew*, 4 Cliff. 549;) in property held adversely to the bankrupt and his assignee, (*Davis* v. *Anderson*, 6 Bank. Reg. 145;) and it has been held to apply only to cases where there is an adverse interest, (*Union Canal Co.* v. *Woodside*, 11 Pa. St. 176,) before the assignment in bankruptcy, (*In re Conant*, 5 Blatchf. 54.) So, purchasers from an assignee of property, transferable to or vested in him, as such assignee, 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 the assignee's right of action was barred by this section, (*Gifford* v. *Helms*, 98 U. S. 249,) whether the property was obtained from the debtor before he was adjudged bankrupt or from some other owner, (*Knight* v. *Cheney*, 5 Bank. Reg. 305.) This section relates to suits by or against the assignee with respect to parties other than the bankrupt, (*Phelps* v. *McDonald*, 99 U. S. 298,) and applies to an action in the name of the assignee though brought wholly for the benefit of a third person, (*Pike* v. *Lowell*, 32 Me. 245;) but it has no application to a case in his own favor for injury to property, or for a disseizin in lands vested in him by the proceedings, (*Stevens* v. *Hauser*, 39 N. Y. 302; *Tappan* v. *Whittemore*, 18 Am. Law Reg. 191.) A controversy between the assignee and the personal representatives of the bankrupt as to the possession of stock is within this section, as no formal transfer on the books of the companies was necessary to vest the assignee with title, (*In re Staib*, 3 FED. REP. 209;) so proceedings to set aside a foreclosure sale, (*Phelan* v. *O'Brien*, 12 FED. REP. 428,) and a suit to ascertain and establish a lien on a vessel for supplies and repairs, is within this section, (*In re Churchman*, 5 FED. REP. 181.) When the bankruptcy proceedings are void for want of jurisdiction there is no basis for the limitation to rest on. *Adams* v. *Terrell*, 4 FED. REP. 803. An assignee is not precluded from defending against a claim by the wife of the bankrupt for a copyright royalty, on the ground that the copyright was transferred to her by her husband in fraud of creditors, because he did not within two years proceed by suit to recover it. *In re English*, 6 FED. REP. 276.

A proceeding to order a distribution of a fund in the registry is not an action or suit within this section, (*In re Masterson*, 4 Bank. Reg. 553,) nor a proceeding to recover property fraudulently conveyed by one who claims by vir-

tue of a voluntary assignment of the debtor, (*In re Krogman*, 5 Bank. Reg. 116.) A fraudulent conveyance may be set aside at any time within two years of the discovery of the fraud. *Nicholas* v. *Murray*, 5 Sawy. 320. So, when the fraud of the husband came to the knowledge of the wife within two years of filing her petition in bankruptcy, proceeding to claim her rights is not too late. *In re Anderson*, 2 Hughes, 378; *Tyler* v. *Angevine*, 15 Blatchf. 536. If there is a fraudulent concealment, the two years does not begin to run till the discovery of the fraud, (*Pritchard* v. *Chandler*, 2 Curt. 488; *In re Pitts*, 9 FED. REP. 544; *Aiken* v. *Edrington*, 15 Bank. Reg. 271;) but the operation of this section is not avoided by the naked averment of concealed fraud, (*Andrews* v. *Dole*, 11 Bank. Reg. 352.) This section does not apply to proceedings to review a bill in equity. *Wilt* v. *Stickney*, 15 Bank. Reg. 23. The pendency of a suit in chancery between the same parties in the same cause of action, which suit was afterwards dismissed for want of equity, does not interrupt or suspend the prescription provided in this section. *McCan* v. *Conery*, 12 FED. REP. 315. That this section does not preclude an action in the state court by the assignee in a cause which accrued to the bankrupt, was held in *Peiper* v. *Harmer*, 5 Bank. Reg. 252.—[ED.

BACKUS & SONS *v.* START and others.

(*Circuit Court, N. D. Ohio, W. D.* June Term, 1882.)

1. DAMAGES—NEGLIGENCE—BURDEN OF PROOF.

   In an action for the recovery of money advanced for the purchase and storage of merchandise, where a counter-claim is interposed alleging carelessness and negligence on the part of the plaintiff in storing the property, and claiming damages as a set-off to the claim of the plaintiff, the burden of proof is on defendant to show negligence on the part of the plaintiff.

2. SAME—NEGLIGENCE DEFINED.

   Negligence is a failure to do what a reasonably-prudent man would ordinarily do under the circumstances, or in doing what such person under existing circumstances would not have done.

3. SAME—WAREHOUSEMEN—DUTY AND OBLIGATION.

   Warehousemen are not required to provide against an unprecedented emergency; but if they have reason to expect such an emergency, they are bound to take such precautionary measures to prevent loss as prudent and skillful men in the like business and under like circumstances might be expected to use.

4. SAME.

   They are not bound to have or keep on hand special facilities to meet and overcome possible but unexpected and unprecedented emergencies, which are included in what is called the "act of God;" but if imminent danger presents itself, to use such appliances and means as the ordinary and safe conduct of their business requires them to possess, and such as are at hand, and to use them with such promptness as would be expected of ordinarily careful and prudent men in regard to their own, or property entrusted to their care under like circumstances.

Bessel & Gorrill and *Scribner, Hurd & Scribner*, for plaintiffs.

John F. Kumbler and *Kent, Hamilton & Gilcrest*, for defendants.

WELKER, D. J., *(charging jury.)* The plaintiffs, A. L. Backus & Sons, sue George H. Start & Co. to recover the sum of $3,312.93 balance due on account for money advanced to the defendants in the purchase of clover seed for them, with interest thereon; also for commissions on such purchase, and the storage of the seed in their warehouse in the city of Toledo, as set forth in an account attached to the petition, and also interest on such balance from the seventeenth day of June, 1881.

The defendants by way of counter-claim set up in their answers that the plaintiffs were warehousemen, and that during the years 1879 and 1880 had purchased for them as commission merchants a large quantity of clover seed, and prior to and on the twelfth day of February, 1881, had the same in store in their warehouse in the city of Toledo for the defendants for compensation for said storage, and that the plaintiffs were guilty of carelessness and negligence in the keeping and care of the seed, in that it was placed and kept on the lower floor of the warehouse, which was an unsafe and improper place to store it; that said floor was not more than six or seven feet above the Maumee river at its usual stage of water; that on the twelfth day of February, 1881, the water of the river arose and overflowed the said lower story of the warehouse, and wet the seed so as to damage it to a great extent, and by reason of which the defendants were greatly damaged; that for several days before the plaintiffs had knowledge, or ought to have known by diligent inquiry, that there was impending a great and extraordinary flood, and with that knowledge neglected to remove the seed to a place of safety, and by such gross negligence left the seed in such improper place to be overflowed and damaged by the flooding of the river; and that by this gross negligence the seed was damaged to the extent of $8,000, which they ask to recover from the plaintiffs. The plaintiffs deny the allegations of this answer.

The issue, then, for you to determine grows out of this counter-claim of the defendants. In the absence of the establishment of this defense, the plaintiffs are entitled to recover the amount of their account, with interest. The defendants have the burden upon them to establish this defense by a fair preponderance of the proof. They must show that the plaintiffs were guilty of the carelessness and negligence, or some material part thereof, as alleged. The plaintiffs are

not required under this issue to prove that they were not careless or negligent in the care of the seed.

All questions of fact are to be determined by you. But there are several questions of law involved in this case, necessary to be given you by the court, to enable you to properly determine the questions of fact. The defendants seek to recover in their counter-claim damages for the negligence of the plaintiffs, set out in their answer. Negligence is a failure to do what a reasonably-prudent man would ordinarily have done under the circumstances of the situation; or in doing what such person, under existing circumstances, would not have done. The essence of the fault may lie in *omission* or *commission*. Carelessness and negligence are relative terms. What might be negligence under some circumstances, may not be so under other circumstances. Reasonable and ordinary care must have reference to surrounding circumstances at the time demanding such care and attention. Circumstances may often demand a higher or lower degree of care and diligence. Negligence is a question of *law* and of *fact*. The matter of law involves the duty of the party; and the question of fact, what was done by the party. The court settles the former, and it is your duty to determine the latter.

The plaintiffs were warehousemen, and the defendants the owners of the clover seed in controversy, placed in the plaintiffs' warehouse for storage for hire. Certain liabilities and rights legally arise from this relation of the parties. As such warehousemen, the law required the plaintiffs to use and exercise ordinary care in regard to the seed in their custody—such care as a reasonably-prudent man would ordinarily, under the circumstances and in the same employment, exercise in regard to his own property, or property entrusted to his care. The plaintiffs were required to store the seed in a proper and suitable place in their warehouse, such as was usually adopted and provided by warehousemen, and in the manner usual in the warehouse business at the city of Toledo. The plaintiffs were not the insurers of the absolute safety under all circumstances of the property placed in their care. They were not liable for injury to the seed occasioned by the act of God or the public enemy, which could not be prevented by the exercise of ordinary care on their part. A sudden and extraordinary flood in the river is to be regarded by you as "an act of God."

The first question of fact for you to settle is, was the seed stored in the usual way in the warehouse by the plaintiffs before the flood? It is not, I understand, seriously claimed by the defendants that it

was not stored in the usual manner and place, but the carelessness insisted on is, that the plaintiffs did not properly provide for its security and safety against the danger from the flood then pending, and in time to save it from injury therefrom.

It becomes important, then, that you understand the duties and obligations of the plaintiffs with reference to the then-impending flood of the river. The plaintiffs were not required or bound to provide against an unprecedented emergency, such as a greater flood than was ever before known in that locality, unless they had reason to believe that such an emergency was about to arise. They were bound, if they had reason to expect such an emergency, to take such precautionary measures to prevent loss as prudent and skillful men in like business and under like circumstances might be expected to use. If they did this, they did all the law required. If they did less than this, it was negligence. The mere fact that it was apprehended that there would be a general break-up of the river, caused by rains, thaws, and high water, did not of itself give reasonable information that the flood would be extraordinary and unprecedented, and greater than had ever before occurred in the locality, unless the circumstances reasonably and clearly indicated that such would be the result.

In determining whether the plaintiffs had reasonable ground to expect an unprecedented flood, they were not required to possess or exercise greater foresight than prudent and skilled men generally engaged in similar business and under like circumstances. The reasonable ground for belief of an unprecedented flood must be determined by you from the circumstances surrounding the plaintiffs as they appeared then and before the flood. It must not be ascertained and judged of from subsequent events, and after the flood had come.

How did the circumstances appear before the damage occasioned by the flood? The plaintiffs were not bound to have or keep on hand special facilities to meet and overcome possible but unexpected and unprecedented emergencies, which are included in what is called the "act of God," but they were required, if imminent danger presented itself, to use such appliances and means as the ordinary and safe conduct of their business required them to possess, and such as are at hand, and to use them with promptness, such as would be expected of ordinarily careful and prudent men in regard to their own, or property entrusted to their care under like circumstances.

Now, what was reasonable information as to the coming of the flood, and the danger arising therefrom, are matters you are to deter-

mine from the evidence. It is your duty to consider all the circumstances disclosed in the evidence—the knowledge and information of the plaintiffs at the time; their means of knowledge; the evidence before them of sudden danger, or the absence of said evidence of sudden danger; what was said to them by owners of seed in their care, and others; what was the talk of the people of the city interested in the danger brought to their knowledge; what had occurred as to floods, and their extent in years before at general break-ups in the river,—these and all others in the proofs are to be carefully and duly considered, with a view to ascertain whether the plaintiffs had reasonable information as to the extent of the danger from an unprecedented flood, such as did come. The mere fact that some persons may have directed the removal of their seed in plaintiff's care, or that others did not do so, does not change the liability of the plaintiffs as to their general duty to the owners of property in their care, but may be considered, with other circumstances, as to the grounds of apprehension of extraordinary danger, indicating such danger, if such appear in the evidence.

If you find that the plaintiffs, or either member of the firm, read the articles in the newspapers admitted in evidence, at the time of their publication, then, to the extent of the information therein contained, you will regard them as if the contents had been told to them by any person at the time. If, however, the articles were not so read, or if it does not appear that they were so read, then you must not presume such reading by plaintiffs, and they are not to be held as having received such information. The plaintiffs were not required to notify the defendants that there was danger of injury to the seed by the flood. Such notice, or the failure of such notice, would not change the duty of the plaintiffs, or their liability as bailees of the defendants' seed. They were required to act upon the circumstances before them, in the care of the property, without reference to such notice to the defendants. If, after reasonable information of danger, the plaintiffs promptly commenced the removal of the seed from the first to the second floor, and did so as rapidly as reasonably could be done under the circumstances, and the flood came suddenly before all could be so removed, they would not be guilty of negligence as to that part not removed. The mere fact that the removal was commenced on the clover seed of the owners who had notified them to remove at the expense of such owners, to the second floor, does not necessarily make it negligence in the plaintiffs in not removing the defendants' seed before that of the other owners. Nor would such

removal justify the plaintiffs in neglecting the removal of the defendants' seed. As to their seed the plaintiffs were required to be held to the exercise of the care already stated.

If you find that the plaintiffs, under these general directions, were not guilty of negligence as claimed by the defendants, then, on the counter-claim, your verdict should be for the plaintiffs, and you will find the amount due them on their account, with interest to the first day of this term.

If you find the plaintiffs were guilty of negligence in taking care of the seed, as charged by the defendants, then you will assess damages in favor of the defendants to the extent of the loss sustained by them on the seed. This you will do by ascertaining the value of the seed at the time of the injury, and deduct therefrom what was realized by the sale of the wet seed, or any dry seed received by the defendants after the flood, and find the balance.

You will also find what amount is due the plaintiffs, and then deduct that amount from the finding for the defendants, and find a general verdict for the defendants for the difference in the amounts, if there be any such difference.

Mohr & Mohr Distilling Company *v.* Ohio Insurance Company, of Dayton, Ohio.*

(*Circuit Court, S. D. Ohio, W. D.* June, 1882.)

1. Insurance Broker—Agent for Insured or Insurers?—Test.

   If plaintiffs (the insured) employed an insurance broker to place insurance for them, he was *their* agent, and not that of the insurance company. But if, acting on behalf of an agent of the company, the broker solicited insurance from the plaintiffs, he was the agent of the insurance company, and it is legally chargeable with his knowledge.

2. Insurance—What Makes a General Agent in Effecting Insurance.

   When an insurance agent who is assigned by his commission to a certain territory, has placed in his hands the blank policies of the company, signed by the president and secretary, and is on the face of such policies authorized to make contracts of insurance by countersigning the same, he is a general agent to the extent of everything relating to the effecting of insurance within the territorial limits to which he has been assigned; and one seeking insurance is not bound to inquire as to the precise instructions he has received from his company.

3. Unauthorized Issue of Policy—Disavowal by Company.

   Where such an agent, in violation of private instructions given to him, issues a policy covering property in territory outside of his district, the company may

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

either ratify or disavow such a policy; but the disavowal must be prompt, and notice thereof must be brought home to the insured, otherwise the company will be deemed in law to have ratified the policy.

4. CANCELLATION OF INSURANCE POLICY — ONUS PROBANDI — SUFFICIENT EVIDENCE.

The burden of proving a cancellation of a policy of insurance is upon the party claiming that the contract has been terminated. Where a policy provided that the company might terminate the insurance "by giving notice to the assured and refunding a ratable proportion of the premiums for the unexpired term of the policy," *held*, that the company must show that it had given the assured notice that the policy was canceled, and that it had paid, or tendered him, such portion of the premium; and notice that the policy would be canceled, or a promise to pay, or a request to call for the premium, is insufficient.

Runkle v. *Citizens' Ins. Co.* 6 FED. REP. 143, followed.

Moulton, Johnson & Levy and *W. H. Jones*, for plaintiff.

Follett, Hyman & Dawson and *Judge Haynes*, for defendant.

SWING, D. J.; (*charging jury.*) This action is brought by the plaintiff to recover of the defendant on two policies of insurance which it is claimed by the plaintiff were issued by the defendant. The first policy is dated June 14, 1881, for $1,000; the second, September 16, 1881, for $1,500. The petition alleges the payment of the premium; alleges the loss; alleges the notice to the company of the loss; and claims that they, in all respects, complied with the requirements of their contract, and therefore that the defendant is liable to them in the sum of $1,000 and $1,500, or at least the proportion that these sums must bear to the entire loss, taking the other insurance into consideration. That is the claim of the plaintiff by the petition in the case.

To this claim of the plaintiff the defendant interposes but two defenses, substantially. There were three, one of which I shall allude to now—that they had not complied with the laws of Indiana, and therefore had no power to enter into any contract for the insurance of property in Indiana. That has been abandoned by counsel before the jury, so that the only two defenses that remain in the case are—*First*, that the agent who took this risk exceeded his authority in this, that he was appointed as an agent of this company, for the city of Norwalk and vicinity, and this property being in the state of Indiana, he has no power to enter into any contract for the insurance of property in the state of Indiana; in other words, he had no power to enter into a contract for the insurance of property outside of the city of Norwalk and its vicinity. The *second* defense is that the policy contains a clause that if there shall be any misrepresentation in regard to the title, etc., (enumerating a number of things,) the policy

shall be void, and that there was a misrepresentation by the plaintiff in this, to-wit: *First,* that it was represented that the property was owned by a company residing in Cincinnati; and, *second,* it was represented that other insurance companies were taking risks upon this property at 4 per cent. That is another defense in the case. Whatever may have been said outside of the pleadings, that is the defense as made in the case.

Upon the presentation of the contract and the proof of loss, and the compliance upon the part of the plaintiff with the requirements of the policy, the plaintiff is entitled to a verdict at your hands. If that verdict is defeated, it must be by the defendant establishing one or both of the defenses which are set up—*First,* that the agent had no power to issue this policy outside of the territorial limits of the city of Norwalk and its vicinity; and, *second,* that it was misrepresented to them as to the title of the property, and to the extent other insurance companies were placing insurance upon it.

The defendant has introduced testimony in the case upon these points, and the plaintiff has introduced its testimony upon the several points, and it is now wholly with the jury to determine what the testimony has established in the case.

I am asked by the defendant to give you certain instructions in the case. It is claimed by the parties that this insurance was obtained by a brother of the agent of the company. It is claimed by the plaintiff in the case that he was acting on behalf of the agent, and therefore on behalf of the company; that that was the position which he occupied. On the other hand, it is claimed by the defendant that he was employed by the plaintiff in the case to place this insurance. It is said by the counsel for the plaintiff that the law of the state of Ohio makes the person soliciting insurance the agent of the insurance company. That, as a general proposition, is true; but a broker may be the agent of one party, or he may be the agent of both parties, and in a certain sense he is the agent of both parties in many transactions mercantile, as many of you know. The first charge I am asked to give you by the defendant is this:

First. That William R. Johnson, employed by the plaintiffs to place this insurance, was the agent of the plaintiffs in making application for the insurance, and that any knowledge he had, or that was communicated to him, in relation to the authority of the agent at Norwalk to issue the policies of insurance sued on in this case, is the knowledge of the plaintiffs.

That assumes a fact, to-wit, that he was the agent of the plaintiff. It must be left to the jury under the instruction. If the plain-

tiff went and employed William R. Johnson, the broker, to go and place this insurance for them, paid him for it, settled with him for it, then he was the agent of the plaintiff, and his knowledge was the knowledge of the plaintiff, because the principal is always chargeable with the knowledge of the agent which is acquired in and about the business he is employed to transact. If, on the other hand, Frank R. Johnson, the defendant's regular agent at Norwalk, had been for several years in the insurance business, and his brother, William R. Johnson, had been in the brokerage insurance business, acting for and on behalf of the agent at Norwalk, as well as other agents, and he called upon Mohr & Mohr, representing his brother, and solicited for his brother this insurance to be placed in this company, then he was not the agent of Mohr & Mohr, but of the insurance company; so that if you find that he was the agent of Mohr & Mohr, then this first instruction will be given. If, on the other hand, he was the agent of the insurance company, this knowledge was the knowledge of the insurance company, and not that of the plaintiff.

Second. The knowledge of the agent is the knowledge of the principal when such agent is acting within the scope of his authority; and if you find that William R. Johnson was employed by the plaintiffs to place insurance, he was the agent of the plaintiffs in applying for said insurance.

That I give you.

Third. If you find that Frank F. Johnson was a local agent only of the defendant, and that the territory within which he was authorized to represent the defendant as such agent was limited to Huron county and its vicinity, such authority to represent the company did not vest him with the powers of a general agent outside of such territorial limits.

That I give you in a modified form. If his agency was confined to Huron county and its vicinity, his general agency did not authorize him to transact business outside of that locality, as a general proposition, as I heretofore stated it. What I shall say to you hereafter in connection with this matter will be the law to govern you in the determination of this case.

If, however, the jury find that although his authority may have been limited to the county of Huron, or to the city of Norwalk and its vicinity, this did not render absolutely void all acts or contracts of his in relation to insurance outside of that territory. The company were in such a position that they could ratify the acts and adopt them as their own. It is admitted by the counsel for the defendant in the case that the company itself, at the city of Dayton, could have taken a risk upon property in the state of Indiana; and

that that would have been binding upon them, and the fact that they had not complied with the laws of Indiana in regard to the taking of insurance would have been no defense to them when an action was brought upon a policy of insurance to recover for a loss. That is admitted. If that be admitted, it must be very clear that the contract which a local agent might enter into for the insurance of property of that kind—I speak of a local agent, one who is confined territorially, but whose general powers to make contracts for insurance may be termed a general agency, to-wit, not a special agent, having power only to receive propositions for insurance and transmit them to the department at Dayton, and subject to their ratification, but one who has placed in his hands the blank contracts of the company, signed by the president and secretary, and who is authorized to make the contract for the premium, and all that he has to do is simply to countersign the instrument executed by the company and the secretary in order to make it binding—I say when such authority is placed in his hands he is a general agent to the extent of everything relating to the effecting of insurance within certain limits. Having these powers, and it being within the power of the company themselves to issue a policy covering property in the state of Indiana, they undoubtedly have the right to ratify any act of his making such a contract.

Now, it is claimed in this case that the plaintiffs knew the extent of his power, and that they were chargeable with the knowledge of the extent of his power because they did not inquire into the extent of it; not only that they knew it in fact, but that they were chargeable with the knowledge of the extent territorially of his power. That proposition is not sound to that extent. If, apparently, a man has authority to do the thing that he is doing,—general power and general authority,—to-wit, if you go to a man who is holding himself out as the agent of a company, and he has in his possession the contracts, or the blank contracts, of the company, duly signed and executed by the officers of that company as required by the charter or by-laws of the company, the man who goes there and sees the condition of things in that light is not bound to go and inquire of that agent the precise character of the instructions which he has received verbally from his company. That is a private matter between the company and its agent. But suppose it were true that he was bound to do so, and suppose it were true that Mohr & Mohr knew the extent of the agent's powers, still a contract of this character could be ratified by the company, although the agent may have exceeded the lim-

its of his power. Now, if on the fourteenth of June this party entered into this contract with Mohr & Mohr, and reported it to his company on the twentieth of June, the law says that that company, if this agent has exceeded his power, must be prompt in disavowing it, or else the presumption of the law is that they acquiesced in it. Now, the defendant in the case claims that, upon the receipt of that report of the twentieth of June, they promptly disavowed the act of the agent. They notified him that he had no power to enter into it. The agent, on the other hand, swears that he never received such a letter, or any such instructions. Whether it was received or not by the agent is a question of fact for the jury to determine. If they did not disavow the act of the agent,—disclaim it as their act,—but permitted it to remain until after this fire in that condition, the law presumes that they assented to it, although they never said a word about it.

Again, it is for the jury to determine, if they find from the evidence of the case that the letter of the 20th was written and the letter of the 27th was written, whether either one of these letters, or both of them, was a disavowal of the authority of this agent to make this contract, or whether they did not treat it as a contract entered into properly by the agent, and required him to take the legal steps to get rid of it. That is another question for the jury.

This contract has this provision in it: "Insurance shall also be terminated at any time by the company at its option on giving notice to the assured, and refunding a ratable proportion of the premium for the unexpired term of the policy." That is the language of it.

The first letter written is as follows:

"June 20, 1881.

"*F. B. Johnson, Norwalk, Ohio*—DEAR SIR: Please cancel No. 31,849, the Mohr & Mohr Distilling Company, on receipt of this. The risk is bad, out of your territory, and of a class we fight very shy of under any circumstances. I trust you will relieve us at once.

"I am very truly yours, W. H. GILLESPIE."

The question is for you to determine whether this is a disavowal of the authority of the agent to make the contract, and whether they placed it upon that ground, or whether upon the fact that it is a kind of property that they fight very shy of, and they wanted him to cancel it. It is a question of fact.

And so with the letter of the 27th. They say:

"On the twentieth day of last June we ordered you to cancel our No. 31,849, and here you are this morning taking on the same risk, making it $2,500, after being instructed to keep out of Indiana, and your last July report was

only received on the 27th. What manner of doing business is this? I was informed the Mohr risk was burned. Did you take it up? How did you come to issue 34,932? Your draft came back unpaid this morning. What is the matter at Norwalk?"

It is a question of fact for the jury to determine whether or not it is a disavowal of authority to make the contract at all, or whether it is an allusion to his lack of judgment in placing risks where they ought not to be.

Now, if the jury come to the conclusion that it was not a disavowal of authority, but that it was an order to him to cancel the policy under the power which the company had under this policy to put the contract at an end whenever they saw proper on certain conditions, this court has held that they had to do certain things.

In the case of *Runkle* v. *Citizens' Ins. Co.* 6 FED. REP. 148, this language is used:

"It is claimed by the defendant that it is not liable because it had canceled the policy of insurance. The policy contains, among other provisions, the following: 'It is also a condition of this insurance that it may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may be terminated at any time at the option of the company by giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy.' It is within the province of the parties to a contract of insurance to stipulate in the policy that the assured may at any time terminate the contract and surrender the policy, and be entitled to a ratable proportion of the unearned premiums, and that the insurer may at any time at his option terminate the contract and cancel the policy by giving notice to the assured to that effect, and paying to him a ratable portion of the premium for the unexpired term. This policy of insurance contains such a stipulation. The right, however, to terminate a contract of insurance which has been fairly entered into, and has taken effect by this method, is a right which can only be exercised by either party by a strict compliance with the terms of the policy relating to cancellation. Where such a contract has been entered into and has taken effect, and either party claims that the contract has been terminated and put an end to by virtue of such provision, it devolves upon such party to establish by the evidence that the contract has thus been terminated; and so, in this case, the defendant claiming that the contract has been terminated, it must satisfy your minds by the evidence that it had given the plaintiff notice of the cancellation of the policy, and that it had returned or tendered to him a ratable portion of the premium for the unexpired term of the policy. The notice must not be that the policy would be canceled in the future, but that it is canceled, and that the payment of the premium must in fact be made or tendered. A promise to pay it in the future is not sufficient, nor is a request that the party call and receive it sufficient—it must, in fact, be paid or tendered to the party."

So that, if this letter meant to order a cancellation of this policy, it is not a cancellation unless he has complied with what I have laid down there. So that, if you find that this defendant did not disaffirm, disavow, disclaim the authority of this agent to make the contract, but directed him to take steps to get clear of it by taking it up and canceling it, they have not complied with what the law requires them to do. The law says they must be prompt in disclaiming or disavowing the authority of the party to enter into it, and it would seem nothing more than reasonable, yet the authorities don't go quite that far, that that knowledge should come to the plaintiff some way or other. If this man is the agent of the company, and a notification to him disavowing his authority is not brought home to the plaintiff, the plaintiff must rest under it until he suffers loss, and yet not know but that the party had power to make the contract, and then when the fire takes place the company disavows the authority and disclaims the contract. It is too sudden.

So far as the misrepresentations are concerned, if you find from the evidence in the case that the plaintiff misrepresented to the agent the title of this property, stating that it was in a position it was not in at all; or if you find that they misrepresented to this company the fact that insurance was being taken by other companies in Cincinnati at 4 per cent., when in fact it was being taken at 5 per cent., that was a misrepresentation. If, however, a single policy had been taken, in which it appeared upon the face of it that 5 per cent. was the rate, and the agent who had taken it required the party to pay but 4 per cent., that was not a payment of 5 per cent. It was a payment of only 4 per cent., although the policy upon its face showed 5. If they misrepresented the title of the property under the policy of insurance it would defeat the policy. It is for you to determine whether any misrepresentation was made, upon all the evidence before you.

Take the case, gentlemen, and render such a verdict as the law and the evidence require.

Verdict for plaintiff.

See 12 FED. REP. 474.

UNITED STATES v. KELLAR.

(*Circuit Court, S. D. Illinois.* 1882.)

CITIZENSHIP—MARRIAGE OF RESIDENT ALIEN.

Upon the marriage of a resident alien woman with a naturalized citizen, she as well as her infant son, dwelling in this country, become citizens of the United States as fully as if they had become such in the special mode prescribed by the naturalization laws.

Indictment for Illegal Voting.

HARLAN, Justice. The question presented for determination is whether the defendant, having reached his majority on the twenty-second day of May, 1880, was entitled to vote at the election for representative in the congress of the United States, held in November, 1880. He possessed the requisite qualifications prescribed by the local laws as to residence in the township and state; but it is contended that he had not been admitted to citizenship of the United States, which, in Illinois, is a prerequisite to the exercise of the elective franchise. His parents were subjects of Prussia, the father dying there in 1865, without ever having been in this country. Subsequently, the mother removed to the United States, bringing her infant son, and in 1868 intermarried here with Michael Gaschka, a naturalized citizen.

Section 2167 of the Revised Statutes of the United States, reproduced from an act passed May 26, 1824, (4 St. at Large, 69,) provides that—

"Any alien, being under the age of 21 years, who has resided in the United States three years next preceding his arriving at that age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of 21 years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of section 2165; but such alien shall make the declaration required therein at the time of his admission, and shall further declare on oath, and prove to the satisfaction of the court, that for two years next preceding it has been his *bona fide* intention to become a citizen of the United States, and he shall, in other respects, comply with the laws in regard to naturalization."

It is conceded that the defendant has never made the declarations nor furnished the proof required by that section, nor complied with the general laws prescribing the mode in which subjects of other countries may become naturalized citizens of the United States.

The contention of the district attorney is that section 2167 embraces every case of foreign-born minors residing in this country, who may wish to become citizens of the United States; in other words, every such minor must, to become a citizen, make the declaration and proof required by that section. So argues the district attorney. In this view the court does not concur.

Section 2172 of the Revised Statutes of the United States, brought forward from an act approved April 14, 1802, (2 St. at Large, 155,) provides that—

"The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of 21 years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof. But no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the revolutionary war, shall be admitted to become a citizen without the consent of the legislature of the state in which such person was proscribed."

And section 1994, which is reproduced from the act of February 10, 1855, (10 St. at Large, 604,) declares that "any woman who is now, or may hereafter be, married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

Since the several sections which have been quoted are in the same revision of the statutes, it is the duty of the court to give them, if possible, such construction as will make them all operative. Consistently with any fair or reasonable interpretation of the language employed by congress, the court should reject any constrcution which would make one section inconsistent with another relating to the same general subject.

1. It is not denied that the mother of the defendant belonged to the class of persons who, under the laws of congress, might have been lawfully naturalized. Upon her marriage, therefore, with a naturalized citizen of the United States she became, under the plain words of section 1994, *ipso facto*, a citizen of the United States, as fully as if she had complied with all of the provisions of the statutes upon the subject of naturalization. There can be no doubt of this, in view of the decision of the supreme court of the United States in *Kelly* v. *Owen*, 7 Wall. 496, where it became necessary to construe

the act of February 10, 1855, which, in respect of the matter now before us, is similar to section 1994 of the Revised Statutes. This language was used in that case:

"As we construe this act, it confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of congress provide. The terms 'married' or 'who shall be married,' do not refer, in our judgment, to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that whenever a woman who, under previous acts, might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage, she becomes, by that fact, a citizen also. His citizenship, whenever it exists, confers, under the act, citizenship upon her."

The object of the act, said the court, was to allow the citizenship of the wife "to follow that of the husband, without the necessity of any application for naturalization on her part."

The mother of the defendant having thus become a citizen by force alone of her marriage with a naturalized citizen in the year 1868, did not the defendant, being *then* a minor and dwelling in the United States, himself also become, *ipso facto*, a citizen? It seems to the court that this question must be answered in the affirmative. The case seems to be so distinctly one of those embraced by the very language of section 2172, that argument could not make it plainer.

It was suggested that the act of 1802, from which, as we have seen, section 2172 is taken, was intended to be temporary in its operation, and to apply only to cases arising previous to its passage. In support of that proposition reference was made by counsel to *Campbell* v. *Gordon*, 6 Cranch, 176. But the court does not perceive that that case maintains, or that the language of the act of 1802, in any degree justifies, any such interpretation of the statute. It is quite certain that the reproduction, in section 2172 of the revision of the statutes, of the principle embodied in the act of 1802 was for the purpose of declaring, as the established policy of the government, that the children of persons who have been duly naturalized under any law of the United States, being under the age of 21 years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof. The only doubt which might have arisen as to the application of that section to the present case is whether a woman, becoming a citizen, under section 1994, solely in virtue of her marriage with a naturalized citizen, can be said to have been "*duly naturalized*" under a law of the United States. That

doubt, we have seen, is removed by the decision in *Kelly* v. *Owen*. The marriage of the defendant's mother with a naturalized citizen was made, by the statute, an equivalent in respect of citizenship to formal naturalization under the acts of congress. Thenceforward she was to be regarded as having been duly naturalized under the laws of this country, and her infant son, then dwelling in this country, was thereafter to be considered not an alien, but as a citizen. And this, we may remark, is not a new feature in the history of naturalization, as is shown by the case of *Campbell* v. *Gordon*, *supra*, where it was held, under the act of 1802, that the naturalization of a father, at the time his daughter was an infant resident of this country, conferred upon *her* full rights of citizenship, although she had taken none of the steps required by the naturalization laws.

Such being the legal effect of sections 1994 and 2172, we come to inquire as to the construction of section 2167. Its language, literally interpreted, might embrace the case of the defendant; that is, he was a foreign-born minor, who had resided in the United States five years, including the three years next his majority. But we have seen that the defendant ceased to be an *alien* when his mother acquired citizenship through her marriage with Gaschka. He was thereafter to be treated as the child of one "duly naturalized;" in other words, as a citizen. Manifestly, therefore, if we give section 2167 the construction contended for by the government, it results that the marriage of defendant's mother is deprived, in large degree, of that effect which section 1994, as construed in *Kelly* v. *Owen*, was intended to have. But all of the sections can be harmonized, and effect given each, if section 2167 be construed, as this court thinks it must be, as not embracing the case of a minor who became invested with citizenship in virtue of the marriage of his mother with a naturalized citizen of the United States, but only such minors as are *alien* when they reached their majority, and who, therefore, could not become citizens except in the mode specifically set out in section 2167.

For these reasons, in which, I am happy to say, my brother TREAT, the learned district judge, concurs, the defendant must be discharged. An order to that effect will be entered.

NOTE. An alien woman who marries a citizen of the United States residing abroad, the marriage solemnized abroad, and the parties continuing abroad, is a citizen of the United States, though she never resided in the United States. "Citizenship," 14 Op. Att. Gen. 402. The words "who might herself be lawfully married" mean any woman being a free white person, and not an alien enemy; and if such a woman marries a citizen of the United States in Ireland

she is a citizen of the United States though she always resided in Ireland. *Kane* v. *McCarthy*, 63 N. C. 299. So the alien widow of a naturalized citizen, although she never lived in the United States during the life-time of her husband, is a citizen of the United States, and is entitled to dower in his real estate. *Burton* v. *Burton*, 1 Keyes, 359. She becomes, by the act of marriage to a citizen, a citizen as effectually as if she had been naturalized by a judgment of the court. *Leonard* v. *Grant*, 5 FED. REP. 11. By analogy with this rule a woman born in the United States, but married to a citizen of France and domiciled there, is not a citizen of the United States, resident abroad. "Citizenship," 13 Op. Att. Gen. 128.—[ED.

LE FEVER and another *v.* E. REMINGTON & SONS

(*Circuit Court, N. D. New York.* August 4, 1882.)

1. PATENT FOR INVENTIONS—MATERIAL ELEMENTS.
   Where the invention regarded an element as material, those who claim under the patent cannot now be heard to say that it is immaterial.
2. IMPROVEMENT IN BREECH-LOADING ARMS.
   Patent No. 205,193, for an improvement in breech-loading fire-arms, not infringed by defendants' fire-arms.

George W. Hey, for plaintiffs.

Thomas Richardson, for defendant.

BLATCHFORD, Justice. This suit is brought on letters patent No. 205,193, granted to Daniel M. Le Fever, June 25, 1878, for an "improvement in breech-loading fire-arms." The specification states the object of the invention to be—

"To give a more perfectly fitting and permanent connection between the barrels and breech-piece than has heretofore been effected, with greater security and less liability of the breech and barrels springing apart. The barrels are connected with the breech-piece by means of certain hooks on the under side of the barrels, that are brought in contact with pins passing horizontally through the mortise in the breech-piece below the barrels, a part of which devices are old and have already been patented."

The specification then goes on to describe the inventor's "improvements thereon." Only one of them is of importance in this suit. It is described thus:

"As a further security, a projection, *k*, extends backward from the rear end of the barrels, and fits into a corresponding recess in the recoil plate similar to some other arms, the important difference being that the projection, *k*, has square shoulders on its front face, as clearly seen in figure 2, which are cut to the curve of a circle centering on pivot, *d*, corresponding with the shoul-

ders in the recess of the recoil plate. This form of shoulder, instead of being rounded or wedged, as heretofore made, which allows the barrels to spring off from the recoil in firing, securely locks the parts together."

The pivot, *d*, is the pivot pin on which the barrels turn when their rear ends are thrown up. The claim founded on the above description, and which is the claim alleged to have been infringed by the defendant, is as follows:

"(1) In breech-loading fire-arms the projection, *k*, formed with square shoulders on its sides, in combination with the recoil plate, provided with a corresponding recess, the shoulders on said projection and on the recess being curved in the arc of a circle struck from the pivot on which the barrels turn, substantially as and for the purposes described."

In the defendants' fire-arm there is a projection extending backward from the rear end of the barrels and fitting into a corresponding recess in the recoil plate. The projection has square shoulders; that is, their horizontal section is a right angle. But instead of being curved in the arc of a circle struck from the pivot on which the barrels turn, the shoulders are straight and tangential to the line of movement. In both the plaintiffs' and the defendants' arms the shoulders come up to the top surface of the barrels.

It is contended for the plaintiffs that the curving of the shoulders is immaterial, and non-essential to the operation of the device, and that the invention really consists in the square shoulders coming up to the top surface of the barrel. Evidence to show this has been introduced on the part of the plaintiffs, and evidence to show the contrary has been introduced on the part of the defendant.

It is very clear that the vertical form of the shoulders is made an element of the claim by distinct language, and as that forms a curve in the arc of a circle struck from the pivot on which the barrels turn, and is not found in the defendant's arm, the plaintiffs contend that the rectilinear shoulders in that arm are the equivalents mechanically of the curved shoulders of the patent.

If the claim had been intended to be a claim broadly to square shoulders, without reference to their vertical form, it would have been easy to make such a claim. But the claim industriously introduces the element of the vertical curving. The inventor must have regarded that as a material element, and those who claim under the patent cannot now be heard to say that it is immaterial. The question cannot now be left for the domain of testimony. It is determined by the claim. Otherwise the plaintiffs are put in the position of averring that the specification contains more than is necessary to produce the

desired effect, and it is impossible to escape the conclusion that this was done for the purpose of deceiving the public, because the presumption is that the claim would not have been allowed in any broader form than that in which it appears.

The patent to Gundersen of December 30, 1873, shows a barrel constructed with an extension rib, on which are found shoulders which are rectangular in a lateral direction, and engage with corresponding shoulders on the recoil plate. All the shoulders are rectilinear in a direction about tangential to the line of movement at its intersection with the upper edge of the barrel. They do not extend to the top surface of the barrel, but are covered by the extension of the rib.

In view of the Gundersen patent there was no ground for Le Fever to claim shoulders rectangular in their horizontal cross section, and extending out to the top surface of the barrel, without reference to their vertical form. There would have been no invention in merely prolonging the upward extent of the shoulders; so the curved vertical form of the shoulders was introduced in connection with their being square. So far as appears, the first claim was novel and is valid, but it is not infringed by the defendant, because in its arm the shoulders are rectilinear.

The bill is dismissed, with costs

Frost and others *v.* Marcus and another.

(*Circuit Court, S. D. New York.* March 11, 1882.)

PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION.

Although defendants' structure contains improvements, yet if it involves the patented invention its use may be enjoined.

G. M. Plympton, for plaintiffs.

Dickerson & Dickerson, for defendants.

BLATCHFORD, Justice. The decision in Massachusetts disposes of all the questions on this motion in favor of the plaintiff, except that of infringement. As to that, the alleged infringing article here clearly comes within the principles of the decision under which the defendants' article in the Massachusetts case was held to infringe. It adds two nipping places to the one the patent has, thus making three. It distributes the strain as to the material of the plate, and it bites more of the fabric by nipping it at three places. Thereby the sides

of the structure before reaching the first nip may be made more rapidly converging, because that nip is not required to hold so firmly, or so much of the fabric. Yet the first nip holds more or less according to the thickness of the fabric in it as compared with the convergence of the sides, and although when the fabric is drawn through the first nip it is held by the other two nips, and is packed in the wider end portions, it still, as to part of it, continues to be held by the first nip. The defendants' structure doubtless contains improvements, but it involves the patented invention. The motion for an injunction is granted.

THE CIMBRIA.

(*District Court, E. D. New York.* June 30, 1882.)

SHIPPING—NEGLIGENT STOWAGE—LIABILITY FOR LOSS.

In the stowage of drums of glycerine care must be taken to prevent working of the tiers in case of springing of the ship, and the vessel will be liable for loss or damage where the exercise of proper care would have prevented any injury arising from any springing of the ship.

Scudder & Carter, for libellants.

Butler, Stillman & Hubbard, for respondents.

BENEDICT, D. J. This action is to recover for the loss of the contents of two drums of glycerine, during a voyage from Hamburgh to New York, on the steamer Cimbria. The two drums in question formed part of a shipment consisting of 26 drums, made under an ordinary bill of lading, wherein is an exception of liability for damage caused by perils of the seas or arising through insufficiency in strength of the packages. The drums when shipped were in good order; upon arrival two of them were found to have been cut through, apparently by a sharp edge, and the contents gone. These drums were of sheet iron, in thickness about three-sixteenths of an inch, with heads about 28 inches in diameter. On each end, where the head was joined, was a ridge or rim, and around each drum at the middle were two iron rings, projecting from the surface of the drum from one and three-fourths to one and one-half inches; the body of the drum being in this way protected by these rolling rings, on which the drum rests. Drums constructed in this manner, for the purpose of transporting glycerine, have been used for some time on Atlantic voyages, and have proved to be sufficient for the purpose.

The testimony warrants the inference that the cuts in the drum in question were caused by pressure of the rolling rings of another drum during the voyage of importation.

On the part of the vessel it is contended, first, that the loss of the glycerine arose from the insufficiency of the drums, and therefore is not to be borne by the ship. But the testimony does not support this contention. Neither the special exception in this bill of lading nor the law will absolve the ship from liability when merchandise of this character is placed in a vessel sufficiently strong to withstand the necessary pressure which arises from ordinary stowage and ordinary handling during an Atlantic voyage. The drums in question are proved to be sufficient, with the rule as above stated.

It is next contended on the part of the ship that the loss arose from a peril of the seas; and it has been proved that during the voyage in question the steamer encountered unusually heavy weather, which caused the steamer to labor heavily, and that during the heavy weather the drums of glycerine were found to be rolling on two occasions, when they were restowed, and thenceforth were not moved by the heavy seas. From this testimony the fair inference is that the cuts in the drums under consideration were made while the tiers were thus working during the storms. The question then arises whether due care was used in the stowing of the drums at the port of shipment. The stowage was as follows: The drums were stowed in tiers upon the lower deck, with nothing above them. Each drum was chocked with pieces of wood so as to leave about one-half an inch between the rolling rings of the drums. These chocks were placed horizontally between the drums, and what happened was that the drums moved so as to permit some of the chocks to drop down, when, of course, the whole tier became loose. While so loose the rolling rings of some of the drums would be likely to come in contact with the body of other drums, and in this way, doubtless, the two drums in question were cut through. At the time when the drums were discovered to have shifted they were restowed, and then with upright chocks. In this way the tiers were so fastened that they no longer moved. The character of the drums made it plain that if the tiers should get loose on the voyage the drums would be likely to cut each other, and called for unusual care to prevent a working of the tiers. But according to the testimony of the officer who stowed these drums no greater care was taken in stowing them than is taken with wine casks, or casks of any spirits or liquors or cherry juice. It seems to me not unreasonable to require, in respect to drums of this

character, in the original stowing the exercise of the same care to prevent working that was afterwards taken when the drums were found to be rolling, and because of the absence of such care I hold the ship responsible.

I have not overlooked the testimony to the effect that an iron steamer will spring in such heavy weather as this vessel experienced, and that it is not possible so to stow a cargo that it will not loosen when the steamer springs under such circumstances. But I am satisfied that the exercise of proper care in the stowing of these drums would have prevented injury arising from any springing of the ship.

There must, therefore, be a decree for the libelant.

THE ANT.

(*District Court, D. New Jersey.* July 13, 1882.)

COLLISION—MEASURE OF DAMAGES FOR LOSS.

In case of a total loss of a canal-boat and her cargo of coal by a collision the measure of damages is the value of the boat and of the cargo immediately preceding the collision. So, where a canal-boat was sunk in 40 feet of water, and there purchased and raised, and floated to a distance, and was there sunk and destroyed by a collision, the measure of damages was the price paid for her where she was first sunk, the value of her cargo, and the expenses incurred in raising and floating her to the place of the collision.

Libel *in rem.*

Beebe, Wilcox & Hobbs, for libelants.

Benedict, Taft & Benedict, for claimants.

NIXON, D. J. On the libel originally filed in the above case the court decided that the collision was one of mutual fault, and ordered a reference to ascertain the aggregate amount of the damages, in order that the same might be apportioned equally between the parties. The commissioner has taken the testimony and made his report, and the matter now comes up on exceptions thereto filed by the proctor for the claimants.

Upon the reference it was the duty of the commissioner to ascertain as nearly as possible, under the circumstances, the value of the canal-boat Chandler at the time of the injury, the loss of the cargo, and the increased expenses which the libelants incurred by reason of the collision. He has reported the aggregate damages at $1,476, as follows:

(1)	For the value of the canal-boat at the date of the collision, -	$1,000
(2)	For 108 tons of coal, the portion of the cargo lost, at $3.25 per ton, - - - - - - - -	351
(3)	For amount paid by libelant for extra services of the wreckers on account of the collision, - - - - -	125

Exceptions have been filed to each of these items, and the question is whether the proofs sustain the allowances.

The principal controversy is in regard to the value of the canal-boat. She proved to be a total loss. The libelants had bought her for $325, lying in 40 feet of water at the bottom of New York bay, and had expended several hundred dollars in raising her and her cargo by means of four chains passed under her hull, and fastened to two pontoons or wreckers on either side. She had been moved about one mile up the bay by these instrumentalities, and was lying with her bow aground, waiting for the tide, when the collision occurred. The libelants are entitled to her value in that condition; not as she was at the wharf, before the trip began in which she was lost, or as she was at the bottom of the bay, when the libelants purchased her. It is a fair inference, from such a condition of affairs, that if the collision had not occurred the libelants would have succeeded, on subsequent tides, in getting the boat and her cargo in a place of safety for the repair of the one and the delivery of the other. But it was insisted on the argument by the proctor of the claimants that the boat was worthless when purchased, and that the proofs show that the only effect of the collision was to develop and complete the fatal injuries which had been received two months before, at the time of sinking.

If I was satisfied that the testimony sustained this view, I should at once strike out the allowance of $1,000 for the damage to the boat. But I have carefully examined the testimony, and it has not made the impression upon my mind that it seems to have produced upon the mind of the learned advocate who argued the exceptions. The most that can be said in reference to it is that it leaves the matter in doubt; that, as the claimants have been found to be in fault, they are not in a position to claim the benefit of the doubt; and that, as we have at hand a proximate cause of the injury, to-wit, the collision with the steam-tug and scows of the claimants, we are not at liberty to speculate that the injury may have arisen from some remote cause. But I am not clear that the commissioner is justified by the proofs to award to the libelants $1,000, which gives to them, who are also in fault, the benefit of all doubts. I should prefer to say that, under the circumstances, the most reasonable method of making up the dam-

ages would be to allow the libelants the $325 which they paid for the boat at the bottom of the bay, and add to that sum such proportion of the moneys expended by them previous to the collision in raising her and her cargo as the value of the vessel bears to the value of the cargo. This would make the damages for the loss of the boat about $600, which is conceded to be an approximation only; but the whole case is necessarily one of approximation.

I am of the opinion that the exception as to the value of the canal-boat should be sustained, and that the sum should be reduced to $600. I find nothing in the proofs which authorizes me to disturb the report of the commissioner in regard to the value of the coal, or the extra expenses incurred by reason of the collision, and the exceptions to these items are overruled.

SIMPSON v. SPRECKELS and others.

(*District Court, D. California.* August 7, 1882.)

COLLISION—OVERTAKING VESSEL—DUTY TO AVOID COLLISION.

A vessel overtaking another is required to keep out of the way of that vessel, and steps to avoid collision must be taken in season, and the burden of proof, in case of an accident, is on the overtaking vessel to show diligence on her part and negligence on the part of the other vessel. Doctrine applied to a case where the overtaking vessel was more heavily laden and deeper in the water than the other vessel, and both were drifting with a strong ebb-tide, with a heavy swell from the opposite direction, and the wind light and variable.

In Admiralty.

James C. Perkins, for libelant.

C. Temple Emmett and *Jas. Wheeler*, for respondents.

HOFFMAN, D. J. At about 6 A. M. on the sixth day of March, 1881, the steam-tug Hercules took in tow the libelant's brig Rival, and the respondent's schooner Rosario, and proceeded to sea. The schooner Rosario was dropped at or near the nine-fathom buoy, and the brig Rival about one mile and a half further out, or to the S. W. At this time, about 8 o'clock A. M. of the same day, a strong ebb-tide was running to the S. W., and a heavy swell setting in from the S. W. The wind was light and variable from the S. E., or S. S. E. The Rosario was heavily laden and deep in the water. The Rival was light. The influence of the tide was, therefore, most strongly felt by the Rosario, while that of the S. W. swell operated most strongly on the Rival. The course made, or attempted to be made, by the Rosario

was W. by S., while that of the Rival was about W. N. W. But the wind was too light to afford perfect steerage way to either vessel, and for some time before the collision there appears to have been no wind. At about the moment of the collision a puff of wind sprung up from the S. W. Whether this occurred before or after the vessel struck is disputed. About 10 o'clock A. M. the vessels collided. The port cat-head of the Rosario struck the Rival on the starboard side of the stern-post. Recoiling, she again struck her bow directly upon the stern-post of the Rival. Again recoiling, she struck the Rival on the port side of the stern-post, and rubbed along the port side of the latter until the bows of the two vessels came together, when they swung clear of each other. The vessels were in full view of each other from the time of starting until the collision.

The foregoing narrative is derived from the answer of the respondents, and from the statement of "undisputed facts" contained in the written brief of their advocate.

It is, I think, apparent that both vessels were sailing, or perhaps drifting, in the same general direction, and the Rosario drawing more water than the Rival, and therefore more influenced by the current and less by the swell, gradually overtook the Rival, on whom those forces acted with a reversed effect. The Rosario was therefore clearly within the rule which requires every vessel overtaking another vessel to keep out of the way of the last-mentioned vessel, (article 17, rules 1864;) and the burden of proof, in cases of accident, is on her to show diligence on her own part and negligence on the part of the other vessel. *The Governor*, Abb. Adm. 108. It is not only her duty to take steps to avoid the collision, but she must do so *in season*. *Whettridge* v. *Dell*, 23 How. 418. "A ship going out of port," says Emerigon, "is to take care to avoid the vessel that has gone out before her." Emerigon, *c*. 12, § 14, p. 330. And Valin says, (section 2, p. 578:) "Whether it be by night or day, the ship that leaves after another and follows her should take care to avoid a collision, without which she will have to answer in damages." See opinion of Mr. Justice Clifford, 23 How. 454.

As the collision did not occur until about two hours after the tug dropped the Rival a mile and a half ahead of the Rosario, it is evident that the latter approached the former very gradually. There was thus ample time for the Rosario to have taken means to prevent the collision as soon as it seemed likely to occur, and before the danger became imminent. Both vessels were on or near the bar. Had the Rosario seasonably dropped an anchor all danger of collision

would have been avoided; and this simple precaution it was clearly her duty as the vessel astern to take.

The cause of the collision is, I think, clearly revealed by the mate of the Rosario. He testifies that when the vessels were about one-eighth or a quarter of a mile apart the master of the Rival called out to the master of the Rosario to drop his anchor, to which the latter replied by telling him to drop *his*. Capt. Swift, of the Rosario, testifies to the same effect. He states that about five minutes before the collision Capt. Adams called out to him to drop his anchor; and when asked why he did not do so, he answers: "Capt. Adams, of course, had charge of his ship, and I had charge of mine. Perhaps we saw things in a little different way. I don't know that I should obey Capt. Adams. Why didn't he anchor his ship? As I supposed he was going to drift clear of me as he was going across my bow, I didn't cast my anchor. I supposed he would drift on to me if I had done so." Record notes, p. 78.

This last intimation, that in his opinion it would have been imprudent to drop his anchor, is hardly consistent with the admitted fact that he did let go his anchor, by which, as he states, the vessel was brought up before the collision. If the depth of water was as claimed by the respondents, it was impossible that the vessel could have been brought up with the length of chain then ranged before the windlass, unless we accept Mr. Pauzus' statement that he paid out 45 fathoms of chain before the collision, and that "it fetched her up." This operation he does not pretend to have commenced until the vessels had approached within one and a half or probably two ships' lengths of each other. But the fact that it was resorted to, although too late, is a sufficient answer to Capt. Swift's suggestion that by dropping anchor the chances of collision would have been increased.

The answer alleges as a fault on the part of the Rival that immediately before the collision she attempted to tack, and, failing to do so, was taken aback and drifted down on the Rosario. But this is denied by all on board the Rival, and, under the circumstances, it seems almost impossible that she should have made any such attempt.

It appears from all the testimony that there was little or no wind— not enough to afford good steerage way to either vessel. No captain in his senses would have attempted to tack under such circumstances. If, as some of the witnesses state, a puff came out from the southwest just before the collision, it gave the Rival a fair wind, as her course lay to the northward and westward. She had, therefore, no motive to tack, even if the maneuver had been practicable.

The testimony in the case is quite voluminous. There are, as usual, many contradictions and discrepancies in the statements of the witnesses, even when testifying on the same side. But the principal facts of the case can be clearly discovered. The Rosario, going out behind the Rival, overtook and ran into her through neglect of measures to avoid her which the law called on her master to adopt.

Decree for libelants. Cross-libel dismissed.

Counterfeiting—Essential Allegations.

UNITED STATES *v.* CARLL, U. S. Sup. Ct., Oct. Term, 1881. On certificate of division in opinion between the judges of the circuit court of the United States for the southern district of New York. The indictment was brought under section 5431 of the Revised Statutes. The decision was rendered by the supreme court of the United States on April 24, 1882. Mr. Justice *Gray* delivered the opinion of the court.

In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging all facts necessary to bring the case within that intent. The offense at which the statute is aimed is similar to the common-law offense of uttering a forged or counterfeit bill, and knowledge that the instrument is forged and counterfeited is essential to make out the crime, and the omission to allege that the defendant knew the instrument which he uttered to be false, forged, and counterfeit, fails to charge him with any crime.

S. F. Phillips, Solicitor General, for the United States.

William C. Roberts, for accused.

Cases cited in opinion: U. S. v. Cruikshank, 92 U. S. 542; U. S. v. Simmons, 96 U. S. 360; Com. v. Clifford, 8 Cush. 215; Com. v. Bean, 14 Gray, 52; Com. v. Filburn, 119 Mass. 297.

Practice—Rehearing.

CHICAGO, D. & V. R. Co. and others *v.* FOSDICK, U. S. Sup. Ct., Oct. Term, 1881. Appeal from the circuit court of the United States for the northern district of Illinois. On petition for a rehearing. The decision was rendered by the supreme court of the United States on May 8, 1882. Mr. Justice *Matthews* delivered the opinion of the court, granting the application, on the ground that the record on which the case was decided was not complete.

Lawrence, Campbell & Lawrence and Henry Crawford, for the petition.

THOMPSON v. ALLEN COUNTY and others.*

(*Circuit Court, D. Kentucky.* July 28, 1882.)

1. TAXES—COLLECTION BELONGS TO THE STATE—UNITED STATES COURTS CANNOT COLLECT THROUGH A RECEIVER.

   The *collection* of a public tax as much belongs to the authority of the state as its levy and assessment. The tax, when assessed, although levied for a specific purpose, is not a fund which can be dealt with by a court as an equitable asset or chose in action subject to an implied trust, and United States courts have no power to appoint a receiver to collect such taxes even where there is no state officer to perform that duty; per MATTHEWS, Justice; BAXTER, C. J., dissenting.

2. SAME—CASE STATED.

   Complainant holds an unsatisfied judgment against the defendant Allen county. A special tax to pay his judgment was levied in pursuance of a *mandamus.* The statute authorizing the tax provided that it should be collected by a collector appointed for that purpose by the county court. In answer to a *mandamus* requiring the appointment of such collector, it appeared that no suitable person could be found who was willing to accept the appointment. Upon bill in equity filed in the United States circuit court to obtain relief by the collection of these taxes and their application to the payment of the complainant's judgment through a receiver or other agency of the court, *held,* by MATTHEWS, Justice, that the court had no jurisdiction to grant the relief prayed for. BAXTER, C. J., dissented.

In Equity.

The facts were as follows:

In 1869 the Kentucky legislature chartered the Cumberland & Ohio Railroad Company. Its proposed line of road passed through Allen county, defendant in this suit. The charter authorized any county through which such proposed road should pass to subscribe for stock in said company, and to issue and sell its bonds to pay for such stock. The county subscribed for a large amount of stock, and in payment issued its bonds to the company, which sold them. The charter of the company provided that the county court of any county issuing bonds was "authorized and required to levy annually, and collect, a tax upon the taxable property in their county, as listed and taxed under the revenue laws of this state—a sum sufficient to pay the interest on said bonds as it accrues, together with the costs of collecting the same;" and also to levy and collect a tax to pay the principal of the bonds. It was further provided that "the county court * * * may appoint collectors for said tax, or may require the sheriffs of the respective counties within the jurisdiction of the same to collect said tax; all of whom shall have the same powers and remedies, and shall proceed in the same way, for the collection of said tax as the sheriffs in the collection of the state revenue." It also provides for the time when the sheriff shall pay over the taxes so collected, and his rate of com-

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

missions thereon. 1 Acts 1869, pp. 471, 472. See, also, amendment to said charter, 2 Acts 1869–70, p. 226.

In 1876 the Kentucky legislature passed an act by which it was provided "that hereafter the sheriff of Allen county shall not be required to give bond for the collection of any levy or tax in said county for the purpose of paying the principal or interest on the county bonds of said county issued for railroad purposes, and shall not be held responsible in his official bond for the same; that the county court shall, at the instance or motion of any person, or by request, appoint a special collector to collect all taxes or levies in said county for railroad purposes, and shall require bonds, with security, to be approved by the court, for the faithful discharge of all duties incumbent on him." 1 Acts 1876, p. 307.

The complainant, T. W. Thompson, as the holder of a large number of said bonds, sued the county in this court on a number of the interest coupons on said bonds, and in 1878 and 1879 recovered judgments against it in the amount of $22,188.03 and costs. An execution issued therefor, which was returned "no property found."

Thompson then sued out, in this court, a *mandamus* against the county court of Allen county, and thereby compelled said county court (composed of the county judge and the justices of the peace of that county) to levy a tax of $2.08 on each hundred dollars' worth of property in the county to pay said debt of Thompson. He also sued out a *mandamus* to compel said county court to select a "collector" of taxes, in accordance with said statute of 1876; and the county court, in obedience thereto, undertook to select a collector, but was unable to find any one who would accept the office, as appears by the following stipulated facts:

"*First.* That the county court of Allen county has in good faith and diligently endeavored to find a fit and proper person to act as collector of the railroad taxes in said county, and of the special levies of taxes in the bill of complaint set forth. *Second.* That no such fit and proper person can be found who will undertake and perform the office and duty of such collector. *Third.* That the complainant is without remedy for the collection of its debt herein, except through the aid of this court in the appointment of a receiver, as prayed for in the bill, or other appropriate orders of the court."

Under these circumstances the complainant, Thompson, filed his bill in equity in this court, and, after setting out the above facts, made certain named tax-payers of the county defendants, and gave the amounts assessed against them respectively, and alleged that by virtue of said levy of taxes the said tax-payers "became and they are indebted to the defendant Allen county in the sums set opposite their respective names, which indebtedness, together with that of all the other tax-payers of said county under the said levy, is a trust fund for the use and benefit of your orator's said judgments." The bill then prays that the said tax-payers "be required and compelled to pay into this court, or to some person to be appointed by this court as its receiver, the several sums due by them to the said Allen county, on account of and by reason of said special levy and tax of May 28, 1881, as aforesaid, and that the same be applied to the payment of your orator's judgments, interest, and costs, including the costs of collecting said tax."

W. O. & J. L. Dodd, for complainant.

Brown & Davie, for respondents.

Before MATTHEWS, Justice, and BAXTER, C. J.

MATTHEWS, Justice. The complainant has an unsatisfied judgment rendered in the court against this defendant upon coupons representing interest upon bonds issued by the county in aid of a projected railroad. A special tax to pay this judgment has been levied in pursuance of a *mandamus*. The statute authorizing the tax provides that it shall be collected by a collector appointed for that purpose by the county court. In answer to a *mandamus* requiring the appointment of such a collector, it is returned that no suitable person can be found who is willing to accept the appointment, and it is admitted that the county court has in good faith diligently endeavored to find one, and that no one can be found who is willing to qualify as such collector. The present bill is filed to obtain relief by the collection of these taxes, and their application to the payment of the complainant's judgment, through a receiver or other agency of the court.

The ground of this resort to equitable relief is that the remedy provided by law is inadequate and has failed; and that the levy and assessment of the taxes have created a fund which constitutes a trust to be administered by a court of equity.

The precise question thus presented was left undecided by the supreme court in the case of *Meriwether* v. *Garrett*, 102 U. S. 472. In the conclusions of the court, as announced by the chief justice, it is said:

"Whether taxes levied in obedience to contract obligations or under judicial direction can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the legislature to perform that duty, is not decided, as the case does not require it."

It may, perhaps, be equally true that the case has not, in fact, arisen here, for although it is to be assumed that no collector has been or can be appointed, yet the reason is not that there is no such officer provided by law, but because no person is willing to accept an appointment and perform its duties. The failure of the remedy is therefore merely casual, and not necessary; and in contemplation of law there is an officer charged with the duty which a court of equity is asked to assume because there is no such officer.

But, if the question was left open by the decision referred to, I am constrained to conclude that it is decided by the spirit and logic of that case. The collection of a public tax as much belongs to the authority of the state as its levy and assessment, and the reasons

which forbid a court to supply the latter, apply with equal force to the former. The tax, when assessed, is not a fund which can be dealt with by a court as an equitable asset or a chose in action subject to an implied trust. The levy and assessment is a step in a process of which the collection is another, and that proceeding is the only agency known to the law by which the desired result can be affected. The jurisdiction of this court is confined to compelling the state officers to perform their duty under the state laws, and no substitute can be invented.

The bill, consequently, must be dismissed.

BAXTER, C. J., dissents; and a division is certified to the supreme court of the United States.

NOTE. For Judge Baxter's views upon this question see *Garrett* v. *Memphis*, 5 FED. REP. 860, delivered upon entering the mandate of the supreme court in the case of *Meriwether* v. *Garrett*, 102 U. S. 472.—[REP.

GILES *v.* LITTLE.

(Circuit Court, D. Nebraska. January, 1881.)

WILL—CONSTRUCTION—POWER TO CONVEY FEE.

A bequest, "To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, *the same to remain and be hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper*, so long as she shall remain my widow," gives to the legatee unlimited power to dispose of any or all of the property bequeathed, so long as she remains a widow.

On Demurrer to Petition.

J. M. Woolworth, for plaintiff.

Marquett, Deweese & Hall, for defendant.

MCCRARY, C. J. Was Edith J. Dawson empowered by the will of Jacob Dawson to convey the fee of the premises? The answer to this question depends upon the construction of the will.

In its determination very little assistance can be derived from the consideration of adjudicated cases, since testamentary conveyances, unlike most others, present an endless variety of form and expression, and each must be construed very largely by a consideration of its own language and circumstances.

We have found great difficulty in arriving at a satisfactory conclusion as to the true construction of the will now under consideration,

but, upon the best consideration we are able to give it, we hold that the widow was authorized to convey the fee, and that the judgment must therefore be for the defendant. We base this conclusion upon the following considerations:

1. This construction is, we think, the only one by which we can give effect to the very comprehensive terms in which the bequest is expressed, to-wit: "To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, *the same to remain and be hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper,* so long as she shall remain my widow." The whole property was to be hers. The power of disposal was given by words well chosen to express the most unlimited control. The whole instrument must be construed together, and the words just quoted must have their ordinary meaning, except in so far as they are controlled by the other terms employed. The concluding words in the above quotation, "so long as she shall remain my widow," do not restrain or limit the *power* of disposal, but only the *time* of its exercise. The devisee had unlimited power to dispose of any or all the property bequeathed, provided she exercised it during her widowhood.

2. The condition can have full effect by giving the whole instrument the meaning above stated. The words are: "Upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, shall go to my surviving children, share and share alike." If the language here employed had been such as to convey the idea that the estate bequeathed was to remain for the children it would have greatly strengthened the position of plaintiff. But, on the contrary, the language used clearly shows that the testator contemplated the possibility, at least, that the widow might, under her unlimited power of disposal during widowhood, sell and convey a part or all of the property, and hence in case of her marriage the children were to receive the estate bequeathed, "or whatever shall remain." It is only by conceding the power of disposal as to part that we can conceive of a remainder, and if she had power to dispose of a part she had power to dispose of all. Her control was precisely the same over every part of the estate.

3. The construction we have adopted is the only one that will give effect to every clause of the will. As we have seen, no other construction is consistent with the terms of the first clause of the will, which declares the property hers, with power to dispose of it as to her

shall seem meet and proper. To hold that she took only an estate for years, with power to dispose of no more, would be to nullify so much of the instrument as gave her the property "with power, right, and authority to dispose of the same as to her shall seem meet and proper." The construction contended for by plaintiff is also inconsistent with some of the language used in the condition, while that we have adopted will give effect to all the clauses. Unless we hold that the power of disposal was conferred upon the widow by the will, we can give no meaning or effect to that clause in the condition which gives to the children, in case of the marriage of the widow, the estate bequeathed "or whatever may remain." As already suggested, this implies that a part may be disposed of, and proceeds upon the theory that there was a power of disposal given by the will. It is insisted that the words "or whatever may remain" apply only to the personal estate; but an examination of the terms of the instrument will show that there is no room for this construction. It is "the estate herein bequeathed," whether real or personal, or both, "or whatever may remain;" that is, whatever may remain of the estate that is to go to the children. By recognizing the power of disposal we can give meaning to this clause, and in no other way can it have any meaning or effect.

4. The construction we adopt seems to us the most reasonable. The power to sell the widow's interest during her widowhood would have been so uncertain as to the extent of the interest to be conveyed as to be almost valueless. A title which could be ended the day after it was given by the marriage of the grantor would be too uncertain to be of any value. It is scarcely conceivable that the testator would have been so careful to employ the well-chosen words found in the will giving the widow such unlimited discretion as to the disposal of the estate, if he had intended only to empower her to convey an interest that might be at any moment defeated by her marriage.

5. The statute of Nebraska, according to which the will must be construed, provides as follows, (Gen. St. p. 300, § 124:) "Every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate."

This statute clearly requires that construction of the will which favors the theory that the whole estate was transferred thereby.

The demurrer to the petition is sustained, and if plaintiff stands upon his petition there will be judgment for defendant.

TABORECK *v.* B. & M. R. R. Co. IN NEBRASKA.

(Circuit Court, D. Nebraska. January, 1881.)

1. LAND GRANT TO RAILROADS—CONSTRUCTION.
   Land grants to railroads take effect from the time that the line of the railroad is definitely fixed or located, notwithstanding the lands may not be selected till a later date.
2. SAME.
   The land-grant act of July 2, 1864, was a definite and explicit grant of all the land embraced within 10 alternate sections on each side of the line of the road, on the line of the road, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had not attached at the time the line of the road was definitely fixed; and the fact that congress did not prescribe any lateral limit in the selection of lands in lieu of those previously sold or disposed of by government, cannot affect the construction of the grant.
3. HOMESTEAD AND PRE-EMPTION RIGHTS.
   The act of April 21, 1876, (19 St. 35,) passed for the protection of settlers on public lands, by pre-emption and homesteads, does not apply to a case where, prior to such pre-emption or homestead entry, the lands had been specially granted by act of congress, and had fully vested in the grantee.

Suit in Equity.

H. H. Blodgett, for complainant.

T. M. Marquett and *J. W. Deweese,* for respondent.

MCCRARY, C. J. The controlling question in this case is, did the grant to the Burlington & Missouri River Railroad Company attach to the land in controversy on the fifteenth day of June, 1865, the date at which the line of the railroad was definitely fixed under the provisions of the act of congress approved July 2, 1864, making a grant of land to said company? 13 St. p. 364, § 19. Complainant insists that the title did not pass to the company until the land was actually selected by the company and patented to it.

Section 19 of the act above named provides as follows:

"Sec. 19. And be it further enacted, that for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington & Missouri River Railroad Company every alternate section of public land (excepting mineral lands, as provided in the act) designated by odd numbers, to the amount of 10 alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time that the line of said road is definitely fixed: provided, that said company shall accept this grant within one year from the passage of this act, by filing such acceptance with the secretary of the interior, and shall

also establish the line of said road, and file a map thereof with the secretary of the interior within one year of the date of said acceptance, when the said secretary shall withdraw the lands embraced in this grant from market."

The agreed statement of facts shows that the line was definitely fixed June 15, 1865, at which time the land in question had not been sold, reserved, or otherwise disposed of by the government, nor had any pre-emption or homestead claim attached. The complainant's claim, whatever it was, did not attach to the land until in the year 1871, at which time the proceedings to obtain title under the homestead law were inaugurated. The general rule that grants of land of this character take effect from the time that the line of the railroad is definitely fixed or located, is well settled. *Knevals* v. *Hyde*, 1 McCrary, 402; *Railroad Co.* v. *Smith*, 9 Wall. 95; *U. S.* v. *B. & M. R. R. Co.* 98 U. S. 334; *M.*'*K. & T. Ry. Co.* v. *K. P. Ry. Co.* 97 U. S. 491; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Leavenworth, etc., R. Co.* v. *U. S.* 92 U. S. 733.

The only question open for consideration in this case is whether there is anything in the provisions of the grant under which the respondent claims to take the case out of the general rule established by these authorities. Counsel for complainant insists that, since the grant has no lateral limits, and there is no limitation of distance from the road within which the selection is to be made, the rule does not apply. I fail to see the force of this objection. The grant is of "every alternate section of public land (excepting the mineral lands, as provided in this act) designated by odd numbers to the amount of 10 alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time that the line of said road is definitely fixed." This seems to be a definite and explicit grant of all the land embraced within the 10 alternate sections on each side of the line of the road, with the exceptions named. Nothing is wanting to make it definite and absolute except the definite location or fixing of the line; and there can be no doubt, in view of the decisions already referred to, that the title to the land in controversy vested in the respondent when the route was fixed and the location became certain. By the location of the line the location of the land became certain, and the title, which was previously imperfect, acquired precision and became attached to the land. The fact that congress did not prescribe in this grant any limitation upon the distance from the road

within which the company may make selections, in lieu of lands previously sold or disposed of by the government, can make no difference in the construction of the language above quoted.

A question of greater difficulty arises under the act of April 21, 1876, (19 St. 35.) That statute confirms "all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than 160 acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land-office in the district in which such lands are situate," etc. It is insisted that this statute is broad enough to embrace within its terms the case at bar; but it appears to me that the act, by its terms, presupposes a case in which notice of withdrawal of the lands was required by law to be given. It does not, in my opinion, apply to a case where, prior to any such pre-emption or homestead entry, the lands had been specially granted by an act of congress, and had fully vested in the grantee. To give it such a construction would be equivalent to saying that congress intended to take lands from an owner whose title was perfect, and confer them upon another. It is conceded that the line had been definitely fixed within the meaning of the act before any steps were taken by the complainant to acquire title under the homestead or pre-emption laws, and it follows from this fact, as already shown, that the title vested in the grantee, the lands being within the 20-mile limits. The act of congress was itself a grant, as well as a law, and had all the force of a patent. When the condition (the definite location of the line) was performed, the title became absolute. It cannot be supposed that congress intended, by the act of 1876, to divest titles which had previously been perfected. That act, like previous laws of a similar kind, was intended to give force and effect to the principle that "when an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." *Lytle* v. *State of Arkansas*, 9 How. 333. But this principle applies only "where, by law or contract, the acquisition of a right is made dependent upon the performance of certain specified acts." *The Yosemite Valley Case*, 15 Wall. 91. The present case does not fall within the rule. There is nothing in the granting act requiring officers of the land department to give notice of the withdrawal of the land from market. It does not appear that such officers failed to perform any act that the law required of them

respecting said grant, much less that respondent neglected to do anything required of it.

My conclusion is that the title of respondent, under the act of congress, was perfect prior to the occupation of the land by complainant, and that therefore the complainant is not entitled to decree as prayed for.

The case will be referred, in accordance with the agreement of parties, to D. G. Hull, master in chancery of the court, to take the testimony and find the facts as to the character and value of complainant's improvements.

DUNDY, D. J., concurs.

KANSAS PACIFIC RY. CO. *v.* ATCHISON, TOPEKA & SANTA FE R. CO.

(*Circuit Court, D. Kansas.* January, 1881.)

1. PUBLIC LANDS—WITHDRAWAL FROM SALE.

   The withdrawal of public lands from sale by competent authority for the purpose of appropriating them to any lawful purpose, operates to sever such lands from the public domain, and the land department is the proper authority to make the order of withdrawal.

2. PACIFIC RAILROAD ACTS—CONSTRUED.

   On July 1, 1862, the original Pacific Railroad act was passed, granting a certain portion of the public lands for the construction of railroads; and on July 2, 1864, an amendatory act was passed enlarging the original grant. The lands in controversy were not included in the original grant, but are included in the grant under the later amendatory act, under which complainant claims title. *Held*, that such lands, during the intervening period, were subject to be reserved from sale, pre-emption, or homestead settlement by the proper authority.

3. SAME—TITLE UNDER INTERVENING GRANT.

   Where complainant claims title under the amendatory act of 1864, and respondent claims title under an intervening act of congress of March 3, 1863, passed while the lands in controversy were subject to reservation from sale by the government, the title to the lands is in the respondent.

In Equity.

J. P. Usher, for complainant.

Ross Burns, *A. A. Hurd*, and *Geo. R. Peck*, for respondent.

MCCRARY, C. J. The lands in controversy were not granted to the complainant by the original Pacific Railroad act of 1862. They are outside of the limits of that grant. If complainant's title can be sustained at all, it must be under and by virtue of the amendatory act of July 2, 1864, enlarging the Pacific Railroad grant. Under this lat-

ter act the complainant undoubtedly acquired the title, unless by the intervening grant to the state of Kansas of March 3, 1863, and the withdrawal of the lands thereunder, they were within the meaning of the statute "reserved or otherwise disposed of by the United States." These several acts occurred in chronological order as follows:

July 1, 1862. Original grant.

March 3, 1863. Grant to the state.

April 30, 1863. Lands withdrawn from market by order of the commissioner of the general land-office with the approval of the secretary of the interior.

July 2, 1864. Amendatory act passed enlarging the original grant.

The case turns upon the effect that is to be given to the act of the interior department withdrawing the lands from sale, pre-emption, or homestead entry. Did this withdrawal amount to a reservation of the lands within the meaning of the grant? If so, the lands in controversy did not pass by the grant of 1864, and the complainant has no title. In the case of *Walcott* v. *Des Moines Co.* 5 Wall. 681, the opinion was expressed that the interior department was the competent power to make an order withdrawing or reserving public land from sale, and it was held that, if this were not so, a grant of land for a specific purpose "carried along with it by necessary implication not only the power, but the duty of the land-office to reserve from sale the lands embraced in the grant." The proposition that wherever there is authority to withdraw any of the public land from market, the land department of the government is the proper authority to make the order of withdrawal, is, to my mind, too clear to require argument to enforce it. Nor can there be any doubt that the moment the grant of March 3, 1863, was made, the authority to withdraw the lands embraced therein was created.

It is also well settled that a withdrawal of public lands from sale by competent authority for the purpose of appropriating them to any lawful purpose operates to sever such lands from the public domain. *Wilcox* v. *Jackson,* 13 Pet. 498; *Leavenworth, etc., R. Co.* v. *U. S.* 92 U. S. 745; *Railroad Co.* v. *Fremont Co.* 9 Wall. 94.

Complainant, however, relies on the ruling of the supreme court in the case of *Missouri, etc., R. Co.* v. *Kansas Pac. Ry. Co.* 97 U. S. 491.

In that case the acts under which the complainant claims were construed. Mr. Justice Field, in delivering the opinion of the court construing the two acts together, said:

"When the location was made and the sections granted ascertained, the title of the plaintiff took effect by relation as of the date of the act, except as to the reservations mentioned, the act having the same operation upon the sections as if they had been specifically described in it.

"It is true that the act of 1864 enlarged the grant of 1862, but this was done, not by words of a new and an additional grant, but by a change in the words of the original act, substituting for those there used words of larger import. This mode was evidently adopted that the grant might be treated as if thus made originally; and therefore, as against the United States, the title of the plaintiff to the enlarged quantity, with the exceptions stated, must be considered as taking effect equally with the title of the less quantity as of the date of the first act."

I do not understand the supreme court to hold that the amendatory grant of 1864 passed to the grantee the title to land which congress had in the mean time granted to another, or which had in the mean time been by competent authority otherwise disposed of. It is certainly clear that during the time intervening between July 1, 1862, when the original grant was made, and July 2, 1864, when it was amended and enlarged, the United States was at liberty to dispose of any public lands outside of the limits of the original grant, and the lands in controversy were during that period public lands outside of said grant. They were, I presume, up to the time of their withdrawal under the grant to the state, lands in the market subject to pre-emption or homestead entry. If any of them had been, prior to the passage of the act of 1864, disposed of under the pre-emption or homestead laws, or patented to private parties under any law of the United States, it would, I apprehend, hardly be claimed that lands thus disposed of would have passed to the complainant. And yet this would be the logical consequence of holding that the two acts are to be construed as one act *for all purposes.*

The supreme court was careful to avoid this construction.

It is said that "when the location was made and the *sections granted ascertained,* the title of the plaintiff took effect by relation as of the date of the act, *except as to the reservations mentioned.*" There is in this language a distinct recognition of the fact that the reservations mentioned did not pass, and that an inquiry was necessary to ascertain what sections did and what did not pass. But to make the meaning still more definite and certain the supreme court add, "and therefore, *as against the United States,* the title of the plaintiff to the enlarged quantity, *with the exceptions stated,* must be considered as taking effect equally with the title to the less quantity, as of the date

of the first act." This language not only does not authorize, but it forbids the inference that as against an intervening grantee of some of the lands included within the limits of the larger grant, the title would pass under the two grants as of the date of the former.

It is only as against the United States that this construction prevails. As against other grantees claiming adversely to the United States as well as to complainant, the later act must be considered as a subsequent grant and as taking effect only from its date.

Decree for respondent.

In re DIXON, Bankrupt.

(*Circuit Court, W. D. Missouri, E. D.* January, 1881.)

NOVATION—SUFFICIENT CONSIDERATION.

An agreement on the part of a debtor to make five new notes, in accordance with the request of the creditor, for the purpose of enabling the creditor to bring suits on the new notes in the justice's court, which he could not do on the original claim, is an agreement upon sufficient consideration. Such an agreement cancels the original contract, and substitutes for it five new contracts.

Petition for Review in Bankruptcy.

Belch & Silver, for petitioner.

J. R. Edwards, for bankrupt.

MCCRARY, C. J. Upon petition of the bankrupt the district court ordered that certain land be set apart to him as a homestead, and as such, exempt. This order was made against the objection of the First National Bank of Jefferson City, one of the creditors of the bankrupt estate. The bank files its petition under section 4986, Rev. St., praying a review and reversal of said order of the district court. The ground upon which the decision of the court below is attacked is that the debt held by the bank against the bankrupt was contracted prior to the acquisition by the bankrupt of the premises now claimed by him as exempt under the homestead law of Missouri. 1 Rev. St. Mo. p. 452, § 2695.

The proof shows that at the time the original indebtedness was contracted the land in question was held in common by the bankrupt and his father, Levi Dixon. The original debt was contracted January 23, 1874. It does not appear from the evidence whether the original debt was evidenced by more than one note or not; but it

does appear that in January, 1878, by agreement of parties, the said indebtedness was divided into five parts, and five new notes were given by the bankrupt for sums ranging from $100 to $150.

This was done, as the record shows, for the purpose of bringing the notes within the jurisdiction of a justice of the peace, prior to the time of the filing of Dixon's petition in bankruptcy. Suit was brought on them and judgments obtained before a justice of the peace, but no part of the judgments has been paid. The new notes were given long after the acquisition by the bankrupt of the full title to his homestead.

Was the taking of the new notes for different amounts, for the purpose of enabling the bank to sue upon them before a justice of the peace, an accord and satisfaction of the original debt and the making of a new contract within the meaning of the homestead act? If the giving of the new notes was another agreement between the parties, differing in any material respect from the original, then the old contract was extinguished and merged in the new. Whether the new agreement shall have the effect of satisfying the original claim depends upon the terms, and especially upon the question whether the new promise is founded upon any new consideration.

The question is whether there was an agreement, upon sufficient consideration, to cancel the old and enter into a new contract.

It is not necessary that there should be an express agreement on the part of the creditor to proceed in case of default upon the new and not upon the old indebtedness. It is sufficient if such appears from all the facts and circumstances to have been the intent of the parties. In the present case such intent is sufficiently shown by the cancellation of the original note; by the execution of new notes in small amounts; by the agreement to make new and different notes for different sums so as to enable the bank to sue in a justice's court, which it could not do on the original claim; by the bringing of suits on the new notes and by proving them, and failing to make any proof of the original debt against the bankrupt's estate. *Babcock* v. *Hawkins*, 23 Vt. 561.

Was there a sufficient consideration for the new agreement? It is not claimed that any part of the original debt was actually paid, but it appears that the bank desired to divide the debt into a number of parts, and to take new notes for each part, so as to bring the claim within the jurisdiction of a justice of the peace.

The agreement on the part of Dixon to make five new notes in accordance with the request of the bank, and for the purpose named,

was an agreement upon sufficient consideration, and it must be held to have been an agreement to cancel the original contract and substitute for it the five new contracts, for otherwise the purpose of the contracting parties to bring the claims within the jurisdiction of a justice of the peace would have been defeated. Upon this ground the decree of the district court must be affirmed without considering the other questions argued by counsel.

So ordered.

COY *v*. PERKINS.

(*Circuit Court, D. Massachusetts.* August 3, 1882.)

COSTS—SOLICITOR'S FEES.

Where in an equity case, before any decree is rendered, an order dismissing the bill with costs is obtained, without notice to the defendant or hearing or consideration of the case by the court, the solicitor's fee of $20 will not be allowed.

Appeal from the clerk's taxation of costs in a suit in equity allowing a docket fee of $20 to the defendant's solicitor under these circumstances: At the term at which the case was entered, the parties appeared by their solicitors, and the defendant filed a demurrer to the bill. After the case had been continued for several terms, the plaintiff caused this entry to be made upon the docket: "Bill dismissed by direction of complainant."

The clerk stated his reasons for the allowance as follows:

"I based my decision solely upon the practice of the clerk's office, under which an attorney fee of $20 is taxed for the prevailing party in every equity case disposed of by order of court, otherwise than upon agreement of parties. Previously to a decision by Mr. Justice Clifford, that when an equity case is disposed of by agreement of parties the prevailing party is not entitled to an attorney fee, such fee was taxed in every equity case disposed of; but since that decision an attorney fee has not been taxed in such cases as come strictly within Judge Clifford's decision, but has been taxed in every other equity case disposed of."

The matter was submitted to the court upon the report of the clerk, and the written objections filed by the plaintiff to the allowance of this fee, without further argument.

Causten Browne, for plaintiff.

R. M. Morse, Jr., and *R. Stone, Jr.*, for defendant.

Before GRAY and LOWELL, JJ.

GRAY, Justice. The fee bill allows to the attorney of a prevailing party, in cases on the common-law side of the court, a docket fee of $20 on a trial by a jury or before referees; of $10, when judgment is entered without a jury; and of $5 when the case is discontinued. And the only provision that it makes for a similar fee to solicitors in equity, or to proctors in admiralty, is of the largest of these sums "on a final hearing," which it classes with a trial by a jury, or before referees at common law. Rev. St. §§ 823, 824.

We are of opinion that upon the face of the statute the intention of the legislature is manifest that it is only where some question of law or fact, involved in or leading to the final disposition actually made of the case, has been submitted, or at least presented to the consideration of the court, that there can be said to have been a final hearing which warrants the taxation of a solicitor's or proctor's fee of $20; as, for instance, where the court, on motion and argument, dismisses for irregularity an appeal from the district court, as in the case before Mr. Justice Nelson of *Hayford* v. *Griffith*, 3 Blatchf. C. C. 79, or where the plaintiff discontinues, after the court has substantially decided the merits of the case, either by an opinion expressed at the hearing upon the merits, as in the case of *The Bay City*, before Judge Brown, 3 FED. REP. 47, or by a previous interlocutory decree, as in *Goodyear Dental Vulcanite Co.* v. *Osgood*, decided by Judge Shepley in February, 1878.

In *Howe* v. *Shumway*, October, 1865, Mr. Justice Clifford, disregarding the practice of the clerk's office, held that where by agreement of the parties a bill in equity was dismissed with costs, no solicitor's fee should be allowed.

By the settled practice in equity, the plaintiff, before any decree in the case, may obtain, as of course, an order dismissing his bill with costs. *Curtis* v. *Lloyd*, 4 Mylne & C. 194; *Cummins* v. *Bennett*, 8 Paige, 79; 1 Daniell, Ch. Pr. (5th Am. Ed.) 790–793.

The order in the present case was entered in accordance with this practice, without notice to the defendant, or hearing or consideration of the case by the court. The only issue which had been joined was an issue of law upon the demurrer to the bill, no evidence had been taken, and the case had not even been set down for hearing.

The clerk's taxation must therefore be modified by striking out the docket fee to the defendant's solicitor. The statute having enacted that no other compensation than as therein provided shall be taxed

and allowed to attorneys, solicitors, and proctors, and having provided for a fee upon discontinuance in cases at law only, no solicitor's fee can be taxed in this case unless by the plaintiff's consent.

As this appeal, though involving a small amount, presents a question of frequent occurrence in practice, we have consulted Judge Nelson, and he concurs in this opinion.

Taxation modified.

NOTE.

FEES ALLOWED TO OFFICERS. Section 823 prescribes what fees are allowed to the clerk. district attorney, and other officers;(*a*) and nothing can be taxed as costs for the services of attorneys, solicitors, or proctors, except costs and fees enumerated in the statute;(*b*) but the fee bill does not prevent a court of equity from allowing counsel fees as costs in certain cases;(*c*) so, whether counsel fees shall be allowed on a creditor's petition for an adjudication of bankruptcy rests with the court.(*d*) Costs can be taxed for only two counsel of the same party.(*e*) An allowance of a solicitor's fee for an overruled exception to a master's report is not proper.(*f*) District attorneys are recognized only as attorneys, and are compensated as such;(*g*) and the allowance of costs to them is in the jurisdiction of the judge, and not within the power of the officers of the treasury.(*h*) Where services were in part performed by one district attorney, and in part by his successor, the fees taxed will be distributed between them.(*i*) The statute is a positive enactment,(*j*) and must be rigorously enforced.(*k*) The prevailing party is entitled only to such costs as the statute allows;(*l*) and when a charge for services is not found in the schedule of fees it must be rejected;(*m*) but fees may be allowed for matters not therein enumerated.(*n*) A court of equity may allow costs not presented in the statute, and such as justice and equity may require.(*o*)

COSTS. Costs are not payable out of the fund in controversy, (*a*) but each party is liable to the officer for fees for services performed for him without respect to which recovers judgment; (*b*) and security may be required from a non-resident.(*c*) Commissions of the sheriff or marshal on collections, and of the clerk for taking charge of the money, are part of the costs of the suit.(*d*) A party is not liable for costs for not doing what he was restrained by injunction from doing;(*e*) but where delay in suing was attributable to con-

(*a*) U. S. v. Cigars, 2 Fed. Rep. 495.

(*b*) Canter v. Amer. Ins. Co. 3 Pet. 307; The Baltimore, 8 Wall. 377; The Liverpool Packet, 2 Sprague, 37; Derry v. Hersey, 21 Law Rep. 473.

(*c*) In re Waite, 1 Low. 321; Ex parte Platt, 2 Wall. Jr. 453.

(*d*) In re Williams, 2 Bank. Reg. 83.

(*e*) In re Waite, 1 Low. 321.

(*f*) Garretson v. Clark, 17 Blatchf. 256; S. C. 15 Blatchf. 70.

(*g*) The Nassau, Blatchf. Pr. 601.

(*h*) U. S v. Ingersoll, Crabbe, 135.

(*i*) Ex parte Robbins, 2 Gall. 320.

(*j*) The Nassau, Blatchf. Pr. 601.

(*k*) Stimpson v. Brooks, 3 Blatchf. 456.

(*l*) Day v. Woodworth, 13 How. 363; Kneass v. Schuylkill Bank, 4 Wash. C. C. 106.

(*m*) Dedekam v. Vose, 3 Blatchf. 153; Lyell v. Miller, 6 McLean, 422; U. S. v. Smith, 1 Wood. & M. 184; U. S. v. Packages, 18 Law Rep. 284.

(*n*) Jordan v. Agawam Wool Co. 3 Cliff. 239.

(*o*) Spaulding v. Tucker, 2 Sawy. 50.

(*a*) National Bank v. Whitney, 103 U. S. 99.

(*b*) Caldwell v. Jackson, 7 Cranch, 276; In re Stover, 1 Curt. 93.

(*c*) Gross & P. Manuf'g Co. v. Gerhard, 8 Law Rep. 136.

(*d*) Kitchen v. Woodfin, 1 Hughes, 340.

(*e*) Kearney v. A Pile Driver, 3 Fed. Rep. 247.

cealment in the wrong-doer, costs were allowed.(*f*) No costs are allowed on dismissing a bill and cross-bill.(*g*) The allowance or non-allowance of costs in an admiralty cause is a matter of discretion.(*h*) The clerk's fee of one dollar with the note of issue, on appeal in admiralty, put upon the calendar, is taxable.(*i*) Where there are cross-libels in a case of collision, and both vessels were in fault, costs of both courts are equally divided.(*j*) The taxation of costs in a cause removed is governed by these sections; (*k*) and where a suit is removed it brings along with it the costs as an incident;(*l*) but the act of congress prescribing what costs may be taxed applies to such costs as accrue after the removal of the cause.(*m*)

EXPENSES—ALLOWANCE. The statute does not prohibit the allowance of such disbursements as are rendered necessary by order of the court;(*a*) so, if the rule of court requires papers or briefs to be printed, their expenses may be taxed as costs;(*b*) so, the cost of printing the record on appeal to the supreme court,(*c*) or the record preparatory to a final hearing, may be taxed;(*d*) but the expense of printing testimony,(*e*) or a statement of the case, for the use of the judges, cannot be taxed as costs.(*f*) The cost of copies of assignments appropriate to the case may be taxed,(*g*) and the amount paid for telegraphic dispatches in the suit is allowable, where by affidavit it is shown to have been properly and necessarily expended;(*h*) so, postage paid on the transmission and return of a commission may be allowed.(*i*) The expense of a survey may be charged against both parties in equal shares.(*j*) The expenses of such models as are copies of models in the patent-office is allowable,(*k*) and their actual value is taxable,(*l*) but not the expense of procuring other models;(*m*) so the expense of the model of the infringing machine is not allowable;(*n*) nor is defendant entitled to the cost of procuring a copy of plaintiff's patent.(*o*) Expenditures for copies of pleadings and proofs are not taxable; and, in the absence of an agreement to that effect, the expense of reporting argument of plaintiff's counsel on final hearing,(*p*) or the expense of a stenographic reporter, is not taxable as costs.(*q*) This section does not apply to costs for travel and attendance; these are allowed by rule of court.(*r*)

(*f*) The Christopher Columbus, 8 Ben. 239.

(*g*) Prune v. Brandon Manuf'g Co. 16 Blatchf. 453.

(*h*) Taylor v. Woods, 3 Woods, 146. See The Emily B. Souder, 15 Blatchf. 85.

(*i*) The Alice Tainter, 14 Blatchf. 225.

(*j*) Vanderbilt v. Reynolds, 7 Law Rep. 523.

(*k*) Clare v. National City Bank, 14 Blatch 445.

(*l*) Warren v. Ives, 1 Flippen, 356; Penrose v. Penrose, 1 Fed. Rep. 479; Kreager v. Judd, 5 Fed. Rep 957. See Gilman v. Libbey, 4 Cliff. 450.

(*m*) Warren v. Ives, 1 Flippen, 356.

(*a*) Dennis v. Eddy, 12 Blatchf. 95.

(*b*) Neff v. Pennoyer, 3 Sawy. 335; Dennis v. Eddy, 12 Blatchf. 195; Brooks v. Byam, 2 Story, 553.

(*c*) Railroad Co. v. The Collector, 96 U. S. 594.

(*d*) Jordan v. Agawam Wool Co. 3 Cliff. 239.

(*e*) Hussey v. Bradley, 5 Blatchf. 210; Troy I. & N. Factory v. Corning, 7 Blatchf. 16; Spaulding v. Tucker, 2 Sawy. 50.

(*f*) The Perseverance, 3 Dall. 336.

(*g*) Hathaway v. Roach, 2 Wood. & M. 63.

(*h*) Hussey v. Bradley, 5 Blatchf. 210.

(*i*) Prouty v. Draper, 2 Story, 199.

(*j*) Whipple v. Cumberland C. Co. 3 Story, 84.

(*k*) Hussey v. Bradley, 5 Blatchf. 211.

(*l*) Hathaway v. Roach, 2 Wood. & M. 63.

(*m*) Hussey v. Bradley, 5 Blatchf. 210; Woodruff v. Barney, 2 Fish. 244; Hathaway v. Roach, 2 Wood. & M. 63.

(*n*) Parker v. Bigler, 1 Fish. 285.

(*o*) Hathaway v. Roach, 2 Wood. & M. 63; Woodruff v. Barney, 2 Fish. 244.

(*p*) Hussey v. Bradley, 5 Blatchf. 210.

(*q*) Bridges v. Sheldon, 18 Blatchf. 507.

(*r*) Nichols v. Brunswick, 3 Cliff. 88; Whipple v. Cumberland C. Co. 3 Story, 84; Hathaway v. Roach, 2 Wood. & M. 63. See Sebring v. Ward, 4 Wash. C. C. 546.

DOCKET FEE. The docket fee of $20 is the highest compensation allowed, and it can be allowed but once;(*a*) but where there were three trials—the first resulting in a verdict for plaintiff, and the other two in separate verdicts for defendant—the defendant's attorney is entitled to a docket fee of $20 for each of the three trials.(*b*) In a case tried twice by a jury, which both times disagreed, and the case was dismissed, a docket fee of only five dollars is taxable.(*c*) A docket fee may be taxed in one of a number of cases embraced, by stipulation, in a single hearing.(*d*) It cannot be taxed for an attorney not admitted to the bar of the court, nor one whose name is not on the docket before the filing of the general replication.(*e*) It is to be taxed in every case where a final decree is entered after replication filed.(*f*) There is no distinction in admiralty between suits *in rem* and suits *in personam*.(*g*) "Trial" means a trial by jury, and until the jury is sworn there is no trial.(*h*) "Trial before a jury" applies only to cases where the controversy is terminated by a verdict and judgment thereon.(*i*) "Final hearing" is the submission of a case in equity for determination.(*j*) The docket fee may be allowed, although libelant discontinues after a witness has been sworn;(*k*) but it is not taxable on a motion for an order, by default, against stipulators.(*l*) If parties waive a jury trial, a docket fee of only $10 can be taxed.(*m*) It is allowable in the circuit court, when a cause on appeal is on the calendar for hearing, and dismissed for want of security for costs.(*n*) A docket fee of $20 is taxable in cases of involuntary, but not in cases of voluntary, bankruptcy.(*o*) If tried before the court, and the petition dismissed, it may be allowed to defendant's attorney; but it cannot be taxed in favor of the attorney of the petitioning creditor.(*p*) So, when there is no denial and no contest, it cannot be allowed.(*q*) Proceedings before a master upon a reference, for an interlocutory purpose, is neither a trial nor a final hearing, and the docket fee cannot be allowed therefor; (*r*) nor can a docket fee be allowed upon exceptions to a commissioner's report.(*s*)

DEPOSITIONS. The attorney of the prevailing party is entitled to the pay of $2.50 for each deposition admitted in evidence, when it is agreed that they may be read on the trial,(*t*) although the witness attended and was sworn and examined;(*u*) but if the depositions taken and used in the district court are read from the apostles in the circuit court, no fee is taxable in the circuit court.(*v*) The costs of taking a deposition *de bene esse* may be taxed,(*w*) but if the party dispenses with the deposition and examines the witness, the costs of the deposition cannot be taxed;(*x*) nor will fees of illegible deposi-

(*a*) Troy I. & N. Factory v. Corning, 7 Blatchf. 16; Dedekam v. Vose, 3 Blatchf. 77.

(*b*) Schmieder v. Barney, 7 Fed. Rep. 451.

(*c*) Strafer v. Carr, 6 Fed. Rep. 466.

(*d*) Goodyear D. V. Co. v. Osgood, 13 O. G. 325.

(*e*) Goodyear D. V. Co. v. Osgood, 13 O. G. 325.

(*f*) Goodyear D. V. Co. v. Osgood, 13 O. G. 325.

(*g*) The Young Mechanic, 3 Ware, 58.

(*h*) Miller v. Scott, 2 Bank Reg. 86; The Bay City, 3 Fed. Rep. 47.

(*i*) Strafer v. Carr, 6 Fed. Rep. 466.

(*j*) Goodyear D. V. Co. v. Osgood, 13 O. G. 325.

(*k*) The Bay City, 3 Fed. Rep. 47.

(*l*) Dedekam v. Vose, 3 Blatchf. 153.

(*m*) Jones v. Schell, 8 Blatchf. 79.

(*n*) Hayford v. Griffith, 3 Blatchf. 79.

(*o*) Miller v. Scott, 2 Bank. Reg. 86.

(*p*) Davidson v. Coates, 6 Bank. Reg. 304.

(*q*) In re Mead, 8 Phila. 174.

(*r*) Doughty v. Manuf'g Co. 4 Fish. 318.

(*s*) Beckwith v. Easton, 4 Ben. 357.

(*t*) Jerman v. Stewart, 12 Fed. Rep. 271.

(*u*) Beckwith v. Easton, 4 Ben. 357.

(*v*) Dedekam v. Vose, 3 Blatchf. 77.

(*w*) Fry v. Yeaton, 1 Cranch, C. C. 550.

(*x*) Hathaway v. Roach, 2 Wood. & M. 63.

tions be allowed.(y) The fee for depositions relates to testimony taken out of court under such authority as will entitle it to be read as evidence in court at the trial or hearing.(z) Courts of the United States will allow the same fees to any one taking a deposition as is allowed by the Revised Statutes to clerks of courts and commissioners;(a) but a fee for an *ex parte* affidavit in a proceeding for a preliminary injunction is not allowable.(b)—[ED.

(y) The Avid. 3 Ben. 434.

(z) Troy I. & N. Factory v. Corning, 7 Blatchf. 16.

(a) Jerman v. Stewart, 12 Fed. Rep. 271.

(b) Stimpson v. Brooks, 3 Blatchf. 456.

GALLENA *v.* HOT SPRINGS RAILROAD.

(*Circuit Court, E. D. Arkansas.* April Term, 1882.)

1. RAILROADS—EJECTING PASSENGER FROM TRAIN.

   Where the legal right of a conductor of a railroad train to eject or remove a passenger from the cars exists, he must effect the removal at a proper place and in a proper manner, and with no more confusion, force, or violence than is reasonably necessary for the purpose.

2. SAME—DUTY OF CONDUCTOR IN EJECTING PASSENGER.

   Before a conductor can require a passenger to get off the cars he should stop the train at a station or depot, or where he could be put off without injury or danger of injury. He has no right to forcibly eject a passsnger at such a place and in such a manner as his whim, caprice, or malice may dictate or suggest.

3. SAME—ACTION—PROVINCE OF JURY.

   In an action for damages for violent ejection from a car by the conductor, it is the province of the jury to reconcile difference in the testimony, and to decide as to the credibility of the witnesses, taking into consideration the relation they sustain to the case, their probable motives, their demeanor, and their opportunities of knowing and seeing the facts about which they testify, and the reasonableness or unreasonableness of their testimony, in view of the knowledge of human nature, and the established and undoubted facts in the case.

4. ASSAULT ON PASSENGER.

   Where a conductor, with a loaded revolver in his hand, approaches a passenger before making any effort to induce him to get off, and when the passenger had not made, or threatened to make forcible resistance to his authority, the conductor is guilty of a gross outrage.

5. SAME—THREATS.

   With or without the use of a deadly weapon, a conductor has no right to compel a passenger, by commands or threats, to jump from a moving train.

6. RAILROAD COMPANIES—DUTY OF—LIABILITY.

   The law makes it the duty of railroad companies to employ competent, safe, and civil men to discharge the duties of a conductor, and for the assaults, injuries, and wrongs inflicted on a passenger by a conductor in the course of his employment as such, the railroad company is responsible.

7. SAME—DAMAGES—EXEMPLARY DAMAGES.

Where the plaintiff was put off the train in an improper manner and in an improper place, he is entitled to recover a reasonable compensation for bodily injury, and mental suffering and anguish, resulting from the assault; and where the injury has been wanton and malicious, a further compensation by way of punishment or exemplary damages, in the discretion of the jury.

Casey Young and *G. W. Gordon*, for plaintiff.

John M. Moore, for defendant.

CALDWELL, D. J., (*charging jury.*) The plaintiff, a citizen of Memphis, Tennessee, on the twenty-eighth of July, 1881, purchased an excursion coupon ticket from Memphis to Hot Springs and return, good until the thirty-first day of August of the same year. He traveled on this ticket from Memphis to Hot Springs, and on the eighteenth day of August, with his wife and daughter, who had preceded him to the springs, took passage on defendant's train at Hot Springs to return to Memphis. When the conductor of the train came to plaintiff for his ticket, which he did according to custom soon after the train left Hot Springs, the plaintiff tendered to him the excursion ticket before mentioned. This ticket the conductor refused to honor, saying that before he could accept it the plaintiff must present it to the defendant's agent at Hot Springs, identify himself, and sign the ticket, and have the agent at that place stamp it. The plaintiff offered to identify himself to the conductor, and sign the ticket on the train, or to do the same before the agent of the defendant company on the arrival of the train at Malvern, but the conductor declined to permit him to do so, and required him to leave the train at once. The train was then stopped, and in compliance with the demand of the conductor the plaintiff got off, but on receiving assurance from one or more passengers on the train that his ticket was good, and to get on the car again, he did so.

The conductor did not see the plaintiff at the time he got on after being put off, but in a short time afterwards, seeing the plaintiff on the train, proceeded to put him off a second time, in the manner and under the circumstances detailed to you in the testimony.

The questions in the case to be determined by the court and jury are:

(1) Did the conductor have a legal right to put the plaintiff off the train? (2) If he had such right, was it exercised in a proper manner and at a proper place? (3) If the conductor had either no right to put the plaintiff off the train, or if, having the right, he exercised it in an improper manner and at an improper place, what damages shall the plaintiff receive for such wrongful act?

1. That the plaintiff purchased and paid for the excursion ticket mentioned, and that he was the *bona fide* holder of the same at the time he was put off the train, is not contested. But there are certain conditions or stipulations contained on this ticket, to which the plaintiff subscribed, the fifth of which reads as follows:

"It is not good for return passage unless the holder identifies himself or herself as the original purchaser to the satisfaction of an authorized agent of the Hot Springs Railroad; and when officially signed and dated in ink, and duly witnessed and stamped by said agent, this ticket shall then be good only one day after such date, and in no case after the thirty-first day of August following date of sale."

And these further stipulations comprise a part of the contract signed by the plaintiff;

"Unless all the conditions on this ticket are fully complied with, it shall be void."

"In consideration of the reduced rate at which this ticket was sold, I agree to the above contract."

The contract is signed by the plaintiff and the agent of the railroad company, and immediately below the first coupon on the return part of the ticket is this notification:

"TO PURCHASERS.—Read the contract and take notice that the return part of this ticket must be stamped and your signature witnessed by a ticket agent of the Hot Springs Railroad before it will be honored for passage."

The following is the sixth clause of the contract subscribed by the plaintiff:

"I, the original purchaser, hereby agree to sign my name, and otherwise identify myself as such, whenever called upon to do so by *any* conductor or agent of the *line or lines* over which this ticket reads.'

Confessedly this sixth clause, taken by itself, would imply that all the holder had to do was to sign his name and identify himself as the original purchaser when *called upon to do so by any conductor or agent* of the railroad company, and that until such demand was made upon him he had nothing to do. But in the opinion of the court this sixth clause does not annul or supersede the requirements of the fifth clause, but they both stand and are effectual for the purpose for which they were severally intended. If the usual full-fare tickets issued to passengers contained like conditions with those on this ticket, the purchaser whose attention was not expressly called to them before he took passage, and who did not assent to them, would probably not be bound thereby. But where one without being induced thereto by fraud signs a contract for a special-rate ticket, the law

conclusively presumes he knows the contents of such contract, and he is bound thereby.

It follows, therefore, that the plaintiff should have identified himself to an agent of the defendant company, and otherwise complied with the requirements of the fifth clause of the contract, before taking passage on the train at Hot Springs, and that not having done so he had not, under the terms of the contract between himself and the company, the right to return on that ticket. It matters not that the plaintiff was in fact the original purchaser of the ticket, and that he was ready and offered to sign the ticket, and identify himself as such to the conductor on the train, or to the agent at Malvern, upon the arrival of the train at that place. This is a technical and strict legal construction of the contract, but it is one the railroad company had a right to insist on; and standing on its strict legal rights under the contract between itself and the plaintiff, the conductor had a right to refuse to honor the plaintiff's ticket, and require him to leave the cars; and if the plaintiff declined to do so, the conductor had a strict legal right to remove him therefrom *at a proper place and in a proper manner*. "The law allows it, and the court awards it."

2. But where the law gives the conductor this right, it at the *same time regulates the mode of its exercise*. Where the legal right to eject or remove a passenger from the cars exists, the law does not invest the conductor with the power to effect the removal at such place and in such mode and manner as his whim, caprice, or malice may dictate or suggest. But the removal must be effected at a proper place, and with no more confusion, force, or violence than is reasonably necessary for the purpose. This is due to the other passengers on the train, no less than the passenger ejected. Especially is this rule applicable to a case where the passenger is on the train in good faith, holding a ticket for which he has paid the required price, but which he cannot legally require the conductor to honor, on account of a mere oversight to comply with some of its numerous conditions, or an honest misinterpretation of them on his part, or more likely from an utter ignorance of their existence. A passenger on a train under such circumstances is not to be regarded or treated as though he were a felon or an outlaw.

Applying these general principles of law to the case at bar, I instruct you that before the conductor required the plaintiff to get off the train he should have stopped it at a station or depot where the plaintiff, if he had chosen so to do, could have got off without danger,

or where, if he declined voluntarily to get off, he could have been put off without injury or danger of injury of any kind except such as he might necessarily and justly bring upon himself by forcible resistance to the lawful authority of the conductor. Where the right to put a peaceable passenger off the train exists, it must be exercised at a station or depot. The humanity and justice of the law will not permit a conductor to put such a passenger off the train at any place his caprice may suggest. If the law were otherwise, it would be in the power of a conductor to inflict great oppression on a passenger whom he had the right to remove from his train. A passenger put off between stations on roads running through swamps or other unsettled districts might suffer great hardships, and even perish, before he could reach shelter or food.

The conductor himself testifies that the plaintiff not only made no forcible resistance to his authority, but that he never threatened nor intimated that it was his purpose to do so at any time. He told the conductor that while he would offer no resistance to being put off, he would not voluntarily get off, because he believed his ticket was good, and he wanted to test his right to ride on it. The conductor further testifies that before making any effort to induce plaintiff to get off the car the second time, he went to the baggage car and procured a loaded revolver, of the army size, with which he returned to the car in which the plaintiff and other passengers were riding, and that holding the revolver in his right hand he laid his left hand on the plaintiff and conducted him to the platform of the car, and there required the plaintiff to jump off, which he did while the train was running at a low rate of speed, and at a place where there was a ditch four or five feet deep, into which the plaintiff was precipitated. The place where this occurred was some two miles or more from any station or depot. The conductor says he was not angry or violent in his deportment to the plaintiff at this time, and that he did not forcibly fling him off the platform into the ditch.

The plaintiff and many other witnesses who were in the car as passengers testify that the conductor was angry and insulting and threatening in his manner and language in a high degree, and that he hurled the plaintiff from the platform into a ditch six or eight feet deep, with great force and violence, when the speed of the train was from eight to twelve miles an hour, to the imminent peril of his life and limb. And the passengers testify that immediately after throwing the plaintiff from the train, the conductor placed himself in the

door of the passenger car, and flourishing his six-shooter in the face of his passengers cried out, "Is there anybody else in here wants any of this?"

It is your province to reconcile all differences in the testimony of the witnesses if you can do so, but if the difference is irreconcilable, then you will give the credit to those whom you believe speak the truth; and in determining who you will believe you will take into consideration the relation they sustain to the case, the probable motives, if any, that influence them in giving their testimony, their demeanor on the stand, their opportunities to know and see the facts about which they testify, and the reasonableness or unreasonableness of their testimony, in view of your knowledge of human nature, and the established and undoubted facts in the case.

The following is an extract from the testimony of the conductor:

By the Court. *Question.* Had the plaintiff himself exhibited any weapon? *Answer.* No, sir. *Q.* Had he made any forcible resistance? *A.* No, sir.

By Mr. Moore. Q. Do I understand you to state that it was your object in getting that pistol to prevent these passengers from assisting Gallena on the train; that you thought from their statements they were going to interfere? *A.* Yes, sir; that is my simple reason.

By Col. Young. *Q.* That you got that pistol for the purpose of using it on Gallena or some one else? *A.* No, sir.

By the Court. *Q.* You say that plaintiff had not made any forcible resistance, or offered any? *A.* No, sir. *Q.* Had he intimated any? *A.* Not that I heard. *Q:* Had any person made any exhibition of violence towards you? *A.* No, sir; except by language. *Q.* When you found that he was on the train what effort did you make to put him off, or induce him to get off before you got the pistol? *A.* None whatever. *Q.* What kind of a pistol was it? *A.* It was a revolver, army size; six-shooter.

In approaching the plaintiff in a menacing manner with a loaded army revolver in his hand, before making any effort to induce him to get off, or to put him off, and when the plaintiff had not made, or threatened that he would make, any forcible resistance to his authority, the conductor was guilty of a gross outrage, not only on the plaintiff, but as well upon all other passengers whose lives would be put in peril by the use of such a deadly weapon in the car, and who could not fail to be justly alarmed and disturbed by its exhibition under the circumstances. Conductors have no right to draw a deadly weapon on a passenger who is quiet and peaceable, and who has not offered, and is not threatening, any violence to the conductor or other passengers. Deadly weapons of such a character are never to be brought into requisition by a conductor of a passenger train ex-

cept to protect himself, or the passengers under his charge, from deadly or unlawful assaults. He cannot collect fares, or compel passengers traveling without tickets to jump from a moving train, by the use or exhibition of such a weapon. And with or without the use of a deadly weapon he has no right to hurl a passenger from a moving train into a ditch. And to compel the passenger, by commands or threats, to jump from a moving train into a ditch, is as much a violation of the law and the rights of the passengers, as if the conductor had hurled him from the car by actual physical force. The office of conductor of a passenger train is an exceedingly important and responsible one. There are few positions which demand of their incumbents more good judgment and self-possession. Not only the peace and comfort, but the lives as well, of passengers are in their keeping. They must not, by any act of their own, disturb the one or endanger the other. They have to deal with all classes of people. They daily come in contact with the unscrupulous and dishonest, who are seeking to defraud the railroad company of what is justly its due, and are often grossly insulted by the ignorant and vulgar for a lawful and proper discharge of their duties. It is obvious that if a conductor was to attempt to redress every personal insult, or enter a boisterous quarrel with every vulgar and rude person who might invite it, there would be no peace or safety for his passengers. He must decline all such contests. He can take action only in those cases where the rights of the railroad company, or the peace or safety of the passengers under his charge, or his own safety, demand it. And then he can only act in the mode and manner heretofore indicated, accomplishing what he has a right to do in the given case with as little force, violence, and confusion as is practicable and reasonable under the circumstances.

The remarks of one or more of the passengers to the plaintiff when put off the train the first time, to the effect that his ticket was good, and to get back on the train; that if he paid his fare the conductor would probably appropriate it to his own use,—were uttered, the conductor himself testifies, without any exhibition or threat of violence, and, however irritating to the conductor, constituted no justification or excuse for his subsequent treatment of the plaintiff, nor for his menacing with a six-shooter a car full of peaceable passengers. Words, however irritating or approbrious, will not justify an assault by one under no special obligation to keep the peace; much less will they justify an assault by a conductor, who is, by virtue of his position, not only bound to keep the peace himself, but whose duty it is

to maintain peace and order in the cars, and protect the passengers in his charge from assaults and violence.

The law requires railroad companies to carry their passengers safely and treat them respectfully. They are under obligations to use proper precautions and exertions to protect passengers while in the cars from the violence and insults of strangers and co-passengers, and they are bound, of course, to protect them from the assaults, insults, and violence of their own conductors and servants. They select and appoint their own conductors without consulting their passengers, and it is but reasonable that they should be held responsible for any act of violence to the passengers of which the conductors may be guilty. The moment the passenger enters the car he is more or less under the control of the conductor, and subject to his orders. Fit or unfit, humane or brutal, good-tempered or morose, the passenger is comparatively helpless, and may be obliged to submit for the time without any means of redress. *Pendleton* v. *Kinsley*, 3 Cliff. 416. The law, therefore, makes it the duty of railroad companies to employ competent, sober, and civil men to discharge the responsible duties devolving on a conductor; and for the assaults, injuries, and wrongs inflicted on a passenger by a conductor, in the course of his employment as such, the railroad company is responsible.

If, applying the rules of law I have laid down to the testimony in this case, you find that the plaintiff was expelled from the car in an improper manner and at an improper place, the plaintiff is entitled to a verdict at your hands, and the only remaining question is as to the amount of damages you will award him.

3. This makes it necessary for the court to instruct you with reference to the rules adopted by the law to guide and govern you in measuring and ascertaining such damages.

Damages are of two kinds: (1) Actual or compensatory damages; (2) exemplary or vindictive damages, or, as it is sometimes called, "smart money." The plaintiff claims to recover both.

If you find the plaintiff was put off the train in an improper manner and at an improper place, then he is entitled to recover a fair and reasonable compensation for the bodily injuries sustained, and the mental suffering and anguish resulting from the assault, indignity, and insult inflicted upon him in the presence of his wife and child, and the other passengers on the train. The plaintiff is not required to prove by witnesses what would under the circumstances be a just and fair compensation for the mental and bodily suffering inflicted upon him.

"The law leaves the amount to your sound judgments, reasonably, fairly and dispassionately exercised. This it does from necessity. If one man owes another so many dollars, or has taken from him so much property, there is something to measure (as the law expresses it) the amount of the damages or the recovery. But in an action of this kind the law is unable to furnish you with any definite rule to measure the damages. It confides it to the sound, temperate, deliberate, and reasonable exercise of your functions as jurymen."

The circumstances which will authorize the infliction by the jury of exemplary damages or smart money is thus stated by the supreme court of the United States:

"Where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the compensation for actual damages something further by way of punishment or example, which has sometimes been called smart money. This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." *Day* v. *Woodsworth*, 13 How. 371; *Milwaukee R. Co.* v. *Arms*, 91 U. S. 489.

You will inquire and decide whether, considering all the circumstances in evidence in this case, it comes within this rule, and is one in which, in addition to compensating the plaintiff for his actual damages, the defendant should also be punished in damages for example's sake.

If you decide to go beyond the limits of compensation to the plaintiff, and enter into the field of exemplary damages, then it is your duty to put yourselves in the situation of the parties as near as may be; to look at all the circumstances under which the conductor acted—at those which are claimed to aggravate and at those which are claimed to mitigate the acts complained of; and in this connection you may consider the character and disposition of the conductor as disclosed by the evidence; whether other passengers holding tickets similar to that of plaintiff's were permitted by the conductor to ride to Malvern and there identify themselves and have their tickets stamped, and whether the railroad company, with a full knowledge of all the facts, approved the action of the conductor and retained him in its service. While, in the language of the supreme court, "it is left to the discretion of the jury" to determine the amount of exemplary damages they will award in cases where they find the injury has been wanton and malicious, or gross and outrageous, yet this is not a discretion to be wildly, wantonly, or recklessly exercised, but it is a discretion to be guided and controlled by the deliberate and impartial exercise of common sense and sound judgment.

And if you find this is a case calling for the imposition of exemplary damages, you should not, in an effort to punish the defendant for the malicious, gross, or excessive action of its conductor, yourselves commit an excess by awarding to the plaintiff an extravagant or unreasonable amount.

You are the sole judges of the facts in the case, the credibility of the witnesses, and the weight to be given to their testimony.

The jury returned a verdict for the plaintiff for $4,900.

The defendant filed a motion for a new trial upon the ground the damages were excessive. This motion, before argument upon it, was withdrawn; the plaintiff agreeing to receive $4,000 in satisfaction of his judgment, in consideration of the speedy payment of that sum and the withdrawal of the motion.

FOYE *v.* NICHOLS and others.

(*Circuit Court, D. California.* July 24, 1882.)

1. PATENTS FOR INVENTIONS—SIMILAR CONTRIVANCES.

   Where defendant's machine employs the same contrivance as the machine of the plaintiff, it is an infringement, although it may be an improvement upon plaintiff's patent.

2. UTILITY—EVIDENCE OF.

   If the several features or inventions separately claimed by complainant are admitted to be useful when employed in defendant's machine, it is evidence of their usefulness in the machine of the complainant.

In Equity.

SAWYER, C. J., (*orally.*) In the case of *Foye* v. *Nichols* I have reached a conclusion. It is a patent case—a patent plow or pulverizer. One party calls his implement a plow, the other calls his a pulverizer. I am satisfied, on an examination, that the first, fourth, and fifth claims are infringed, and that the patent is a valid patent as to those claims. I do not think there is any anticipation. The point most relied upon is as to whether the blades of the complainant's plow are concavo-convex "transversely." The argument is on the word "transversely." I think the argument is hypercritical, on the strict mathematical scientific definition of the term "transverse."

The drawings show exactly the form, and the model also, which the defendant himself presents, so that there can be no doubt as to what

the party means. The drawing and model give precisely the form in which the blade when bent on the shaft of the defendant's machine takes, which defendant calls "*dishing*," and the complainant "*concavo-convex*." The fact that the complainant christens his implement a "plow," and the defendant his a "pulverizer," cannot affect the character or operation of either machine, as shown by the models and drawings, which constitute important parts of the description. So, whether the term "concavo-convex transversely" describes the complainant's blades with strict mathematical or scientific precision and accuracy, cannot affect the character or operation of the implement, as shown in the models and drawings. The whole, taken together, shows what his meaning is.

The defendant does not make his blades quite so wide as the complainant suggests, but the blade performs the same service in substantially, nay, precisely, the same way. I do not think there can be any misunderstanding as to what the complainant means by his description; that is to say, the description of the implement and its operation in the specifications and drawings. There can be no doubt but that the defendant's blade performs the same operation in precisely the same way. There was some criticism on the single shaft of complainant, and on the draft at right angles to the axis of motion. But defendant's two plows or pulverizers—whatever they may be called—are on a single shaft,—jointed, it is true, but still a single shaft. There is in his machine a contrivance by which he can set his opposite plows absolutely at right angles, or at any desired inclination, in order to accommodate itself to the different varieties of soil. This may possibly be an improvement, but if so, he still uses the two plows on opposite ends of the shaft, with their screws running in opposite directions, the one counteracting the strain of the other in the opposite direction. He embraces the complainant's invention, and even if the complainant's plows on the opposite ends of the shaft are set at an angle, the draft would be at right angles to the general line of the axis of revolution of the entire machine.

The other point that was very strenuously argued and dwelt upon was as to whether the complainant's invention is useful or not.

It was contended that the evidence is insufficient to show its usefulness. If we concede, for the purpose of the argument, that the complainant's own testimony on the question of usefulness left it in doubt, it is still one of those cases which so frequently arise where the defendant uses the precise features of the prior machine, and still insists that they are not useful; and in this case his machine man-

ifestly depends on those elements. In fact, it is all there is of the defendant's machine, so far as its operation as a plow or pulverizer is concerned, and the several features used are separately claimed in plaintiff's patent. He testified that his machine is useful; by far the most useful machine for the purposes intended in existence. If, then, the several features or inventions separately claimed by the claimant are useful in the defendant's machine, they must be useful in the other. Without those features, covered by the several claims sustained, there would be no machine of the defendant.

Defendant's patent does not cover those features, and for the reason that they are anticipated by Foye. It only covers those features in combination with some other minor features. It certainly embraces the features of the complainant's machine, and they are the operative elements of defendant's machine, without which his machine manifestly would not work well.

The complainant claims the several subfeatures or combinations separately, and all are used in defendant's machine, which is admitted to be useful. That is ample evidence of their usefulness. Those are the main points on which the contest arises, and on which the argument was expended.

I think that the patent is a valid one as to these three claims, the first, fourth, and fifth; and the defendant's machine infringes each of those three claims.

There must be a decree for complainant with reference to those claims, and it must be referred to the standing master to ascertain the profits. It is so ordered.

COAST WRECKING CO. and others *v.* PHŒNIX INSURANCE CO., of Brooklyn.

(Circuit Court, E. D. New York. July 8, 1882.)

1. ADMIRALTY—MARITIME SERVICE—ADJUSTING GENERAL AVERAGE.

   Services performed by average adjusters, including expenses, disbursements, and charges incidental to ascertaining and adjusting the proportionate share chargeable to the cargo of the expense incurred in saving and discharging the cargo, and delivering it, are maritime in their nature; and an express contract for such services is a maritime contract and cognizable in the admiralty.

2. SAME—SALVAGE—WRECKING COMPANY.

   Services performed by a wrecking company in saving the cargo of a stranded vessel and transporting it in different lots to a place of safety, and there stor-

ing it, are continuous services; and every part of the cargo was interested in the whole of it, and should bear its due proportion of the whole expense of saving all that was saved.

3. SALVAGE—MEASURE OF COMPENSATION.

In estimating the compensation to be made for salvage services, not only is the service in the particular case to be regarded, but the reward is to be looked at, that it may induce aid on future occasions, by competent salvors to other property in distress; and the equipment of the Coast Wrecking Company with steamers and pumps and wrecking material and skilled men, and its readiness to act at a moment's notice, must be considered.

George A. Black, for libelants.

Thomas E. Stillman, for respondent.

In this case I find the following facts:

The libelant the Coast Wrecking Company, at the times hereinafter mentioned, was a corporation created by the State of New York, and authorized to own and hire vessels, and use them in salvage services. It had a capital of $222,000, invested in steamers and wrecking material, and a store-house, and from 33 to 35 men constantly employed, with an experienced superintendent, receiving a salary of from $4,500 to $9,000 a year, and its men and vessels were always ready to start at an instant's notice for the relief of a vessel in distress. The Phœnix Insurance Company, the respondent, was and is a corporation authorized to carry on, and carrying on, the business of marine insurance. The libelants Johnson, Higgins, and Krebs were carrying on the business of average adjusters in the city of New York, as copartners, under the firm name of Johnson & Higgins.

On the first of January, 1879, the steam-ship Vindicator sailed from Fall River, Massachusetts, with a general cargo of merchandise on board, bound to Philadelphia. On the fourth of January the Vindicator stranded on the shore of Long Island, near Moriches, and became in great danger of ultimate total destruction, with her cargo. She was stranded just inside the outer bar, heading towards the beach, with her stern to the inside of the outer bar, very low down in the water, listed to port about 45 deg., and covered completely with ice. The place where she lay was about 70 miles from the nearest harbor, and was one of the worst spots on the Long Island shore for rendering assistance. The weather was very cold, and ice formed all over the vessel. The lower hold was entirely full of water, and in the between-decks the water was as high inside as it was outside, and she was completely full at high water on the port side.

The Coast Wrecking Company, through its system of shore agents, received at New York, on the day that the vessel was stranded, notice of the fact through a telegram from its coast patrol. On the same day the company sent out from New York its steamer Relief and the schooner John Curton, with men and materials for the relief of her vessel and cargo. The Relief and the John Curton arrived along-side of the Vindicator at 3 o'clock on the morning of January 5th. W. Clyde, the owner of the Vindicator, arrived on board of her early on that morning, and conferred with her master and with the agents of the Coast Wrecking Company in regard to saving the property. A steam

pump was put at work at 6 o'clock P. M., and was kept at work through the night, and on the morning of the 6th another large steam-pump was put in, and both pumps were worked during the night of the 6th, but they had no effect in reducing the water in the vessel, and work with them was discontinued. On the evening of the 5th the schooners S. L. Merritt and H. W. Johnson, owned or controlled by the Coast Wrecking Company, were sent to the Vindicator by that company. On the morning of the 6th the company commenced discharging the cargo of the Vindicator into schooners. The schooners, as fast as they were filled, were taken to a store-house on Staten Island, owned by the company, and their cargoes were there unloaded. The crew of the Vindicator were discharged on the sixth of January. The Coast Wrecking Company, by its representatives, employed laborers from the neighboring settlements, who assisted the officers and crews of the Relief and of the schooners in discharging the cargo. A few days after the discontinuance of the pumping the Coast Wrecking Company made an examination of the outside of the Vindicator through divers, and found nothing on the outside to show any breaks along the seams. Before the twenty-ninth of January nearly all of the cargo was out of the vessel, and in the store-house at Staten Island. Some cargo was taken from the Vindicator on the thirtieth and thirty-first of January, and on the first and second of February. On the eighth of February an examination of her hull, inside and out, was made by divers. Her keel was found to be broken in several places, and her bottom to be badly injured under her boilers. It was then determined that she could not be saved, and the Relief returned to New York with the John Curton on the ninth of February, taking with her strippings of the Vindicator, with several hundred dollars. On the twelfth of February the Vindicator broke up and came on shore.

Among the cargo of the Vindicator were 341 bales of print goods consigned to the Eddystone Manufacturing Company; 8 cases and 8 boxes of yarn, consigned to Hall & Co.; and 12 cases and 2 boxes of hats, consigned to Lippincott, Mitchell & Co. All of these goods were insured by the Phœnix Insurance Company, and the consignees of them abandoned them to that company shortly after the stranding of the Vindicator, and that company accepted the abandonment. On the tenth of January, 1879, the Phœnix Insurance Company, with other owners of cargo, signed an average bond, of which the following is a copy, the part put in brackets in this copy being in writing in the original, and the rest being a printed form, there being no brackets in the original:

"Average Bond. Whereas, the [steamer Vindicator,] whereof [Rogers is] master, having on board a cargo of merchandise, sailed from the port of [Fall River] during the month of [January inst.] bound for [Philadelphia,] and in the due prosecution of her said voyage [encountered heavy weather, and got ashore near Moriches, Long Island, where she now lies. When news of the disaster was received at New York the Coast Wrecking Company's vessels and men were sent to the steamer, and the cargo is now being discharged and sent to New York. The owners and agents of the steamer Vindicator are hereby authorized to settle the salvage for any sum that may be agreed upon between the salvors and underwriters in New York or Philadelphia interested, or, in the event of a suit, for such sum as may be awarded by court,] by which means certain losses and expenses have been incurred, and other

expenses hereafter may be incurred, in consequence thereof, which, according to the usage of this port, may constitute a general average, to be apportioned on the said vessel, her earnings as freight, and the cargo on board said vessel, and other charges thus incurred, may apply to and be due from specific interests. Now, we, the subscribers, owners, shippers, consignees, agents, or attorneys of certain consignees of said vessel and cargo, do hereby, for ourselves, our executors, and administrators, severally and respectively, but not jointly, or one for the other, covenant and agree to and with [Johnson & Higgins] that the loss and damage aforesaid, and other incidental expenses thereon, as shall be made to appear to be due from us, the subscribers to these presents, either as owners, shippers, consignees, agents, or attorneys of certain consignees of said vessel or cargo, shall be paid by us respectively, according to our parts or shares in the said vessel, her earnings as freight, and the said cargo, as shall belong or be consigned to us, or shall belong or be consigned to any person or persons with whom we are co-partners, agents, or attorneys, or in any manner concerned therein, provided such losses and expenses before mentioned be stated and apportioned by Henry W. Johnson, A. Foster Higgins, [and William Krebs,] average adjusters, in accordance with the established usage and laws of this state in similar cases. And we do further bind ourselves to furnish promptly, on request of said adjusters, all such information and documents as they may require from us to make said adjustment. And for the true performance of all and singular in the premises, we do hereby severally bind ourselves, our respective heirs, executors, and administrators, to the said [Johnson & Higgins] in the penal sum of [ten thousand ($10,000) dollars] lawful money of the United States. In witness whereof we have to these presents set our hands in the city of New York this [tenth] day of [January,] in the year of our Lord one thousand eight hundred and seventy-[nine.]"

The Vindicator was a large and valuable ocean steamer built of iron. The total value of the cargo saved was $41,340.37, in its damaged condition. The total value of the strippings saved from the wreck was $718.62. There was no freight saved. The cargo saved was owned by 124 different interests. The principal interest in the saved cargo was that of the Phœnix Insurance Company. Of the 341 bales of print goods consigned to the Eddystone Manufacturing Company, and insured by the Phœnix Insurance Company, 339 were saved, of the value, as damaged, of $12,442.14. A part of the yarn insured by the Phœnix Insurance Company was saved, of the value, as damaged, of $163.36. A part of the hats insured by the Phœnix Insurance Company was saved, of the value, as damaged, of $23.80. Of the 339 bales of print goods saved, all but 51 were out of the Vindicator and in the schooners on the fifteenth of January, and were in the store at Staten Island on the 16th and 17th. On the 20th, 42 more were taken out of the Vindicator, and were in said store on the 22d, and the remaining nine bales were taken out of the Vindicator on the 26th, and were in said store before the 29th. The yarn and the hats were in said store on or before the 22d. The services of the relief extended over 37 days. She had a crew of 14 men, all told; was fitted with steam pumps; and was worth, with her outfit, about $65,000. The schooner John Curton was in service 37 days. She had a crew of six men, all told, and was worth about $3,000. She was owned by Capt. Merritt, the superintendent of the coast wrecking company, and performed hard service, being always near the Vindicator, and being used as a lighter between the Vindicator and

the other schooners. Her owner chartered her, with her crew, to the Coast Wrecking Company for $40 a day. She was not to share in the salvage. Twenty-one days of her service were prior to the twenty-sixth of January. The schooner H. W. Johnson was in service 18 days, all prior to January 23d. She had a crew of seven men, all told, and with her working equipment was worth about $12,000. She was owned by the Coast Wrecking Company. The schooner S. L. Merritt was in service 13 days, all prior to the nineteenth of January. She had a crew of six men, and a wrecking equipment, and, with her equipment, was worth about $12,000. She was owned by Captain Merritt, and he chartered her to the Coast Wrecking Company for $40 a day, and her equipment for $15 a day. She was not to share in the salvage. The Coast Wrecking Company also sent two divers from New York, to whom they paid wages ranging from $5 to $10 a day each. They sent also three foremen, two engineers, and two firemen, who were paid $5 or $6 a day each. They also sent one man in their regular employ, whose wages were $60 a month, and 10 wreckers, who were paid $2 a day each. All the other labor and assistance that were given to the Vindicator and her cargo were obtained from the neighboring settlements, and were paid for by the Coast Wrecking Company. Laborers to the number of 44 were employed on the sixth of January ; 42 on the 7th ; 37 on the 15th ; 28 on the 5th ; and 21 each on the 11th and 25th. On the 6th, 14 laborers worked all night ; on the 7th, 11 worked half of the night; on the 13th, 17 worked half of the night; and on the 19th, 4 worked all night. The wages of these men were paid by the Coast Wrecking Company, and were $2 a day with board, and $2.50 a day without board. None of these employes share in the salvage.

On the seventh of January the schooner S. L. Merritt deposited a cargo of merchandise, from the Vindicator, in the store at Staten Island. On the 8th the schooner John Curton deposited there a cargo of merchandise. On the 12th the schooner S. L. Merritt deposited there another cargo. On the 14th the schooner H. W. Johnson deposited there a cargo. From that time on a cargo was deposited there every two or three days until the twenty-second of January. The cargoes were in good order except being wet. The total expenses of the Coast Wrecking Company for the hire of the schooner John Curton, and the hire of the schooner S. L. Merritt, and for the superintendents, foremen, divers, engineers, laborers, and others employed by them at the Vindicator, and for all other charges of every kind, except the wages of the crews of the Relief and the H. W. Johnson, and the expenses of running the Relief, were $7,870.40. Of this sum $5,666 was incurred prior to the twenty-second of January, and $6,284 prior to the 26th. From the time the Relief went to the assistance of the Vindicator until all her cargo had been saved and she had gone to pieces, on February 12th, work was done night and day, when work was possible, for the preservation of the property by the Coast Wrecking Company and its employes. The labor of saving the cargo was dangerous for the men and vessels employed. The weather was stormy, and no port of refuge was near. The cargo had to be got out by divers, and this was rendered more difficult owing to the ship having settled in the sand and being hogged, which jammed everything between the decks. All of the cargo

which was saved was brought to New York and delivered to the owners, except a small part unidentified, which, with the savings of the wreck, was sold. After the Coast Wrecking Company took charge of the Vindicator, the libelants, Johnson & Higgins, were employed by her owners to render, and they did render, the necessary services at New York in corresponding with the consignees, ascertaining the valuations, and identifying the cargo, and taking general charge of the interests of all concerned. And their services in this regard, including their statement and apportionment, hereafter mentioned, in respect to the cargo delivered to the respondent, were reasonably worth the sum of $1,223.82. This does not include any commission to them for collecting and paying the salvage. On the ninth of January they issued the following circular to the shippers and consignees of the Vindicator's cargo:

"NEW YORK, January 9, 1879.

"The steamer Vindicator, from Fall River for Philadelphia, went ashore near Moriches, Long Island, where she now lies. Assistance has been sent to her, and her cargo is being discharged and sent to New York. To enable us to identify and deliver cargo we need a copy of your invoice. Will you please send it to us as soon as possible, and state where you are insured, and in what company. Any information in regard to cargo saved can be obtained from the undersigned. JOHNSON & HIGGINS."

A copy of this notice, which had been sent to the Eddystone Manufacturing Company, was forwarded by it to the Phœnix Insurance Company, and was received by the latter company on the eleventh of January. Johnson & Higgins paid to the store-keeper at Staten Island $100 for receiving, identifying, and delivering the cargo. They paid to a professional appraiser $275 for appraising it. They made an elaborate statement in the form of a general average statement, in which they apportioned the charges of the coast wrecking for salvage and special disbursement, and their own disbursements and charges, among the owners of the cargo and the wreck. Such disbursements and charges were in accordance with the established usage and laws of the state of New York in similar cases, and the losses, expenses, disbursements, and charges which they so stated and apportioned were stated and apportioned by them in accordance with the established usage and laws of the state of New York in similar cases. They have already received on account of their disbursements, charges, and services, from the owners of the Vindicator and from the owners of the cargo, about $3,000. The Coast Wrecking Company has agreed with all parties interested, except the respondent, upon a salvage of 50 per cent., and has received the sum of $14,465.16 for such salvage. The value of the property exposed to loss in rendering the salvage service was $92,000. The equipment of the Coast Wrecking Company is kept up at a large expense, and is in active service only about one-quarter of the time, and during the intervals of rest the men are fed and paid at an average expense of $50 a month for wages, and $25 a month for keep for each man. A reasonable salvage reward for the services performed by the Coast Wrecking Company, in respect to the property received by the respondent, is 50 per cent. of the value of such property, which salvage really amounts to $6,314.65, but it was taken in the court below at $6,314.10.

From the foregoing facts I find, as conclusions of law, that the libelant the Coast Wrecking Company is entitled to a decree against the respondent for the sum of $6,314.10, with interest on said sum at the rate of 6 per cent. per annum from May 2, 1881, the date of the decree of the district court awarding to it that sum; that the libelants, the members of the firm of Johnson & Higgins, are entitled to a decree against the respondent for the sum of $1,223.82, with interest on said sum at the rate of 6 per cent. per annum from December 4, 1879, the date of the filing of the libel; and that the libelants are entitled to a decree against the respondent for their costs in the district court, taxed at $117.47, and for their costs in this court, to be taxed. SAML. BLATCHFORD, Circuit Justice.

BLATCHFORD, Justice. It is objected by the respondent that the claim made in the libel is founded wholly on the bond signed, and is set up as a claim for general average charges, and that no suit to recover such charges can be maintained in the admiralty. It is also objected that the bond provides only for the payment of such losses and expenses, incurred and to be incurred, as may constitute a general average when stated according to the established usage and laws of the state of New York; and that there were no general average expenses incurred, inasmuch as the voyage of the Vindicator was abandoned, and all community of interest between vessel, freight, and cargo was destroyed. It is true that the libel is based on the bond or agreement, and that in reciting the agreement it recites it as one applying to an apportionment of only general average expenses. But the agreement is in evidence, and in the answer the respondent submits to the determination of the court the question of the amount of compensation to be awarded to the Coast Wrecking Company for salvage. The answer alleges that the claim of Johnson & Higgins is not one of admiralty jurisdiction, but there is no exception to the joining of the two claims in one libel. I concur with the district judge in the view that the agreement covers the expense of the services rendered by Johnson & Higgins, and their disbursements made in connection with the cargo, although the case may not be one of general average. The bond or agreement covers general-average charges. But it goes further; it recites general-average losses and expenses, and then it recites that there may be other charges incurred in respect to salvage and discharging the cargo, and sending it to New York, which may apply to and be due from specific interests, according to the usage of the port of New York. The signers then

agree to pay "the loss and damage aforesaid, and other incidental expenses thereon," according to their interest in vessel, freight, and cargo, provided "such losses and expenses aforementioned" be stated and apportioned by Johnson & Higgins in accordance with the established usage and laws of the state of New York in similar cases. This includes the expenses, disbursements, charges, and services sued for by Johnson & Higgins, because they were incidental to ascertaining and adjusting the proportionate share chargeable to the cargo of the expenses incurred in saving and discharging the cargo and delivering it, in addition to embracing such expenses.

As to the admiralty jurisdiction, the services and expenses covered by the agreement are those which, if performed and incurred by the owner of the vessel, would have fallen within the line of his duty to take care of and save the cargo. Such duty would have extended to all the disbursements and services of Johnson & Higgins. They would have been maritime in their nature, and their character is not changed or affected because the ship-owner put Johnson & Higgins in his place, and the liability of the owners of cargo to the ship-owner became evidenced by a written obligation in favor of Johnson & Higgins. This is an express contract for a maritime service. Everything that was done was incident to saving and delivering the cargo.

The propriety and lawfulness and reasonableness of the charges made by Johnson & Higgins are attacked, but there is no evidence opposing that of Mr. Krebs in their favor.

As to the amount of salvage to be awarded to the Coast Wrecking Company, it is contended by the respondent that all the services rendered at the wreck after January 26th were for the benefit of the vessel alone and with the hope of saving her, and not for the benefit of the cargo of the respondent, and that the cargo cannot be made to pay for unsuccessful efforts to save the vessel. It is also urged that the 50 per cent. salvage awarded by the district court was too large. But, even if the services in regard to the cargo be considered by themselves, it is impossible to determine what particular services were rendered in respect to the cargo of the respondent. The service in regard to all the cargo was a continuous service, and every part of the cargo was interested in the whole of it, and should bear its due proportion of the whole expense of saving all that was saved. The only proper or possible mode of fixing the salvage is to award a percentage of the value of the property saved. The district court has fixed that at 50 per cent. on a full and careful consideration of all

the evidence. That rate was adopted without litigation by all the owners of cargo except the respondent. Not only is the service in the particular case to be regarded, but the compensation is to be looked at, as it may induce aid by competent salvors to other property in distress; and the equipment of the Coast Wrecking Company, with steamers and pumps and wrecking material and skilled men, and its readiness to act on a moment's notice, must be considered, involving, as that does, large investments and expenses, which go on as well while there is no employment. Even the award of 50 per cent. in respect to the respondent's property will not give more than $12,-000 compensation beyond expenses for saving over $40,000 worth of property. This is liberal, as it ought to be, but I concur with the district court that it cannot, in view of all the circumstances, be considered excessive.

See same case in the district court, 7 FED. REP. 236.

ANDERSON, Master, etc., and others *v.* THE EDAM, etc.

DUNSCOMBE, Master, etc., and others *v.* SAME.

(District Court, E. D. New York. July 27, 1882.)

1. SALVAGE—SUCCESS AN ESSENTIAL ELEMENT.

   Where services rendered were not successful, the claim for salvage will not be allowed; success being the essential element of a salvage service, and its absence fatal to a claim for compensation.

2. SAME—VALUE OF PROPERTY AN ELEMENT.

   Although salvage compensation is not awarded by any fixed rate of commission on the value of the property saved, yet the value of the property saved is an element to be taken into account when making up a salvage reward.

3. SAME—FOREIGN VESSELS—WHAT LAW GOVERNS.

   In a case of a salvage service performed by a British vessel in rescuing a Dutch vessel, neither the Commercial Code of the Netherlands, nor the practice of the English courts, furnishes the law for the American courts of admiralty; and those courts, when not fettered by statute, administer the maritime law upon a consideration of those principles which have obtained general recognition among maritime nations, and are justly applicable to all ships that sail the seas.

4. SAME—COMPENSATION—LIBERAL REWARD.

   The greatness of the peril from which the salved vessel was rescued; the fact that, if she had not been taken in tow by the salving vessel, she would most likely have drifted into the same dangerous locality from which she had

barely escaped; and the facts that the master of the salving vessel had abandoned his own voyage, and that by the service rendered he had brought the salved vessel into her port of destination, and relieved a large number of passengers from peril,—make up a case meriting a liberal reward.

Butler, Stillman & Hubbard, for libelants.

P. J. Joachimssen, for respondent.

BENEDICT, D. J. These two actions are brought—one by the master and owners of the steam-ship Persian Monarch, and the other by the master and owners of the steam-ship Napier—to recover salvage compensation for services rendered to the Dutch steamer Edam. They were tried together by consent. The following are the facts:

The steamer Edam, laden with a cargo and passengers, left Rotterdam, bound for New York, on the first day of January, 1882. On the fourteenth of January, in latitude 43 deg. N. and longitude 58 deg. 30 min. W., she lost all the blades of her propellor. Sails were then set, and she proceeded for seven days under sail with signals of distress flying. One steamer of the Hull line passed by in plain sight without stopping, although informed by gun and signal that the Edam required immediate assistance. On Saturday, January 21st, when about latitude 40 deg. 36 min. and longitude 68 deg. 50 min. W., the steam-ship Persian Monarch, a powerful steamer, bound to the westward, fell in with the Edam, and at her request took her in tow. The weather was then fine, but by midnight it blew a gale, with a heavy sea. On Sunday morning the hawser parted in the increasing gale. Efforts to regain the hawser were made during Sunday without success. During Sunday night the Persian Monarch lay by, exchanging signals with the Edam until 3:15 on Monday morning. After that the Edam was lost sight of. Efforts to find her were kept up by the Persian Monarch until 1:30 P. M. on Monday, when the hope of finding her was abandoned, and the Persian Monarch took a course for New York, where she arrived on Tuesday. Upon arrival the agents of the Edam were informed by the master of the Persian Monarch how and where the Edam had been left, and he held consultations with the officers of a revenue cutter, which the agents of the Edam procured to be dispatched from New London in search of her, and he also prepared charts to aid the cutter in her search, which search proved to be vain.

The Edam, when lost sight of by the Persian Monarch on Monday morning, was some 65 miles south-west of Nantucket shoals, powerless to hold any course, and drifting to the north-east. The weather was cold, and some of her crew became frost-bitten. Her decks were covered with ice. The sea continued high, she rolled heavily, and some of her sails were blown away. By noon on Monday she was among the breakers on Nantucket shoals. The small boats were made ready and life-preservers distributed among the passengers. She passed near dangerous breakers in 12 fathoms of water, and once actually touched, after which the leak increased. At 2 o'clock she passed between the shoals and the Davis light-ship, nearly 70 miles from where she had been left by the Persian Monarch. She drifted until morning to the south-

ward without control of her movements, steering in one direction while she drifted in another, her sails only steadying her. On Tuesday the gale and sea moderated, but the drifting of the steamer to southward continued. On Wednesday the sea was smooth, the wind light, from the south-east, and the Edam on the inner edge of the Gulf stream, 180 to 200 miles E. by S. ½ S. from Sandy Hook, 60 miles S. from Nantucket shoals, some 80 miles S. E. from where the Persian Monarch had left her, and S. of the usual track of steamers bound in or out of New York, when at about 8 A. M. she was discovered by the steam-ship Napier, an iron steam-ship of 1,927 tons, bound from New York to London, which had happened to take a more southerly course than is usually taken by out-going steamers. When the Edam was discovered by the Napier she had flying from her mainmast the signal "Want immediate assistance," and from her foremast the signal "Will you take me in tow?" The Napier ran down to her, and, in answer to her signals, replied that she would tow her to Halifax. The master of the Edam then went on board the Napier, and, with great earnestness, entreated the master of the Napier to tow him to New York, representing the perils he had encountered on the shoals, the disabled condition of his vessel, and the danger of his being wrecked on the shoals, in case of storm, while being towed towards Halifax. After much hesitation, arising from his unwillingness to return to the coast, the master of the Napier consented to endeavor to get the Edam to New York, upon the agreement that the compensation for the service should be determined in London by arbitration.

At 11 A. M. on Wednesday the Napier commenced to tow the Edam by a hawser fastened around her mainmast. Her speed, with the Edam in tow, was six knots an hour, having before been eight and one-half knots. About 6 o'clock on Wednesday the weather changed, a strong wind came up from the south, increasing to a gale, with sleet and rain. The sea set strong from the S. W., and at 10 o'clock was very boisterous, washing over the Napier. All hands on board the Napier, in all departments, stood watch through the night. The crew stood by the hawser, watching it and parcelling it. The strain was so severe that the heaving hawser was brought from the forepeak to be used in case of need. There was six hours' hard work, amid exposure from the sleet and rain and cold, in handling the hawser. The gale became so strong and the sea so high that the Napier could make but between two and three knots an hour, and abandoned her course to head more to the sea. Thursday morning the gale abated somewhat, but the sea continued heavy throughout the day and night with the wind from the S. W. At 6 P. M. thick fog set in and heavy rain, and at half-past 8 P. M. the Napier, having run her distance to Sandy Hook, headed to wind and put her engines dead slow to keep her position until the fog should lift. During the night the fog lifted and the Highland lights appeared bearing about N. W., distant about 15 miles. The Napier steamed slowly for the Hook, the sea running high, with strong ebb-tide, and between 10 and 11 o'clock Friday morning she left the Edam safely at anchor off Hoffman's island. The Napier was obliged to procure fresh coals before she could resume her voyage. She ordered them on Friday, but could not get them until Monday. On Tuesday she sailed again for London, just a week from the date of her original departure.

The Edam was a new steamer, built at a cost of $226,525. Her cargo was worth $220,000. On her arrival in New York she had on board coals, stores, and provisions worth $4,300. Her freight for the voyage amounted to $6,500, her passenger money to $3,080. She had on board a crew of 52 persons, all told, and 146 passengers, 35 of whom were children.

The value of the Napier was $160,000; her cargo was worth $98,750. Her crew numbered 25, all told. In saving the Edam she incurred expenses amounting to $1,134.56, $422.06 of which was for insurance of the cargo from New York to London after her return to New York with the Edam. She was detained seven days.

The underwriters on the Edam having refused to assent to a determination of the amount of the Napier's compensation by an arbitration in London, the above-entitled action was commenced in her behalf, and also an action in behalf of the Persian Monarch. In both actions the claim is for salvage.

The claim of the Persian Monarch will be first considered. It seems plain to me that this claim must be wholly disallowed, upon the ground that the services rendered by the Persian Monarch were not successful. The contention in behalf of the Persian Monarch is that her failure to bring the Edam into port is important only in measuring the amount of the reward. I do not so understand the law. On the contrary, success has always been held to be an essential element of a salvage service, and its absence fatal to a claim for salvage compensation. I am aware of decisions holding that, in case of a continuous peril, all vessels whose exertions contributed directly to the final rescue may share in the reward. Such was the case of *The Island City*, 5 Blatchf. 264. Also of decisions holding that exertions which have secured the only chance of salvation to a vessel otherwise certain of destruction may be rewarded when it appears that, by means of the chance so afforded, and not otherwise, final safety was attained. Such was the case of *The E. U.* Spinks, 63. Also of decisions allowing salvage for bringing property into a condition whereby a part of it was saved by the subsequent exertions of others. Such was the case of *The Samuel*, 15 Jur. 407. But the case of the Persian Monarch differs from all of these, and I know of no authority that will sustain her claim. Undoubtedly, her exertions in behalf of the Edam were meritorious, but her services were completely terminated and all connection with the Edam ended by a peril of the sea before safety was secured. Nothing that the Persian Monarch did after her hawser parted, and nothing that she had done before, tended in any degree to the subsequent rescue of the Edam by the Napier. She neither brought the Edam to the place where the Napier took hold of her, nor conducted her to a place of safety.

On the contrary, by the misfortune which befell both vessels when the hawser of the Persian Monarch parted, the Edam was placed in greater danger than she was when the Persian Monarch began to tow her. Subsequent events show this. The services of the Persian Monarch did not save the Edam, nor tend to save her; but, as it happened, only brought upon her a new peril by placing her where she was in great danger of destruction on the shoals, in the neighborhood of which, during thick weather, she had been brought when the hawser parted. A new disaster fell upon the Edam when the hawser parted and the Persian Monarch was lost sight of, out of which arose new and different dangers. From them she escaped, it is true, but her escape is not in the slightest degree attributable to the exertions of the Persian Monarch. My conclusion, therefore, in regard to the action brought by the Persian Monarch, is that it cannot be maintained. The libel in that case will therefore be dismissed, and with costs.

In regard to the claim of the Napier, which forms the subject of the second action above named, it is conceded on the part of the Edam that the Napier is entitled to salvage compensation. The only dispute is in regard to the amount. No tender of any amount has been made in behalf of the Edam. She has expressed a willingness to pay a reasonable amount, and on the argument the suggestion was made that $1,000 would be reasonable and proper. The Napier asked for $30,000.

In behalf of the Edam it has been contended that the old method of giving percentage on the value of the property saved is obsolete. No doubt it is true that salvage is not awarded according to any fixed rate of commission, but now, as always, the value of the property saved is an element to be taken into account when making up a salvage award. Again, it is contended that because the Edam is a Dutch vessel the rule of the commercial code of the Netherlands must be applied, according to which, as it seems, any consideration of the danger from which the property is rescued is prohibited except when the property saved is derelict. But while the Edam is a Dutch vessel the Napier is not. She is a British vessel, and by the same rule may invoke the decisions of the English courts, where not only is the peril of the property rescued considered in all cases, but, as is well known, the present leaning is towards very liberal rewards in case of relief afforded by one steamer to another steamer disabled. And what is more, the Napier may invoke the agreement made by the master of the Edam at the time of securing the service of the Napier, that the compensation should be fixed by arbitration in London,

where, as it may be presumed, the amount would have been upon the liberal scale which the English admiralty courts have felt forced to adopt in cases of this description.

But neither the commercial code of the Netherlands nor the practice of the English courts furnishes the law for the American courts of admiralty in cases of this description. Those courts, when not fettered by statute, administer the maritime law upon a consideration of those principles that have obtained general recognition among maritime nations, and are justly applicable to all ships that sail the seas. It cannot, therefore, be doubted that the Napier is entitled to ask this court, on fixing the amount of her reward, to consider the value of the Edam and her cargo, and likewise the danger to which she was exposed when taken hold of by the Napier. The greatness of that peril is disclosed by the strenuous objection made by the master of the Edam to being towed towards Halifax, by what had happened to the Edam between the time when the Persian Monarch lost sight of her and the time when she fell in with the Napier, and by the fact that, as the weather proved to be, the Edam, if she had not been taken in tow by the Napier, would most likely have drifted into the same dangerous locality from which she had already once barely escaped. It is also to be noticed that the Edam, when fallen in with by the Napier, was out of the ordinary track of steamers bound in and out of New York; that the master of the Napier, in compliance with the entreaties of the master of the Edam not to take him towards Halifax, but to New York, abandoned his own voyage and returned to a dangerous coast in a stormy month of a winter, remarkable for its severity; that by so doing he brought the Edam to her port of destination and relieved a large number of passengers from peril, the extent of which is disclosed by the fact that the agents of the Edam, on hearing of her abandonment by the Persian Monarch, procured to be dispatched in search of her a revenue cutter, that could hope to save lives, but nothing else.

Looking at all the circumstances, and mindful of the numbers whose lives and happiness are constantly at risk in the steamers plying between the Atlantic shores, of which a large and constantly-increasing portion are, in case of failure in their machinery, wholly dependent for safety upon the voluntary aid of other steamers; mindful, also, of the policy upon which the doctrine of salvage rests,—it appears a duty owing by the courts of admiralty towards the public to give, in cases like the present, a reward sufficiently liberal to induce the master of any steamer to overcome all unwillingness to assume

additional labor, to put aside his desire to make a direct and quick passage, even to disregard the express instructions of his owners, in favor of the request of another steamer disabled at sea to be towed to a place of safety.

Upon these considerations I award to the Napier a salvage compensation of $25,000, to be distributed among the owners, officers, and crew as follows: Out of the sum awarded, the amount actually disbursed by the Napier in performing the services, viz., $712.50, is to be first deducted and paid to the owners of the Napier. Three-fourths of the remainder is to be then paid to the owners of the Napier as their share of the salvage award. The master of the Napier is to receive the sum of $2,500, and her chief officer the sum of $650. The remainder is to be divided among the other officers and crew in proportion to their respective rates of wages—the volunteer third officer to be rated at £5 per month.

Let it be referred to the commissioner to ascertain the names and wages of the crew, and report the amount to be decreed each person, in accordance with this opinion.

Equity—Jurisdiction—Dismissal—Remedy at Law.

MITCHELL, Adm'r, *v.* DOWELL and others, and the same parties *e converso*, U. S. Sup. Ct., Oct. Term, 1881. Cross-appeals from the same decree and on the same record, from the circuit court of the United States for the eastern district of Arkansas. The decision was rendered by the supreme court of the United States on May 8, 1882. Mr. Justice *Woods* delivered the opinion of the court, reversing the decision of the circuit court, and remanding the cause, with directions to dismiss the bill.

Where a cause of action cognizable at law is entertained in equity, on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill and remit the cause to a court of law.

Clark & Williams, for Mitchell.

W. F. Henderson and A. H. Garland, for Dowell.

Cases cited in the opinion: Russell v. Clark, 7 Cranch. 69; Price's Pat. Candle Co. v. Bauwen's Pat. Candle Co. 4 Kay & J. 727; Baily v. Taylor. 1 Russ. & M. 73; French v. Howard, 3 Bibb, 303; Robinson v. Gilbreth, 4 Bibb, 184; Nourse v. Gregory, 3 Litt. 378.

Appeal—Taken in Time.

BRANDRES and others *v.* COCHRANE and others, U. S. Sup. Ct., Oct. Term, 1881. Appeal from the circuit court of the United States for the northern district of Illinois. On motion to dismiss because the appeal was not taken within two years after entry of decree. The decision was rendered by the supreme court of the United States on March 13, 1882. Mr. Chief Justice *Waite* delivered the opinion of the court, denying the motion.

Where complainants prayed an appeal on the day the decree was entered, which was allowed upon their giving bond according to law, and on the day before the expiration of the two years the circuit judge approved a bond for an appeal and signed a citation, which were filed with the clerk, and afterwards entered an order allowing the appeal *nunc pro tunc*, as of the date of approval of the bond, the taking of the security and the signing of the citation were an allowance of the appeal, and no formal order of allowance was necessary, and the appeal was taken in time.

John S. Mont, for appellants.

Edwin F. Bailey, for appellees.

Cases cited in opinion: Sage v. Railroad Co. 96 U. S. 714; Draper v. Davis, 102 U. S. 371.

Appeal—Matter in Dispute.

RUSSELL *v.* STANSELL, U. S. Sup. Ct., Oct. Term, 1881. Appeal from the district court of the United States for the northern district of Mississippi. The decision was rendered in the supreme court of the United States on March 13, 1882. Mr. Chief Justice *Waite* delivered the opinion of the court, dismissing the appeal for want of jurisdiction.

Where several land-owners are assessed by court commissioners, each for small sums, and each liable only for his own assessments, the matter in dispute, as regards their right of appeal, is the separate amounts assessed to each, and not the aggregate amount; and the distinct and separate interests cannot be united for the purpose of making up the necessary amounts to give jurisdiction on appeal.

H. T. Ellett, for appellees.

Cases cited: Paving Co. v. Mulford, 100 U. S. 148; Seaver v. Bigelow, 5 Wall. 208; Rich v. Lambert, 12 How. 347; Stratton v. Jarvis, 8 Pet. 41; Oliver v. Alexander. 6 Pet. 143.

Damages—Province of Jury.

CITY OF MANCHESTER *v.* ERICSSON, U. S. Sup. Ct., Oct. Term, 1881. Error to the circuit court of the United States for the eastern district of Virginia. The controversy in this case was on the question whether the city or a bridge company was responsible for the condition of the street in such a manner as to incur liability for negligence in the care of it. The decision was rendered in the supreme court of the United States on April 17, 1882. Mr. Justice *Miller* delivered the opinion of the court, reversing the judgment of the circuit court, and remanding the cause, with instructions to grant a new trial.

The fact that the city owned stock, and had advanced money to the corporation which held the title to the bridge, does not make the city responsible

for defects in the approaches to the bridge, but whether the city by its action had treated the embankment as a street, or an extension of a street, is a question of fact for the jury.

P. Phillips, W. A. Maury, and C. C. McCrae, for plaintiffs in error.

C. V. Meredith and G. K. Macon, for defendant in error.

Practice.

HITCHCOCK *v.* BUCHANAN and another, U. S. Sup. Ct., Oct. Term, 1881. Error to the circuit court of the United States for the southern district of Illinois. The decision was rendered by the supreme court of the United States on April 10, 1882. Mr. Justice *Gray* delivered the opinion of the Court.

Where a bill of exchange was manifestly a draft of a company and not of the individuals by whose hands it is subscribed, and it purports to be made at the office of the company, and directs the drawees to charge the amount thereof to the account of the company, of which the signers describe themselves as president and secretary, will not bind the agents personally.

Thomas G. Allen, for plaintiff in error.

Charles W. Thomas, for defendants in error.

Cases cited: Sayre v. Nichols, 7 Cal. 535; Carpenter v. Farnsworth, 106 Mass. 561; Dillon v. Bernard, 21 Wall. 430; Binz v. Tyler, 79 Ill. 248.

Duties on Imports.

HENRY *v.* FIELD and others, U. S. Sup. Ct., Oct. Term, 1881. Error to the circuit court of the United States for the western district of Illinois. The decision was rendered on March 20, 1882, in the supreme court of the United States. Mr. Justice *Field* delivered the opinion of the court, approving the judgment of the circuit court.

"White linen torchon laces and insertings" are "thread lace and insertings," and are liable for duties only to the amount prescribed for articles of that kind; and are not classed as a manufacture of flax, or of which flax is the component material or chief value, "not otherwise provided for."

S. F. Phillips, Solicitor General, for plaintiff in error.

John H. Thompson and Edward S. Isham, for defendants in error.

Practice—Bill of Exceptions—Internal Revenue.

UNITED STATES *v.* RINDSKOPF and others, U. S. Sup. Ct., Oct. Term, 1881. Error to the circuit court of the United States for the eastern district of Wisconsin. The decision in this case was rendered in the supreme court of the United States on April 24, 1882. Mr. Justice *Field* delivered the opinion of the court, reversing the judgment, and remanding the case for a new trial.

Only such parts of the charge of the court should be given as would point the exceptions; and, so, inserting the entire evidence in the record is objectionable practice. The assessment of the commissioner of internal revenue is only *prima facie* evidence of the amount due as taxes upon distilled spirits. If not impeached, it is sufficient to justify a recovery; but every material fact upon which liability is asserted is open to contestation. An instruction that the assessment is to be taken as an entirety, and that the government is enti-

tled to recover the exact amount assessed, or not any sum, is erroneous, unless an erroneous rate has been adopted by the officer, or where it is impossible to separate from the property assessed the part which is exempt from the tax, or where its validity depends upon the jurisdiction of the commissioner.

S. F. Phillips, Solicitor General, for plaintiff in error.

J. B. C. Cottrell, L. Abraham, and C. E. Mayer, for defendants in error.

Case cited as to practice: Lincoln v. Laflin, 7 Wall. 137.

Patents—Novelty and Utility.

LEHNBENTER *v.* HOLTHAUS, U. S. Sup. Ct., Oct. Term, 1881. Appeal from the circuit court of the United States for the eastern district of Missouri. This case was decided in the supreme court of the United States on March 6, 1882. Mr. Justice *Woods* delivered the opinion of the court, reversing the decision of the circuit court, and remanding the cause for further proceeding. A patent, as against a party proved to have infringed it, is *prima facie* evidence of both novelty and utility.

Obstruction to Navigation.

ST. LOUIS *v.* THE KNAPP CO., U. S. Sup. Ct., Oct. Term, 1881. Appeal from the circuit court of the United States for the eastern district of Missouri. The case was decided in the supreme court on March 4, 1882. Mr. Justice *Harlan* delivered the opinion of the court, reversing the judgment, and remanding the case for further proceedings according to law.

A public navigable stream must remain free and unobstructed, and no private individual has a right to place permanent structures within the navigable channel; and if a proposed run-way, when completed, proves to be a material obstruction to the free navigation of a river, or a special injury to the rights of others, it may be condemned and removed as a nuisance. Where the complaint avers that defendant proposes to do the act, and the averment is accompanied by the general charge that "the driving of piles in the bed of the river and the construction of the run-way will not only cause a diversion of the river from its natural course, but will throw it east of its natural course, from along the river bank north and south of the proposed run-way and piling," it is a sufficiently certain and minute allegation of facts, and not a case of a threatened nuisance only, and is not demurrable on the ground of uncertainty. In most cases general certainty is sufficient in pleadings in equity, and where the pleading distinctly apprises the defendant of the precise case the pleading is sufficient.

Leverett Bell, for appellant.

J. M. & C. H. Kram, for appellee.

COUNTY OF SAN MATEO *v.* SOUTHERN PACIFIC R. CO.

(*Circuit Court, D. California.* 1882.)

1. REMOVAL OF CAUSE—DEFENSE UNDER CONSTITUTION AND LAWS.
   It is sufficient, to maintain the jurisdiction of the circuit court in a cause removed from a state court, that the defense necessarily involves a construction of a clause of the federal constitution.
2. SAME—ASSESSMENT OF PROPERTY OF RAILROAD.
   The validity of the assessment of the property of a railroad company, and of the provisions of state law discriminating between the assessment for taxation of the property of such companies and the property of individuals; and whether the fourteenth amendment of the federal constitution applies to artificial as well as to natural persons, may depend upon the proper construction of such amendment; and the right of the company to a reduction in the estimated value of its property assessed for taxation, by the amount of the morgtage due thereon, depends upon the construction of said amendment, and constitutes a case for relief arising under the constitution and laws of the United States, and is removable into the circuit court.
3. SAME—ACT OF 1875—VALIDITY OF.
   The terms "*suits* of a civil nature," used in the act of 1875, providing for the removal of causes from the state court into the circuit court, are less comprehensive than the term "cases," in the fourteenth amendment of the federal constitution, as the latter may embrace proceedings not usually nor strictly termed suits, as well as prosecutions of a criminal nature. There can, therefore, be no question as to the validity of the legislation of congress.

FIELD, Justice. This is an action to recover of the Southern Pacific Railroad Company, a corporation created under the laws of California, certain state and county taxes levied upon its property for the fiscal year of 1880 and 1881, and alleged to be due to the plaintiff, with an additional 5 per cent. for their non-payment and interest. It was commenced in the superior court of the county of San Mateo.

The railroad company, among other things, sets up in its answer. as a defense substantially this: That by the thirteenth article of the constitution of the state a mortgage or other obligation, by which a debt is secured, is treated, for the purposes of assessment and taxation, as an interest in the property affected; that, "except as to railroad and other *quasi* public corporations," the value of the property less the value of the security is to be assessed and taxed to the owner, and the value of the security is to be assessed and taxed to its holder, (section 4;) that by the same article the franchise, roadway, road-bed, rails, and rolling stock of railroads, operated in more than one county, are to be assessed by the state board of equalization at their actual value, and apportioned to the counties, cities, or towns in

which the roads are located, in proportion to the number of miles of railway laid therein, (section 5;) that at the time of and previously to the assessment of the property of the railroad company, upon which the taxes claimed in this action were levied, there existed a mortgage upon the property, executed for advances made for the construction and equipment of the road, exceeding $3,000 for each mile of the same, no part of which has been paid except the accruing interest, and the whole of which was and still is a lien thereon; that the state board of equalization, acting under the authority of the provisions of the state constitution, assessed, as the property of the railroad company, its franchise, roadway, road-bed, rails, and rolling stock at what was deemed to be their actual value, without allowing any deduction for the mortgage subsisting thereon, and thus made, as between the property of individuals, and that of the railroad company, an unjust and unlawful discrimination against the company; and that the state constitution, in its discriminating provisions, conflicts with the inhibition of the fourteenth amendment of the constitution of the United States, which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. Upon that inhibition the company relies to defeat the assessment, or at least to reduce it by such deductions as are made in the estimate for taxation of the value of property held by individuals.

The railroad company also sets up among other things, as a further defense to the action, substantially this: That the section of the thirteenth article of the state constitution, which confers all the authority possessed by the state board to make the assessment complained of, is itself invalid in this: that while it is self-executing, requiring no legislation for its enforcement, it makes no provision for affording to the owners of the property assessed an opportunity to be heard respecting its valuation, but authorizes the board to act without notice to them, without receiving any information from them, and without liability to have its action reviewed, and, if erroneous, corrected by any other tribunal, making its judgment, however arbitrary and capricious, final and conclusive. And the company contends that in thus not affording to it an opportunity to be heard respecting the valuation of its property, while an opportunity is afforded to individuals for the correction of errors in the assessed value of their property, a discrimination is made against railroad companies within the inhibition of the fourteenth amendment.

Claiming in its answer protection under the amendment to the federal constitution against the enforcement of what it alleges to be partial and discriminating provisions of the state constitution, under which the state board acted and by which alone it justifies its action, the railroad company applied by petition to the state court to transfer the action to the circuit court of the United States. The required bond in such cases being filed, the transfer was made. The petition, among other things alleges that the supreme court of the state has decided that the railroad company is not entitled to the protection of the fourteenth amendment, or to any reductions for its indebtedness secured by mortgage in the estimate of its taxable property.

The plaintiff now moves that the action be remanded to the state court for trial, as not being removable to the federal court under the act of congress of March 3, 1875, to determine the jurisdiction of the circuit courts, and to regulate the removal of causes to them from the state courts.

By the federal constitution, the judicial power of the United States extends to all cases in law and equity arising under it, and under the laws of the United States, and treaties made under their authority. The act of 1875, in its first section, invests the circuit courts of the United States with original cognizance, concurrent with the courts of the several states, "of all suits of a civil nature, at common law or in equity, thus arising, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars. Its second section declares that any suit of that character thus arising, brought in a state court, may be removed by either party into the circuit court of the United States. The terms used in the act—"*suits* of a civil nature"—are less comprehensive than the term "cases" in the constitution. The latter may embrace proceedings not usually or strictly termed suits, and prosecutions of a criminal nature. There can, therefore, be no serious question as to the validity of the legislation of congress.

The inquiry is as to its meaning; and upon this there might be room for much difference of opinion, if its construction had not already been determined. If we were at liberty to give our view of its meaning, we should not hesitate to limit the authority to remove suits of a civil nature from a state court to a federal court, under the act in question, to those in which the cause of action arises upon the constitution, laws, or treaties of the United States, and not extend it to cases where the defense, as here, rests merely upon some right or

privilege claimed under them. Here the cause of action arises upon the constitution and laws of the state prescribing the manner and conditions on which its sovereign right of taxation shall be exercised. There are eminent fitness and propriety in having all such causes disposed of by the local courts, and in not having them carried into the federal courts, with their attendant delays and expense. But the construction we might give, if the question were one of first impression, we are not permitted to give. The supreme court has already passed upon the meaning of the act, and held in express terms against the view suggested. In *Railroad Co.* v. *Mississippi* (102 U. S. 135) that court reaffirmed what had been previously declared, that cases arising under the laws of the United States are such as grow out of the legislation of congress, whenever any right or privilege or claim or protection or defense of the party, in whole or in part, is asserted under them. Equally, therefore, cases must be held to arise under the constitution, when upon any of its provisions some right or privilege or claim or protection or defense, in whole or part, is asserted in a judicial proceeding. In the Mississippi case, which was brought in a state court, the defendant, setting up certain rights claimed under an act of congress, prayed for a removal to a federal court under the act of 1875, and the supreme court held that the party was entitled to it, Mr. Justice Miller dissenting on the ground urged here, that a removal was only authorized when the cause of action was founded on the law of congress, and not where the defense rested upon it; that in this latter case the remedy of the defendent for an adverse ruling was by an appeal after judgment to the supreme court of the United States. The decision of the majority of the court overruling the position of Mr. Justice Miller disposes of the same position taken here.

The construction given by the court is binding upon us, until modified or reversed, as fully as though we had participated in it and adopted its conclusions. Long previously to that decision, Chief Justice Marshall, speaking for the court, had held that a case might be said to arise under the constitution or laws of the United States, wherever its decision depended upon the correct construction of either, or when the title or right set up by a party might be defeated by one construction or sustained by the opposite construction. *Osborne* v. *Bank of U. S.* 9 Wheat. 822. If the removal authorized by the act of 1875 is not limited to those cases where the cause of action arises upon the constitution, laws, or treaties of the United States, this ruling of the chief justice would also lead to the

conclusion reached in the Mississippi case. The validity of the assessment of the property of the railroad company, and of the provisions discriminating between the assessment for taxation of the property of such companies and of the property of individuals, may depend upon the construction given to the fourteenth amendment, and the determination whether it applies to artificial bodies as well as to natural persons. The right of the company to a reduction in the estimate of the value of its property assessed for taxation, by the amount of the mortgage thereon, would be defeated by the construction of that amendment for which the plaintiff insists, and might be sustained by the construction for which it contends. Its case for relief, according to the decisions mentioned, therefore, arises under the constitution of the United States.

Whether the fourteenth amendment applies to corporations as well as to natural persons, is a question which cannot be determined on this motion. It will come up for determination upon the trial of the action in the consideration of the merits of the company's defense. It is enough to maintain the jurisdiction of this court, according to the decisions mentioned, that the defense necessarily involves a construction of a clause of the federal constitution.

It may not, however, be out of place to make some suggestions as to the force of the fourteenth amendment, in order to draw the attention of counsel to the difficulties in its application in the present case, which they must be prepared to meet on the trial. That amendment was undoubtedly proposed for the purpose of fully protecting the newly-made citizens of the African race in the enjoyment of their freedom, and to prevent discriminating state legislation against them. The generality of the language used necessarily extends its provisions to all persons of every race and color. Previously to its adoption the civil-rights act had been passed, which declared that citizens of the United States of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, should have the same right in every state and territory to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, own, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens; and should be subject to like punishments, pains, and penalties, and to none other. The validity of this act was questioned in many quarters; and complaints were made that notwithstanding the abolition of slavery and involuntary servitude, the freedmen were

in some portions of the country subjected to disabilities from which others were exempt. There were also complaints of the existence in certain sections in the southern states of a feeling of enmity, growing out of the collisions of the war, towards citizens of the north. Whether these complaints had any just foundation is immaterial. They were believed by many to be well founded, and to prevent any possible legislation hostile to any class from the causes mentioned, and to obviate objections to legislation similar to that embodied in the civil-rights act, the fourteenth amendment was adopted. This is manifest from the discussions in congress with reference to it. There was no diversity of opinion as to its object between those who favored and those who opposed its adoption.

The concluding clause of its first section was designed to cover all cases of possible discriminating and partial legislation against any class, in ordaining that no state shall deny to any person within its jurisdiction the equal protection of the laws. Equality of protection is thus made the constitutional right of every person; and this equality of protection implies not only that the same legal remedies shall be afforded to him for the prevention or redress of wrongs and the enforcement of rights, but also that he shall be subjected to no greater burdens or charges than such as are equally imposed upon all others under like circumstances. No one can, therefore, be arbitrarily taxed upon his property at a different rate from that imposed upon similar property of others, similarly situated, and thus made to bear an unequal share of the public burdens. Property may indeed be classified, and different kinds be subjected to different rates. Real property may be taxed at one rate and personal property at another. Property in particular places may be taxed for local purposes, while property situated elsewhere is exempt. License taxes may also vary in amount, according to the calling or business for which they are exacted. But arbitrary distinctions not arising from real differences in the character or situation of the property, or which do not operate alike upon all property of the same kind similarly situated, are forbidden by the amendment. Equality in the imposition of burdens is the constitutional rule as applied to the property of individuals, where it is subject to taxation at all; and this imports that an uniform mode shall be followed in the estimate of its value, and that the contribution exacted shall be in some uniform proportion to such value prescribed, according to the nature or position of the property. All state action, constitutional or legislative, impinging upon the enforcement of this rule, must give way be-

fore it. Congress, in its legislation since the adoption of the amendment, has recognized this to be the rule. The amendment was adopted in 1868, and in 1870 congress re-enacted the civil-rights act; and to the clause that all persons within the jurisdiction of the United States should enjoy the same rights as white citizens, and be subject only to like punishment, pains, and penalties, it added; and be subject only to like "*taxes, licenses, and exactions of every kind, and to no other.*" Rev. St. § 1977.

Looking at the object of the amendment, it must be admitted that it was intended primarily for the protection of the rights of natural persons; its language is mainly applicable to them. If it also include artificial persons, as corporations, whenever its language is susceptible of application to them, it must be because the artificial entity is composed of natural persons whose rights are protected in those of the corporation. It may be that the chain which binds the individuals into a single artificial body, does not keep them in their united form from the protection of the amendment. Corporations are not citizens,—the term applies only to natural persons,—and yet they are treated as citizens within the clause of the constitution which defines the judicial power of the United States, and declares that it shall extend to controversies between citizens of different states.

"That name, indeed," (of the corporation,) says Chief Justice Marshall, "cannot be an alien or a citizen, but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the indivdual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals. Such has been the universal understanding on the subject." *Bank of U. S.* v. *Deveaux,* 5 Cranch, 61. See, also, the cases cited in the opinion of the chief justice.

The fifth amendment to the constitution contains a prohibition upon the government of the United States, similar to the one in the fourteenth amendment against the action of the states, declaring that no person shall be deprived of life, liberty, or property, without due process of law; and it has been assumed, if not expressly held, that the provision protects the property of corporations against confiscation equally with that of individuals.

As thus seen, the question which will be presented for our determination on the trial of this case is one of the greatest importance. We express no opinion upon it, but invite for it the most thoughtful consideration of counsel. And in their discussions the control of the state over corporations of its creation, where a reserved power of amendment is embodied in their charters or imposed by the constitution, should be considered. The general tendency of modern decisions is to treat corporations with this reserved power as subject at all times to the will of the state as to their rights, powers, and liabilities. Such unlimited control, asserted in some cases, would, indeed, lift them not only out of the protection of the fourteenth amendment, but also out of nearly all protection, except such as the legislative pleasure of the hour may permit.

The motion to remand is denied.

TAYLOR *v.* S. & N. ALABAMA R. Co. and another.

(Circuit Court, M. D. Alabama. 1882.)

1. CORPORATIONS—CONTRACTS OF.

   Contracts, which though invalid for want of corporate powers, yet if fully executed, shall remain as the foundation of rights acquired by the transaction.

2. SAME—RIGHTS OF STOCKHOLDERS.

   A stockholder of a corporation will not be allowed, after a reasonable time, to disturb and rescind a contract made by his corporation, after the same has been fully executed, on the ground that it is *ultra vires*, and in excess of the corporate powers granted by the charter of the corporation.

3. SAME.

   Where a corporation issued preferred interest-bearing stock in excess of its authority, non-assenting stockholders must, within a reasonable time, dissent, and take steps to make their dissent effectual, or they will be held to have tacitly assented to the act of the corporation.

4. STATUTE OF LIMITATIONS—DISCOVERY OF FRAUD.

   In actions seeking relief on the ground of fraud, where the statute of limitations has created a bar, the cause of action is not considered as having accrued until the discovery by the aggrieved party of the facts constituting the fraud complained of; but this does not absolve him from all effort or diligence to obtain such knowledge, and facts of which he might have obtained knowledge had he sought it from its natural sources of information which were at his command, will be deemed within his knowledge.

5. CORPORATE PROPERTY—CAPITAL STOCK.

   The property of a corporation is a trust fund for the benefit of the stockholders in the hands of a corporate body, which is the trustee; but capital stock in the corporation in the hands of its owner, who has paid for it, is neither a trust fund, nor is its owner a trustee, and statutes of repose run to protect such owner in his right to such property.

In Equity. Heard upon demurrer to amended bill.

BRUCE, D. J. The amended bill assails the title and right of the Louisville & Nashville Railroad Company to the two millions capital stock in the South & North Alabama Railroad Company, issued to the Louisville & Nashville Railroad Company, as the successor and assignee of Tate and associates in their contract with the South & North Alabama Railroad Company, for the building and equipment of their road—the South & North Alabama Railroad.

By the terms of the contract between the South & North Alabama Railroad Company and Sam Tate and associates, of date March 21, 1871, it agreed to "issue to Sam Tate and associates, at 40 cents on the dollar, preferred stock bearing 6 per cent. interest, guarantied payable in kind from date of issue for 12 months after the completion of the road, and thereafter in cash. * * *"

By contract of May 19, 1871, which recites the assignment and transfer to the Louisville & Nashville Railroad Company of the contract of Sam Tate and associates with the South & North Alabama Railroad Company for the consideration therein named, the Louisville & Nashville Railroad Company "assumes and binds itself to perform all the obligations imposed by said contracts on said Sam Tate and associates. * * *"

And by contract of same date—May 19, 1871—between the two railroad companies named, the South & North Alabama Railroad Company agrees that it will issue to the Louisville & Nashville Railroad Company the said $2,000,000 of preferred or interest-bearing stock specified in said contract with Sam Tate and associates, if legally entitled to do so.

These contracts are made exhibits to the amended bill. The proposition of the complainant is that the South & North Alabama Railroad Company had no power under its charter to issue this two million of preferred or interest-bearing stock, and that its issue to the Louisville & Nashville Railroad Company was a fraud upon the other stockholders of the corporation who held common stock; that the issue was a fraud upon the law, is void, and confers no right upon the Louisville & Nashville Railroad Company to hold and own said stock.

To this amended bill the respondents, the Louisville & Nashville Railroad Company and the South & North Alabama Railroad Company interpose demurrers, and as they raise, substantially, at least, the same questions, they may be considered together. Many causes of demurrer are assigned, but the questions raised go mainly to the right and title of the Louisville & Nashville Railroad Company to

hold the two millions of stock in question, and to the legal right of the South & North Alabama Railroad Company to issue the preferred interest-bearing stock, which it is alleged it contracted and agreed to issue and did issue to the Louisville & Nashville Railroad Company.

The demurrers also raise the question that even if the issuance of the stock was *ultra vires* and in excess of the powers granted by the charter of the South & North Alabama Railroad Company, that the contract being now a fully executed one, a court of equity will not at the suit of stockholders disturb the contract which has now become the foundation of the rights of the parties.

The question of the statutes of limitation of six and ten years of the state of Alabama is also raised, and held to bar the relief sought by the complainant in his amended bill, and that the complainant is chargeable with laches, and must be held to have acquiesced in the wrongs of which he now complains, and that his conduct since the issuance of the stock in question works an estoppel upon him in the matters as to which he now seeks relief.

Much argument has been made and many authorities cited to show that the South & North Alabama Railroad Company, under what are claimed to be the very ample powers given in its charter, had the right to issue interest-bearing stock at 40 cents on the dollar, as it did do, and that in so doing it did not act *ultra vires* of its charter powers, but within them; that such issue of capital stock was but a mode of borrowing money, which it had express power to do, and that the stock was assets of the corporation, and the directory who were authorized to manage the affairs of the said company had the power to dispose of it upon the best terms possible, to the end that the purpose and object of the corporation might be accomplished.

It is also claimed that as it is not alleged that the directory acted unfairly or in bad faith, and that they did not get all the stock was worth at that time, that a court of equity will not disturb the transaction.

It is not deemed necessary to discuss and pass upon these questions, and others which have been pressed upon the court in argument, because the case must turn upon the proposition that this contract for the issuance of the stock in question is an executed contract made in May, 1871, and by the allegations of the bill the stock was actually issued, delivered, and paid for in the year 1871, and since that time, which is more than 10 years prior to the filing of the amended bill, the respondent, the Louisville & Nashville Railroad Company, have held and voted at the meetings of the stockholders of

the company this stock, and the complainant, a stockholder in the company, took no steps during all this time, and instituted no proceeding to enjoin his company, or in any way to prevent the evils or obtain redress for the wrongs of which he now complains.

Admitting that the South & North Alabama Railroad Company had no authority under its charter to issue this stock, and that the Louisville & Nashville Railroad Company had no authority under its charter to purchase and hold it, still, the charters of the respective companies did not forbid it, and the rule is, that contracts which, though invalid for want of corporate power, yet, if fully executed, they shall remain as the foundation of rights acquired by the transaction. Authorities upon this point are numerous; a few only are cited: *Hitchcock* v. *Galveston,* 96 U. S. 351; *Nat. Bank* v. *Graham,* 100 U. S. 699; *Nat. Bank* v. *Mathews,* 98 U. S. 621; *Spring Co.* v. *Knowlton,* 103 U. S. 60; *Thomas* v. *Railroad Co.* 101 U. S. 82, in which it is said: "The executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it."

I think that reason and authority alike sustain the proposition that a stockholder of a corporation will not be allowed after a reasonable time to disturb and rescind a contract made by his corporation after the same has been fully executed, on the ground that it is *ultra vires,* and in excess of the corporate powers granted by the charter of the corporation. It is to be observed, however, that the case at bar is not simply a case of the exercise of power in excess of that granted in the charter of the corporation, but it is a case in which the matter complained of is the issue by the corporation of preferred interest-bearing stock, guarantied at 40 cents on the dollar to the amount of $2,000,000, for which only $800,000 was paid.

The proposition of the complainant is that such a transaction is in itself a fraud—a fraud upon the other stockholders of the company who hold common stock; and that an issüe of such stock is not only voidable, but void—a fraud upon the law. In support of this proposition a number of authorities are cited: *Burke* v. *Smith,* 16 Wall. 395; *Sturges* v. *Stetson,* 1 Biss. 246; *Fosdick* v. *Sturges,* 1 Biss. 256.

The proposition that any action of a corporation which gives to one class of its stockholders a preference over another class in sharing the earnings of the corporation is a violation of the rights of the holders of non-preferred stock, and is illegal, seems to be sustained both upon reason and authority; but may not such illegality be cured by the assent, express or implied, of the holders of non-preferred

stock? Does the case of *Sturges* v. *Stetson*, cited *supra*, which holds such action to be a fraud upon the law, go so far as to hold that it is a fraud which cannot be condoned or cured, and that no conduct on the part of the holders of the non-preferred stock will work an estoppel upon them in making objection to it? What is the true quality, legal, and moral, of the issuance of preferred stock, such as the stock in question, by a railroad corporation with the charter powers of the South & North Alabama Railroad Company? Can it be said that such a transaction involves actual fraud and moral turpitude; that it is in violation of public policy, and fraught with harm to the state? By act of February 26, 1872, the law-making power of Alabama amended the charter of the South & North Alabama Railroad Company, and provided that the "capital stock of said company should be $3,000,000, or more if required, * * * of which the sum of $2,000,000 might be issued as preferred stock, the same to be made up of shares of $100 per share."

I am not now speaking of the effect of this amendment, except to say that certainly the legislature of Alabama did not intend by this act to authorize this railroad company to do that which was a violation of public policy, or to shield the company and its officers from responsibility for having done that which was wrong in itself and an actual fraud.

The phrase "fraud upon the law," used in the opinion of the court in the case of *Sturges* v. *Stetson*, cited *supra*, must mean no more than that the issue of preferred stock, under the circumstances there stated, is in violation of the principle of equality of right among stockholders of a corporation who unite their capital upon equal terms in a common enterprise, and are therefore entitled to share equally and without preference in the profits or avails of the enterprise.

The issue of the preferred stock in question was not forbidden by the charter of the corporation; it was not in violation of any statute law, was no public evil, and did not affect the state to its harm, and if wrong and without legal justification, it was so only because it affected injuriously the private rights of the stockholders of the corporation who held common and non-preferred stock. The fact, then, that this issue of stock was preferred stock, does not take the case out of the rule that non-assenting stockholders in the corporation, if they do not in a reasonable time dissent and take steps to make their dissent effectual, they will afterwards be held to have tacitly assented to the act. To this proposition there is not only reason, as I have attempted to show, but there is authority in the case of *Hazelhurst* v.

Savannah & C. R. Co. 43 Ga. 13-67; *Kent* v. *Quicksilver Mining Co.* 78 N. Y. 159-191.

These are, both of them, cases in which preferred stock has been issued, and elaborate opinions were delivered by the respective courts, and while in the case first cited the majority of the court held that the directors had power to issue the preferred stock in payment for work done in building the road, yet the court, on page 54, says:

"The question is not whether the directors had power to make it, but whether, after it has been made, after the company has, upon its part, got the benefit of the contract, after the other parties have, upon the faith of it, spent their money, and the company has acquiesced in the act of the directors, either the whole company or a portion of the stockholders can come forward and repudiate the contract?"

On the next page the court answers the question, and says:

"Such acts, though directly contrary to the provisions of the charter, if they be authorized by the stockholders or acquiesced in or confirmed, cannot be avoided after third persons have acted upon them."

The case of *Kent* v. *Quicksilver Mining Co.* seems to be still more in point, because there the court held, as I incline to hold here, that there was no power in the directors to issue preferred stock. The court say, on page 184:

"But there remains a serious question—whether, though there was at the outstart a minority of the stockholders who gave no assent to the corporate act, there has not been such tacit acquiescence and delay in action by that minority as to amount to indefensible laches and estoppel upon those who constituted it, and their assigns. In our judgment there has, and we find here a safe place on which to rest our decision of these cases."

So much in point here does the opinion in this case seem to be, that I cannot forbear to make a further quotation from page 185, where the court continues:

"For the lapse of four years, however, there was no action of the company or an individual stockholder to have a judicial declaration that the company had exceeded its powers and that it was invalid. We think that these facts, most of which are set forth in the findings of two of the cases, warrant the conclusion of law thereon, that the stockholders, by acquiescing in the action of the corporation in making the preferred stock, have ratified and assented thereto, and the same is binding upon them by reason of such assent and ratification."

Applying these principles to the case at bar, it is clear that whatever might have been the rights of complainant, if he had promptly and actively sought redress for the wrongs complained of in reference to the issuance of this stock, he cannot now be allowed to disturb the

contract of his corporation by which the stock was issued, delivered, and paid for over 10 years prior to the institution of his suit.

It is claimed that the law of Alabama is different from this, and that by a line of decision coming down to the case of *Chambers* v. *Falkner*, 65 Ala. 451, it has been settled that contracts of corporations which they have no power in their charters to make are void; that the courts cannot enforce them. But none of the cases cited are like the case at bar, in which complainant is not seeking to enforce an executory *ultra vires* contract, but the case is one of an executed contract, where the party paid his money and obtained his stock, and now stands upon the defensive and says that the corporation with which he dealt and the stockholders of the corporation cannot now rescind the contract. Besides that, this is a question of general corporate law, and even if the supreme court of Alabama has held the doctrine claimed, this court would not be bound by the decision, and at most it would be but persuasive.

Complainant invokes section 3242 of the Revised Code of Alabama, which provides:

"In actions seeking relief on the ground of fraud, where the statute has created a bar, the cause of action must not be considered as having accrued until the discovery by the aggrieved party of the facts constituting the fraud, after which he must have one year within which to prosecute his suit."

Complainant avers in his bill that "he was ignorant of the fact that said stock issued to the Louisville & Nashville Railroad Company was preferred stock, or that it bore interest, and of the terms and contract by and upon which said stock was issued to the said Louisville & Nashville Railroad Company, until the filing of the answers of the defendants to your orator's original bill; and that your orator had no knowledge or notice of any of the fraudulent acts of the said Louisville & Nashville Railroad Company which are averred and charged in your orator's original bill, or of any facts to put your orator upon inquiry, or create suspicion of such fraudulent acts, until within less than 12 months before said original bill was filed." This statute determines that in the class of cases to which it refers the action shall not be considered as having accrued until the discovery by the aggrieved party of the facts constituting the fraud, and the allegation of complainant's bill is that he was ignorant of these facts until the filing of the answers of defendants to your orator's original bill. To bring the allegation within the statute the complainant must mean by saying that he was ignorant of the facts until the filing of the answers, that he then, from the

answers, discovered the facts constituting the fraud. A discovery of facts by an aggrieved party would seem to imply a seeking for knowledge by such party; and the statute certainly was not intended to absolve a party from all effort or diligence to obtain a knowledge of the facts constituting the fraud complained of. The statute was certainly not intended and did not change the rule of equity upon the subject of diligence in such cases, and thus benefit those only who might be willfully ignorant, or who, from carelessness and indifference, should neglect to avail themselves of the means of information upon the subject.

The opinion of the supreme court of Alabama in the case of *Porter* v. *Smith*, 65 Ala. 172, upon the construction of this statute, is in accordance with this view. There must, then, be some disposition and effort to obtain a knowledge of the facts, and that is what the law calls reasonable diligence. The question is not simply what facts the complainant actually knew, but of what facts might he have obtained knowledge had he sought it from the natural sources of information which were at his command.

It is held in numerous cases that the means of knowledge are the same thing in effect as knowledge itself. And in the case of *Wood* v. *Carpenter*, 101 U. S., the supreme court, discussing not merely the Indiana statute but the general principle as well, say, at page 143: "The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence." Applying these rules to the case at bar, the conclusion is inevitable that if the complainant did not actually know that the stock issued was preferred stock, he certainly had within his reach the means of knowledge. He was a stockholder in the company. It was incorporated to build and equip a railroad connecting North and South Alabama,—an enterprise of magnitude, involving the expenditure of large amounts of money. It, like other enterprises of the kind, experienced many vicissitudes and difficulties, as the legislation of the state and the public history of the times abundantly show, and it is difficult to see how he could have remained ignorant of the facts of which he complains, if he had used any diligence at all to obtain knowledge in regard to them. He does not say that he was ignorant that two millions of stock was issued to the Louisville & Nashville Railroad Company, but that he was ignorant that the stock issued was preferred stock, or that it bore interest, and of the terms and contract by and upon which said stock was

issued. It is fair, then, to infer that he knew, in the year 1871, that two millions of stock had been issued to the Louisville & Nashville Railroad Company, and he could hardly presume that at that time the stock of the South & North Alabama Railroad Company was worth par, or that any one would take it at par, and it would seem to be a very natural and reasonable inquiry for any one interested in the matter to make, as to the terms upon which this majority of the stock of the company was taken by the Louisville & Nashville Railroad Company.

Ignorance in regard to that matter is consistent only with carelessness and indifference, superinduced perhaps by the idea that the stock was of little value, (for I think that may be fairly inferred from the allegations of the bill,) that it was not worth a serious thought or an inquiry, and therefore no inquiry was made, though the sources of information were not closed, and if applied to would doubtless have disclosed, not only that the stock was issued, but that it was preferred or interest-bearing stock, and that it furnished the means by which the railroad was being built. If that hypothesis is the true one, it repels all idea of relief, such as is sought in this bill, for Lord Camden's maxim in relation to a court of equity must be borne in mind: "Nothing can call this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive and does nothing."

One other point: It is claimed that the statute of limitations does not run here in favor of the Louisville & Nashville Railroad Company as the owner of this stock, because there exists the relation of trustee and *cestui que trust.* But what constitutes the trust, and who is the trustee, in whose favor the statute does not run? The Louisville & Nashville Railroad Company claims to be the owner and holder of this two millions of stock, and to say that it holds the stock in trust for the benefit of the complainant, or any one else, is a confusion of ideas. We are not dealing now on this amended bill with the property of the South & North Alabama Railroad Company, which is held by the corporation in trust for the benefit of the stockholders of that corporation, and we are not here concerned with the breaches of that trust, which the complainant charges in his original bill upon his own company, and the Louisville & Nashville Railroad Company, which he charges, by virtue of its ownership of a majority of the stock of the South & North Alabama Railroad Company, is enabled to, and, in collusion with the South & North Alabama Railroad Company, is

using and controlling the property and earnings of that corporation in breach of the trust imposed upon it, and in fraud of the rights and interests of the stockholders of the company.

It is a general principle that the property of a corporation is a trust fund for the benefit of the stockholders, in the hands of the corporate body, which is the trustee; but capital stock in the corporation, the certificate or evidence of which is in the hands of its owner, who has paid for it, is neither a trust fund, nor is its owner a trustee; and it is not perceived why statutes of repose do not run to protect the owner in his right to such property, the same as it would in reference to any other class of property.

The result of these views is that the demurrers to the amended bill are sustained.

DOMESTIC & FOREIGN MISSIONARY SOCIETY *v.* HINMAN and others.

(*Circuit Court, D. Nebraska.* January, 1881.)

1. CONCURRENT JURISDICTION—RIGHT TO POSSESSION OF PROPERTY.
   By the service of a writ of replevin issued from a state court, the property comes into the custody and possession of that court, for all purposes of jurisdiction in that case, and no other court has a right to interfere with that possession, unless it be some court having a direct supervisory control over the court issuing the writ, or some superior jurisdiction in the premises.
2. SAME—REPLEVIN—RIGHT AND TITLE TO PROPERTY.
   The question as to whether the property levied on under the writ of replevin is trust property, belonging to the complainant as trustee, or individual property of the defendant, is for the state court to determine in the replevin suit; and it cannot, therefore, be assumed, in determining the question of jurisdiction, that the property is trust property, and that complainant is entitled to it as trustee.
3. INJUNCTION—WHEN NOT TO ISSUE—RESTRAINING PROCEEDINGS IN THE COURT.
   The circuit court will not issue an injunction to restrain a party from claiming, using, occupying, incumbering, disposing of, or interfering, or in any manner intermeddling, with property which the state court has directed its officers to place in his hands.

Bill in Equity.

J. M. Woolworth, for complainant.

George W. Doane, for respondents.

MCCRARY, C. J. As one of the grounds upon which the respondent moves to dissolve the injunction, it is alleged that the property in controversy was, at and before the time of the commencement of this

suit, and still is, in the possession and control of another court of concurrent jurisdiction, to-wit, the district court of the state of Nebraska, in and for the county of Knox, and that, therefore, this court ought not to take jurisdiction. The property which is the subject-matter of this suit consists of certain buildings erected upon an Indian reservation in Knox county, Nebraska, and the furniture, etc., connected therewith, used as a chapel for religious worship, and for Sunday schools and other religious purposes, including clergyman's residence, apartments for an industrial school for Indians, dwellings for employes, etc.; also a farm of about 30 acres of cultivated land. Neither party to this suit claims any title to the soil. The property is used in connection with a church and school established for the civilization and education of Indians; but whether it is the property of the complainant, or of the respondent S. D. Hinman, is the principal matter of dispute between the parties to this suit.

The bill was filed July 30, 1880. It sets forth the facts concerning the acquisition of the property in question, and the purposes for which it was acquired, as claimed by the complainant, and concludes with the following prayer:

"Wherefore your orator prays the aid of this honorable court as follows:

"(1) That the said defendants answer this, your orator's bill, according to the course and practice of this court, but not under oath, their answer under oath being hereby waived.

"(2) That the said defendants and each of them, and the attorneys, counsellors, agents, and employes of each of them, be, by the order and injunction of this honorable court, enjoined and restrained from claiming, using, occupying, incumbering, disposing of, or interfering, or in any manner intermeddling with, the said buildings, and the furniture, fixtures, and appliances therein, the said farm and crops, or the use of the same, for the said mission and its work; and also from interfering with, obstructing, or preventing the said plaintiff, its agents, and employes from resuming and taking possession of said property, and all thereof, or in using the same, or in carrying on the said work of the said mission, as it has been done prior to the twenty-third of June last past.

"(3) That a receiver be appointed, with the usual powers of receivers in such cases, to take possession of the said property, and all thereof, and resume and conduct the work of the said mission.

"(4) That it be decreed that the said defendants and each of them has no right, title, or interest in the said property, and that the injunction above prayed may be made perpetual.

"(5) That your orator have its costs of this suit, and all other relief that is necessary and equitable."

On the twenty-third day of June, 1880, more than a month before the commencement of this suit, the respondent S. D. Hinman

brought an action of replevin in the district court of Knox county, Nebraska, against William W. Fowler, who was then in possession as complainant's agent, to recover possession of said property; and thereupon a writ of replevin was issued, and the officer's return shows that on that day he seized the property and delivered it to said Samuel D. Hinman, taking from him the bond and security required by the statute. Afterwards, in November, 1880, the complainant entered its appearance in said replevin suit in the state court, and was made a party thereto and given 60 days to interplead. The replevin suit is still pending.

There can be no doubt that by the service of the writ of replevin the property came into the possession of the state court for all the purposes of jurisdiction in that case. The rule upon this subject is not doubtful. The same property cannot be subject to two jurisdictions at the same time. The first levy, whether made under the federal or state authorities, withdraws the property from the reach of the process of the other. Where there are several authorities equally competent to bind the goods of a party, they must be considered effectually and for all purposes bound by the authority which first actually attaches upon them. "This rule," says Mr. Justice Campbell, in *Taylor* v. *Carryl*, 20 How. 594, "is the fruit of experience and wisdom, and regulates the relation and maintains harmony among the various superior courts of law and chancery in Great Britain." In *Buck* v. *Colbath*, 3 Wall. 341, Mr. Justice Miller stated the rule in these words: "The principle is that whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being, and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." See, also, to the same effect, *Freeman* v. *Howe*, 24 How. 450; *Hagan* v. *Lucas*, 10 Pet. 400.

The general rule is not controverted by counsel for complainant, but he insists that it does not apply to this case because the property in controversy is held and claimed for the purposes of a public charity only, and that consequently a trust attaches to it, which necessarily gives this court jurisdiction over it.

In the first place it must be said, in answer to this suggestion, that whether this is trust property belonging to the complainant as trustee, or individual property of the respondent Hinman, is one of

the questions in dispute between the parties, and is, indeed, the very question which must be determined by the state court in the replevin suit, and by this court also, if our jurisdiction shall be maintained. It cannot, therefore, be assumed, in determining the question of jurisdiction as an established proposition, that the property is trust property, and that the complainant is entitled to it as trustee. But even assuming that the complainant is right as to the fact, and that this property is a trust property purchased with funds contributed to the complainant or its agents for the purpose of aiding in a public charity, it still remains true that every question which can arise touching the possession of it may be properly decided by the state court in the replevin suit. A trustee who has the right to the possession of specific articles of personal property which are wrongfully withheld from him, may, without doubt, bring an action at law in replevin to recover the same. The real question here is this: If the jurisdiction of this court be maintained; if the injunction heretofore granted be continued in force and finally made perpetual,—will it deprive the state court of the power to go on and determine the issues in the replevin suit, rendering judgment according to its own views of the law and the facts, and to execute the same by its own process? A reference to the pleadings in the two cases will furnish a ready answer to this inquiry. We are asked in this case to enjoin the respondents from claiming, using, occupying, incumbering, disposing of, or interfering, or in any manner intermeddling, with the property in controversy. Now it is perfectly clear that while this injunction is maintained the state court cannot go on and adjudge the possession of the property to be in the respondent. The injunction forbids the respondent to take possession of or to hold or to intermeddle with the very property which the state court has directed its officers to place in his hands, upon his giving bond to answer for it at the end of that suit. The bill also prays that a receiver be appointed to take possession of the property, which is, of course, entirely inconsistent with the exercise of any jurisdiction or control over it by the state court. It also prays for a decree that the said defendants and each of them have no right, title, or interest in the said property, and that the injunction may be made perpetual.

By reference to the General Statutes of Nebraska on the subject of replevin, (chapter 11, pp. 552–555,) it will be seen that the question of the right of property as well as the right of possession may be tried in the replevin suit; but whether the judgment in that case extends to a determination of the right of property, or stops with that

of the right of possession, in either case its judgment might be rendered entirely nugatory by the decree in this case.

Complainant relies upon the case of *Watson* v. *Jones*, 13 Wall. 679, as sustaining his view of the case before us. In that case a state court of Kentucky had decreed that the possession of certain church property should be delivered to certain persons who were held to be legal officers of the church, and entitled, for the time being, to control its property. It was held that the nature and character of the possession so decreed to be delivered, might be inquired into by another court, and if it was of a fiduciary character, and the trust was not involved in the first suit, the second suit might be maintained in any court of competent jurisdiction to declare, define, and protect the trust, though the first suit might still be pending.

There is this clear distinction between that case and the one at bar. None of the parties to the case of *Watson* v. *Jones* claimed any individual interest in the property in controversy. Here, as we have already seen, the respondent does claim to be the absolute owner, and to test his right has commenced a suit in the courts of Nebraska. It was not, however, held by the supreme court in *Watson* v. *Jones* that any relief could be granted which would interfere with the execution of the decree of the state court. On the contrary, Mr. Justice Miller, who delivered the opinion, on page 720 says: "Under this prayer for general relief, if there was any decree which the circuit court could render for the protection of the right of the plaintiffs, *and which did not enjoin the defendants from taking possession of the church property, and which did not disturb the possession of the marshal of the Louisville chancery*, that court had a right to hear the case and grant that relief."

It appears, therefore, that the jurisdiction was maintained upon the ground that it was not necessary, in order to maintain it, that any judgment or decree should be rendered interfering in any way with the action of the state court in a suit previously commenced.

Indeed, the rule that, as between courts of concurrent jurisdiction, the court which first gets possession of the property must retain it to the end, is distinctly affirmed in that case. Its application to the facts presented in that record was denied upon the ground that the issues in the two cases were essentially different, and that in the case in the federal court the relief sought was different from that awarded in the state court. On page 717 Mr. Justice Miller points out these differences very clearly, and adds: "This brief statement of the issues in the two suits leaves no room for argument to show that the pend-

ency of the first cannot be pleaded either in bar or abatement of the second."

It is true that here the case in the state court is an action at law, and that the present case is a suit in equity; but the rule applies notwithstanding. See Conkling, Treat. 296. The case of *Taylor* v. *Carryl, supra,* was one of conflict between the purchaser of a vessel, under the judgment of a state court in an attachment case, and another purchaser, under the decree of a federal court in a proceeding in admiralty. It was insisted in that case that by virtue of the exclusive jurisdiction of the federal courts in admiralty over the vessel in question, its judgment was a lien prior to that in the state court, although the suit in the latter court was first instituted; but the court held that the vessel, being in the lawful custody of the sheriff by virtue of the process of the state court, was beyond the reach of the process of any other court, whether a common-law court, proceeding as such, or of a court of admiralty in a suit *in rem* to enforce the maritime lien. No valid seizure was possible upon the process issued by the federal court, for the reason that the vessel was in the custody of the state court.

Section 720 of the Revised Statutes of the United States provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

From what has already been said it is manifest that the effect of the injunction in this case would be to stay proceedings in the state court in the replevin suit. It would be to retain the property in the possession of the complainant regardless of the writ issued by the state court ordering it to be placed in the possession of the respondent. It would be to stop altogether the proceedings in the replevin suit, because it would be impossible to proceed with that suit without violating the injunction prayed in this case.

These considerations necessarily lead to the conclusion that the granting of an injunction in this case, after the commencement of the replevin suit in the state court—of which neither the court nor the counsel was advised—was an error, and that, therefore, the injunction must be dissolved; and it is so ordered.

NOTE.

RESTRAINING PROCEEDINGS IN STATE COURTS. This section applies to the restraint of suits, which, but for the injunction, the state court would have jurisdiction over, (*In re Long Island, etc., Trans. Co.* 5 FED. REP. 628,) and only such as are commenced in a state court before proceedings in the federal court have been commenced, (*Fisk* v. *Union Pac. R. Co.* 10 Blatchf. 518;) for, if a suit be commenced in the federal court, subsequent proceedings in a state court may be restrained. Id. "Proceedings" include all steps taken in a suit from its inception to final process. *U. S.* v. *Collins*, 4 Blatchf. 142. This section is an inhibition against staying a party in the conduct of the proceedings in a state court, as much as an inhibition against an injunction, *mandamus*, or prohibition directed to the state court, (*Fisk* v. *Union Pac. R. Co.* 6 Blatchf. 362;) and its interpretation is restricted by sections 640 and 646 of the Revised Statutes to cases where the jurisdiction of the courts of the United States is originally invoked for the purpose of staying proceedings in the state courts. *Perry* v. *Sharpe*, 8 FED. REP. 24.

RESTRICTION OF AUTHORITY. A court of the United States cannot enjoin proceedings in a state court. *Diggs* v. *Wolcott*, 4 Cranch, 179; *Rogers* v. *City of Cincinnati*, 5 McLean, 337. So the supreme court cannot enjoin proceedings in a subordinate state court, although it has allowed a writ of error to the judgment of the appellate court. *The Slaughter-house Cases*, 10 Wall. 273. The circuit court has no jurisdiction over the proceedings of a state court. *Bridges* v. *Sheldon*, 18 Blatchf. 517; *Watson* v. *Jones*, 13 Wall. 679. Although the circuit court has no jurisdiction over proceedings in a state court, yet this section does not prevent it from releasing a defendant from process out of a state court violating its protection, or to prevent abuse of its privileges. *Bridges* v. *Sheldon*, 18 Blatchf. 517; S. C. 7 FED. REP. 45; *Hurst's Case*, 4 Dall. 387. So a circuit court may restrain parties from taking out criminal process under a state law which impairs the obligations of contracts, (*Louisiana State Lottery Co.* v. *Fitzpatrick*, 3 Woods, 222;) nor does this section prohibit the district court, after a transfer of the ship and freight under the "limited-liability act," from restraining the prosecution of any suit growing out of the disaster theretofore commenced and then pending in a state court, (*In re Long Island, etc., Trans. Co.* 5 FED. REP. 627.) A circuit court cannot issue an injunction to stay proceedings in a state court. *The Slaughter-house Case*, 1 Woods, 21. An injunction to restrain suits in the state court for the collection of taxes will not be granted, (*Moore* v. *Holliday*, 4 Dill. 52;) but, under special circumstances, a temporary injunction to restrain the collection of retrospective taxes was allowed. Id. Although a party files a bill of interpleader, yet he cannot restrain a defendant from prosecuting an action pending in the state court. *City Bank* v. *Skelton*, 2 Blatchf. 14. Where the jurisdiction of a court and the right of a plaintiff to prosecute his suit have once attached, that right cannot be arrested or taken away by proceedings in another court. *Peck* v. *Jenness*, 7 How. 625. So, if a marshal is sued in a state court for taking the goods of a third person on a writ of execution, the proceedings against him cannot be enjoined. *Evans* v. *Pack*, 7 Cent. Law J. 409. This section prohibits the issue of an injunction to restrain the sale of property under an

execution issued out of a state court, although application is made by a third party whose property is taken. *Watson* v. *Bondurant*, 2 Woods, 166; S. C. 30 La. Ann. 1; *Daly* v. *The Sheriff*, 1 Woods, 175; *Perry* v. *Sharpe*, 8 FED. REP. 23; *contra*, *Cropper* v. *Coburn*, 2 Curt. 465. The holder of a chattel mortgage cannot enjoin the sheriff from selling the property under execution on a judgment against the mortgageor. *Ruggles* v. *Simonton*, 3 Biss. 325. Courts of the United States have jurisdiction over executors and administrators where the parties have the requisite citizenship, and this jurisdiction is not barred by subsequent proceedings in insolvency in the state court. In such case the courts may interpose in favor of a foreign creditor to arrest the distribution of any surplus of the estate of decedent. *Green* v. *Creighton*, 23 How. 90. See *Youley* v. *Lavender*, 21 Wall. 276; *January* v. *Powell*, 29 Mo. 241.

ON CAUSE REMOVED. A circuit court will not order a stay of all proceedings in a state court in a cause removed into the circuit court, (*Fisk* v. *Union Pac. R. Co.* 6 Blatchf. 362; *Perry* v. *Sharpe*, 8 FED. REP. 23;) but after removal it has jurisdiction to continue in force an injunction allowed by the state court before the removal. *Smith* v. *Schwed*, 6 FED. REP. 458; and see Rev. St. §§ 640, 646; Act of March 3, 1875, § 4; 18 St. 571. If plaintiff, after removal, brings an action in the state court, upon a judgment rendered therein before removal, defendant may file a bill in the circuit court to restrain the proceedings. *French* v. *Hay*, 22 Wall. 250. Where a state court improperly refuses a petition for removal, and renders final judgment in a replevin suit, and orders plaintiffs to restore the property, and, on their refusal to do so, defendant sues on the replevin bond, the federal court may restrain the proceedings on such suit, the injunction being merely an ancillary proceeding, and not forbidden by this section. *Kern* v. *Hindekoper*, 2 Morr. Trans. 618.

IN BANKRUPTCY COURTS. Except in cases arising under the bankrupt law a court of the United States cannot enjoin a party from proceeding in a state court, (*Haines* v. *Carpenter*, 91 U. S. 254; *Dial* v. *Reynolds*, 96 U. S. 340; *Chaffin* v. *St. Louis*, 4 Dill. 19; *Tifft* v. *Iron-clad Manufacturing Co.* 16 Blatchf. 48; *Hyde* v. *Bancroft*, 8 Bank. Reg. 24;) but it has been held that the bankrupt act does not authorize district courts to issue injunctions to state courts, nor to actors or parties litigating before them, (*In re Campbell*, 1 Bank. Reg. 166; *In re Burns*, Id. 174; *Peck* v. *Jenness*, 7 How. 625; *Erwin* v. *Lowry*, 7 How. 172;) and that a state court having acquired jurisdiction a United States court has no authority to oust it, (*Clark* v. *Bininger*, 3 Bank. Reg. 518; *Tenth Nat. Bank* v. *Sanger*, 42 How. Pr. 170; *Ex parte Dudley*, 1 Pa. L. J. 302.) The express authority of bankruptcy courts to restrain proceedings in state courts under the bankrupt law extends only to suits against the bankrupt himself, (Rev. St. § 5106; *Gilbert* v. *Quimby*, 1 FED. REP. 114;) and the implied authority extends only to proceedings to realize the assets and bring them into the custody of the bankrupt court, (Rev. St. § 4972; *Gilbert* v. *Quimby*, 1 FED. REP. 114.) So, although a party has issued an attachment from a state court to reach a dividend in bankruptcy, he cannot be restrained by injunction from the federal court. *Gilbert* v. *Quimby*, 1 FED. REP. 111. It may prohibit a creditor by injunction from proceeding under an execution issued out of a state court, (*Irving* v. *Hughes*, 2 Bank. Reg. 61;)

or enjoin a sheriff and parties litigant from selling the property on execution, (*In re Mallory*, 61 Bank. Reg. 22; *In re Lady Bryan Min. Co.* 6 Bank. Reg. 252; *In re Atkinson*, 7 Bank. Reg. 143.) It may allow the goods to be sold under the execution or may enjoin proceedings thereunder. *In re Schnepf*, 1 Bank. Reg. 190. Before the appointment of assignees the petition for the injunction must be filed by the bankrupt, but after their appointment it may be filed by the assignees. *In re Bowie*, 1 Bank Reg. 628. The commencement of the bankruptcy proceedings operates as a *supersedeas* of process in the hands of the sheriff, and an injunction against all other proceedings until the question of the bankruptcy shall be disposed of. *Jones* v. *Leach*, 1 Bank. Reg. 595. The bankrupt court may restrain a claimant of a lien obtained by collusion with the bankrupt from proceeding elsewhere to enforce the lien. *Samson* v. *Clark*, 6 Bank. Reg. 403. The control of the district court, sitting in bankruptcy, over proceedings in the state court over liens and mortgages existing upon the property of the bankrupt, is exercised, not over the state courts themselves, but upon the parties, through injunction or other appropriate proceedings in equity. *Ex parte Christy*, 3 How. 292. Where the circuit court has jurisdiction of a case in bankruptcy, an error in granting an injunction can only be reviewed after a final decree. *Ex parte Schwab*, 98 U. S. 240.—[ED.

FARMERS' LOAN & TRUST CO. *v.* OXFORD IRON CO. and others.

(*Circuit Court, D. New Jersey.* July 20, 1882.)

FORECLOSURE SALE—POSTPONEMENT.

Where the sale of mortgaged premises under a foreclosure decree, appointed for a particular date, would be ultimately detrimental to all interests to all interested, and good cause is shown therefor, the petition of defendants for a postponement of the sale to a future day fixed will be granted.

In Equity.

Turner, Lee & McClure, for complainants.

Cortlandt & R. Wayne Parker, for defendants.

NIXON, D. J. This matter is before me on the petition of the Oxford Iron Company, and the firm of Selden T. Scranton & Co., defendants in the above suit, praying that the sale of the mortgaged premises be further postponed.

It appears that on the first of April, 1876, the Oxford Iron Company, a corporation of the state of New Jersey, doing business at Oxford, in the county of Warren, and being the owner in fee of certain real estate, including farms, lands, mines, and mining rights, situate in the said county of Warren, caused to be issued bonds of the corporation amounting in the aggregate to $750,000, payable April

1, 1896, with interest semi-annually, at the rate of 7 per cent. per annum, on the first days of October and April; and at the same time duly executed a mortgage to the Farmers' Loan & Trust Company, a corporation of the state of New York, upon all its real estate and appurtenances, to secure the payment of the said bonds and accruing interest. Only a small portion of these bonds were sold, the bulk being assigned and pledged by the company to its numerous creditors as collateral security for loans made, or for its general indebtedness in carrying on its business. Owing to the great depression in the iron trade of the country, and especially in that department of industry which the Oxford Company was organized to carry on, it failed to meet its liabilities, and became so much embarrassed in September, 1878, that the chancellor of the state, on proper proceedings before him, issued an injunction restraining its officers from any further exercise of the franchises of the corporation, and appointed Mr. Benjamin G. Clarke receiver.

The company failing to pay the interest on the bonds as it fell due, the Farmers' Loan & Trust Company, the trustee, at the request of a large majority of the holders, filed a bill in this court for the foreclosure of the mortgage, and a final decree has been entered for the sale of the mortgaged premises,—the decree setting forth that there was due to the complainant corporation, in trust for the several bondholders, the sum of $171,377.50, for interest thereon to October 1, 1881; that none of the principal of said bonds was due; that the mortgaged premises were so situate that they could not be sold in parcels without prejudice to the parties interested in procuring the highest and best price for the same; and that a part could not be sold to satisfy the amount due without a material injury to the remaining part. Execution was duly issued thereon, directed to the marshal of the district, and he has advertised the whole of the premises to be sold on the twenty-first of July instant.

The petitioners represent that the mortgaged premises are a very valuable property, costing the company upwards of $1,700,000, and that their sale, at the present time and under existing circumstances, would be alike disastrous to the interests of the corporation and its creditors:

(1) Because such a sale should not take place in midsummer, when business is largely suspended, and capitalists and business men are away at the usual summer resorts. (2) Because the receiver, who has had the management of the affairs of the company, under the supervision of the chancellor of the state, since 1878, and to whom purchasers would naturally apply in

endeavoring to ascertain the value of the plant, is absent in Europe, and will not return before the first week in September. (3) Because persons proposing to purchase, and making inquiries in regard to the productive value of the property, would be misled by the last report of the business, filed by the receiver in the court of chancery, for the year ending September 1, 1881; that although said report shows upon its face a loss of $25,000 from carrying on the business during the previous year, there was, in truth, a gain for the year; that the apparent deficiency was caused by the receiver applying about $40,000 of the profits to the building of a new and more efficient blast-furnace, to the permanent betterment of the plant. (4) Because the accounts of the managing superintendent show that the receiver has now got the property in such good working order that during the months of the current year its average profits have been little short of $10,000 per month; and that the receiver's report to be made to the chancellor on the first of September next will reveal such net profits as greatly to enhance the value of the premises in the estimation of purchasers at the sale. And (5) because the petitioners are now engaged, with good prospect of success, in forming a syndicate to purchase the mortgaged premises at such a price as will relieve them of all embarrassment and enable them to meet their liabilities in full, with the corporate and partnership assets, without the sacrifice of their private estate.

These different grounds are supported to some extent by the testimony, but the fact in the case which largely influences me to grant the motion is this: On the hearing of the rule to show cause why the adjournment should not be ordered, Judge Hand appeared for the bondholders, to resist the postponement, and in reply to the suggestion of the counsel of the petitioners, that no bidders could be got to the sale at this season of the year, he stated that the bondholders had formed a combination for mutual protection of interests, and, if needs be, would make the property bring at least a half million of dollars; and that the confirmation of the sale was with the court, and if the price was not satisfactory, any sale would be nugatory. Now, I think, it would be ultimately detrimental to all interests to have a sale take place which the court could not approve, because of the inadequacy of the price. Experience has shown that such judicial interferences, in the absence of fraud, are ordinarily not successful in promoting the end which is sought to be accomplished; but if the sale should go on under the present circumstances, and a bid not exceeding the amount suggested was obtained, and proceedings were taken to hinder a confirmation, I should regard the reasons stated and the arguments used for the postponement as of much force when urged against the confirmation of the sale. It is better for all parties that the court should listen to them now, rather than then.

The rule to show cause is made absolute.

I should have designated the last week in September as the proper time for the adjournment, but the chairman of the committee of bondholders stated in open court that he could not attend the sale during the month of September.

Let an order be entered directing notice to the marshal, and the solicitors of the respective parties, that the sale of the property stands over until Tuesday, October 10, 1882, at the same place and hour as heretofore advertised, and that the marshal give legal public notice of the adjournment.

WALLACE *v.* NOYES and others.

(*Circuit Court, D. Connecticut.* August 7, 1882.)

PATENTS FOR INVENTIONS—PROCESS FOR MAKING SPOONS AND FORKS.

Where the patentee attained the result of producing a new thing, a silver-plated steel spoon, by a succession of old processes, which, though separately old, had not been practically grouped together in the order in which he used them, it is a patentable novelty in process.

B. F. Thurston, John S. Beach, Charles E. Mitchell and *L. M. Hubbard,* for plaintiff.

E. N. Dickerson, Charles R. Ingersoll, and *J. W. Towner,* for defendants.

SHIPMAN, D. J. This is a bill in equity to restrain the defendants from the alleged infringement of letters patent to Robert Wallace, as inventor, No. 220,003, for improvements in the process of manufacturing spoons and forks, and also of letters patent to said Wallace, No. 220,002, for improvements in spoons and forks. The former patent was for the process of manufacturing silver-plated spoons and forks, from homogeneous steel; the latter was for the product from such process. Each patent was dated September 23, 1879.

The nature of the invention, as claimed by the patentee, and the precise thing for which letters patent were granted, will be best understood by quoting his description in the specification of the process patent:

"This invention relates to an improved process for the manufacture of spoons and forks, consisting of inferior metal plated with precious metal, usually silver; the object being to produce spoons and forks which shall be of small initial cost, of great durability, and susceptible of a highly-finished and ornamented surface.

"Spoons and forks resembling silver in their finish, ornamentation, and general appearance have ordinarily been made of an alloy largely composed of copper and zinc, known in the arts as German silver, and of other metals or alloys of similar composition, which could be rolled and stamped with as much facility as silver. Sheet and cast iron have also been largely used in the manufacture of a cheap article of spoons and forks, and such articles of table ware have usually been provided with a coating of tin; but spoons and forks made of iron could not compete in their finish and appearance with spoons and forks made of German silver or similar alloys; and such articles form a distinct class of manufacture. I am also aware that spoons and forks have long been made, in whole or in part, of steel, and in some cases the articles have been plated with precious metal, and hence I make no broad claim to spoons or forks made either of iron or steel, as my invention consists in an improved process for the manufacture of spoons and forks of homogeneous steel, whereby the finished article is possessed of all the desirable and valuable characteristics of silver-ware in its appearance, finish, ornamentation, strength, and durability, while it is much lighter in weight, and can be produced at a much lower cost than the ordinary articles of silver-ware.

"German silver and similar alloys are adapted to be rolled and stamped with the same facility as silver; but homogeneous steel requires more than four times the pressure imparted to German silver before the homogeneous steel can be made to flow into the fine and deep recesses of that portion of the dies for producing the desired ornamentation, and hence the ordinary process resorted to in the manufacture of German-silver spoons and forks is wholly impracticable, if it is desired to employ homogeneous steel in the manufacture of such articles.

"I will now proceed to describe the various steps for carrying my improved process into effect.

"The homogeneous steel is first rolled into sheets of the desired width, length, and thickness, and from such sheets the blanks, *a*, *a*, are cut, as illustrated in figure 1, whereby the material is economized and waste scrap is avoided. The blanks, *a*, *a*, are then rolled to extend the same, and to impart varying thicknesses to different portions of the blank, as shown in figure 2.

"The blanks are rolled cold, and, as heretofore stated, when the blanks are composed of silver, German silver, or similar material, no difficulty is experienced in the process of rolling; but with homogeneous steel the blanks cannot be rolled in the usual manner on account of the greatly-increased power necessitated in forcing the blank through the rolls, and also for the reason that the surface of the steel is so smooth that the rolls fail to take hold of the blank promptly.

"In rolling articles of irregular or varying thickness, it must be remembered that the blank must enter the rolls at a fixed point, and that the slightest slip or variation of the blank not only ruins the blank, thus causing loss of material and all previous labor bestowed upon the blank, but that such variation or slip of the blank is liable to injure the rolls, and thus cause a still greater loss to the manufacturer. To prepare the blank, therefore, for

rolling, and prevent it from slipping as it enters between the rolls, I thoroughly cleanse the blanks, preferably by placing a large number of blanks into a tumbling barrel or mill with a quantity of pumice stone, or other similar substance, that will operate to scour the surface of the blanks. Then, to insure a prompt and certain hold of the rolls on the blank, and prevent the latter from slipping, I cover the rolls or the blank, or both, with turpentine, and when the blank is now entered between the rolls it is promptly and firmly grasped and transformed into the desired form, as indicated in figure 2. From the blank, after having been rolled, is stamped the spoon-blank proper, *b*, as illustrated in figure 3, or a fork-blank in case the blank was rolled for the production of fork-blanks.

"When homogeneons steel has been compressed by cold rolling, as hereinbefore described, it is of such density that it is necessary to soften the metal by annealing, that it may yield sufficiently to receive the impression of the dies for ornamenting the surface of the article. The operation of annealing is usually performed by heating and slowly cooling the blanks, and in the manufacture of spoons and forks, from the metal ordinarily used, the blanks are ordinarily annealed in an open oven or furnace; but this method of annealing will not answer when the blanks are formed from homogeneous steel, because the latter will oxidize and blister, and thus injure the surface of the blanks. To prevent this I pack the blanks tightly in close-fitting iron boxes, and close all the joints of the boxes by luting the joints with clay, and thus exclude the outer air from the blanks within the boxes. The boxes are then placed in a furnace and heated to the desired temperature, after which they are allowed to cool, care being taken not to open the boxes until they have become cold; and when the blanks are removed from the boxes it is preferable to protect them from the direct contact and influence with the atmosphere, which may be effected by sprinkling unslaked lime over them."

The stamping, forming, and plating processes are also described, which are those usually practiced in the manufacture of German-silver plated spoons.

The claims of the process patent were as follows:

"(1) The method or process of manufacturing forks or spoons from homogeneous steel, consisting, essentially, in the following steps: *First*, in cutting the blanks of the desired size and form; *second*, in imparting a smooth surface to the blank; *third*, in applying adhesive substance, such as turpentine, to the blanks or rolls, or both, preparatory to rolling, and afterwards cold-rolling the blanks to impart the desired thickness to the different portions thereof; *fourth*, in annealing the cold-rolled blanks in air-tight receptacles; *fifth*, in stamping, shaping, and plating the blanks to form the completed article substantially as hereinbefore set forth.

"(2) In the process of manufacturing forks or spoons from homogeneous steel, the method of preparing the blanks, consisting in applying adhesive substance, such as turpentine, to the blanks or rolls, or both, preparatory to subjecting the blank to the pressure of the rolls, substantially as set forth."

The art of manufacturing silver-plated German-silver spoons was well known at the date of this invention, and the various operations are described by Mr. A. A. Sperry, the defendant's foreman, as follows:

"The first operation in making a German-silver spoon is to cut the blank from a sheet of metal of the required width and thickness. The blank is then annealed. It is then plated in acid to remove the scale. This operation is called pickling. The next operation, after washing the blank with water, is to place it in a tumbling barrel with a quantity of sawdust. It is then tumbled a short time to remove the moisture. The blank is then taken to the rolls. The upper roll, as they are usually used in rolling spoon blanks, is so formed that the spoon in passing through the rolls shall leave such portions of the spoon where strength is required of the necessary thickness, while the bowl and end of the handle for ordinary figured work shall be made thin. This is called graded rolling. Except in the manufacture of solid-silver table-ware, there is no other rolling known in the spoon business proper, except graded rolling. There is no other rolling known in the spoon business proper, except cold rolling. After the rolling of the blank, the next step is cutting out the spoon. Next is the annealing process. After the annealing the blank is again pickled. The blank is now ready for cutting down; this is done on belts coated with some polishing material to cut away the rough surface of the blank, and reduce it to a smooth surface. The blank is now ready for putting on the impression; this is called striking or stamping. From the edges of the spoon the burr is now cut away on belts and wheels, and the edges are polished. The spoon is now ready for bowling; that is, forming the bowl between the dies. The next step is shaping the handle. The spoon is now ready for facing the bowl, and finishing."

The "blanking" or cutting out of the blank is usually done by the process patented by Leroy S. White, in letters patent of December 24, 1867.

Iron tinned spoons had been manufactured for years prior to 1878. They were a cheap and coarsely-finished article. In this condition of the art, the Pittsburgh iron and steel manufacturers began, in 1876, to bring to the notice of the Connecticut spoon makers soft or "homogeneous" steel as a suitable article for the manufacture of spoons. Within the last 20 years this kind of steel, or steel produced by fusion, as distinguished from that produced by cementation, has been extensively manufactured, both by the "crucible" process and by the Bessemer and Siemens-Martin processes, and has been used for a great many purposes. All steel is homogeneous, but the term has been applied to this kind of steel on account of its especial uniformity of structure. The article is low in carbon, and does not harden and temper in water, and in that respect is

materially unlike the steel which was formerly manufactured, and therefore has been refused the name by many metallurgists. Whatever it should be properly called,—and it seems that ingot iron would be a more exact name,—its manufacture into flat table-ware was undertaken by a number of the Connecticut manufacturers about the year 1876. Some of them made tinned steel spoons which were like their iron predecessors,—a cheap and somewhat coarse article. Others essayed to make and did make silver-plated spoons. But nobody succeeded, commercially at least, till the plaintiff placed upon the market his goods, which are elegant in finish, ornamented with delicate and clearly-defined lines, and, though they cannot permanently withstand rust, are cheaply produced, and possess the advantages which are stated in the patent.

The result to be gained by the efforts of the spoon manufacturers was the silver-plating of table-ware, which should be both durable and susceptible of ornamentation, upon a material cheaper than German-silver, whereby attractive articles could be furnished to the public at a cheap price. The difficulties which were to be overcome, after a material which would not split in manufacture or in use had been found, would naturally arise from the hardness of the material and from its tendency to oxidation. The iron manufacturers furnished the material, which would not split, and was comparatively soft. The invention of Wallace, if invention it was, consisted—*First*, in treating this material in such a way that cold rolling, which was a necessity of prime importance in order to increase the density of the material, and thus to enable the lines of ornamentation to be stamped clearly and distinctly, could be accomplished. This method was by scouring the smooth or glassy and slippery surface of the steel blank so that it would furnish as little resistance as possible to the bite of the rolls, and next by aiding the rolls to take hold of the hard and glossy surface of the steel by the application of turpentine to the blank. *Secondly*, oxidation during the necessary subsequent annealing process was prevented by annealing in covered boxes, made airtight. The other steps were those usually taken in the manufacture of German-silver spoons.

Before considering the question of novelty, it is desirable to state the elements of the claimed invention with respect to material. It is suggested that "homogeneous steel" is not defined in the patent, and that steel necessarily implies an article which will not harden and temper in water; whereas, it is manifest from the record that the "spoon metal" used by both parties is not steel in that sense.

Prior to 1867-68 the distinctions in this country and elsewhere between iron and steel were sharply defined. Quoting substantially from Mr. Isaac Adams' testimony, but abbreviating somewhat his language, the term "steel" formerly meant a compound of iron and carbon, in which the carbon was present in an amount varying from one-half of 1 per cent. to 2 per cent. The compound thus called steel possessed the properties of both cast iron and wrought iron in a certain degree. It had strength, hardness, and resiliency, but it also possessed a salient property, which the others possessed in a moderate degree or not at all, and that is the property of being hardened and tempered by heating and cooling. But the new processes in the manufacture of iron with carbon have left the distinctions between steel and iron in an unsettled condition, and so there have been for some years two contending definitions of steel,—one which excludes all compounds of iron and carbon which do not have the tempering quality, and another which includes all malleable products produced by fusion, whether or not the percentage of iron is sufficient to give the tempering quality. The term "steel" is practically applied by American steel manufacturers to the low carbon article used by both the plaintiff and the defendants, and from the use of this term no confusion would arise among mechanics as to its meaning, although the spoon manufacturer must necessarily ascertain for himself, by experiment or inquiry, the grade of soft steel which is best suited to his purpose.

Although the product patent seems to imply that the steel must be cold rolled in the process of its manufacture, that was not its meaning. The patentee meant to emphasize that in the process of manufacture of the spoon, the steel must be made dense by cold rolling. He says in the product patent that the smooth and even surface produced by cold rolling is necessary—"*First*, that the surface of the ware may be of uniform density, so that sharp and well-defined ornamentation may be stamped thereon;" and, *second*, to provide the ware with a highly-finished plated surface, which will burnish evenly. The steel which is generally used is hot rolled in its manufacture,—that is, rolled while hot in cold rolls.

The important question in the case relates to the novelty of the patented process. The defendants deny any patentable novelty, because they say: (1) That every one of the mechanical operations stated by the patentee had been successfully practiced in the German-silver spoon manufacture; (2) that they were practiced in the se-

quence pointed out in the patent; (3) that there was no novelty in the successful use of this process upon homogeneous steel.

Tumbling German-silver blanks in sawdust for the purpose of cleaning them from acid and drying them after they had been taken from the "pickle" in which they had been placed after the first annealing, and by which "pickling" process the scale is removed, was well known at the date of the invention. The use of the tumbling barrel for this purpose of scouring metal was also well known. The dipping of blanks in turpentine or sal-soda or water for the purpose of enabling the rolls to take hold of blanks of unusually hard surface, and the occasional annealing of German-silver spoons or other articles in air-tight receptacles, had been practiced. It was well known that steel tools and other articles peculiarily liable to oxidation should be thus annealed. These methods of treating metal so as to overcome difficulties arising from the nature of the material were familiar to experienced metal workers, but there is no satisfactory proof that in the manufacture of German-silver or tinned iron or steel spoons, both the cleaning and dipping in turpentine and air-tight annealing had been resorted to, or were ever used in the sequence named in the patent before the experiments of Wallace. The Messrs. Sperry dipped their blanks in turpentine as an occasional thing. They annealed spoons in air-tight pans or boxes occasionally, and had annealed ladle bowls in that way; but this consecutive process was not the way in which they manufactured their ware. Mr. Lewis' use of turpentine and of air-tight annealing was of the same kind. Mr. Stevens used turpentine in rolling his iron and steel spoons "for a few days." Mr. H. W. Bassett, foreman of Hall, Elton & Co., and who made iron and steel spoons between 1876 and 1878, and Mr. Andrews, who was also in their employ, had used turpentine for 10 or 12 years, but not uniformly. Andrews says he "used it some." The plaintiff's consecutive process to enable cold rolling and perfect annealing to be accomplished was new. Neither is there any satisfactory evidence that this process had ever been used with success upon steel before Wallace introduced it to the public. The efforts of Charles Parker & Co. and of Garry I. Mix to use steel were unsuccessful. They made spoons, but not in a way satisfactory to themselves. Luther Boardman did not practice air-tight annealing. Hall, Elton & Co. made tinned steel spoons, which were a very different article from Wallace's silver plate. I have already adverted to the testimony of their workmen Bassett and Andrews. Stevens, who used turpentine "for a few

days," made iron tinned spoons, and says that "we buffed and plated some" with silver plate, and sold them in the year 1874. If this silver plating had been a success or an affair of moment in Mr. Stevens' business, his testimony in regard to it would have been less vague. The Landers, Frary & Clark steel fork was a different article from the forks in question. It was an unannealed, hardened, and tempered article.

In 1836 silver-plated steel spoons and forks were imported from England by Samuel Haghes & Son. The method of manufacture, whether by forging or rolling, is not known. Mr. Bassett, who was in the employ of the importers when the spoons were sold, thinks that they were close or hand plated, which was done by soldering a sheet of metal upon the article plated. The patentee does not claim that spoons and forks had not been plated before the date of his invention.

The English patent to Job Cutler, of 1853, describes his method of making silver-plated spoons from wrought sheet iron or steel. He cold rolled the strips of iron or steel, cut out the blanks, annealed, pickled, stamped, annealed again if the dies did not produce a good impression, pickled, cleaned, and restamped. He annealed in a muffle or oven made air-tight in some way. The annealing boxes or pans were filled with alternate layers of blanks, and a mixture of charcoal dust or sawdust, coke dust, and Cumberland ore. The peculiarities of the Wallace process, scouring the blanks and dipping in turpentine and annealing in boxes simply made air-tight by cementing the joints, are not given by Cutler.

The defendants also attacked the theory of patentable novelty by the following line of argument, which had great force. The methods of treating cold refractory metal so as to subject it to the rolling operation, and the methods of annealing steel or iron so as to prevent oxidation, were all well known in 1876–7. There was no mystery in the way in which metal workers treated steel and iron. At this time the steel manufacturers of the country began to manufacture soft or decarbonized or homogeneous steel for very many purposes, and conceived the idea that it could be used to advantage by the spoon makers of Connecticut. Ely & Williams, of Philadelphia, introduced the article in 1876 to the different prominent Connecticut manufacturers, who all tried it. Some, like Hall, Elton & Co., and Mr. Boardman, gave it up because they preferred to devote themselves exclusively to German silver, and did not want to procure separate sets of dies and rolls. Others, like Mr. Mix, found the steel too refractory to exhaust

time upon. Mr. Wallace had both patience and a disposition to use time in the employment of old and well-known processes for the manipulation of this article which was represented to possess advantages over wrought iron. There was no invention, there was an application of familiar ideas, and a general mechanical improvement, and there was business skill and energy. There was the employment of the same qualities of mind which have made his brother manfacturers of the Connecticut and Naugatuck valleys successful in the departments of table-ware manufacture to which they have devoted themselves, but there was no striking out a new path in the field of invention. He did just what other people had done, but he exercised patience and energy to make his work a commercial success.

On the other hand, the plaintiff says an attractive, cheap, and durable silver-plated steel spoon was a thing practically unknown in the art. It was wanted. When produced the manufacturers knew that it would fill an empty space in the market. They desired to produce it, and the skillful and prosperous mechanics of the neighborhood set themselves with more or less energy to accomplish this result. Nobody but the plaintiff succeeded. He produced a new thing—a silver-plated steel spoon which was cheap, durable, beautiful, and useful. Having done that, having accomplished what other men tried to do and wanted to do, but did not do, and having shown that he attained the result by a succession of old processes, which, though separately old, had not been practically grouped together in the order in which he used them, the only fair conclusion is that there must have been patentable novelty in the process. The plaintiff's argument seems to me to have the greater weight.

The first claim of the process patent and the various claims of the product patent are found to be valid, but the second claim of the process patent does not possess patentable novelty by reason of the prior use of turpentine upon German-silver blanks before they are rolled.

The question of infringement only remains. The defendants, after blanking, anneal the blank, pickle it to remove the scale, tumble it in sawdust to clean and dry it, then apply the turpentine and cold roll it, and when the second annealing process is to be done, they anneal in air-tight boxes. They do not use pumice stone or anything which scours the blank, but, after annealing, they subject the blank to such cleaning as to make it clean and bright. The smooth and slippery character of the steel is removed by the tumbling, which is practiced long enough to thoroughly clean the surface of the blank.

The process which the plaintiff pointed out has been substantially adopted.

Let there be a decree for the plaintiff upon the first claim of the process patent, and upon the product patent for an injunction and an accounting.

THE MILL BAY.

(*District Court, E. D. Arkansas.* July, 1882.)

1. SHIPPING—CARRIER BY WATER—RIVERS OF THE SOUTH-WEST.

   The rules regulating the liability of a carrier of goods by water to landings where there are wharves and warehouses, and where the consignee resides or may be found, are not applicable to neighborhood or way landings on the river banks of the south-west, where there is no wharf and no warehouse, and where the consignee does not reside, and is not to be found.

2. SAME—USAGE AND CUSTOM.

   The usage and custom has been uniform that when the boat put goods off at such a landing in good order and condition, and the person living at or near the landing was notified of the fact, and requested to look after them and notify the consignees, the liability of the boat was at an end, and, being reasonable, contracts of affreightment will be presumed to have been made with reference to such usage and custom.

3. SAME—DUTY AND OBLIGATIONS OF CONSIGNEES—LOCAL USAGE AND CUSTOM.

   Where the consignees had notice in fact of the precise character of the landing, and ordered a mill consigned to such landing, and lived at a distance from it, with no direct or speedy means of communication between the landing and themselves, it was their duty to have been in attendance to receive the mill, or to have had an agent at or near the landing for that purpose, if they did not desire to be bound by delivery in accordance with the usage and custom of the landing.

M. W. Benjamin, for libelants.

G. B. Dennison, for claimant.

CALDWELL, D. J. On the eighth of September, 1881, the libelants directed their correspondents at Little Rock to ship to them by boat, "to Cates' landing, on the Arkansas river," a Bradford pully grist-mill, consisting of 30-inch stones, stand, and hopper. On the twenty-seventh of September the mill was shipped on the defendant boat, consigned as directed. There is no wharf or warehouse at Cates' landing, and no means of storing or protecting goods put out there. In low water boats cannot reach the high banks in consequence of a prominent sand bar, extending from the main land far out into the river channel, and at such time it is conceded the "landing" is on this sand bar, which is so broad that teams have to be

employed to convey goods to the main land. But this carriage of goods over the bar is always done by the consignee and never by the boat. The boat put the mill off in good order and condition, and at the place all goods for that landing are discharged and received by the consignee, when the river is at the stage it then was. The libelants resided some 20 miles from the landing, and there was no means of direct or speedy communication between the landing and the place where they reside. They owned a steam saw-mill, situated about two miles from the landing, where the mill in question was designed for use, and it was shipped by boat to this landing on account of its proximity to the place where it was to be run. One Lyon was at libelants saw-mill running and managing the same, and was commonly reputed to be the agent of the libelants in matters pertaining to such mill, though one of the libelants testifies that he was not their agent for any purpose. The officers of the boat, in conformity to usage, notified a citizen who resided on the bank of the river at the landing that the mill had been put off, and requested him to notify libelants, or their agent, of the fact; and the freight bill was left with him, as was usual with all boats leaving goods at that landing. He notified Lyon, who said he would come for the mill as soon as he could get a team to haul it, and he made unsuccessful efforts to get a team for that purpose. He also sent word to libelants the first opportunity he had of doing so, which was four or five days after the mill was landed. Lyon failed to come and get the mill, and the day after libelants were personally notified of its arrival, and before they had had time to make the necessary arrangements to remove it, a sudden rise in the river carried the mill off and it was lost. The mill remained a week where the boat left it before the rise came which washed it away. On this state of facts is the boat liable for the loss of the mill?

The general rule is that the carrier by water may deliver goods on the wharf, but to constitute a valid delivery there, the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods, or put them under proper care and custody.

The learned proctor for the libelants insists this general rule governs this case, and that, though the mill was deposited at the proper landing, the boat was not discharged from liability, because the libelants were not notified.

I am inclined to think the testimony supports the conclusion that Lyon was the agent of the libelants to receive notice that the mill

was deposited at the landing; and notice having been given to him in apt time, the boat was discharged from liability under the rule contended for. But if I am mistaken in supposing Lyon was libelants' agent, the same result is reached on other grounds. The rules regulating the liability of a carrier of goods by water to landings where there are wharfs and warehouses, and where the consignee resides or may be found, are not applicable to a case like this.

The question in this case is, when is the carrier discharged from liability, when the contract is to carry to a neighborhood or way landing where there is no wharf and no warehouse, and where the consignee does not reside and is not to be found?

Such landings are not uncommon on the rivers of the south-west. They are established or rather named by the settlers living in the vicinity for their own convenience, and to avoid the labor, expense, and delay of traveling to some established wharf or landing where the usual facilities for storing goods may be found. It is a well-known fact that on the Arkansas and other rivers in the south-west the distance between towns or established ports where there are warehouses, or wharf-boats, is often very great. The necessities and convenience of the settlers imperatively require that their goods should be delivered on the bank of the river, as near their plantations and homes as practicable, regardless of wharfs or warehouses. The practical sense and generous spirit of good neighborship which characterized these settlers very soon devised means for accomplishing the desired ends. It was perceived at once that the rules governing the rights and duties of carriers by water, where the contract is to carry to some established port having a wharf or warehouse, and where the consignee resided or might be found, or where he could be speedily notified by telegraph or otherwise, could have no application to these country or way landings. It was seen that a boat could not be required to lay at each one of these landings until the consignees appeared to receive their goods, or until notice of their arrival could be sent to them. To impose such an obligation on a boat would protract her voyage unreasonably and indefinitely; and no boat would receive goods consigned to a way landing, if such an obligation had to be incurred. Accordingly, some spot deemed most favorable for a boat landing would be fixed upon by the settlers and given a name. Some settler living at or near the landing, for the accommodation of his neighbors, would take it upon himself to notify them, by some of those casual methods usual among people in the country, when goods were put off at the landing for them, and would assume such

care and oversight over the goods in the mean time as good neighborship and the necessities of the case seemed to require. And the usage and custom has been uniform that, when the boat put goods off at such a landing in good order and condition, and the person living at or near the landing, was notified of the fact and requested to look after them, and notify the consignee, the liability of the boat was at an end. This usage and custom is strikingly analogous to the rule governing the liability of carriers where goods are consigned to ports having the usual storage facilities.

In *Fick* v. *Newton*, 1 Denio, 45, the court says:

"Where goods are safely conveyed to the place of destination, and the consignee is dead, absent, or refuses to receive, or is not known, and cannot, after due efforts are made, be found, the carrier may discharge himself from further responsibility by placing the goods in store with some responsible third person in that business at the place of delivery, for and on account of the owner. When so delivered the store-house keeper becomes the bailee and agent of the owner in respect to such goods."

And the person in whose charge, in a very general sense, the goods may be said to be left at these landings, and who is expected to notify the consignee, is, as between the carrier and consignee, to be regarded as the bailee or agent of the latter, and not of the former, although no such relation may exist in fact between him and the consignee, or certainly none other than that of a bailee without reward. The usage and custom relating to the delivery of goods at these landings is shown to have prevailed, and to have been generally known and uniformly acted upon, ever since boats have navigated the Arkansas river, now more than half a century. It is a reasonable usage, and contracts of affreightment will be presumed to have been made with reference to it. Persons consigning goods to such landings must, therefore, be held to know their character, and the usage and custom relating to the delivery of freight thereat.

The libelants had notice in fact of the precise character of Cates' landing; and having ordered the mill consigned to this landing, and living at a distance from it, with no direct or speedy means of communication between the landing and themselves, it was their duty to have been in attendance to receive the mill, or to have had an agent at or near the landing for that purpose, if they did not desire to be bound by the delivery in accordance with the usage and custom of the landing. The boat earned her freight. The libel will be dismissed, and a decree entered against the libelants in favor of the owner and claimants of the boat for the freight and all costs.

THE JOHNS HOPKINS.

(*Circuit Court, D. Massachusetts.* August 14, 1882.)

1. COLLISION—BETWEEN STEAMER AND SAIL VESSEL.

In case of a fog, and in a place much frequented by vessels, it is as much the duty of a sail vessel to go at a moderate rate of speed as it is the duty of a steamer.

2. SAME—LOOKOUT.

In a case where, besides a man forward, stationed as a lookout, there were two persons on watch in the pilot-house of a large ocean steamer, the lookout was sufficient.

3. SAME—EXCESSIVE SPEED IN FOG.

Where a sail vessel in a fog was going at twice the speed of an approaching steamer, and neglected to show a torch-light, and the steamer was going as slow as she could go against a head-wind and a head-sea, and as soon as the steamer saw the light of the sail vessel orders were given to stop and reverse the engine, she is not in fault for a collision which ensues, from the sail vessel attempting to cross the course of the steamer.

In Admiralty.

John C. Dodges & Sons, for libelants.

Morse & Stone, for claimants.

Before HARLAN and LOWELL, JJ.

LOWELL, C. J. At about 9 o'clock on the night of February 26, 1881, the bark Fury came in collision with the steamer Johns Hopkins, off the coast of Cape Cod, near Chatham. A dense fog had shut in some half hour before. The bark was sailing with the wind nearly aft, and making eight or nine knots through the water, and had besides, as I understand the evidence, a current of about two knots in her favor. Her lookout reported a light to the mate, who was the officer of the deck, and was standing on the forward part of the quarter-deck. The mate looked and saw a green light, and gave the word "hard a-starboard," in order, as he says, to keep green light to green light. The helmsman began to put the wheel to starboard, when the pilot, who was near the wheel, and did not see the light, and thought that they were meeting a sailing ship, and that the mate had given the order to port, ran to the wheel and had it put hard to port, where it was kept until some time after the collision. The bark, under her port helm, crossed the bows of the steamer, and received a glancing blow on her port quarter, near the stern, which caused a damage estimated in the libel at $3,000. The total claim is $3,500. The bark did not display a torch. The mate says there

was not time to light one. The steamer had been slowed to one bell, when the fog came on, and was going against the wind and sea and current. Her master, whose evidence appears to have been given in a very fair and candid spirit, says: "Well, probably it might have been going three and one-half miles an hour. She was going as slow as she could go. She was under one bell, with a head-sea and a head-wind." The engineer fully confirms this statement. There was a competent lookout on the top-gallant forecastle. Her master and second officer were in the pilot-house keeping a careful lookout, each leaning from a window. A light was reported nearly ahead, and all the witnesses of the steamer declare that it was a white light. We cannot say, upon the evidence, that there was a white light displayed by the bark; possibly her green light may have shown white in the fog. However, nothing came of this mistake. Orders were immediately given to stop and reverse the engine, and they were obeyed. Whether the headway of the steamer was lost before the collision, it is not easy to say. All her witnesses think that it was. The master, who is the least positive, as he is also the most reliable, says: "I suppose we were about at a standstill."

The district court pronounced against the libelants, finding that they were going too fast. The evidence below is reported to us with the addition of a deposition by the steamer's engineer, which shows that the engine was making 30 revolutions, just one-half of the usual number. Thereupon very able arguments have been addressed to us to prove what rate of speed would be obtained by 30 revolutions. This must be a matter of estimate, after all, and we do not consider that mathematics are more accurate, under the circumstances disclosed, than observation, because the amount of loss by the pitching of the vessel, and by the effect of the head-wind, sea, and current, are not ascertained with any approach to definiteness. We think the master's statement is as near the truth as we can get.

The broad facts are that a sailing vessel, going at least twice as fast as a steamer, showing no torch, and crossing the bows of the steamer, undertakes to say that the speed of the latter was not moderate. There seems to be some misunderstanding here as to the relative duties of the two classes of vessels. Before the law concerning this subject took the form of statutory rules, speed was always a question of due care in navigation, and although a sailing vessel could not stop and reverse after sighting another ship, she

could lessen her speed when she encountered a fog; and, in a place near the coast, much frequented by vessels, it was her duty to do so. Sailing vessels were condemned for going too fast in the following cases: *The Juliet Erskine*, 6 Notes Cas. Adm. & Ecc. 633; *The Virgil*, 2 Wm. Rob. 201; *The Pepperell*, Swab. 12.

Lowndes, in his treatise on the Admiralty Law of Collisions, says, at page 73, after speaking of steamers: "The same principles are, of course, applicable to sailing vessels." He cites two of the foregoing cases, and *The Girolamo*, 3 Hagg. 169.

The sailing rules, which were identical in the chief maritime countries, required steam-ships to go at a moderate speed in a fog, and said nothing about sailing vessels, which may have led their owners to suppose that they were relieved from this obligation. But this law was not intended to change the rules of seamanship, excepting where the statute differed from or added to those rules; and we find by the *dicta* in certain cases in the supreme court that in places like this channel off Cape Cod sailing ships should not carry a "press of sail," which means that they shall go at a moderate speed; for the amount of sail which would be a "press" must depend upon the amount of wind, and the consequent rate of progress. See *The Morning Light*, 2 Wall. 550; *The Colorado*, 91 U. S. 962. The revised sailing rules of 1879, in England, provide, (article 13:) "Every ship, whether a sailing ship or a steam-ship, shall, in a fog, mist, or falling snow, go at a moderate speed." 4 Prob. Div. 247. This article puts sailing ships on the same footing as steam-ships, on the open ocean as well as in channels and frequented places. We hold that a steamer is bound, in all places, to go at moderate speed in a fog, and that a sailing vessel is bound to do so in such a place as this. The neglect to show a torch, and the act of crossing the bows of the steamer, are excused by the libelants on the ground of want of time, and the suddenness of the emergency. The lights of the steam-ship were much larger and higher than those of the bark, and could be seen sooner from the bark than her lights could be seen from the steamer. We are not sure that there was not time to show a torch, as required by Rev. St. § 4234. There is some reason to believe that the lookout did not report the light as a mast-head light, as he should have done, and that the mate was not at first aware that the vessel was a steamer. There was time for the bark to cross the bows of the steamer, and it can hardly be that this could take less time than the simple lighting of a torch, if one were ready. Supposing, however, that the sailing vessel cannot be blamed, it is

necessary, in order to a recovery, that some fault should be attached to the steamer. Two faults are found with her by the libelants:

1. That there was only one lookout forward. Cases are cited in which it is said to be usual for large ocean steamers to have two lookouts. *Chamberlain* v. *Ward*, 21 How. 548; *The Colorado*, 91 U. S. 692. But these declarations constitute no part of the matter in judgment in those cases. The maritime law has not declared that one man forward may not be enough; and in this case, where, besides such a man, there were two persons on watch in the pilot-house, we hold that the lookout was sufficient.

2. The rate of speed. The phrase so often quoted from the decision in *The Batavia*, 9 Moore, P. C. 286, that the rate of speed in every case should be so moderate as to enable a steamer to do what the law requires her to do, cannot be taken literally. A fog may be so dense that a collision will take place when neither party is in fault. Some persons have understood that in such a state of the weather the steamer must lie to or anchor; and it was so argued in this case; and such is the necessary result of a literal interpretation of the *dicta* in some cases. It may be that a ship of any kind will be responsible for moving from one dock to another, or for beginning a voyage, in a dense fog, (see *The Borussia*, Swab. 94; *The Girolamo*, 3 Hagg. 169;) and so if the vessel had arrived at a usual anchorage and persisted in going further; but the fog in this case came on after the bark had left Vineyard Haven, and after the steamer had left Boston, and it is as certain that they were not required to lie to or anchor, as that "a moderate speed" does not mean no speed at all.

The Colorado, 1 Brown, Adm. 393, (91 U. S. 692,) is relied on by the libelants. There the sailing vessel had diminished her speed when the weather became thick from five or six knots to four; the steamer had but three men on deck, and the lookout was obliged to run to the wheel, though after he had reported the light; the speed of the propeller is found by Mr. Justice Clifford to have been five or six knots. A careful study of that case has shown us that the sailing vessel had taken every precaution possible, and that the propeller was condemned for the whole of her conduct taken together, rather than for any definite single fault.

Granting that a steamer should go as slowly as is reasonably possible, we think that this steamer did not exceed that rate. We are of opinion that the collision was caused by the acts and neglects of those who were navigating the bark, and that if they were excusable, which we do not think they were, the collision was without fault by

either party. This is the judgment of Mr. Justice Harlan and the circuit judge, and is to be entered as of a time before Mr. Justice Gray was assigned to this circuit.

Decree affirmed, with costs.

Receiver—Appointment—Railroad Mortgage.

HAMMOCK *v.* FARMERS' LOAN & T. Co., U. S. Sup. Ct., Oct. Term, 1881. Appeal from the circuit court of the United States for the southern district of Illinois. The decision of the United States supreme court was rendered on April 24, 1882. Mr. Justice *Harlan* delivered the opinion of the court affirming the decree appealed from.

In Illinois, a judge has no authority to appoint a receiver of a railroad corporation in vacation; such authority is to be exercised by the court while in session. Punctuation is no part of a statute. Courts, in construing statutes or deeds, should read them with such stops as will give effect to the whole. We are not prepared to hold that the power of a judge in vacation to exercise the important judicial function of appointing a receiver of a corporation, charged with public functions, was conferred by the introduction of a comma in the revised statute of a state, where the established doctrine is that no judicial functions can be exercised by a judge in vacation except where expressly or especially authorized by statutes. Where the circuit court of the United States had lawfully acquired possession of property prior to any action in reference to it by the state court, the former had the right to retain possession, for all the purposes of the suit, for foreclosure of the mortgage thereon. The provisions of the statutes of Illinois giving the right to redeem as well lands or tenements sold under execution, as mortgaged lands sold under decrees of courts of equity, has no application to the real estate of a railroad corporation which, with its franchises and personal property, is mortgaged as an entirety, to secure the payment of money borrowed for railroad purposes. Its property, real and personal, and its franchises, should be sold as an entirety, and without right of redemption in the mortgageor, or in judgment creditors, as to the real estate. A railroad mortgage security, so far as the personalty of the corporation is concerned, is not embraced in the statutes of Illinois relating to chattel mortgages.

J. K. Edsall, for appellants.

R. E. Williams, for appellee.

Cases cited in the opinion: Taylor v. Carryl, 20 How. 583; Freeman v. Howe, 24 How. 450; Hagan v. Lucas, 10 Pet. 400; Peck v. Jenness, 7 How. 612; Blair v. Reading, 99 Ill. 609; Devine v. People, 100 Ill. 290; Keith v. Kellogg, 97 Ill. 147; Doe v. Martin, 4 Term Rep. 65; Price v. Price, 10 Ohio St. 316; Cushing v. Worrick, 9 Gray, 385; Gyger's Estate, 65 Pa. St. 311; Hamilton v. The R. B. Hamilton, 16 Ohio St. 432; Brine v. Insurance Co. 96 U. S. 627; Gue v. Tidewater Can. Co. 24 How. 262.

County Bonds—Validity of.

RALLS COUNTY *v.* DOUGLASS, U. S. Sup. Ct., Oct. Term, 1881. Error to the circuit court of the United States for the eastern district of Missouri. The decision of the supreme court of the United States was rendered on March 6, 1882. Mr. Chief Justice *Waite* declared the opinion of the court affirming the decree of the circuit court.

County bonds issued in Missouri by a *de facto* court, sealed with the seal of the court, and signed by the *de facto* president, cannot be impeached in the hands of an innocent holder by showing that the acting president was not *de jure* one of the justices of the court. It cannot be shown as a defense to bonds issued by counties in Missouri, in payment of subscriptions to the capital stock of a company, and in the hands of innocent holders, that the company to whose stock the subscription was made was not organized within the time limited by its charter. Bonds issued by counties in Missouri during the years 1870 and 1871, in payment of subscriptions to the stock of railroad companies, without a vote of the people, are valid, if the subscription was made under authority of charters granted in 1857, which did not require such a vote to be taken. Such bonds and coupons issued in those years were admissible in evidence, in an action against the county for the recovery of the amount due thereon, without being stamped as obligations for the payment of money, under the provisions of the internal revenue law. It was not necessary to prove the order of the county court authorizing the president of the court to countersign the bonds, where there was no plea or answer sworn to, denying their execution. Where there was no averment in the petition to that effect, testimony was admissible to prove that plaintiff was a *bona fide* holder and owner.

H. A. Cunningham, for plaintiff in error.

John H. Overall, for defendant in error.

Cases cited in the opinion: State v. Douglass, 50 Mo. 596; Harbaugh v. Winsor, 38 Mo. 327; Bank of Missouri v. Merchants' Bank, 10 Mo. 130; Kayser v. Trustees, 16 Mo. 90; Smith v. Clark Co. 54 Mo. 81; St. Louis v. Shields, 62 Mo. 247; Macon Co. v. Shores, 97 U. S. 277; State v. Macon Co. Ct. 41 Mo. 453; Kansas City, etc., R. Co. v. Justices, 47 Mo. 349; State v. County Court, 51 Mo. 531; State v. Greene Co. 54 Mo. 550; Callaway Co. v. Foster, 93 U. S. 570; Scotland Co. v. Thomas, 94 U. S. 688; Henry Co. v. Nicolay, 95 U. S. 624; Cass Co. v. Gillett, 100 U. S. 592; State v. Garroutte, 67 Mo. 455; State v. Dallas Co. Ct. 72 Mo. 330; Douglass v. Pike Co. 101 U. S. 687.

Commerce—Bridging Navigable Waters.

NEWPORT & CINCINNATI BRIDGE CO. *v.* UNITED STATES, U. S. Sup. Ct., Oct. Term, 1881. Appeal from the circuit court of the United States for the southern district of Ohio. This case was decided in the supreme court of the United States in April, 1882. Mr. Chief Justice *Waite* delivered the opinion of the court affirming the decree of the circuit court; *Miller*, *Field*, and *Bradley*, JJ., dissenting.

The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States is in congress. It comes from the power to regulate commerce with foreign nations and among the states. The

withdrawal by congress of its assent to the maintenance of a bridge, when properly made, is equivalent to a positive enactment that from the time of such withdrawal the further maintenance of the bridge shall be unlawful, notwithstanding the legislation of the several states upon the subject. If modifications are directed, assent is in legal effect withdrawn unless the required changes are made. Where congress licensed the erection of a bridge over a navigable stream, and in express terms reserved to itself the power to revoke the franchise or require alterations in case experience proved that the structure which was to be erected substantially and materially interfered with navigation, it may withdraw its assent, or direct such modification or alterations in the structure in its own discretion, and the United States will not be liable for the expenses incurred in making such modifications or alterations.

William M. Ramsey, for appellant.

S. F. Phelps, Solicitor General, for the United States.

Cases cited in opinion: As to the power of congress over bridges, Wilson v. Blackbird Creek Marsh Co. 2 Pet. 252; The Wheeling Bridge Case, 18 How. 421; Gilman v. Philadelphia, 3 Wall. 729; The Clinton Bridge Case, 10 Wall. 462; Railroad Co. v. Fuller, 17 Wall. 569; Pound v. Turck, 95 U. S. 464; Wisconsin v. Duluth, 96 U. S. 387.

City Bonds in Aid of Manufacturing Company.

City of Ottawa *v.* National Bank, U. S. Sup. Ct., Oct. Term, 1881. The decision in this case was rendered by the supreme court of the United States on April 24, 1882. Mr. Justice *Harlan* delivered the opinion of the court affirming the judgment of the circuit court.

Where a city council had power, the voters consenting, to issue negotiable securities for certain municipal purposes, if the purchaser, under some circumstances, would have been bound to take notice of the provisions of the ordinances whose titles were recited in the bonds, he was relieved from any responsibility or duty in that regard by reason of the representation upon the face of the bonds that the ordinances provided for a loan for municipal purposes. Such a representation by the municipal authorities of the city would estop the city, as against *bona fide* holders for value, to say that the bonds were not issued for legitimate or proper municipal or corporate purposes. By the decisions of the supreme court of Illinois, municipal bonds, payable to bearer or to some named person or bearer, were excepted from the rule that notes payable to a person or bearer could not be transferred or assigned by delivery only, so as to authorize the holder to sue in his own name.

C. B. Lawrence, for plaintiff in error.

G. S. Eldredge, for defendant in error.

Cases cited in the opinion: Roberts v. Bolles, 101 U. S. 120; Hilborn v. Artus, 4 Ill. 344; Roosa v. Crist, 17 Ill. 450; Garvin v. Wiswell, 83 Ill. 217; Turner v. Railroad Co. 95 Ill. 143; Wall v. Monroe Co. 103 U. S. 77; Johnson v. Stark Co. 24 Ill. 75; Brush v. Reeves, 3 Johns. 439; Dean v. Hall, 17 Wend. 214; Cox v. United States, 6 Pet. 200; Andrews v. Pond, 13 Pet. 77; Bell v.

Bruen, 1 How. 169; People v. Tazewell Co. 22 Ill. 151; City of Pekin v. Reynolds, 31 Ill. 531; Prellyman v. Tazewell Co. 19 Ill. 406; Sherlock v. Winnetka, 68 Ill. 535.

County Bonds—Nebraska.

DAVENPORT *v.* DODGE CO., U. S. Sup. Ct., Oct. Term, 1881. Error to the circuit court of the United States for the district of Nebraska. The decision in this case was rendered in the supreme court of the United States on March 20, 1882. Mr. Chief Justice *Waite* delivered the opinion of the court reversing the judgment of the circuit court.

A precinct is a mere subdivision of a county, and not a separate political entity, and bonds issued by authority of a vote of the precinct for public purposes must be issued in the name of the county of which the precinct forms a part; and suit on such bonds must be against the county, the judgment to be paid by a tax levied only on the taxable property of the precinct. A suit to obtain such a judgment is maintainable, although the state statute authorizing the issue of the bonds provides the special remedy by *mandamus* for their enforcement; yet inasmuch as a suit to obtain judgment on bonds or coupons is part of the necessary machinery of the federal courts in enforcing the writ of *mandamus*, which is in the nature of an execution, it will not be issued until judgment is obtained.

W. H. Munger and E. Wakely, for plaintiff in error.

William Marshall, for defendant in error.

Cases cited in opinion: State v. Dodge Co. 10 Neb. 20; Cass Co. v. Johnston, 95 U. S. 360; County Com'rs v. Chandler, 96 U. S. 205; Greene Co. v. Daniel, 102 U. S. 195; Graham v. Norton, 15 Wall. 427; Bath Co. v. Amy, 13 Wall. 244.

Bonds in Aid of Railroads—Liability of Town.

AMERICAN LIFE INS. CO. *v.* TOWN OF BRUCE, U. S. Sup. Ct., Oct. Term, 1881. Error to the circuit court of the United States for the northern district of Illinois. The decision of the supreme court of the United States was rendered in this case on April 24, 1882. Mr. Justice *Harlan* delivered the opinion of the court reversing the judgment of the circuit court.

Where a statute authorizes a town to make a subscription in aid of a railroad, to be paid in bonds of the town, subject to the conditions that the road be so constructed as to pass through the town, and that a depot be located and maintained in the town, it cannot, after the bonds have been signed, sealed, and delivered by its constituted authorities to the railroad company, and have passed into the hands of *bona fide* holders for value, escape liability by showing that the conditions, or some of them, imposed by popular vote have not been complied with upon the part of the railroad company, even though the statute authorizing their issue especially provides that they shall not be valid till such conditions are complied with.

Henry Hazlehurst, Isaac Hazlehurst, and G. L. Fort, for plaintiff in error.

Phelps & W. Hallet Phelps, for defendant in error.

Cases cited in the opinion: Town of Eagle v. Kohn, 84 Ill. 292, distinguished; Brooklyn v. Insurance Co. 99 U. S. 370, followed.

JOHNSON *v.* JOHNSON.

(Circuit Court, S. D. New York. June 20, 1882.)

1. REMOVAL OF CAUSE—TIME OF APPLICATION.

   Under the act of 1875 the first term during which the cause might have been tried means the first term when the cause is legally triable, not a subsequent term to which it may have been legally postponed by agreement, or by order of the court, and it has no reference to the presence or absence of witnesses, or the crowded state of the docket.

2. SAME—PREJUDICE AND LOCAL-INFLUENCE ACT.

   It is only where a suit is removed on account of prejudice or local influence, under subdivision 3, § 639, Rev. St., which is not repealed by the act of 1875, that a removal may be had at any time before the final hearing.

3. SAME—DIVORCE—REMAND ON MOTION OF COURT.

   An action for divorce *a vinculo* and for alimony, removed from the state court, may be remanded by this court of its own motion on suggestion of the party removing, on the ground of want of jurisdiction in this court over actions of that character.

Robertson, Harman & Cuppia, for plaintiff.

Joseph J. Marrin, for defendant.

BROWN, D. J. The papers show that this cause was at issue and duly noticed for trial and placed upon the calendar of the state court for trial in October, 1881, and that it was on the day calendar and called at several terms prior to the June term, when it was removed to this court.

When a cause is removed on account of the citizenship of the parties, it must, under the act of 1875, be removed at the first term during which the cause might have been tried in the state court. This means the first term when the cause was legally triable, not a subsequent term to which it may have been legally postponed by agreement or by order of the court; and it has no reference to the presence or absence of witnesses, or to the crowded state of the docket. *Ames* v. *Colorado*, 4 Dill. 263; *Sough* v. *Hatch*, 16 Blatchf. 233. The practice is perfectly settled in this circuit and elsewhere. *Whitehouse* v. *The Continental*, 2 FED. REP. 498; *Murray* v. *Holden*, Id. 740; *Cramer* v. *Mack*, 12 FED. REP. 803. It is only where a suit is removed on account of prejudice or local influence, under subdivision 3 of section 639, which is not repealed by the act of 1875, that removal may be had at any time before the final hearing. *Sims* v. *Sims*, 17 Blatchf. 369; *Whitehouse* v. *The Continental*, *supra*. There has been no order or adjudication of the state court adjudging that

this cause could not have been tried before the June term, as in *Mc-Lean* v. *St. Paul*, 17 Blatchf. 363, 365; and the facts would not warrant any such adjudication.

The cause must be remanded because not removed at the first term when it might have been tried.

In another suit between the same parties for divorce *a vinculo* and alimony, removed to this court by the defendant, who afterwards asked that the cause be remanded, the plaintiff objected that the defendant could not make such an application.

BROWN, D. J. Upon the authority of *Barber* v. *Barber*, 21 How. 582, 584, I think this cause must be remanded by the court of its own motion as not properly within the jurisdiction of the United States courts.

June 27, 1882.

WATSON *v.* EVERS and others.

(Circuit Court, S. D. Mississippi. May Term, 1882.)

1. JURISDICTION—NECESSARY PARTIES—CITIZENSHIP.

   Where the contract sued on was entered into between plaintiff and defendants, one of whom was a citizen of the same state with plaintiff, and the other a citizen of a foreign country, and both defendants are not only necessary but indispensable parties to the controversy, as shown from the face of the bill, this court is without jurisdiction.

2. SAME—CASE STATED.

   Where the bill charged that complainant was induced by false and fraudulent representations of defendant, a citizen of Great Britain, and another party, a citizen of the same state with the complainant, to enter into contracts with defendant, and a contract with defendant and such third party, and that by false and fraudulent representations of both defendant and such third party he was induced to advance money pursuant to said contracts for the purchase of lands to be owned and held by them in common, *held*, that as to the contracts made with defendant alone, such third party was not a necessary party to the suit; but as to the contract entered into by all three, and which contract was recited in the bill for relief, such third party was not only a necessary, but an indispensable party to the suit, and that, being a citizen of the same state with complainant, this court has no jurisdiction to grant the relief sought.

HILL, D. J. The questions now presented for decision arise upon defendants' motion to dismiss the bill and their demurrer thereto, which will be considered together.

The bill in substance states that complainant and defendant Baldwin are both citizens and residents of Chicago, Illinois; that defendant Evers is a subject of Queen Victoria, and resident of England;

that in the fall of 1881 Evers and Baldwin were together in Chicago, and there met complainant, who was introduced by Baldwin to Evers; that Evers and Baldwin, combining and conniving together, represented to complainant that Evers resided in London, England, and was a partner in a firm of large British capitalists, and that Evers was their representative in America, and controlled, or could control, a large and very advantageous enterprise in Mississippi lands, and jointly and separately proposed and urged an agreement between Evers and complainant to purchase from the levee commissioners of Mississippi about 640,000 acres of land situated in different counties in this state; that the lands were well timbered and valuable, and could be purchased at 20 cents per acre; that complainant, confiding in the truth of these statements, entered into a written agreement with Evers, signed by complainant and by Baldwin, in Evers' name, as agent for Evers, dated October 10, 1881. The substance of this agreement, which is exhibited with and made a part of this bill, is that the lands were to be purchased at 20 cents per acre; that they should be sold; the cost and expenses were to be repaid to those who had advanced them; then complainant and Evers were to account to Baldwin for the one-fourth of the balance of the lands, or their proceeds, and divide the residue between them.

The bill charges various other fraudulent and false representations made by Baldwin and Evers, which induced Watson to enter into another written agreement, dated October 25, 1881, which recited that Evers had purchased 663,785 acres of land, and that Evers had bargained and sold to Watson an undivided half interest therein, at 20 cents per acre—payable, $10,000 down, the balance to be paid when the deed should be executed, which was to be done before the tenth of November thereafter; that at the time the last agreement was entered into, Baldwin and Evers falsely and fraudulently represented to Watson that Evers had before that time purchased said lands, and had paid for the same out of his own resources at 20 cents per acre.

The bill further alleges that Watson, relying upon these statements as true, and that 706,360 acres of land had been so purchased, and the further statement that Evers had before that time paid fees to commissioners to the amount of $3,531.80, and for recording deeds the sum of $1,600, aggregating the sum of $146,403.60; that the one-half of this sum, Watson's share, amounted to $73,201.90,—that Watson, relying on the truth of all these statements, paid to Evers said sum, and took his receipt therefor, which is exhibited with the bill.

The bill further avers that the sum so paid by Watson to Evers is every cent that has ever been paid for said lands in any way, and that Ever's statements as to his having paid anything for said lands out of his own resources are wholly false and untrue; and that Evers, out of the money so paid to him, and with levee bonds and coupons, purchased at a large discount, at 10 cents per acre, and paid therefor out of the money so received; that Evers purchased the lands described in the schedule thereof filed with the bill, at the price of 10 cents per acre; that the sum paid therefor amounted to $48,454.22—$4,837.98 being in money, and the remainder in levee bonds and coupons; that although Evers has obtained the legal title to said lands, he now refuses to convey to Watson the title to the one moiety, as provided for in either of the agreements stated.

The bill further alleges that after said purchase was made and the title obtained, Baldwin falsely represented to Watson that he controlled certain state lands or internal-improvement lands lying within the same boundaries, estimated at 150,000 acres; that the same were exempt from taxation; with other false and fraudulent representations in relation to such lands and the price at which they could be purchased, which were made to induce Watson to enter into another agreement in regard to the lands embraced in the former agreements; whereupon another written agreement was entered into between Watson and Evers, and to which Baldwin became a party, and signed by each of them, dated December 1, 1881. This agreement recites that Watson, Evers, and Baldwin were then interested in 706,000 acres of land then purchased and paid for, and the title held in Evers' name. The agreement provides in substance that Baldwin should procure these internal-improvement or state lands,—not less than 150,000 acres; that a joint-stock company or corporation should be formed, and that the stock or shares therein should be equally divided between Baldwin, Evers, and Watson; that all the lands before that time purchased and held as stated should, with that purchased by Baldwin, be conveyed to said company, and held and disposed of by said company as the property thereof.

The bill alleges that Baldwin never did purchase any lands whatever, and that his statements in relation thereto were false, and designed to deceive and defraud Watson, and to induce him to enter into the last agreement.

The bill further alleges that Evers, with a portion of the money so fraudulently procured from Watson, purchased other lands situate within this state, amounting to some 12,000 acres.

The bill contains many other charges of fraud, which need not be stated to a determination of the question upon the decision now made.

The prayer of the bill is for the apppointment of a receiver; that an account may be taken of the costs and expenses in the purchase of the lands described; that Evers be declared as holding the legal title to these lands for the use of Watson as the equitable owner; and that the legal title be divested out of Evers and vested in Watson.

The only question that need be considered is as to the jurisdiction of this court to entertain the cause and grant the relief sought as shown from the face of the bill, and which arises from the citizenship of complainant and Baldwin, both being in the same state, and this depends upon the question as to whether or not Baldwin is a necessary and indispensable party to the suit, as shown from the statements and allegations made in the bill. I am inclined to the opinion that, under the written agreements or contracts of the tenth and twenty-sixth of October, Baldwin was not such a necessary party to the suit as would debar this court of its jurisdiction of the cause, and for the reason that under these contracts Baldwin was not a party to them, although charged in the bill with being one of the conspirators in fraudulently procuring them, the contracts themselves being entirely between Watson and Evers; but the contract of December 1, 1881, is upon its face a contract and agreement between Baldwin, Evers, and Watson, each acting for himself, or himself and those whom Evers claimed to represent,—the agreement being that Baldwin was to convey 150,000 acres of land to the company or corporation to be formed, and Evers and Watson were to convey to it the lands they had purchased, and then the capital stock or shares were to be divided into three parts; one to be held by Baldwin, one by Watson, and the other by Evers, or himself and his associates. This agreement upon its face shows such an interest in Baldwin as makes him not only a necessary but an indispensable party to the controversy, as shown from the face of the bill, and this written contract, signed by all the parties to it, and which is made a part of the bill. Baldwin, being made a party, would be concluded by such decree as might be rendered in the cause, and if he were not made a party his interest in the controversy, as shown from the bill, is such that the bill would have been demurrable by reason of his not having been made a party, and for the reason that his rights, as shown by the bill, are such as to entitle him to a hearing, and the assertion and enforcement of his

rights; and, which is necessary, to the adjudication and settlement of the right of Watson and Evers. Baldwin and Evers each has a right to deny the charges of fraud made in the bill, and to call upon Watson to establish that which he has alleged.

The rules of law applicable to the questions presented are so familiar to the profession that reference to the authorities is unnecessary. I am satisfied that for the reasons stated this court is without jurisdiction to entertain the cause, and grant the relief sought by the bill. Therefore the demurrer must be sustained.

KELLOGG *v.* MILLER.

(*Circuit Court, D. Nebraska* January, 1881.)

1. CONTRACT—BETWEEN CITIZENS OF DIFFERENT STATES.
   A citizen of one state may loan money to a citizen of another state, and contract for the rate of interest allowed by the laws of the latter state, although the legal rate of interest allowed is greater in such state than in the state where the contract is made, and in which it is to be performed. Where it appears upon the face of the contract that such was the intention of the parties, it constitutes an exception to the rule that the law of the place where the contract is made must govern in expounding and enforcing it.
2. SAME—CONTRACT NOT USURIOUS—CASE STATED.
   Where a citizen of New York loaned money to a citizen of Nebraska, secured by bond and mortgage on land in Nebraska, the money being furnished in New York and the mortgage being executed in Nebraska, and the statute of New York limiting the right to interest on loans at 6 per cent. per annum, and being highly penal, while the statute of Nebraska allowed the rate of 10 per cent. per annum, *held*, that the contract reserving 10 per cent. interest, the legal rate in Nebraska, was not usurious, notwithstanding that it was made in New York and was to be performed in that state.

In Equity.

J. H. Martindale and *W. J. Lamb*, for complainant.

T. M. Marquett, for respondent.

MCCRARY, C. J. By the law of New York a contract for the payment of more than 7 per cent. per annum interest on money borrowed is absolutely void. If, therefore, the contract sued on in this case is a New York contract, and to be governed by the New York statute, it cannot be enforced. If, on the other hand, it is a Nebraska contract, and to be governed by the Nebraska statute, it is valid. To aid us in the determination of the question, what law shall be applied, we have the following undisputed facts:

(1) That complainant is, and was at the time of the contract, a resident and citizen of the state of New York, and that defendant is, and was at said time, a resident and citizen of Nebraska; (2) that the terms of the loan were agreed upon in New York, and it was there agreed that it should be secured by mortgage upon lands in Nebraska, and by bond, both to be executed in Nebraska; (3) that afterwards the bond and mortgage were executed by respondents, J. G. Miller and wife, in Nebraska, and sent by mail to R. H. Miller, in Le Roy, New York, by whom they were at that place delivered to complainant; (4) the money was actually paid to respondent, Jason G. Miller, through his agent in New York; (5) the bond stated on its face no place of payment; (6) the loan was made with the understanding that the bond and mortgage would be executed in Nebraska, and that the interest should be according to the law of Nebraska.

It is to be observed, in the first place, that the law will not so construe a contract as to make it void if it will reasonably bear a different construction making it valid; and the defense of usury, especially where the penalty is the forfeiture of the whole debt, must be established by a clear preponderance of testimony. 1 Jones, Mortg. § 643, and cases cited.

It is not to be doubted that a contract fairly and honestly made between a citizen of Nebraska and a citizen of New York, whereby the latter agrees to loan to the former a sum of money at a rate of interest lawful in Nebraska, to be secured by mortgage upon lands in Nebraska, and to be performed in and governed by the law of that state, is a valid contract even if actually executed in New York.

"Where the contract is made in one place and is to be performed in another place, * * * the law of this last place must determine the force and effect of the contract, for the obvious and strong reason that parties who agreed that a certain thing should be done in a certain place intended that a legal thing should be done there, and therefore bargained with reference to the laws of the place, not in which they stood, but in which they were to act." Parsons, Mer. Law, 321.

This rule applies here, if we may assume that the contract was to be performed in Nebraska; and that it was to be performed there seems to be clear, in view of the following facts: (1) No place of performance is named; (2) the obligor resided there; (3) the land mortgaged is situated there; and (4) the bond and mortgage were executed there.

Says the same author: "If the contract be made by letter, or by separate signatures to an instrument, the contract is then made where that signature is put to it, or that letter is written, which in fact completes the contract."

Although certain preliminary negotiations were had in New York, yet the contract was consummated, so far as Miller was concerned, when he executed the bond and executed, acknowledged, and recorded the mortgage in Nebraska, and deposited them in the post-office directed to his brother in New York, to be by him delivered to complainant. That is the place where the signature was put to these papers, which in fact completed the contract. It is said that the delivery was in New York, and that the contract was not consummated until the papers were delivered. But the proof shows that the parties agreed that the bond and mortgage should be executed in Nebraska; that the mortgage should be recorded there; and that, after recording, the papers should be sent to New York to the complainant. Under these circumstances I think that a delivery of the mortgage to the recorder for record was a sufficient delivery to the grantee. *Cooper* v. *Jackson*, 4 Wis. 537; *Marterson* v. *Cheek*, 23 Ill. 72; *Hedge* v. *Drew*, 12 Pick. 141; *Jackson* v. *Cleveland*, 15 Mich. 94; *Boody* v. *Davis*, 20 N. H. 140.

But it is not necessary to place the decision of the case upon the ground that the contract was to be performed in Nebraska. It is now well settled by authority, as it is certainly well supported by reason, that a citizen of one state may loan money to a citizen of another state, and contract for the rate of interest allowed by the law of the latter, especially in a case like the present, where the money is to be used in the latter state, and is secured by a mortgage upon lands located there; and this notwithstanding the place of payment may be elsewhere. This doctrine constitutes an exception to the general rule that the law of the place where the contract is made is to govern in enforcing and expounding it. Thus, in the case of *Arnold* v. *Potter*, 22 Iowa, 194, it was held that it was competent for citizens of different states, who are parties to a promissory note, to contract in good faith for the rate of interest, and with reference to the law of the state where the maker resides, and where the property mortgaged to secure the note is situated, although the note is in terms payable in a state different from the residence of either, and the rate of interest reserved is greater than the legal rate of the state where the note is made, or where by its terms it is payable.

In that case *Wright*, J., said: "The general rule is well settled that the law of a place where a contract is made is to govern in enforcing or expounding it, unless the parties provide for its execution elsewhere; in which case it is to be governed by the law of the latter

place. The parties may, however, if it is made in one place to be executed in another, stipulate that it shall be governed by one or the other." And again: "Nor do we hold that a citizen of one state could make his note in another to a resident there, payable in a third, with interest as allowed in a fourth. But what we do hold is, that if A., of Iowa, in good faith, borrows money of B., of Illinois, gives security on land in Iowa, and they in good faith agree that the law of Iowa shall govern, that a note given in pursuance of said contract in Illinois, bearing the interest allowed by our laws, would not be usurious." And the same rule is laid down by Chancellor Kent, who says: "The general doctrine is that the law of the place where the contract is made is to determine the rate of interest where the contract specifically gives interest; and this will be the case though the loan be secured by a mortgage on land in another state, *unless there be circumstances to show that the parties had in view the laws of the latter place in respect to interest.*" 2 Kent, Comm. (12th Ed.) 460. And see *Newman* v. *Kershaw*, 10 Wis. 333; *Vliet* v. *Camp*, 13 Wis. 221.

Lord Mansfield laid down the rule in these words: "The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." *Robinson* v. *Bland*, 2 Barr, 1077, 1078.

In applying this rule in this case there is but a single question of fact to be considered, and that is the question of good faith. Did the parties in good faith agree that this loan should be made according to, and to be governed by, the law of Nebraska? As already said, the law will presume an honest intent, unless there is something in the nature of the transaction or in the proof to establish the contrary. The usury law of New York is a statute highly penal in character, and a purpose to violate it will not be presumed in the absence of clear proof. So far from showing clearly a purpose on the part of complainant to violate that statute, I think the contrary appears. That the parties both understood that they were contracting with reference to the law of Nebraska is affirmatively shown by the testitimony. In the course of the negotiations reference was continually had to the law of Nebraska relating to interest. The borrower lived there, and represented to complainant that a loan at 10 per cent. under the laws of Nebraska would be lawful. Advice was taken as to the proper mode of contracting under that law, and out of abundance of caution it was decided that Miller should return to Nebraska and there execute the bond and mortgage, and have the latter recorded, after which he was to forward them by mail to complainant in New

York. Respondent, J. G. Miller, himself admits in testimony that he informed complainant that the legal rate of interest in Nebraska was 10 per cent., and that complainant informed him that he wanted to make the contract so as to be sure of that rate of interest. When we bear in mind that the parties had, under the circumstances in which they were placed, a perfect right to adopt the law of either state, provided only they did so in good faith, and that they were so advised, it is difficult to see what sufficient motive they could have had to resort to any device or to act in bad faith. Men do not ordinarily prefer to violate a penal statute and run the risk of the confiscation of valuable property, when a safe, convenient, and honest way of proceeding is open before them.

It only remains to consider some facts not enumerated above, and upon which counsel for respondents relies. It appears that at the time of the original agreement the complainant advanced to Miller $4,500, on which interest at 10 per cent. was charged from January 30, 1871, to March 15, 1871. It is insisted that as to this sum there was usury under the law of New York, and that inasmuch as the $4,500 went into the mortgage debt and into the bond, it makes the whole bond usurious. But it is clear that there was in reality but one transaction, to-wit: A loan of $15,000 to a citizen of Nebraska, to be secured upon land in that state, and to bear 10 per cent. per annum interest, according to the law of that state.

This being so, the fact that pending the preparation and execution of the necessary papers, and their transmission from Nebraska to New York, the complainant advanced a portion of the loan at the rate of interest agreed upon, was not a violation of the usury laws of New York.

I hold that, according to the evidence and the law, the entire transaction, from the beginning, was conducted with reference to the law of Nebraska relating to interest, and must be judged by that law alone. This renders it quite unnecessary to go into the question whether 10 per cent. interest was actually paid in New York upon the sum advanced on the loan, or any part of it; because if it is so it does not render the contract usurious.

The exceptions to the master's report are overruled, and decree will be entered for complainant in accordance with the said report.

HALE, AYER & Co. v. B., C. R. & N. R. Co.

(*Circuit Court, D. Iowa.* October, 1881.)

1. MECHANIC'S LIEN—WHEN NOT WAIVED BY TAKING SECURITY.

   The holder of a claim for labor or materials for a building, erection, or improvements upon land does not waive his right to a mechanic's lien by taking security upon the same contract and upon the same property unless it appear affirmatively that it was his intention to look to such security and not to his mechanic's lien.

2. SAME—SECURITY TO BE UPON THE IDENTICAL PROPERTY.

   The taking of bonds secured by a mortgage on "all the franchises, fuel, rolling stock, cars, engines, machinery, and appurtenances appertaining or belonging to" a single division of a railroad line which embraces four different divisions, as collateral security for a mechanic's lien claimed upon "building, erection, or other improvement, including any work of internal improvement" on the entire line of road including the four divisions, is not equivalent to taking security upon the identical property upon which the mechanic's lien is sought to be enforced.

3. FORECLOSURE—PURCHASER AT SALE PROTECTED BY THE RECORD.

   Where, in a suit to foreclose a mortgage, brought against a railroad company, third parties intervene and seek to enforce a claim for materials furnished or used in the construction of the roadway, against the earnings of the road in the hands of the receiver, and without claiming a mechanic's lien, the purchaser at the foreclosure sale is not bound to look beyond what appears upon the face of the record, and anticipate a future claim for a mechanic's lien in case the earnings of the road should not satisfy the claim of intervenors.

Hubbard & Clark, for complainants.

James Grant and *J. Tracy*, for respondents.

MCCRARY, C. J. The complainants bring this suit for the purpose of establishing and enforcing a mechanic's lien against the lines of railway now run and operated by the defendant, the Burlington, Cedar Rapids & Northern Railway Company, the main line extending from Burlington, Iowa, to Postville, Iowa; the Pacific division extending from Vinton to Traer; the Muscatine division extending from Muscatine to Riverside; and the Milwaukee extension from Linn to Postville. A lien is also claimed upon the rolling stock of said road, upon the right of way, road-bed, station-houses, car and engine-houses, machine-shops, and all property or things whatsoever belonging or in any way appertaining to said lines of railway. It appears in proof that the plaintiffs, who are iron merchants at Chicago, Illinois, during the year 1873, and between the first of March and the last of December of said year, sold and delivered to the Burlington, Cedar Rapids & Minnesota Railway Company, then owning and

operating said lines, material for use in the construction and repair of its lines, or some of them, as shown by the bill set out as a part of the petition in this case; that in May, 1875, proceedings were commenced to foreclose certain mortgages upon the said Burlington, Cedar Rapids & Minnesota Railway, and for the appointment of a receiver thereof.

In that case the complainants, Hale, Ayer & Co., filed their petition of intervention, wherein they prayed that the court would order the receiver of said railway to pay their said claim out of the earnings of said railway, but not claiming a mechanic's lien.

Such proceedings were had in the foreclosure cases that at the October term, 1875, of this court a decree was rendered and the sale of the railway was ordered, subject, however, to the claims of parties who had intervened in the case, including the said Hale, Ayer & Co. From the said decree an appeal was prosecuted to the supreme court of the United States, where it was held that the intervenors (plaintiffs herein) were entitled to payment out of the earnings of the road of so much of their claim as was shown to be in the nature of supplies, but that for all that part which was for construction, they were not entitled to payment from such earnings. After the decree in the court below, and pending said appeal, these proceedings were instituted under the statute of Iowa for the purpose of enforcing a mechanic's lien for so much of the claim as was for materials furnished for construction purposes.

At the time of furnishing the supplies in question, Hale, Ayer & Co. took the notes of the railway company for the amount due them, and also received as collateral security 20 of the bonds of the said railway company, secured by mortgage upon what was known as the Pacific division of said railroad.

At the sale under the decree of foreclosure the entire line of railroad was purchased by the defendant herein, the Burlington, Cedar Rapids & Northern Railway Company.

Upon these facts several questions have been discussed by counsel, two of which only will be considered. These are—*First*, whether a mechanic's lien was waived by taking collateral security; *second*, whether the defendant, the Burlington, Cedar Rapids & Northern Railway Company, purchased the road with notice of the complainant's claim of a mechanic's lien.

A decision of the first question requires a construction of section 2129 of the Code of Iowa of 1873, which declares that "no person is entitled to a mechanic's lien who takes collateral security on the same

contract." This statute has been several times considered and construed by the supreme court of Iowa, whose ruling upon the question of its construction we are bound to follow. In several cases that court has held that the acceptance of promissory notes for work and labor performed or materials furnished in the erection of a building or other improvement will not divest the right of a party to a mechanic's lien, unless such is the agreement of the parties. *Bonsall* v. *Taylor*, 5 Iowa, 546; *Scott* v. *Ward*, 4 G. Greene, 112.

The taking of notes is not the taking of collateral security.

It has also been held that where a party has done work or furnished materials in erecting a building under a contract with the owner, he does not waive his lien upon such building by accepting the promise of a subsequent purchaser of the building, made in consideration of forbearance to sue, to pay for such work or materials. *Mervin* v. *Sherman*, 9 Iowa, 331.

The court in that case, per *Wright*, chief justice, defines the words "collateral security" to mean "either a separate obligation attached to the regular contract named, to guaranty its performance, or it may be the transfer of property or other contracts to insure the performance of the principal agreement; and in any event, the contract, promise, or property taken must have been intended and accepted as collateral security, before the lien could be said to be waived or defeated."

The latest case upon the subject is that of *Gilcrest* v. *Gottschalk*, 39 Iowa, 311, where it is held that the acceptance of a mortgage for the same debt upon the same property covered by a mechanic's lien is not the taking of collateral security, within the meaning of the statute, and will not divest a mechanic's lien, unless the lienholder evinces the intention to rely upon the new security rather than upon the lien.

The rule to be deduced from these authorities is that the holder of a claim for labor or materials for a building, erection, or improvement upon land, does not waive his right to a mechanic's lien by taking security upon the same contract and upon the same property, unless it appear affirmatively that it was his intention to look to such security, and not to his mechanic's lien. If, therefore, in the present case it is made to appear, either that the security afforded by the 20 Pacific-division bonds was not upon the same property sought to be subjected to the mechanic's lien, or that the complainants intended to and did rely upon the collateral security afforded by said bonds, in either case the mechanic's lien is waived.

There is testimony tending strongly to show that the complainants did intend to rely upon the security of said bonds; as, for example, the fact that they claimed under the bonds in the foreclosure suit, and received their proceeds in the form of stock in the new company under the decree of foreclosure. But, without dwelling upon this feature of the case, let us inquire whether the security taken was in fact upon the identical property which might have been held by the mechanic's lien.

It appears in evidence that the 20 bonds here referred to were secured by mortgage upon only a part of the railway, to-wit: That part known and designated as the Pacific division, being one of four divisions into which the entire railway was divided, and on each of which there was a separate mortgage. Now it does not appear upon what part of the lines the material furnished by complainants herein was used. It certainly cannot be claimed, under the evidence, that it was all used upon the Pacific division. No such claim is made. On the contrary, the complainants admit that they are unable to show into what part of the lines their material went, and they therefore claim a lien upon all the lines now run and operated by the defendant, the Burlington, Cedar Rapids & Northern Railway Company, including not only the Pacific division, but the main line, the Milwaukee extension, and the Muscatine division. It is manifest, therefore, that the security afforded by the 20 bonds of the Pacific division, secured as they were by mortgage upon that division alone, was not a security upon the identical property against which a lien is claimed.

But again, the statute provides for a mechanic's lien upon "the building, erection, or other improvement, including any work of internal improvement."

I suppose it would not be contended that under this statute the complainants could enforce a lien against the rolling stock of the railway for materials furnished or used in the construction of the roadway, and no part of which was used in the construction or repair of such rolling stock.

It has been held by the supreme court of Iowa, in the case of *Neilson* v. *Iowa Eastern R. Co.* 51 Iowa, 184, that the rolling stock of a railroad does not constitute a part of its real estate, and that a mechanic's lien upon a railroad does not embrace such property.

If this be a true construction of the statute, (and it is at all events a rule of decision for us,) it still further illustrates the correctness of the proposition above stated, to-wit: That the mortgage bonds, taken as collateral security, are a lien on different property from that upon

which the complainants might have asserted their mechanic's lien, for the mortgage securing the bonds covers and includes, so far as the Pacific division is concerned, "all the franchises, fuel, rolling stock, cars, engines, machinery, and appurtenances appertaining or belonging to said Pacific division," as well as coal stations, land stations, engine-houses, and other buildings.

It is quite apparent that a large proportion, at least, of the property here enumerated would not be subject to a mechanic's lien for iron and other materials used in the construction of the track.

We think it therefore quite clear that the taking of the bonds in question as collateral security was not equivalent to taking security upon the identical property upon which a mechanic's lien is sought to be enforced.

The second question is whether it appears from the evidence that the purchaser at the foreclosure sale, the Burlington, Cedar Rapids & Northern Railway Company, had notice that the complainants claimed a mechanic's lien upon the road.

They certainly had notice that the complainants held a claim against the old company, and that they were seeking to enforce it as against the earnings of the road in the hands of the receiver under their bill of intervention in the foreclosure cases; but I see nothing in the record of the foreclosure cases which would charge a purchaser at that sale with notice of a mechanic's lien, claimed or to be claimed by these complainants.

They certainly did not claim any such lien in their intervening petition, and in the agreed statement of facts filed in the foreclosure cases, it is distinctly stated, not only that the Pacific-division bonds above referred to have been taken as collateral security, but also that "no mechanic's lien is claimed." Counsel insist that this was simply an admission of what was apparent without it, that no mechanic's lien was claimed in that case. Even if we admit this, how can it be claimed that the filing of a petition claiming payment out of the earnings of the road, together with an admission that no mechanic's lien was claimed, was sufficient to give to the purchaser at the foreclosure sale notice that a mechanic's lien would or might be claimed? To give the record this construction would be to require the purchaser at the sale to anticipate that the claimants would fail in the end to secure their claim out of the earnings of the road, and would thereupon take measures to enforce their claim, or a part of it, under the mechanic's lien law.

I do not think that the purchaser was bound to anticipate all this. He was not bound to look beyond what appears upon the face of the record, and nothing appears there indicating any purpose on the part of the intervenors in that case to claim anything more than that which was claimed by them in their intervening petition.

I think it fair to say that the purchaser was authorized to assume that the claim of the intervenors was fully and completely set forth by them.

Without considering any of the other questions discussed by counsel, these considerations lead to the conclusion that the complainants are not entitled to a mechanic's lien as prayed.

The bill must therefore be dismissed.

ST. LOUIS SMELTING & REFINING CO. *v.* GREEN and others.

(Circuit Court, D. Colorado. June 19, 1882.)

1. EJECTMENT—PATENT NOT SUBJECT TO COLLATERAL ATTACK.

   In an action of ejectment defendant cannot collaterally attack a patent for land issued by the officers of the land department of the government, even upon the ground of fraud.

2. SAME—ESTOPPEL, DOCTRINE OF.

   If the owner of an estate stands by and sees another erect improvements on the estate, in the belief that he has the right to do so, and does not interpose to prevent the work, he will not be permitted to claim such improvements after they are erected; but he is not thereby estopped to claim the title in an action of ejectment.

3. SAME—INSUFFICIENT PLEA.

   An allegation that after defendants were notified and informed that plaintiff had applied for a patent they had an arrangement with the plaintiff by which plaintiff assured them that he would sell to them for a nominal price, and would not disturb them in their possession, is not a good plea of estoppel.

Ruling on Demurrer.

G. G. Symes, for plaintiff.

T. A. Green, for defendants.

MCCRARY, C. J., *(orally.)* This in an action of ejectment, and the record shows, and the defendants by their pleadings admit, that the plaintiff claims under a patent of the United States. Some of the questions in the case have been determined heretofore upon demurrers to former answers. The questions now to be considered arise upon demurrer to the third amended answer. By this pleading the defendants seek to attack, in this action of ejectment, the patent

under which the plaintiff claims. They do so upon two grounds, substantially. The answer is quite voluminous, but its allegations may all be summarized under two heads:

First, that the patent was obtained by the patentee, Mr. Starr, under whom the plaintiff claims, by fraud, conspiracy, bribery, and perjury; *second,* defendants plead, as an estoppel, certain facts, to which I will refer presently,

With regard to the defense that the patent was obtained by fraud, etc., it may be observed that many of the allegations of the answer are too general in their character to be sufficient. It is, of course, not enough to say in general terms that an instrument has been obtained or procured by fraud, perjury, or conspiracy. The pleader must state facts which will enable the court, and not the pleader, to determine whether there is a case of fraud or conspiracy or perjury. Still, we are of the opinion that there are, in this answer, allegations sufficient to call for a reply, if it be true, as claimed by the counsel for defendants, that a patent of the United States, in an action of ejectment, can be attacked collaterally for fraud. And this makes it necessary to determine that question. It is a question about which the authorities are not in entire harmony. But we are, of course, concluded by the decisions of the supreme court of the United States, and it is therefore proper that we should refer to the decisions of that court, and determine whether the question is settled, so far as this court is concerned.

Another action of ejectment, arising upon this identical patent, was brought in this court some time since, and was tried here. The court in that case admitted certain evidence tending to show that the officers of the land department had issued the patent improperly and erroneously. The judgment of the court in that case has been reversed, and an elaborate opinion pronounced by Mr. Justice Field, is now before us. In that opinion, the doctrine is laid down so clearly and emphatically as to leave no room for doubt, that, in an action of ejectment, the defendant cannot be permitted to attack a patent, even upon the ground of fraud. He must resort to a court of equity.

After citing numerous cases in the supreme court of the United States, the opinion in the case just referred to proceeds as follows:

"According to the doctrine thus expressed, and the cases cited in its support,—and there are none in conflict with it,—there can be no doubt that the court below erred in admitting the record of the proceedings upon which the

patent was issued, in order to impeach its validity. The judgment of the department, upon their sufficiency, was not, as already stated, open to contestation. If, in issuing a patent, its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, *or even from corrupt motives*, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. *Boggs* v. *Merced Mining Co.* 14 Cal. 363-4. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

And, proceeding, the court says:

"The case at bar, then, is reduced to the question, whether the patent to Starr is void on its face; that is, whether, read in the light of existing law, it is seen to be invalid. It does not come within any of the exceptions mentioned in the cases cited. The lands it purports to convey are mineral, and were a part of the public domain. The law of congress had provided for their sale. The proper officers of the land department supervised the proceedings. It bears the signature of the president, or rather of the officer authorized by law to place the president's signature to it—which is the same thing; it is properly countersigned, and the seal of the general land-office is attached to it. It is regular on its face, unless some limitation in the law, as to the extent of a mining claim which can be patented, has been disregarded."

Without reading further from that opinion, it is sufficient to say that the doctrine is fully and elaborately discussed, and numerous cases are cited as establishing the doctrine that a patent of the United States, in an action of ejectment, cannot be collaterally attacked.

The cases referred to may be mentioned, although I shall not take the time to read from them or comment upon them: *Pope's Lessees* v. *Wendall*, 9 Cranch, 87; *Patterson* v. *Winn*, 11 Wheat. 380; *Hoofnagle* v. *Anderson*, 7 Wheat. 212; *Boardman* v. *Reed*, 6 Pet. 342; *Bignall* v. *Broderick*, 13 Pet. 448; *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 585.

In the case of *Johnson* v. *Towsley* the doctrine was stated by Mr. Justice Miller in these words, (13 Wall. 83:)

"That the action of the land-office, in issuing a patent for any public land subject to sale, by pre-emption or otherwise, is conclusive of the legal title, must be admitted on the principle above stated, and in all courts and in all forms of judicial proceedings where this title must control, either

by reason of the limited powers of the court or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand, there has always existed in the courts of equity the power, in certain classes of cases, to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume when it invades private rights; and, by virtue of this power, the final judgment of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other relief granted."

It is hardly necessary to say that an action of ejectment is pre-eminently an action in which the legal title must prevail, and therefore one in which, according to this ruling, the patent cannot be attacked collaterally.

Governed and controlled, therefore, by the decisions of the supreme court of the United States, we are bound to say that so much of this answer as sets up fraud, conspiracy, etc., is bad, and that the demurrer must therefore be sustained.

I come now to the consideration of that part of the answer in which the defendant pleads estoppel. It is somewhat voluminous, but I will state in condensed form the substance, as I understand it, of the pleading.

The answer demurred to, so far as this question of estoppel is concerned, pleads certain facts, which, it is claimed, should estop plaintiff to recover in this case. Many of these facts tend only to show fraud, and are therefore, under the doctrine already announced, not admissible in this form of action. Eliminating the allegations falling within this description, we have remaining in substance the following:

First. That defendants are owners of and entitled to the possession of the property in controversy, by virtue of prior, adverse, and exclusive possession of the same, as part of a town site on the public domain.

Second. That Starr obtained the mining patent, under which plaintiff claims title, for 164 61-100 acres, all of which was included within the town site and city of Leadville.

Third. That said Starr claimed under placer mining claims which had their inception in favor of his grantors in 1860, the claims of Starr himself dating from August, 1877.

Fourth. That after the inception of these claims, and prior to the issuance of the patent to Starr upon them, the city of Leadville grew to a city of 20,000 people, and the property greatly increased in value.

Fifth. That, during that time, Starr, the patentee, was living in Leadville, and witnessed the improvements that were being made, and the large sums of money being expended by defendants, as settlers on the lots now in con-

troversy, and during all said time said Starr and his grantors stood by and kept quiet in regard to his or their ownership of said mining claims, and confederated with certain other parties in interest to stand by and secrete all their claims to ownership and all their efforts to obtain a patent.

Sixth. That plaintiff had an interest in the Starr patent, and by its general manager, August Myers, also stood by and saw the property improved by defendants, and never at any time notified defendants that the plaintiff had made or would make any claim to said land, but, on the contrary, secreted and concealed the same.

Seventh. That said Myers, general agent, and one Harrison, the president of plaintiff company, conspired and combined with Starr to secrete and conceal their claims, with the intention of allowing the defendants to go on and spend their money in making valuable improvements, etc.

Eighth. It is, however, admitted that defendants were notified of the application for a patent made by Starr, and it is averred that after defendants found that said application included land situated in said city of Leadville, the said Starr and Myers and Harrison, through their attorney, one Hereford, assured defendants that in case said patent should be obtained, defendants would not be disturbed or interfered with in their right and possession, and, at most, only a nominal sum would be expected or demanded of defendants, and in no case to exceed twenty-five dollars per lot, and advised defendants to go on making improvements, and that they did go on, relying upon these assurances, and made valuable improvements, etc.

Ninth. That after obtaining the patent plaintiff gave notice that it would claim the full value of the lots.

It will be observed that the plea of estoppel rests upon two separate allegations: The first is that the plaintiff stood by and saw defendants make improvements upon these lots, and failed to make known to the defendants the fact that they (the plaintiffs) were seeking to obtain a patent for the land upon which defendants were making the improvements.

The principle sought to be invoked, I apprehend, upon this branch of the case is the very familiar rule of the law of estoppel, that if the owner of an estate stands by and sees another erect improvements on the estate in the belief that he has the right to do so, and does not interpose to prevent the work, he will not be permitted to claim said improvements after they are erected.

In the first place, it is extremely doubtful whether that principle of the law can be invoked in a case of this character, for it is not claimed, and cannot be, that at the time these plaintiffs are charged with having stood by and advised the erection of these improvements, they were the owners of this property; and I have never heard it asserted before that a party who intends to purchase land, or who has applied to the owner for the right to purchase it, stands

in the position of ownership within the meaning of this principle, so that he is bound to warn all persons to make no improvements upon such land, at the peril of losing them.

Assuming, however, that for the purposes of this decision the defendants did stand in the relation of owners of this land at the time, I do not think this principle of the law of estoppel can be carried so far as to hold that even the owner of real estate who stands by and sees another make improvements upon it, and makes no objection, is thereby estopped thereafter to claim the title of the real estate; he may be estopped to claim the improvements, but I do not think that he is estopped to claim the title in an action of ejectment.

There is another reason why it is difficult to hold that this doctrine of estoppel can apply to a case like this: The law prescribes the mode and manner by which entries of the public mining lands are to be made, and, among other things, it is provided, by section 2335 of the Revised Statutes of the United States, that an applicant for a mineral patent must post a plat of the land and notice of his application for a patent in a conspicuous place on the land embraced in such plat. Now, it must be presumed that this law was complied with; and if so, how can it be said that the parties applying for the patent gave no notice, no warning, to anybody? The very fact of their giving this notice was of itself a warning to all who were upon the land, or were about to erect improvements upon it, that these parties were applying for a patent, and were seeking to obtain the title. Moreover, it is admitted by this answer that they did, in fact, ascertain the fact of this application for a patent. Now, one of the familiar rules with regard to estoppel, which we all understand perfectly, is this: That the party to whom the representations are made must be ignorant of the truth of the matter about which they are made. If he knows the fact, and chooses to take his chances, the other party is not estopped.

For these reasons, then, we are constrained to hold that the allegation that the plaintiffs and their grantors stood by while these improvements were being made, and made no objection, does not amount to a good plea of estoppel in this action of ejectment.

The other allegation under this head is that, after the defendants were notified and informed of this application for a patent, they had an arrangement with the plaintiff by which the plaintiff assured them that after obtaining a patent it would sell to them for a nominal price, and would not disturb them in their possession. This is not a good plea of estoppel. It lacks some of the essential elements

of such a plea. It alleges an arrangement, understanding, or agreement entered into confessedly with full notice on the part of defendants that Starr had applied for a patent, with a view to obtaining title to the land, and by which defendants were to obtain that title from Starr, or plaintiff, after it should be vested in one or both of them. How, then, can it be set up as an estoppel to prevent plaintiffs from recovering that title in ejectment? Defendants did not act in ignorance of the facts, but with notice, relying upon the promise of plaintiffs to convey the title upon certain terms and conditions after obtaining it. If, therefore, the arrangement amounted to anything, it is simply a contract under which, if it be valid and binding, defendants may be entitled to have a remedy. If it be a contract capable of specific performance, it must be in a court of equity. If it be one upon which defendants are entitled to recover damages, the proper action must be brought for that purpose. As the arrangement, whatever it was, clearly contemplated the obtaining of the legal title by plaintiff, it cannot be set up by way of estoppel in the present action.

There is still another branch of the answer, in which there is a counter-claim, based upon the value of these improvements. Without going much into that, we overrule the demurrer to that part of the answer, and reserve the question as to what the law may be until the evidence shall be produced.

In view of the importance of this case, and of the fact, as we are advised, that it will affect the decision in numerous other cases, we have given such consideration to it as was possible under the circumstances. If we are wrong in any of the conclusions which have been announced, the record will be in good shape for the defendants to present the question to the supreme court, where the whole matter can be reviewed, and, perhaps, in the best possible form for the defendants, being an issue upon demurrer, which will raise all the questions they desire to have determined.

The demurrer to so much of the answer as sets up fraud and estoppel is sustained.

The demurrer to the counter-claim is overruled.

Mr. Green. We will stand by our answer.

The Court. Unless there are some other questions in the other cases, the same order must be entered in all of them.

SWANSTON v. MORNING STAR MINING CO.

(*Circuit Court, D. Colorado.* June 19, 1882.)

1. ACTION—SETTLEMENT BY CLIENT—DISMISSAL.
   Plaintiff has the right to settle a suit brought to recover damages for a personal injury without the consent of his attorneys, and where he does so the controversy must be regarded as at an end, and the suit must be dismissed.
2. SAME—CONTRACT BETWEEN ATTORNEY AND CLIENT—CONTINGENT FEE.
   Whether a contract between attorneys and the client, whereby, in the event of their success in an action for the recovery of damages, they are to receive, as compensation for their services, one-third of the amount which may be recovered, is champertous, not decided.

D. J. Haynes and *Wells, Smith & Macon*, for plaintiff.

L. C. Rockwell and *J. B. Bissell*, for defendant.

McCRARY, C. J., (*orally.*) This is an action to recover damages for a personal injury. Since the institution of the suit, the plaintiff has, without the knowledge of his counsel, settled it, and the following writing has been filed, upon which the court is now asked to dismiss the case:

[Title of case.] "Having received eighteen hundred dollars from defendant, in full for all claims, demands, and causes of action sued for in this case, I hereby authorize and direct the clerk of this court, or the court itself, to dismiss this action at my own cost, and I agree not to further prosecute the same, and that defendant is authorized to file this order of dismissal, or use it as it deems proper." Signed by plaintiff and sworn to.

The motion to dismiss upon this agreement is resisted, not by the plaintiff himself, but by his attorneys, who say that they had a contract with the plaintiff, whereby, in the event of their success in this suit, they were to receive as their compensation for services one-third of the amount which might be recovered. The question is made as to whether this is a champertous agreement, but we are not disposed to go into that question. It is one, perhaps, of some difficulty, and about which there is a considerable conflict of authority. It would undoubtedly be champertous if either of the attorneys had agreed to pay the costs of the proceeding; but whether a mere contract for a contingent fee of one-third of the amount recovered is champertous, is a question not entirely settled. We do not think it necessary, at all events, to pass upon it in this case.

It is, perhaps, not improper to remark, however, that it is not a contract which commends itself very much to the favor of the courts, and this court would not be disposed to go any further than the law

requires to uphold it. But even assuming that it is a valid contract as between the plaintiff and his attorneys, the question arises, how can we, by any order of ours, continue this case and carry it on to judgment, after the plaintiff himself has sold the cause of action and received a sum which, he says, is in full satisfaction. The attorneys are not parties to the record; no judgment could be rendered in their favor, and, if we were to go on to trial, I do not see how it is possible that any judgment at all could be rendered upon the record in the face of this dismissal, this acknowledgment of payment in full by the plaintiff himself. If the counsel for the plaintiff had any lien upon anything, the court would protect them, perhaps, by some form of proceeding in this case; that is to say, the counsel might, perhaps, be allowed under your statute to intervene, if you have a statute authorizing such a proceeding as that, and to assert their rights in this suit. But it is very clear that the attorneys of the plaintiff have no lien upon anything in a case of this character. I believe it is well settled that an attorney has no lien, even upon a judgment recovered by him for his client in an action, unless the statute gives it. It has never been claimed that an attorney would have a lien upon a claim for unliquidated damages, and there can be no foundation for a lien of any kind or description upon anything in controversy here.

If the attorneys had in their hands a contract, a promissory note, or instrument of any description that could be called property, and had rendered services in prosecuting a suit upon it, perhaps they might, by proper proceeding, be allowed to enforce a claim or lien upon it.

It is enough to say that there is no doubt of the right of the plaintiff to settle the suit without the consent of his attorneys, and having done so the controversy must be regarded as at an end, and the suit must be dismissed. If the attorneys have any claim against the parties who have made the settlement, they must assert it in some other mode of proceeding. It is not open for consideration here.

The doctrine I have announced is supported by the case of *Coughlin* v. *Railroad Co.* 71 N. Y. 443, and *Hooper* v. *Welch,* 43 Vt. 269.

HAYNER v. STANLY and others.

(*Circuit Court, D. California.* July 31, 1882.)

1. MEXICAN LAND GRANT—RES ADJUDICATA.

Prior to the acquisition of California by the United States, the Mexican government granted a tract of land therein to one H. In 1857, S., claiming to be the owner of a part of the land so granted under title derived from H., (the claim for which part had been confirmed to the grantor of S., but no patent therefor issued,) commenced an action of ejectment against G. and others, who were in possession of the lands, also claiming to own the same under title derived from H., and who had also obtained a confirmation of their claim to the premises, but no patent. On the trial of the action the principal question litigated was whether the premises in controversy had been conveyed by a deed made by H. to one F., under whom S. claimed, and it was determined that said deed did convey the lands, and judgment was rendered in favor of S. On appeal to the state supreme court this judgment was affirmed. Pending the litigation a patent for the lands was issued to the grantor of S., and some 20 years later patents were issued to G. *et al.* for the same lands. The grantees of G. *et al.*, after the issue of the latter patents, brought ejectment against the grantee of S. for the lands, and on the trial of that action offered to prove that the premises in controversy were not within the premises conveyed by the deed from H. to F. *Held*, that by the trial and judgment in the former action that point was determined in favor of S. and became *res adjudicata*, and the grantee of G. *et al.* was estopped from again litigating the question as against S. or his grantee, and that the issue of the patents on the claims of G. *et al.* did not, as to the question so determined, create any new title or right to again litigate the question determined by the former judgment, and that such question is not open to further litigation.

2. PATENT FOR LAND—LEGAL TITLE—DERIVATIVE TITLES.

M., a claimant under title derived from the original grantee of a part of the lands embraced in a Mexican grant, obtained a decree of confirmation, on which a patent was issued, and other claimants of the same land, under title also claimed to have been derived from the same original grantee, and whose claim had been confirmed prior to the issue of the patent to M., obtained patents for the same land some years subsequent to the issue of the patent to M. *Held*—

(1) That the issue of the patent to M. vested the entire legal title in him, and left nothing in the United States upon which the subsequent patents could operate, and consequently nothing passed by them. With the issue and delivery of the senior patent all authority or control of the executive department over the land passed away.

(2) That under such circumstances, in an action at law, the senior patent is conclusive as to the title, and cannot be assailed by the holders of the junior patent.

(3) The only remedy of the junior patentees is in equity, to charge the holder of the senior patent, if there are equitable grounds for so doing, with a trust for their benefit.

(4) While, in a proper sense, it may be true that in acting on a claim for land based on a Mexican grant, the United States has no interest in the derivative title from the original grantee of the Mexican government, yet where one held such a derivative title prior to the transfer of California to the United States,

he was one of the parties protected by the stipulations of the treaty, and it would seem was as much entitled to have his deed from the original grantee passed upon, as he was to have the original grant itself passed upon.

(5) The cases in which it has been held admissible, in an action at law between the holders of senior and junior patents for the same land, to examine into the equities for the purpose of attaching a prior equity to the junior patent, are all cases where the parties have sought to acquire lands belonging to the United States *upon different and independent adverse claims*, and have no application to a case where both parties claim under the same original grant or right, though by different derivative titles.

(6) Where two parties claim the same land under different derivative titles from the original granteé of the Mexican government, and one of them obtains a patent for the lands, the right, if any, of the other to relief in equity accrues on the day the patent issues. The cause of suit is full, complete, and perfect on that day, and is not dependent and cannot rest upon any subsequent proceeding or patent.

Semble, where such equitable action is not commenced until a time when by the state statute of limitations it would be barred, the United States circuit court, although a court of equity, and not absolutely bound by that statute, may, in analogy thereto, hold the cause to be stale, and decline on that ground to sustain a bill.

The question whether a patent gives a new cause of action so as to avoid the statute of limitations, where both parties claim under the same grant, *not determined.*

B. S. Brooks and *Wm. Leviston*, for plaintiff.

Stanley, Stoney & Hayes, *Delos Lake*, and *John Garber*, for defendants.

SAWYER, C. J. The governor of California in 1836 granted to Nicholas Higuera a tract of land called "Entre Napa." On November 13, 1847, before the transfer of California to the United States, said Higuera and wife conveyed to Mateo Fallon a part of said land, described (as translated from the Spanish language, in which the conveyance was written) as "a certain quantity of land lying, being, and situate in the district of Sonoma, and territory of Upper California, in the valley of Napa, containing, more or less, one square mile of land in the place known as the 'Rincon de los Carneros,' commencing at the wagon road, and ending at a point of the hill on the east." Said Fallon conveyed the same land to Julius Martin, July 1, 1850. Martin filed his petition for the confirmation of the grant, and his claim to the land so conveyed to him, with the board of land commissioners, under the act of 1851, on September 4, 1852. His claim was confirmed September 7, 1856; and upon such decree of confirmation a patent of the United States was issued to him April 3, 1858, which patent embraced the lands in controversy. The title of said Fallon and Martin became vested in Edward Stanly prior to December, 1857. On February 7, 1852, Nicholas Higuera conveyed to one

Riva the lands granted to him as before stated, *excepting from the conveyance all lands previously sold and conveyed.* On February 11, 1853, Marta Frias de Higuera, deriving title under said grant through said Riva, presented a petition to the board of land commissioners for a confirmation of a claim to a portion of said land so granted to Higuera, which claim was confirmed February 13, 1857, and a patent issued in pursuance of said confirmation on November 4, 1879, which patent embraces a portion of the lands in question. On February 13, 1853, and July 12, 1854, Joseph Green, deriving title under said grant through said Riva, presented his petition to said board for confirmation of a claim to a portion of said lands granted to Higuera, which claim was confirmed on February 11, 1857, and, in pursuance of said decree of confirmation, a patent was issued to said Green April 7, 1881, which patent embraces a portion of the land in controversy. On March 3, 1853, Edward Wilson, deriving title from said Riva under said grant, also presented a petition to said board for a confirmation of a claim to a portion of said land, which claim was confirmed March 20, 1857, and a patent in pursuance of said decree of confirmation was issued to said Wilson on April 8, 1881, which patent also embraces a portion of the land in controversy. Eleven-twelfths of whatever title accrued, respectively, to said Marta Frias, Joseph Green, and Edward Wilson by virtue of said grant to said Higuera, and of said several conveyances from Higuera to Riva, and from said Riva, and from said proceedings and several patents, became vested in the plaintiff prior to the commencement of this action. On December 14, 1857, said Edward Stanly, who had before that date acquired the title of said Fallon and Martin, commenced an action in the district court of the county of Napa against said Marta Frias, Joseph Green, and others,—all being the parties under whom plaintiff derives title through said several conveyances,—to recover all the same lands now in controversy. The plaintiff, Stanly, alleged title to the lands. The defendants denied the title of plaintiff, and upon trial of the issues formed the facts were found for the plaintiff, and judgment for the recovery of the land thereupon rendered for the plaintiff; and under said judgment the plaintiff was put in possession on March 30, 1859, from which time the said Edward Stanly and the defendant in this action, John A. Stanly, who derives title from said Edward, have been in exclusive adverse possession till the present time. The main question litigated, and upon which the case turned, was as to what land was embraced in said deed from Higuera to

Fallon—whether it embraced the land now in controversy. And it was decided that it did.

Upon the foregoing facts appearing in the testimony, the plaintiff offered to prove what part of the land granted to Higuera was known as the "Rincon de los Carneros," for the purpose of showing that the land confirmed to Martin, and patented to him, as being the land conveyed by Higuera to Fallon, and from Fallon to Martin, was erroneously located in the patent, and is not the land described in said deeds of conveyance.

The questions, therefore, arise: (1) Whether the point is *res adjudicata* in the said action of *Stanly* v. *Green* and others, and, on that ground, not open to further examination. (2) Whether the patent to Martin is not conclusive upon the defendants in an action at law. In my judgment, both must be answered in the affirmative. At the date of the commencement of said action by *Stanly* v. *Green*, neither patent had been issued, and the parties stood upon an equal footing as to the derivative title from Higuera; the grant to Higuera, under which both parties claimed, being admitted. The parties to the present action are the same, or in privity with, the parties to the former action. The pleadings as to title are substantially the same in both actions, except that the parties have changed sides. The issues are substantially the same in matter and form. In the former case, as appears from the record, and the decision of the supreme court in evidence reported in 12 Cal. 159, the main question in issue fully litigated and determined, was as to what land was conveyed by Higuera to Fallon by the deed mentioned. It is precisely the same point which the plaintiff now seeks to contest by the evidence offered, and the evidence is precisely of the same kind and character as that introduced upon the same point in the former action. The defendants have fully and aptly pleaded the matter put in issue, litigated and determined in the former action by way of estoppel, and are in a position to fully avail themselves of that defense. In my judgment, the former determination is conclusive within the rule as established by the great mass of authorities, and even within the narrowest generally-recognized limits of the rule. The deed from Higuera to Fallon was the title upon which the plaintiff relied to recover. Of necessity, the court was obliged to determine whether it embraced the lands in controversy or not; and it was determined that it did. That determination, and the judgment resting upon it, were affirmed by the supreme court. That was the issue, in fact, litigated and adjudged.

If the title under and the effect of that deed were not directly in issue, and determined in such sense as to be available as an estoppel against further litigation, it would be difficult to determine what the limitation of the rule is. I think the case clearly within the principle applied in *Caperton* v. *Schmidt*, 26 Cal. 479, 501; and certainly within the case of *Marshall* v. *Shafter*, 32 Cal. 176, wherein my views are fully expressed in the concurring opinion. Page 199. The former adjudication is also conclusive, under the decisions of the supreme court of the United States. *Miles* v. *Caldwell*, 2 Wall. 38; *Sturdy* v. *Jackaway*, 4 Wall. 176; *Blanchard* v. *Brown*, 3 Wall. 249; *Campbell* v. *Rankin*, 99 U. S. 263; *Cromwell* v. *County of Sacramento*, 94 U. S. 351.

For the purpose of avoiding the effect of the former adjudication as an estoppel, it is insisted that the condition of the parties has changed since the trial of the former case, and that plaintiff in this case has acquired a new and different title from that litigated by her grantors, which is not affected by the matters before adjudged. But there is no change in title that in any respect affects the questions before litigated and determined. The case is not like any of those cited. There is now, as there was before, no dispute as to boundaries of two opposing Mexican grants. There was but one grant, under which both claim. There is now, and there was then, no dispute affecting the question as to the boundaries of the Mexican grant under which both claim. The same Mexican grant, as confirmed in parts to the grantors of both parties, covers the same land.

The question arises on the derivative title under the original grantee. The question is, which party acquired the title of Higuera under his grant to particular portions of the land? and this is the precise question which was litigated in the former suit. There is no change whatever in the title of circumstances or rights with reference to this particular question. The change in the circumstances does not avoid the point before determined. In view of the fact that nearly a quarter of a century has elapsed since the former trial, and that several of the actors in the transactions and witnesses on the trial in that case are dead, the conditions for attaining a correct determination of the question at issue were far more favorable then than than it is possible for them to be now. It would seem that this is a fit case, if ever there was one, for applying the rule of *res adjudicata*. In my judgment the point has been conclusively adjudged, and it is not open to further examination.

I also think the patent to Martin, under which defendants claim, unassailable in any action at law.

In *Beard* v. *Federy* the supreme court of the United States, following a long and unbroken line of decisions in the supreme court of California, declared the effect of a patent issued upon a Mexican grant confirmed in pursuance of the act of congress of 1851. The court says:

"In the first place, the patent is a deed of the United States. *As a deed*, its operation is that of a *quitclaim*, or rather of a conveyance of *such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners.*

"In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. * * * This instrument is the record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government, this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent." 3 Wall. 492. See, also, 18 Cal. 26; Id. 570, 571; 20 Cal. 412; and many others in the California reports.

A great majority of Mexican grants, among which was that to Higuera, were inchoate, the legal title never having passed to or become perfected in the grantees. Upon the transfer of California to the United States, the legal title to such lands, subject to the equitable rights of the grantees to have their titles perfected, passed to the United States. The proceeding provided for in the act of 1851, establishing the board of land commissioners, was the mode provided in pursuance of the provisions of the treaty for ascertaining who had grants of land or equitable claims entitling them to recognition, and to have their grants or titles perfected. The effect of the patent issued in pursuance of the proceedings provided for in its first character as a deed or conveyance, as held in the cases cited, is to pass the legal title in the United States at the date of the filing of the petition to the patentee. The petition of Martin and all proceedings under it are regular upon their face, and the patent issued therefor under said decree vested the entire legal title, whether rightfully or wrongfully, in Martin. His petition was first filed; his confirmation was first; and his patent is long prior in point of time to either of

those under which plaintiff claims. Before either of the patents under which plaintiff claims had been issued, the grant under which the defendants claim had been confirmed, and the title to the land had been legally conveyed to the defendants' grantor. There was nothing left in the United States upon which the subsequent patents could operate.

In the language of Mr. Justice Field, in *Patterson* v. *Tatum*, 3 Sawy. 172, wherein both parties had patents:

"A patent is the instrument by which the government, whether state or national, passes its title; it is the government conveyance. But if the government possesses at the time no title, none passes by its execution. It is of itself evidence of title only, because government being the original source of title, the presumption of law is that the title remained with the government until some other disposition of it is shown. But if an earlier patent is produced, the subsequent one ceases to have any operation. The title passing by the first conveyance is not affected by the second until the first is got out of the way. If the first was issued from improper motives, corrupt actions, erroneous views of duty, or mistaken considerations as to matter of fact or law by the officers of the government to whom the execution and issue of patents is entrusted, a court of law can afford no remedy to the second patentee; he must resort to a court of equity for relief. So, also, if particular facts respecting the condition or location of the property must be previously ascertained and determined by a special tribunal appointed for that purpose, and that tribunal has come to erroneous conclusions, upon which the patent has issued, such conclusions cannot be questioned collaterally, and the patent be thereby invalidated in the action of ejectment. Relief in such cases can only be afforded by a direct proceeding by bill, information, or *scire facias*, either to revoke the first patent or to restrain its operation, or to subject, where equitable grounds exist, the land to certain trusts in the first patentee's hands. A court of law, in an action of ejectment, cannot listen to any objections founded upon such considerations. But where the action of the officers in the execution and issue of the patent, or the correctness of the conclusions of the special tribunal, is not assailed, but the objection to the patent reaches beyond such action and conclusions, and goes to the existence of a subject upon which such officers or tribunal could act,—that is, to the title in the grantor,—no such difficulty exists in its consideration in a court of law. That tribunal is fully competent to pass upon the question whether a title existed at the time in the government, as it would be whether the title existed in an individual, where the grantor is a private party."

This language covers the case at bar in all particulars. The title passed to Martin by the first patent, and there was nothing left upon which the second patent could operate. Conceding, for the purposes of the argument, that the patent was erroneously given to Martin, when it ought to have gone to the subsequent claimants and patentees, the title, nevertheless, passed; and the only remedy of the in-

jured parties is in equity to charge Martin and his grantors, if there are equitable grounds for so doing, with a trust for their benefit. The legal title is in Martin, and that must control in ejectment.

The case of *Moore* v. *Robbins*, 96 U. S. 533, fully sustains this view. The court says:

"While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the land department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land-office. Not only has it passed from the land-office, but it has passed from the executive department of the government. A moment's consideration will show that this must, in the nature of things, be so. We are speaking now of a case in which the officers of the department have acted within the scope of their authority. The offices of register and receiver and commissioner are created mainly for the purpose of supervising the sales of the public lands; and it is a part of their daily business to decide when a party has by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the president, is delivered to and accepted by the party, the *title of the government passes with this delivery*. With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course. 'A patent,' says the court in *United States* v. *Stone*, 2 Wall. 525, 'is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias;* but a bill in chancery is found a more convenient remedy.' See, also, *Hughes* v. *United States*, 4 Wall. 232; S. C. 11 How. 552. If an individual setting up claim to the land has been injured, he may, under circumstances presently to be considered, have his remedy against the party who has wrongfully obtained the title which should have gone to him. But in all this there is no place for the further control of the executive department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance generally called a patent has been signed by the president, and sealed and delivered to and accepted by the grantee."

These observations apply with still greater force to patents issued by the same department in pursuance of the judicial proceedings had before the board of land commissioners, and the courts on appeal from its decisions under the act of 1851. The patent regularly issued to Martin, after a full investigation by a board and courts provided for the purpose and having jurisdiction.

In *United States* v. *Morillo*, 1 Wall. 707, it was assumed, though not expressly decided, that when a grant has been once confirmed to one party and patented, the power of the board and court as to the land so patented is under the *same grant* exhausted. The case of *Adams* v. *Norris*, 103 U. S. has no application.

It has been sometimes somewhat loosely said that the United States has no interest in the *derivative* titles, except to ascertain that it has a party before it apparently entitled to be heard. This may be true in a proper sense as to the derivative titles first originating since the acquisition of California. But in this case Fallon acquired his title from Higuera before the transfer of California, so that under his derivative title, held at the date of that treaty, he was one of the parties protected by the stipulations of the treaty, and, as the claimant of the property, it would seem that he was as much entitled to have his deed from Higuera to him passed upon, as the grant from the government to Higuera. In no other way could he be protected; and Martin stood in his shoes, as he acquired his rights. The plaintiffs' *derivative* title originated after the date of the treaty. But, however this may be, it was necessary for the board to determine the question whether Martin was entitled to a confirmation and patent of a portion of this particular grant, and if so, of what portion; and that being determined in his favor, and the patent having issued, the legal title under that grant to the part embraced in the patent became perfected in him, and it is unassailable at law by a party receiving a subsequent patent to the same part under the same grant. In opposition to this view, many cases are cited from the United States supreme and other courts, to show that it is admissible in an action at law to examine into the equities for the purpose of annexing a prior equity to a junior patent from the same source, and giving it effect as against the prior patent. But none of them are like this case. They are all cases where different parties have sought to acquire lands belonging to the United States upon different and independent adverse claims and courses of proceedings, and the court has inquired into the origin of the right, which has ripened into a patent,

and regarded the patent as taking effect by relation from the date when that right first attached. The prior act, by which the right to a patent as against the government vested, is regarded as a part of the title. This is very well illustrated by the court in the case of *Bagnell* v. *Broderick*, 13 Pet. 451, one of the class of cases and one of the cases cited. The court says, in distinguishing a prior case:

"In that case [*Ross* v. *Borland*, 1 Pet. 662] there were conflicting patents, the younger being founded on an appropriation of the specific land by an entry in the land-office of earlier date than the senior patent. The court held that the *entry and junior patent* could be given in evidence *in connection as one title*, so as to overreach the elder patent." Id. 450, 451.

This case is, upon the whole, favorable to the defendants. The entry in the land-office is the purchase of the land from the government. Upon a proper entry, the land becomes the property of the party making the entry. *People* v. *Shearer*, 30 Cal. 648; *Witherspoon* v. *Duncan*, 4 Wall. 218; 2 Sawy. 455. Often the patent does not issue for years after the entry. But when it does issue, it attaches itself to the entry, and the patent is regarded as taking effect by relation as of the date of the entry, and in that way overreaches the elder patent issued upon a younger entry. *Gibson* v. *Choteau*, 13 Wall. 100–102. Some of these cases are also put upon the ground that the laws of the state in which they arose abolish all distinctions between law and equity proceedings, and all questions may be examined in the same case. In the cases arising under Mexican grants cited, there are always two grants, and the contest is between them. In those cases the patent also *operates in its other aspect*, recognized in the cases before cited, as a record of the government of its action and determination adjudging the grant to be valid, and fixing its location, in which character it relates to and takes effect, not from the filing of the petition merely, as in the aspect of a deed of conveyance, but *from the date of the grant*. Such was the case of *Henshaw* v. *Bissell*, cited from 18 Wall. and 1 Sawy. In this case there is nothing to go back to by relation. There was but one Mexican grant, under which both parties claim by derivative title, the defense on derivative title accruing before the acquisition of the country, which was therefore as much within the protection of the treaty as the original grant. But defendant's conveyance was first in time, his petition first filed, his confirmation first had, and his patent first issued. His derivative title was properly examined by a board and courts having jurisdiction, and whose duty it was, under the treaty, to protect this grantee's interest, and his patent issued in the proceeding being regu-

lar on its face and first in time upon all points, in any view that may be taken, carried with it the legal title. There is nothing in the plaintiff's case to which his patent can go back by relation, so as to overreach defendant's title, which must prevail at law. In my judgment, this case is not within any case, or the principle of any case, cited by plaintiff's counsel.

It is said that the construction of the deed to Fallon is purely a matter of legal cognizance, and therefore is open to consideration in this case. This was, doubtless, so in the former action, when neither party had secured the legal title; and the whole case depended upon the construction of that deed. But the inquiry now is, not which party ought in fact and in law to have received the title, but which party in fact and in law has acquired the title; and the determination of that question rests wholly upon the patents. They go back to the United States, the source of title, and the defendant has the elder patent, regularly issued in pursuance of the law. It is, also, in my view, highly proper, under the circumstances, and after so long a lapse of time, that the remedy should be in equity. There may be, and probably are, many equities on the side of the defendant which could and would be considered by a court of equity, but which would be wholly unavailable at law.

The defendant's patent, issued more than 24 years ago, and more than 23 years before the commencement of this action. If plaintiff has any equitable ground upon which she is entitled to a decree controlling the title now in defendant for her own use, her right, or the right of her grantors, to relief accrued on the day the patent issued. The cause of suit was as full, complete, and perfect on that day as it is now. Her equitable right in no respect rests upon any of the subsequent proceedings, or the patents issued on them, under which she claims. Her equities ante-date all those proceedings, and rest on the defects in the deed to Fallon by which that deed fails to cover the land in controversy, if any such defect there be; and the trust to hold the title for the benefit of plaintiff, or her grantors, arose and became fully vested upon the issue of the patent to defendant's grantor. That cause of suit in the state courts under the state statute of limitations would have been barred in four years at the longest, and would have been barred nearly six times over before the commencement of this action. The United States circuit court, although, as a court of equity, it may not be absolutely bound by the state statute of limitations, might very well, in analogy to the statute, hold the cause to be stale, and decline to entertain a bill on that

ground. Yet, if the same questions can be examined in the action at law upon the patents recently issued, which are held to give a new cause of action, it may be that neither the staleness of the equities nor the statute of limitations would be available defenses, notwithstanding the fact that there is no change in the *status* of the parties *with reference to the particular grounds of recovery relied on.* And such, also, would have been the case if plaintiff had waited 50 years more before procuring to be issued the patents under which she claims. The principle that a new cause of action arises upon the issue of a patent in this class of cases ought not, in my judgment, to be extended. But it is unnecessary now to decide whether a patent gives a new cause of action, so as to avoid the statute, when both parties claim under the same grant. Again: Upon looking into the record and opinion of the supreme court, in evidence, it appears that on the former trial testimony was given showing that before the purchase either by Martin or Fallon, and before any rights had accrued to the plaintiff's grantors, Higuera pointed out at various times to Fallon, Martin, and others the lands in controversy as the lands intended to be conveyed, and as the lands in fact conveyed, upon which pointing out and representations the parties doubtless relied in making their several purchases. A court of equity might take into consideration these and other equities, if any there be, which might be less available in an action at law. There might also be a case for the proper application of the maxim of "Where the equities are equal the position of the possessor is best," or of other equitable maxims. So, also, several of the persons who appear to have been witnesses for defendant's grantor, it is well known as a public historical fact, were among the prominent historical characters of the early days of California, and may now be, and, in fact, are generally known to be dead. These are some of the manifest disadvantages under which defendant must labor if the matters in contest are examinable at law at this late period of time. The ends of justice are much more likely to be subserved by referring cases of this character to courts of equity, where they exclusively and properly belong.

The testimony offered I think inadmissible on both grounds discussed, and the objection to its introduction is sustained.

In re QUONG WOO.

(*Circuit Court, D. California.* August, 1882.)

1. MUNICIPAL CORPORATIONS—LEGISLATION.

   A city ordinance which makes it unlawful for any person to establish, maintain, or carry on any laundry within certain limits without first having obtained the consent of the board of supervisors, which shall only be granted upon the recommendation of not less than 12 citizens and tax-payers in the block in which the laundry is proposed to be established, and which punishes by fine or imprisonment for a violation of its provisions, is invalid.

2. SAME—POWER TO LICENSE TRADES.

   Under their authority to license trades and callings, supervisors cannot delegate their power to others, or make its exercise depend upon the consent of others. The legislative power vested in them is a public trust, which can only be executed in consonance with the general purposes of the municipality, and in subordination to the general laws and policy of the state.

3. SAME—RESTRICTION ON POWERS.

   Licenses for callings, trades, and employments may be required by supervisors where the nature of the business requires special knowledge or qualifications, or where they are issued as a means of raising revenue for municipal purposes; but they cannot be required as a means of prohibiting any of the avocations of life which are not injurious to public morals, offensive to the senses, nor dangerous to public health and safety.

4. ALIEN RESIDENTS—RIGHTS OF—UNDER TREATY WITH CHINA.

   Under the treaty with China, a Chinese resident of this country is entitled to all the rights, privileges, and immunities of subjects of the most-favored nations with which this country has treaty relations; and where he was a resident here before the passage of the act of congress restricting immigration of Chinese, he has a right to remain and follow any of the lawful ordinary trades and pursuits of life, and his liberty so to do cannot be restrained by invalid legislation.

McAllister & Bergin and *Thomas D. Riordan*, for petitioner.

L. E. Pratt, Dist. Atty., *contra*.

FIELD, Justice. In May of the present year an ordinance was passed by the board of supervisors of the city and county of San Francisco, which took effect on the tenth day of June following, to regulate the establishment, maintenance, and licensing of laundries within certain designated limits, and prescribing punishment for establishing or carrying on the business of a laundry in violation of its provisions. In its first section the ordinance declares that after its passage it shall be unlawful for any person "to establish, maintain, or carry on any laundry within that portion of the city and county of San Francisco lying and being east of Ninth and Larkin streets, without having first obtained the consent of the board of supervisors, which shall only be granted upon the recommendation of not less than 12 citizens and tax-payers in the block in which the

laundry is proposed to be established, maintained, or carried on." The second section declares that the license collector shall not issue a license to any person or persons proposing to establish, maintain, or carry on a laundry within the limits mentioned, unless he, she, or they shall first have obtained from the board of supervisors their written consent thereto, based upon the recommendation of citizens and tax-payers, as provided in the first section. The third section makes the violation of these provisions a misdemeanor, upon conviction of which the party may be punished by a fine not exceeding $1,000, or by imprisonment not exceeding six months, or by both.

The petitioner is a subject of the emperor of China, residing in the city of San Francisco under the provisions of the treaty between that country and the United States, and alleges that he has for the last eight years been engaged in carrying on the business of a laundry within the limits of the district mentioned, and has at all times paid the license tax exacted from him under previous ordinances, and is still ready to pay any such license tax; that his license issued under said ordinances expired on the thirtieth of June last; that there now exist, and have existed for years, with the residents of the city and county of San Francisco, and its citizens and tax-payers, great antipathy and hatred toward the people of his race; that combinations among such residents have been formed to drive them from the country; that in consequence of this feeling it has been impossible for him to obtain the recommendation of 12 citizens and tax-payers to carry on his business in the block where he is now engaged, as required by the ordinance of June 10th; and that for carrying on his business without a license issued upon such recommendation he has been arrested, and is now restrained of his liberty by the chief of police. That officer returns that he holds the petitioner under a warrant issued by a justice of the peace and acting police judge of the city and county, issued upon a charge of misdemeanor against him for violating the provisions of the ordinance in question, and accompanies his return with a copy of the warrant.

The question presented is the validity of the ordinance in requiring, for the issue of a license to "establish, maintain, or carry on" a laundry within the limits mentioned, the recommendation of 12 citizens and tax-payers in the block in which the laundry is to be "established, maintained, or carried on."

The ordinance in terms covers all laundries, whether used for the separate wants of a family or for the washing of clothes of others for hire. We shall assume, however, that it has reference only to

laundries of the latter class. It is directed equally against those who establish them, those who maintain them, and those who carry them on. If the recommendation of any parties in the block can be required as a condition of granting the license for either of these purposes, the number is a matter of discretion with the supervisors. They may require the recommendation of double or treble the number designated; they may exact the unanimous recommendation of the citizens and tax-payers of the block. Nor need they confine the recommendation required to citizens and tax-payers; any other class may be equally designated. They may require it of some of our worthy resident aliens from Europe—gentlemen of Irish or German nativity. Indeed, if they can make the exercise of their legislative power in the granting of licenses dependent upon the approval of anybody else, they may place the approval with whomsoever they may deem best, and no one can control their action. They have the power, by the act of April 25, 1863, "to prohibit and suppress, or exclude from certain limits, or to regulate, all occupations, houses, places, pastimes, amusements, exhibitions, and practices which are against good morals, contrary to public order and decency, or dangerous to the public safety." But the business of a laundry—that is, the washing of clothing and cloths of various kinds, and ironing or pressing them to a condition to be used—is not of itself against good morals, or contrary to public order or decency. It is not offensive to the senses, or disturbing the neighborhood where conducted, nor is it dangerous to the public safety or health. It would be absurd to affirm that it is. If it be conducted in a manner that is offensive or dangerous, the supervisors may direct the manner to be changed, and prescribe regulations for its prosecution. If the building in which it is carried on is by its structure, form, or material unsafe, the supervisors may, by proper proceedings, have it altered or removed. This power the supervisors possess with reference to all avocations, and the buildings in which they are prosecuted. All business must be so conducted as not to endanger the public safety and health. Here we are concerned only with the business of a laundry by itself; the manner, or the buildings in which it is conducted, are not before us. The ordinance applies as well to a laundry in a fire-proof building, as to one in a wooden shanty. In the business of a laundry by itself, there is nothing objectionable that may not be urged against all occupations in the city and county. If, therefore, the supervisors can make its prosecution depend upon the approval of others in its

neighborhood, they may require a similar approval for the prosecution of other business equally inoffensive. They may require members of the bar to close their offices against professional business unless they can secure the recommendation in their behalf of such parties in the block where the offices are, as may be designated. So, too, with bankers, merchants, traders, mechanics, journalists, publishers, printers,—indeed, with all brain-workers and hand-workers; the pursuit of their avocations in particular localities may be made to depend, not upon their wishes, their means, the position of their property, the facilities afforded for their business, but upon the favor or caprice of others, whose actions they cannot control by any legal proceedings. A party might not even be able to obtain a license to carry on business on his own land, provided he should possess an entire block, and it should not be occupied by others who could give the recommendation exacted. Such a restriction upon the freedom of pursuit of a lawful occupation is not authorized by any power vested in the board of supervisors; and it may be doubted whether it could be authorized by any legislative body under our form of government.

The supervisors are, it is true, empowered by the act of March 3, 1872, to "license and regulate all such callings, trades, and employments as the public good may require to be licensed and regulated, and as are not prohibited by law;" but their power cannot be delegated by them to others, or its exercise made dependent upon others' consent. The power of legislation vested in them is a public trust, which can only be executed in consonance with the general purposes of the municipality, and in subordination to the general laws and policy of the state. Their ordinances must be reasonable,—that is, not oppressive nor unequal nor unjust in their operation,—or they will not be upheld. Such is the well-established doctrine with respect to the legislation of municipal bodies.

In *Ex parte Frank* it was applied by the supreme court of California to an ordinance passed by the supervisors, under the act in question, exacting a license for selling goods, and fixing a different rate where the goods were within the corporate limits or *in transitu* to the city, and where the goods were without the city and not *in transitu* to it. The ordinance was held to be unjust, oppressive, unequal, and partial, and for these reasons, as well as because it was in restraint of trade between the city and the interior of the state, was adjudged to be void. The decision of the court was accompanied by

some very just observations upon the limitations to the exercise of legislative power in the passage of ordinances by municipal bodies. 52 Cal. 606.

Licenses for callings, trades, and employments may be required by the supervisors where the nature of the business demands special knowledge or qualifications on the part of the party, as in the case of dealers in drugs. They may also be required as means of raising revenue for municipal purposes. But in neither case can they be required as a means of prohibiting any of the avocations of life which are not injurious to public morals, nor offensive to the senses, nor dangerous to the public health and safety. Nor can conditions be annexed to their issue which would tend to such a prohibition. The exaction for any such purpose of a license to pursue an avocation of this nature, or making its issue dependent upon conditions having such a tendency, would be an abuse of authority. Such is evidently the tendency and purpose of the conditions required in the ordinance in question in this case, and we have no doubt of its invalidity for that cause.

The petitioner is an alien, and under the treaty with China is entitled to all the rights, privileges, and immunities of subjects of the most favored nation with which this country has treaty relations. Being a resident here before the passage of the recent act of congress, restricting the immigration of subjects of his country, he has, under the pledge of the nation, the right to remain, and follow any of the lawful ordinary trades and pursuits of life, without let or hindrance from the state, or any of its subordinate municipal bodies, except such as may arise from the enforcement of equal and impartial laws. His liberty to follow any such occupation cannot be restrained by invalid legislation of any kind; certainly not by a municipal ordinance that has no stronger ground for its enactment than the miserable pretense that the business of a laundry—that is, of washing clothes for hire—is against good morals or dangerous to the public safety.

It follows that the petitioner is illegally restrained of his liberty, and must, therefore, be discharged. Ordered accordingly.

COTTER v. NEW HAVEN COPPER CO. and others.

(*Circuit Court, D. Connecticut.* August 7, 1882.)

PATENTS FOR INVENTIONS—PROCESS—NOT AN INFRINGEMENT.

Where defendants' process is not the patented process, but omits a patented step, and in its stead includes one which the patentee intended to avoid, it is not an infringement.

John S. Beach, George Harding, and *Charles E. Mitchell,* for plaintiff.

Benjamin F. Thurston and *Charles R. Ingersoll,* for defendants.

SHIPMAN, D. J. This is a bill in equity to restrain the defendants from the alleged infringement of reissued letters patent, dated October 16, 1877, to Andrew O'Neil, assignor to Samuel A. Cotter, for an improvement in preparing sheet copper for boilers and other vessels. The original patent was granted to Mr. O'Neil, as inventor, on April 6, 1869.

Prior to the date of the original patent, tinned sheet copper for the manufacture of culinary utensils was furnished to the coppersmith in the form of a soft sheet of copper tinned on one side, and the copper side discolored by the action of the heat and acids employed in the tinning process. This soft, porous, flexible sheet was then made dense and hard by tedious and expensive hand hammering, or "planishing," as it was called, which consisted of hammering the sheet upon an anvil with hammers of a curved surface to make the sheet dense, and then with hammers of a plane surface to smooth and brighten it. Tinned copper had been also sometimes cold rolled, or passed through polished rolls, whereby the sheet was made more dense, but the form in which the coppersmith generally received the sheet for manufacture into utensils was the one which has been described. Sometimes the discoloration was attempted to be removed by the use of acid.

Mr. O'Neil, in 1867, received letters patent for a tinned copper sheet prepared in this way. A varnish, made after a prescribed formula, was applied with a brush to the copper side of the tinned sheets in the rough state "without subjecting them to any acid bath, scouring, planishing, or any other chemical or mechanical preparation." The varnished sheets, when dry, "were passed through highly-polished rolls of steel or case-hardened or chilled iron." In 1869 the original of the reissue which is now in suit was granted to Mr. O'Neil. The specification describes the invention as follows:

"The object of my invention is to prepare for market tinned copper sheets, with smooth and uniform and permanently-lustrous surfaces, without artificial coloring. Sheets of tinned copper, as now usually prepared for pot bodies, acquire a discolored, stained, and mottled appearance by the oxygenating agency of the heat and acids employed in the process of tinning; and to these causes of disfigurement there is often added that arising from the overflow of the tin itself onto the copper side. This disfigurement is now sought to be removed by acids, which, in turn, 'cut' the tin and initiate rust, and by tedious and costly mechanical abrasion, which consumes much time and material. In consequence of the above, it is frequently necessary to retin the interior of the vessels after they are made up, which reproduces the evils above alluded to. To the above evils there is commonly added that of unevenness of tinned surface, due to hand planishing or striping, the tin being found to wear rapidly away from the ridges or eminences."

After describing the benefits of his invention, the patentee says:

"My process is as follows: I provide copper sheets, of the precise size required to compose the body of the wash-boiler or other desired vessel, and, having tinned them by the usual or any approved process, I pass them through highly-polished, chilled or steel rolls, and cold roll the sheets. Then they are placed upon an endless apron or carrier, and passed beneath a rotary polishing wheel or buffer, to produce a high gloss, or they may be polished by any other approved or preferred mode. I prepare two quarts of dammar varnish, one quart of turpentine, one quart of alcohol, to make one gallon of the transparent enamel. Then lay the sheets, with the bright sides up, on a steam table, which is kept at a moderate temperature to warm the sheets. Then I apply the transparent enameling with a soft, flat brush, and, when dry, the sheets are ready for market."

The claims were as follows:

"(1) I claim a bright cold-rolled tinned sheet of copper, as explained. (2) I claim a transparent enameled, bright tinned, cold-rolled sheet copper. (3) As a new article of manufacture, the polished and enameled tinned copper sheet, produced by the process substantially as herein described, for the manufacture of wash-boilers and other culinary vessels."

The first claim was for a tinned sheet of copper made "hard, even, and lustrous" by cold rolling, and bright by polishing upon a buffer or by any other approved mode, but not by scouring or scrubbing with acid, for this was one of the evils which the patentee wished to avoid. The order in which cold rolling and the removal of discoloration by polishing was done was immaterial. It was not for an enameled sheet. That was included in the second claim.

This invention, which consisted in subjecting the sheet to cold rolling, whereby the surface was made dense and glossy, and to polishing, whereby the discoloration was removed, and, if need be, to an additional enameling process, was received with great favor, went

into extensive use, entirely superseded hand planishing, and was very useful.

In 1877 the reissue which is now in suit was obtained. In the specification the patentee says that "in some instances the sheet had been passed through rollers before my invention;" but in consequence of the acids employed in preparing the sheet for tinning, and the heat in the tinning operation, the copper surface became dark and mottled. He described his invention as follows:

"To render the sheet of copper of a handsome color and a more merchantable appearance, and of superior stiffness and elasticity, so that it is less liable to dent or bruise than heretofore, I employ two operations. One is the planishing or consolidating of the sheet, for which highly-polished chilled or steel rollers may be used. By this operation the copper is rendered dense or hard, and the coating of tin is smoothed and unified. The other is a cleaning or polishing operation to remove the discoloration, scale, or foreign substance from the copper surface of the sheet. This is done by a rotary polishing wheel or buffer, or by any other approved or preferable mode. The copper thus produced presents a clean, bright surface of copper on one side, and a uniform surface of tin on the other side, and the sheet is hard and dense. In order to prevent atmospheric action on the surface of the copper it is preferable to employ a dammar varnish, thinned out with turpentine and alcohol, in about equal proportions, and mixed with about the same quantity of dammar varnish, and this is applied to the copper side of the sheet, when it has been warmed upon a steam table or otherwise. This varnish dries rapidly, and the sheet metal is ready for the market."

The claims are as follows:

"(1) As a new article of manufacture, the tinned sheet copper herein described, the same having a bright or polished copper surface, and the whole being cold rolled, as and for the purpose described; (2) the improvement in the manufacture of tinned sheet copper, consisting in tinning one surface, cleaning or brightening the other surface, and subjecting the sheet, while cold, to pressure between rollers, substantially as set forth; (3) the sheet of tinned copper prepared by cleaning and rolling, and protected by a varnish upon the copper surface, as and for the purpose set forth."

The first claim is identical with the first claim of the original. It is not for a tinned sheet, cold rolled, and having a bright copper surface, made such by the use of acids, but having a surface made bright or polished by the wheel, or by any approved mode of polishing. The second claim is for the process of manufacturing described in both original and reissue, not including the varnishing; but it is not to be construed as including any mere "cleaning" of the surface, although the word "cleaning" is introduced both into the description and the claim. To include in the patented process cleaning by acid,

or by scouring with acid and sand, would be an undue expansion of the original patent.

In 1876 Thomas James obtained a patent for an improvement in the manufacture of tinned sheet copper, under which the defendants now make the article which is said to be an infringement. After the sheet is tinned, the discoloration is removed by the use of diluted acid, or by scrubbing with acid and sand. The sheet is then washed in pure water, and after it is dry is cold rolled between bright chilled rolls, two sheets having been placed together, with their tinned surfaces in contact. By this process the discoloration is removed by the application of acid, and then the surface is polished by the chilled rolls. By the O'Neil process the surface is polished and made glossy by the rolls, and the discoloration is removed by the buffer, or other approved polishing method.

The defendant's process is not the patented process. It omits a patented step, and in its stead includes one which the patentee intended to avoid. There is no infringement, and the bill is dismissed.

Execution—Property in Public Use Exempt.

CITY OF NEW ORLEANS *v.* MORRIS and others, U. S. Sup. Ct., Oct. Term, 1881. Appeal from the circuit court of the United States for the district of Louisiana. The substance of the bill is that defendants, having several judgments on the law side of the circuit court, had caused executions, issued on these judgments, to be levied upon shares of the stock of the New Orleans Water-works Company, and the marshal had advertised them for sale and was about to sell them to the highest bidder; that prior to March 31, 1877, the city was the sole and absolute owner of the water-works now owned and held by the corporation known as the New Orleans Water-works Company; that on that day the legislature enacted a law creating that corporation with a capital of $2,000,000. Of this sum the corporation, as soon as organized, was to "issue to the city of New Orleans stock to the amount of $606,600, full paid and not subject to assessments, and in addition thereto one similar share for every $100 dollars of water-works bonds the city had taken up heretofore and extinguished by payment, exchange, or otherwise; and that the residue of said capital stock shall be reserved for the benefit of all holders of water-works bonds, to the extent of the amount now outstanding, who may elect to avail themselves of the provisions of this act." The bonds here referred to were those issued by the city, while sole owner of the water-works, in aid of their construction and extension. The seventh section of this act reads as follows: "Be it further enacted, that the stock owned by the city of New Orleans in said water-works company shall not be liable to seizure for the debts of said city." Under the statute, and especially under the seventh section, the city

invoked the restraining power of the court to prevent the sale of its stock in the company. To this bill defendants interposed a plea to the effect that, so far as the provision of the statute exempting the company's stock from sale under execution relates to their judgments, it is void by the provisions of the constitution of Louisiana and of the United States, which forbid the enactment of laws which impair the obligation of contracts; and in their plea they show that the obligations on which their judgments were obtained against the city were existing contracts before the passage of the act of 1877. The court held this plea good, refused the injunction, and dismissed the bill. The case was decided in the supreme court of the United States on May 8, 1882. Mr. Justice *Miller* delivered the opinion of the court reversing the decree of the circuit court, with directions to overrule the plea, and for such further proceedings as are not inconsistent with the opinion of the supreme court.

Where one of the defendants filed in the court below a general demurrer to the bill on the ground that there is ample remedy at law by motion to compel the marshal to release his levy on the stock because not liable to be sold on the execution, and afterwards withdrew his demurrer and joined in the plea on which the cause was decided, we should, under such circumstances, have great hesitation in permitting the party who had, by tendering this issue, waived the question of the special jurisdiction of the court in equity, to raise that point for the first time in this court on appeal. But the bill does show on its face a sufficient ground of equitable jurisdiction, sustained by the provisions of the statute which creates a trust in favor of the holders of old water-works bonds of the city, and of other creditors of the city, which is not shown in any way to have been released or discharged. Although in the ordinary case of a wrongful levy on property not subject to seizure the proper remedy is by motion to have the levy discharged, there are in this bill other sufficient grounds for the equitable jurisdiction of the court. A state statute which authorizes a city to convert its ownership of property, held for the public use, into the shares of a corporation, and which provides that these shares shall be exempt from sale under execution for its debts, is not in violation of the constitutional provisions against impairing the obligations of contracts, as the city was using no property in acquiring this stock which could have been appropriated under any circumstances to the payment of its debts.

E. Howard McCaleb, for appellant.

John A. Campbell, W. W. Howe, and Albert Voorhies, for appellees.

Statute of State—Validity of.

THE AMOSKEAG NAT. BANK *v.* TOWN OF OTTAWA. In error to the circuit court of the United States for the northern district of Illinois. The decision in this case was rendered by the supreme court of the United States in May, 1882. Mr. Justice *Gray* delivered the opinion of the court, affirming the judgment.

The constitution of the state of Illinois, requiring each house of the legislature to keep and publish a journal of its proceedings, and on the final passage of all bills to take the vote by ayes and noes, and ordaining that no bill shall become a law without the concurrence of a majority of all the members

elect at each house, is not merely directory. Whether a seeming act of the legislature is or is not a law, is a judicial question, to be determined by the court, and not to be tried by the jury. The construction uniformly given to the constitution of a state by its highest court is binding on the courts of the United States as a rule of decision. An act of the legislature of a state, which has been held by its highest court not to be a statute, because never passed as required by its constitution, cannot upon the same evidence be held a law of the state, and that which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who take them for full value, and in the belief that they have been lawfully issued. The copies of the journals certified by the secretary of state, and the printed journals published in obedience to law, are both competent evidence of the proceedings of the legislature; and by virtue of statute the copies of the daily journals kept by the clerks of the two houses, and made by persons employed for the purpose, though not sworn public officers, in well-bound books, furnished by the secretary of state, and afterwards deposited and kept in his office, are official records in his custody, copies of which, certified by him, are admissible upon settled rules of evidence, and neither the competency nor the effect of such copies is impaired by the loss or destruction of the daily journals or minutes. Where there is nothing in the record to show that either of the statutes under which the municipal bonds in the action were issued, was ever complied with in issuing the bonds, or relied on by the plaintiff in purchasing them, no action can be maintained on them.

Cases cited in the opinion: South Ottawa v. Perkins, 94 U. S. 260; Sup'rs of Kendall v. Post, 94 U. S. 260; Ryan v. Lynch, 68 Ill. 160; Miller v. Goodwin, 70 Ill. 659; Elmwood v. Marcy, 92 U. S. 289; East Oakland v. Skinner, 94 U. S. 255; Dunnovan v. Green, 57 Ill. 63; Force v. Batavia, 61 Ill. 99; Ill. Cent. R. Co. v. Wren, 43 Ill. 77; Bedard v. Hall, 44 Ill. 91; Grob v. Cushman, 45 Ill. 119; People v. Dewolf, 62 Ill. 253; Binz v. Weber, 81 Ill. 288; Happel v. Brethauer, 70 Ill. 166; Watkins v. Holman, 16 Pet. 25; Ryan v. Forsythe, 19 How. 334; Gregg v. Forsyth, 24 How. 179.

Evidence—Treasury Transcripts.

UNITED STATES *v.* HUNT and others, U. S. Sup. Ct., Oct. Term, 1881. Error to the circuit court of the United States for the southern district of Mississippi. This was an action brought by the United States upon the official bond of a collector of taxes under the internal revenue act. He was sued as principal, and having died pending the suit, it was renewed against his executrix. The other defendants were sureties. The sureties filed joint pleas, and the executrix pleaded separately. The pleas were alike, and amounted to a general denial of every allegation necessary to constitute a liability. There was a verdict and judgment for defendants. The errors assigned arise upon the rulings of the court, upon the trial, upon questions of evidence presented by a bill of exceptions. The plaintiff offered in evidence the certified transcript of the account of deceased, to the introduction of which objection was made on the part of the defendants, and the objection sustained. This ruling was excepted to, and is assigned for error by the plaintiff in error. The decision was rendered in the supreme court of the United States on April

3, 1882. Mr. Justice *Matthews* delivered the opinion of the court reversing the judgment.

The certificate of the treasury department declaring an account contained in a treasury transcript to be an account between the United States and the collector of internal revenue, has the legal effect of making the treasury transcript *prima facie* evidence of the fact of indebtedness which it certifies, unless upon the face of the account it necessarily appears to be otherwise. Excluding a treasury transcript, when offered in evidence, is error, even if collections embodied therein were made at a preceding term, if containing charges admittedly collected during the term. Collector's receipts are admissible in evidence to prove the debit side of his account, and, being part of his official transactions, forming the basis of the account against him upon the books of the treasury department, their exclusion is erroneous.

S. F. Phillips, Solicitor General, for plaintiff in error.

W. L. Nugent, for defendants in error.

County Bonds—Negotiability.

LEWIS *v.* COUNTY COMMISSIONERS, U. S. Sup. Ct., Oct. Term, 1881. Error to the circuit court of the United States for the district of Kansas. This case was determined in the supreme court of the United States on March 13, 1882. Mr. Justice *Harlan* delivered the opinion of the court reversing the judgment of the circuit court.

The act of Kansas of March 2, 1872, did not require as a necessary prerequisite to the negotiability of certain county bonds, unconditional on their face, that they should in all cases pass through the hands of the treasurer before reaching the auditor. The action and certificate of the auditor are conclusive evidence, as between the county and a *bona fide* holder, that bonds unconditional upon their face were regularly and legally issued, and therefore negotiable.

James Grant, for plaintiff in error.

Edward Spellings, Thomas B. Fenlon, and A. M. F. Randolph, for defendant in error.

Practice—Setting Aside Default.

JAMES *v.* MCCORMACK, U. S. Sup. Ct., Oct. Term, 1881. Appeal from the circuit court of the United States for the western district of Virginia. The motion to reinstate this cause was denied after hearing on April 8, 1882. Mr. Chief Justice *Waite* delivered the opinion of the court. When the appellant was called and his appeal dismissed the case had been nearly three years on the docket. He had no brief on file, and was not present, either in person or by counsel. He has not excused himself for his default, and the rule will be rigidly enforced, not to set aside defaults growing out of the neglect of counsel or parties, except for very good cause.

CONNELL, Adm'r, etc., *v.* UTICA, U. & E. R. Co. and others.

(*Circuit Court, N. D. New York.* July 28, 1882.)

1. REMOVAL OF CAUSE—ON GROUND OF CITIZENSHIP.

   A cause is not removable under the first clause of section 2 of the act of March 3, 1875, unless all the parties on one side are citizens of different states from those on the other, and all the defendants must join in the petition.

2. SAME—SEPARATE CONTROVERSY.

   A suit is not removable under the second clause of that section unless it is a separate controversy, wholly between citizens of different states.

3. REPEAL OF ACT OF 1866.

   The second clause of section 639 of the Revised Statutes is repealed by the act of March 3, 1875.

S. H. Wilcox, for plaintiff.

J. H. Choate, for defendant King.

BLATCHFORD, Justice. This suit was not removable under the first clause of section 2 of the act of March 3, 1875, because all the parties on one side of the controversy were not citizens of different states from those on the other, and also because all the defendants did not petition for removal. Nor was the suit removable under the second clause of that section, because there was not in the suit a separate controversy wholly between citizens of different states. To entitle a party to a removal under the second clause there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other. *Hyde* v. *Ruble*, 3 Morr. Trans. 516. The present case does not fall within that of *Barney* v. *Latham*, 103 U. S. 205. The decision of the state court, at the special and general terms, that the cause of action is entire, is a decision which it is proper for this court to follow, and it leads to the conclusion that there is but a single controversy in the suit, and that parties to the suit who are citizens of the same state with the plaintiff, are necessary parties to the controversy to which the plaintiff and the defendant King are parties.

The case of *Hyde* v. *Ruble*, *supra*, decides that the second clause of section 639 of the Revised Statutes is repealed by the act of March 3, 1875.

The motion to remand is granted, with costs, to be taxed.

SAHLGAARD v. KENNEDY and others.

STRICKER v. SAME.

MESSCHAERT v. SAMF

(*Circuit Court, D. Minnesota.* July 15, 1882.)

1. EQUITY—PARTIES—JOINT INTERESTS.
   While it may be that the holder of negotiable securities can at law maintain a suit in his own name, excluding equities under given circumstances, yet when joint parties seek to upset judicial decrees, charge trusts, and fasten supposed liens in consequence of joint interests, all of them should be before the court, that it may be known to what extent and in whose favor a decree may be had.
2. SAME—INTERFERENCE WITH DECREES OF OTHER COURTS.
   Courts should judiciously refrain from interfering with the decrees of other courts, except when such interference or inpeachment is plainly necessary.

The First Division of the St. Paul & Pacific Railroad Company, owning a line of railroad from St. Paul via St. Anthony to Watab, a distance of about 80 miles, known as its Branch Line, and a line of railroad from St. Anthony to Breckinridge, a distance of 207 miles, known as its Main Line, to each of which lines was attached a land grant consisting originally of 6 sections per mile, and subsequently increased to 10 sections, made the following trust mortgages:

On the *Branch Line*, a $1,200,000 mortgage, dated June 2, 1862, and covering also the 6-section land grant; and a $2,800,000 mortgage, dated October 1, 1865, covering also the entire 10-section land grant. On the *Main Line*, a $1,500,000 mortgage dated March 1, 1864, and covering the first 150 miles of the railroad but not the land grant. A $3,000,000 mortgage, also dated March 1, 1864, and covering the first 150 miles of road and the 6-section land grant appertaining thereto, which mortgage was by its terms made subordinate to the lien of the contemporaneous $1,500,000 mortgage. A $6,000,000 mortgage dated July 1, 1868, covering the entire Main Line of railroad, the additional 4-section grant appertaining to the first 150 miles, and the entire 10-section grant appertaining to the remaining 57 miles of the line. The bonds secured by the $1,500,000 mortgage (and which had never been negotiated) were, pursuant to the terms of the $6,000,000 mortgage, turned over to and held by the trustees of that mortgage, as additional security for the bonds secured by that mortgage.

The bonds of these various issues were all negotiated in Holland. In 1873, the company having stopped payment of interest on its bonds, a committee was chosen by the Dutch bondholders to protect their common interests, and a very large majority of the bondholders placed their bonds in the hands of this committee. The committee appointed Messrs. J. S. Kennedy & Co. their agents in the United States, who at once caused suits to be instituted in the proper state court in Minnesota, to foreclose the mortgages and obtain a receiver of the property. In 1876, Mr. J. S. Kennedy was appointed a trustee in each of the mortgages, in place of trustees who had resigned, and from that time the trustees of the $1,200,000 and $3,000,000 mortgages were Edmund Rice and Horace Thompson of St. Paul, Minnesota, and John S. Kennedy of New York, and of the $2,800,000 and $6,000,000 mortgages, the trustees were Messrs. Thompson and Kennedy.

In September, 1876, the trustees, under powers in the mortgages, took possession of the Main and Branch Lines, and operated them from that time until they were delivered to the purchasers under the foreclosure decrees.

On March 13, 1878, Messrs. George Stephen, Donald A. Smith, N. W. Kittson, and James J. Hill, purchased nearly all the bonds held by the Dutch committee. By the terms of the agreement of purchase, Mr. Kennedy and his partner, Mr. Barnes, were to retain possession of the bonds, as trustees, until the purchase price should be fully paid.

From the beginning the foreclosure suits had been stoutly defended by the company, and it was not until March, 1879, that decrees of foreclosure and for the sale of the property were obtained.

On May 7, 1879, the property covered by the $2,800,000 mortgage was sold under the foreclosure decree, and purchased by Mr. Barnes for the benefit of Messrs. Smith, Stephen, Kittson, and Hill, who, on May 23, 1879, organized the St. Paul, Minneapolis & Manitoba Railway Company, which also became the purchaser of all the property covered by the $1,200,000, the $3,000,000 and the $6,000,000 mortgages, and sold in May and June, 1879, under the decrees in the suits to foreclose those mortgages.

After the entry of the decree in the suit to foreclose the $3,000,000 mortgage, one Sahlgaard and others, residents of St. Paul, made a joint purchase of bonds secured by that mortgage to the amount of $11,000, intending to sell them for use in paying for lands; but as the decree

for sale of the property had been entered, no lands could then be sold at private sale, or except as provided in the decree, and the trustees therefore declined to receive the bonds in payment for land. Sahlgaard thereupon, and after the decretal sale, applied to the court for leave to be made a party to the $3,000,000 foreclosure suit, and to oppose the confirmation of the sale, charging in his affidavit that the sale under the decree in the $3,000,000 foreclosure suit was fraudulent; that the property was worth much more than the sum bid for it by the St. Paul, Minneapolis & Manitoba Railway Company, and that the trustees fraudulently refused to bid in the property for all the bondholders. This application was heard before *Simons*, J., who held that the mortgaged property had been properly sold in one parcel; that the purchase of the bonds by Messrs. Smith, Stephen, Kittson and Hill was a perfectly legitimate transaction, and that there was no ground for the charges of misconduct against the trustees. Sahlgaard's petition was accordingly dismissed, and the sale was duly confirmed, as were the sales under the decrees in the other suits.

Afterwards and in June, 1879, Sahlgaard and his associates caused a suit to be brought in the United States circuit court for Minnesota, against the trustees, the St. Paul, Minneapolis & Manitoba Railway Company, and others, to set aside the sale and order for confirmation in the $3,000,000 foreclosure suit.

Although the bonds of Sahlgaard and his associates were owned by them jointly, the suit was brought in the name of Sahlgaard alone, and in his bill of complaint he alleged that he was the owner of the bonds. This was done for the reason (as testified to by Mr. Sahlgaard when examined by the defendants) that he was not a citizen of the United States, and to give the federal court a jurisdiction it could not have if all the joint owners of the bonds had been named as plaintiffs.

In this bill of complaint Mr. Sahlgaard charged that Mr. Kennedy was secretly interested in the purchase of the bonds from the Dutch committee, in the purchase of the mortgaged property at the decretal sales, and in the St. Paul, Minneapolis & Manitoba Railway Company, and that at his instance, and under his influence, his co-trustees suffered the foreclosure suits and the management of the property to be controlled by Messrs. Smith, Stephen, Kittson, and Hill, and that the decrees were so framed as to allow those gentlemen to obtain the property at a nominal price as compared with its real value, and that, to accomplish this end, the property was fraudulently

sold in one lot instead of in parcels, and for a price much less than its value, and that the trustees fraudulently refused to buy in the property at the sale for the benefit of all the bondholders.

Having begun this suit, Sahlgaard, on behalf of himself and associates, went to Holland, to get control of other bonds of the $3,000,000 issue, and to arrange for bringing like suits in the name of Dutch holders of bonds of the other issues, his purpose being (as he testified) "to help the poor bondholders over there—and benefit ourselves." Arriving in Holland, he caused his bill of complaint to be translated, printed, and widely circulated as a truthful statement of the facts regarding the foreclosures and sales. He supplemented this with a written opinion from counsel at St. Paul, (also translated into Dutch and widely circulated,) promising a speedy and profitable outcome of the pending suit, and such others as should be brought to set aside the other sales.

Mr. Sahlgaard at first desired to arrange with the Dutch bondholders that they should furnish money to pay their *pro rata* share of the expenses of the pending suit and such others as should be brought, and in case of success should receive 25 per cent. of the profits, the other 75 per cent. to go to himself and his associates. But the bondholders had not sufficient confidence in him or his suits to advance any money, and he then offered the bondholders their choice of two schemes, by one of which they were to allow Sahlgaard to use their bonds in his suits, and he was to advance to them at once the amount of the dividend in each case to which they would be, in any event, entitled under the decree, and allow them 25 per cent. of the net profits realized in the suits, (over and above the amount of the dividends and after deducting all expenses,) Sahlgaard and associates taking the other 75 per cent. By the other scheme Sahlgaard was to be allowed to use their bonds in his suits, but was not to make any advance to the bondholders, who would receive in each case, if the suit did not succeed, the dividend in the foreclosure suit, and if the suit did succeed, they would receive 50 per cent. of the profits over the amount of the dividend and after deducting expenses.

On Mr. Sahlgaard's return from Holland he caused suits to be instituted to set aside the decree, sale, and confirmation in the $6,000,000 and the $2,800,000 foreclosure suits. Both suits were brought in the United States circuit court for Minnesota. In one of them B. H. Stricker, and in the other A. Messchaert, was the nominal plaintiff, but the suits were controlled by Sahlgaard and his associates, who were to advance the expenses, make no charge unless

successful, and divide the net profits with the Dutch bondholders under the schemes above mentioned.

The defendants answered the bills in each suit, and a large amount of testimony was taken. The three suits were argued together at the June term, 1882, of the United States circuit court at St. Paul, before *Treat* and *Nelson*, JJ. The court dismissed the bills in each case, holding (1) That Sahlgaard's suit was wrongfully brought. (2) That the Stricker and Messchaert suits were speculative, and tainted with champerty. (3) That there was no fraud in any of the proceedings of Mr. Kennedy or the other trustees, nor in any of the acts by which Messrs. Stephen, Smith, Kittson, and Hill acquired their bonds and the mortgaged property. (4) That the proceedings in the foreclosure suits, including the decrees, sales, and confirmations, were valid, and the bondholders have no claims on any of the property.

Similar unsuccessful attempts by Sahlgaard and his associates to set aside the decree and sale of other portions of the line of the Manitoba Company (viz. the Extension Line of the St. Paul & Pacific Railroad Company, sold under foreclosure of a $15,000,000 mortgage, on June 14, 1879) were made and defeated in the cases of *Kropholler* v. *St. Paul, Minneapolis & Manitoba Ry. Co.* 1 McCrary, 299; S. C. 2 FED. REP. 302, (opinion by *Nelson*, J.;) *Wetmore* v. *St. Paul & Pacific R. Co.* 5 Dill. 531; S. C. 1 McCrary, 466; 3 FED. REP. 177, (opinion by Mr. Justice Miller;) and in the case of *Wilton* v. *St. Paul, Minneapolis & Manitoba Ry. Co.* (opinion by *Nelson*, J.,) not reported.

Gilman & Clough, for plaintiff.

R. B. Galusha, *Geo. B. Young*, and *Geo. L. & C. E. Otis*, for defendants.

TREAT, D. J. These three cases have been heard at the same time, by agreement of counsel, because a large portion of the evidence is common to each. Many of the questions involved have been before this court in some form or another, especially in the *Wetmore Case*, 5 Dill. 531, so that, practically, little remains for present decision except the force of the evidence submitted on the issues joined. It is not purposed to go into a statement of the cases at length, nor to analyze the evidence, review the authorities cited, or state specifically what has been authoritatively decided heretofore in the progress of this litigation. The record and all matters pertaining to the progress and ultimate decision of these cases will unquestionably undergo review by the supreme court of the United States, so that if any errors are now or have been heretofore committed, the losing party will have

ample redress. As to the *Sahlgaard Case,* there are two questions not involved in the other suits. The evidence discloses that he is not the sole owner of the bonds on which his suit is based, and that if his co-owners had been made co-plaintiffs, as they should have been, this court would have had no jurisdiction. It is urged that as the bonds are payable to bearer, and he happens to have the manual possession, therefore he has a right in equity to institute and pursue this litigation without disclosing that he is only one of many joint owners, and despite his own testimony that others than himself are such joint owners. It must be borne in mind that this is a suit in equity in which the real parties in interest must appear, especially as they are seeking to invalidate judical decrees in another forum, and to go behind those decrees to the extent, at least, of charging a trust upon the defendant railroad to the extent of bonds held by plaintiff, as if by a lien therefor. While it may be that the holder of negotiable securities can at law maintain a suit in his own name, excluding equities under given circumstances, yet when joint parties seek to upset judicial decrees, charge trusts, and fasten supposed liens in consequence of joint interests, all of them should be before the court, in order that it may be known to what extent and in whose favor a decree may be had. If the bonds in question are to be decreed a lien on the property of the defendant, it must be done for the benefit of the owners of the bonds—for those who have an equitable right thereto, and who are to be bound by the result of the litigation. If a decree should be given against this plaintiff, and he immediately thereafter shifts the manual possession to one of his co-owners, can the latter institute a new suit and avoid a plea of *res adjudicata?* The rule is deemed clear and explicit that this plaintiff cannot maintain a suit of this nature in his own name, he being only one of several joint owners of the bonds in question, those holding a majority interest being citizens of this state. On that ground alone, if there were no others, his suit would have to be dismissed.

There is a second question, upon which it is not deemed necessary to give a definite opinion, viz., whether his appearance in the state court, under the circumstances in evidence, does not conclude him. He appeared there, requesting to be admitted a party, on the ground that the trustees of the bondholders were not faithful to their trust. Having sought the interposition of that court, and that court having passed on his demand adversely, and he having chosen to abide thereby, to what extent can he reopen that judgment, except possibly for actual fraud since discovered? If, in a direct proceeding to inval-

idate the decree of the state court, he can show that it was obtained by actual fraud, he has a right to be heard; but it might be that if full opportunity had been had to pursue his supposed rights before that court for whose aid he had applied, with a full knowledge of all the facts now presented, he would be held estopped. It is not necessary, however, to decide that point. It must suffice to refer to the many cases in which it is intimated that courts should judiciously refrain from interfering with the decrees of other courts, except when such interference or impeachment is plainly necessary.

There is a common ground of complaint in all of these cases, on which, independent of technical considerations, they would necessarily rest. It is charged that the decrees and decretal orders in the state court were fraudulent. This court has read with scrupulous care all the evidence before it, in the light of the undisputed rule that fraud must be proved and cannot be presumed,—that is, actual fraud. There were many suspicious circumstances which called for explanation, and which, as Justice Miller says, are not to be viewed in the light of after events for a correct interpretation. All the facts and circumstances must be considered as they existed with respect to the property involved at the time action was had with regard thereto. It is not uncommon that men embark in enterprises which promise great gain, and are ruined thereby; and, on the other hand, men invest in doubtful enterprises, and win eminent success. The latter seems to have been the case in hand. The foreclosure suits had been long pending. All parties concerned knew that, without relief from some unknown quarter, decrees and sales would inevitably follow. The bondholders, represented by their trustees, were urging such decrees and sales. In the mean time the depreciated bonds were on the market, subject to the outcome of pending litigation. The majority resolved on the course deemed best for the interests of all, and urged all to join them. The known end was reached, ample opportunity for rescue having been given to the minority bondholders to appear, if they chose to incur the needed responsibility for averting the catastrophe. They did not choose to move in the matter, although invited so to do. Where, then, is the actual fraud? None appears. Mere inadequacy of consideration at a judicial sale does not establish a fraud.

But it is further urged that a constructive fraud exists, and on the solution of that question, if none other applies, these suits must hinge. Every authority cited, and many others, have been carefully examined in order to reach a right conclusion. Most of the cases have

turned upon the action of a trustee in buying for himself the property of his beneficiary, or speculating upon his trust, in some way, for his own benefit, to the detriment of those whose interests were entrusted to him for their protection. He cannot be agent of both buyer and seller, and favor one to the injury of the other, his double relationship being concealed. It is not necessary to refer to cases of attorney and client, guardian and ward, etc. Kennedy & Co. were the representatives of the Amsterdam committee in an agreement pronounced by Justice Miller to be perfectly legitimate. As such representatives, they were bound to see that the syndicate complied with the contract made. They held the securities in their hands for the enforcement of the contract. That could not be effected until after decretal sales and confirmations. Those decretal sales were to be for the benefit of all bondholders, and every bondholder and stranger was invited to purchase. Full publicity was given. When Mr. Kennedy became a trustee by appointment, what was his duty to the bondholders? Evidently, to enforce their rights through foreclosure. All other means had failed. His duties as representative of the Amsterdam committee, instead of being repugnant to his duties as trustee, were in entire accord. If, however, he, in actual fraud of the rights of the minority bondholders, entered into a scheme with the so-called syndicate to sacrifice the property, so that the syndicate should acquire the same in a way to defraud the minority, then not a constructive but an actual fraud existed. As already stated, no actual fraud is shown, and no constructive fraud appears.

The result is decisive of all three of the cases. Yet it is not improper to remark that courts of equity scan with great distrust all champertous suits. It is clear that the Stricker and Messchaert suits are tainted with champerty. It does not appear that they were the owners of any bonds until after the decretal sales and confirmations. Hence the strong *dicta* of the United States supreme court in recent cases are applicable. If the bonds were bought after such judicial action, they had no value except as judicially established. Their purchasers did not acquire an assignment of a supposed right of action to impeach such judicial proceedings. It would be inconsistent, as suggested by the United States supreme court, with all rules of equity concerning property interests of the nature involved, if, after judicial sales, any one not at the time interested in the controversy could, by the purchase of one or more bonds, be permitted to assail such decrees. There may be thousands of such bonds outstanding, and one or more speculators in lawsuits could, if a different rule obtained, stir up litiga-

tion indefinitely. If he bought bonds after the judicial decrees, he bought subject thereto.

As to the sale in gross, the courts have decided that such is the legal and proper mode in this class of cases. This court has not failed to notice the difference between the decrees entered in the state court and those usually entered in like case as in this court under the $15,000,000 mortgage. Hence the evidence was closely scrutinized in that regard. Why a clause was not inserted in the decrees permitting the minority bondholders to come in after purchase within a limited time, on equal terms with purchasing bondholders, is not disclosed. There may have been adequate reasons to the contrary, and it is not for this court to revise those decrees in that respect, or as to any other of their details.

The result is that each of these three cases must be dismissed, with costs, and a decree will be entered accordingly.

BAILEY *v.* AMERICAN CENT. INS. CO.

(Circuit Court, D. Iowa, S. D. June Term, 1882.)

1. EQUITY—CORRECTING MISTAKE OF LAW.

   A mistake of law, made through the representations of an agent, may be corrected in equity.

2. SAME—MISTAKE IN INSURANCE POLICY.

   If an applicant for insurance correctly states his interest, and distinctly asks for an insurance thereon, and the agent of the insurer agrees to comply with his request, and assumes to decide on the form of the policy, and by mistake of law adopts the wrong form, a court of equity will reform the instrument so as to make it insurance upon the interest named.

3. INSURANCE—INTEREST INSURED—MAY BE ENHANCED.

   A change of title which increases the interest of the insured, whether the same be by sale under judicial decree or by voluntary conveyance, does not defeat the insurance, as, where the interest insured was that of a mortgagee, who afterwards obtains the full title.

In Equity.

This is an action in equity, brought to reform a policy of insurance and renewal certificate, and to recover judgment for a loss sustained thereunder. The facts appear as follows:

That on or about October 24, 1878, complainant held a mortgage for $1,200 on a certain dwelling-house and store-room in the town of Kahoka, Clark county, Missouri, the legal title being in John Wagner.

On that day complainant, through his agent, A. J. Mathias, applied to defendant for the insurance of his interest in such property in the sum of $1,000, and paid the necessary premium for the insurance of such interest for the term of one year; that afterwards, on December 5, 1879, the policy so taken out was renewed for another year, complainant paying the premium therefor. N. T. Cherry, a practicing attorney of some years' experience, was the agent of defendant, and acted for it in relation to such insurance, receiving the premiums, and writing up both the policy and renewal certificate.

Wagner had agreed with Bailey to keep the property insured for the benefit of complainant, as mortgagee, but failed to do so. Mathias, at the time he sought the insurance, communicated these facts to Cherry, and asked to have Bailey's interest insured by the policy. Cherry told him that he could issue such insurance, but the policy would have to be written in the name of Wagner, with loss made payable to Bailey. Mathias said he did not know how the policy should be written, but he wanted it to cover Bailey's interest as mortgagee, and he testifies that he at the time believed he was having Bailey's interest insured, and trusted Cherry to write the policy correctly. Cherry wrote the policy, naming John Wagner as the assured, with this provision: "This company hereby agrees to recognize Noah Bailey as mortgagee under this policy; loss, if any, first payable to him as his interest may appear." He wrote the renewal certificate in the name of John Wagner, without any reference to Bailey. Bailey never authorized Mathias to insure Wagner, and nothing appears in the record showing that Wagner ever knew of the insurance.

On March 6, 1879, Bailey began a suit in the circuit court of Clarke county, Missouri, to foreclose his mortgage on the property insured, and such proceedings were had therein that on October 25, 1879, a judgment against Wagner and a decree of foreclosure against the property were entered by that court, and a special execution was afterwards issued, and on April 9, 1880, the property was sold thereunder to the complainant herein. Of these proceedings the defendant company had no knowledge. Upon November 24, 1880, the property insured, which was of greater value than the insurance named, was destroyed by fire. At the time of the original insurance Wagner was in possession of the property, and at the time of the fire it was occupied by tenants of Bailey. The policy contained the following provision: "If the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust, or if the property insured be assigned under any bankrupt or insolvent law, or any change take place in title or possession, (except in case of succession by reason of the death of the assured,) whether by legal process or voluntary transfer or conveyance, then and in every such case this policy is void."

Proof of loss was in proper time made by complainant, and forwarded to defendant. John Wagner was made a party defendant, but failing to appear, a decree *pro confesso* was entered against him at the May rules.

Hagerman, McCrary & Hagerman, for complainant.
W. J. Fulton and *H. Scott Howell*, for respondent.

McCrary, C. J. The policy upon its face is for the insurance of John Wagner against loss by fire upon a certain building, and contains a provision recognizing the complainant, Noah Bailey, as mortgagee, and agreeing to pay the loss, if any, in the first instance to him, as his interest may appear. It is insisted on the part of complainant that this does not express the contract as intended by the parties; that it was so written by mistake; that the contract was for the insurance of the interest of Bailey as mortgagee, and not to insure Wagner's interest at all and that it should be reformed so as to express that contract. The proof is that Wagner was the owner of the fee of the realty, and that Bailey held a mortgage upon it; that Wagner had agreed to insure it for the protection of Bailey, but had failed and refused to do so; and that thereupon Bailey applied to respondent for insurance upon his interest as mortgagee. This application was made to the respondent through its agent, N. T. Cherry, who was a lawyer engaged in the practice of his profession, as well as an insurance agent, and who informed complainant's agent that it would be necessary to write the policy in the name of Wagner, loss, if any, payable to complainant. The complainant and the agent who acted for him were ignorant of the law upon the subject, and left it to Cherry to say what the form of the policy should be; but they did not fail to advise him that Wagner had failed and refused to insure the property, and that complainant desired an insurance upon his own interest as mortgagee.

Complainant paid the premium. Wagner paid nothing; authorized no one to obtain insurance in his name; and, so far as appears, had no notice that his name was used.

That the interest of a mortgagee is an insurable interest is admitted, and it follows that the policy might have been issued in the name of Bailey, and might have expressed a contract for the insurance of his interest as mortgagee.

The agent, Cherry, was therefore mistaken if he believed that, as a matter of law, it was necessary to write the policy in the name of the owner of the fee.

Where a mortgagee applies to the agent of an insurance company and states plainly his wish to obtain insurance alone upon his interest as mortgagee, requests the agent to write the policy so as to effect this purpose, and relies upon him to determine as to what form is necessary under the law of insurance for that purpose, this court holds that the agent is bound to write a policy which shall insure the mortgagee's interest in his own name. This is not denied, but it is said

that the parties in this case all understood that the policy was to be in Wagner's name; that it was understood and agreed between them that the policy should be written just as it is. It is very evident that the policy was not applied for on behalf of Wagner, and that it was not the intention of the complainant to obtain a policy upon Wagner's interest. He (Wagner) was not present in person or by agent; he paid nothing and agreed to pay nothing; the use of his name was unauthorized by him.

Complainant had certainly no interest in procuring insurance for Wagner, and the latter's name was used only for the reason that Cherry asserted, and complainant's agent believed, that this was necessary as a means of insuring complainant's interest as mortgagee. It was not necessary for that purpose, and therefore the policy was so drawn by mistake, and whether a mistake of law or a mistake of fact is under the circumstances immaterial. The most that can be said in behalf of the respondent is that the complainant, through his agent, made a mistake of law through the representations of Cherry, who was a lawyer as well as an insurance agent, and in such a case a mistake of law may be corrected in equity. *Sias* v. *Ins. Co.* 8 FED. REP. 183, opinion by *Lowell*, C. J. See, also, *Keith* v. *Globe Ins. Co.* 52 Ill. 518; *Snell* v. *Ins. Co*, 98 U. S. 85; *Oliver* v. *Ins. Co.* 2 Curt. C. C. 277; *Woodbury Savings Bank* v. *Ins. Co.* 31 Conn. 517; *Longhurst* v. *Ins. Co.* 19 Iowa, 364.

We regard it as well settled by authority, and well supported by reason, that if the applicant correctly states his interest and distinctly asks for an insurance thereon, and the agent of the insurer agrees to comply with his request, and assumes to decide upon the form of the policy to be written for that purpose, and by mistake of law adopts the wrong form, a court of equity will reform the instrument so as to make it insurance upon the interest named. Such a doctrine is eminently just and equitable, since the insurance company always prepares the contract, and inserts therein its own terms.

It remains to be determined whether the policy as reformed has been broken. It provides that "if the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust, * * * or any change take place in title or possession, * * * whether by legal process, or judicial decree, or voluntary transfer or conveyance, * * * in every such case this policy is void." It appears that complainant has foreclosed his mortgage upon the property insured, having ob-

tained a decree for that purpose in October, 1879, in one of the courts of Missouri, and in April, 1880, he bought in the premises under a special execution issued thereon and took possession as such purchaser. At the time of the fire his tenants were in possession.

It is now insisted that this foreclosure and sale, and complainant's purchase and entering into possession, defeat the policy, because there was a decree of foreclosure, and a change of title and possession. Provisions in insurance policies substantially the same as the one above quoted have frequently been the subject of judicial consideration, and they have generally, if not uniformly, been held to provide against a diminution of the interest of the assured and not against its increase.

Thus, in *Heaton* v. *Ins. Co.* 7 R. I. 503, where the policy was for the insurance of a mortgagee's interest, and provided that "if the said property shall be sold or conveyed this policy shall be null and void," it was held to refer to such a sale or conveyance by the assured, determining his interest in the subject of insurance and not to a sale or conveyance to him, to the increase of his interest in it. And see *Lockwood* v. *Ins. Co.* 47 Conn. 564; *Inbush* v. *Ins. Co.* 4 Ins. L. J. 545.

The policy, being upon the interest of the mortgagee, is not affected by any alienation by the owner of the fee, for the reason that it is a distinct and independent contract for indemnity between the mortgagee and the insurance company. *Foster* v. *Ins. Co.* 2 Gray, 216.

In the case of *Humphrey* v. *Ins. Co.* 15 Blatchf. 504, the terms of the condition respecting alienation were in substance the same as in the policy now under consideration, and it was held that as the contract was with the mortgagee for the insurance of his interest, no alienation by another person, of the property in respect of which the insurance is effected, can affect or prejudice his rights. And see Wood, Fire Ins. 863, where the same rule is laid down.

The purpose of the provision in question is to require the assured to retain his interest in the property, and it has been construed to mean that if at the time of the fire he has no interest he cannot recover. Wood, Fire Ins. § 325, p. 552; 4 Wait, Ac. & Def. 51.

At all events, it seems clear, both upon reason and authority, that a change of title which increases the interest of the assured, whether the same be by sale under judicial decree or by voluntary conveyance, does not defeat the insurance. This is especially true of a

case like the present, where the insurance is upon the interest of a mortgagee. In such a case the parties must have contemplated the possibility, at least, that the mortgage would be foreclosed, and the full title and right of possession pass to the mortgagee. The defendant was bound to expect that complainant would foreclose his mortgage if his debt was not paid at maturity. It must be remembered that the foreclosure, sale, and change of title and possession complained of, are the necessary result of the proceedings to enforce the very mortgage which complainant held upon the property when he applied for the insurance, and that it was for the purpose of insuring his interest under it that he applied for and obtained the policy now in question. Of course, under such circumstances, the defendant must be charged with notice of the mortgage, and with a knowledge of the fact that the foreclosure sale and consequent change of title and possession was to be anticipated.

If this is not so, then we are obliged to assume that defendant was justified in believing that the complainant, when he insured his interest as mortgagee, did not intend to assert his rights under the mortgage. What we have said applies also to the change of possession against which the policy provides. It does not mean such a change of possession as would result from the enforcement according to law of the mortgage which complainant held upon the property at the time of the insurance, and of which the defendant had full notice. When the complainant applied to defendant for insurance upon his interest as mortgagee, and the defendant after investigation accepted the risk, it is not too much to say that defendant contracted with full knowledge that complainant had a right under his mortgage to foreclose, if the debt was not paid at maturity; to sell the premises under special execution after obtaining decree of foreclosure; to buy the premises at such sale and to take possession as such purchaser. And defendant was bound to know that none of these rights given by the mortgagee were waived by taking out the policy of insurance. It follows that the several provisions above quoted, respecting change of title and possession, refer to some change other than that which would necessarily follow from the enforcement of the complainant's well-known rights under the mortgage. If this were not so, the complainant in every such case would be reduced to the necessity of deciding between a waiver of his rights as mortgagee and the abandonment of his rights as policy-holder. This view is the only one that is entirely consonant with equity.

The defendant received complainant's money and has kept it, and ought to comply with its contract.

Decree for complainant.

NOTE.

1. The power of a court of equity to reform written instruments upon the ground of mistake is indisputable. Equity will correct errors, but of course cannot make new contracts. *Casaday* v. *Woodbury*, 13 Iowa, 113. Hence a contract must have been made, and by a *mutual* mistake of the parties incorrectly reduced to writing. *Lanier* v. *Wyman*, 5 Rob. (N. Y.) 147; *Sutherland* v. *Sutherland*, 69 Ill. 481; *Evarts* v. *Steger*, 5 Or. 147; Wood, Fire Ins. 800, and cases.

It has been asserted that a mistake of law is not ordinarily a ground for relief in equity. *Mellish* v. *Robertson*, 25 Vt. 603; *Lyon* v. *Sanders*, 23 Miss. 530; *Shafer* v. *Davis*, 13 Ill, 395; *Kenyon* v. *Welby*, 20 Cal. 637; *Hunt* v. *Rousmaniere's Adm'rs*, 1 Pet. 1. But, as stated by one eminent writer, "of late years the disposition of courts and text writers seems to qualify the propositions by many exceptions, and no little difference of opinion, perhaps, exists as to whether it can now even be asserted as a general rule." Bispham, Principles of Equity, § 187. This author makes the distinction that a mistake as to the general law is irremedial, but that a mistake of law in regard to individual rights may be redressed. Id.; and see *Cooper* v. *Phibbs*, L. R. 3 H. L. 149; S. C. below, 17 Irish Ch. 82. He also states that relief will be granted in equity against mistakes of law in "cases where the law is confessedly doubtful, and one about which ignorance may be well supposed to exist." Id.; and see *Daniell* v. *Sinclair*, L. R. 6 Ap. Cas. 181.

That a mistake of law will be relieved against in equity has been announced by much authority. *In re Saxon Assurance Co.* 2. J. & H. 408; *Broughton* v. *Hutt*, 3 De G. & J. 501; *In re Condin*, L. R. 9 Ch. Ap. 609; *Stone* v. *Godfrey*, 5 De G., M. & G. 90; 1 Story, Eq. Jur. §§ 138*e*, 138*f*; *Harney* v. *Charles*, 45 Mo. 157; *Northrop* v. *Graves*, 19 Conn. 548.

Whatever the true rule may be, there can be no question of the doctrine asserted in the principal case, where the representative of the insurance company, a practicing attorney, believes, and induces the insured to believe, that a certain form of a policy correctly insures the interest sought to be covered; that such a mistake, whether considered as one of law or as a combined mistake of law and fact, will be speedily corrected in equity and the policy reformed. See cases cited in the opinion, and especially *Snell* v. *Ins. Co.* 98 U. S. 85; also *Knox* v. *Lycoming Ins. Co.* 7 N. W. Rep. (Wis.) 776; *Equitable Ins. Co.* v. *Hearne*, 20 Wall. 494; Wood, Fire Ins. 796 *et seq.*

If the insured have knowledge of the mistake in the policy, he should move to reform it at once, or else his laches will defeat his right. *Graves* v. *Boston Marine Ins. Co.* 2 Cranch, 419; *Paddock* v. *Com. Ins. Co.* 104 Miss. 521; *Thwing* v. *Great Western Ins. Co.* 111 Mass. 110; *Conant* v. *Perkins*, 107 Mass. 79. But the mere possession of the policy as written for any length of time does not constitute laches, unless the insured knows that the policy incorrectly describes the contract of insurance. *Snell* v. *Ins. Co.* 98 U. S. 85.

The proceedings to reform may be brought as well after loss as before, and, upon reformation, judgment may be had in the same action for the amount due. See cases cited in the opinion; also, Wood, Fire Ins. 809, and cases; *Herbert* v. *Mut. Life Ins. Co.* 15 C. L. J. 93, and cases.

2. It is well settled that a mortgagee has an insurable interest in the property covered by the mortgage. Wood, Fire Ins. 529; *Holbrook* v. *Am. Ins. Co.* 1 Curt. C. C. 193; *Davis* v. *Quincy, etc., Ins. Co.* 10 Allen, (Mass.) 113; *Fox* v. *Phœnix Ins. Co.* 52 Me. 333; *Traders' Ins. Co.* v. *Robert,* 9 Wend. (N. Y.) 404; *Ins. Co.* v. *Updegraff,* 21 Pa. St. 513; *Ins. Co.* v. *Stinson,* 103 U. S. 25; *King* v. *State Mut. Ins. Co.* 7 Cush. 4; *Carpenter* v. *Prov. Wash. Ins. Co.* 16 Pet. 495.

As well stated by an able text writer: "The right of a mortgagee to insure the premises to the amount of his debt, *is the lien given upon the property by the conveyance as security for the payment of the debt;* yet the *insurance* is in no sense *an insurance of the debt,* but of the mortgagee's interest in the property *as security for the debt.*" Wood, Fire Ins. 863; *King* v. *State Mut. Ins. Co.* 7 Cush. 4.

Where a mortgageor insures in his own name, with a provision that the loss be paid to a mortgagee as his interest may appear, the insurance is that of the mortgageor. Making the loss payable to the mortgagee, is nothing more nor less than an appointment of the mortgagee by the mortgageor as his agent to collect the money. The effect is the same as an assignment of the policy after loss. Wood, Fire Ins. 863; *Carpenter* v. *Prov. Wash. Ins. Co.* 16 Pet. 495; *King* v. *State Mut. Ins. Co.* 7 Cush. 4.

Many persons may have insurable interests in the same property. Thus the owner of the fee may insure, and so may the mortgagee, (Wood, Fire Ins. 529;) yet this is in no sense a double insurance, for the simple reason that the insurance is not upon the same interests; (Wood, Fire Ins. 862.) Therefore, if a mortgageor insure his interest, and there is a provisisn in the policy to the effect that the policy should become void if there is other insurance, an insurance by a mortgagee of his interest in the same property would not avoid the policy. *Woodbury, etc., Bank* v. *Charter Oak Ins. Co.* 31 Conn. 517; *Nichols* v. *Fayette Ins. Co.* 1 Allen, (Mass.) 63; *Foster* v. *Eq. Mut. Ins. Co.* 2 Gray, 216; *Ins. Co.* v. *Stinson,* 103 U. S. 25. So the rule is general that insurance upon the same property by persons holding other and different insurable interests would not constitute additional insurance. *Ætna Ins. Co.* v. *Tyler,* 16 Wend. (N. Y.) 507; *Acer* v. *Merchants' Ins. Co.* 57 Barb. (N. Y.) 68; *Mut. Safety Ins. Co.* v. *Hone,* 2 N. Y. 235; *Wells* v. *Phila. Ins. Co.* 9 Serg. & R. (Pa.) 103. It will be readily seen that the reason upon which this doctrine rests is that, "in order to amount to other insurance, *the interests covered by the policies must be identical.*" Wood, Fire Ins. 597, 862. As decided in the principal case, the same reason exists for the rule there adopted.

Where a policy is conditioned to be void upon a change of title, and it is written in the name of the mortgageor, with a provision that the loss be paid to the mortgagee, it has been seen that the insurance is upon the mortgageor's interest. Hence, if there is a foreclosure of the mortgageor's interest, or a voluntary transfer of his equity of redemption to the mortgagee, this is such a

change of title as avoids the policy, because the interest insured no longer exists. *Bilson* v. *Ins. Co.* 7 Am. Law Reg. 661; *Fitchburg Sav. Bank* v. *Amazon Ins. Co.* 125 Mass. 431; *Campbell* v. *Hamilton, etc., Ins. Co.* 51 Me. 69; *Lawrence* v. *Holyoke Ins. Co.* 11 Allen, (Mass.) 365; Wood, Fire Ins. 863, and cases; 4 Wait, Ac. & Def. 51. But if the insurance is upon the mortgagee's interest, then a change of title out of the mortgageor does not avoid the policy, because the interest of the insured is not affected; neither does a purchase by the mortgagee of the mortgageor's interest avoid the policy, for the provision against a change of title is held to mean such a change of title as leaves the insured without an insurable interest, and not to such a change as increases this interest. See authorities cited in the opinion; also *Bragg* v. *N. E. Ins. Co.* 25 N. H. 289. Surely no hardship can result to the insurer from such a doctrine. The contract to insure a certain interest has been made; an increase of the interest does not increase the insurance, but should require all the more care on the part of the assured towards protecting the property. No matter what the change of title is, so long as there remains an insurable interest in the assured, the policy is not avoided. *Scanlon* v. *Union, etc., Co.* 4 Biss. 511.

In accordance with this principle it has been held that, even where the assured, during the existence of the policy, sells the property, yet if afterwards, and before the fire, he reacquires the title, the policy is renewed, and in case of loss the company held liable. *Lane* v. *Maine, etc., Co.* 12 Me. 44; *Power* v. *Ocean Ins. Co.* 19 La. Ann. (O. S.) 28; *Worthington* v. *Bearse,* 12 Allen, 382; *Hitchcock* v. *N. W. Ins. Co.* 26 N. Y. 68; *Mackey* v. *Ins. Co.* (U. S. C. C. Dist. Iowa,) MSS.

The learned judge who delivered the opinion in the principal case asserted a doctrine, the justness of which cannot be well controverted. It was this: That if the company insure the interest of a mortgagee, it must have been anticipated that when the debt secured should become due that there would be a foreclosure and sale if the debt remained unpaid, and therefore a technical defense that the policy had become forfeited by acts which were necessarily anticipated should not be permitted. When it is remembered that the conditions of a policy are usually, if not always, in printed form, it may well be doubted whether such a defense is allowable. If permitted, we would have a state of things aptly described by Chief Justice Ryan in *Appleton Iron Works* v. *Brit. Am. Ins. Co.* 46 Wis. 23. That great jurist said: "If the crafty conditions with which fire insurance companies fence in the rights of the insured, and the subtle arguments which their connsel found upon them, were always to prevail, these corporations would be reduced to the single functions of receiving premiums, with little or no risk."

Although the doctrine declared by Judge McCrary is probably the first time it has been presented in a case of that kind, yet principles analogous have been often laid down. Thus, where a policy covers a stock of goods, or materials used in certain lines of business, conditioned that the keeping or use of certain articles shall avoid the policy, yet if the keeping or use of the prohibited article was only as usually kept or used in the line of business of the insured, or as composing part of such a stock as is insured, then such keeping or use would not avoid the policy, for the reason that the insurer must,

at the time of issuing the policy, have known or contemplated what goods would be kept or used by the insured as incident to property mentioned in the policy. *Steinback* v. *La Fayette Fire Ins. Co.* 54 N. Y. 98; *Whitmarsh* v. *Conway Ins. Co.* 16 Gray, 359; *Elliott* v. *Hamilton Mut. Ins. Co.* 13 Gray, 139; *Harper* v. *N. Y. Ins. Co.* 22 N. Y. 441; *Harper* v. *Albany Ins. Co.* 17 N. Y. 194; *Franklin Ins. Co.* v. *Updegraff*, 43 Pa. St. 350; *Archer* v. *Merchants', etc., Co.* 43 Mo. 434; *Phœnix Ins. Co.* v. *Taylor*, 5 Minn. 492; Wood, Fire Ins. 368–376. But see *Steinbach* v. *Ins. Co.* 13 Wall. 183. So, where a policy issued on an unoccupied building was conditioned to be void in case it should become vacant, it has been held that if the insurer knew at the time of issuing the policy that the premises were vacant, such knowledge would be a waiver of the condition. *Williams* v. *Niagara Ins. Co.* 50 Iowa, 561. Many other cases might be cited where policies were issued by the insurers with the knowledge that certain conditions had not been complied with, and the courts held that the conditions had been waived, or that the companies were estopped from insisting upon a violation thereof. Wood, Fire Ins. 832–840.

Provisions in policies that in case of a foreclosure against the property insured the insurance should be avoided, have been construed to mean such a decree of foreclosure that in and of itself changes the title, and without sale dispossesses the insured of all interest. *Kane* v. *Hibernia Ins. Co.* 38 N. J. 441; *Ins. Co.* v. *O'Maley*, 82 Pa. St. 400; *Pennebaker* v. *Tomlinson*, 1 Tenn. Ch. 598. And a policy conditioned to become void in case of sale or transfer by legal or judicial decree or voluntary act, issued at a place where the law allows redemption from all sales by judicial authority, is construed to apply only to completed sales, and that where the loss occurs before the expiration of the time of redemption the policy is not avoided. *Hammel* v. *Queen's Ins. Co.* 11 N. W. Rep. (Wis.) 349; *Loy* v. *Home Ins. Co.* 24 Minn. 315; *Strong* v. *Ins. Co.* 10 Pick. 40.

A provision avoiding the policy in case of an execution being levied upon the property insured has reference only to personal property, because in practice in most of the states there is no such thing as a levy upon real estate which interferes with its use or possession. *Hammel* v. *Queen's Ins. Co.* 11 N. W. Rep. (Wis.) 349; *Shafer* v. *Phœnix Ins. Co.* 10 N. W. Rep. (Wis.) 381; *Colt* v. *Phœnix Ins. Co.* 54 N. Y. 595; *Ins. Co.* v. *O'Maley*, 82 Pa. St. 400; *Pennebaker* v. *Tomlinson*, 1 Tenn. Ch. 598; May, Ins. 269; Wood, Fire Ins. 552.

FRANK HAGERMAN.

Keokuk, Iowa, August 29, 1882.

SAMPSON *v.* MUDGE and others.

(*Circuit Court, D. Massachusetts.* August 22, 1882.

1. EQUITY—MISTAKE OF LAW AND OF FACT.
   The mistake of a scrivener in one state as to the law of another state, is a mistake of fact.
2. SAME—CORRECTION OF.
   The mistake of a scrivener in drawing a deed, whether it be a mistake of law or of fact, whereby he fails to carry out the previous agreement of the parties, may be corrected in equity; and oral evidence is admissible to prove the intention of the parties.
3. SAME—DEED AS EVIDENCE OF INTENTION.
   Where, upon the face of the deed, it appears that the grantors intended to convey a fee, and, by mistake, they have failed to carry out their intention, the mistake may be corrected upon the evidence furnished by the deed itself.
4. SAME—DEED AS NOTICE OF EQUITY.
   When the bill charges defendant with having notice of the true contract and intent of the parties to a deed when he made the levy, he takes by the levy the land of the debtor subject to all equities; and where the deed, on its face, discloses the intention, its record is notice to subsequent purchasers of the equity which that intention creates.

Bill in equity, filed October 11, 1881, by Hannah H. Sampson, of Massachusetts, against Hepsia B. Mudge, of Ohio, and Chandler Sampson and Frank G. Sampson, of Florida. All the defendants accepted service, and the two Sampsons took no further steps in the cause. Mrs. Mudge demurred. The bill charged that upon the death of Olive H. Sampson, a daughter of the complainant, in July, 1874, the defendants Chandler and Frank Sampson became the owners in fee, subject to the plaintiff's dower, of one undivided sixth part of certain specified parcels of land in Charlestown, now a part of Boston; that in August, 1874, the plaintiff purchased of the said two defendants, in good faith, their entire share and estate in the said parcels of land, and paid them therefor, and for certain other property, $10,000 in money, and that it was distinctly and expressly understood by and between the respective parties that the said defendants were to convey to the plaintiff their entire undivided shares of said land, to hold in fee-simple; that pursuant to this contract they executed a deed, a copy of which is annexed to the bill, and marked A, whereby they intended to convey, and supposed they did convey, the same in fee-simple; and the plaintiff being informed by said defendants, and believing, that the deed correctly embodied the agreement, paid the purchase money, accepted the deed, and had continued in the use and enjoyment of the property; but she had

been lately informed that the defendant Hepsia B. Mudge, claiming that the deed conveys only an estate for the life of the plaintiff, had caused the legal remainder in the grantors to be levied on and sold, in November, 1880, upon an execution against them, she well knowing that the agreement, intention, and belief of the parties to the deed was as before alleged. The bill prayed for a reformation of the deed A, and for other relief. The parts of the deed most material to the case were that Chandler Sampson and Frank G. Sampson, both of New Orleans, in consideration of $10,000, "sell and transfer, with no warranty except as to their rights of heirship, unto Mistress Hannah Harlow, of lawful age, widow of the late Calvin C. Sampson, deceased, she being a resident of the town of Charlestown, state of Massachusetts, all and singular their hereditary rights, both movable or immovable, whether consisting in real and personal property, or in fruits and revenues, accrued and to accrue, of whatever nature, and in whatever place the same may be situated, without exception or reservation, * * * of, in, and to the succession of the late Olive H. Sampson, their sister, who died, etc. The said Mistress Hannah H. Sampson shall, by virtue of these presents, have and dispose of the hereditary rights hereby transferred in full ownership," etc., with subrogations to all rights and actions pertaining to said succession.

S. J. Thomas and *C. P. Sampson*, for plaintiff.

W. B. French, for Mrs. Mudge.

Lowell, C. J. Counsel agree that the deed A does not convey a fee; but the defendant Mrs. Mudge contends that it cannot be reformed without violating the statute of frauds. The other defendants have not seen fit to plead or answer. It might be enough to say that the bill does not show that the agreement by which the plaintiff seeks to reform the deed was oral, but, as the case has been fully argued on the supposition that it was so, I will take that fact for granted. If it shall be found that the decisions in Massachusetts would authorize the court to reform this deed, there will be no occasion to cite other cases, because those decisions are as little favorable as any, and less so than most others, to the exercise of this equitable power.

1. It is clear that if there is any difference as to the amount of evidence required, or in any other way, between correcting a mistake of law and one of fact, the mistake of a scrivener in Louisiana as to the law of Massachusetts is a mistake of fact.

2. It is the law in Massachusetts, as elsewhere, that the mistake of a scrivener in drawing a deed, whether it be a mistake of law or fact, whereby he fails to carry out the previous agreement of the parties,

may be corrected in equity. *Canedy* v. *Marcy*, 13 Gray, 373; *Stockbridge Iron Co.* v. *Hudson Iron Co.* 107 Mass. 290; *Rumrill* v. *Shay*, 110 Mass. 170; *Wilcox* v. *Lucas*, 121 Mass. 21. In all these cases the evidence was oral, and in all but one the defense of the statute of frauds was set up. The court, in a very elaborate and ingenious opinion by the late lamented Justice Wells, in *Glass* v. *Hulbert*, 102 Mass. 24, refused to make a positive addition to the terms of a description in a deed upon merely oral evidence. This decision is ably criticised in 2 Pomeroy, Eq. Jur. § 867, and may need modification, but it is enough here to say that the court in that case escapes the argument of part performance upon grounds which are wholly inapplicable in this case, and this is, of itself, a vital difference between the two.

3. There is a third point which is favorable to the plaintiff. It appears by the deed itself, which, as is remarked by *Ames*, C. J., in *Allen* v. *Brown*, 6 R. I. 386, 398, is evidence of the highest order that the parties intended to convey a fee. No one can read the deed and doubt that it undertakes to grant whatever estate was derived by the grantors by inheritance from their sister. By the law of Massachusetts, these words in a will would convey a fee, and in this suit the question is precisely the same as if we were construing a will; that is, what was the true intention of the parties using the words? I do not mean to intimate that the plaintiff should not produce all the evidence she has if the case goes on, but that, upon the face of the deed, until some evidence is introduced one way or the other, it intends to convey a fee. This leads me to remark upon a *dictum* of *Wells*, J., in *Stockbridge Iron Co.* v. *Hudson Iron Co.* 107 Mass. 319, 320, that if, through a mistake of law, the agreement of the parties fails to be carried out in the deed, it may be corrected, but that if there is a mere mistake of law in the deed, without a previous agreement, it cannot be corrected. I do not suppose that there is often a deed, excepting in case of a gift, without a previous agreement; so that the distinction is not very important; but if a grantor, in unmistakable but untechnical language, undertakes to convey a fee, and by a mistake, which, in an arbitrary division of subjects we choose to call a mistake of law, has failed to carry out his intention, I have no doubt that the mistake may be corrected upon the evidence furnished by the deed itself. That would be the case before me if the deed had been drawn in this state; *a fortiori* when it was drawn in another. Therefore, if the case were rested merely upon the deed, I should not hesitate to say that there ought to be a reformation of it.

4. In most of the states a judgment creditor takes by his levy the land of his debtor, subject to all equities; but the law of Massachusetts is somewhat different in this respect, and puts such a creditor in substantially the position of a purchaser. But the bill in this case charges the defendant with having notice of the true contract and intent of the parties when he made the levy, and by such notice even a purchaser would be bound. *Rumrill* v. *Shay*, 110 Mass. 170. And, if I am not mistaken in saying that the deed upon its face discloses the intention, then its record may very well be held to be notice to subsequent purchasers of the equity which that intention creates.

Demurrer overruled.

BARTLETT and others *v.* SMITH.

(*Circuit Court, D. Minnesota.* July, 1882.)

1. SALE AND DELIVERY—TIME CONTRACTS.

   The purchase or sale of wheat to be delivered at a future time is a fair contract if the intention of the contracting parties is to deliver the wheat, although it is not in their possession at the time of the contract of sale; but if the intention is not to deliver, but to settle differences between the contract price and the then market price, the transaction is illegal and void.

2. SAME—RIGHT TO RECOVER ADVANCES.

   Where parties knowingly furnish means for an illegal transaction, and make advances in the settlement of losses under illegal contracts, the court will not aid them to recover moneys thus paid out; but if parties acting as brokers in the sale and purchase of wheat, without disclosing the name of their principal, enter into *bona fide* contracts for the actual sale and delivery of wheat with third parties for defendant's account, and at his request settled the losses, and paid the amount due under the contracts, they are entitled to recover the moneys thus paid out.

3. SAME—SALE OF PROPERTY NOT ON HAND.

   It is not necessary, in case of a sale or purchase of property for future delivery, that the property should actually be on hand at the time.

4. CONTRACT—MUTUALITY OF INTENT.

   A contract which is valid in law cannot be rendered illegal by the mere intention of one of the parties to the contract to do something which, if mutually intended, would render it invalid.

5. PRINCIPAL AND AGENT—ADVANCES BY AGENT—RECOVERY OF.

   If a principal employs an agent to transact a legitimate business for him, and in conducting such business the agent is authorized to advance money on his principal's account, the law protects the agent, and he may recover the money so advanced if the transactions are legitimate.

C. K. Davis, for plaintiff.

Gordon E. Cole, for defendant.

When the plaintiff's testimony was closed the defendant moved the court to instruct the jury to find a verdict for the defendant. After the argument and submission of this motion the court,—his honor, Judge NELSON, presiding,—in deciding the same, said:

NELSON, D. J. I decline to take this case from the jury. I think there is an underlying question of fact here which they must determine, and that is, were the contracts legitimately entered into? were they contracts for the actual delivery of wheat? or were they mere subterfuges, and entered into on the part of the plaintiffs and third parties for the purpose of promoting gambling transactions? That is an underlying question of fact which it seems to me the jury must determine, and I cannot say, in examining this rule, that although these contracts were made subject to this rule 9—and, perhaps, rule 10—of the chamber of commerce, they upon their face are gambling contracts. It is not an unusual thing, where parties enter into contracts for the delivery of personal property at a future time, to put up earnest money for the fulfillment and performance of those contracts. Under these rules, what is called a "margin" is required for the faithful performance of the contract that is entered into. It may be that parties under these rules—members of that chamber of commerce—may engage in illegitimate trade, but I cannot, from reading the rules, construe them (taking them together) to intend that all contracts which are entered into by the members of that chamber are gambling transactions.

Now, the proviso to section 5, which was read by the counsel here, is one under which gambling contracts might be entered into, but it does not necessarily follow that when a contract like this in evidence is entered into by a member of that chamber, although providing that it is subject to the rules and regulations of the chamber of commerce, there shall be no actual delivery of wheat.

If it was the intention of the parties to the contract that there should be a delivery of wheat, although subject to the rules and regulations of the chamber of commerce, it is not an illegal contract.

It is a fair question for the jury to say, and it is for them to determine, in the light of all the evidence here as to the usages of the members of that chamber of commere, as to the facts and the circumstances attending these transactions and the conduct of the parties, whether they were actual contracts for the delivery of wheat, or whether they were mere subterfuges entered into to enable the parties to engage in speculation in margins.

In that view, I propose to leave (under proper instructions) the whole question for them to determine, whether there was a fair contract for the delivery of actual wheat, or whether it was a speculation on margins. Now, the first part of this section 5, of rule 9, provides that—

"Any party who shall contract to buy or sell property, and who shall fail to respond within the next one and one-half banking hours, after having been called on for security, [margins, in case the property rises or falls,] as hereinbefore provided, shall be judged to have defaulted on his contract; and in case of such default, the party who has called for such security shall have the right to buy or sell (as the case may be) the property named in said contract, in the quantity and for the time of delivery specified in said contract, and all differences between the contract price and the price at which the property may have been or sold bought, (as the case may be) in consequence of such default, shall constitute the rule and measure of damages against the party in default; provided, that in case the party calling for security shall elect not to buy or sell the property, as hereinbefore provided, he may have the right, by giving notice to the delinquent, (as provided in section 6 of this rule,) to consider the contract then terminated at the market price of the property named for the delivery specified in the contract. And the party so terminating the contract may forthwith proceed against the party so defaulting for the collection or enforcing payment of all damages sustained by reason of such default; and the rule and measure of such damages shall be the difference between the contract price and the market price (at the time of giving such notice) of the property named for the delivery specified in the contract."

These contracts are entered into for the purchase or sale of a certain amount of wheat, at seller's option for future delivery.

Now, suppose A. has sold B. 5,000 bushels of wheat to be delivered in August, seller's option at one dollar; the wheat falls off five cents, and B. calls for further security, (under these rules and regulations,) which is not put up by A. Now, under this rule, A. having failed to put up this further security has defaulted. Now, then, B. can go into the market and buy 5,000 bushels of wheat at the market price, (that is, it must be an actual purchase,) and in case he brings suit against A., what is the measure of damages? It would be the difference between the price which he paid when he went into the market, and the contract price. That is the legal rule of damages.

Where the earnest money is put up in that way, and the parties agree that in case of a rise or fall in the market they may call for further security, and if that security has not been put up, the party may go into the market and buy 5,000 bushels of wheat, (in this instance, say,) he can recover the difference between the contract

price and the price that he paid in the market for the wheat. It may be this is all sham. It may be these parties have entered into contracts of this character, and instead of going into the market, have merely drawn up between third parties and themselves contracts, which upon their face purport to be the purchase and sale of wheat, when it was never intended that there should be an actual delivery of wheat at all. If this is so, then it is a gambling transaction. The law never upholds gambling transactions in any instance, and particularly is a gambling transaction in wheat pernicious and it cannot be sustained.

Parties who speculate in the bread-stuffs of the country, demoralize not only the trade, but injure the producers themselves. When the case arises, and the party seeks to enforce a gambling transaction, the court will say: "We will not aid you to enforce it." If there be any loss in the transaction, the party who loses cannot recover.

I shall leave it to the jury, gentlemen, to determine whether there has been, in the first instance, any actual sale and delivery of wheat. The other instructions they will receive as I come to deliver my charge.

After all of the testimony was in, and argument by counsel—

NELSON, D. J., *(charging jury.)* You have listened to very elaborate arguments of the facts by counsel. If I can give you the law of the case, so you will understand it, I think you will have little difficulty in coming to a conclusion.

The plaintiffs bring this suit against the defendant to recover for services and alleged advances made on the defendant's account in the sale and purchase of wheat for future delivery during the years of 1879, 1880, and 1881.

The plaintiffs are commission merchants and brokers. They are citizens of the state of Wisconsin, and reside in the city of Milwaukee, and the defendant is a citizen of the state of Minnesota. The amount claimed is about $13,000. The defendant is a wheat dealer, miller, and warehouseman, and during these years authorized the plaintiffs, by letters and telegrams, nearly every day, for the greater part of the time he operated, to sell and purchase wheat on his account and for his benefit. Under these contracts, whether a purchase or sale of wheat, the wheat was to be delivered in Milwaukee, and in most instances the defendant was a seller. The plaintiffs were members of the chamber of commerce in the city of Milwaukee, (a corpo-

ration created by the laws of Wisconsin,) and when orders were received by these plaintiffs from the defendants they made contracts with the members of the chamber, and in all contracts stipulated that they were subject to the rules and regulations of the chamber of commerce. The plaintiffs conducted the business in their own name, and upon the face of the contracts the name of their principal is not disclosed.

The purchase or sale of wheat to be delivered at a future time is a fair contract, if the intention of the contracting parties is to deliver the wheat, although it is not in their possession at the time of the contract of sale. But if the contract does not contemplate the delivery of wheat, but the settlement of differences between the contract price and the then market price, the transaction is illegal and void, being contrary to public policy, and demoralizing to legitimate trade and commerce. The chief controversy in this case is about the character of the transactions between the parties.

The defenses urged upon the part of the defendant to defeat a recovery may be reduced to two: *First*, that the contracts entered into by the plaintiffs as agents for the defendant were wagers, contrary to public policy and void; *second*, that the plaintiffs furnished the defendant money for the express purpose of enabling him to engage in an illegitimate enterprise, and therefore cannot recover for any advances made for such purpose. This is the theory of the case on the part of the defendant, and evidence has been introduced tending to support it.

The theory of the plaintiffs is, and evidence has been introduced tending to sustain it, that they were employed as brokers or commission merchants to purchase or to sell wheat for future delivery, and that in all of the contracts entered into by them with third parties they conducted the business in their own name, but for defendant's benefit and on his account, and in every instance an actual delivery of wheat was intended by them and the other parties to the contract, and that subsequently they were instructed to close up and settle up these contracts by the defendant, and in doing so, at his request, advances were made and their money paid out for his benefit, and to recover this sum suit is brought, and they are entitled to recover.

These are the issues between the parties which you are to decide. If you believe from the evidence that no wheat was to be delivered, and that the contracts for the sale and purchase of wheat were merely colorable, and were made and executed as a cover for speculations in

margins, and in case the price of wheat rose or fell in the market differences merely were to be paid, then the contracts are in their nature and character wagers, and illegal. Neither an offer or an ability to perform is required of either party in order to entitle the party claiming a breach of contract to the differences. If the plaintiffs, in your opinion, are shown by the evidence to have been employed by the defendant to make contracts of this character with third parties, and have conducted the business in their own name and for defendant's benefit, and supplied the defendant with funds for the express purpose of enabling the defendant to engage in these transactions, and have paid out and advanced money in the settlement of losses arising under such contracts, they cannot maintain this suit to recover the money so expended. In that case they knowingly furnish the means for an illegal transaction, and made advances in the settlement of losses under illegal contracts, and the court will not aid them to recover moneys thus paid out.

On the other hand, if you believe the evidence shows that the plaintiffs, acting as the defendant's brokers in the sale and purchase of wheat, without disclosing the name of their principal, entered into *bona fide* contracts for the actual sale and delivery of wheat with third parties for defendant's account, and at his request subsequently settled the losses and paid the amount due under the contracts, they are entitled to recover from the defendant the moneys thus paid out at his request. The form, however, of these contracts (which on their face specify wheat to be delivered) is not conclusive of their character. You must look into the transactions themselves, and determine from the testimony, and the facts and the circumstances attending the making of the contracts, and the conduct of the parties with reference to them, whether the contracts are illegal and void within the rule laid down, or whether they are *bona fide*, and in determining this question you may take into consideration the fact that these contracts are subject to the rules and regulations of the chamber of commerce in the city of Milwaukee, and that under those rules it is possible for persons on that board to speculate in margins under the forms of contracts like those in evidence; and you may also look at the usages of this trade and business in order to determine the intention of the parties thereto.

If, on full consideration, you should determine the arrangement or understanding between the parties to the contract was a gaming transaction, as defined, and the money was advanced by plaintiffs to enable the defendant to engage in such illegal transactions, and that

the plaintiffs and defendant had in view mere wagering contracts upon the price of wheat, and the advances which the plaintiffs made were paid out in contracts, which, between the plaintiffs and the parties with whom they dealt, were bets upon the market price of wheat, no delivery having been made or contemplated, then the plaintiffs cannot recover, and your verdict will be for the defendant.

If, on the other hand, you believe from the evidence the transactions were *bona fide* on the part of the plaintiffs; that they were employed by the defendant to buy and sell wheat for actual delivery, and bought and sold for actual delivery in their own name, but for defendant's benefit; that losses occurred in such transactions, and that plaintiffs advanced money to pay such losses,—the plaintiffs are entitled to recover.

You are to determine which theory is proved by the testimony. It is not the policy of the law to encourage or sanction wagering transactions (or any transactions) having an injurious and immoral tendency. But, on the other hand, if a principal employs an agent to transact a legitimate business for him, and in conducting such business the agent is authorized to advance money on his principal's account, in which case the law protects the agent, and he may recover the money so advanced, provided the transactions are legitimate.

Several special instructions have been requested on the part of the plaintiffs, as well as on the part of the defendant. I will read them with such modifications as I have made, giving some and rejecting others.

The jury are instructed that it is not gambling for a party to enter into a fair and *bona fide* agreement to purchase or to sell property for future delivery. And the jury are further instructed that it is not necessary, in case of a sale or purchase of property for future delivery, that the party buying or selling should actually have the property in his possession or under his control at the time of entering into the contract of sale or purchase.

If the jury find from the evidence that the defendant requested the plaintiffs to purchase or to sell wheat for him for future delivery; and further find from the evidence that plaintiffs made such purchases, and in doing so entered into the contract read in evidence, and such contract intended the actual delivery of wheat, and subsequently were obliged to pay and did pay losses occasioned by the making of the said contracts; and further find from the evidence that at the time the said contracts of sale and purchase were made neither of the parties to the said contracts had either possession or control of wheat enough to fill the contracts,—that then and under such circumstances the contracts of purchase or sale are not wagering or gambling contracts, although the defendant, at the time he gave the order to buy or to sell, had no design, purpose, or intention to either receive or deliver this

wheat, but designed and intended merely to sell out before the time of delivery or receipt, and settle or adjust the losses on the mere differences in the market value of the wheat.

That is, in substance, that it is not necessary for parties to enter into a contract for sale or purchase, wheat to be delivered at a future time, to have the wheat on hand at the time. That fact does not make it a gambling contract, neither does it make them gambling contracts if only one party intends to gamble by the transaction and not intend to furnish or deliver the wheat which upon the contracts themselves purport to be delivered at a future time.

If the jury find from the evidence that the plaintiffs are commission merchants in the city of Milwaukee and members of the chamber of commerce in that city, and that they, from time to time, and at various times, in 1880 and 1881, received orders from the defendant to buy or sell wheat; and further find from the evidence that plaintiffs, acting in good faith and in the belief that defendant was sending said orders in good faith, made actual purchases and sales for said defendant at his request, as ordered, and in such transactions laid out and expended money for defendant for the purpose of such actual delivery, then the plaintiffs are entitled to recover the amount thus paid, laid out, and expended for this defendant.

If the jury find from the evidence that the plaintiffs are commission merchants in the city of Milwaukee and members of the chamber of commerce in that city, and that they acted as the brokers of defendant and at defendant's request, and from time to time and at various times made in good faith the contracts read in evidence, on the order of defendant, and that said contracts intended the actual delivery of wheat therein mentioned, and in settlement of said contracts paid, laid out, and expended money, for the money thus paid, laid out, and expended for the defendant, they can recover in this action.

The contracts read in evidence are *prima facie* valid contracts in law, and such contracts cannot be rendered illegal by the mere intention of the defendant alone that he did not intend to deliver or receive the property.

That is, it takes two to make a contract. One party cannot defeat a contract and render it void in his own mind.

To make said contract read in evidence void, as wagering or gambling contracts, each party to the contract must have designed and intended at the time the contract was entered into not to buy or receive the property, but to sell on the mere difference between the contract price and the market price.

If the jury find from the evidence that the defendant intended to gamble in wheat, and at no time to deliver or receive the property or pay for it, and further find from the evidence that the plaintiffs were ignorant of such intention on the part of the defendant, and received the order of defendant to buy and to sell, and in good faith proceeded to buy and to sell on his orders, and in doing so incurred obligations for said defendant, by the contract read, and said contracts intended the actual delivery of wheat in evidence,

and that plaintiffs afterwards paid thereon money to settle or adjust the said contracts, then the plaintiffs are entitled to recover in this action for the money so paid.

I refuse to give No. 6.

I refuse to give No. 7.

If the plaintiffs rendered to the defendant, from time to time, statements of purchases and sales made on his account showing prices paid and received. and such purchases and sales were for the actual delivery of wheat,—

(That is, you have heard the statements which were put in evidence, which were rendered; now, if you believe those statements represented purchases and sales for the actual delivery of wheat;)

—And he retained them and did not within a reasonable time object to them, the law implies their correctness, and implies a contract by the defendant to pay the plaintiffs any balance that such statements show to be due to them.

The burden of proof is on the defendant to show that these were gambling transactions. *Prima facie* they are valid, and if the defendant has failed to satisfy you by a fair preponderance of testimony that they were gambling contracts, the plaintiffs are entitled to recover.

There are several requests on the part of the defendant. I give three of them and refuse one:

If the jury believe from the evidence that the transactions between the plaintiffs and defendant were transactions in which no actual sale and delivery of wheat was contemplated, but merely the payment of differences according to the rise and fall of the grain market, the contracts were gambling contracts, and void in law.

If the jury find from the evidence that the plaintiffs in the transactions in controversy were brokers or factors of the defendant, and that in said transactions no actual sale and delivery of grain was contemplated, but merely the payment of differences according to the rise and fall of the grain market, and that plaintiffs performed services for the defendant, and supplied him with funds, and made advances for the express purpose of enabling defendant to engage in such transactions, and if they, as agents of the defendant, conducted such illegal ventures in their own name, they became *particeps criminis*, and the law will not aid them to recover moneys advanced for such purpose, or commissions earned in such transactions, and your verdict must be for the defendant.

The jury may look to the usages of the trade or business to learn the real intentions of the parties.

I refuse to give the fourth.

Now, gentlemen, I have gone all over this case. You will give it due consideration, and enter upon your duties with a determination to give such a verdict as the facts disclosed by the evidence, and the law applicable to them, will justify.

The evidence disclosed presents for your decision this inquiry, upon which the case turns:

Did the contracts in evidence intend an actual delivery of wheat, or were they mere subterfuges for speculations in margins?

This is the simple issue upon which the case turns. If the former, plaintiffs are entitled to recover. If the latter, your verdict should be for the defendant.

This is a very expensive litigation, involving a great deal of money. It is an important case, and will settle not only private rights here, but matters in which the public are interested, and I hope you will go through with it with a determination to arrive at a verdict. You have been selected to settle the controversies here involved. I hope you will exercise due forbearance, not yielding your convictions, but enter into the jury-room with the determination to settle the controversy. Let it end with your verdict, gentlemen, so far as the questions of fact are concerned.

The Oder.

(*Circuit Court, E. D. New York.* July 22, 1882.)

Collision—Sail-Vessel in Fault—Neglect to Show Lights.

Where a steam-ship in mid-ocean, on a dark night, was approaching a bark from aft in a course that rendered it impossible for her lookouts to see the regulation-lights of the bark, but the lights of the steamer were in full view of those on the bark, who knew her to be a steamer approaching the bark on a course crossing her course, so as to involve the risk of collision, yet those on the bark, though having ample time so to do, did not show any light or give any other warning to the steam-ship to notify her in time of the position of the bark, and the steam-ship, immediately on discovering the bark, threw her wheel hard a-port, and, at the same time, backed at full speed, but too late to avoid collision, *held*, that the bark was alone in fault, and that the libel against the steamer be dismissed.

Henry T. Wing, for libelants.

William G. Choate, for claimant.

In this case I find the following facts:

On the night of June 7, 1879, a collision occurred in the Atlantic ocean, to the eastward of the Grand Banks, in about latitude 48 deg. 1 min. N. and longitude 38 deg. 9 min. W., between the libelant's bark, the Collector, and the claimant's steam-ship, the Oder. The night was dark, and it was somewhat overcast at times, and no stars or moon were visible, but the lights of vessels, of ordinary brilliancy, and properly set and burning brightly, could be seen at a dis-

tance of from one to two miles. The wind was blowing a moderate breeze from not further S. than W. by S., and from not further N. than W. by N., and the bark was sailing at a speed of from four to five knots an hour, close-hauled upon the wind, and sailing by the wind, with all her sails set and drawing on the port tack. She was well manned, and had good and sufficient lights, properly set, and conforming to the regulations, and burning brightly. The mast-head light of the steam-ship was discovered by those on board of the bark four or five minutes before the collision, on the starboard quarter of the bark, and very soon thereafter the red light and then the green light of the steam-ship were successively seen, so that all three of said lights were visible at the same time, and then the green light was hidden shortly before the collision, as the steam-ship came along-side of the bark, and the red and white lights continued all the time open to the full view of those on the bark.

The bark kept her course, and the steam-ship threw her wheel hard a-port just before the collision, immediately upon discovering the bark, and at the same time backed at full speed; but the time before the collision was so short that her heading was not materially changed under her port wheel. and she struck the bark a heavy blow with her stem on the starboard side, between her fore and main rigging, cutting her down so that she sank in a few minutes and became a total loss, five of her crew being drowned thereby, and the rest of her officers and crew being rescued and taken on board of the steam-ship, but losing all of their property on board except the clothes which they had on at the time.

The steam-ship was running at a speed of between 11 and 12 knots an hour, on a course W. by N. ¼ N. As the vessels were approaching each other, the green light of the bark was not visible to the steam-ship, the line of her approach, from the time the green light of the bark would, if open to her, have become visible, being more than two points abaft the starboard beam of the bark. The steamer, from the aforesaid view of her lights by those on board of the bark, was known by them to be a steamer approaching the bark on a course crossing her course, so as to involve the risk of collision, and was so seen to be approaching on a line more than two points abaft the beam of the bark, on the starboard hand, and out of view of either of the regulation lights of the bark, and to be overhauling the bark, yet those on the bark, though having ample time so to do after seeing and knowing what was so seen and known by them, did not show any light or give any other warning to the steamer to notify her in time of the position of the bark.

The steamer was well manned and equipped. She had a bright mast-head light, which could be seen in clear weather about five miles, and good side lights, properly set and brightly burning, which could have been seen in clear weather about three miles. She had two competent seamen forward on the lookout, who were carefully attending to their duties. The second officer was on the bridge, keeping a good lookout, and carefully attending to his duty as officer of the deck, and the other officers and men of the watch were carefully attending to their duties. The steamer kept her said course till the discovery of the bark, which was made simultaneously by the second and fourth officers on the bridge, and the lookouts, seeming very near to them, and on the port

bow the shine or glimmer of a light, which, however, was so indistinct that its color could not immediately be discerned. Upon seeing this glimmer of a light the second officer immediately gave, in immediate and rapid succession, the order "hard a-port" to the wheelsmen, and the orders to stop and back at full speed to the engineer, which orders were instantly and promptly obeyed, but before the steamer could be stopped the collision took place. The libelants sustained by the collision the damages found by the district court. The steamer sustained no material damage.

On the foregoing facts I find the following conclusions of law:

The bark was in fault in not showing a light, or giving some other warning, in time, to the approaching steamer. There was no fault on the part of the steamer. The bark was wholly responsible for the collision.

The claimant is entitled to a dismissal of the libel, with costs to it in the district court and in this court.

SAML. BLATCHFORD, Circuit Justice.

BLATCHFORD, Justice. The libel alleges that at the time of the collision "the wind was blowing a moderate breeze from the westward," and that the bark was "on her port tack, close-hauled by the wind, on a course by the compass north by west." The libel does not otherwise state the direction of the wind. The answer admits that the breeze was light, and alleges that the wind "was from west by north." It also alleges that the steamer was on a course west by north, half west; that there was no light on the bark which was seen, or which could have been seen, by any one on board of the steamer sooner than the light seen was seen; that "notwithstanding the most vigilant and unremitting scrutiny of the lookouts and the second officer of said steam-ship, they could not discover said bark at any earlier moment than they did;" that the bark "had no light whatever which could, by any possibility, have been discovered by those on board said steam-ship until the latter had reached the point where her lookouts and second officer did in fact discover one, and that no sound or signal was given by those on board of said bark, but she was suffered to glide on in silence and darkness, a comparatively small and dark object, wholly invisible to a vessel approaching her from abaft, as said steam-ship was approaching her.

The petition of appeal of the claimant states that the appellant intends to make new allegations in the circuit court. The collision occurred June 7, 1879. The libel was filed June 19, 1879. The answer was filed July 2, 1879. The depositions of eight witnesses for the libelants were taken in July, 1879, at New York, and those of seven witnesses for the claimant were taken in September, 1879, at New York.

They were all taken out of court, before a commissioner, in writing, and read at the trial. There was no oral testimony in the case delivered in open court before the district judge. The trial took place in April, 1881. The district judge gave a written decision in July, 1881, and an interlocutory decree in favor of the libelants was entered July 25, 1881. A final decree was entered April 17, 1882, awarding to the libelants $21,285.13 as damages and interest, and $744.43 as costs. On the twentieth of April, 1882, the claimant filed a notice of appeal, and on the twenty-sixth of April, 1882, a petition of appeal. On the eighteenth of May, 1882, the claimant, in this court, gave notice to the libelants of an application to file an amended answer. Such amended answer, sworn to on the seventeenth of May, 1882, by the same person, as attorney in fact for the claimant, who swore to the original answer on the first of July, 1879, was presented to this court at the time the case was heard on the appeal, and leave was asked to file it, founded on an affidavit made by one of the proctors for the claimant.

The material differences between the amended answer and the original answer are the allegation that the wind was "about W. by S.," instead of "from W. to N.," and the allegation that the course of the steamer was "W. by N. ¼ N.," instead of "W. by N. ½ W." The amended answer also contains the following averments not found in the original answer:

"That from the time said bark came within such distance that those on board the said steamer could have seen her light, or lights, if they had been visible, till the collision, said steamer was more than two points abaft the beam, upon the starboard quarter of said bark, and for that reason the starboard side light of said bark, if burning and properly placed, was invisible to those on the steamer until the vessels were very near together, when the glimmer of said light, or of some other light, in or upon said bark, was faintly seen, and immediately afterwards the said bark herself was seen; nor did said bark show to said steamer, as she approached, any light, or give any other signal or indication of her presence or position;" [and as a specification of negligence in the bark causing the collision,] "that although the lights of said steamer were plainly visible to those on board of said bark for full five minutes before said collision, and said steamer was evidently approaching said bark on a course intersecting the course of said bark, so as to involve risk of collision, and at such an angle on the starboard quarter of said bark that the light of said bark was not visible to those on said steamer, the said steamer bearing from said bark more than two points abaft her beam, yet those on said bark showed no flash or other light to said steamer, nor made any signal of any kind to those in charge of said steamer of the position and course of said bark, who could not, except by means of such a light, discover said bark in time to avoid her by any movement on said steamer's part."

The following specification of negligence in the bark, causing the collision, contained in the original answer, is omitted in the amended answer:

"That neither the man forward nor any one on said bark discovered said steam-ship till her whistle was blown, though she was a large passenger ship, 375 feet in length, of great tonnage, rising high out of the water, and brilliant with lights, which those in charge of said bark could and would have seen, had they been attending to their duty, in time to have warned said steam-ship of the presence of the bark, and thus have enabled her to discover and avoid her."

It is not necessary to refer to the other proposed variations between the original answer and the amended answer. The libel contains averments that "when said steam-ship was first seen by those on board of said bark she presented her mast-head light, and shortly afterwards all three of her lights simultaneously to view, and was coming under full headway for the stern part of the starboard quarter of said bark," and that she then "hid her green light and opened her red light to full view of those on said bark." These allegations are denied by the original answer and the amended answer.

The affidavit referred to says:

"The information upon which I drew the answer touching the course of the steamer was derived from the original statement made by the second officer, who was in charge of the deck at the time of the collision, taken down in my office and in my presence, which statement is now before me, and is in the following words: 'The Oder was bearing W. by N. a quarter N.' I am unable to account for the mistake in the answer, but presume that the blunder must have occurred when I was dictating to the stenographer the draft answer. This mistake wholly escaped my attention till after the trial of the case in the district court was concluded, and the opinion of the judge thereon rendered. The libel stated that the bark was close-hauled on the port tack, and that 'the wind was blowing a moderate breeze from the westward.' My information as to the wind when I drew the answer was that given by the second officer in his statement taken down in my office, to which I have already referred, that the wind was 'W. by N.,' and I so inserted it in the answer without particularly considering the effect of the averment in relation to the course of the bark. The proof was that the steam-ship was moving at the rate of about 11 or 12 knots an hour, and that the wind was light, not exceeding a four or five knot breeze. Therefore, the judgment of the second officer as to the direction of the wind was of little or no moment, such a wind being to him of necessity apparently a head wind, or about W. by N. as the steamer was running. One of the material questions in the case raised on the argument, and submitted to the court upon the testimony, was whether the green light of the bark was open to the approaching steamer; the contention of the claimant being that the clear preponderance of the evidence was that the line of her

approach to the bark was very much more than two points abaft the beam. Indeed, this was assumed by me from the testimony of the witnesses for the libelants, as well as that of the claimant, confirmed and illustrated by the diagram used by the libelants on the trial, which is a part of the evidence in this cause. Therefore, neither the precise course of the steamer nor the precise course of the bark seem to me in that aspect of the case to be material, inasmuch as the facts stated by the witnesses for the libelants in connection with the diagram were inconsistent with any other view than that the approach of the steamer was all the while from a point far abaft two points abaft the beam; but to my surprise the opinion of the court upon the question of the line on which the steamer approached the bark gives almost a conclusive effect to the statement of the steamer's course, and of the direction of the wind as controlling the course of the bark as given in the answer. The amended answer now proposed to be filed in this court differs in its statement of fact from the former answer in no material respect, except in correcting the aforesaid mistake as to the steamer's course, and in stating that the wind was about W. by S., instead of about W. by N. The claimant's proctors desire to raise in this court the same question raised below—whether the green light of the bark was open to the approaching steamer—disembarrassed of the aforesaid mistaken and erroneous averment of the former answer as to the course of the steamer, and the admission contained in the former answer as to the course of the wind, which was based upon no certain knowledge, and is proved by the evidence to have been incorrect. I verily believe, and we expect to be able to satisfy this court, that the amended answer more truly states the facts of the case as shown upon the trial than the former answer, and the amended answer sets up no new point by way of defense not argued and relied upon in the trial in the district court, the amendments being in accordance with what I conceive to be the real facts as clearly proved by the evidence."

The brief submitted to the district court on the part of the claimant contended that the course of the steamer was W. by N. ½ N.; that the light of the steamer was seen by the man at the wheel of the bark four or five minutes before the collision, and more than long enough to have enabled the steamer to clear the bark, had she discovered her; that it was the duty of the bark to have had a light ready to be shown, and to have instantly exhibited it over her stern or starboard quarter; that if she had done so the collision would have been avoided; that it was extremely difficult, if not impossible, for the steamer to discover the hull or sails of the bark till within too short a distance of her to clear her; that the green light of the bark was, necessarily, invisible to the steamer until she had got so near as to render a collision inevitable; that after the steamer discovered the bark's green light it was impossible for her to have gone astern of the bark; that the speed of the steamer was not measurable in

the state of the weather; and that she was, in fact, approaching the bark at a rate of less than eight miles an hour.

The proctor for the libelants, in connection with his brief in the district court, presented diagrams intended to show that whether the course of the steamer was W. ½ N., while that of the bark was N. ½ W., or that of the steamer was W. by N. ¼ N., while that of the bark was N. by W., the speed in both cases being, of the steamer, 12 miles an hour, and of the bark, 4 miles an hour, and the wind in both cases being W. by N., the green light of the bark was always in the view of the steamer, and its range towards the steamer always in front of abeam of the bark on her starboard side.

In reply to such brief and diagrams the proctor for the claimant contended, in a brief submitted to the district court, that the diagrams were inconsistent with the fact testified to by witnesses for the libelants, on the deck of the bark, that they saw all three of the lights of the steamer; that, according to the diagrams, they could not have seen her green light at any time when she was more than her length off; that the testimony of the witnesses for the libelants as to the line of the steamer's approach, as drawn by them on libelants' Exhibit A, in giving their depositions, was inconsistent with the theory contained in said diagrams as to the line of approach to the steamer; that such theory was inconsistent with the fact that several of the bark's crew saved themselves by climbing up the anchor-stock of the steamer, 25 feet abaft her stern on her port side, and with the testimony of the witnesses for the libelants that the steamer came up with and along-side of the bark at an acute angle; that if the steamer had been coming on a line ahead of a line two points abaft the beam of the bark, for the time the witnesses of the bark indicate, she would have gone astern of the bark; that if the green light of the bark had been open to the steamer for a mile or half a mile, as indicated by said diagrams, it was incredible that it should not have been seen from the steamer, and, when it was suddenly discovered, it would not have been seen, as it was, as a mere shine or halo, the color of which could not be made out; that the libel nowhere states that the green light of the bark was open to the steamer, or that the steamer might or should have seen it; that the averments of the libel as to the manner in which the steamer presented her lights to the view of those on the bark, and as to the part of the bark for which she was coming, show that she was overtaking the bark on a line making an acute angle with the course of the bark; that the alleged presentation to the bark of the three lights of the steamer was before the steamer had dis-

covered the bark, and therefore before the steamer had changed her wheel; that it was therefore obvious, as the bark was moving at a speed of four miles per hour, that if the steamer presented her three lights at the time testified to by the witnesses from the bark, she would have crossed the bark's line astern of the bark, unless she was approaching her at an acute angle; or, in other words, if the steamer, when first seen from the bark, was, as the libel states, coming for the stern part of the starboard quarter of the bark, she must have crossed the line on which the bark was sailing a considerable distance astern of the bark, unless she was coming at an angle much more acute than that made by the course of the bark, and a line drawn two points abaft her beam; that as, on the theory of the diagrams, the witnesses for the libelants testified untruly in saying that they saw the green light of the steamer as well as the other two lights immediately on discovering her, their testimony as to the course of the bark was not to be relied on; that the whole theory of the case as made by the witnesses for the libelants, and as illustrated by them on libelants' Exhibit A, proceeded on the view that the steamer was coming up with the bark from a point far astern of the points abaft her beam; and that to decide the case on the new theory presented by the argumentative diagrams would be to contradict the fourth article of the libel, and the testimony of the witnesses for the libelants, to discredit libelants' Exhibit A, used and sworn to by those witnesses before the commissioner, and to demonstrate that their statements that they ever saw the green light of the steamer were untrue.

The district judge, in his opinion, holds that the steamer was not approaching the bark from aft on a course that rendered it impossible for her to see the green light of the bark sooner than she did. He so holds because the answer states that the course of the steamer was W. by N. ½ W., (that is W. ½ N.,) and also states that the wind was W. by N., and also states that the speed of the steamer was between eleven and twelve knots an hour, and because on those facts, and the facts that the speed of the bark was from four to five knots an hour, and that she was bound to the westward and was sailing close on the wind, so that her course must have been from N. to N. by W., her green light, which was so arranged as to show two points abaft the beam, must have been visible to the steamer a considerable period of time before it was discovered by those in charge of her, and in abundant time to enable her to avoid the bark.

The application to amend the answer is opposed by the libelants, on an affidavit made by their proctor stating that in his oral argu-

ment before the district court he laid great stress on the direction of the wind and the course of the steamer alleged in the answer; that in his printed brief, afterwards submitted, he discussed the course of the steamer and argued that her correct course was that alleged in the answer; that this brief was replied to by the proctor for the claimant; that after the interlocutory decree was entered a commission was, in September, 1881, issued to Norway to prove the damages, and was executed and returned in December, 1881; that the purpose of amending the answer is to defeat, if possible, the findings of the district judge as to the relative courses of the vessel, the direction of the wind, the character of the lights seen on the bark by those on the steamer, and other particulars; that all the witnesses on both sides agree in fixing the wind as W. by N., and there is not a witness in the case who says that the wind was W. by S; that as to the course of the steamer the claimant has had all the information it now has since the evidence of the witnesses for the claim was taken in September, 1879; that no suggestion or application has ever been made until the present time to change the allegations of the answer as to the course of the steamer and the direction of the wind; that the witnesses for the claimant do not agree as to the course of the steamer; that the district judge having taken the course of the steamer to be that alleged in the answer, the claimant acquiesced therein while the case remained in the district court; and that to permit the amended answer to be now filed would be a hardship to the libelants, whose witnesses have scattered to different parts of the world, rendering it impossible to secure their attendance again.

It is plain that the averments of the answer as to the direction of the wind and the course of the steamer were held by the district judge to be conclusive to show that the green light of the bark was open to the steamer. But if the course of the steamer was W. by N. ¼ N., and the wind was as far to the southward as W. by S., and the course of the bark was as far to the westward as N. W. by N., or six points from the wind, then the course of the steamer was three points and three-quarters from the course of the bark, or at an angle of a little over 42 deg. to it. If the bark's course was N. W. by N., her green light showing two points abaft her beam on the starboard side would not be visible to the steamer heading W. by N. ¼ N. Even if the course of the bark was N. by W., the approach of the steamer, if she was heading W. by N. ¼ N., was from a direction a quarter of a point abaft of a line running from the bark two points abaft her beam, and thus from a direction almost coincident with the line of the green

light of the bark, so as to make necessary only a slight variation either way to throw the steamer on the dark side or the light side of that line. In fact, with the steamer heading W. by N. ¼ N., any heading of the bark to the westward of N. ¾ W. would make her green light invisible to the steamer.

A careful examination of the evidence on both sides has led me to the conclusion that the steamer approached the bark on a line more than two points abaft the beam of the bark, so that the green light of the bark was not visible to the steamer. When Larsen, the man at the wheel of the bark, took her wheel, the wheelsman whom he relieved gave him the course, not by the compass, but "by the wind;" that is, as close to the wind as the bark would lie and sail with her sails full. He is asked, in that connection, if he noticed her course by compass, and he says "Yes," and that she was "N. by W. and N. ½ W. there between." This was apparently when he first took the wheel, and he does not say that he looked at the compass again. He had no occasion to do so, as he was steering by the wind. He says that the wind was about W. by N.

The concurring testimony of all the witnesses for the libelants is that the lights of the steamer appeared from abaft the starboard beam of the bark. Anderson marks the direction of the lights, and Larsen marks the direction of the blow. These lines make an acute angle of not over three points with the course of the bark. The angle of approach and the angle of collision were about the same, for the bark did not change her course, and the porting of the steamer's wheel did not materially change her course. All the evidence from the bark shows that the steamer approached at an acute angle on the quarter from aft. As all her lights were visible to the bark for several minutes, if she had been appproaching at near a right angle she would have gone astern of the bark. The bark must have been crossing obliquely the course of the steamer, ahead of the steamer, in the path in which all the steamer's lights were visible. The inevitable conclusion to be drawn from the many concurring facts testified to by the witnesses from the bark outweighs the statement of Larsen as to his observation of the compass course of the bark.

The evidence from the steamer shows that the second and fourth officers on the bridge, and two lookouts at their posts forward, were looking out ahead during the last four or five minutes before the collision, and that no one of them saw any light on the bark. It certainly would have been seen by some one of them if it had been within

range, unless all were negligent and inattentive. The evidence shows that they were not inattentive, and yet they saw nothing of the light until the steamer was so close upon the bark that the collision happened, although the most prompt measures to avoid it were immediately taken by the steamer. What was seen when it was seen was not the light distinct and green, but only a shimmer or glimmer or sheen or halo, without clear impress of color. The second officer instantly ordered the helm hard a-port and blew the whistle. Four of the men on the bark heard the whistle just before the collision, and some time after they had first seen the lights of the steamer. The conclusion from the whole testimony as to what Zimmering, the starboard-bow lookout, did is, that he reported the light by singing out from forward and not by going to the bridge, just after the whistle was blown. That the light was first discovered from the bridge is consistent with the fact that it was a feeble sheen, hovering on the edge of the line of possible vision, and just coming into view beyond it, as the steamer moved onward, and more quickly visible from an elevation. To hold that the steamer was approaching from forward of abeam, requires it to be held that the four men of the steamer failed to see the green light of the bark, plainly visible a long distance off, and failed to observe it at all until a collision with the bark was unavoidable. This latter conclusion also results from holding the claimant to the averments in the answer as to the direction of the wind, involving the course of about N. by W. for the bark, without permitting such amendments of the answer as will accord with the proved facts, and yet will not change the issues actually tried in the court below on the evidence, and presented for trial in this court on the same evidence.

On all the testimony from both vessels, the conclusion is irresistible and undoubting, that the steamer was approaching on a line more than two points abaft the starboard beam of the bark, so that her green light was not open, and there was nothing to indicate her presence till her sails or hull should be seen, or the steamer should run beyond the limit-line of the light. It follows inevitably that the statement in the answer as to the direction of the wind is erroneous. None of the witnesses from the bark make out that with the light breeze at the time the bark was sailing on a course within eight points of the wind. To hide her green light from the steamer, with the course of the steamer W. by N. $\frac{1}{4}$ N., as it clearly was, the course of the bark was not to the northward of N. by W. W. by S. is eight points from N. by W. The aim of the bark was to sail as close to

the wind as she could, bound as she was to the westward, and any heading by her to the westward of N. by W., by her sailing closer to the wind than eight points, or by the wind drawing more away, tended to hide her green light more certainly from the steamer. It was an easy matter for those on the steamer to mistake the direction of the light wind. To the steamer, with its speed, the light wind would seem nearly ahead. The libel states no more definite direction of the wind than that it was "from the westward."

Criticism is made on the non-production as a witness of the port lookout on the steamer; but it is shown that he became insane and was discharged before the witnesses from the steamer were examined.

The case is a proper one for allowing the proposed amended answer to be filed. The statement of the answer as to the course of the steamer is shown to have been an accidental error. Its statement as to the wind should be allowed to be corrected as proposed, in view of all the established facts. The other amendments in the answer accord with the facts proved, and do not change the issues tried in the court below. It is not claimed that the libelants have any new or different testimony to produce. The witnesses on both sides were none of them examined before the district judge. The deposition of the fourth officer of the steamer, not produced before the district court, but produced before this court, strengthens the case for the steamer. In view of the conclusive force which the district judge gave to the averments and admissions in the answer, the case, on the amended answer and the evidence, does not fall within the principle of the cases where the dispute being one of fact, and the evidence being conflicting, and the witnesses having been examined in the presence of the district judge, the circuit court will not disturb the finding below.

The bark was clearly in fault in not making known her presence to the approaching steamer. Those on the bark saw the three lights of the steamer advancing in a direction and with a persistence indicating that the steamer did not and could not see the green light of the bark, or be aware of the presence of the bark. Under these circumstances it was the duty of the bark to indicate her presence by some means. The exhibition of a light flashing or flaming up would have done so. Other means might have done so. Any proper means used seasonably after those on the bark saw the steamer approaching would have arrested the course of the steamer or have enabled her to avoid the bark.

The speed of the steamer was not improper when the weather was such that proper lights could be seen from one to two miles off when within range. The steamer had a right to assume that a vessel which she was overtaking, and whose lights were invisible to her, and who could see her advancing lights, would make known her presence in season for a steamer going at not more than ordinary ocean speed in such weather to avoid a collision. The order of hard a-port on the steamer produced no material change in the course of the steamer, and did not contribute to the collision. At the distance off at which the steamer ported there was clearly no chance of avoiding the collision by starboarding, and in view of the angle at which the steamer was approaching there was a chance of less disaster to the bark by reducing that angle by porting than by increasing it by starboarding. The steamer stopped and reversed instantly on seeing what there was of the light, and that was seen as soon as could be seen.

The libel must be dismissed, with costs to the claimant in both courts.

Motion for rehearing having been made, the following opinion was handed down:

C. Van Santvoord and *Henry T. Wing*, for libelants.

W. G. Choate, for claimant.

BLATCHFORD, Justice. I have carefully reviewed this case and see no reason for altering the findings and conclusions and decision heretofore made in it by me. [After commenting in detail upon the fresh findings of fact and conclusions of law proposed by the libelants, the court goes on to say:] It is a proper conclusion, from all the testimony in the case, that the seeing of the light of the bark, the order to hard a-port, the whistle, and the order to stop and back at full speed, followed each other in immediate and rapid succession, as rapidly as they could be given, and in the above order. There was no interval between the whistle and the order to go full speed astern. There was no interval between the order to go half speed astern and to go full speed astern. * * *

The suggestion that the purport and effect of the evidence were misapprehended by the court from want of proper reference to the testimony, does not, on full consideration, seem to be a correct observation, and it does injustice to those who represented the libelants as counsel on the first hearing in this court. The case could not

have been presented with more thoroughness and ability on the part of the libelants than it was then presented, and any failure of success then was because the case was not with the libelants, and not because of any incompetency or inadequacy of counsel.

It is not perceived that the court erred in deciding that the course of the bark was further to the westward than N. by W. The course of the steamer being fixed at W. by N. ¼ N., the course of the bark depended on the direction of the wind. What her course was is to be determined by all the evidence bearing on the point as to whether the line of approach of the steamer was a line more than two points abaft of the starboard beam of the bark, as well as by the direct evidence that the course of the bark was so and so, and that the direction of the wind was so and so. Nor is it perceived that the court erred in deciding that the line of approach of the steamer was such as to shut out the green light of the bark. No foundation is seen for the theory that the steamer circled round to the northward, and followed up the bark till she overtook her. The porting of the wheel of the steamer hard a-port did not change her course to any material extent before the collision. The vessels were very close together before the light of the bark was seen at all by those on the steamer. The evidence shows that there would have been no different result if the order to reverse at full speed had preceded the order to hard a-port. Moreover, as the concealment of the bark by herself from the steamer till the flash of the bark's light appeared created a necessity for the steamer to suddenly determine what the light was, and what to do in the emergency, when the vessels were very close together; and as the officer in charge of the steamer believed that the light was the white light of a steamer, and acted on that belief, and so ported to the light seen on his port bow, his error of judgment, if any there was in so porting before reversing, cannot be imputed to the steamer as a fault.

The evidence is that four of the men on the bark heard the steamer's whistle just before the collision, and that they heard that whistle some time after they had first seen the steamer's lights; and, as that whistle marks the time when the bark's light was first seen from the steamer, there is no foundation for the view that the steamer saw the light of the bark before the bark saw the lights of the steamer.

No error is perceived in the conclusion that there was a proper lookout kept on the steamer. All the questions involved in this case, which seem to have a bearing on the issues, were so fully considered

in the decision before filed, that it is not deemed necessary to enlarge on them. The application for a rehearing is denied.

September 9, 1882.

See same case in district court, 8 FED. REP. 172.

CASE OF THE CHINESE CABIN WAITER.

In re AH SING.

(*Circuit Court, D. California.* August, 1882.)

1. CHINESE LABORERS—PROHIBITION—ACT OF CONGRESS CONSTRUED.

 The prohibition of the act of congress upon any master of a vessel bringing into the United States any Chinese laborer from any foreign port or place, means, from bringing any Chinese laborer embarking at a foreign port or place, and does not apply to the bringing of a laborer already on board of the vessel when it touches at a foreign port.

2. SAME—TEMPORARY ABSENCE—RIGHT TO RETURN.

 The object of the prohibitory act of congress was to prevent the further immigration of Chinese laborers to the United States, not to expel those already here. It even provides for the return of such laborers, leaving for a temporary period, upon their obtaining certificates of identification.

3. AMERICAN VESSEL—PART OF UNITED STATES TERRITORY.

 A person shipping on an American vessel as one of the crew is within the jurisdiction of the United States. An American vessel is deemed a part of the territory of the state within which its home port is situated and as such a part of the territory of the United States.

On *Habeas Corpus.*

Philip Teare, Dist. Atty.

McAllister & Bergin, for petitioner.

Milton Andros, for captain.

Before FIELD, Justice, and SAWYER, C. J.

FIELD, Justice. The act of congress of May 6, 1882, "to execute certain treaty stipulations relating to Chinese," declares in its first section that after the expiration of 90 days from its passage, and for the period of 10 years, "the coming of Chinese laborers to the United States" is suspended, and that during such suspension "it shall not be lawful for any laborer to come, or having so come after the expiration of said 90 days, to remain within the United States."

Its second section enacts:

"That the master of any vessel who shall knowingly bring within the United States on such vessel, and land or permit to be landed, any Chinese laborer *from any foreign port or place*, shall be deemed guilty of a misde-

meanor, and, on conviction thereof, shall be punished by a fine of not more than $500 for each and every such Chinese laborer so brought, and also be imprisoned for a term not exceeding one year."

The third section declares that these provisions shall not apply to Chinese laborers who were in the United States on the seventeenth of November, 1880; or who shall have come before the expiration of 90 days from the passage of the act, and who shall produce to the master of the vessel and the collector of the port certain prescribed certificates of identification, containing the name, age, occupation, last place of business, and physical marks or peculiarities of the laborer.

Section 8 requires the master of a vessel arriving from any foreign port or place, at the time he delivers a manifest of the cargo or reports the entry of his vessel, to deliver to the collector of the district a separate list of all Chinese passengers "*taken on board his vessel at any foreign port or place*, and all such passengers on board the vessel at that time."

Other sections contain various provisions to secure the enforcement and prevent the evasion of the clauses prohibiting the immigration of Chinese laborers; but they are not material to the disposition of the question presented on this application.

The petitioner is a subject of the emperor of China, and alleges that he came to California six years ago, and has since resided in the state; that for some months past he has been employed as a seaman on board the steam-ship City of Sydney, which departed from the port of San Francisco on the eighth of May last, bound on a voyage to Australia, and returned to this port on the eighth of this month; that since its return the captain has refused to allow him to land, and detains him on board, in contravention of the constitution of the United States, and of the treaty between this country and China.

The captain of the steam-ship returns that he detains the petitioner on board of his vessel, and refuses to allow him to land, by reason of the prohibitory and punitive provisions of the act of congress which we have cited. He also sets forth all the facts connected with the employment of the petitioner, stating that he shipped on board of the steam-ship at the port of San Francisco on the fifth of May last as a cabin waiter; that the vessel is employed in carrying the mails of the United States and of certain foreign powers, as well as passengers and merchandise, between the port of San Francisco and the ports of Sydney, in New South Wales, of Auckland, in New Zealand, and Honolulu, in the Hawaiian Islands; that he signed shipping articles binding himself to go as one of the crew on a voyage from San

Francisco to Sydney and back, and went on board of the vessel in pursuance of the contract; that the vessel departed from this port on the eighth of May last, arrived at Sydney on the fourth of June, left Sydney on the thirteenth of July, and arrived at San Francisco on the eighth of this month, having touched at the ports of Auckland, in New Zealand, and Honolulu, in the Hawaiian Islands, the petitioner being all the time on board in his capacity as cabin waiter under his contract.

The question presented is whether the petitioner is within the class of laborers whose landing in the United States is prohibited by the act of congress. The 90 days after its passage expired on the fourth of August. The captain of the vessel is desirous of obeying the law, and is not actuated by any personal feeling in restraining the petitioner. He is also under this embarassment: he is bound by his contract to return the petitioner to the port of shipment, and this implies that he shall land him. The detention, if unlawful, renders him liable to both civil and criminal prosecution. He therefore asks the direction of the court as to his duty; and, with the consent of his counsel, the district attorney has been heard in support of his action.

We do not, however, find any difficulty in arriving at the meaning of the act. Its provisions are plain. The master of a vessel is prohibited from bringing within the United States, and landing or permitting to be landed, any Chinese laborer *from any foreign port or place;* and that means, from bringing any Chinese laborer embarking at a foreign port or place. The prohibition does not apply to the bringing of a laborer already on board of the vessel when it touches at a foreign port. When we speak of merchandise as brought from a foreign port, the port of shipment is always understood, and not any intermediate port at which the vessel bringing the goods may have stopped. This is the common understanding of the terms by merchants, and is the interpretation given to them by the courts. They must be held to have the same meaning when used with reference to the importation of persons from a foreign port, as when used with reference to the importation of goods. The eighth section of the act confirms this view, if it needed any confirmation; that requires the master of the vessel to deliver a list of Chinese passengers "*taken on board* his vessel at any foreign port or place." It is the laborers thus taken on board that the master is prohibited from bringing into the United States.

Any other construction would compel a master of an American vessel, leaving a port of the United States with a Chinese seamen or

waiter, to send him adrift at a foreign port at which the vessel might touch, and prohibit the master from bringing him back in accordance with the bond which he is required by existing law to execute. Rev. St. § 4576.

The object of the act of congress was to prevent the further immigration of Chinese laborers to the United States, not to expel those already here. It even provides for the return of such laborers leaving for a temporary period, upon their obtaining certificates of identification. It was deemed wise policy to prevent the coming among us of a class of persons who, by their dissimilarity of manners, habits, religion, and physical characteristics cannot assimilate with our people, but must forever remain a distinct race, creating by their presence enmities and conflicts, disturbing to the peace and injurious to the interests of the country. But it was not thought that the few thousands now here, scattered, as they must soon be, throughout all the states, would sensibly disturb our peace or affect our civilization.

And in this connection it should not be overlooked that the petitioner, while on board the steamship as one of its crew, was within the jurisdiction of the United States, at all times under their protection, and amenable to their laws. An American vessel is deemed to be a part of the territory of the state within which its home port is situated, and as such a part of the territory of the United States. The rights of its crew are measured by the laws of its state or nation, and their contracts are enforced by its tribunals. *Crapo* v. *Kelly*, 16 Wall. 610. A foreign jurisdiction, even for offenses committed by her crew on board of her in a foreign port, except where the offense is against the law of nations, does not attach unless the acts affect the peace of the port, or persons disconnected from the vessel. 8 Op. Atty. Gen. 73. It would be, therefore, a singular circumstance in the legislation of the country if the act of congress had been so framed that a subject of China, by his temporary employment on an American vessel sailing from an American port, was deprived of the right of residence acquired under the treaty with his country. Only the clearest language would justify such a conclusion. Nothing in the act requires it. Whenever the United States intend to eject any person from their jurisdiction they will undoubtedly express their purpose in plain terms.

The district attorney urges against the construction we give that it will open the door to evasions of the law, contending that it will be impossible to prevent Chinese in a foreign port from taking the place

of those shipped here, unless certificates of identification, mentioned in the act, be exacted from them. The answer to this position is, that for importing other laborers by such evasions, equally as for importing prohibited laborers without any attempt to substitute them for others, the law has provided a penalty; and it would be impossible for the master violating the law to escape detection and punishment. Independently of this consideration, the law touching the shipment of crews requires that a list of the men shall be furnished to the collector by the master of every vessel, which shall contain substantially the same particulars of description of every one, which the act of congress exacts in the certificate of identification of the Chinese laborer, who may wish to return to the country. But if the act of congress were defective, as we do not think it is, in providing the necessary means of identifying Chinese laborers shipping as seamen, the defect would not change the plain meaning of the sections cited.

We are of opinion that the petitioner is not within the prohibition of the act of congress, and that his restraint by the captain of the steamship is unlawful. He must therefore be discharged.

Ordered accordingly.

NOTE. The bond required by this section does not embrace the case of a vessel sold in a foreign port, and which does not return to the United States. *Montell* v. *U. S.* Taney, 24. The act applies only to a case of voluntary sale, and not a sale rendered necessary by misfortune. *The Dawn*, 2 Ware, 121. Nor does it apply to cases where the seaman is lawfully separated from the vessel, or is separated from her without fault of the master or owner. *Montell* v. *U. S.* Taney, 24. It applies to those cases only where the vessel returns to the United States; to cases where the seamen continue subject to the lawful authority of the master, and where it is in his power to bring them home. Id. Whether the bond is intended to be given for seamen, even if shipped in the United States, who by the terms of their engagement are entitled to be discharged abroad, *quære*. *U. S.* v. *Parsons*, 1 Low. 107. The statute must be construed with the aid of its other parts, and it cannot be held to require the master to return to the United States foreign seamen shipped at their own home for a particular cruise, the voyage ending where it began, and discharging there according to the terms of their contract, though without the consent of the consul. *U. S.* v. *Parsons*, 1 Low. 107. Seamen discharged from an American vessel in a foreign port may bring an action in admiralty against her owner to recover their portion of the three-months' wages required to be paid by act of congress, (*Dustin* v. *Murray*, 5 Ben. 10;) and it is immaterial what were the terms of the agreement signed by them, or whether the discharge was at the termination of their agreement or before its termination. (*Tingle* v. *Tucker*, Abb. Adm. 519;) nor is it material who are the particular owners of the vessel, provided she is owned by citizens of the United States,

(*U. S.* v. *Harwood*, 3 Sumn. 14.) But an action can be maintained by a seaman discharged in a foreign port with his own consent, (*Ogden* v. *Cox*, 12 Johns. 143;) but the certificate of the consul, to excuse the master, states that he was left in the foreign port with his consent. *U. S.* v. *Barstow*, 1 Paine, 336. A shipmaster sued on his bond may give parol evidence of a consul's certificate authorizing the discharge of one of his crew, on satisfactory proof that such paper was once in existence and has been lost. *U. S.* v. *Parsons*, 1 Low. 107. Where a master by deceit or collusion procures the discharge of a seaman at a foreign port, he can claim no benefit or immunity under it. *Tingle* v. *Tucker*, Abb. Adm. 519. He cannot discharge seamen abroad unless the vessel is condemned or sold or wrecked. *Burke* v. *Buttman*, 1 Low. 191. Where the voyage is broken up without necessity on a foreign voyage, and seamen are discharged without payment of the three-months' wages, the court will, on a libel of the seamen, compel the owner to pay such wages,—two-thirds to the seamen and one-third for the use of the United States. *Pool* v. *Welch*, Gilp. 193. The seamen are entitled, on a voyage broken up in a foreign country, to wages till their return, and are not bound to work their way back as seamen on the vessel belonging to the same owner. *Burke* v. *Buttman*, 1 Low. 19. In the absence of a contract the master is under an implied contract to return the seamen to the port of shipment. *Worth* v. *The Lioness No.* 2, 2 McCrary, 208. It may be doubted whether the intention of congress was to require or permit the payment to be made elsewhere than to the consul at the place of discharge. *Pool* v. *Welch*, Gilp. 193. Generally, when the performance of a contract has become impossible by a fortuitous event, the parties are discharged from its obligations. *The Dawn*, 2 Ware, 121.—[ED.

CASE OF THE CHINESE LABORERS ON SHIPBOARD.

In re AH TIE and others.

(*Circuit Court, D. California.* August, 1882.)

1. CHINESE LABORERS—IMMIGRATION—PROHIBITION.

   The prohibition upon the master of a vessel, contained in the act of congress restraining the immigration of Chinese laborers, from bringing within the United States, from any foreign port or place, any Chinese laborer, was intended to prevent the importation of such laborers from the foreign port or place,—laborers who there embarked on the vessel,—and does not apply to bringing a Chinese laborer already on board his vessel when touching at a foreign port or place.

   Matter of Ah Sing, ante, 286, affirmed.

2. SEAMEN—ON AMERICAN VESSEL.

   While on board an American vessel a Chinese laborer is within the jurisdiction of the United States, and does not lose by his employment the right of residence here previously acquired under the treaty with China.

   Matter of Ah Sing, ante, 286, affirmed.

3. SAME—NOT CHANGED BY TEMPORARY ABSENCE.

The *status* of a person employed on an American vessel is not changed by the fact that he is permitted by the captain to land for a few hours at a foreign port or place, and a Chinese laborer on an American vessel cannot be held to lose his residence here, so as to come within the purview of the prohibitory act of congress, by a temporary entry upon a foreign country.

4. STATUTORY CONSTRUCTION.

All laws should be so construed, if possible, as to avoid an unjust or an absurd conclusion.

McAllister & Bergin, for petitioners.

Milton Andros, for the captain.

Before FIELD, Justice, and SAWYER, C. J.

FIELD, Justice. The petitioners are part of the crew of the American steam-ship City of Sydney. Their case is substantially like that of Ah Sing, the Chinese cabin waiter of the same vessel, recently before us on *habeas corpus*. It differs in only one particular. Like him, they are Chinese, and like him they shipped on board of the steam-ship on the fifth of May last, signing at the time articles binding themselves to go as part of its crew on a voyage from San Francisco to Sydney and back. One of the petitioners served on board as a scullion; the others, as waiters or pantrymen. The vessel departed from this port on the eighth of May, arrived at Sydney on the fourth of June, left Sydney on the fourteenth of July, and arrived here on the eighth inst., having touched at the ports of Auckland, in New Zealand, and Honolulu, in the Hawaiian Islands. At Sydney the petitioners, on several occasions, by the written permission of the captain, went on shore and remained a few hours, without, however, severing or intending to sever their connection with the vessel as part of its crew. This fact is the only one distinguishing this case from that of Ah Sing. We there held that the prohibition upon the master of a vessel, contained in the act of congress, to bring within the United States from a foreign port or place any Chinese laborer, was intended to prevent the importation of such laborers from the foreign port or place,—laborers who there embarked on the vessel,—and did not apply to his bringing a Chinese laborer already on board of his vessel touching at the foreign port or place. We also held that while on board the American vessel the laborer was within the jurisdiction of the United States, and did not lose, by his employment, the right of residence here previously acquired under the treaty with his country.

The *status* of the petitioners and their relation to the vessel were not changed in any respect by the fact that they were permitted by

the captain to land for a few hours at the port of Sydney. They were bound, by their contract of shipment, to return with the vessel; and the captain was bound to bring them back. He could not have forced them ashore in a foreign port; nor could he have abandoned them there. Had he done either of these things, he would have rendered himself liable to criminal prosecution. An act of congress passed more than half a century ago, and re-enacted in the Revised Statutes, declares that "every master or commander of any vessel, belonging in whole or in part to any citizen of the United States, who, during his being abroad, maliciously, and without justifiable cause, forces an officer or mariner of such vessel on shore in order to leave him behind in any foreign port or place, or refuses to bring home again all such officers and mariners of such vessel whom he carried out with him, as are in a condition to return and willing to return when he is ready to proceed on his homeward voyage, shall be punished" by fine and imprisonment. The fine may extend to $500, and the imprisonment to six months. Rev. St. § 5363. The terms "officers and mariners," here used, apply to all persons, other than the captain, employed under shipping articles on the vessel in any capacity.

In *U. S.* v. *Coffin*, 1 Sumn. 394, Judge Story was called upon to construe this act, and he held that the "home" referred to was not the home of any seaman, native or foreign, but the home port of the ship for the voyage.

In another case (*Matthews* v. *Offley*, 3 Sumn. 125) the same distinguished judge had occasion to consider the circumstances under which a foreign seaman, who had acquired a residence in the United States, and had been engaged in the merchant service, could be deemed to have abandoned that service, so as to justify the captain of another vessel in refusing to bring him home from a foreign port as a destitute seaman, by direction of the consul; and the judge said that some overt act on the seaman's part, such as engaging in a foreign service, or resuming his original native character, or disowning his American character and domicile, seemed indispensable to rebut the presumption that he still attached himself to the American service. Something equally indicative of an intention on the part of a Chinese laborer who had shipped on an American vessel as one of its crew in an American port, to abandon the service of the ship and his residence in the United States, would seem to be necessary to justify the master in refusing to bring him back. The

law of congress as to the duty of the master in this particular has not been, in terms, repealed by the act restraining the immigration of Chinese laborers, and the purpose of the latter act does not require us to hold that the former is repealed by implication. A Chinese laborer on an American vessel cannot be held to lose his residence here, so as to come within the purview of the act, by such temporary entry upon a foreign country as may be caused by the arrival of the vessel on her outward voyage at her port of destination, or her touching at any intermediate port in going or returning, or her putting into a foreign port in stress of weather. And we should hesitate to say that it would be lost by the laborer passing through a foreign country in going to different parts of the United States by any of the direct routes, though we are told by the counsel of the respondent that a Chinese laborer, having taken a ticket by the overland railroad from this place to New York, by the Central Michigan route, which passes from Detroit to Niagara Falls through Canada, was stopped at Niagara and sent back, as within the prohibition of the act of congress, and on his attempting to retrace his steps was again stopped at Detroit. A construction which would justify such a proceeding cannot fail to bring odium upon the act, and invite efforts for its repeal. The wisdom of its enactment will be better vindicated by a construction less repellant to our sense of justice and right.

All laws should be so construed, if possible, as to avoid an unjust or an absurd conclusion. "General terms," said the supreme court, in a case before it, "should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter." *U. S.* v. *Kirby*, 7 Wall. 482. So the judges of England construed the law which enacted that a prisoner breaking prison should be deemed guilty of felony, holding that it did not apply to one breaking out when the prison was on fire, observing that the prisoner was "not to be hanged because he would not stay to be burnt." And in illustration of this doctrine the construction given to the Bolognian law against drawing blood in the street is often cited. That law enacted that whoever thus drew blood should be punished with the utmost severity, but the courts held that it did not extend to the surgeon who opened the vein of a person falling down in the street in

a fit. The application sought to be made of that law to the surgeon was hardly less absurd than some of the applications which, without much reflection, are sought to be made of the act of congress.

The petitioners must be discharged. Ordered accordingly.

The Whistler.

(*District Court, D. Oregon.* August 31, 1882.)

1. Pleadings.

New matter in an answer constituting a defensive allegation should be articled and pleaded separately, and not blended with the response to any article of the libel.

2. Exceptions.

Exceptions to an answer for insufficiency and impertinence are taken for entirely different causes, and therefore they ought not to be taken to the same matter, either conjunctively or disjunctively.

3. Pilot Service—Place of Tender of.

A state may permit or require its pilots to tender their services to inward-bound vessels at a greater distance from the shore than three miles, or the outward limit of the pilot ground.

4. Same—Offer of, when Sufficient.

The bark Whistler was approaching the mouth of the Columbia river with intent to enter and load there as soon as one of the three pilot tugs stationed there should come out to her without orders to go elsewhere, and being met by one of said tugs, without such orders, she was taken in tow thereby, and went in; but on the day before, and while she was standing off and on about 30 miles from the bar, she was hailed by an Oregon schooner pilot, who tendered his services to pilot her in, which were refused. *Held*, that the vessel was "bound in the river," within the meaning of the statute giving full pilotage for the offer and refusal of such services, and, having afterwards gone in, the libelant became entitled to such pilotage.

Frederick R. Strong, for libelant.

John W. Whalley, for claimant.

Deady, D. J. The libelant, George W. Woods, brings this suit to enforce a lien upon the American bark Whistler for the sum of $72, for pilotage, arising, as he alleges, as follows: On March 18, 1882, the libelant, being a duly-licensed pilot under the laws of Oregon for the Columbia river below Astoria, hailed the said vessel and offered to pilot her across the bar of said river to Astoria, she being then in the open sea outside of said bar, drawing nine feet of water, and bound for said port, which offer the master of said vessel declined; but afterwards, on the same day, "entered said port" under the charge

of another pilot, by reason whereof the libelant became and is entitled to full pilotage—eight dollars per foot draught—from said vessel.

The answer of the claimant, A. M. Simpson, admits the offer and refusal of the libelant's services, but denies that the vessel was then upon the pilot ground, or bound for the port of Astoria, or that she ever entered the same, or that the libelant made the first offer to pilot her; and alleges that on March 6th the Whistler sailed from San Francisco on "a coasting voyage, bound to the mouth of the Columbia river for orders," to be there received from one of the three tugs, naming them, to the effect that he was to take his vessel to Puget Sound or into the Columbia river, and if no orders were received from either of said tugs, the vessel was to proceed to Knappton, Washington Territory, in tow of the first one that came to her, and there load with lumber for San Francisco; that when the libelant hailed the vessel "she was lying off and on about 30 miles from the mouth of the Columbia river, awaiting the arrival of one of the said tugs," and had not received orders from any of them as to "his future course;" and that on March 19th one of said tugs hailed said vessel, without orders, whereupon, in pursuance of his sailing directions, the master of the latter requested the tug to tow him to Knappton, which was done, when he loaded with lumber for San Francisco.

The libelant excepts to portions of the answer, setting them out *in extenso*, as insufficient, irrelevant, and impertinent.

The answer is not *articled*, but run together in a continuous statement, without special references to the articles of the libel to which it relates, but the portions excepted to may be briefly referred to as follows: (1) The denial that the vessel was bound to Astoria or that she entered there; (2) the allegation that she came to the mouth of the river under directions to take orders for her future course from one of the tugs; and (3) that she had not received her orders when hailed by the libelant, but entered the river afterwards in pursuance of the same and loaded with lumber at Knappton.

An exception to an answer in admirality ought to specify whether it is taken for insufficiency or impertinence. They are very different grounds, and an exception to an allegation for both causes on one *or* the other of them is not good pleading. The former is only allowed upon the ground that the answer, so far as excepted to, is not a full and explicit response to the allegation or allegations of the libel, while the latter merely raises the question of whether the answer is a response and defense to such allegation. *The California*, 1 Sawy. 465.

The first of these exceptions is not well taken, in any view of the matter. The allegations excepted to are clear and explicit, and in direct response to the answer.

If the libelant is of the opinion, as he well may be, that it is immaterial in this case whether the Whistler was bound to Astoria or did go there, so that she entered the river, he should not have alleged the fact in his libel. Having made the allegation and called upon the claimant to answer, he cannot object that it is impertinent, even if the allegation and answer are both immaterial. The only way to get rid of the matter, if it is thought desirable, is to amend the libel and omit it.

The matter embraced in the second and third exceptions is a defensive allegation, and, however sufficient as such, is liable to an exception for impertinence, because not separately pleaded, but blended with the matter in response to the libel. Id.

But the exceptions were argued by counsel without reference to this point, and will be so considered.

If the offer of the libelant to pilot the Whistler was a valid one, the liability of the vessel to him for full pilotage is not denied.

The pilot law of Oregon (Gen. Laws, 708) provides that the master of a vessel may pilot her "from outside the Columbia river bar into said river," but he shall "pay to such pilot as shall first offer his services outside of the bar full pilotage," which, by the same law, (p. 707,) is eight dollars per foot draught for the first twelve feet.

Some effect prejudicial to the offer of the libelant is attempted to be given by the answer to the fact, as therein alleged, that it was made at some distance beyond the bar—say 30 miles. No authority has been cited on the point, and but little attention paid to it on the argument. There is no provision in the Oregon law defining the limit of the bar pilot ground outwardly, further than what is implied in the use of the phrase "Columbia-river bar," (Gen. Laws, 706;) but it is implied, both from usage and the law, that a pilot may cruise beyond that, for it is provided, (Id.,) that the pilots on the bar shall keep a seaworthy boat "to cruise outside the bar," and an incoming vessel is made liable for full pilotage to the first pilot who offers his services outside of the bar." Id. 708.

While it may be that the state cannot extend the pilot ground at the mouth of the river indefinitely into the sea, and probably not further than three miles beyond the headland, it does not follow that she may not permit and require her pilots to cruise for vessels at a

much greater distance from the shore, nor that an offer of pilot service to be performed on the pilot ground, made at such distance, to a vessel bound in the river, is not valid and effective, as if made within three miles of the shore.

In *Lea* v. *Ship Alexander*, 2 Paine, 468, Mr. Justice Wayne says that the term "cruising ground" is not synonymous with "pilots' water or pilotage ground."

"By pilots' cruising ground is meant that distance out in the sea along a certain extent of coast that pilots cruise for vessels bound to ports, inlets, harbors, rivers, or bays into which a pilot may take them by his commission. By pilots' water or pilotage ground is meant the access to a bay, inlet, river, harbor, or port, beginning at the exterior point where a pilot may take leave of an outward-bound vessel, and extending to the place fixed upon by law or usage for the anchorage or mooring of inward-bound vessels."

In *Horton* v. *Smith*, 6 Ben. 264, Judge Benedict, in considering this question, says:

"It is the policy of most pilot laws to induce the pilots to make an early tender of their services to inward-bound vessels. * * * State boundaries have been sometimes considered as furnishing the outward limit, (1 Daly, 185,) although Sandy Hook pilots are sought for, and their services taken much further out than a marine league. In France it has been adjudged, in regard to vessels bound to Havre, that the pilots may board such vessels at any time or distance out, and the liability to take a pilot has been adjudged to attach to a French ship although she was at the time in English waters, as at the Downs. Cour. Cass. D. 1866, p. 303; Caumonte, Traite Pilote, 31."

The offer, in my judgment, is not insufficient on account of the place where it was made. Was the offer invalid because of the direction to the master not to enter, if he got orders by the tug to go elsewhere? I think not. The Whistler was bound in the Columbia river, subject to a contingency that never happened, and she came in. No order was received from the tug, and the vessel, in pursuance of the purpose with which she came to the bar, went into the river on the voyage in which she received the offer of pilot service from the libelant. The offer of pilot service was made upon the assumption that the vessel was then bound in the river, and also upon the contingency that she would go in. If she met orders at the mouth that turned her back, or was foundered or blown away before the pilot service was or could be performed, then the offer went for naught. But the offer having been made while the vessel was on her way to and approaching the mouth of the river with the intent to enter, unless turned away by a contingency which did not happen, to-wit, an order from the tug, and having entered in pursuance of such purpose, it

is, in my judgment, an offer of pilot service within the letter and spirit of the law, and, being refused, entitles the libelant to full pilotage.

If the law were otherwise, it would be very easy to have an understanding between coasters and the tugs at the mouth of the river by which the pilots who cruise for vessels in a pilot boat outside would be unjustly deprived of all benefit of their enterprise in hailing vessels beyond the bar, in favor of the tug pilots who wait inside in ease and safety until they are signaled by the approaching vessel. All that is necessary is to give the master directions on leaving port not to go into the river until met by a tug, and then to go in with the tug and its pilot, unless he there receives orders to the contrary—orders which he is certain not to receive, and no one ever expected he would.

Indeed, when all the circumstances are considered,—those of general notoriety as well as those set out in the pleadings,—it is difficult to avoid the conclusion that this defense is a mere preconcerted device to prevent the schooner pilots from making an effectual offer of pilot service to the Whistler before she was taken in tow by the tug, as per previous arrangement with the owners of both.

The exceptions are allowed.

GREEFE v. CORTIS.

(*District Court, E. D. New York.* July 27, 1882.)

SEAMEN—DISCOUNT OF ADVANCE SECURITY.

Where defendant did not ship the seamen, nor employ the shipping agent to ship them, nor was he owner of the vessel, nor did he know of the giving of the agreements sued on, the fact that he was authorized to collect the inward freight, and procure outward freight, and pay the ship's disbursements, upon the master's certificate, does not make him an agent who "authorized the giving of the advance security," although he paid the shipping agent's bill on which the advances were charged.

Henry Heath, for plaintiff.

McDaniel & Souther, for defendant.

BENEDICT, D. J. This is an action in which, by virtue of section 4534, Rev. St., it is sought to hold the defendant liable for the advance wages of three seamen of the ship James Aiken, upon three agreements made by a shipping agent named Haveron, which had

been indorsed to the libelant. The defendant did not ship the seamen, nor did he employ the shipping agent to ship them. He was not the owner of the vessel, nor did he know of the giving of the agreements sued on. The fact that the defendant was authorized to collect the inward freight of the vessel, and to procure for her an outward freight, and to pay the ship's disbursements upon the master's certificate, does not make him an agent who "authorized the giving of the advance security" within the meaning of the statute. Nor is he made out to be such agent by the further proof that upon the master's certificate he paid the shipping agent's bill in which the advances in question were charged.

If the defendant had employed the shipping agent to ship the men, the case would have been different.

The libel must be dismissed.

Equity—Injunction—Damages—Security.

RUSSELL *v.* FARLEY, U. S. Sup. Ct., October Term, 1881. Appeal from the circuit court of the United States for the district of Minnesota. The case was decided in the supreme court of the United States on April 3, 1882. Mr. Justice *Bradley* delivered the opinion of the court affirming the decree of the circuit court.

An appeal does not lie from an appeal in equity as to the costs merely. The circuit court of the United States is not governed in its practice in equity by the laws of the state in which it sits, but by the rules of practice prescribed by the supreme court, and by the circuit court not inconsistent therewith, and when these are silent by the practice of the high court of chancery in England when the equity rules were adopted. The courts of the United States, under the general principles and usages of equity, may impose terms or require security for damages before granting an injunction, and this power is independent of any statute. So it may relieve from or modify such terms during the progress or at the termination of the cause, and enforce or carry out the conditions imposed, or the undertakings entered into; but while the court may have the power to assess damages, yet if it has that power it is in its discretion to exercise it, or to leave the parties to their action at law.

R. S. Ashurst and T. H. Hubbard, for appellant.

Henry J. Horn, for appellee.

Cases cited in the opinion: Canter v. Amer. Ins. Co. 3 Pet. 307; Elastic Fab. Co. v. Smith, 110 U. S. 112; Marquis of Downshire v. Lady Sandys, 6 Ves. Jr. 107; Wombwell v. Belasyse, 6 Ves. Jr. 110, note; Wilkins v. Aitkin, 17 Ves. Jr. 422; Novello v. James, 5 De Gex, M. & G. 876; Bein v. Heath, 12 How. 179; Merryfield v. Jones, 2 Curt. 306.

Jurisdiction—Assignee of Chose in Action.

MARINE & RIV. PHOS., ETC., CO. *v.* BRADLEY, U. S. Sup. Ct., October Term, 1881. Appeal from the circuit court of the United States for the district of South Carolina. The decision was rendered by the supreme court of the United States on April 3, 1882. Mr. Justice *Matthews* delivered the opinion of the court affirming the decree of the circuit court.

Where the obligation sued on is a negotiable promissory note, it is excepted out of the prohibition contained in section 1 of the act of March 3. 1875, inhibiting the assignee of a chose in action to sue in cases where the assignor could not maintain a suit in the circuit court. The bond of a corporation, payable to a particular individual and not negotiable, when subsequently indorsed, becomes a new and complete contract upon a distinct consideration, and if payable to bearer is negotiable by delivery merely. It is a negotiable note within the meaning of the law merchant, and according to the law of the place of the contract, notwithstanding it is an instrument under seal. Where the delivery of the bond was a transfer of the legal title, and it is nowhere shown that the party transferring could not have maintained action upon the bond, the transfer will not be deemed collusive for the purpose of conferring jurisdiction on the circuit court. To confer or oust jurisdiction, when it depends on citizenship, the necessary facts must be distinctly alleged and admitted or proved. Where the statute prescribes no form of action, the jurisdiction may be regarded as concurrent at law and in equity, according to the nature of the relief made necessary by the circumstances upon which the right arises.

A. G. Magrath and Samuel Lord, Jr., for appellants.

William E. Earle and James B. Campbell, for appellee.

Cases cited in the opinion: Langston v. South Car. R. Co. 2 S. C. 251; Bank v. Railroad Co. 5 S. C. 158; Bond Debt Cases, 12 S. C. 250; Smith v. Kernochen, 7 How. 216; Jones v. League, 18 How. 76; Barney v. Baltimore, 6 Wall. 280; Williams v. Nottawa, 4 Morr. Trans. 390.

Municipal Subscription to Railroad Stock.

CITY OF LOUISIANA *v.* TAYLOR, U. S. Sup. Ct., Oct. Term, 1881. Error to the circuit court of the United States for the eastern district of Missouri. The decision of the supreme court was rendered on April 24, 1882. Mr. Justice *Matthews* delivered the opinion of the court affirming the judgment of the circuit court.

The repeal of an act is not the direct and immediate result of the constitution, but, on the contrary, a prohibition contained in that instrument is a limitation merely upon the power of the legislature for the future, so that it should not thereafter grant authority to municipal corporations to become stockholders in companies except upon the terms especially mentioned; and all previous grants of such authority remain in their original force until duly revoked, unaffected by the constitutional provision. An enabling act passed in execution of the powers authorized by the constitution, general in its provisions, conferring power upon any county, city, or town to take stock in, or to loan its credit to, any railroad company duly organized under any

law of the state, upon the assent of two-thirds of the qualified voters thereof does not revoke any previous grants of similar authority.

James O. Broadhead and David P. Dyer, for plaintiff in error.

Clinton Rowell and Thomas K. Skinker, for defendant in error.

Cases cited in the opinion: Callaway Co. v. Foster, 93 U. S. 570; Scotland Co. v. Thomas, 94 U. S. 682; Henry Co. v. Nicolay, 95 U. S. 619; Ray Co. v. Vansycle, 96 U. S. 675; Schuyler Co. v. Thomas, 98 U. S. 169; Cass Co. v. Gillett, 100 U. S. 585.

Practice—Review on Writ of Error.

JONES and others *v.* BUCKELL and others, U. S. Sup. Ct., Oct. Term, 1881. Error to the circuit court of the United States for the northern district of Florida. The decision in this case was rendered on January 16, 1882. Mr. Chief Justice *Waite* delivered the opinion of the court affirming the judgment of the circuit court.

Where no issue was made directly by the pleadings, and no evidence is set forth or referred to in the bill of exceptions showing the materiality of the charge complained of, and the case presents only an abstract proposition of law, which may or may not have been stated by the court in a way to be injurious to the plaintiff in error, it will not be considered by the appellate court.

W. A. Beach, for plaintiffs in error.

C. W. Jones, for defendants in error.

Cases cited: Henderson v. Moore, 5 Cranch, 11; Railway Co. v. Heck, 102 U. S. 120; Dunlop v. Monroe, 7 Cranch, 270; Reed v. Gardner, 17 Wall. 409.

Jurisdiction—Collusive Assignment.

WILLIAMS *v.* NOTTAWA, U. S. Sup. Ct., October Term, 1881. Error to the circuit court of the United States for the western district of Michigan. The decision of the supreme court was rendered on December 5, 1881. Mr. Chief Justice *Waite* delivered the opinion of the court reversing the judgment.

Where various parties transferred negotiable securities to a non-resident for the purpose of conferring jurisdiction on the circuit court, it is the duty of the court to dismiss the case on its own motion as soon as such collusion appeared.

Hughes, O'Brien & Smiley, for plaintiff in error.

Charles Upson, for defendant in error.

Case cited in the opinion: Gordon v. Longest, 16 Pet. 104.

Lien of Judgment—Priority.

STEVENSON *v.* TEXAS & PAC. R. CO., U. S. Sup. Ct., Oct. Term, 1881. Appeal from the circuit court of the United States for the western district of Texas. The decision of the supreme court was rendered on May 8, 1882. Mr. Justice *Matthews* delivered the opinion of the court affirming the decree of the circuit court.

Under the laws of Texas the lien acquired by judgment and levy of execution is superior to an unrecorded deed; and the purchaser at the execution sale on judgments antedating the recording of a mortgage, and without notice of it, has a better title than the mortgagee, although the sale was made subsequent to the recording of the mortgage.

W. S. Herndon and A. Q. Keasbey, for appellants.

W. S. Davidge and James Lowndes, for appellees.

Cases cited in the opinion: Price v. Cole, 35 Tex. 461; Ayres v. Duprey, 27 Tex. 593; Grimes v. Hobson, 46 Tex. 416; Catlin v. Bennatt, 47 Tex. 165; Mainwaring v. Templeman, 51 Tex. 205.

Appeal—Amount in Controversy.

LAMAR *v.* MICOU, U. S. Sup. Ct., October Term, 1881. Appeal from the circuit court of the United States for the southern district of New York. The case was decided in the supreme court on December 19, 1881. Mr. Chief Justice *Waite* delivered the opinion of the court dismissing the appeal, as the decree was for less than $5,000; and the fact that the decree should have been for more than that amount cannot be urged, in order to confer jurisdiction on the supreme court.

Edward N. Dickenson and Charles Beaman, Jr., for appellant.

S. P. Nash, for appellee.

Cases cited: Thompson v. Butler, 95 U. S. 694; Sampson v. Welsh, 24 How. 207.

Tax Collector—Bond of.

UNITED STATES *v.* JACKSON, U. S. Sup. Ct., Oct. Term, 1881. Error to the circuit court of the United States for the eastern district of Virginia. The case was decided in the supreme court on October 31, 1881. Mr. Justice *Miller* delivered the opinion of the court affirming the judgment.

A bond of a collector of taxes, which does not bind the obligors on its face for the faithful performance by the principal of the duties of his office in any particular district, is not, for that reason, void as to the sureties. A declaration on such a bond must aver that he had been appointed collector of revenue for some district.

S. F. Phillips, Sol. Gen., for plaintiffs.

Shellabarger & Wilson, for defendants.

Practice—Affirmance—Appeal Taken for Delay.

MICAS *v.* WILLIAMS, U. S. Sup. Ct., Oct. Term, 1881. Error to the circuit court of the United States for the eastern district of Louisiana. The case was decided in the supreme court of the United States on January 16, 1882. Mr. Chief Justice *Waite* delivered the opinion of the court affirming the decision of the circuit court; it appearing that the writ of error had been taken for delay only, and contained no assignment of errors, as required by section 997 of the Revised Statutes.

Thomas J. Durant, for plaintiff in error.

Joseph P. Hornor, for defendant in error.

Practice—Review on Certificate of Division.

BANKING HOUSE OF BARTHOLOW *v.* TRUSTEES OF SCHOOLS, U. S. Sup. Ct., October Term, 1881. On a certificate of division in opinion between the judges of the circuit court of the United States for the southern district of Illinois. The decision of the supreme court was rendered on October 31, 1881. Mr. Chief Justice *Waite* delivered the opinion of the court.

Under section 693 of the Revised Statutes, final judgments of the circuit courts in civil actions, wherein there has been a division of opinion of the judges, are only reversable in the supreme court on writ of error or appeal. The act of 1802, (2 St. 159,) which allowed the questions to be certified up before judgment, was superseded by the act of July 1, 1872, (17 St. 196.)

Appeal to Supreme Court—Practice.

SCRUGGS *v.* VISER, U. S. Sup. Ct., October Term, 1881. Appeal from the district court of the United States for the northern district of Mississippi. The case was decided in the supreme court on December 12, 1881. Mr. Chief Justice *Waite* delivered the opinion of the court denying the motion to dismiss the appeal, the citation and bond being sufficient, and the amount involved being over $5,000.

Cases cited in the opinion: U. S. v. Curry, 6 How. 111; Bacon v. Hart, 1 Black, 38; Brockett v. Brockett, 2 How. 240.

Patents for Inventions.

THE PACKING COMPANY CASES, U. S. Sup. Ct., Oct. Term, 1881. Appeals from the circuit court of the United States for the southern district of Illinois. The decision of the supreme court was rendered on May 8, 1882. Mr. Justice *Woods* delivered the opinion of the court affirming the decree of the circuit court.

Where there is nothing new in the process described in the patent, and all the elements are old and are merely aggregated, and the aggregation brings out no new product, nor does it bring out any old product in a cheaper or otherwise more advantageous way, it is not patentable.

William Henry Clifford, John N. Jewett, and L. L. Bond, for appellants.

J. W. Noble, J. C. Orrick, and L. L. Coburn, for appellees.

Cases cited in the opinion: Pearce v. Mulford, 102 U. S. 112; Rubber Tip Pencil Co. v. Howard, 20 Wall. 498; Hotchkiss v. Greenwood, 11 How. 248; Stimpson v. Woodman, 10 Wall. 117.

Patents for Inventions—Decree Affirmed.

PRICE *v.* KELLY, U. S. Sup. Ct., Oct. Term, 1881. Appeal from the circuit court of the United States for the district of Minnesota. The case was decided in the supreme court on October 25, 1881. Mr. Chief Justice *Waite* delivered the opinion of the court affirming the decree, because of the imperfect state of the record, and the lack of models and drawings, and a failure on the part of appellant to present the case.

OHLQUIST and another *v.* JOHN V. FARWELL & Co. and others.

(*Circuit Court, D. Iowa, N. D.* 1882.)

1. REMOVAL OF CAUSE—TRESPASS—CAUSE REMANDED.

Where an action of trespass was commenced in a state court against a sheriff for the wrongful seizure of goods of plaintiffs as the property of an attachment debtor, and the creditors of such debtor, citizens of another state, procured themselves to be substituted as defendants in the state court in place of said sheriff, and removed the cause to the United States circuit court; *held*, on motion to remand, that the cause be remanded to the state court.

2. SAME—PLAINTIFF CANNOT BE DEPRIVED OF ALL REMEDY.

Where the real cause of action is between citizens of the same state, citizens of another state cannot, by procuring themselves to be substituted for the defendant, procure the removal of the cause into the federal court, and thereby deprive the plaintiffs of their remedy against the original defendant for a trespass committed by him.

Motion to remand.

On the nineteenth day of December, 1881, said John V. Farwell & Co., and other creditors, commenced actions against P. & N. Ohlquist by attachment in the district court of Linn county, Iowa. It is alleged and claimed by the plaintiffs in the present suit that the sheriff of Linn county did not levy the attachments upon the property of said P. & N. Ohlquist, but at the request of said Farwell & Co. and others said attachments were levied upon a stock of goods and merchandise belonging to and in the possession of N. A. Sunberg and F. B. Ohlquist; that said N. A. Sunberg and F. B. Ohlquist immediately served notice in writing upon said sheriff that they were the owners of said property, and demanded the same; that John V. Farwell & Co. and others having furnished the sheriff with a bond of indemnity, he refused to release the property. It appears that thereupon, on the twenty-ninth day of December, 1881, said N. A. Sunberg and F. B. Ohlquist commenced, in the district court of Linn county, actions of trespass against the sheriff, claiming damages for the seizure of said property; that at the March term of said court for the year 1882, B. F. Seaton, said sheriff, and said Farwell & Co., Becker, and Sherer, Sherk & Co., presented their petition to said court asking that said Farwell & Co., Becker, and Sherer, Sherk & Co. might be substituted in the place and stead of said sheriff as defendants in said action, and that said sheriff might be discharged; whereupon an order was made by said court discharging said sheriff and substituting said Farwell & Co., Becker, and Sherer & Co. as

defendants in said action. To this order the plaintiffs at the time excepted, and thereupon said Farwell & Co., Becker, and Sherer, Sherk & Co. filed their petition for removal of said cause to this court, which petition was granted and said cause was transferred accordingly, the plaintiffs excepting to the order of transfer. And now, at the April term of said circuit court of the United States, the plaintiffs move to remand said cause to the state court.

J. B. Young and *Welsh & Welsh*, for the motion.

Herrick & Co., *O. P. Shiras*, and *E. Keeler*, *contra*.

Love, D. J. Was this cause rightfully removed into this court? If it was, the legal results are certainly most extraordinary, not to say unjust.

The plaintiffs here sued the sheriff of Linn county, in trespass for—as they alleged—seizing the plaintiffs' property by a writ of attachment issued against other and different parties. If the plaintiffs' allegations be true, the sheriff dispossessed them of their property without any warrant of law whatever. Most certainly, if this was a wrongful seizure, the sheriff ought to respond to the plaintiffs for damages, and look for indemnity to the attaching creditors, at whose instance and in whose interest he made the seizure. Nothing, at all events, can be clearer, in point of law and in common justice, than that the plaintiffs ought to have a right to be heard somewhere—in some tribunal—against the sheriff in such a case. To deny them this common right would certainly be to inflict upon them a flagrant wrong. Now, if the plaintiffs' motion to remand be denied, he will be deprived of all right to assert his cause against the sheriff—a public ministerial officer, alleged to have committed a trespass upon the plaintiffs—in any tribunal whatever.

These defendants, who were the attaching creditors in the state court, intervened in the action against the sheriff, and obtained an order discharging the sheriff from that action and substituting themselves. To this order the plaintiff excepted; and surely, whether the action of the district court of Linn county was right or wrong, he had a right to be heard on his exceptions before the supreme court. And if, upon a hearing in the supreme court, the order of the court below had been reversed, the sheriff would have been retained as a party to the plaintiff's action, and the cause could not have been removed into this court, because the sheriff and the plaintiffs are both citizens of Iowa. But these defendants, having succeeded in getting the sheriff out of the case, and being themselves citizens of Illinois, immediately removed the cause into this court, upon the ground that the

sole continuing controversy was between themselves and the plaintiff, citizens of different states. The removal carried the whole case into the federal court, it being now well settled that the whole cause, and not any part of it, must be transferred by the removal. Nothing remained in the state court upon which it could act, and there was no cause there from which any appeal could be taken to the supreme court of the state. Thus the defendants, by their voluntary intervention and by the removal, deprived the plaintiffs of their action against the sheriff in the court below, and of their rights to a hearing upon their exceptions in the supreme court of the state.

The defendants have now got the plaintiffs into this court. What is the result? The sheriff is out of the case entirely, and the defendants have succeeded in depriving the plaintiffs of any hearing whatever against him in the district court of Linn county, in the state supreme court, and in this court. This court cannot hear the plaintiffs, to assert anything whatever against the sheriff, because the sheriff is not here. If he were here, his presence would oust the jurisdiction, and the court could do nothing but remand the cause to the state court. Thus, though the sheriff may, at the instance and request of the defendants, have committed a flagrant trespass against the plaintiffs, he goes entirely free, and the injured party has no redress whatever against him. The sheriff is personally within the jurisdiction; he may have property here; he is presumably a responsible man; he has, at all events, given bond, with approved sureties, for the indemnity of injured parties. The plaintiffs sought their remedy, as they had a clear right to do, against the sheriff, a public officer, who committed the alleged trespass. What is the result of the intervention and removal? The plaintiffs are driven to prosecute their suit in this court against non-resident parties, who may be insolvent, and whose property, if they have any, is, in all probability, beyond the jurisdiction and process of the court.

It is our judgment that it was not competent for the defendants to displace and supplant the original defendant and remove the cause, so as not only to deprive the plaintiffs of all remedy against him, but of a hearing of his cause in any court whatever.

The motion to remand is sustained.

McCrary, C. J., concurs.

CROSS *v.* SABIN and others.

(*Circuit Court, E. D. Tennessee.* 1882.)

1. BILL TO ENJOIN WASTE AND REMOVE CLOUD ON TITLE—TITLE TO BE SHOWN.
   A complainant not in possession, who seeks by bill in equity to enjoin waste and remove a cloud upon his title to land, which at the time is in possession of an adverse claimant, must show a good title in himself or fail in his suit.
2. GRANT—PRIORITY.
   A grant of land by the state of Tennessee, on the eleventh November, 1841, on an entry made in 1840, is paramount to a grant issued in 1845, on an entry made in 1830.
3. SAME—IN WHOM TITLE VESTS.
   A grant to John H. Jones & Co. vests the legal title in John H. Jones, for himself and in trust for his partners, in proportion to their several interests.
4. STATUTE OF LIMITATIONS—SUSPENSION BY WAR.
   The existence of war suspends the statute of limitations as between citizens of the adverse, belligerent powers, but not as between citizens of the same power.
5. SAME—EFFECT OF WAR AND CLOSING OF COURTS.
   A public war and the closing of the courts conjointly would suspend the statute of limitation. But if the means provided by law for the issuance and service of process exist, whereby injured parties can commence suit, the court is not "closed," although they are not regularly held at the times appointed by law, and the probabilities are that a suit then brought would not be tried until after the cessation of hostilities.
6. SAME—JUDICIAL KNOWLEDGE.
   Courts may take judicial notice of the existence of a public war, when it commenced and when it terminated, and all of its historical incidents; but the courts cannot take judicial cognizance of the fact that the courts of a particular county were closed. If the fact exists, and is relied on by either party to a suit, it must be established by extraneous evidence, as other ordinary facts are required to be proven.
7. POSSESSION—EFFECT OF.
   An actual, exclusive, continuous, and adverse possession of granted land in Tennessee for seven years, by a party claiming under a color of title, defining boundaries and purporting to convey a fee-simple estate, will vest the possessor with a good title in fee.
8. SAME—BY BOTH PARTIES.
   Where small quantities of a tract of land adversely claimed by the contending parties have been held by both of them during the same period, the owner of the superior title is, by construction of law, in possession of all the land embraced within his title not in the actual possession of the adverse claimant.
9. THE FACTS OF THIS CASE.
   Complainant sues for 3,000 acres of unimproved mountain land. He had held two or three acres thereof by his tenant for more than seven years, claiming the whole under color of title, purporting to convey a fee. But during the same period the defendants, and those from whom they claim, who owned the superior title, had possession of about the same quantity of the land claimed by them both. Complainant contended that, notwithstanding the conceded fact that defendants had both the title and possession, defendants did not claim the

land under their better title; that they owned another adjoining tract which they intended to hold, but by mistake extended their possession over and upon a small part of the land in controversy; that their said possession was by mistake and unintentional; wherefore complainant insisted that he had acquired by his adverse holding a good title to all the lands in controversy not in the actual possession of defendants.

Held, that possibly a case might arise in which the claimant under the junior title might thus acquire a good title as against the owner of the superior title, who held a contemporaneous possession, as well as the better title. But the court finds, in this case, defendants held under their superior title, claiming the whole, and that their possession neutralized complainant's possession as to all of said land, except such as complainant had in actual possession.

C. E Lucky and *James Comfort*, for complainant.

Samuel J. Kirkpatrick and *H. H. Ingersoll*, for defendants.

BAXTER, C. J. The complainant claims that he is the owner in fee of the 3,000 acres of land described in his bill; that in March, 1880, Sally Harvey and others, widow and heirs at law of Thomas Harvey, deceased, made a conveyance of 5,000 acres to the defendant Guy E. Sabin, under and in virtue of which Sabin claims complainant's land. He further charges that Sabin has sold to his co-defendants, Miller and Carr, the right to take and appropriate all the timber standing thereon; that they had cut and appropriated a part thereof; and that they were then actively engaged in cutting and removing the balance. He further charges that the defendants are "financially unable to meet and pay the damages" to result to complainant from their trespasses, whereby, as he avers, he "will sustain irreparable loss." Upon these allegations he prays for an injunction to stay further waste, for an account of damages already done, and for a decree removing the cloud on his title created by the deed from the Harveys to Sabin.

Defendants answer and admit the trespasses complained of, but deny complainant's claim of title, and assert title in Sabin.

From this brief summary of the pleadings it will be seen that the principal question to be determined is one of title. Complainant must, as against defendants, who are lawfully in possession of the premises, show title in himself or fail in his suit, and he essays to prove the fact. His claim is that he acquired title under a grant issued by the state to John H. Jones & Co. on the second of June, 1845, upon an entry made in 1830, which he puts in evidence. But this grant is of no avail to him unless he goes further and shows that the title thereby vested in John H. Jones & Co., if any, has been conveyed to him. To do this he assumes that one John Andes was a member of the firm of John H. Jones & Co., and as such vested

with title to an undivided moiety of the land granted. But there is no evidence in the record to support this assumption. If John Andes was a member of that firm the fact has not been proven. But it does appear that he assumed to convey an undivided half of said premises to Henry Bell, who afterwards conveyed it to complainant. Now, if we assume that these conveyances vested the complainant with a good title to an undivided moiety of said land, it is clear that the title to the other half thereof remained in Jones, unless complainant in some way acquired that also. This he claims to have done, and offers, in support of his claim, an exemplification of a record from the chancery court at Jonesboro, which, he insists, shows that Jones' interest in the land was duly attached at the instance of creditors under process issuing from that court, and that Jones' interest therein was judicially divested by a sale duly made pursuant to the decrees rendered in that case, and vested in a Mrs. Johnson. Complainant then exhibits a deed conveying her interest therein to James S. Jones, a deed from James S. Jones to James Bell, a deed from James Bell to Henry Bell,—to whom Andes had previously conveyed,—and a deed from the latter to complainant for the whole tract.

Now, if the sale made by authority of the chancery court did in fact divest Jones' title, and vest the same in Mrs. Johnson, the purchaser, then the complainant, in virtue thereof, and the subsequent mesne conveyances under which he claims, succeeded thereto. But the record of said judicial proceeding is fatally defective in this: It does not show that Jones was legally before the court, or sufficiently describe or identify the land, and for these reasons the court entertains the opinion that his title was not divested by that proceeding, but that the same still remains in him, unaffected by the decrees made in said cause, and sale made pursuant thereto. Nor does the complainant stand in any better position touching the moiety claimed to have been derived from Andes. The grant to John H. Jones & Co. vested the title in John H. Jones, (*Moreau* v. *Safferans*, 3 Sneed, 595; *Holmes* v. *Moorn*, 7 Heisk. 506;) and if Andes was, as is alleged in argument, a member of the firm of John H. Jones & Co., and as such entitled to an equitable interest therein, he could not by his deed pass the legal estate. But, as has been already said, there is no evidence that he was a member of said firm, or otherwise interested in said land, and consequently his deed to Henry Bell, from whom complainant purchased, conveyed nothing whatever. Hence, if complainant was left to stand upon his evidences of title, unopposed by any title in the defendants, the

judgment of the court would be against him. But defendants have put in evidence a grant from the state to Thomas Harvey, under which they claim to have derived title to 5,000 acres of land, including the 3,000 acres claimed by the complainant, issued on the eleventh of November, 1841, upon an entry made in 1840. This is a superior title to the title claimed by complainant under the grant of the second of June, 1845, to John H. Jones & Co., even if it were shown that the complainant had succeeded to the rights of said grantee. *Williamson* v. *Throop*, 11 Humph. 265; *Sampson* v. *Taylor*, 1 Sneed, 600; *Blevins* v. *Crew*, 3 Sneed, 154; and *Bullock* v. *Tipton*, 2 Head, 408. Complainant is, therefore, upon the face of the papers offered in evidence, without title to the premises sued for; and if there was nothing more in the case, his bill would be dismissed without further discussion.

But he contends that he has, by himself and by his tenants, and by those from whom he claims to have derived his color of title, been in the actual, exclusive, continuous, and adverse possession of parts of said land, claiming the whole for more than seven years prior to the commencement of this suit under conveyances, purporting to have conveyed an estate in fee; whereby, as he insists, he has, under section 2763 of the Code of Tennessee, acquired a fee-simple title thereto. Such a holding would undoubtedly vest him with a good title. But does the evidence show such holding? It is upon this point the determination of the case depends. The evidence is voluminous, diffuse, and conflicting. It relates to the occupancy of different portions of the premises by Martin Dewry, Bassil Owens, and Robert Mathes. Complainant contends that each of these parties was a tenant of some one of the parties under and through whom he claims, prior to his purchase, and that two of them, to-wit, Owens and Mathes, afterwards, in 1859, attorned to and thereafter held under him. It would require too much space to review in detail all the testimony offered on this point. The announcement of our conclusions must suffice. It does appear that both Dewry and Owens occupied separate portions of the land, but it does not satisfactorily appear when they respectively entered, how or under whom they claimed, if under any one, nor when they left. In the judgment of the court Dewry left more than 40 years ago, and Owens abandoned his possession before 1850. Neither of these possessions can, as we think, in any way strengthen complainant's title, for if it appeared that they had entered and held under some one or more of the parties from whom complain-

ant claims, his holding was not under such color of title defining boundaries as would divest Harvey's title and vest it in complainant.

The contention is that Dewry held under Andes, but the proof does not sufficiently sustain the assumption. If it did, we have already shown that Andes had neither title nor the color of title; besides, it is shown beyond a reasonable doubt that Dewry quit the premises before the issuance of the grant to John H. Jones & Co., under which, it is said, complainant acquired such interest as he had therein. The contention further is that Owens held under Bell. But it distinctly appears that Bell did not acquire the color of title under which he claimed until January, 1856; and it is not probable that he would have assumed to lease the land before he acquired a claim thereto; but if it were shown that he had, then the possession of his tenant was without color, and of course unavailing to perfect his title unless it had been continued long enough to raise a presumption of a grant, and the complainant does not claim this. It follows that the only inquiry remaining is to ascertain the nature and extent of Mathes' occupancy of the land in question. When and under whom did he go into possession, and how long did he continue to occupy it? Upon this point Mathes, who has been examined as a witness, says that he leased from James Bell in 1855, and went into possession in 1856. He does not state at what time in 1856 he entered, but considering his testimony in connection with the evidence of other witnesses, it is believed that his entry thereon was in the early part of 1856, and he continued to hold until 1864 or 1865, more than seven years. As before stated, the terms of his lease and the character and extent of his holding are not definitely disclosed. But if we supply this omission, and assume that he was, under the terms of his lease, in actual or constructive possession of the whole tract claimed, his possession, in the absence of all neutralizing causes, would have divested defendant's title and vested it in complainant. The statute having begun to run in 1856, would have completed its work and barred defendant's right of action in 1863. But the defendants contend that the operation of the statute was suspended, as between citizens of the different adverse belligerent powers, by the pendency of the late rebellion. The proposition is conceded to be correct. And it is true that complainant was a citizen of Maryland and an adherent of the federal Union, and that defendants, or those from whom they claim, were resident citizens of Tennessee, one of the confederate states. But Mathes, complainant's tenant, who resided on the

land, was a citizen and resident of the confederate states, and was amenable to suit; and although a recovery against him would not have concluded the complainant, a suit against him would have suspended the operation of the statute of limitation, and protected defendants' title; and hence we have reached the conclusion that this case must be regarded as one between citizens of the same belligerent power, and that the statute of limitations was not suspended by reason of the war.

Thereupon the defendants say, *secondly*, that the war closed the courts; that in consequence defendants could not have brought and successfully prosecuted a suit to eject Mathes from the premises; and that the two causes—the existence of war and the closing of the courts—operated to suspend the statute of limitations. This is correct, provided it sufficiently appears that the courts were closed. *Harrison* v. *Henderson*, 7 Heisk. 346–7. But no evidence has been offered to prove the fact. Defendants, however, contend that the fact is one of which the court is bound to take judicial notice. There are many things of which the courts may, without proof, take judicial cognizance. We know that there was a civil war between the federal government and the confederate states. We are bound to know when it began and when it terminated, and take judicial cognizance of its historical incidents; but we cannot, according to the authority of *Anderson* v. *Talbott*, 1 Heisk. 402, judicially know that the courts of Washington county—the county in whch the land in controversy lies—were closed before the statute effected a bar in complainant's favor. But if it were otherwise,—if the closing of the courts of a particular county by war is a fact which this court is bound to know without proof,—our holding, in this instance, would be against defendants. We know that the courts of Washington county were not regularly held at the times designated by law, but all the machinery provided for the issuance and service of process existed; and, although suits then brought could not have been tried until after the cessation of hostilities, there was no obstacle in the way of commencing them prior to August, 1863, at which time Mathes had held for more than seven years; and upon these facts, we think, the statute of limitations was not suspended as between the parties to this suit.

But in the judgment of the court Mathes' possession, though adverse to Harvey, was not exclusive. Harvey's 5,000-acre grant includes the 3,000 acres claimed by the complainant. Near the center of these Harvey owned an 150-acre tract, under a title superior to both grants, on which more than 40 years since he entered

and built a dwelling-house, erected a stable and other appurtenant buildings, and cleared a farm, which he, and those succeeding under his 5,000-acre grant, have continued to hold, occupy, cultivate, and possess, from his first entrance thereon till the commencement of this suit.

The fences inclosing this farm extend over the lines of the 150-acre tract, and include from one and a half to four acres of the 5,000-acre grant. This possession, commencing before and continuing long after Mathes' possession had ceased, neutralized the latter to the extent of restricting his possession to his actual enclosures, unless this legal consequence is averted by the evidence to be hereafter considered. It is contended that Harvey, from whom defendants claim, did not, in fact, hold that part of his farm outside the boundaries of his 150-acre tract, under his 5,000-acre grant; that neither he nor those who succeeded and claimed under him intended to inclose any part thereof not embraced within his 150-acre tract; and that they did not, by their possession, assert or intend to assert title to any part thereof, and that therefore the possession did not inure to their benefit, or neutralize Mathes' possession. The proposition is that notwithstanding defendants have had both the title to the whole and possession of a part of the premises in controversy for more than 40 years, yet as they did not hold it under and in virtue of their better title—the 5,000-acre grant—the title thereto has been wrested from them and vested in complainant by Mathes' adverse possession. Possibly a case might arise in which such a claim could be sustained.

But the evidence in this case does not present such a case. Complainant's testimony, apart from that offered by defendants, tends to sustain the theory that Harvey did not, by his possession outside the boundaries of the 150-acre tract, claim, or intend to claim, any part of the 5,000-acre tract. It forcibly indicates that Harvey, the grantee, believed, during his holding thereof, that his improvements and possession were within the limits of the 150-acre tract. But, on the other hand, it appears that more than 40 years since, and after he had purchased the 150-acre tract, he entered, and subsequently obtained, a grant for the 5,000 acres surrounding it; that his title thus acquired was and is superior to complainant's title; and that he, and those claiming under him down to and including defendants, have, in fact, occupied a part thereof for the long period mentioned. The law presumes that they held under their title. But this is not all. Defendants have supplemented the legal presumption by the evidence of 18 or 20 witnesses, who testify that they have resided in that vicinity for long periods; that they

knew both Harvey and the land in controversy; and that during said periods, and while Harvey was so occupying a part of the 5,000-acre tract, he claimed title thereto, made a road for his convenience to and through the premises, cut and used the timber found thereon for staves and other purposes, and grazed his stock thereon, and authorized others to get timber therefrom and pasture their stock on the premises. But notwithstanding this conflict of evidence, which cannot be easily reconciled or explained, the preponderance, we think, as well as presumption of law, is with defendants. Harvey's possession, being in virtue of his superior title, embraced, by construction, the whole tract not in the actual adverse possession of Mathes. But it does not exceed two or three acres, on which defendants have neither entered nor threatened to trespass; and hence there is no necessity for an injunction to protect complainant as to these few acres, to which he has probably acquired a title through Mathes' holding.

Complainant's bill will therefore be dismissed, with costs; but as he may wish to retry the issue in a court of law, the appropriate forum for the trial of such controversies, the same will be dismissed without prejudice.

JOHNSON v. POWERS and another, Ex'rs, etc., and others

(*Circuit Court, N. D. New York.* August 2, 1882.)

1. EQUITY—CREDITOR'S BILL—TO REACH ASSETS OF ESTATE.

   The creditor of a deceased person may go into a court of equity for a discovery of assets and the payment of his debt, and he will not be turned back to a court of law to establish the validity of his claim; and the court being in rightful possession of the cause for a discovery and account, will proceed to a final decree upon all the merits.

2. SAME—MULTIFARIOUSNESS.

   A bill which seeks to reach the property, and its rents and proceeds, acquired by one of the defendants through alleged conspiracy and the property acquired by another defendant, also through an alleged conspiracy, is not multifarious.

3. SAME—DISCOVERY OF FRAUD A QUESTION OF FACT.

   The defense that the plaintiff discovered the fraud more than six years before bringing suit, must be raised by plea or answer, so that the issue on the discovery may be tried as a question of fact.

Francis Kernan, for plaintiff.
William F. Cogswell, for defendants.

BLATCHFORD, Justice. 1. The bill is filed on behalf of the plaintiff individually, as a creditor of Stewart, and on behalf of other like creditors, and is not brought by him in his capacity of administrator of Stewart.

2. The debt of the plaintiff was *prima facie* established against the estate by the proceedings in Michigan. All the property of the estate everywhere has been reached and applied, except that in this suit. No judgment in any suit, but such a suit as the present, could reach that. No administrator of Stewart could bring such a suit, and no administrator could be appointed in New York. Under such circumstances, the case of *Kennedy* v. *Creswell*, 101 U. S. 641, is a direct authority that this bill will lie. In that case the plaintiffs were simple contract creditors of the deceased, and filed a bill against his executor and devisees of his real estate for an account of his personal estate and a discovery of his real estate, and the application thereof to the payment of his debts. There was a plea that although there were sufficient assets, the plaintiffs had not enforced their claim against the executor by proper proceedings at law. The court held that a creditor of a deceased person had a right to go into a court of equity for a discovery of assets and the payment of his debt, and would not be turned back to a court of law to establish the validity of his claim, and that the court, being in rightful possession of the cause for a discovery and account, would proceed to a final decree upon all the merits. The case of *Case* v. *Beauregard*, 101 U. S. 688, holds that where a creditor has a trust in his favor he may go into equity without exhausting legal processes or remedies; that if he avers insolvency, so that a suit at law and the recovery of a judgment would not afford any relief, that is enough to show there is a remedy in equity; and that the same is true where fraudulent conveyances are charged, and a privilege or lien on the property is claimed, and there is a prayer that the conveyances be declared void and the property be made liable to pay the amount due to the plaintiff.

3. It is objected that Powers has no interest in Congress Hall or in Congress Hall barn; that no defendant except Powers has any connection with the Irondequash property; that Mrs. Powers has no concern with the Washington-street property; and that the executors of Craig have no concern with any of the property, except the rents from Congress Hall. The *gravamen* of the bill is the alleged fraudulent conspiracy between Stewart, John Craig, and Powers to defraud the creditors of Stewart. The bill seeks to reach the property, and its rents and proceeds, acquired by John Craig through such alleged

conspiracy, and also the property acquired by Powers through the same. Such a bill is not multifarious.

4. On the allegations in the bill it is not manifest that the widow or heirs of Stewart are necessary parties. There is no allusion in the defendants' brief to this ground of demurrer.

5. The allegations of the bill are such that the defense that the plaintiff discovered the fraud more than six years before this suit was brought, must be raised by plea or answer, so that the issue on the discovery may be tried as a question of fact.

The demurrer to the bill is overruled, with costs, and the defendants demurring are assigned to answer the bill by the rule day in October next.

COURTRIGHT v. BURNES.

(*Circuit Court, W. D. Missouri, W. D.* November, 1881.)

1. CHAMPERTY—AS A DEFENSE.
   The fact that there is a champertous and illegal contract between plaintiff and his attorney for the prosecution of a cause of action is no ground of defense to the action, and can only be set up by the client against the attorney when the champertous agreement itself is sought to be enforced.
2. CONTRACT—PAROL EVIDENCE.
   Parol testimony of a contemporaneous agreement is not admissible to contradict or vary the terms of a written contract.
3. SAME—DEFENSE OF WANT OF CONSIDERATION.
   The defense of want of consideration may ordinarily be made at law; but when a determination of the question of consideration depends upon the settlement of the affairs of a partnership, some of the members of which are not before the court, it is a question for equitable jurisdiction.

Action upon a promissory note for $7,333, executed by defendant to one F. H. Winston, and by him transferred, after maturity, to the plaintiff.

Besides a general denial the defendant answers as follows:

"For further answer to said petition, says that before and at the time of the making of the pretended note in said petition described, said plaintiff, this defendant, and F. H. Winston and George C. Campbell had been and were partners in a contract for building a railroad to a point opposite the city of Atchison, Kansas, from a point on the Chicago & Southwestern Railroad, which road was known as the Atchison branch of the Chicago & Southwestern Railroad. Prior to the date of said pretended note said Winston had been in charge of the construction of said branch road for said partners under said contract, and

had received, and then had in his possession, as part of the assets under such contract, 40 bonds of the city of Atchison, for the sum of $1,000 each, belonging to said parties, subject to the payment of the partnership debts, and a distribution among said parties after such payment in proportion to their respective interests therein. Shortly before said pretended note was made, said parties made, constituted, and appointed this defendant as trustee for said partners, to take charge of said partnership business in place of said Winston, and to wind up said business ; that at the time of making said pretended notes said partnership had not been settled, nor is it yet settled, nor has the interest of said Winston in said partnership, or in said bonds, been ascertained; that at the time of making said pretended note Winston turned over to this defendant, as trustee of said partnership as aforesaid, said bonds and other assets in his hands belonging to said partnership, with the consent of said partners, and for the benefit of said partnership; that at the time said Winston turned over to defendants said bonds and assets, said Winston estimated that there would be due him as a partner as aforesaid, upon the final settlement of said partnership, a considerable sum of money arising from said bonds or their proceeds, and he estimated that sum at the amount of said pretended note; that there having been no settlement of said business, said Winston and this defendant considered said estimate as a mere conjecture, depending upon the debts due said partnership, and the result of said settlement. Said Winston therefore requested this defendant, as the trustee of said partners, of whom plaintiff was one, to make said note, with the understanding that the same was not to be sued on, but was to be deemed a mere memorandum of the amount that should be estimated as the share of said Winston on account of said bonds on a settlement among said partners. Defendant executed said pretended note with such understanding between said Winston and himself as trustees of said partnership, and not as the separate note of this defendant. Said pretended note, so executed, was assigned by said Winston for the benefit of plaintiff to one G. W. De Camp, and by said De Camp to plaintiff, without any consideration from said De Camp to Winston, nor from said plaintiff to De Camp, and with full knowledge by said De Camp and plaintiff of said facts relating to said note, and that such were made long after the time at which said note was due, as appeared on its face, and upon the further consideration and agreement between said De Camp and plaintiff and Winston that this defendant should not be sued upon said note, and this defendant says that said note was and is wholly without consideration, and is null and void, and that said note is based upon and grew out of transactions relating to business of said partners; that said partners are interested in the same, and are necessary parties to a suit relating to said note, and the amount due upon said note, if any, cannot be ascertained until a final settlement of said part nership can be had.

"For further answer to said petition said defendant says said plaintiff ought not to have or maintain his said action, because he says that said action was instituted and is being prosecuted under an agreement between plaintiff and George W. De Camp, his attorney, by which said De Camp agrees to prosecute such suit, and to bear all the expenses incident to the prosecution of the same,

in consideration that said De Camp shall receive a portion of the amount to be recovered in such suit, to-wit, four-tenths of the amount so recovered, which said agreement is illegal, and against public policy and good morals. Defendant, therefore, asks to be discharged with his costs."

This case was tried before the court by agreement of parties, a jury being waived.

Botsford & Williams and *G. W. De Camp*, for plaintiff.

Willard P. Hall, *Silas Woodson*, *Benj. F. Stringfellow*, and *L. H. Waters*, for defendant.

McCrary, C. J. The answer alleges that this suit is being prosecuted by one of the attorneys for plaintiff upon a champertous contract by which he is to pay the expenses of the litigation and receive as his compensation 40 per cent. of the sum realized, and the defendant moves to dismiss the suit for that reason. The proof sustains the allegation of champerty, the testimony of the defendant himself being quite conclusive upon that point. This makes it necessary for the court to decide the important question whether the plaintiff can be defeated in his action upon the note by the proof that he has made a champertous contract with his attorney. In other words, can the defendant, the maker of a promissory note, avoid payment thereof or prevent a recovery thereon upon the ground that the holder of the note has made a void and unlawful agreement with an attorney for the prosecution of a suit upon it.

The authorities upon this question are in conflict. Some courts have ruled that if the fact that a suit is being prosecuted upon a champertous contract comes to the knowledge of the court in any proper manner it should refuse longer to entertain the proceeding. *Barker* v. *Barker*, 14 Wis. 142; *Webb* v. *Armstrong*, 5 Humph. 379; *Morrison* v. *Deaderick*, 10 Humph. 342; *Greenman* v. *Cohee*, 61 Ind. 201.

Other courts have held that the fact that there is an illegal and champertous contract for the prosecution of a cause of action is no ground of defense thereto, and can only be set up by the client against the attorney when the champertous agreement itself is sought to be enforced. *Hilton* v. *Woods*, L. R. 4 Eq. Cas. 432; *Elborough* v. *Ayres*, L. R. 10 Eq. Cas. 367; *Whitney* v. *Kirtland*, 27 N. J. Eq. 333; *Robinson* v. *Beall*, 26 Ga. 17; *Allison* v. *Railroad Co.* 42 Iowa, 274; *Small* v. *Railroad Co.* 8 N. W. Rep. 437.

This latter view is in my judgment supported by the better reason. It is not necessary for the full protection of the client to go so far as to dismiss the suit, for he is in no manner bound by the champertous

agreement; nor are there any reasons founded on public policy that should require such dismissal. If all champertous agreements shall be held void, and the courts firmly refuse to enforce them, they will thereby be discouraged and discountenanced to the same extent and in the same manner as are all other unlawful, fraudulent, or void contracts. If, on the other hand, the defendant in an action upon a valid and binding contract may avoid liability or prevent a recovery by proving a champertous agreement for the prosecution of the suit between the plaintiff and his attorney, an effect would thus be given to the champertous agreement reaching very far beyond that which attaches to any other illegal contract. The defendant in such case is no party to the champerty; he is not interested in it, nor in anywise injured by it. If the contract upon which he is sued is a *bona fide* contract, upon which a sum of money is due from him to the plaintiff, and he has no defense upon that contract, I can see no good reason for holding that he may be released by showing that the plaintiff has made a void and unlawful agreement with his attorney concerning the fee and expenses of the suit.

The tendency in the courts of this country is stronger in the direction of relaxing the common-law doctrine concerning champerty and maintenance, so as to permit greater liberty of contracting between attorney and client than was formerly allowed, and this for the reason that the peculiar condition of society which gave rise to the doctrine has in a great measure passed away. In some of the states the common-law rule is altogether repudiated, and it is held that no such contract is now invalid unless it contravenes some existing statute of the state. *Sedgwick* v. *Stanton*, 14 N. Y. 289; *Voorhees* v. *Darr*, 51 Barb. 580; *Richardson* v. *Rowland*, 40 Conn. 572; *Mathewson* v. *Fitch*, 22 Cal. 86; *Hoffman* v. *Vallejo*, 45 Cal. 564; *Lytle* v. *State*, 17 Ark. 609.

The common-law doctrine, however, prevails in Missouri, according to the decision of the supreme court of the state in *Duke* v. *Harper*, 66 Mo. 55. While following that ruling, I am disposed, in view of the general tendency of American courts, to relax somewhat the rigor of the English rule, to apply it only to the champertous contract itself, and not to allow debtors to make use of it to avoid the payment of their honest obligations.

It follows that the defense of champerty in this case cannot be maintained, and that the motion to dismiss must be overruled.

This brings us to the consideration of the case upon its merits. The first defense, as set forth in the answer, is, in substance, that the

note sued on was not intended to bind the defendant to pay the sum therein named 30 days after date, as appears from the face, but was intended as a mere memorandum to show that Winston, the payee, claimed an interest amounting to $7,333 in certain bonds turned over by him to defendant, and for which defendant was to account to him in the settlement of certain partnership affairs. In other words, it is claimed that the note sued on was not intended to be a promissory note, and was not to be sued upon or paid as such, but was to be held by the payee as a memorandum, not of any fact or agreement stated therein, but of an understanding wholly inconsistent with and repugnant to its terms. The note is in the usual form of a negotiable promissory note. The alleged understanding or agreement relied upon by defendant is not in writing, and the proof of it, so far as there is any proof, is in the parol testimony of the defendant. The testimony of Winston, the other party, is directly in conflict with that of the defendant, and if it were necessary to decide the question of fact, I should feel bound to say that Winston's statements, corroborated and confirmed as they are by the writing itself, made at the very time of the contract, and, presumably, embodying the understanding of the parties, would prevail over the testimony of the defendant. But it is not necessary to decide this question, because it is perfectly clear that all parol testimony to show a contemporaneous agreement in conflict with the plain terms of the note must be rejected. The rule which excludes such testimony is fundamental and elementary, and its application to this defense is too apparent to require argument or the citation of authorities. The contract signed by the defendant plainly declares that he is for value received to pay a given sum of money within a definite time, and to admit parol proof to show the fact relied upon by the defense would not only vary the terms of the instrument, but would flatly contradict and nullify every material provision it contains.

The evidence was, however, received, and may, perhaps, be considered as tending to support the other defense set up in the answer, which is that the note was without consideration. To establish this defense the defendant has attempted to prove—*First*, that the note was given to represent the interest of Winston in certain bonds which belonged to a partnership of which plaintiff and defendant, as well as Winston, were members, and which were at the date of the note turned over by Winston to the defendant; and, *second*, that said Winston had, in fact, no interest in said bonds, because he had previously drawn

from the partnership assets more than he would be entitled to upon a settlement of the partnership affairs. Ordinarily the defense of want of consideration may be made at law, but is such the case when a determination of the question of consideration depends upon the settlement of the affairs of a partnership, some of the members of which are not before the court? Even if this were an open question, I should not hesitate to hold that the defendant must resort to a court of equity for relief. But it is not an open question. It seems that defendant, acting upon the theory that his remedy was in equity, filed his bill in chancery in this court setting forth substantially the facts found in his answer in this case, and praying an injunction to restrain the plaintiff from prosecuting this action at law. The bill was demurred to, and the application for the injunction was resisted in this court at the last term.

Upon full argument it was held by this court that the defense to the note upon the facts stated in the bill should be made in equity. Mr. Justice Miller, in delivering the opinion of the court, said: "As to the general fact that equity has jurisdiction of the case, and that the transactions ought to be settled in equity without going to law, we have no question." And again: "The whole question can and ought to be settled in a court of equity, and we have no hesitation in overruling the demurrer as a general demurrer." Notwithstanding this decision the defendant saw fit to dismiss his bill in chancery, and to make his defense at law in this case. I must hold that want of consideration for the note, if it can be shown at all, can only be shown on a settlement of the partnership affairs between Burnes, Courtright, Winston, and others, who were interested in the contract for the construction of the railroad named in the answer, and that a court of law is not competent to supervise such settlement. It is argued that the evidence before the court in this case shows that upon such a settlement it would appear that Winston had no interest in the bonds for which the note was given. But I cannot assume that the other members of the partnership, who are not here, would not be able, if brought into a court of equity, to make other and further proof. I cannot take it for granted that Winston would be unable to show that he had an interest in said bonds if the opportunity was afforded him. I have, in considering the defense of want of consideration, assumed that the note sued on was given by defendant for the interest of Winston in the bonds above named, and was to be settled upon a settlement of the partnership affairs, and not to be a charge against the defendant personally. But whether this assumption is in

accordance with the facts I do not decide. The testimony upon the question is quite conflicting, and it is not necessary to decide it, because, in any view of the case, the plaintiff has a right to recover at law upon the note, whether it was executed to Winston to hold in trust for others, or for his own use and benefit. *Sturges* v. *Swift*, 32 Miss. 239; *Anderson* v. *Robertson*, Id. 241; *Gibson* v. *Moore*, 6 N. H. 547.

Judgment for plaintiff for the amount of the note and interest.

NOTE.

§ 1. General State of the Law Concerning Champerty in the United States. In the foregoing opinion the learned judge aptly draws attention to the fact that the common-law rules with regard to champerty and maintenance have been greatly relaxed in many of the American states, and in others repudiated altogether. Confining our attention to the subject of champerty, which is a species of unlawful maintenance, we shall find that the common-law rules and the early English statutes relating to this offense are not in force in Arkansas,(*a*) California,(*b*) Connecticut,(*c*) Delaware,(*d*) New Jersey,(*e*) Texas,(*f*) and, it seems, Vermont.(*g*) On the other hand, these rules are held to be in force in Alabama,(*h*) Georgia,(*i*) Illinois,(*j*) Indiana,(*k*) Iowa,(*l*) Kentucky,(*m*) Massachusetts,(*n*) Missouri,(*o*) Ohio,(*p*) Rhode Island,(*q*) Tennessee,(*r*) and Wisconsin.(*s*) In New York the subject is covered by elabo-

(*a*) Lytle v. State, 17 Ark. 608, 670.

(*b*) Mathewson v. Fitch, 22 Cal. 86, 94; Hoffman v. Vallejo, 45 Cal. 564; Ballard v. Carr, 48 Cal. 74; Howard v. Throckmorton, Id. 483; Mahoney v. Bergin, 41 Cal. 423.

(*c*) See Richardson v. Rowland, 40 Conn. 565, 572; Stoddard v. Mix, 14 Conn. 24.

(*d*) Bayard v. McLane, 3 Harr. (Del.) 139, 216.

(*e*) Schomp v. Schenck, 40 N. J. L. 195.

(*f*) Bentinck v. Franklin, 38 Tex. 458; White v. Gay, 1 Tex. 384; McMullen v. Guest, 6 Tex. 275; Carder v. McDermott, 12 Tex. 553. See Clark v. Koehler, 32 Tex, 684; Hill v. Cunningham, 25 Tex. 25.

(*g*) Danforth v. Streeter, 28 Vt. 490; Edwards v. Parkhurst, 21 Vt. 472. But compare Stacy v. Bostwick, 48 Vt. 192.

(*h*) Jenkins v. Bradford, 59 Ala. 400; Holloway v. Lowe, 7 Porter, 488; Dumas v. Smith, 17 Ala. 305; Byrd v. Odem, 9 Ala. 755; Wheeler v. Pounds, 24 Ala. 472. Compare Walker v. Cuthbert, 10 Ala. 213, 219.

(*i*) Ga. Code, 1873, § 2750; Meeks v. Dewberry, 57 Ga. 263. Compare Stansell v. Lindsay, 50 Ga. 360; Robison v. Beall, 26 Ga. 17.

(*j*) Thompson v. Reynolds, 73 Ill. 11, (explaining Newkirk v. Cone, 18 Ill. 449.) Compare Fetrow v. Merriwether, 53 Ill. 275, 279; Gilbert v. Holmes, 64 Ill. 548; Walsh v. Shumway, 65 Ill. 471.

(*k*) Scobey v. Ross, 13 Ind. 117; Quigley v. Thompson, 53 Ind. 317. See, as to deeds of land adversely held, Fite v. Doe, 1 Blackf. 127; Martin v. Pace, 6 Blackf. 99; Galbreath v. Doe, 8 Blackf. 366; Leslie v. Slusher, 15 Ind. 166; German Mutual Ins. Co. v. Grim, 32 Ind. 249, 257.

(*l*) Boardman v. Thompson, 25 Iowa, 487, (overruling Wright v. Meek, 3 G. Greene, 472;) Adye v. Hanna, 47 Iowa, 264; S. C. 29 Am. 484. See Cooley v. Osborne, 50 Iowa. 526.

(*m*) By statute. See Rust v. Larue, 4 Litt. 411, 417; Davis v. Sharron, 15 B. Mon. 64, 68; Harman v. Brewster, 7 Bush. 355.

(*n*) Thurston v. Percival, 1 Pick. 415; Lathrop v Amherst Bank, 9 Met. 489. As to deeds of land adversely held, Sweet v. Poor, 11 Mass. 549; Brinley v. Whiting, 5 Pick. 348.

(*o*) Duke v. Harper, 66 Mo. 51, (reversing S. C 2 Mo. App. 1.)

(*p*) Key v. Vattier, 1 Ohio, 59. Compare Spencer v. King, 5 Ohio, 182.

(*q*) Martin v. Clarke, 8 R. I. 389; Orr v. Tanner, 12 R. I. 94.

(*r*) By statute. Floyd v. Goodwin, 8 Yerg. 484; Weedon v. Wallace, Meigs, 286; Webb v. Armstrong, 5 Humph. 379; Morrison v. Deaderick, 10 Humph. 342; Hunt v. Lyle, 8 Yerg. 142; Cross v. Bloomer, 6 Bax. 74.

(*s*) Barker v. Barker, 14 Wis. 131; Miller v. Larson, 19 Wis. 463; Martin v. Vedder, 20 Wis. 466; Stearns v. Felker, 28 Wis. 594; Allard v. Lamirande, 29 Wis. 502.

rate and carefully-drawn statutes.(*t*) These statutes have been generally held to be a complete substitute for the early British statutes, and the rules of the common law upon the subject of maintenance and champerty.(*u*) The ordinary species of champerty, which consists in an attorney supporting his client's suit at his own expense upon an agreement to receive for his compensation a part of the money or thing recovered in the event of success, and nothing in the event of failure, is not within these statutes, and is not unlawful in that state.(*v*) It has been held by the supreme court of the District of Columbia that the common-law rule as to champerty, as relaxed by the modern decisions, is in force in that district.(*w*)

§ 2. Disagreement among the Courts as to what Champerty is. One of the most striking commentaries upon the subject of champerty is found in the fact that the decisions of the courts which recognize the common-law rules on the subject as being in force, are at utter variance as to what those rules are. The difference of opinion relates principally to the question whether the gist of the common-law offense of champerty is the unlawful maintenance of another's suit, or the mode in which the maintenor is to receive compensation. According to the former class of cases the gist of the offense consists in the unlawful intermeddling with, and the support of another man's lawsuit, without reference to the manner in which the intermeddler is to be paid for his trouble, or whether he is to be paid at all. The latter decisions do not consider whether the maintenor is an intermeddler, or whether he stands in such a relation to the litigation that he may lawfully support the suit; but they look chiefly to the mode in which he is to receive his compensation; and, if he is to get for his pains a part of the land, money, or other thing recovered, it is champerty, and unlawful. Applying these distinctions to the case of contracts between attorney and client, and considering that it is not unlawful for an attorney to render profesional assistance to a client, it results that, in the opinion of the courts which hold the former doctrine, in order to constitute champerty the attorney must not only have an agreement with his client whereby the attorney is to get a part of the money or thing recovered, but the attorney must also support at his own expense, and take all the risks of, the litigation; while, in the opinion of the latter courts, it is champerty if he merely render his services as attorney upon an agreement to get a part of the money or thing recovered, without advancing any of the expenses of the litigation, or without indemnifying his client against costs and expenses. This difference of opinion would not excite so much attention if it originated in the American decisions; but it will be found that it has its origin in a difference of opinion among the most eminent authorities upon the common law. Lord Coke and Mr. Sergeant Hawkins are authorities for the former view, while

(*t*) See the "New York Code of Remedial Justice." This Code is chapter 448 of the Session Laws of 1876. Attention is directed to sections 73, 74, 75, 76, and 77. See, also, the "Penal Code of New York," (chapter 676, Session Laws 1881,) §§ 130-142, inclusive.

(*u*) Sedgwick v. Stanton, 14 N. Y. 289; Mott v. Small, 22 Wend. 425; Hoyt v. Thompson, 5 N. Y. 347, per Paige, J.; Ogden v. Des Arts, 4 Duer, 275, 283, per Oakley, C. J.; Richardson v. Rowland, 40 Conn. 565, (construing the New York law.)

(*v*) Sedgwick v. Stanton, 14 N. Y. 2 9; Looney v. Second Ave. R. Co. 18 N. Y. 368; Ely v. Cooke, 28 N. Y 365; Benedict v. Stewart, 23 Barb. 420; Coughlin v. New York, etc., R. Co. 8 Hun, 136; Richardson v. Rowland, 40 Conn. 465. Compare Dawley v. Brown, 79 N. Y. 390, (reversing S. C. 9 Hun, 461.)

(*w*) Stanton v. Haskins, 1 McArthur, 558.

those American courts which have adopted the latter view have appealed for support to the texts of Sir William Blackstone and Mr. Chitty. This will appear from the following quotations from these eminent writers: First, it is said by Lord Coke that "to maintain to have part of the land, or anything out of the land, or part of the debt, or other thing in plea or suit, and this is called *cambi-partia*—champerty."(*a*) So Sergeant Hawkins defines champerty as "the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it."(*b*) On the other hand, Mr. Chitty says that "champerty is the purchasing a suit or right of action of another person; or, rather, it is a bargain with a plaintiff or defendant to divide the land or other matter between them if they prevail at law, *whereupon the champertee is to carry on the party's suit at his own expense.*"(*c*) And the definition of Mr. Justice Blackstone is substantially the same: "A bargain with a plaintiff, or defendant, *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; *whereupon the champertor is to carry on the party's suit at his own expense.*"(*d*) It is thus seen that both Lord Coke and Mr. Sergeant Hawkins omit from their definitions the element that the champertor (or champertee, as Mr. Chitty has it) is to maintain the party's suit at his own expense.

Contracts between attorney and client by which the former agrees, in consideration of having a part of the money or thing recovered, to support, at his own expense, the litigation of the latter,(*e*) or to indemnify the latter against costs and charges,(*f*) are universally regarded as being within the prohibition of the ancient common law against champerty, and also of the early English statutes, which were merely in affirmance of the common law. But it is where the attorney does not undertake to support the litigation at his own expense, or to indemnify the client against costs and charges, but merely agrees to render the ordinary services of an attorney in consideration of receiving a percentage of the money, or a part of the thing recovered, that the disagreement among the courts arises as to whether the contract is unlawful. In Alabama (*g*) and the District of Columbia(*h*) it is held that it is. In Wisconsin,(*i*) Georgia,(*j*) Louisiana,(*k*) Missouri,(*l*) and one of the circuit courts of the United States,(*m*) it is held that it is not.

§ 3. MERE AGREEMENTS FOR CONTINGENT FEES do not seem to come within any of the ideas of champerty to be found in the books, if we except

(*a*) Co. Litt. 368*b*.

(*b*) 2 Hawk. P. C. 463, § 1, (Curw. Ed.)

(*c*) 2 Chit. Cont. (11th Am. Ed. 996.)

(*d*) 4 Bl. Comm. 135.

(*e*) Martin v. Clarke, 8 R. I. 389; Boardman v. Thompson, 25 Iowa, 487; Coleman v. Billings, 89 Ill. 183; Meeks v. Dewberry, 57 Ga. 263; Thompson v. Reynolds, 73 Ill. 11; Weakly v. Hall, 13 Ohio, 167; Coquillard v. Bearss, 21 Ind. 479; Orr v. Tanner, 12 R. I. 94; Stevens v. Bagwell, 15 Ves. 139; Slade v. Rhodes, 2 Dev. & Batt. Eq. 24; Grell v. Levy, 16 C. B. (N. S.) 73; S. C. 10 Jur. (N. S.) 210; Thurston v. Percival, 1 Pick. 415; Key v. Vattier, 1 Ohio, 59.

(*f*) Adye v. Hanna, 47 Iowa, 264; S. C. 29 Am. 484. Compare Harrington v. Long, 2 Mylne & K. 590; Knight v. Bowyer, 2 De Gex & J. 445; Hunter v. Daniel, 4 Hare, 420; Tilton v. Gleed, 33 Vt. 405; Knight v. Sawin, 6 Me. 361.

(*g*) Holloway v. Lowe, 7 Porter, 488; Elliott v. McClelland, 17 Ala. 206.

(*h*) Stanton v. Haskins, 1 McArthur, 558.

(*i*) Ryan v. Martin, 16 Wis. 57, (overruling, it seems, on this point, Barker v. Barker, 14 Wis. 131;) Allard v. Lamirande, 29 Wis. 502.

(*j*) Moses v. Bagley, 55 Ga. 283.

(*k*) Martinez v. Succession of Vives, 32 La. Ann. 305; Flower v. O'Connor, 7 La. 207.

(*l*) Duke v. Harper, 66 Mo. 51.

(*m*) Maybin v. Raymond, 15 N. B. R. 353, per Woods, J.

the decisions in Tennessee, all of which were rendered under a peculiar statute. It is to be implied from the word itself that there can be no champerty without an agreement to divide the fruits of the legal contest, although, of course, there may be unlawful maintenance without such an agreement. Accordingly, it is laid down by the supreme court of the United States that agreements to pay contingent compensation for professional services of a legitimate character before the courts or departments of the government of the United States, or commissions appointed under treaties to examine claims, are not in violation of any rule of law or of public policy.(*n*) Carrying out this idea, one court takes a distinction between contracts where the attorney is to have for his compensation a part of the land, money, or other thing recovered, and contracts where he is to have a sum of money equal in value to a specified part of the land, money, or other thing recovered. The former are regarded as champertous, the latter are not.(*o*)

§ 4. CHAMPERTOUS CONTRACTS BETWEEN PLAINTIFF AND HIS ATTORNEY NO DEFENSE TO AN ACTION. The principal interest in the foregoing decission lies in the ruling that, although a suit may be prosecuted in pursuance of a champertous bargain between a plaintiff and his attorney, it does not lie in the mouth of the defendant to set up that fact for the purpose of avoiding the payment of an honest debt, or escaping a just liability. There is no doubt whatever of the correctness of this ruling. After having given attentive study to all the cases I could find in the books on this subject of champerty and maintenance, I affirm with considerable confidence that there is *but one case* where the contrary principle has been *decided*, and that is the case of *Barker* v. *Barker*.* This case, and two or three others which may be found, where the same conclusion is intimated though not decided, involve a judicial aberration, which was produced by following a similar rule found in some Tennessee cases, overlooking the fact that those cases, in so deciding, merely gave voice to the mandate of a highly penal statute peculiar to that state, which requires the court, on it appearing that a suit is being prosecuted under a champertous bargain between the plaintiff and his attorney, or other person, to dismiss the suit.† So far as I know, there is no similiar statute in England or in any state of the Union. The case of *Greenman* v. *Cohee*,‡ which the learned judge cites in the principal case as so holding, does not *decide* any question relating to the subject of champerty. There was, indeed, an attempt to thrust this question into that case; but the court decided nothing upon the point, because it had not been raised by the proper exception in the court below. What is said upon the subject is purely an extrajudicial *dictum*, and it so purports to be. It is noticeable that the court cite, in support of this *dictum*, the Wisconsin case of *Barker* v. *Barker*, *supra*, and the Tennessee cases cited in that opinion; and the same could be shown with regard to two or three other American cases which contain similar *dicta*. It thus appears that all the cases to be found, where this singular rul-

(*n*) Stanton v. Embrey, 93 U. S. 548, 556; Wright v. Tebbitts, 91 U. S. 252; Wylie v. Coxe, 15 How. 415.

(*o*) Evans v. Bell, 6 Dana, 479; Ramsey v. Trent, 10 B. Mon. 336; Wilhite v. Roberts, 4 Dana, 172.

* 14 Wis. 131.

† Thomp. & Steig. Tenn. St. § 1783. See Douglass v. Wood, 1 Swan, 393, 395; Dowell v. Dowell, 3 Head, 502.

‡ 61 Ind. 201.

ing is made, take root in a local statute in Tennessee. In all the courts which have not fallen into this error, the contrary has been ruled wherever the question has been presented, so far as I can find. In a case decided in Massachusetts in 1827,(*p*) it was said that no precedent could be found showing that maintenance could be pleaded in bar to an action for the recovery of land, though it was also said that no precedent could be found showing that such a plea was bad. In one of the English cases cited in the principal case,(*q*) it was admitted that, in an action at law, the fact that the plaintiff was being illegally assisted would, if pleaded, be no defense. In another English decision,(*r*) cited in the principal case, a suit for the recovery of an interest in land was being prosecuted under a bargain between the plaintiff and his solicitor, which exhibited the worst species of champerty. The plaintiff did not know that he had any title, until a mousing solicitor informed him of it, and agreed to prosecute the suit for recovery, and to indemnify him against costs and expenses, in consideration of receiving an agreed part of the value of the property recovered. This fact was brought out upon a cross-examination of the plaintiff, who testified as a witness in the case. Upon this ground *Sir Richard Malins*, V. C., was pressed to dismiss the suit; but he refused to do so, saying that he could find no precedent in the books for such a course. In another modern English case in equity, which was a suit to recover certain annuities, it was held, on like grounds, that it was no defense that some of the annuities had been assigned, pending an action respecting their title, upon a promise to indemnify the vendor against the future costs of the litigation.(*s*) The St. Louis court of appeals has also held, in recent cases, that such a defense cannot be made to an action.(*t*)

An interesting application of this rule is also found in the case of the selling of a pretended title to land, contrary to the statute of Hen. VIII.,(*u*) and contrary to the common-law rule, of which this statute has been held merely declaratory. Here the rule is, that if A. is sued by B. for the recovery of land, it is no defense for A. to plead and prove that, before the commencement of the suit, B., being out of possession, had made a conveyance of the land to a third party, and that he was prosecuting the present suit in his own name, under an arrangement with such third party, and at the charges and for the benefit of the latter. The reason is that the conveyance to the third party is void, because unlawful. It does not convey a title to the third party which he can assert against the tenant in possession, nor does it divest the title of the grantor. It is a violation of law which may expose the plaintiff to a penalty, but it furnishes no reason why the defendant should keep the plaintiff's land, if the title is really in the plaintiff. Such a plea is merely equivalent to saying this: "It is true that the plaintiff has title, as he declares, but, nevertheless, he ought not to recover possession, because he has attempted to part with his title, and that under circumstances which render his conveyance unlawful, and hence null and void."(*v*)

(*p*) Brinley v. Whiting, 5 Pick. 348.

(*q*) Elborough v. Ayres, L. R. 10 Eq. 367.

(*r*) Hilton v. Woods, L. R. 4 Eq. 432.

(*s*) Knight v. Bowyer, 2 De Gex & J. 421. 444.

(*t*) Bent v. Priest, 10 Mo. App. 543; Million v. Ohnsorg, Id. 432.

(*u*) St. 32 Hen. VIII. *c.* 9.

(*v*) Brimley v. Whiting, 5 Pick. 348. 354; Williams v. Jackson, 5 Johns. 500; Wolcot v. Knight, 6 Mass. 418, 421; Redman v. Sanders, 2 Dana, 68.

The more this subject is looked into, the more the absurdities which attend the contrary view accumulate. For instance, it is said that the plaintiff has parted with his title under an agreement which is void for maintenance; that the plaintiff is a nominal party only; that the action is really prosecuted by the plaintiff's grantee in this void deed, using the plaintiff's name, in pursuance of an unlawful bargain between them; and that, if this is allowed to proceed, the effect will be that the law will lend its aid to the parties to an illegal transaction, to consummate and carry into effect what they have agreed to do, contrary to law. These arguments certainly strike the mind with great force; but the best way to judge of them is to consider the result to which they lead, and, at the same time, the result which is reached by taking the contrary view. They lead to the absurd result that the plaintiff, by attempting, contrary to law, to convey his land to a third party, not only does not convey it to such third party, but conveys it to the defendant, to whom he never intended to convey it, and who may be a mere disseizor, without even color of title. This would add a new penalty to an attempt, by a party out of possession, to convey land, and one which is not prescribed by the statute of Hen. VIII., nor by any rule of the common law. But if the contrary view is adopted, it will result that the plaintiff, if he really had the title at the time when he was disseized by the defendant, will recover the land, and he can afterwards make his entry inure to the benefit of his grantee. A rule which thus reaches the very right of the case cannot be opposed to the policy of the law.(*w*)

So, coming back to the phase of the question we are considering, it would be equally absurd to hold that the plaintiff, by reason of having attempted, contrary to law, and by an agreement which has no validity in law, to convey a part of the subject of the suit to his attorney, has not only not succeeded in conveying it to his attorney, but has released it to the defendant.

§ 5. EFFECT OF THE LAW OF PLACE. In the foregoing opinion the learned judge intimates that he follows the ruling of the supreme court of Missouri,(*a*) which holds that the common law relating to the subject of champerty is in force in this state. This, of course, is the correct view, as applicable to any case where the validity of such a contract is properly drawn in question in a judicial proceeding. In such case a federal court, sitting in a particular state, would, if the champertous contract were to be performed in that state, in determining its validity, look to the law of that state as interpreted by its highest court, just as the courts of a sister state, or of a foreign country, would, if the validity of the same contract were drawn in question there. But where the validity of the contract is drawn in question collaterally, as in this case, I doubt whether a federal court is under any obligation to look to the decisions of the state courts as its rule of decision in the particular case. Suppose, for instance, that the supreme court of Missouri had held with the supreme court of Wisconsin,(*b*) that it is a good defense to an action to show that it is being prosecuted under a champertous bargain between the plaintiff

(*w*) That the courts have placed their conclusion substantially upon the grounds thus stated, will be seen by the language of Parker, C. J., in Brinley v. Whiting, 5 Pick. 348, 358.

(*a*) Duke v. Harper, 66 Mo. 51.

(*b*) See Barker v. Barker, 14 Wis. 131

and his attorney, would a federal court sitting in Missouri be bound to decide the same question in the same way? It seems to me, not. I think that the question as thus presented relates rather to the discipline which every court exercises over its own attorneys, than to any rule of local municipal law. I should think, for instance, that a federal court sitting in Tennessee would not be bound, in disregard of the decisions of the supreme court of the United States, already quoted, to dismiss a suit in obedience to the mandate of the Tennessee statute already referred to, upon it appearing that it was being prosecuted in pursuance of a champertous bargain between the plaintiff and his attorney. I do not find any intimation to this effect in the opinions of the federal courts which I have examined and cited above.

Upon the general subject of the effect of the law of place upon champertous bargains, it may be said that there is a presumption that the common law obtains in other states of the American Union, until the contrary, is shown; and a champertous contract made and to be executed in one state, and sued on in a court of another state, will not be enforced, in the absence of proof of the law of the former on the subject.(c) On the other hand, a contract made in a foreign country and to be enforced in England, which would be void on the ground of champerty if made in England, is none the less void because, in the country in which it was made, it may have been lawful. In so holding, *Erle*, C. J., said: "The argument that the agreement was valid because made in France, is disposed of by the fact that it was to be performed in England, by an officer of an English court. It was clearly an invalid and illegal agreement. Assuming, therefore, that the agreement was not illegal in the country where it was made, it becomes illegal when sought to be enforced here." *Williams*, J., said: "According to the law of this country, the attorneys and suitors in in Westminster Hall are subject to certain reciprocal duties and entitled to certain reciprocal rights. The client, on the one hand, is entitled to call upon his attorney to pay over to him all moneys which he has received for him; and the attorney, on the other hand, is entitled to hold them subject to his costs. We cannot allow these rights and duties to be overturned by agreements made abroad. This is an attempt to fetter the rules of our law in a manner which we cannot sanction."(d) This is but a declaration of the general principle that the validity of such contracts is to be determined by the law of the place of performance, as in the case of other contracts.(e)

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(c) Thurston v. Percival, 1 Pick. 415; Elliott v. McClelland, 17 Ala. 206, 210.

(d) Grell v. Levy, 16 C. B. (N. S.) 73; S. C. 10 Jur. (N. S.) 210.

(e) Richardson v. Rowland, 40 Conn. 565.

BUSSEY *v.* MEMPHIS & LITTLE ROCK R. CO.

(*Circuit Court, E. D. Arkansas.* April Term, 1882.)

1. RAILROAD COMPANIES—AS CARRIERS.

   A railroad company is not bound to undertake the carriage of goods beyond the terminus of its road; but if it does enter into a contract to do so, it is bound by it, and is under the same obligation to furnish means of conveyance beyond the line of its own road as it is upon it.

2. SAME—WHEN MAY REFUSE FREIGHT—DUTY OF.

   A railroad company may rightfully decline to receive freight offered, when it has not the requisite rolling stock and equipments to carry it without delay; but if it receives goods for transportation, it cannot escape responsibility for delay by a previous accumulation of freight at its depots by acquainting the shipper, when he offers goods for carriage, with the facts, and affording him the option of acquiescing in the delay or seeking some other line of transportation.

3. SAME—CONNECTING LINES—THROUGH BILLS OF LADING—DELAY IN TRANSPORTATION.

   Through bills of lading impose on the railroad company, as carrier, the obligation to provide means of transportation for the goods shipped to their ultimate destination without delay, and it is no excuse for the non-performance of this duty that it could not procure transportation by boat by reason of a previous accumulation of freight, of which it was advised when it received the goods for transportation.

4. SAME—MEASURE OF DAMAGES—FOR DELAY.

   The measure of damages for delay by a carrier in the transportion and delivery of goods at their point of destination, is the difference in the market value of the goods at such destination on the day they ought to have been delivered, and the market value on the day they were delivered.

W. G. Whipple, for plaintiff.

B. C. Brown, for defendant.

CALDWELL, D. J. Between the seventh and the twenty-fifth of November, 1878, the plaintiff's agent delivered to the defendant company at Little Rock, and other stations in that vicinity, 602 bales of cotton for shipment, consigned to the plaintiff at New Orleans. The bills of lading specify and guaranty a through rate of freight to New Orleans, and are indorsed in ink "via river from Hopefield," and are identical in every respect, except that some declare the cotton is received "to be transported from Little Rock, Arkansas, to New Orleans, Louisiana, and delivered to the consignee, or a connecting common carrier," while in others "Hopefield, Arkansas," is inserted in lieu of "New Orleans, Louisana," where those words occur in the above extract. The plaintiff having shown an unreasonable delay in delivering the cotton, the burden is cast on the defendant to show some fact which will justify or excuse that delay. This the answer at-

tempts to do by stating that a quarantine, established to prevent the spread of yellow fever, stopped the defendant's road from running from the fourteenth of August to the twenty-eighth of October, and that owing to this fact at the time plaintiff's cotton was received "large quantities of freight had accumulated at Little Rock and other depots upon its line for transportation to Hopefield, and other large quantities had accumulated in the country, and was afterwards delivered for transportation, and that owing to such accumulation it could not forward said cotton upon the day of its reception, but that it did carry said cotton to Hopefield as soon as it could do so under the circumstances." And, touching any delay at Hopefield, the answer states that previous to the receipt of the cotton a quarantine had been in force along the Mississippi river, which prevented boats from navigating that river between Cairo and New Orleans, and that during the existence of the quarantine "large quantities of freight accumulated on the banks of the river for transportation to New Orleans, and boats coming down the river to Hopefield came laden to their utmost capacity, and could take no more freight; and said cotton was forwarded from Hopefield by the very first boat that could take it." These statements in the answer accord with the facts in the case and are fatal to the defense.

A railroad company is not bound to undertake the carriage of goods beyond the terminus of its road, but if it does enter into a contract to do so it is bound by it, and is under the same obligation to furnish means of conveyance beyond the line of its own road that it is upon it. And a railroad company which has the requisite rolling stock and equipments to carry without delay, the freights usually offered, is not bound to receive goods which it is not at the time able to carry, by reason of some accidental or extraordinary increase in the public demand for transportation, occurring without the fault of the company. In such case the company may rightfully decline to receive freights offered, and which it cannot carry without delay. But if it does receive the goods, it can only relieve itself from responsibility for delay in carrying them, resulting from a previous accumulation of freight at its depots for transportation, by acquainting the shipper with the facts when he offers his goods for carriage, and affording him the option of acquiescing in the delay, or seeking some other line of transportation for his goods. There were other lines open to the plaintiff, and his agent testifies that he would have shipped the cotton by some other line had he not been advised that it would go forward over defendant's line without delay.. The through bills of

lading undoubtedly imposed on the company the obligation to provide means of transportation for the cotton from Hopefield to New Orleans without delay. Its engagement to deliver the cotton in New Orleans bound it to furnish the means of carriage for that purpose. Under such a contract it had no right to rely on boats casually navigating the river. And the carriage must have been continuous, and without delay, except the delay usually incident to transferring freight from the cars to the boat at Hopefield. If the cotton was detained an unusual length of time at Hopefield, the defendant cannot escape responsibility for such delay on the plea that no boats offered to take it. The obligation rested on the defendant to furnish boats to transport it, and it is no excuse for the non-performance of this duty that it could not procure transportation by boat by reason of a previous accumulation of freight, of which it was advised when it received the cotton.

On the face of the through bills of lading, therefore, it was the legal duty of the defendant, on the arrival of the cotton at Hopefield to ship it thence by boat to New Orleans without delay, and to provide boats for that purpose. The company had no right to trust to adventitious aid to carry out its contract, and if it did so and was disappointed, the plaintiff is not to be made to suffer thereby.

As to the Hopefield bills of lading it may be observed: (1) That the difference in the bills of lading seems not to have been regarded as of any moment by the parties; they were issued by the company and received by the shipper indifferently, as meaning the same thing, and as having the same legal effect; (2) the plaintiff's agent testifies distinctly that the company's agent assured him the cotton would be shipped through to New Orleans without delay, and the cotton was delivered to the defendant on the faith of such assurance; (3) all the bills of lading fixed and guarantied a through rate of freight to New Orleans, which precluded the shipper from making a contract with any other carrier to carry the cotton from Hopefield.

The defendant had a right to obtain the best freight rates it could for carrying the cotton from Hopefield to New Orleans, but it could not hold the cotton to obtain favorable rates, and in order that it might make more money out of its contract with the plaintiff, as the plaintiff contends was done. Upon the facts in the case all the bills of lading should probably be treated as the parties treated them at the time—as through bills of lading, and imposing obligations on the company accordingly. But whether this is a sound view or not need not be determined. Nor is it necessary to decide what the legal effects

of the Hopefield bills of lading would be taken by themselves, and disconnected with the other facts in the case. On the pleadings and proofs the defendant is in no plight to split hairs on that question or insist on its decision. The liability of the company is fixed before that question is reached, and without any necessary reference to it.

The plaintiff did not deliver his cotton to defendant upon a contract that it would be shipped when convenient, or when an indefinite quantity of freight then in its depot awaiting shipment had been forwarded. If the company had discharged its legal duty to the shipper, it would have advised him of the fact that there would be delay in forwarding the cotton when he offered it for shipment. Not having done so, but having concealed from the shipper this fact, it is responsible for all delay occurring from causes then existing and within its knowledge. The whole delay, whether it occurred before or after the cotton arrived at Hopefield, was the result of the wrongful act of the company in receiving the cotton for immediate transportation, and inducing the shipper to believe it would be carried to its destination without delay, and issuing bills of lading accordingly, when it knew it could not comply with its contract in this regard, and that unusual delay would occur not only on its own road, but as well on its connecting line, by reason of the previous accumulation of freights.

The conclusion reached is supported by adjudged cases. *Tucker* v. *Pacific R. Co.* 50 Mo. 386; *Faulkner* v. *South. Pac. R. Co.* 51 Mo. 311; *Helliwell* v. *Grand Trunk Ry.* 7 FED. REP. 69.

It is conceded that a reasonable time for the transportation of cotton from Little Rock to New Orleans, by the defendant's road to Hopefield and thence by boat to New Orleans, is 10 days. A much longer time than this elapsed between the delivery of the cotton to the railroad and its arrival in New Orleans, during all of which time cotton was declining in price.

The measure of damage is the difference between the market value of the cotton in New Orleans on the day it ought to have been delivered and the market value the day it was delivered. This difference is shown by the testimony of the cotton factors to be $827.37, for which let judgment be entered.

BREWIS *v.* CITY OF DULUTH AND VILLAGE OF DULUTH.

(*Circuit Court, D. Minnesota.* June Term, 1882.)

1. MUNICIPAL CORPORATION—DIVISION OF TERRITORY—LIABILITY FOR DEBTS—REMEDY.

When an old corporation is dissolved, and a new one created, substantially embracing the same territory, the new municipality becomes liable, as successor, for the debts of the old, although the respective charters differ, and consequently an action at law will lie.

2. SAME—POWER OF LEGISLATURE—APPORTIONMENT OF LIABILITY.

Cities, towns, and counties are mere political subdivisions of the state, and are at all times subject to legislative control, and may be divided, subdivided, or abolished. It is competent for the legislature, in making such subdivisions, to apportion the obligations of the divided territory, and in the absence of such legislative apportionment, the old municipality, if still existing, must bear the entire debt; but if a municipality has been abolished, and its territory divided among other municipalities, the creditor may pursue his demand against the latter for their equitable portions thereof.

In Equity.

Williams & Davidson, for plaintiff.

J. M. Gilman, for defendant.

Before TREAT and NELSON, JJ.

PER CURIAM. On the demurrer in this case two points were decided which are in accord with right, reason, and authority: *First*, that under the averments in the bill proceedings in equity furnish an appropriate remedy; and, *second*, that if the facts averred are true, the city and village corporations are respectively liable for this indebtedness in the proportions of the taxable property in each.

The bonds and coupons sued on were executed and delivered by the city before the village was carved out of the city territory, and therefore *at law* only the corporate party issuing them could be pursued so long as its corporate existence remained. When an old corporation is dissolved and a new one created substantially embracing the same territory as the old, the new municipality becomes liable as successor for the debts of the old, although the respective charters differ in many respects, and consequently an action at law will lie. *Broughton* v. *Pensacola*, 93 U. S. 266.

If the repeal of the old and the grant of the new charter occur pending legal proceedings, the action may be revived by *scire facias* against the new municipality, and in some states by suggestion of record. *O'Connor* v. *City of Memphis*, 13 Cent. Law J. 150.

Cities, towns, and counties, being mere political subdivisions of the state, are at all times subject to legislative control, and may be abolished, divided, and subdivided. New municipalities may be carved out of them or portions of the territory detached and annexed to another municipality, etc. It is competent for the legislature, in making such divisions or annexations, to apportion the obligations of the divided territory as to it may seem just. In the absence of such legislative apportionment the old municipality, if still existing, must bear the entire debt, and when paid by it cannot enforce contributions from the municipality to which parts of its taxable property have been annexed. If a municipality has been abolished, and its territory divided among other municipalities, then a creditor may pursue his demand against the latter for their equitable proportions thereof. These general doctrines have been fully recognized by the United States supreme court and other courts, and also by text writers. *Laramie County* v. *Albany County*, 92 U. S. 307; *Broughton* v. *Pensacola, supra; New Orleans* v. *Clark*, 95 U. S. 644; *Mt. Pleasant* v. *Beckwith*, 100 U. S. 514; *State* v. *Lake City*, 25 Minn. 404; Dillon, Mun. Corp. § 124 *et seq.; O'Connor* v. *City of Memphis, supra.* It is unnecessary to review the many cases cited and commented upon in the foregoing authorities, for nothing can be added to their cogency.

The opinion of this court on the demurrer states, with sufficient clearness, the general aspect of the case as then presented, including the acts of the legislature whereby the village was created and the debt of the city apportioned. The scheme thus devised, to the possible injury of the creditors, may not appear worthy of special commendation. Yet, as the legislature, in its wisdom and under its authority to control city and village corporations, passed the respective acts named, they are controlling. The evidence offered, so far from supporting the allegations of the bill, shows that ample means remain with the city to meet the plaintiff's demand; that the apportionment at the time made may not seem entirely equitable, but that, under the increased growth and prosperity of the city,—largely due, it may be, to the successful operation of said scheme,—it is now in a condition to meet its matured obligations, and, prospectively, all others as they mature. It is well known that many municipalities, with a view to their future interests and growth, incur obligations not to mature for years, in the expectation that at their maturity the taxable property will have so increased that the burden

of payment will be comparatively light. Hence, it is not proper to base conclusions concerning such obligations entirely on the condition of affairs when such obligations were assumed for the purposes mentioned. What is the present condition of the city? Can it meet the coupons accruing? According to the testimony, the taxable property therein has already increased nearly or quite fourfold, and is advancing rapidly. There is, therefore, no legal or equitable reason, in the light of authority, for going behind the legislative apportionment. The broad language of most authorities indicates that, under no circumstances, can a court go behind the legislative apportionment so as to charge such new municipality with more of the old indebtedness than the legislature assigned to it. But, certainly, such broad doctrines are subject to the qualifications stated in the former opinion of this court, viz.:

"When the corporation which created the debt is shorn of its population and taxable property to such an extent that there is no reasonable expectation of its meeting the present indebtedness, and it is unable so to do, the creditors at least can enforce a proportionate share of their obligations against the two corporations carved out of one. Both are liable to the extent of the property set off to each respectively."

The doctrine thus announced must commend itself to every just and right-thinking person. While the general rule obtains, that the old corporation remains liable for the old debts, yet when it is shorn by legislative enactment of the means to meet the same, the corporation to which the excised territory has been annexed cannot receive the entire benefit thereof to the practical repudiation of subsisting obligations. Were this permissible, no court should hesitate to pronounce the legislative act whereby the obligation of outstanding contracts is impaired—nay, practically destroyed—unconstitutional and void. Under the averments of the bill such a case was presented; under the evidence such a condition of affairs does not exist. The case, as now before the court, is very different from that presented on demurrer.

In *O'Connor* v. *City of Memphis*, *supra*, the learned judge, after stating the broad rule above referred to, adds, significantly: "A qualification of the latter part of the rule may be assumed, although the point seems never to have arisen in judgment where the municipality has been so reduced in population and territory as to be unable to meet its liabilities." It was that qualification which this court recognized in its opinion on the demurrer, and which it still holds

to be sound and just. It would be enforced unhesitatingly in this cause did the facts justify. As it is, however, no such qualification is required, for the city has ample means to meet the plaintiff's demand now in suit, and his remedy is at law.

The bill is dismissed, with costs.

SMOOT *v.* KENTUCKY CENTRAL RY. CO.*

(*Circuit Court, D. Kentucky.* August 23, 1882.)

1. ACTION FOR DAMAGES UNDER CIVIL-RIGHTS ACT OF MARCH 1, 1875—JURISDICTION—ACT MARCH 3, 1875.

   Whether jurisdiction of a civil action for damages arising out of a violation of the equality guarantied by the first section of the civil-rights act of March 1, 1875, is conferred upon the United States courts by that act, *quære.* But *held* that, if that act is constitutional, jurisdiction is conferred by the act of March 3, 1875, as being a case "arising under the constitution or laws of the United States."

2. FOURTEENTH AMENDMENT — CITIZENSHIP — EQUALITY — CIVIL-RIGHTS ACT, MARCH 1, 1875.

   The declaration in the first section of the fourteenth amendment "that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," did not of itself give congress power to protect, by legislation, the rights pertaining to state or national citizenship.

3. SAME—PROHIBITIONS RELATE ONLY TO ACTION BY STATES, NOT BY INDIVIDUALS.

   The inhibitions of that section, which follow the declaration above quoted, are directed solely against action by the states, not to action by individuals; and therefore if a state has not attempted, by its laws, officers, or agencies, to overstep the limitation there imposed, no case arises for the exercise of the protecting power of the national government.

4. SAME—CASE STATED.

   In an action in the United States circuit court under the civil-rights act of March 1, 1875, the petition alleged that plaintiffs (who were colored persons) and defendant were citizens of Kentucky; that plaintiff, Mrs. Smoot, purchased a first-class ticket over the defendant's road from Paris to Lexington, Ky.; that the train upon which she attempted to take passage consisted of a coach intended and used for ladies, and gentlemen accompanied by ladies, and other inferior coaches; that on account of her race and color she was denied admittance to the ladies' car, and, refusing to accept the inferior accommodations of the other coaches and to give up her ticket, she was forcibly removed from the train; for which plaintiffs asked damages. Upon demurrer to the petition, *held*, that congress had no power to protect the right alleged to have been violated, and the court had no jurisdiction to entertain the action.

*Reported by J. C. Harper, Esq., of the Cincinnati bar.

John W. Stevenson, in support of demurrer.

1. The civil-rights act of March 1, 1875, does not confer jurisdiction upon the federal court in an action for damages for a breach of its provision. Such an action may be maintained in the state courts, and in federal courts, when jurisdiction may be derived from the fact of a difference of citizenship. *Culy* v. *Baltimore & Ohio R. Co.* 1 Hughes, 536; *Gray* v. *Cincinnati Southern Ry. Co.* 11 FED. REP. 536.

2. An attempt to confer such jurisdiction is not warranted by the fourteenth amendment. That amendment distinguishes the rights and privileges of citizens into those which they have as citizens of the United States, and those which they have as citizens of the states. This distinction is shown and illustrated in *Gibbons* v. *Ogden*, 9 Wheat. 203; *Virginia* v. *Rives*, 100 U. S. 313; *Slaughter-house Cases*, 16 Wall. 74; *U. S.* v. *Cruikshank*, 92 U. S. 542; *Bradwell* v. *State*, 16 Wall. 130; *Ex parte Kinney*, 3 Hughes, 1; *Bertonman* v. *Board of Directors*, 3 Woods, 177; and congress is not authorized to take under its care rights which pertain to citizens of the state.

3. The acts alleged violate those rights only which belong to citizens of the state of Kentucky. The sole power of regulating railways, and defining the rights of passengers thereon within that state, is vested in its legislature, and such rights pertain to persons as a citizen of Kentucky, and are derived from the state.

4. Congress has no right to interfere because the state has passed no act discriminating between passengers on account of color. The prohibitions of the fourteenth amendment and the civil rights act both have reference to state action exclusively.

5. Federal authority is limited to national objects, and the states are left in control of internal government. *Gibbons* v. *Ogden*, 9 Wheat. 574; *Brown* v. *Maryland*, 12 Wheat. 419; *Licenses Cases*, 5 How. 589; *New York* v. *Milne*, 11 Pet. 131; *New Orleans* v. *U. S.* 11 Pet. 735; *Conway* v. *Taylor's Ex'rs*, 1 Black, 603; *Cornfield* v. *Coryell*, 4 Wash. C. C. 379; *Crandall* v. *Nevada*, 6 Wall. 36.

Bateman & Harper, for plaintiff.

Jurisdiction of this case by the circuit court is conferred by the first section of the act of March 3, 1875, (18 St. at Large, 570,) which includes all causes arising under the constitution and laws of the United States. The acts complained of are infractions of the rights conferred upon plaintiff by the first section of the act of March 1, 1875, (18 St. at Large, 336,) which grants to her the full and equal right to the enjoyment of the accommodations, etc., of public conveyances on land and water. Previous to the last three amendments to the constitution and to this law, plaintiff, as a person of color, did not possess equal rights with white citizens of Kentucky in public conveyances and otherwise, but only held such right as the "dominant race" might from time to time allow them, and were not considered a part of the political community of the United States. *Scott* v. *Sandford*, 9 How. 404. These rights she now—under the constitution and this law—holds in absolute title by grant from the United States, and their violation constitutes a case arising under its constitution and laws. *Gelston* v. *Hoyt*, 3 Wheat. 246; *River Bridge*

Co. v. *Kansas*, 92 U. S. 316; 2 Story, Const. 1641-42; *Cohens* v. *Virginia*, 6 Wheat. 264, 279.

2. The jurisdiction claimed is also conferred by the third section of the civil-rights act, (18 St. at Large, 336,) which extends the jurisdiction of the circuit and district courts of the United States to all violationis of this act, without limit as to proceedings. The law provides for three different classes of proceedings, to-wit, indictment, action for a penalty, and damages at common law. The law describes these three as *proceedings*, and the terms used, of "rights at common law," refer to the *secondary* right of action accruing by reason of the violation of the *primary* right of the person granted by the constitution and laws. This secondary right is a right of action at common law for damages for the infraction of a legal right of the person, whether that right is derived from statute or held under the common law.

3. The civil-rights act in question is authorized by the fourteenth amendment to the constitution. Previous to the passage of the war amendments the negroes in this country were legally an inferior race, mostly slaves, and holding no rights as citizens of the United States, and none which might not be invaded by the state authorities at their option. Plaintiff, a native of Kentucky, was the subject of discrimination against her as to her essential rights, including the right to the accommodations of inns, public conveyances, etc., and was not admitted or recognized as a citizen of the state. *Scott* v. *Sandford, supra.* The scope and object of the amendment was to emancipate her race, relieve them from legal disabilities, and place them on an equality before the law with the white people of the country. *Slaughterhouse Cases*, 16 Wall. 67.

The first section confers upon her the character and rights of a citizen of the United States, and makes her the *equal* of other citizens of the United States in rights as such. It also confers upon her the character and rights of a citizen of the state of Kentucky—not a portion of them, but the whole—in complete equality with all other citizens of the state. This amendment does not define what these are, but whatever the state prescribes for any, this amendment confers upon and guaranties to plaintiff in *equal* enjoyment with everybody else. The state creates schools, authorizes railroads, and defines the rights its citizens may have in both. The United States, by this amendment, says the plaintiff shall have the *equal* enjoyment of these rights, undisturbed, notwithstanding her race and color. It assumes to protect her place and *equality* as a citizen of the state. So that if a right to ride in a certain mode, and upon certain conditions, upon the defendant's railway is granted to white persons, the United States guaranties it to plaintiff upon the same conditions. 16 Wall. 80.

This amendment is an affirmative grant, and not a negative one; and the fifth section of the fourteenth amendment expressly confers upon congress the power to enforce it by appropriate legislation.

The civil-rights act is exactly within the scope of the amendment, and asserts and provides for the protection of a portion of the rights which it confers, viz., "the full and *equal* enjoyment of the accommodations, privileges, etc., of public conveyances." "Rights and immunities created by a dependent upon the constitution of the United States can be protected by congress."

Chief Justice Waite in *U. S.* v. *Reese*, 92 U. S. 217; *U. S.* v. *Cruikshank*, 92 U. S. 549.

The first section of the amendment is *also* prohibitory upon the states. After conferring upon the colored inhabitants of the United States equal rights as citizens of the United States, and of the states, with other citizens thereof, it further provides: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, and property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The second and third clauses of these prohibitions include all persons, whether citizens or aliens. *Ah Kow* v. *Nunan*, 5 Sawy. 522; *In re Ah Chong*, 2 FED. REP. 733; *In re Ah Fong*, 3 Sawy. 144; *In re Parrott*, 1 FED. REP. 481.

But these prohibitory clauses are founded upon the existence of an equal right previously conferred by the amendment, and of themselves, in connection with the fifth section of the amendment, charge upon the government the duty of protecting this equality of right. The fifteenth amendment is wholly prohibitory. "The rights of citizens, etc., to vote shall not be denied or abridged *by the United States, or by any state*, on account," etc. Yet legislation against individual acts violating or obstructing the right to vote on account of race, although the state had not attempted to abridge it, had been repeatedly sustained. This is the case as to the kuklux bill and enforcement act, punishing *individual* offenses against the right to vote on account of color. *U. S.* v. *Reese*, 92 U. S. 217; *U. S.* v. *Cruikshank*, Id. 542. The first and second sections of the enforcement act, relating to the equal right to vote, is precisely similar to the first and second sections of the act in question, relating to equality of rights in other respects.

Congress has given a clear contemporaneous interpretation of the fourteenth amendment,—the very men who originated and passed it. The original civil-rights act was supposed to have been warranted by the thirteenth, but doubts existing as to its validity, the fourteenth amendment was presented and adopted, with a view to authorize such legislation; and after its ratification, March, 1870, the civil-rights bill of 1866 was re-enacted by the seventeenth section of the enforcement act of May, 1870. The validity of that act is recognized. 92 U. S. 555.

In enforcing the duty of equal protection by the state, congress cannot prosecute the state for its delinquency; it can only reach the citizen, and punish or prevent his violation of the equal rights of others by just such legislation as that in question. Nor can the judiciary inquire into the necessity or expediency of such legislation. Congress is the sole judge as to whether it is necessary or not. *Wynham* v. *People*, 13 N. Y. 475; *License Tax Cases*, 5 Wall. 969; *The Wheeling Bridge Case*, 18 How. 430–2. The court cannot inquire into the fact as to whether the state is or has been delinquent for the determining whether the law should be operative.

BARR D. J. The petition in this case alleges that the plaintiffs are colored people of African descent, residents and citizens of this state and citizens of the United States, and the defendant is a corporation

chartered by this state, owning and operating a railroad running from Lexington to Covington; that the plaintiff, Belle M. Smoot, who is the wife of the plaintiff, Edward J. Smoot, purchased in September, 1881, at Paris, Kentucky, of defendant a first-class ticket on its train from Paris to Lexington. It is alleged that she with said ticket boarded a regular passenger train of defendant's, which was running from Covington through Paris to Lexington, and sought to go into the ladies' car, which was reserved for the use of ladies and the gentlemen accompanying them, but that she was refused admission into said car by defendant's agents, because and only because she was colored and of African descent, and was requested to go into the car which was reserved for gentlemen, and that this car was inferior to that reserved for white ladies. It is for this alleged discrimination that she refused to go into this car, and persisted upon going into the same car with other ladies, and because of this was put off the train between stations by defendant's conductor; and for this they seek the recovery of damages. The suit is brought under the civil-rights act, approved March 1, 1875, (Supp. Rev. St. 148.) The petition has been demurred to, and it is now insisted (1) that as this is a suit for the recovery of civil damages, it is not within the terms of that act, and this court has no jurisdiction; (2) if within the terms of that act, this court has no jurisdiction, because it is not within the constitutional powers of congress to give it, as between citizens of the same state.

The third section of this act provides "that the district and circuit courts of the United States shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses against and *violations* of the provisions of this act." But there are other provisions of the act which raise a serious doubt whether "violations of the provisions of this act" exclude civil actions for damages.

It is, however, not necessary to decide this question, because if congress has the constitutional right to give this court jurisdiction of this action, it has done so in the judiciary act approved March 3, 1875, which gives circuit courts jurisdiction of "all suits of a civil nature at common law or in equity when the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and arises under the constitution or laws of the United States." If, therefore, this case arises under the constitution, or laws of the United States made in pursuance thereof, this court has jurisdiction. The material question is, has congress the constitutional right to give this court

jurisdiction because of the subject-matter, as alleged in this petition? The first section of the civil-rights act provides—

"That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusements, subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Supp. Rev. St. § 148.

The authority for this enactment is based upon the first section of the fourteenth amendment to the constitution, which is in these words:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The fifth section gives congress the "power to enforce by appropriate legislation" this and the other provisions of the amendment. There is no allegation in the petition that there is any law of the state of Kentucky which authorized the defendant to make any discrimination in the treatment or accommodation of its passengers on account of their race or color. There is no such law known to me, and I do not know of anything in the laws of Kentucky which would prevent plaintiff from recovering for the wrong complained of if the facts are as alleged. The defendant had no right under its charter to give plaintiff, if in fact it did give, accommodations on its trains which were inferior to those given white persons because of her race and color; and if she refused to accept such inferior accommodations, and was in consequence put off the train, she is, I think, entitled upon common-law principles to recover damages. But is not that fact a reason, if there was none other, why plaintiffs cannot come into this court with their action? In other words, can congress give this court jurisdiction over this subject, and between citizens of the same state, unless Kentucky has, by it laws or through its officers or agencies, denied to plaintiff the equal protection of the laws, or abridged her "privileges or immunities" as a citizen of the United States?

We will not determine whether the right to travel over railroads in public cars, without discrimination on account of race or color, is

a privilege pertaining to national citizenship. But assuming that the right to travel to and from the capitol of the nation, to and from post-offices, revenue offices, and United States courts, is a privilege pertaining to national citizenship, and that this includes the right to travel in the usual public conveyances without discrimination because of the citizen's race or color, still, the inquiry remains, has this privilege been abridged by the state or its agencies? *Crandall* v. *Nevada*, 6 Wall. 35.

The fourteenth and the other amendments are limitations upon the power of the states, and to some extent an enlargement of the powers of congress. But the enlargement of the powers of congress are for the purpose and to the extent only of enforcing the limitations placed upon the power of the state. If, therefore, a state has not attempted by its laws, officers, or agencies to overstep these limitations, no case arises for the exercise of the protecting and guaranteeing power of the national government.

The declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside," does not of itself, I think, give congress the power to declare that the federal courts shall have, exclusively of or concurrently with the state courts, original jurisdiction to protect the rights of national and state citizenship. If this had been the intention, the subsequent inhibitions upon the state would have been entirely unnecessary.

The supreme courts, prior to this declaration, had decided that citizenship of a person born in the United States could only come through a state, and that a person of African descent, though born in one of the United States, could never become a citizen of that state. *Dred Scott* v. *Sandford*, 19 How. 393. This declaration in the amendment changed this, and by a broad declaration made all persons, whatever their race, color, or previous condition, born in the United States, and subject to its jurisdiction, citizens of the United States, and of the state whereof they reside. *Slaughter-house Cases*, 16 Wall. 67. But this declaration did not of itself give congress the power to protect by legislation the rights pertaining to state or national citizenship. The power of congress to protect the national citizen in his privileges and immunities, and all persons in certain fundamental rights, is given in the subsequent part of the clause, and this protection is from the action of the states, or its agencies, and not from the acts of individuals, unless individuals act by or through state authority. *Ex parte Virginia*, 100 U. S. 339.

If the mere declaration of citizenship gives the power to congress, under the fifth section of this amendment, to protect from the acts of individuals the rights pertaining to the citizenship therein declared, this power must extend to protecting the rights pertaining to state as well as national citizenship, as there is no distinction in the declaration of citizenship.

I conclude, therefore, as there is no allegation in the petition that the state of Kentucky has denied the plaintiff the equal protection of its laws, or made or enforced any law which abridges her privileges or immunities as a citizen of the United States, nor is there, in fact, any such law or denial of protection known to me, the all-important jurisdictional fact to give this court jurisdiction is wanting, and the demurrer must be sustained and petition discharged.

If I am mistaken in the Kentucky law, and the courts of the state shall sustain as legal this discrimination on account of race and color, the plaintiff and others of like condition are not without remedy, but may have the question passed upon by the supreme court. *Virginia* v. *Rives*, 100 U. S. 313; *Heal* v. *Delaware*, 103 U. S. 370.

NOTE. Where a state has been guilty of no violation of the provisions of the thirteenth, fourteenth, and fifteenth amendments to the constitution of the United States, no power is conferred on congress to punish private individuals, who, acting without any authority from the state, and it may be in defiance of law, invade the rights of the citizen which are protected by such amendments. So, where an act of congress is directed exclusively against the action of individuals, and not of the states, the law is broader than the amendments by which it is attempted to be justified, and is without constitutional warrant. *Le Grand* v. *U. S.* 12 FED. REP. 577, (opinion by Mr. Justice Woods,) and the elaborate note by Mr. Desty. Congress had no power under the fourteenth amendment to protect the right "to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of theaters and inns" against violation by individuals acting in their private capacity, and to that extent the civil-rights act of March 1, 1875, is unconstitutional. Charge to grand jury by Judge Emmons, (May, 1875, U. S. C. C., W. D. Tenn.,) 2 Am. L. T. Rep. (N. S.) 198. *Contra*, *U. S.* v. *Newcomer*, (U. S. D. C., E. D. Pa., Feb. 1876,) 22 Int. Rev. Rec. 115, *Cadwallader*, J. The same question was before Judges Blatchford and Choate, and they divided and certified it to the supreme court. *U. S.* v. *Singleton*, 1 Crim. Law Mag. 386. For a further discussion of this subject, see Cooley, Torts, 284–6, and note to *U. S.* v. *Buntin*, 10 FED. REP. 736.—[REP.

BULLOCK & Co. v. TSCHERGI & SCHWINDE.

(*Circuit Court, D. Iowa.* 1882.)

CONTRACT OF SALE—STATUTE OF FRAUDS—DELIVERY TO COMMON CARRIER.

A delivery of goods by a vendor to a common carrier is a delivery to the vendee, though such carrier was not designated by him, and under the provision of the Iowa statute of frauds that no evidence of any contract for the sale of personal property is competent when no part of the property is delivered, and no part of the price paid, such a delivery is sufficient to take the contract out of the statute.

LOVE, D. J. The question presented upon the facts of this case is whether or not the delivery of goods under an oral contract of sale to a common carrier (not designated by the purchaser) in the usual course of transportation is sufficient, under the Iowa statute of frauds, to bind the contract.

The language of the Iowa statute, it will be seen, differs very materially from that of England, and many of the states of the Union. The Iowa statute of frauds provides that it shall embrace, among other contracts, "those in relation to the sale of personal property, when no part of the property is *delivered*, and no part of the price paid."

The language of the English statute is somewhat different. It provides—

"That no contract for the sale of any goods, wares, and merchandise, for the price of 10 pounds sterling or upwards, shall be allowed to be good, except the buyer shall *accept* part of the goods so sold, and *actually receive* the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

In many of the state statutes, and among them those of New York, Massachusetts, and Georgia, the same words, "accepted and received," are used, and these words have been expounded by many English and American decisions. Unquestionably, wherever these words have been used, it has been held that in order to dispense with the necessity of writing, the goods must be both "*accepted and received*," and that one or the other is not sufficient. It is well settled in England, New York, Massachusetts, Georgia, and some other states, that the mere delivery of the goods is not sufficient under the statute, because the words "delivery" and "received" are "correlative terms," and therefore that the goods must not only be "deliv-

ered" or "received" but also accepted, in order to comply with the terms of the statute. But delivered and accepted are not, according to these decisions, equivalent terms. Goods may be delivered and not accepted, but, on the contrary, rejected, as not corresponding to samples, or as otherwise contrary to the conditions of the contract. Hence it has been held, in England and in the states referred to, that delivery to a common carrier is not sufficient under their statutes of frauds, because the carrier is authorized to "receive" but not to accept goods for the vendee, while the statute requires that they shall be both received or delivered and accepted, in order to bind the bargain without writing. But the decisions in England and the states, referred to at the same time, hold that a delivery to a common carrier, though not designated by the purchasers, is a good and perfect delivery to the latter; that the carrier is *quoad hoc* his agent; that the possession is after such delivery in the purchaser, and the goods at his risk; that the lien of the vendor for the price is upon the delivery to the carrier lost, by reason of the fact that the possession has been transferred from him to the purchaser; and that the vendor's only remaining right to the goods after such delivery is that of stoppage *in transitu*.

But these decisions further hold that the common carrier is the agent of the vendee for the purpose of delivery only, and not of acceptance, etc. The common carrier cannot accept for the vendee, because acceptance implies assent that the goods are in accordance with the contract. Acceptance implies a mental act. It is by such mental act that the purchaser finally gives assent to the performance of the contract by the vendor, as being in full compliance with the terms of the contract of sale. Such was the exposition of the words "accepted and actually received" by the courts of England and the American states. But we see that these words are entirely omitted in the Iowa statute, and the word "delivery" alone used, and that the word "delivery," according to the adjudication, had been held to be equivalent to "received." There is no word in the Iowa statute equivalent to the word "accepted." Can we suppose that the codifiers were ignorant of the previous adjudications as to the meaning of the words "accepted and received?" Can we assume that they omitted the word "accepted," or any equivalent term, from the statute unintentionally or by mere accident? Such assumptions would be violent and untenable. We must conclude that the word "accepted" was omitted intentionally, and that the purpose of the legislators was that delivery alone, without "acceptance," should be sufficient to

dispense with the necessity of writing. Nor was this change of phraseology without good and solid reason in the mind of the framers of the Iowa statute. The delivery of the possession of goods is an open, visible, tangible act. It is a physical fact, manifesting the intention of the parties. A sale, therefore, with delivery of possession, is a totally different thing from a sale by mere words, without any outward symbol of the intention of the parties. A sale by words only would open the door to fraud and false swearing. A sale with delivery removes this danger, as far as it can be removed, and to the extent that the statute of frauds intended to remove it. Delivery of possession, therefore, accomplishes the very purpose of the statute, and the mere act of acceptance could add little or nothing to that purpose. Hence was the word "accepted" omitted from the Iowa statute.

Now, delivery to a common carrier is not only an open and visible act, calculated to satisfy the policy of the statute, but is ordinarily susceptible of more satisfactory proof than a delivery direct to the vendee, since, in many cases, the vendee would be the only witness of delivery to him, while delivery to a carrier could always be proved by many disinterested witnesses.

Again: The Iowa statute is, by its express terms, a statute of evidence. "No evidence of the contracts enumerated is competent without writing, unless the goods be delivered," etc. In this it differs somewhat from the terms of the English statute, which provides that no *action* shall be maintained upon any of the contracts named which shall not be in writing, etc. The purpose of the Iowa statute was to prescribe a mode of proof which would, as far as possible, avoid the danger of fraud and perjury. Its framers must have known that it had been settled that delivery to a common carrier is a good and perfect delivery, and we may assume that they saw clearly that such a delivery would be more susceptible of certain proof as evidence of the bargain, and less exposed to the danger of perjury and fraud, than any direct delivery to the purchaser could possibly be. Proof of a direct delivery by the vendor to the vendee might rest upon their own testimony; whereas a delivery to a common carrier might be shown by the testimony of the intervening agents, and by the very circumstances of the transaction. Hence a delivery to a common carrier would more effectually accomplish the purpose of the statute than a direct and immediate delivery to the vendee.

But, again, let us consider the effect in commercial transactions of a rule that nothing short of acceptance by the vendee is sufficient to bind an oral contract for the sale of goods. The distant merchant visits the city and makes his purchases orally. It would be highly inconvenient to require that all such purchasing contracts should be reduced to writing. Now, if nothing short of the acceptance of the goods by the purchasing merchant when they reach him, would make the contract valid and binding under the statute of frauds, how could the selling merchant, with any safety whatever, venture to forward the goods? The goods might be in strict accordance with samples, if sold by sample, or with the terms of the oral contract, if sold otherwise; and yet the purchasing merchant would be at perfect liberty to reject them without incurring the least liability. The purchasing merchant might simply say: "True, the goods are all right,—they are in strict accordance with the samples and the contract,—but there was no writing, and I have not yet accepted them, therefore I will simply throw them on your hands." But suppose the vendor may bind the bargain by delivering the goods to the common carriers in the regular course of business, he can with safety forward them, and the vendee, when they reach him, would still be at liberty to refuse them if unsound, or otherwise not in accordance with the contract. The vendee could thus hold the vendor to a strict compliance with his contract, but he could not, at his mere caprice, or as his interest might dictate, reject the goods to the serious loss and inconvenience of the vendor. Thus the delivery to the common carrier would simply take the place of writing to withdraw the contract from the operation of the statute of frauds. Even if the contract were in writing the vendee might refuse to accept the goods. Indeed, he might reject them, notwithstanding the writing, as not in accordance with samples or the conditions of the contract. This he would of course do at his peril, and if the vendor could show that the goods were in strict accordance with the contract, the seller could make the vendee liable as upon a breach of contract. Precisely the same results would follow if it be the law that delivery to a carrier takes the case out of the statute.

Thus, in Benjamin's learned work upon Sales, § 675, we find the following:

"When questions arise as to the 'actual receipt' which is necessary to give validity to a parol contract for the sale of chattels exceeding 10 pounds value, the judges constantly use the word 'delivery' as the correlative of 'actual receipt;'" citing *Carter* v. *Kingman*, 103 Mass. 517.

Mr. Justice Blackburn, in commenting on this clause, makes the following remarks:

"If we seek for the meaning of the enactment, judging merely by the words and without reference to decisions, it seems that the provision is not complied with unless two things concur: the buyer must accept, and he must actually receive part of the goods; and the contract will not be good unless he does both. And this is to be borne in mind, for as there may be an actual receipt without acceptance, so may there be acceptance without any receipt." Benj. Sales, § 139.

Again:

"The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods and the buyer accepts such control, he has actually received them. Such receipt is often evidence of acceptance, but it is not the same thing; indeed, the receipt by the buyer may be and often is for the express purpose of seeing whether he will accept them. If goods of a particular description are ordered to be sent by a carrier, the buyer must, in every case, receive the package to see whether it answers his order or not; it may even be reasonable to try a part of the goods by using them; but, though this is a very actual receipt, it is no acceptance so long as the buyer can consistently object to the goods as not answering the order. It follows from this that a receipt of the goods by a carrier or on board ship, though *a sufficient delivery to the purchaser*, is not an acceptance by him so as to bind the contract; for the carrier, if he is agent to receive, is clearly not one to accept goods." Section 140.

And this, says Benjamin, is also the law of the United States; citing *Calkins* v. *Holman*, 47 N. Y. 449.

The same distinction between the acceptance and receipt of goods is taken in Georgia. *Lloyd* v. *Wright*, 25 Ga. 215. The court says:

"The statute requires that the purchaser should 'actually receive the goods.' And although goods are forwarded to him by a carrier by his direction, or delivered abroad on board a ship chartered by him, still there is no acceptance to satisfy the act so long as the buyer continues to have the right to object either to the *quantum* or quality of the goods.

"The *Case of Dutton*, 3 Bos. & P., relied on, was a mere question of what constituted a good delivery. It consequently does not meet the question now presented. The decision there was that a delivery of goods by the vendor in behalf of the vendee, to a carrier not named by the vendee, was a delivery to the vendee; that is, it was a good delivery to bind the contract, but not a sufficient delivery to take the case out of the statute of frauds, which requires that the goods should be 'actually received,' to come within the meaning of the statute."

Hence it is evident that if the language of the Georgia statute had been simply "delivery," the delivery to the carrier would have been held sufficient.

Again, Benjamin, § 804:

"A delivery of goods to a common carrier for conveyance to the buyer is such a delivery of actual possession to the buyer through his agent, the carrier, as suffices to put an end to the vendor's lien;" citing a large number of authorities. See, also, section 675.

Again, Benjamin, § 181, says:

"It is well settled that a delivery of goods to a common carrier—*a fortiori* to one specially designated by the purchaser for a conveyance to him or to a place designated by him—constitutes an *actual receipt* by the purchaser. In such cases the carrier is, in contemplation of law, the bailee of the person to whom, not by whom, the goods are sent; the latter, in employing the carrier, being considered as the agent of the former for that purpose. It must not be forgotten that the carrier only represents the purchaser for the purpose of receiving, not accepting, the goods. The law of the United States is the same." *Cross* v. *O'Donnell*, 44 N. Y. 661; *Caulkins* v. *Hellman*, 47 N. Y. 449; citing a large number of English and American cases in note *g*.

In note *g* it is said:

"It is not necessary that the purchaser should employ the carrier personally, or by some other agent than the vendor. We see no reason why a delivery to a warehouseman should not have the same effect." *Merchant* v. *Chapman*, 4 Allen, 362; *Hunter* v. *Wright*, 12 Allen, 548-550.

The doctrine in section 181 is repeated with some emphasis in section 693.

In *Phillips* v. *Bistolle*, 2 Barn. & C. 511, the court say:

"To satisfy the statute there must be a delivery of the goods by the vendor with intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with an intention of taking to the possession as owner." Id. 142.

And in note *g*:

"A mere delivery is not sufficient; there must further be an acceptance and receipt by the purchaser, else he will not be bound;" citing *Sheppard* v. *Pressy*, 32 N. H. 57.

Again, in same note:

"In truth the statute is silent as to the delivery of the goods sold, which is the act of the seller. It requires the acceptance and receipt of some part thereof, which are subsequent acts of the buyer." *Foster*, J., in *Boardman* v. *Spooner*, 13 Allen, 357; *Prescott* v. *Lock*, 51 N. H. 94.

Again, section 155:

"In *Combs* v. *Bristol & Exeter R. Co.*, *Pollock*, chief baron, said the 'vendee should have an opportunity of rejecting the goods. The statute requires not only delivery, but acceptance.'

"In May [says Benjamin] he confidently assumed that the construction which attributes distinct meanings to the two expressions, 'acceptance' and

actual receipt,' is now too firmly settled to be treated as an open question, and this is plainly to be inferred from the opinions delivered in *Smith* v. *Hudson.*" Section 156.

And in section 157:

"That acceptance may precede receipt." *Cusick* v. *Robinson*, 1 Best & S. 299.

Again, section 160:

"It is settled that the receipt of goods by a carrier or wharfinger appointed by the purchaser does not constitute acceptance, these agents having authority only to receive, not to accept, the goods for their employers. But it is held that if, after acceptance, the vendor delivers the goods to a carrier named by the purchaser, the receipt of them by the carrier is a receipt by the purchaser." Note *a* to same section.

NOTE. See *Burnside* v. *Rawson*, 17 Iowa, 639; Code, § 3636; 4 Greene, 410; *Partridge* v. *Wilsey*, 8 Iowa, 450; 47 N. Y. 452; 1 N. Y. 265, quoting statute, "The buyer should accept and receive some part of the goods," on page 265; 6 Wend. 400, (important; date of decision, 1831;) *Outwater* v. *Dodge*, 120 Mass. 315; *Noman* v. *Phillips*, 14 Mees. & W. 277; *Combs* v. *Ry. Co.* — Hurl. & N. 510; 9 Cush. 115.

SCHNEIDER v. GEO. F. BASSETT & Co.

(*Circuit Court, D. New Jersey.* July 25, 1882.)

PATENT FOR INVENTIONS—REISSUES—DEFECTS CURED.

Where, upon inspection and comparison, the lack of definite specifications, which rendered prior reissues inoperative, has been cured by the present reissue, the reissue *prima facie* is good.

In Equity.

Gifford & Gifford, for complainant.

NIXON, D. J. The bill of complaint was filed against the defendants for infringing reissued letters patent No. 10,087, dated April 11, 1882, for "shade-holders for lamps," and the case comes now before me on a motion for a preliminary injunction.

The application for the original patent was filed August 18, 1876, and letters patent No. 182,973 were granted October 6, 1876. These were surrendered January 27, 1877, and the first reissue, No. 7,511, dated July 13, 1877, was duly obtained.

A suit was brought against an alleged infringer of this first reissue, in the circuit court of the United States for the eastern district of New York, which resulted in a decree for the defendant; his honor,

Judge Benedict, holding that the patent was invalid, because it did not contain that full, clear, and exact description of the invention which the law required. Another suit was instituted upon the same reissue before his honor, Judge Blatchford, in the southern district of New York, which also resulted in favor of the defendants; the court holding that the reissue must be limited to the particular form of shade shown in the drawings, as nothing was said in the specifications or claims about the shape or size or proportion of the parts of the shade; and inasmuch as the defendants were not shown to have made or sold any such shade, they could not be chargeable with infringing the complainant's patent. After these decisions the owner of the patent made another surrender, for the purpose of correcting the defective specification, and obtained another reissue, on which the present suit is brought.

I think it is quite obvious, upon inspection and comparison, that the lack of definite specifications which induced these learned judges to declare the patent to be inoperative, has been cured by the present reissue. No suggestion to the contrary, at least, has been made, and *prima facie* the reissue is good. The defendants have not appeared and denied the infringement, or set up any defense. The lamp which they are making and selling has been produced and proved before the court. There is no reasonable doubt that it infringes the patent of the complainant, and the motion for a provisional injunction must prevail.

TUEDT and others *v.* CARSON and others.

(*Circuit Court, D. Minnesota.* 1882.)

1. REMOVAL OF CAUSE.

   The act of 1866, providing for the removal of a part of a cause into the federal court, and thereby splitting the action, was repealed by section 2 of the act of March 3, 1875.

2. SAME—UNDER ACT OF MARCH 3, 1875.

   An action brought by a citizen of the state in which it is brought against citizens of the same state and citizens of another state, cannot be removed from the state court to the federal court by the non-resident defendants, unless the whole suit is removed.

3. SAME—SEVERABLE AND INSEVERABLE CONTROVERSY.

   Although an action brought by the plaintiff against several defendants is for a tort, in respect to which plaintiff could sue one or all of the tort-feasors, yet if he elects to sue all, it will be deemed so far an inseverable controversy that a part only of the defendants cannot remove the cause into the federal court.

TREAT, D. J. This case was instituted in the state court against several non-resident defendants; also Wood and Styles, residents. The action is for malicious prosecution. The cause was removed from the state court to this court at the instance of the non-resident defendants. Without suggestion to the court that this was a removed cause, it went to trial on its merits. It appeared that the non-residents, being merchants, had sold and delivered to the plaintiffs goods amounting to three or four hundred dollars. Having heard a rumor that the plaintiffs had failed, a telegram was sent by them to Wood, of the law firm of Wood & Styles, inquiring as to the truth of said rumor. Wood answered, substantially, that the plaintiffs had not yet failed, but were in a bad way, and requesting said non-resident defendants to send forward the amount of their demand and the individual names of the members of the firm. That was done, together with a direction to secure their demand at all hazards. After information secured by Wood & Styles as to the preparation of an attachment suit in the interest of others, Styles made the needed affidavit for an attachment, upon the strength of which a levy was made. It was contended that such action having been had without previous demand for the amount due, other attachment suits of like nature were induced, whereby the store of the plaintiffs, under the several attachment and other suits following, and executions issued, plaintiffs' property was sacrificed at said execution sales. Judgment was had in the state court, as by default, against the plaintiffs here

for the amount of the demand made by the non-resident defendants in this suit, and execution was issued and levied accordingly; also several executions under other judgments.

The non-resident defendants in this suit gave no direction to their local attorneys as to the manner in which they should proceed, but before final judgment were informed that an attachment suit had been instituted in their name. Of the facts averred in the affidavit made by Styles, they knew nothing. There was no evidence offered to show the connection of the non-residents with the commencement and continuance of said attachment suit other than what is thus stated. At the close of the case the counsel for said non-resident defendants asked the direction of the court as to their liability on the case as made. The court, holding that they were not responsible in this action for what their local attorneys had done without their knowledge or direction, ordered a verdict in favor of said non-resident defendants, and suggested to plaintiffs' counsel to proceed before the jury with their cause of action against said Wood & Styles. The plaintiffs' counsel thereupon moved to remand the cause, which was overruled. A verdict for non-resident defendants was rendered, and the plaintiffs' counsel moved to remand the cause as to the resident defendants, which motion was also overruled. No further action was had, because said resident defendants had not appeared to contest the cause, and the plaintiffs declined to proceed further as to them. At that stage of the case it was suggested by said resident defendants that they were willing to have the case as to them submitted to the jury.

It should also be stated that after judgment had been rendered in the original attachment suit the same was opened on motion, and after said motion was heard the attachment was dismissed, but the judgment for the demand sued for upheld, leaving in force the levy on execution. There were many facts and circumstances developed which made it proper for the jury to decide whether said Wood & Styles acted with malice, and without probable cause.

It will thus be seen that the case is anomalous. In one of its aspects the court should, at the request of Wood & Styles, have submitted the case, as to them unargued, to the jury, under such instructions as the case demanded, inasmuch as plaintiff's counsel declined to proceed further as to them, resting on his motion to remand. In another aspect, it may be urged that as the whole case was before the jury, and a verdict rendered in favor of the non-resident defendants on the submission of the case, and nothing was said in the verdict as

to the other defendants, the verdict, under the circumstances stated, should be held as if for all the defendants. Behind the immediate conduct of the suit and the verdict rendered is the grave question whether this suit was removable to the United States court. The action was *ex delicto*,—a tort,—in respect to which the plaintiffs could sue one or all of the tort-feasors. They chose to sue all, resident and non-resident, in one suit. The non-resident defendants caused the whole suit to be removed, and now contend that as the cause of action was severable as against tort-feasors, the case falls within the recent rulings of the United States supreme court. It has been conceded and has been expressly decided that the act of 1866 is repealed by the act of 1875, so that the whole case must be removed if a removal is had. It therefore becomes necessary to decide whether, under the act of 1875, this case was removable.

The question presented has been suggested to the United States supreme court in several cases, the most recent of which went to that court from this circuit.

In the case of *Barney* v. *Latham*, 103 U. S. 205, no new views were expressed, but an elaborate analysis given of the various acts of congress whereby the conclusion theretofore reached was upheld, viz., that when many parties are named, some of whom are formal, though essential to the record, United States courts are not ousted of their jurisdiction if, under another distribution of the parties to the record, the real controversy is between citizens of different states. That case is only one of many to the same point. The case of *Hyde* v. *Ruble* has since been before the United States supreme court, in which the opinion of this court in remanding said case was sustained. That was a suit by a Minnesota plaintiff on a contract of bailment against copartners, one of whom was a citizen of the same state with plaintiffs, and the other copartners (defendants) citizens of another state. The United States supreme court held that the case was not removable.

How does this suit differ from that in principle?

The act of 1866 in *terms* permitted the unseemly condition of having a suit in a state court split in two as to the respective parties, whereby precisely the same cause of action would be pursued at the same time as to some of the defendants in the state court, and as to others in the United States court. It is evident that the results of the distinct trials in different jurisdictions might differ; and consequently persons equally liable would be in the strange predicament of having no right of contribution, where allowable, when judgment

against some in one jurisdiction was had, and a judgment for the others rendered in another jurisdiction. What judgment should dominate? Why should not the parties in whose favor a judgment had been secured be protected thereby, and why should the others who had been mulcted by a different judgment be stripped of their legal right to contribution by a decision of a court in which they had ceased to be parties? Without pursuing the inquiry into the strange conditions in which parties might be involved under the act of 1866, it must suffice that in some of the federal courts strong dissenting opinions were originally given when said act was so construed as to permit such anomalous results, and as to the constitutionality of such act, if such was the legitimate construction of its terms. It may be that from such and other considerations congress in its wisdom repealed that statute. The mischief to be remedied must be regarded in construing any statute which changes prior laws or enactments. Hence, it is clear that the following language of the act of 1875 ought to receive only one interpretation. That act says, in section 2, that any suit of a civil nature, etc., may be removed from a state to a United States circuit court, (omitting other provisions.) "When, in any suit mentioned in this section, there shall be a controversy which is *wholly* between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants *actually interested* in such controversy may remove said suit to the circuit court of the United States for the proper district."

The plain meaning of the provisions of the act of 1875, thus quoted, is that when all the plaintiffs are residents, for instance, in the state in whose local court suit is brought, and *all* the defendants are non-residents, then *all* the defendants may by uniting cause the suit to be *wholly* removed, or any *one* of the many non-residents may cause the removal of the *whole* case, although his co-defendants do not join in the request. Under such construction of the statute, the whole case, without splitting, would be transferred to the federal court, and no constitutional difficulty arise. While it is the constitutional right of a citizen of one state, other than that of which his adversary is a citizen, to have the controversy decided in a United States court, it is equally the right of citizens of the same state to be heard solely in the state courts. To avoid that difficulty the act of 1866 was passed. But, as it involved greater difficulties,—such as already suggested in this opinion,—congress repealed that act, so that now there can be no so-called splitting of cases. The whole case must be removed, or no removal had. The act of 1875 is quite

explicit. All of the actual parties on the one side or the other must be citizens of different states, in which event one of the non-residents, even if the others on the same side do not join, may cause the whole controversy to be removed. The act of 1875, however, is guarded in its terms, so as to prevent injustice; for it, as it were, emphasizes the clause that either one or more of the plaintiffs or defendants (under the conditions stated) *actually interested* in such controversy *may* remove, etc. Under that provision the federal courts look to the position of the parties to ascertain whether they are *actually interested*, and if not, as in *Barney* v. *Latham*, the jurisdiction of the federal court is not ousted.

In the suit now under consideration an apt illustration occurs. Many persons were sued in the state court, some resident and some non-resident. The non-residents caused a removal. It is true, the plaintiff could have sued any one or more of said defendants, because the action was in its nature severable, yet he chose, as was his right, to pursue all the wrong-doers in one suit. In the progress of this suit it is judicially determined on the merits that no cause of action exists against the non-residents, leaving the case to be further pursued solely between resident plaintiffs and resident defendants. The case thus became split into two parts, to be continued in a forum which had no jurisdiction of the remaining parties if they had originally been the sole parties. There could not be presented a more forcible illustration of the error in holding that the case was removable at all. It is unnecessary to trace the rulings under the act of 1789 and subsequent acts to the present time, to show that the conclusion reached is the only justifiable one.

The case was not removable, and should have been remanded on motion at the outset, without reserving that motion until the case had been tried on its merits. Still it is this duty of this court, when at any stage of the proceedings it ascertains that it has no rightful jurisdiction, to dismiss or remand.

The court is bound to correct its errors when made to appear. It therefore sets aside the verdict entered, overrules its own action on the motions for removal, and orders the whole case remanded to the state court whence it was removed, with costs against the removing parties.

NELSON, D. J., did not sit in case.

MERCHANTS' MANUF'G CO. *v.* GRAND TRUNK RY. CO.

(*Circuit Court, S. D. New York.* August 30, 1882.)

1. JURISDICTION—FOREIGN CORPORATION.

When a foreign corporation avails itself of the privileges of doing business in a state whose laws authorized it to be sued there by service of process upon an agent, its assent to that mode of service is implied; and it consents to be amenable to suit by such mode of service as the laws of the state provide, when it invokes the comity of the state for the transaction of its affairs; and waives the right to object to the mode of service of process which the state laws authorize.

2. SAME—SERVICE OF PROCESS UNDER REV. ST., § 739.

Under the Revised Statutes, § 739, a foreign corporation is "found" in the district where its agent is served when it does business there, and the state laws authorize such a servive.

Wingate & Cullen, for complainant.

Butler, Stillman & Butler, for defendant.

WALLACE, C. J. The motion to vacate the service of the writ raises a question of jurisdiction. The suit is brought by a foreign corporation against a foreign corporation to recover damages for the loss of merchandise of the plaintiff while being transported by the defendant in the dominion of Canada. It is insisted that the court has no jurisdiction, because the laws of this state provide that an action against a foreign corporation can only be maintained by another foreign corporation in one of the following cases: (1) When brought to recover damages for the breach of a contract made within this state, or relating to property situated within the state at the time of the making thereof; (2) when brought to recover specific real property situated within the state, or a chattel replevied within the state; (3) where the cause of action arose within the state, except when the object of the action is to affect the title to real property situated without the state.

It will not be contended that a citizen of a foreign state can be denied access to this court by a state law, or that jurisdiction over persons or subject-matter which is devolved by the constitution and laws of the United States upon the federal courts can be circumscribed by any legislative action by the state. *Ry. Co.* v. *Whitton*, 13 Wall. 286; *Payne* v. *Hook*, 7 Wall. 427; *The Moses Taylor*, 4 Wall. 411; *Ins. Co.* v. *Morse*, 20 Wall. 445. Nor is it claimed that a corporation created by another state, which, for all the purposes of suing and being sued in the federal courts, is deemed a citizen of that state, may not maintain an action against another foreign corpora-

tion in these courts upon any cause of action of which the court has jurisdiction, whenever it can obtain due service of process upon the defendant. Neither is it seriously asserted that the cause of action in the present suit is not one of which this court has cognizance.

The real objection, then, if any there be, is that jurisdiction of the person of the defendant cannot be acquired. No suit can be brought in this court "against an inhabitant of the United States by any original process in any other district than that of which he is an inhabitant, or in which he is found at the time of serving the writ," (Rev. St. § 739;) and the case turns on the point whether the defendant can be "found," within the meaning of this statute, in the district where the suit is brought. The defendant's argument leads to the proposition that a foreign corporation cannot be "found" in this state except to litigate certain specified controversies, of which this is not one.

A corporation, although it cannot migrate beyond the limits of the sovereignity which has created it, may by comity exercise its franchises elsewhere. A foreign corporation can transact business here upon such conditions as may be imposed upon it by the laws of this state. It can be sued whenever the technical obstacles in the way of compelling its appearance do not exist. At common law, process must be served on its principal officer within the jurisdiction of the sovereignity where the corporate body exists. But it can waive this requirement and consent to be served in a different manner, and when it does this it stands on the same footing with a natural person. When it avails itself of the privileges of doing business in a state whose laws authorize it to be sued there by service of process upon an agent, its assent to that mode of service is implied. Accordingly, it has been repeatedly held that a foreign corporation consents to be amenable to suit by such mode of service as the laws of the state provide, when it invokes the comity of the state for the transaction of its affairs. *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Railroad Co.* v. *Harris*, 12 Wall. 81; *Ex parte Schollenberger*, 96 U. S. 369. It waives the right to object to the mode of service of process which the state laws authorize.

The laws of this state enact that a foreign corporation may be served with process within this state by service upon its president, treasurer, or secretary. It is not disputed that the defendant was thus served in the present suit. The authorities referred to, and many others which it is unnecessary to cite, are unanimous to the effect that the corporation is "found" in the district where its agent

is served, when it does business there and the state laws authorize such a mode of service. No question of jurisdiction of the person of the defendant can therefore arise. It may be that the cause of action is one of which the court has not jurisdiction, and the suit will be dismissed for want of jurisdiction of the subject-matter; but this does not affect the jurisdiction over the person of the defendant, which must be acquired before the court can determine whether or not there is any jurisdiction of the subject-matter. The jurisdiction of this court to hear the suit is not derived from the implied consent of the defendant to be sued. It has not consented to be sued in this court by any mode of service. It is here because it has been found here, and it was found here because it voluntarily placed itself in a position where it could be served with process in the manner prescribed by the state laws.

Well-considered authorities have favored the conclusion that a commercial corporation may be deemed constructively present outside the state of its origin, wherever it has property and carries on its operations by its agents; and that service of process upon such agents at such places is good service upon the corporation, even in the absence of local laws authorizing such mode of service. *Moulin* v. *Ins. Co.* 1 Dutcher, 57; *Bushel* v. *Commonwealth Ins. Co.* 15 Serg. & R. 176; *Libbey* v. *Hodgdon,* 9 N. H. 394; *St. Louis Ins. Co.* v. *Cohen,* 9 Mo. 422; *Hayden* v. *Androscoggin Mills,* 1 FED. REP. 93; *Newby* v. *Van Oppen,* 41 L. J. Q. B. 148; *Moch* v. *Virginia Fire Ins. Co.* 10 FED. REP. 696. But it is not necessary, for present purposes, to adopt this opinion.

The motion is denied.

NOTE. Section 739 of the Revised Statutes provides that a defendant can be sued only in the district where he resides or may be found, but corporations may be "found" for the purpose of the service of process where they have an agent and are doing business. *Wheeling etc., Trans. Co.* v. *Baltimore & O. R. Co.* 1 Cin. 311; *Hannibal, etc., R. Co.* v. *Crane,* 102 Ill. 249; *Handy* v. *Ætna Ins. Co.* 37 Ohio St. —; *Wilson Packing Co.* v. *Hunter,* 8 Cent. Law J. 333; S. C. 12 FED. REP. 222, note; *McNichol* v. *Mercantile Ass'n,* 14 Cent. Law J. 51; *Williams* v. *Empire Trans. Co.* 14 O. G. 523; and see *Hale* v. *Cont. L. Ins. Co.* 12 FED. REP. 359; *Lovejoy* v. *Hartford F. Ins. Co.* 11 FED. REP. 63, and note on page 69.—[ED.

In re FARMERS' & MECHANICS' BANK OF ROCHESTER, a Bankrupt.

(*District Court, N. D. New York.* 1882.)

1. EQUITY—MONEY PAID BY MISTAKE—RECOVERY BACK.

Where, by mistake, there is a payment of money, which there is no ground to claim in equity or conscience, it is recoverable back.

2. SAME—CASE STATED.

Where a bank, on a certain date, was indebted to a depositor, who owed the bank on a note not yet due, and who purchased of the bank and gave his check for a draft on a distant city, which was mailed to that city to pay an indebtedness to an insurance company, but the draft was dishonored, and notice given, the bank in the meantime having become bankrupt, and, upon consulting with a layman, he was advised that bankruptcy prevented an offset, and he paid the note to the assignee, *held*, that he was entitled to a return of the money so paid by him.

J. M. Dunning, for petitioner.

W. H. Whiting, for assignee.

COXE, D. J. On Saturday, the sixteenth day of May, 1874, the Farmers' & Mechanics' Bank owed George H. Roberts, as depositor, $650, and he owed the bank $500 on a note due the latter part of June, 1874. On that day he bought at the bank a New York draft for $500, paying for it by his check. He mailed the draft to New York to pay an indebtedness to the Globe Insurance Company of that city. On the eighteenth of May (Monday) the bank suspended, and on the 20th a petition in bankruptcy was filed. The draft was never paid. Roberts received notice of its dishonor by mail on the twenty-first of May. On the ninth day of July, after consulting with his partner, a layman, who advised him that bankruptcy prevented an offset, he paid the note to the assignee. Asserting that he paid under a misapprehension of his rights, he seeks to have the money returned to him. The matter was referred to the register in charge to report the facts, with his opinion. The case is now before the court on exceptions to the referee's report, which was adverse to the petitioner.

I cannot assent to the conclusions reached by the learned referee, and am constrained to hold that Roberts is entitled to the relief asked for in the petition. I think he had a perfect defense to the note, and paid it under a mistake. Had he been familiar with section 20 of the bankrupt act it can be said, almost with certainty, that he would not have taken the course he did. Indeed, the fact of the payment of the note without demur is alone sufficient to carry the conviction that it was the act of a man ignorant of the existence of a law which virtually canceled the obligation. If the debt was

one which, in good conscience, he was bound to pay, he could not now take advantage of that ignorance; but it was not such a debt. That Roberts had a legal offset to the note on the ninth day of July, 1874, I have no doubt. It is true that he did not then have actual possession of the draft, but I fail to see how this circumstance changed the legal *status* of the parties. On the sixteenth of May he paid the bank $500 for a piece of worthless paper. He attempted to use this paper to pay his debt to the insurance company. The company finding it to be valueless, declined to receive it, and so notified him on the twentieth of May. On the 16th Roberts bought the draft and was its owner. When did he lose title to it? When did the company ever accept it, or acquire title to it? Understanding the evidence as he does, the conclusions of the learned referee are certainly correct. He says: "The note was paid July 9, 1874, when the draft was held by the drawee, and before the insurance company had decided to repudiate it."

It seems to me that the letter of May 20th was a legal repudiation of the draft. It is in these words: "Your check for five hundred dollars on the Farmers' & Mechanics' Bank has been returned to us marked 'not good.' Please remit for same and oblige." If the letter had contained the additional expression, "We repudiate the draft and hold it subject to your order," how much stronger would it have been? Was not all this implied? Nor do I think the legal aspect was changed because Roberts, unconscious of his remedy at Rochester, endeavored to induce the insurance company to accept the draft or help share his loss. They never did accept it; the position taken in the letter was maintained throughout; payment of the $500 debt was insisted upon to the last dollar; and Roberts was the owner—doubtless the unwilling owner—of the worthless draft. Whether it was in his possession or not is surely immaterial. If, instead of sending the New York draft, he had sent his own check, it will be readily seen that if the check had not been presented until after the suspension of the bank, he would have had a perfect offset to the note; and yet the cases are parallel in principle. The bank officials gave him, in return for his $500, a valueless paper; and they must have known that it was valueless at the time. He has never received a dollar, directly or indirectly, on the draft. Legally and equitably the bank owed him the $500. The assignee could never have collected the note by process of law; there was a perfect defense. Roberts was not legally bound to pay the note, nor did good conscience require it. If restitution is not

made, the creditors will receive a sum to which they are not entitled, and which they never would have received but for an inadvertent act. I cannot divest myself of the impression that Roberts made a mistake which a layman might naturally make, and that it would be inequitable and unjust not to relieve him from its consequences.

In the case of *Bize* v. *Dickason*, 1 Durn. & East, 285, upon facts almost precisely similar, the court decided in favor of allowing the set-off. In that case Lord Mansfield said:

"The rule had always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. So where a man has paid a debt, which would have otherwise been barred by the statute of limitations; or a debt contracted during his infancy, which in justice he ought to discharge, though the law would not have compelled the payment, yet the money being paid, it will not oblige the payee to refund it. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action."

It follows that the prayer of the petition should be granted.

RICKER v. GREENBAUM.

(Circuit Court, N. D. Illinois. 1882.)

1. FORECLOSURE SALE—RIGHTS OF PURCHASERS FROM MORTGAGEOR.

A party owning land, subject to a mortgage, conveyed a block thereof to a purchaser, who gave the vendor his note for the purchase money, and executed a deed of trust to secure payment of the note, and afterwards, by warranty deed, the owner conveyed to the present plaintiff another block of said lands, the latter not knowing at the time of the existence of the mortgage. In satisfaction of the mortgage debt the decree in the foreclosure suit required the sale of both blocks in the inverse order in which they had been sold, and the amount realized on the sale of the first parcels sold, not being sufficient to pay the mortgage debt, plaintiff was compelled to pay the difference in order to prevent the sale of his block; *Held*, that plaintiff is entitled to be subrogated to the rights of the mortgagee to the extent of such payment, and to have the interests, of the owner as holder of the trust deed, and of the holders of the note for the unpaid purchase money,—transferred to them by the original owner with knowledge of the existence of the mortgage,—sold for the purpose of reimbursing paintiff in the sum paid by him, with interest.

Melville W. Fuller and *W. C. Goudy*, for Ricker.

Rosenthal & Pence, for Greenbaum & Foreman.

HARLAN, Justice. On the thirtieth day of September, 1870, Samuel J. Walker held the title to certain real estate in the city of Chicago,

known as Packer's subdivision, subject, however, to a mortgage given Powell by conveyance dated April 8, 1869, and recorded May 25, 1869. The present suit relates only to blocks 14 and 16 of that subdivision.

By warranty deed dated July 1, 1872, and recorded December 7, 1872, Walker and wife conveyed to Coolbaugh and Powers several blocks in Packer's subdivision, including 14 and 16. By quitclaim deed dated February 25, 1873, and recorded April 3, 1873, Coolbaugh and wife, and Powers and wife, re-conveyed to Samuel J. Walker block 14; and by warranty deed dated February 25, 1873, and recorded April 5, 1873, Walker and wife conveyed block 14 to Sherman A. Ricker. The consideration was $15,100, of which $5,100 was paid in cash April 6, 1873, and $10,000 in a note which Ricker subsequently paid off; and, without actual knowledge of the Powell mortgage, commenced, May 6, 1873, building on block 14, erecting thereon a packing-house, at a cost of more than $80,000. These improvements were completed about the last of September, 1873.

For the purposes of the present suit it is only necessary to say, as to block 16, that by warranty deed dated November 25, 1872, and recorded December 2, 1872, Walker and wife conveyed it to John D. Kinney, who, by deed of like date, (November 25, 1872,) conveyed the same property to Rogers, in trust, to secure Kinney's note to Walker for $12,000, payable November 25, 1875, and which was given for the purchase money; that the deed to Rogers was made without notice to him, and was not recorded until October 23, 1873; and that Coolbaugh and wife, and Powers and wife, by quitclaim deed dated February 25, 1874, and recorded April 15, 1874, conveyed block 16 to Samuel J. Walker.

In satisfaction of the mortgage debt, the decree in the foreclosure suit instituted by Powell required the sale of blocks 16 and 14 in the following order: (1) The north 201 feet of block 16, excepting and reserving therefrom such estate, right, title, and interest therein as Rogers and Greenbaum & Foreman (the holders of the $12,000 note) had in virtue of the trust deed executed by Kinney; (2) the south 100 feet of block 16; (3) block 14; (4) the estate, right, title and interest of Rogers, and of Greenbaum & Foreman, in block 16. That decree has been executed to the extent necessary to satisfy the mortgage debt. The first and second parcels, sold as required by the decree, did not bring the mortgage debt by $9,030.76. That sum Ricker was compelled to pay, and did pay, in order to prevent the sale of block 14. His payment, it is conceded, was without preju-

dice to any right he had to insist upon the estate and interest of Rogers and Greenbaum & Foreman in block 16 being sold before block 14; consequently, without prejudice to any equity, he had to be subrogated, to the extent of such payment, to the rights of the mortgagee, Powell, and to have the interest of Rogers and Greenbaum & Foreman, to the extent of the unpaid purchase money due Walker from Kinney, sold for the purpose of reimbursing Ricker said sum of $9,030.76, with interest. The present suit is an assertion of such right upon the part of Ricker. Counsel, with commendable frankness, concedes that Ricker has the right in this suit to litigate the equities between himself and Greenbaum & Foreman. That concession is no more than, in the opinion of the court, was required by the settled principles of equity.

We have seen that, subject only to the Powell mortgage, Ricker, on the fifth of April, 1873, by the record of the deed from Walker to him, acquired a complete title to block 14; we have also seen that the Powell mortgage also rested upon block 16. *When Ricker's deed was recorded,* Samuel J. Walker, the evidence shows, was the owner of the $12,000 note, and also held the deed of trust executed to secure its payment. Had he continued to be the owner of that note up to the institution of the foreclosure suit, or when the decree of sale therein was passed, it is clear that Ricker would have been entitled in equity to have the sale of block 14 deferred until after the sale of such estate and interest in block 16 as Walker would have had as well in virtue of his ownership of that note, as of the lien given on block 16 to secure its payment. This, because Walker had given a warranty deed to Ricker for block 14, and because it would have been inequitable to expose that block to the mortgage claim so long as Walker had any interest covered by the mortgage.

This brings us to the decisive question in this case, viz., whether, under the circumstances established by the proof, Greenbaum & Foreman can, in virtue of their ownership of the $12,000 note, claim, as against Ricker, any more than Walker could had he never parted with the note. They obtained the note from Walker, or from Walker's agent with his approval, in a negotiation not commenced until the latter part of September, 1873, more than five months after the Ricker deed was placed on record. That negotiation does not seem to have been concluded until the twenty-fifth day of February, 1874, the day on which Coolbaugh and wife, and Powers and wife, gave the before-mentioned quitclaim deed to Walker for block 16. There is a serious conflict in the testimony as to whether

Greenbaum & Foreman acquired the note merely as collateral security for certain demands against Walker, or purchased it outright for $9,500; that is, for $2,000 in cash paid to Walker, and $7,500 in an overdue check of Reed's, which Walker had negotiated with them, and for which he was liable. The court is of opinion that the latter view is established by the weight of testimony, and, consequently, that Greenbaum & Foreman must be deemed to have purchased the note, without any right remaining in Walker to redeem it, or the deed of trust which passed with it to the purchaser. But of what facts were Greenbaum & Foreman informed, or of what facts must they be deemed to have had notice when they purchased the note?

The testimony shows, beyond question, that when Walker and Greenbaum & Foreman entered upon negotiations in reference to the $12,000 note, the Powell mortgage was the subject of discussion between them. It is true that Greenbaum, when giving his deposition, said that *he* did not see the deed to Ricker of block 14 until this litigation was commenced; that *he* did not himself examine the record of conveyances of lots or blocks in Packer's subdivision; and that *he* did not remember that he had any information about the situation of block 14. It is also true that he testified in general terms that he did not recollect anything about the Powell mortgage. But he also says: "I did not discuss the title generally with Walker, but only as to the mortgages. We talked about the Powell mortgage; and Walker said that there was a large amount of other property to protect the Powell mortgage. We had our man in the office, an attorney, to examine the abstract or minutes. I don't know whether he examined it from the records or from minutes. I think he had pencil minutes. Walker mentioned a large amount of property as included in the Powell mortgage not sold, so that this property would be clear from the Powell mortgage."

The attorney referred to was not examined as a witness, and it cannot, therefore, be stated with certainty what facts his investigation of the title disclosed. But the presumption should be indulged that he discharged his duty, and that he came into possession of such facts as could be gathered from the public record of conveyances. And notice to him was, under the circumstances, notice to Greenbaum & Foreman. The latter were distinctly informed that block 16 was covered by the Powell mortgage; that other property besides that block was embraced therein; and that some of the property mortgaged had not been sold. An examination of the records upon those

points would have disclosed the fact that block 14 was covered by the mortgage, and that Ricker held a conveyance from Walker, with warranty, recorded long before the negotiations with Walker for the purchase of the $12,000 note. Those facts being thus ascertained,—or if they were not so ascertained, it was because of the carelessness upon the part of Greenbaum & Foreman, or their office attorney,—the court must assume that Greenbaum & Foreman purchased the note with knowledge of (and therefore upon equitable principles subject to) Ricker's rights to have the interest of Walker in block 16 sold for the protection of block 14 from the Powell mortgage. It would be a gross perversion of the Illinois rule requiring the sale of mortgaged premises in the inverse order of their alienation to permit that equitable right to be destroyed by a purchase made under such circumstances. The recorded deed of Ricker should prevail against the subsequently-recorded trust deed. Had Greenbaum & Foreman purchased the note for value, and without any notice of the Powell mortgage other than that constructively furnished by the record of conveyances, or under circumstances which did not put them as men of ordinary prudence upon inquiry as to the right of others holding portions of the mortgaged premises, their position might possibly have been different.

It is not necessary that I should extend this opinion by an examination of the adjudications of the supreme court of Illinois to which attention has been particularly called: *Old* v. *Cummings*, 31 Ill. 188; *Tenney* v. *Hemenway*, 53 Ill. 97; *Colehour* v. *Savings Inst.* 90 Ill. 156; *Niles* v. *Harmon*, 80 Ill. 396; *Silverman* v. *Bullock*, 98 Ill. 11; *Iglehart* v. *Crane*, 42 Ill. 261; and *Baldwin* v. *Sager*, 70 Ill. 503. Nothing which I have said is in conflict with those cases, when carefully examined. Indeed, consistently with the settled principles of equity, as recognized by the supreme court of the state in those and other cases, with which counsel are familiar, I do not perceive how any conclusion could be reached different from that indicated.

Ricker is entitled to the relief asked by him; or a decree may be entered upon the cross-bill of Greenbaum & Foreman for the enforcement of the lien given by the trust deed; the proceeds of sale, however, to be applied first to the repayment to Ricker of the before-mentioned sum advanced by him in satisfaction of a balance due on the mortgage debt, with interest upon the sum so advanced, and his costs in the suit expended. Whatever may remain of the proceeds of the sale will go to Greenbaum & Foreman, as the holders of the

$12,000 note, lessened, of course, by the amount recovered by them on the Orvis note.

It may be that, in the absence of counsel, I have fallen into some errors as to the details of the decree to be entered. What has been said will, however, guide them in the preparation of the proper decree.

NOTE. The decree in the original suit to foreclose the Powell mortgage was affirmed by the supreme court of the United States, after rehearing granted, in *Orvis* v. *Powell*, 98 U. S. 176.

Ricker then applied for leave to file a bill of review, which was then denied; and that action of the circuit court was affirmed in *Ricker* v. *Powell*, 100 U. S. 104.

The sale then took place, and Ricker obtained leave to file and filed his bill of review, which was heard by Justice Harlan.

BURHAM *v.* FRITZ and others.

(*Circuit Court, D. Iowa, C. D.* 1882.)

1. REDEMPTION—JUNIOR LIENHOLDER.

   Under the statutes of Iowa the holder of a simple judgment lien has not an equitable right to redeem from a senior lienholder after the execution of a sheriff's deed made pursuant to a sale thereunder.

2. SAME—RULE OF PROPERTY—STATE DECISIONS TO GOVERN.

   The decision of the supreme court of a state, as to the rule of property, will be followed by the federal courts sitting within the district included in such state.

This cause is now before the court upon the complainant's demurrer to the cross-bill of the respondent B. F. Elbert.

The complainant obtained in this court a decree for the foreclosure of a mortgage against the mortgageor and all incumbrancers except said B. F. Elbert, who was named in the bill but not served with process. On the twenty-ninth day of August, 1879, the master sold the mortgaged premises in pursuance of the decree. On the twenty-fourth day of April, 1878, prior to the foreclosure proceedings, said B. F. Elbert recovered a judgment in the district court of Monroe county, Iowa, which became a lien on the land embraced in the foreclosure and sale. The complainant was the purchaser at the master's sale, and on the fifteenth day of September, 1879, he received a deed for the land in question and took possession of the same. After these proceedings, to-wit, on the thirtieth day of January, 1882, the

complainant caused service to be made on Elbert for the purpose of cutting off and barring his right of redemption. The latter, on the third day of April, 1882, answered the bill and filed a cross-bill, praying that the complainant should be required to account for rents and profits, and the respondent allowed to redeem. To this cross-bill the complainant demurs, and among other grounds of demurrer assigns the following: "That a junior judgment creditor cannot in this state, in equity, redeem from a sale under a foreclosure of a prior mortgage after the expiration of the statutory time of redemption."

Leyman & Clark, for demurrer.

Perry & Townsend, *contra.*

LOVE, D. J. The question thus presented has, we think, been fully decided by the supreme court of the state of Iowa in *Diddy* v. *Risser*, 55 Iowa, 699. Although that case was decided upon grounds by no means satisfactory to our own judgment, it is our duty to follow it as a law of property in this state. It is too obvious for discussion that we cannot, by disregarding the rule laid down in that case, set up a different rule of property for the federal courts in this district.

We are wholly unable to distinguish the case of *Diddy* v. *Risser* from the case before us upon any material grounds of fact or law. The only difference between the two cases consists in the fact that in *Diddy* v. *Risser* the sale from which the junior judgment creditor sought to redeem was under a decree foreclosing a mechanic's lien, while in the present case the sale was under a decree foreclosing a prior mortgage. We cannot see, however, that this fact makes any difference in the principle of the two cases. Indeed, the supreme court of Iowa, in its opinion, does not proceed upon any such distinction, but puts its judgment upon the broad ground that "the holder of a simple judgment lien never had an equitable right to redeem from a senior lienholder after the execution of a sheriff's deed made pursuant to a sale thereunder." We suppose that the supreme court of Iowa used this language with reference only to the jurisprudence of the state of Iowa. As a proposition of law it certainly is not true, if applied in the wide and comprehensive sense which the words imply. The rule was, I think, quite otherwise at common law. 2 Jones, Mortg. § 1436, and cases there cited; 4 Kent, 162; Story, Eq. § 1053; *Brainard* v. *Cooper*, 10 N. Y. 356; Powell, Mortg. 251.

It would seem, in view of these and other authorities, that the doctrine of the Iowa supreme court can be sustained only upon the

ground that we have in Iowa a statute giving the right of redemption, and prescribing the time within which it must be exercised. Perhaps it might be well argued that it is the policy of our statute to require the judgment creditor holding a junior lien to make his redemption promptly within the prescribed time, and not allow him to disturb and harass a purchaser long after the time of sale, and at any time within the statute of limitations. But, however this may be, we are bound by the rule as laid down by the supreme court of the state.

The demurrer to the cross-bill will be sustained; but since the counsel for the complainant in the cross-bill have made no reference to the case of *Diddy* v. *Risser*, the court will be willing to hear them, in writing, upon the application of that case to the present controversy.

Demurrer sustained.

ORMEROD *v.* NEW YORK, WEST SHORE & BUFFALO R. Co.

(*Circuit Court, S. D. New York.* August 25, 1882.)

1. EMINENT DOMAIN.

   The right of eminent domain over the shores and the soil under the waters, resides in the state for all municipal purposes, and within the legitimate limitations of this right the power of the state is absolute, and an appropriation of the shores and land is lawful.

2. SAME—OBSTRUCTING NAVIGABLE WATERS.

   In the exercise of this right the state may directly or indirectly by delegation, authorize the construction of bridges, piers, wharves, or other obstructions in navigable waters, and such obstructions are not nuisances, because erected under lawful authority.

3. SAME.

   It is only when the exercise of this power of eminent domain comes in collision with the paramount authority of the United States that it is inhibited; and until congress has asserted its power to regulate commerce, and by legislation has assumed to restrict the jurisdiction of the state over its navigable waters, no conflict can arise, and the authority of the state is conclusive.

W. W. Badger, for complainant.

Alexander & Green, for defendant.

WALLACE, C. J. Although the complainant has obtained a preliminary injunction upon due notice but by the default of the defendant, the present motion has been argued as though it were one to dissolve an *ex parte* injunction. As both parties have seemed desirous

that the right of the complainant to an injunction should be considered upon the merits, the motion will be disposed of accordingly.

The complainant seeks to restrain the defendant from constructing a road-bed and railroad track in the waters of the Hudson river near New Windsor, laterally along the front of certain docks and brick-yards situate on the west shore of the river. The lands under the water of the river, which have been appropriated by the defendant, were granted by the state of New York to the riparian proprietors, and the defendant has taken proceedings in the state courts to acquire these lands for the purposes of their railroad, under the general railroad act of this state delegating to railroad corporations the exercise of the power of eminent domain in this behalf. The defendant is in possession of these lands under an order of the state court, made in the course of these proceedings after hearing the respective parties. The complainant is the owner of a schooner, and resides in the state of New Jersey. He asserts that the defendant's railroad will obstruct the navigation of the river, and alleges that he will sustain special injury, because he has made a contract with several of the riparian proprietors to transport bricks for them to New York city in his vessel during the present season of navigation, and that the obstructions of the defendant will defeat the performance of this contract. The controversy may be considered in two aspects:

1. The complainant has, in common with all other persons, the right to navigate the public waters, and if the acts of the defendant constitute a nuisance, as he may sustain special injury, he has a sufficient interest to invoke the aid of the court. But it is not seriously contended in his behalf that the acts of the defendant will materially obstruct the general navigation of the river. The railroad will intercept communication with the shore along that portion of the river where it is to be located, and will be an impediment to the riparian owners, and those who desire access by the river to their lands. The shores of navigable waters and the lands under the waters belong to the state within whose territorial limits they lie, or to those who have derived title from the state. It is a familiar doctrine that the right of eminent domain over the shores and the soil under the waters resides in the state for all municipal purposes, and within the legitimate limitations of this right the power of the state is absolute, and an appropriation of the shores and lands is lawful. In the exercise of this right the state may directly, or indirectly by delegation, authorize the construction of bridges, piers, wharves, or other obstructions in navigable waters. Such obstructions are not

nuisances, because that cannot be a nuisance which is done by lawful authority. It is only when the exercise of this power of eminent domain comes in collision with the paramount authority of the United States that it is inhibited and impotent. The power of the state ends where that of the national sovereignty begins; but until congress has asserted its power to regulate commerce, and by legislation has assumed to restrict the jurisdiction of the state over its navigable waters, no conflict can arise, and the authority of the state is comprehensive. *Willson* v. *Blackbird Creek Marsh Co.* 2 Pet. 250; *Gilman* v. *City of Philadelphia*, 3 Wall. 728; *County of Mobile* v. *Kimball*, 102 U. S. 691.

No act of congress has been adverted to by counsel, or has met the observation of the court, which assumes to circumscribe the state of New York in the exercise of its power of eminent domain from authorizing such a limited interference with the navigation of the Hudson river as is apprehended here. On the contrary, the cases decided in this court—*Silliman* v. *Hudson River Bridge Co.* 4 Blatchf. 395, (affirmed by the supreme court, 2 Wall. 403,) and *Silliman* v. *Troy & West Troy Bridge Co.* 11 Blatchf. 274—are to the effect that a far more serious obstruction to the navigation of the river is within the legitimate sanctions of the municipal power. These cases are decisive against the theory that the defendant cannot occupy a portion of the river for the purposes of its railroad without an invasion of public right.

2. The case then resolves itself into a controversy in which the parties primarily interested are the riparian owners and the defendant. It is true, the complainant has an independant standing by reason of his contract of transportation with these proprietors; but it is not alleged that his contract was entered into before the defendant appropriated the lands. The complainant's rights are derivative, and originate with the riparian proprietors. If they had chosen to convey the lands to the defendant, the complainant would be without remedy as against the defendant. If the defendant is lawfully in possession as against the owners by virtue of its proceedings to acquire title, the complainant can have no relief here. Whether the defendant can lawfully acquire the title of the owners to the lands, whether its proceedings have been effectual, and whether its present possession is lawful or the contrary, are questions which depend upon the provisions of the general railroad act, and the proceedings taken under it. These questions will be adjudicated by the state courts in the pending proceedings. The determination by the state court will

be controlling upon this court. Certainly, in view of the fact that the state court has already decided for the defendant, and adjudged that it should retain possession of the lands during the pendency of the proceedings to acquire title, this court should not disregard the authority of that decision upon a motion, and interpose by a preliminary injunction.

It is not the office of such a motion to determine questions of doubtful rights. The injunction is dissolved.

NOTE. See *Escanaba & Lake Mich. Transp. Co.* v. *Chicago*, 12 FED. REP. 777, and note, p. 779; *Miller* v. *City of New York*, 10 FED. REP. 513, and note.—[ED.

GRIESSER and others *v.* MCILRATH, Receiver, etc.

(*Circuit Court, D. Minnesota.* June Term, 1882.)

DISCRIMINATION IN RAILROAD FREIGHTS—DAMAGES, HOW COMPUTED.

Where at a former term of the court it was decided that the receiver of a railroad company, by the adoption of a contract with a third party and settlements with him thereunder, had discriminated against the plaintiffs in the rates charged them for transportation of wheat and grain over the railroad operated by him contrary to the provisions of the state statute, and that plaintiffs were entitled by law to have their grain transported over said road at rates which would put them on an equal footing with said third party for like transportation, and it was referred to a special master to take an account of the amount of such unfavorable discrimination, and to report the result of such examination, *held*, that the amount of the fund which, under the contract, could be used to pay such third party's commissions, and all expenses incident to the business and the receiver's freights, is the difference between the prime cost of the wheat shipped and the net proceeds of sales, deducting freights and charges incurred upon other roads and after the shipment left the receiver's road; and that the amount of discrimination is the difference between such amount, after deducting therefrom expenses, compensations, rent of warehouses, interest, exchange, insurance, and the outlay at way stations made by the receiver to secure the trade, and the amount of the freight charged to such third party according to tariff rates; and that a decree be entered accordingly.

Gilman & Clough, for plaintiffs.

Henry J. Horn, for defendant.

NELSON, D. J. At the December term, 1877, this court decided that the receiver, by the adoption of the contract with J. C. Easton of August 15, 1872, and the settlements with him thereunder, had discriminated against the plaintiffs in the rates charged them for transportation of wheat and grain over the railroad operated by him between May 6, 1873, and March 4, 1874, contrary to the provisions

in that behalf of the act of the legislature of the state of Minnesota approved March 6, 1871, and that the plaintiffs were entitled by law to have their grain transported over the said railroad at rates which would put them on an equal footing with the said Easton for like transportation of grain under the said Easton contract or agreement, which is hereinafter set forth in full, and to a decree for the amount of such unfavorable discrimination, and it was referred to George B. Young, Esq., a special master, to take an account of the amount of such unfavorable discrimination, and to report the result of such examination, together with all the *data* necessary to enable the court to render a final decree. The master was granted power and authority to examine, if necessary, the parties, their books, and such witnesses as the parties might severally produce before him, in addition to the proofs already taken. The contract or agreement, by the adoption of which the receiver did discriminate against the plaintiffs, is in the following words:

"Memorandum of an agreement made this fifteenth day of August, 1872, between J. C. Easton, party of the first part, and the Southern Minnesota Railroad Company, party of the second part, witnesses: That J. C. Easton, party of the first part, agrees to furnish warehouses and elevators, at all stations on the line of the Southern Minnesota Railroad, suitable for handling grain and other produce, at fair and reasonable rents and employ agents, and men to buy and handle grain and other produce, at said stations, in the interest of, and at such prices, as the president and manager of the Southern Minnesota Railroad Company may direct, and shall have such grain and other produce sold in Milwaukee, or elsewhere, as may be agreed, at a cost not exceeding one cent per bushel for grain, and at corresponding rates of commission for other produce.

"Said J. C. Easton, party of the first part, further agrees that he will employ competent buyers and agents, and will be responsible for the honest and faithful performance of their duties in buying, handling, grading, and management of grain and other produce, and promptly pay any damages occurring through a failure to perform such duty, and will keep correct account of all expenses attending the performance of this business, and render an account of the same once a week, when all settlements shall be made and differences paid. The Southern Minnesota Railroad Company, party of the second part, in consideration of the foregoing, and the energetic superintendence of this business by the party of the first part, agrees to allow the party of the first part three-quarters of a cent per bushel profit for all grain, and three-quarters per centum profit on the gross sales of the other produce, handled under this contract, and also to pay the expenses of buying and handling the same, and 10 per centum on all money used in the transaction of said business.

"The object of the foregoing agreement is to enable the Southern Minnesota Railroad Company to regulate and control the business along its line, and to

sustain the rates of freight, and is to be explained as follows: J. C. Easton is to buy and own the grain and other produce, but at prices dictated by the Southern Minnesota Railroad Company. He is to make immediate sales by telegraph, and after paying the costs of handling and necesssary and legitimate expenses, added to three-quarters of a cent per bushel on grain, and three-quarters of one per cent. on the gross sales of other produce, as profit to himself, is to pay the residue to the Southern Minnesota Railroad Company as their freights. Settlements to be made once a week, and all differences paid, and this agreement may be terminated by either party at any time.

"In testimony whereof the parties hereunto have signed and delivered the same this fifteenth day of August, 1872.

"J. C. EASTON, [Seal.]
"THE SOUTHERN MINNESOTA RAILROAD COMPANY,
"By CLARK W. THOMPSON, President."

Sections 4 and 7 of the act of legislature of the state of Minnesota approved March 6, 1871, entitled "An act to regulate the carrying of freight and passengers on all railroads in this state," reads as follows:

"Sec. 4. It shall be the duty of all railroad companies and corporations in this state to receive all freights of the kind mentioned in this act at any depot or station of such company or corporation, whenever brought to such depot for transportation, and to provide suitable places for the storage and reception of such freight at all of its depots and stations. And all railroad companies and corporations shall furnish equal facilities for transporting, and shall transport freights of every description in this state to and from warehouses or elevators other than those owned by any such company or corporation at the same rates, as from warehouses or elevators owned by such company or corporation, and shall make no discrimination in favor of nor against any warehouse or elevator."

"Sec. 7. That all railroad companies or corporations doing business in this state shall transport all freights ordered for transportation within a reasonable time, and in the order of the reception of the same for carriage; and if any railroad company or corporation shall transport freights of any description for any person or persons, corporation, company, or association, at rates less than are provided in this act, then such company or corporation shall thereafter transport freights of the same description over its line of railroad for all other persons at the same reduced rates during the time such discrimination is in force."

The master has given great attention to the case, and furnished full *data* upon which he bases his report, and finds that the amount of discrimination in favor of Easton under the contract is 3.97-100 cents on each and every bushel shipped by him at each of the stations where the plaintiffs made shipments during the period of their shipments. The freight charged to Easton according to tariff rates is $193,403.48. The only fund which under the contract could be used to pay Easton's commissions, and all expenses incident to the business

along the line of the road and the receiver's freights, is the difference between the prime cost of the wheat shipped and the net proceeds of sales, deducting freights and charges incurred upon other roads, and after the shipment left the receiver's road. The master has taken the purchase records, and on examination finds the amount of wheat purchased 1,668,322 58-60 bushels, at a cost of $1,534,106.66, and the quantity sold 1,668,023 36-60 bushels, for the net price of $1,714,-573.13, and deducting the prime cost from the net proceeds of the sales there is available for payment of freight, etc., $180,466.47.

The salaries and wages paid by Easton under the contract, according to the latter's testimony, which he was entitled to be allowed in the purchase of wheat, is $35,000, and the compensation for rent of warehouses, interest, exchange, and insurance, $18,550; and his commission, at $\frac{3}{4}$ per cent. per bushel to September 1, 1873, and 1 per cent. per bushel from September 1, 1873, amounts to $14,884.15. The aggregate of these sums must be deducted from the $180,446.47, before the receiver was entitled to be paid for freight, which gives the result:

Difference between prime cost and net sales, - -		$180,446 47
Expense, - - - - - - -	$35,000 00	
Compensations, - - - - -	14,884 15	
Rent of warehouses, interest, exchange, and insurance, - - - - - - -	18,550 00	
		68,434 15
Balance, - - - - - - - -		$112,012 32

There is another item which, it is claimed, should be allowed Easton as a credit on freight charges, and be added to the balance found of $112,012.32.

It appears from the evidence that at several small stations where wheat could be purchased and a market opened which might be productive of substantial benefit to the receiver's road, some $12,000 of expenses were incurred. The business at these stations did not pay expenses at the time, but the receiver, in his effort to secure the trade, undertook this outlay, and the item has been allowed by the master as a credit to apply on Easton's freight charges. I think the receiver was justified in making this expenditure, and the master very properly has so reported. This would increase the amount to be applied on freight charges to $124,012.32. The freight charged to Easton, according to the regular tariff, is found to be $193,403.48. The deficiency is $69,391.16, which represents the discrimination on

Easton's wheat, amounting 3'97-100 cents per bushel. The answer admits the shipments made by the complainants, and the number of bushels. A decree will be entered in their behalf and against the defendant, and it is referred to the clerk, as master, to make the computation and report.

McCrary, C. J., concurring.

See *Hays* v. *Pennsylvania R. Co.* 12 Fed. Rep. 309, and note, p. 314; *Texas Express Co.* v. *Texas & Pac. R. Co.* 6 Fed. Rep. 426: *Same* v. *Inter. & Grand Northern R. Co.* Id.; *Tilley* v. *Savannah, F. & W. R. Co.* 5 Fed. Rep. 641.

Farr *v.* Town of Lyons.

(*Circuit Court, N. D. New York.* 1882.)

1. Municipal Bonds—Negotiability of.

   Municipal bonds, payable to bearer, are deemed payable to the holder, and the holder is not regarded as the assignee of the contract, but the holder through transfer by delivery.

2. Jurisdiction of Circuit Court—Act of 1875.

   A citizen of another state may sue a municipal corporation, located in the state where suit is brought, upon bonds issued by such corporation, and his right of action does not depend upon the rights of former owners of the bonds to sue thereon under the inhibition in section 1 of the act of March 3, 1875, defining the jurisdiction of the circuit court, as he does not derive his title by assignment.

C. H. Roys, for defendant.

W. F. Cogswell, for plaintiff.

Coxe, D. J. This action was tried at the June term of this court, and plaintiff had a verdict. The defendant now moves for a new trial. The plaintiff is a citizen of Pennsylvania. The defendant is a municipal corporation of New York. The action is to recover the semi-annual interest due on the first day of April, 1880, and on the first day of October, 1881, upon four coupon bonds of the defendant. The bonds and the coupons are payable to bearer. The bonds are sealed. The coupons are not sealed. A similar suit between these parties, tried in this court in 1880, resulted in a verdict for the plaintiff. The judgment record in that action is produced, and it is insisted that the doctrine of *res adjudicata* precludes the defendant from again asserting any defense which was, or which might have been, there interposed. The defendant now, for the first time, disputes the jurisdiction of the court, for the alleged reason that no

action could have been maintained on the bonds in this court by the party from whom plaintiff received them, he being a citizen of New York; that this action is not on the coupons, but is on the bonds; that the bonds are neither promissory notes negotiable by the law merchant, nor bills of exchange, and are therefore not within the exceptions mentioned in the statute. That portion of the act of March 3, 1875, which is applicable, is in the following words:

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange." 18 St. at Large, 470.

The question being one of jurisdiction may properly be considered here. The defendant is not concluded as to it by the prior judgment.

It is not disputed that, both in practice and by a series of decisions extending over many years, the federal courts have maintained and asserted their jurisdiction of actions arising upon municipal bonds in circumstances similar to those developed here. But it is argued with much learning and ingenuity that the recent decision in *Coe* v. *Morgan*, 8 FED. REP. 534, has effected a complete overthrow of these well-established principles. It is thought that the decision does not enunciate doctrines so radical. In that case it was held that a note payable to order, and negotiable by the law merchant, was transformed into a specialty by the addition of the seal of the maker. It was, even after the seal had been affixed, in one sense, a promissory note, but not a note negotiable by the law merchant. With the seal absent the note would have passed by indorsement, and if indorsed in blank, thereafter by delivery. With the seal added it was held to be no longer negotiable in the commercial sense, and could only pass by assignment. In this respect it differs from an instrument payable to bearer, where the holder does not trace his title through any intermediate indorsee or assignee, and where it is wholly immaterial whether the instrument was delivered to him by the maker or passed through the hands of many antecedent owners. He derives his title, not by assignment or indorsement, but by the *bona fide* possession of the instrument. In order to maintain his action he is required to plead and prove the instrument, and that he is its lawful owner and holder. How he procured it, and from whom, is not at all important. This distinction is recognized by Judge Blatchford in the case referred to. He says, speaking of municipal bonds: "Such obligations, payable to bearer, are deemed payable to the holder; and so,

under this act of 1875, the holder who sues is not regarded as an assignee of the contract, but is a holder through a transfer by delivery."

The federal courts have by a long line of adjudications invested these bonds, and each coupon, with all of the characteristics, and subjected them to most of the rules applicable to commercial paper. They are issued to invite the investments of the world. The citizens of the state in which they have their inception not only, but the citizens of other states and foreign countries, are solicited to become their purchasers. A citizen of Pennsylvania who possesses such a cause of action against a citizen of New York, the amount exceeding $500, has a right to invoke the aid and seek the protection of the federal courts. His action would not be defeated, and the court ousted of jurisdiction, by proof that the first holder, after inception, or the last holder, was a citizen of New York.

In the case at bar plaintiff's right of action does not depend upon the former owners of the bonds; he derives no title from them. No act of theirs can add to or detract from the strength of his position. The town of Lyons promises to pay *him*, Creon B. Farr, and he is a citizen of Pennsylvania. In the *Coe and Morgan case* the promise was to pay to the order of a citizen of New York. He could not sue in the federal courts, nor could he transfer the obligation to one who could so sue, except by assignment; hence the inhibition of the statute attached. In this case, on the contrary, the promise is direct to a person who has a right to enforce it in the federal tribunals. The fact that a citizen of New York, or a hundred citizens of New York, held the bonds before he held them, does not affect his standing in the smallest particular.

The motion is denied.

PERCIVAL *v.* MCCOY and others.

(Circuit Court, D. Iowa, W. D. 1882.)

1. BOND OF INDEMNITY—PARTIES—JOINDER OF, TO RECOVER THE PENALTY.

   A party cannot sue alone on a bond of indemnity made to himself and other obligees on a prior delivery bond, without showing that he alone has received injury by the breach thereof, and therefore that he brings the suit without joining the other obligees as plaintiffs. He cannot set out a bond as running to or as made to himself alone, and give in evidence an instrument made to himself jointly with other obligees.

2. SAME—MISRECITAL IN PLEADING—VARIANCE.

In an action upon an indemnity bond, given to indemnify the sureties on a prior delivery bond, a misrecital of the amount of the penalty in the delivery bond, of the parties in it to be indemnified, and of the terms and conditions of the delivery to be made under it, is a fatal variance.

3. SAME—VARIANCE NOT CURED BY AVERMENT OF MISTAKE.

Such variance cannot be cured by an averment that the indemnity bond, sued on, was executed by mistake and inadvertence, without alleging and proving that the mistake was mutual, and that it was the intention of the parties to the indemnity bond to indemnify the sureties on the prior delivery bond.

4. SAME—LIABILITY OF SURETIES—REMEDY IN EQUITY.

The liability of sureties cannot be enlarged or changed by averment in the pleading, whatever the understanding of the pleader may have been; and where an indemnity bond has been executed by mistake or inadvertence, the proper remedy is by a bill in equity to reform it and make it conform to the mutual intention of the parties.

At Law.

This is an action at law upon a penal bond in the sum of $12,000 executed by said defendant McCoy as principal, and the other defendants as sureties, to George Bebbington, Robert Percival, J. P. Williams, J. E. Rudd, and Marshall Key. The bond thus sued on purports upon its face to be intended to indemnify said obligees against their liability as sureties for McCoy upon a certain delivery bond executed by them with said McCoy to the government of the United States to secure the delivery to McCoy of his distillery, which the government had seized. The case is now before the court a second time upon the demurrer of the defendants to the plaintiff's amended and substituted petition.

The petition states that in the month of November, 1868, the government of the United States seized the distillery of the defendant McCoy for an alleged violation of the revenue laws; that McCoy, with the plaintiff and one John E. Rudd as sureties, executed a delivery bond to the United States in the penal sum of $6,705; that the property was released on said bond, and the possession of the same delivered to the plaintiff to secure him against loss as surety on said delivery bond.

It is further alleged that McCoy, being desirous to remove said distillery from Iowa to Omaha, Nebraska, executed and delivered to the plaintiff a bond in the sum of $12,000, with the other defendants, James G. Megeath, John Davis, and Jesse H. Lacy, as sureties, conditioned that the said J. C. McCoy would hold the plaintiff and others, his co-sureties, harmless from all liability on their said delivery bond to the United States, and thereupon that the plaintiff accepted said indemnifying bond, waived his right to retain posses-

sion of said distillery property, and surrendered the same to McCoy to be removed to Omaha. Both the delivery and indemnifying bonds are exhibited by copy and made a part of the petition.

It is further alleged that the government obtained a decree of condemnation against the distillery property; that McCoy failed to deliver the same to the marshal, or pay its appraised value; that a summary judgment was therefore, according to the practice of the court, entered against the plaintiff, and said McCoy and Rudd, on the delivery bond, for the sum of $6,705, the amount of the penalty thereof, and $183.75 costs; that execution was issued upon said judgment and levied upon the property of the plaintiff, Percival, and that he has been compelled to pay the same.

Said plaintiff, Percival, therefore sues the defendants as obligors of said indemnity bond, claiming against them the sum he has been compelled to pay as principal, interest, and costs upon said judgment.

It appears by inspection of the exhibits that the indemnity bond on which the suit is brought does not run to the plaintiff alone, nor to the plaintiff and his co-surety, Rudd, in the delivery bond, but to George Bebbington, Robert Percival, J. P. Williams, J. E. Rudd, and Marshall Key, none of whom, except said Percival and Rudd, are parties to the delivery bond. The plaintiff alone, of the obligors just named, is a party to the present suit.

The plaintiff alleges that it was recited by mistake and inadvertence in the indemnity bond that the delivery bond is in the sum of $10,000, whereas it is only for the sum of $6,705; that it was also by inadvertence and mistake recited that said delivery bond was executed by said McCoy and George Bebbington, Robert Percival, and J. P. Williams as sureties, whereas in truth and in fact it was executed by McCoy as principal, and the plaintiff and Rudd as sureties; and that it was also recited by mistake and inadvertence in the indemnity bond that the delivery bond was conditioned that the obligors in the same should return said distillery property if judgment should be obtained against it, when in fact said delivery bond was conditioned that the said McCoy should keep and return said property in as valuable and good condition as it was at the time of the seizure, or pay an amount equal to the appraised value of the same, and otherwise in all things abide and perform the orders and decrees of the court.

Sapp & Lyman, for plaintiff.

J. M. Woolworth, for defendants.

Love, D. J. After much consideration it seems to me that to maintain the case now stated in the plaintiff's amended petition at law and before a jury, would involve great if not insuperable difficulties. The bond sued on runs to George Bebbington, Robert Percival, J. P. Williams, J. E. Rudd, and Marshall Key, as obligees, and there is no allegation in the amended and supplemental petition that it was so made by mistake. On the contrary, it is averred that said defendants McCoy, Megeath, Davis, and Lacy executed and delivered to the plaintiff (Percival) the bond in question. It seems clear that if this bond were offered in evidence under such an allegation there would be a fatal variance between the instrument as set out and the proof. Granting that the plaintiff may sue alone under section 2552 of the Code, without joining the other obligees, he must, nevertheless, set out and state the bond correctly, with proper allegations, showing that he alone has received injury by the breach, and therefore that he brings the suit without joining the other obligees as plaintiffs. But he cannot set out a bond as running to or as made to himself alone, and give in evidence an instrument to himself jointly with other obligees.

It is claimed that the bond sued on was given to indemnify the sureties in the first bond, namely, Percival and Rudd, against liability accruing to them from a breach thereof. If so, it must have been intended that the bond sued on should run to Percival and Rudd, whereas its expressed obligees are Bebbington, Percival, Williams, Rudd, and Key. If this occurred by mistake, it ought to be shown by proper averments. If it was the intention of the defendants to bind themselves, in the bond sued on, (as indicated by its express terms,) to indemnify Bebbington, Percival, Williams, Rudd, and Key against loss accruing to them under a bond executed by them, I do not see how the defendants can be made responsible to the plaintiff for loss accruing to him by reason of the breach of a bond executed by him and Rudd alone. The defendants can only be made responsible, if at all, by the plaintiff's alleging that it was the defendants' intention to bind themselves to indemnify the plaintiff and Rudd, and to execute the bond sued on for that purpose, and that by mutual mistake the bond sued on failed to express that intention. For it is quite obvious that the defendants might have been willing to execute a bond to indemnify Bebbington, Williams, Percival, Rudd, and Key, and yet wholly unwilling to sign such an instrument to indemnify Percival and Rudd alone. One of the defendants may have been

induced to execute the bond for the interest of one of the several obligees; another for some other; and a third for a still different obligee. One of the defendants may have signed the bond in the belief that one or more of the obligees, in whom he had confidence, would see that McCoy should fulfill the conditions of the original bond; another, upon his faith that other and different obligees would see to the performance of its conditions. It by no means follows, therefore, from the fact that these defendants signed the bond in suit to save harmless the several obligees who appear upon the face of it, that they would have executed it to indemnify the plaintiff alone, or the plaintiff and Rudd; and the only way to make them liable, if it can be done at all, is by averring and proving that they intended to bind themselves to the actual sureties in the original bond for their indemnity, and that this intention was, by mistake, not expressed in the instrument which they signed.

It must be remembered that the bond sued on purports to bind its obligors to protect the plaintiff and other sureties against loss accruing to them as sureties to a previous bond. The bond sued on stipulates substantially that the principal in the first bond shall perform its conditions, and that the obligors in the second bond will be responsible for any loss arising from the default of the principal in the first bond. Both bonds are exhibited by copy. But the terms and conditions of the first bond are so essentially misrecited in the second bond, that upon the face of the two instruments, as shown by the exhibits, there is no identity between the first bond and the bond recited. The plaintiff seeks to establish this identity by the averments of his amended and substituted petition. He sets out the first bond, and shows that he suffered loss by reason of the breach of its conditions. This first bond is in the penal sum of $6,705, but the bond sued on recites that it is given as indemnity against a prior bond for the sum of $10,000.

Again, the first bond purports on its face to be executed by James C. McCoy as principal, and Robert Percival and John E. Rudd as sureties. The bond sued on runs to George Bebbington, Robert Percival, J. P. Williams, J. E. Rudd, and Marshall Key, and it recites that Bebbington, Percival, and Williams had become sureties in the previous delivery bond, and it stipulates to indemnify Bebbington, Williams, Percival, and all other sureties on said first bond against liability on the same.

The condition of the first or delivery bond is that McCoy, the principal, shall keep and return said property in *as valuable and good con-*

dition as it was when seized, or pay an amount equal to the appraised value of the same, and in all things abide and perform the final order or decree of the court. The condition of the bond indemnified against, as recited in the bond sued on, is that McCoy, with Bebbington and Percival and Williams as sureties, had executed a delivery bond to the United States, *conditioned that they would return the property seized if a judgment should be obtained against it.*

Thus it appears by the face of the two bonds as exhibited that the obligors in the second bond did not undertake to indemnify the plaintiff against the bond under which he suffered loss, but against a bond radically and essentially different; different in the penal sum, in the parties, and in the conditions to be performed. Here is evidently a wide gap to be filled, and the plaintiff attempts to fill it by the allegations of his amended and substituted petition. He avers that these several recitals in the bond sued on were made by mistake and inadvertence. He avers that in writing said bond of indemnity, it was recited by mistake that the first bond was in the penal sum of $10,000, whereas, in fact, it was in the sum of $6,705; that it was also by mistake recited that the first-mentioned bond was executed by said McCoy and George Bebbington, Robert Percival, and J. P. Williams as sureties, when in fact it was executed by J. C. McCoy, with Robert Percival and John E. Rudd as sureties; and that it was also recited by mistake that the first-mentioned bond was conditioned that the obligors should return said property if a judgment should be obtained against it, when in fact said bond was conditioned that J. C. McCoy should keep and return said property in as valuable and good condition as it was when seized, or pay an amount equal to the appraised value thereof, and in all things abide and perform the final order and decree of the court. Waiving at present the question whether or not the alleged mistake can be corrected by averment and proofs before a jury in an action at law it is sufficient to say that the averments themselves are wholly inadequate and insufficient.

It is not alleged that the mistake in the recitals was mutual, or that it was the intention of both parties that the defendants should be bound to indemnify the plaintiff against loss under the first-named bond, but that this intention was not expressed in the bond sued on by reason of a mistake common to both parties. Certainly a written instrument cannot be changed or reformed by parol evidence, either at law or in equity, upon the ground of mistake and in the absence of fraud, unless the mistake was mutual; because it is absolutely *incompetent* for any court to *make* a contract for the parties.

For aught that appears by the plaintiff's averments the mistake was wholly on his part, and the defendants intended to bind themselves exactly as the bond which they signed imports. If the defendants intended to bind themselves to indemnify the plaintiff against liability under just such an instrument as the bond sued on recites, with the conditions recited in the same and none other, their liability cannot be enlarged or changed by averment, whatever the understanding of the plaintiff may have been. It is conceivable that the defendants may have been quite willing to undertake that McCoy should return the property simply, and yet entirely unwilling to stipulate that he would return it in as valuable and good condition as it was when seized. They might well assume that he would be able to perform one of these things and not the other, and that he would in good faith perform what he might be able to do.

It is not averred that these defendants, who are all except McCoy sureties, ever saw the first or delivery bond, or that they had any knowledge of it, except what they found in the recitals of the bond which they signed. For aught that appears, McCoy, or some other party to the delivery bond, may have presented to the defendants the bond sued on, and obtained their signatures under the belief that it truly recited the conditions of the delivery bond. It may, therefore, have been the intention of the defendant sureties to bind themselves only to the extent of McCoy's obligation under the delivery bond, which was that he should return the property, in whatever condition it might be.

It seems to me that the proper remedy of the plaintiff, if he has any upon the facts disclosed, is by a bill in equity to reform the bond sued on, so as to conform it to the mutual intention of the parties. Even if there be a concurrent remedy at law, it is, at best, an imperfect remedy; and equity is by no means ousted of its jurisdiction to reform a written instrument by the fact that a concurrent remedy exists at law. The remedy in equity, if the proper facts can be shown, is unquestionable and entirely adequate, while that which the plaintiff is now pursuing is, to say the least, dubious and imperfect.

Demurrer sustained.

WILSON and others *v.* PEARSON.

(*Circuit Court, S. D. New York.* August 30, 1882.)

1. SENDING FORBIDDEN MATTER THROUGH THE MAIL—PLEADING.

   In an action for damages for the wrongful detention and conversion of certain letters of the plaintiffs, detained by the postmaster under a regulation of the post-office department requiring him, when he has reason to believe that a fictitious address is used for forbidden circulation in the mails, to report the fact and the reason of his belief, await instructions, and give notice that, pending such instructions, persons claiming the correspondence must call at the general delivery and establish their identity before its delivery—where the meaning or application of the allegations in the answer is not doubtful, the plaintiffs' remedy is to be sought by a bill of particulars, and not by requiring the pleading to be made definite and certain.

2. SAME—BILL OF PARTICULARS—PRACTICE.

   Where the circumstances are such as can only influence the postmaster's own judgment, it is not to be assumed that the plaintiffs can definitely know what they are, and they are entitled to information to meet the issue tendered by the defendant by a bill of particulars setting forth the facts and circumstances which induced defendant to believe that the address was being used by some person or persons for covering forbidden correspondence in the mail under such fictitious address.

A. J. Dittenhoefer, for complainant.

Stewart L. Woodford, U. S. Dist. Atty., for defendant.

WALLACE, C. J. The plaintiffs move for an order requiring the defendant to make certain allegations of the answer more definite and certain, and for a bill of particulars. The complaint alleges the wrongful detention and conversion of certain letters of the plaintiffs by the defendant, who received them as postmaster at the city of New York. The answer denies the conversion, and justifies the detention under a regulation of the post-office department which requires a postmaster, whenever he has reason to believe that a street or number or designated place is being used by any person for covering, under a fictitious address, correspondence forbidden circulation in the mails, to report the fact, and reason for his belief, to the first-assistant postmaster general; and await his instructions and to give notice that pending such instructions persons claiming such correspondence must call at the general delivery and establish their identity before its delivery. The answer alleges that the letters mentioned in the complaint, addressed to J. Wilson & Co., at 40, Broadway, New York city, came into his custody as postmaster; that defendant had reason to believe and did believe that said designated place, to-wit, 40, Broadway, was being used by some person or persons

for covering, under a fictitious address, correspondence forbidden circulation in the mails; and that thereupon he reported to the first-assistant postmaster general for instructions, and gave notice, etc., and pending instructions placed the letters in the general delivery, and was always ready and willing to deliver them to the person who might establish his identity as the person entitled; and that no person called for the letters.

It is insisted that the plaintiffs are entitled to information, either by more definite allegations in the answer or by a bill of particulars, (1) of the name of the person or persons using 40 Broadway for covering, under a fictitious address, correspondence forbidden circulation in the mails; (2) of the fictitious address so used; (3) the reason the correspondence was forbidden; (4) the respect in which the address was fictitious; (5) the facts, circumstances, or reasons for the belief that the name used was fictitious, and the address was being used for covering under a fictitious address correspondence forbidden circulation.

The Code of Civil Procedure (section 531) authorizes the court to require a bill of particulars of the claim of either party in any case; and it is held that this provision extends to all descriptions of action and to any defense that may be interposed. *Dwight* v. *Germania Life Ins. Co.* 84 N. Y. 493. Where the precise meaning or application of allegations in a pleading is indefinite or uncertain, the court may require the pleading to be made definite and certain. Code, § 546. The meaning or application of the allegation here is not doubtful. The *gravamen* and nature of the defense relied on is sufficiently plain; and the plaintiffs' remedy is therefore to be sought by a bill of particulars. *Tilton* v. *Beecher*, 59 N. Y. 176. The particularity with which a party should be required to inform his adversary as to essential facts which are in controversy, depends upon the nature of the facts, and the extent to which information may fairly be presumed to be within the cognizance of the respective parties. A party should never be required to make specifications of those matters which from their inherent character are not capable of exactitude, or which constitute evidence rather than substantive facts, nor to proffer information which is presumably more within the knowledge of his adversary than his own.

The regulation under which the defendant justifies, and which for present purposes may be regarded as equivalent to a statute, in substance authorizes a postmaster to withhold the letters of the citizen unless the latter establishes his identity as the person entitled to the

letters, whenever the postmaster has reason to believe that a fictitious address is being employed by any person for covering forbidden circulation in the mails. As in some instances it might be difficult for the person entitled to the letters to establish his identity, cases may arise where, without fault on his part, the citizen may be subjected to inconvenience and even to loss. The postmaster is not authorized by the regulation to exercise an arbitrary judgment; he is only to require proof of identity when he has *reason* to believe that the mails are being used illegitimately. His judgment may be founded upon circumstances with which the owner of the letters has had no connection. Unless some circumstances exist which call for the exercise of his judgment, his action is not within the protection of the regulation.

The affidavits furnished in support of the motion on behalf of the plaintiffs are not very satisfactory; but inasmuch as the circumstances which control the action of the postmaster are necessarily such and only such as influence his own judgment, it is not to be assumed that the plaintiffs can definitely know what they are. The plaintiffs are entitled to information to meet the issue tendered by the defendant, and to disprove the existence of any facts or circumstances authorizing him to exercise his judgment in the premises. In this behalf the defendant should be required to furnish a bill of particulars setting forth the facts and circumstances which induced him to believe that 40 Broadway was being used by some person or persons for covering forbidden correspondence in the mails under a fictitious address.

Ordered accordingly.

TILLINGHAST *v.* HICKS and another.

(Circuit Court, N. D. New York. 1882.)

PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION.

Where there was a delay of 10 years between the original patent and the reissue; a controversy as to the validity of the reissue and as to the infringement; no decision of any court establishing the validity of the patent; no royalty or license fees paid to the patentee; no general use or public recognition; no present manufacturing or sale of the patented article; and no allegation of irresponsibility on the part of the defendants,—a preliminary injunction will be refused.

William A. Abbott, for complainant.

Esek Cowen, for defendants.

COXE, D. J. Complainant moves for a preliminary injunction in an action brought to restrain the infringement of a patent for an improvement in "railroad-car ventilators." The patent was originally issued January 3, 1871. The claim was as follows:

"The improvement in car ventilators, or dust-guards, which consists in providing the leaves, A and A^1, with the right-angled edges, b and b^1, hinged to the car, substantially as described, by means of which the current of air is directed past the joint with the window-jamb or side of the car, as and for the purposes specified."

The patent was reissued February 15, 1881. In addition to the claim of the original patent, just quoted, the reissue contained the following language:

"(2) The combination with the side of a car of hinged deflectors or dust-guard, having their hinged edges shielded by a "break-joint" strip projecting from the car side, to deflect the current of air past the joint and prevent the entrance of dust, substantially as set forth."

A disclaimer was filed by complainant, March 23, 1882,—

"To that part of the specification which is in the following words, to-wit: 'It is evident that a close round hinge attached to the inner edge of the deflector would in a measure serve a similar purpose, and yet be within the scope of my invention, which consists in providing the deflectors with such a means of close connection with the car as will direct the current of air past the point of junction with the car when the leaf is extended outward and in use.'"

He also renounces his—

"Broad claim to a freely-swinging pivoted shield having a flange at its inner or pivoted edge that rests against the side of a car when the shield stands at right angles to the same, and your petitioner desires to explain that his claims are intended to cover hinged deflectors or dust-guards having their hinged edges shielded by a strip on the car or by a projecting part of the car frame in such manner as to form a 'break-joint' so that the entrance of dust cinders, etc., at the pivoted edges of the deflectors or guards is effectually prevented."

It is thought that sufficient has been quoted to warrant the defendants in asserting that the complainant's invention, and his own statements regarding it, are involved in some perplexity. Prior to the reissue and disclaimer, and on the twenty-first day of January, 1879, and on the twenty-ninth day of July, 1879, respectively, the defendant Reynolds was granted two patents for an improvement in "dust-guards for car windows." The claim in the second of these patents—the first is not produced—is in these words:

"(1) The combination, with a hinged dust-guard, of a guard-strip, E, provided with one or more standing flanges, *e*, adapted to form a dust-tight joint with said dust-guard, as herein specified. (2) The combination with the pintle, B, of the socket, C, provided with the spring, D, as and for the purpose herein specified."

Briefly stated, the difference between complainant's device and the one used by the defendants is this:—complainant's dust-guard, as shown by his drawings, is in one piece, provided with an angular edge, which, when it is extended for use, fits closely against the window-jamb, or against a projection on the wall of the car, thus preventing the ingress of dust. Defendants' dust-guard is in two pieces, the one consisting of a plain flat leaf, the other a metallic strip projecting from the car about a quarter of an inch, against the outer edge of which the inner edge of the hinged leaf rests. Whether the latter is an infringement of the former is a question which must ultimately be decided in this case. It is only necessary to say, for the purposes of this motion, that the question is not free from doubt. Ten years elapsed before the reissue was applied for. The application was then made with full knowledge of the device of the defendants. Such a long delay would seem to bring the case within the doctrine of *Miller* v. *Bridgeport Brass Co.* 21 O. G. 201. Complainant's acquiescence for so long a period in the terms of the patent as originally stated would operate as a dedication to the public of those improvements not specifically claimed by him. *Sheriff* v. *Fulton*, 12 FED. REP. 136.

But it is argued that the claim in the original patent is broad enough to cover the device used by the defendants, and that no new principle or combination is stated in the reissue. This position is vehemently combated by the defendants, and they refer to the following language of the patent, which they enterpret as meaning that although the complainant, in 1871, had in mind a ventilator similar to the defendants' device, he did not deem such an invention practicable, and so did not include it in his claim:

"It has been proposed for many years to have ventilators consisting of the plain, flat leaf, hinged to the outside of the car adjacent to the windows. Experiments have been made therewith, but, owing to the difficulty of having a joint which, while it would allow the leaf to come in contact flatwise with the side of the car, would also, when at right angle thereto, present a close joint, the common and usual method of hinging has been applied."

These considerations alone might not lead to a denial of the motion; but the complainant, for other reasons, disconnected from the

questions arising on the patents, has failed to bring himself within the rules applicable to these cases. No suit at law or in equity has ever been commenced by the complainant. His invention has not gone into public use. No manufacturer has ever paid royalties to the complainant. His device has not been extensively used on any railroad, nor has it been recognized by the public. It is not asserted that it is now in use anywhere or for sale anywhere. The defendants are large manufacturers and vendors of the ventilators described in the Reynolds patent. To put a stop to this branch of their business would be likely to cause them irreparable injury. There is no allegation that the defendants are irresponsible or unable to respond in damages should the complainant finally succeed. The granting of an injunction rests in the discretion of the court, having in view all the circumstances of the case,—its effect upon the defendants as well as upon the complainant. If it can be plainly seen that greater mischief will result from granting than from refusing it, the writ should be withheld. No case is cited, and I have been unable to find one, sustaining an injunction where, as in this case, the following facts concur:

(1) A delay of 10 years between the original patent and the reissue; (2) a controversy as to the amended claim of the reissue, and also upon the question of infringement; (3) an apparent apathy on the part of the patentee regarding his rights for many years following his invention; (4) no decision of any court establishing the validity of the patent; (5) no royalties or license fees paid to the patentee; (6) no general use; (7) no present manufacturing or vending under the patent; (8) no public recognition; (9) large interests of the defendants jeoparded; (10) no allegation of irresponsibility.

On the contrary, the courts have frequently regarded the existence of a few of these circumstances as sufficient to authorize a denial of the application. *Fish* v. *Sewing Machine Co.* 12 FED. REP. 495; *Neilson* v. *Thompson*, Webst. Pat. Cas. 278; *Brown* v. *Hinkley*, 6 Fish. 370; *Robertson* v. *Hill*, Id. 468.

For these reasons the court would not be warranted in granting a preliminary injunction. Motion denied.

UNITED NICKEL Co. and others *v.* WORTHINGTON and others.

(*Circuit Court, D. Massachusetts.* August 14, 1882.

PATENT FOR INVENTIONS—INFRINGEMENT—WHO LIABLE.

The only persons who can be held for damages for the infringement of a patent, are those who own, or have some interest in the business of making, using, or selling the thing which is an infringement; and an action at law cannot be maintained against the directors, shareholders, or workmen of a corporation which infringes a patented improvement.

This action at law, for damages for the infringement of two patents, was brought November 21, 1877, and was now submitted to the court upon agreed facts.

The defendants were the American Nickel Plating Works, a corporation duly organized under the general laws of Massachusetts, three directors and one stockholder of the company, and one workman. When this action was brought, a suit in equity was pending by the same plaintiffs against the corporation, and one Anthes, which resulted in a final decree for the plaintiffs, not for profits, but for damages assessed at $13,000, and upwards, and a large bill of costs, for which execution has been issued, but in no part satisfied. Judge Shepley, at one term of the court, when the evidence in the equity suit was nearly all taken, ordered this action to stand continued to await the result of that suit. The company has done no business since the injunction was decreed, and is now insolvent.

The plaintiffs having some security in this action by attachment of the property of the corporation, which has since been mortgaged, submit that they may prosecute it against the corporation, and against the individuals who are, and were during the infringements, its directors or stockholders, or workmen in its employ.

The case finds that Shea had no interest in the business, but was a nickel plater for wages. As to the other defendants, that they were concerned only as officers and stockholders, and as authorizing the defense of the equity suit, which they did in good faith under advice of counsel; except that Allen, as an officer of the company, solicited the business for which the defendant corporation was pursued in the equity suit.

T. W. Clarke, for plaintiffs.

D. H. Rice, for defendants.

LOWELL, C. J. The final decree of this court in the equity suit being for damages in respect to the very same infringements now in

suit, is a merger of the cause of action as against the corporation. The hardship of the case arises from the course of practice by which security can be had by attachment in actions at law, but not in equity, excepting when an injunction *nisi* is ordered, and so it has happened that the present action might have been more productive to the plaintiffs than that which they pursued. It does not appear that this point had occurred to plaintiffs when they moved before Judge Shepley for a trial of this action. If it had, they might have discontinued the equity suit. As torts are joint and several, the decree does not release the other defendants, there having been no actual satisfaction. The question, then, is whether the directors, stockholders, and workmen of the corporation are liable.

It has been held that a mere workman who makes a patented article is not an infringer. *Delano* v. *Scott*, Gilp. 489; *Heaton* v. *Quintard*, 7 Blatchf. 73. The reason given by *Hopkinson*, J., in the first of these cases, goes far to decide the present. He says that the statute does not mean to class mere agents, servants, etc., as makers and venders of the patented improvement, but the principals, for whose account and benefit they act.

It was conceded, but without being decided, in *Lightner* v. *Brooks*, 2 Cliff. 287, and in *Lightner* v. *Kimball*, 1 Low. 211, that a director who has acted affirmatively, so to speak, and ordered an infringement by the corporation, would subject himself to an action. But, upon further examination, I think the law is not so. Infringement is not a trespass. The form of action is case; and this is because the act done is not of itself a direct interference wlth the tangible property of the plaintiff, but an indirect interference with his paramount right. It is like the building of a house upon a man's own land, which shuts out a light which his neighbor has a prescriptive right to enjoy. The person who is to pay damages for a disturbance is not every one who has had anything to do with the building, but he who owns it. It would be a great hardship if the directors of a railway or manufacturing corporation were bound, at their personal peril, to find out that every machine which the company uses is free of all claim of monopoly. No case precisely in point has been cited; but the practice certainly is to ask for damages only against the corporation. Joinder in equity for purposes of discovery and injunction is another matter; but I have not known damages to be asked for against the directors of a corporation, excepting in one case, which did not come to trial, but was discontinued as to the directors.

I am of opinion that the only persons who can be held for damages are those who should have taken a license, and that they are those who own or have some interest in the business of making, using, or selling the thing which is an infringement; and that an action at law cannot be maintained against the directors, shareholders, or workmen of a corporation which infringes a patented improvement.

The plaintiffs are to have 30 days to except to this ruling. At the end of that time the order will be, judgment for the defendants.

THE JOHN W. HALL.*

(*District Court, E. D. Pennsylvania.* July 21, 1882.)

ADMIRALTY—CRUSHING OF BARGE IN DOCK—BURDEN OF PROOF.

A schooner at high water went into a dock, between a loaded barge and another schooner. There being insufficient room at low water for all the vessels, the barge on the fall of the tide was crushed. There was evidence that the superintendent of the dock had ordered the barge to drop astern of the entering schooner, but the testimony left it doubtful whether the barge could have moved, and whether there was room for her to lie astern of the schooner. *Held*, that the schooner having entered where there was insufficient room, was *prima facie* liable for the injury, and the proof having failed to satisfy the court that the barge could have moved, the latter was entitled to a decree.

Libel by the owner of the barge Halsey against the schooner John W. Hall, to recover damages for the crushing of the barge. The facts were as follows:

On June 26, 1878, the Halsey was lying at Pier 1, Port Richmond, loading. On the opposite side of the dock, at Pier 2, was the schooner Mellon. The John W. Hall, having been ordered to Pier 1, attempted to enter the dock, but grounded and lay across the entrance. Late in the afternoon the Halsey finished loading, and about 9:30 in the evening, the tide having risen sufficiently to float the Hall, the latter hauled in between the Halsey and the Mellon. When the tide fell there was not enough space in the dock for the three vessels to lie abreast, and the Halsey was crushed. On the part of libelant it was claimed that after the Hall had entered the dock the Halsey had not room to move out, and that, even if she could have moved, there was not sufficient length of pier to have enabled her to lie astern of the Hall. On the part of the respondent it was claimed that, by the rules of the port, the Halsey being loaded was bound to drop astern of the Hall; that there was

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

enough space between the vessels at high water and sufficient length of pier to have enabled her to do so; that she was ordered to do so by the dock superintendent, and that her captain promised to do so at the time the Hall entered.

A. L. Wilson and *John G. Johnson*, for libelant.

Curtis Tilton and *Henry Flanders*, for respondent.

BUTLER, D. J. The dock afforded insufficient room for respondent, and the vessels there before her, to lie abreast. Crowding in, under the circumstances, she is *prima facie* liable for the injury sustained by libelant, and must justify herself or be held responsible. She seeks justification in an effort to show that libelant should have moved out. Unless the effort is successful she is defenseless.

Should libelant have moved out? She finished loading before 6 o'clock. Conceding it to have been her duty then to move out, if nothing prevented, it is a sufficient answer that respondent was in the way. She had grounded across and closed the channel, and so remained until near 10 o'clock. At that time,—when afloat,—she did not open the passage and invite libelant out, but, changing position slightly, crowded in. To expect libelant to go out, into the river, at that hour, was unreasonable. She was without motive power, and unprepared to lay outside the dock. Blame is not imputable for this want of preparation,—the nature of the craft, and the usages of its class, being considered. It is unreasonable to suppose that respondent could imprison her until such an hour and then order her out. The reason assigned,—that respondent would otherwise lose a tide,—is entitled to no weight. She had already lost a tide, and if she lost another it would be the result of her folly, or misfortune, in grounding. It did not entitle her to keep libelant in or drive her out at pleasure, irrespective of circumstances. The regulations of the port and orders of the superintendent or master, do not affect the question. The regulations must be reasonably interpreted. They no more required libelant to go out into the river at such an hour, than they did to go out when penned or wedged in. The orders of the superintendent or master will not justify encroachment upon another's rights. If libelant could have moved back and still laid within the dock, she, doubtless, should have done so. Whether she could move back after respondent entered, (she had no opportunity before, as I understand the evidence,) and whether there was room thus to lie in respondent's rear, is open to serious doubt. The testimony respecting both these points is in direct conflict. I deem it sufficient to say that in my judgment it was not proved either that libelant could move back, with the force at command, or that she could safely lay as suggested. The

testimony of Capt. Young, of the Mellon, a disinterested witness, who saw the situation and is competent to form a reliable judgment, is flatly against respondent on both points. It is possible, and I think probable, there were a few more inches space than the vessels occupied, at high water. From the situation when respondent entered, however,—the crowding, and necessity for removing fenders,—the inference is justifiable that the unoccupied space, if any, was very small. With the vessels afloat and a few inches thus to spare, they would doubtless bind,—resting against each other in places, and in other places against the piers,—rendering considerable force necessary for the removal of either. Without speculating on the subject, however, it is sufficient that the evidence does not prove the respondent's allegation in this respect.

Did libelant promise to move out, as charged? If she did, it was not until respondent was nearly in; and if therefore she was mistaken respecting her ability to get out, the promise was unimportant,—as it did not mislead. But did she so promise? Capt. Hudson and his mate say Capt. Gallagher promised to move out when they should get in, as they were crowding by. This is distinctly and positively denied by Capt. Gallagher; and when his situation and conduct, at the time and after, are considered, the probabilities seem to be with the denial. Capt. Young says he heard Capt. Gallagher tell some one on board respondent, that he could not go out that night, that his men were all gone.

Capt. Hudson's conduct and conversation, when forcing his way in and after the accident, seem to show consciousness of wrong. More than once, as he entered, he alluded to the danger of "squeezing," and after his fears had been realized, Capt. Young says, "he asked me, about an hour after the boat was sunk, if I thought he was to blame; and I told him that in case of a lawsuit I thought it would go pretty hard with him. He said he thought he was not to blame; I said I thought he was. * * * He did not say the captain of the barge had said he would go out."

The libelant must have a decree for his damages.

THE BESSIE MORRIS.*

(*District Court, E. D., Pennsylvania.* July 21, 1882.)

1. ADMIRALTY—COLLISION—BURDEN OF PROOF.
   Where a vessel having the right of way is injured by a collision, the burden of proof is upon the other vessel to show proper care; and if the testimony of her witnesses is contradicted, and is in conflict with the probabilities of the case, a decree will be entered against her.
2. SAME—LOOKOUT—STEWARD.
   It is doubtful whether a steward is a competent lookout, but he certainly is not when his attention is divided between such duty and the duties belonging to his employment as steward.

Libel by the owners of the schooner William Marshall against the schooner Bessie Morris to recover damages for injuries caused by a collision. The facts were as follows:

About noon on August 6, 1881, the Marshall, bound to Boston with a cargo of coal, was beating down the Delaware river, and when on a port tack about mid-channel collided with the Morris, which was sailing up the river light, with the wind free and directly astern. On the Morris the only man forward of the wheel was the steward, who was about half-way between the foremast and mainmast and between the cabin and forecastle, in which the officers and men respectively were at dinner, he being in that position to answer their calls and wait on the tables. Libelants claimed that the collision was caused by the fact that there was an insufficient lookout kept on the Morris; that the approach of the Marshall was not reported until the vessels were close together; and that then the Morris, instead of passing under the stern of the Marshall, ported her wheel and came across the latter's bows. The respondents claimed that the collision was caused by the Marshall, when on her starboard tack in mid-channel, and only about 200 feet from the Morris, suddenly, and without necessity, tacking and coming across the latter's bows on the port tack.

Edward F. Pugh and *Henry Flanders*, for libelant.

Edward S. Sayres, *Alfred Driver*, and *J. Warren Coulston*, for respondent.

BUTLER, D. J. That libelant had the right of way, and respondent was consequently bound to keep off,—unless the former by disregarding ordinary rules of navigation, improperly ran into danger,—is not only plain, but conceded by counsel. The burden of proof is, therefore, on respondent,—a very important fact in view of the conflicting character of the testimony. She alleges that libelant prevented her keeping off, by suddenly and improperly coming-about,

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

near mid-channel,—directly after crossing her bows, when only about 200 feet away, as described in the answer. That is the only defense; and, in my judgment, it is not proved. The testimony of respondent supports it; but the answering testimony of libelant, apparently as credible, (in part from disinterested witnesses,) is directly the reverse, while the probabilities of the case seem to be with the latter. Under the circumstances described in the answer, and by respondent's witnesses, it appears incredible that libelant could come-about and place herself in respondent's way, as alleged. Considering the latter's speed, the direction of wind and tide, the given distance between the vessels, and the length of time required by libelant to come-about, it is difficult to believe that she could get back to respondent's path before the latter had passed,—even without change of course. It is more difficult, however, to believe that respondent, under the circumstances described,—seeing libelant's purpose,—might not have passed in safety by immediately changing her course eastward.

The libelant did not run as near the western shore as was possible. Precisely how near she ran is uncertain. According to her own witnesses it was almost as near as prudence permitted,—in view of the circumstances they relate. In the absence of all direct evidence on the subject the presumption would be that she did so. It was her interest to run her tack out fully. But how near she ran to the western side is unimportant, unless it appears that she improperly and unexpectedly came-about with respondent close by, as alleged. As already indicated, I believe the testimony not only does not show that she did thus come-about, but that its weight is the other way. The suggestion that she had only gotten around when struck, that her wheel had not been changed, to straighten on her course, and the argument based upon it, are not warranted by the evidence. The testimony of the mate, who was at the wheel, is full and clear, to the contrary,—while the testimony of the master and officers of the Roland Stanford, who witnessed the collision, sustain his statement. I cannot doubt that libelant had straightened on her course, and run some distance, before she was struck. I can only account for respondent's failure to keep off upon the hypothesis that her lookout was defective, and that she consequently failed to see libelant until close upon her. That the lookout was defective is clear. The competency of the steward for this service was doubtful, at least. But, in addition to this, his attention at the time was divided between that service and those belonging to his employment as steward, and he

consequently did not see the vessel untill within 200 feet, or if he did see did not report. It is not improbable that the respondent might still have passed safely to the westward, but in the confusion she attempted to pass under libelant's bows and struck her. (See assessor's answers, filed herewith.) A decree must be entered in libelant's favor.

The court propounded certain questions to a nautical expert, called as an assessor, which, with the answers thereto, were as follows:

(1) Suppose the Bessie Morris to have been coming up the river 200 feet or thereabouts away, and the William Marshall to have crossed her bows westward at that distance, and then to have come about, as described in the answer handed you, (the wind and tide being as stated therein,) would the latter vessel have gotten back so as to come in contact with the Bessie Morris?

Answer. She could not have gotten back in time to come in contact, for in the act of coming about she would have gone ahead down the river to a point below the other vessel before she would have filled away on her eastern tack.

(2) If the William Marshall had her sails trimmed at the time of collision, as stated in the answer, is it or is it not probable that she was considerably further westward than stated in the answer when she came about?

Answer. It is very probable that she came about considerably further westward, because otherwise she would not have been filled away on the eastern tack before she came in collision, for she could not have done this within 200 feet.

Collision—Damages Allowed—Rights of Insurer.

THE POTOMAC and others, U. S. Sup. Ct., Oct. Term, 1881. Appeal from the circuit court of the United States for the district of Louisiana. The case was decided in the supreme court of the United States on May 8, 1882. Mr. Justice *Gray* delivered the opinion of the court partly reversing the decree of the circuit court.

In order to make full compensation and indemnity in a case of collision for what has been lost by the collision,—*restitutio in integram*,—the owners of the injured vessel are entitled to recover for the loss of her use while laid up for repairs. When there is a market price for such use, evidence of the profits she would have earned if not disabled is competent; but from the gross freight must be deducted so much as would, in ordinary cases, be disbursed on account of her expense in earning it. In no event can more than the net profits be recovered by way of damages; and the burden is on the libelants to prove the extent of the damages actually sustained by him. The mere payment of a loss by the insurer does not afford any defense to a person whose fault has been the cause of the loss in a suit brought against the latter by the assured; but the insurer acquires by such payment a corresponding right in any dam-

ages to be recovered by the assured against the wrong-doer, or other party responsible for the loss, and may enforce this right by action at common law in the name of the assured, or, when the case admits of proceeding in equity or admiralty, by suit in his own name. The right of the insurer is not contingent on the loss having been total, or upon its having been followed by an abandonment, but rests upon the ground that his contract is in the nature of a contract of indemnity, and that he is therefore entitled, upon paying a sum for which others are primarily liable to the assured, to be proportionally subrogated to his right of action against them. But the insurers are entitled only to damages to be recovered for an injury for which they have paid, and to such proportion only of those damages as the amount insured bears to the valuation of the policies.

T. D. Lincoln, for appellants.

W. W. Howe, J. H. Kennard, and Bentinck Egan, for appellee.

Cases cited in the opinion: The Caroline, 17 How. 170; The Francis Wright, 4 Morr. Trans. 487; The S. C. Tryon, Id. 360; Williamson v. Barrett, 13 How. 101; Sturgis v. Clough, 1 Wall. 269; The Cayuga, 2 Ben. 125; 7 Blatchf. 385; 14 Wall. 270; The Gazelle, 2 W. Rob. 279; S. C. 3 No. Cas. 75; The Clarence, 3 W. Rob. 283; S. C. 7 No. Cas. 579; Hall v. Railroad Co. 13 Wall. 367; Comegys v. Vasse, 1 Pet. 193; Fretz v. Bull, 12 How. 466; The Monticello, 17 How. 152; Garrison v. Memphis Ins. Co. 19 How. 312. See, also, The Sarah Ann, 2 Sumn. 206; The Ann C. Pratt, 1 Curt. 340; Clark v. Wilson, 103 Mass. 219; Yates v. Whyte, 5 Scott, 640; S. C. 4 Bing. N. C. 272; 1 Arnold, 85; Simpson v. Thompson, Law Rep. 3 App. Cas. 279; White v. Dobinson, 14 Sim. 273; Quebec Assu. Co. v. St. Louis, 7 Moore, P. C. 286; Dickenson v. Jardine, Law Rep. 3 C. P. 639; Darrell v. Tibbetts, Law Rep. 5 Q. B. D. 560; North of England Ins. Ass'n v. Armstrong, Law Rep. 5 Q. B. 244; Gen. Mut. Ins. Co. v. Sherwood, 14 How. 351.

HOBBY *v.* ALLISON and others.*

(*Circuit Court, D. Michigan.* January 16, 1882.)

1. REMOVAL OF CAUSE—JUDICIARY ACT.
   The eleventh and twelfth sections of the judiciary act are to be read independently, and a removal may be had although the suit could not originally have been begun in the federal court; but no suit can be removed which might not, so far as the *constitutional* provisions are concerned, have been begun in the federal courts.
2. SAME—PREJUDICE AND LOCAL INFLUENCE ACT.
   It seems that the act of 1867 with regard to removals is still in force, and is not supplanted by the second section of the act of March 3, 1875.
3. SAME—RELATION OF STATUTORY ENACTMENT.
   The restriction in the eleventh section of the judiciary act does not apply to cases transferred under the act of 1867, and that act being designed to amend section 12 of the judiciary act, must be treated as independent of a subsequent act passed to supply the place of section 11.
4. RIGHT OF REMOVAL UNDER ACT OF 1867.
   The conditions of the power of removal under the act of 1867 are a diverse citizenship, a cause of action exceeding $500, an affidavit of prejudice or local influence, and a proper bond; and the restriction in the act of March 3, 1875, as to the assignee of a chose in action, does not apply.

On Motion to Remand.

This case was originally begun in the circuit court for the county of Saginaw, upon an account against the defendants, citizens of Michigan, in favor of Joseph P. Whittemore, also a citizen of Michigan, and by him assigned to the plaintiff, a citizen of New York. Before the term at which the case could first be tried, the plaintiff petitioned for a removal to the circuit court of the United States, under the act of 1867, upon the ground of prejudice and local influence. The usual transcript having been filed, defendants moved to remand upon the ground that the case could not have originally been commenced in this court under the first section of the act of 1875, the plaintiff being the assignee of such a contract as could not have been prosecuted in this court if no assignment had been made.

Atkinson & Atkinson, for plaintiff.

H. M. Duffield, for defendants.

BROWN, D. J. The only limitation to the jurisdiction of the circuit courts contained in article 3, § 2, of the constitution, is, so far as the question of limitation is pertinent here, that the suit shall be between citizens of different states; but in parceling out this

*Reported by Edwin Sweetser, Esq., of the Detroit bar.

jurisdiction in the judiciary act, congress restricted that of the circuit courts to cases at law or in equity between citizens of different states, involving more than $500 in amount, and further prohibited such suits altogether, when brought to recover upon any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such courts had no assignment been made, except in cases of foreign bills of exchange. The object of the restriction was evidently to prevent the federal courts being used in petty cases, where the expenses of trial might be much greater than the amount involved. The object of the prohibition was equally obvious, namely, to prevent the assignment of choses in action to non-residents for the purpose of enabling suits to be brought in the federal courts. In the interests of commerce, however, and to facilitate the negotiation of commercial paper, an exception was made in cases of foreign bills of exchange, since extended to all bills of exchange and promissory notes.

In the twelfth section, however, providing for the removal of cases from the state courts, upon the petition of a non-resident defendant, there was no necessity for providing against causes of action collusively assigned, as a resident defendant would, in almost every case, prefer to bring suit against a non-resident in the courts of his own state; and hence the only limitation upon such removals was that the suit should be between citizens of different states, and should involve over $500. Hence the courts, as a rule, hold that the eleventh and twelfth sections of the judiciary act were to be read independently, and that a removal might be had though the suit could not originally have been begun in the federal court, although it was obvious that no suit could be removed which might not, so far as the *constitutional* provisions were concerned, have been originally begun in one of those courts. *Green* v. *Custard*, 23 How. 484.

In *Bushell* v. *Kennedy*, 9 Wall. 387–393, it was said that "the restriction in the eleventh section is not found in the twelfth. Nor does the reason for the restriction exist. In the eleventh section its office was to prevent frauds upon the jurisdiction, and vexation of defendants, by assignments being made for the purpose of having suits brought in the name of assignees, but in reality for the benefit of assignors. In the twelfth it would have no office for the removal of suits could not operate as a fraud upon the jurisdiction, and was a privilege of defendants, and not a hardship upon them." *Ayres* v. *Western R. Co.* 45 N. Y. 260; *Winans* v. *McKean R. & Nav. Co.* 6 Blatchf. 215.

We now come to the act of 1867, under which the removal was made in this case. This statute confers upon the circuit courts no additional original jurisdiction. It made no amendment to the eleventh section of the judiciary act, and in that respect left it just where it found it. But in respect to removals it made a startling innovation. It provided that in all suits involving over $500, between a citizen of the state in which the suit was brought and a citizen of a different state, such citizen of another state, whether plaintiff or defendant, might remove, upon filing an affidavit of prejudice or local influence, at any time before the final hearing or trial. This practically defeated the wise restriction in the eleventh section of the judiciary act against actions in favor of assignees of choses in action, unless the assignor could have sued, and gave the non-resident plaintiff the right to begin suit upon such a cause of action in the state court, and then to abandon the forum thus voluntarily chosen, and remove the case to the federal court, by the simple filing of an affidavit, easy to make and impossible to disprove. There was, however, this much to be said in favor of the act: It was passed soon after the close of the civil war, and at the time when northern creditors began to press heavily for payment upon their *ante-bellum* debtors. There were undoubtedly strong prejudice and local influence against these suits, which might not be discovered by the non-resident plaintiff until some time after the suit was begun. It was a question, then, whether the plaintiff should be compelled to discontinue such suit and begin a new suit in the federal court, against which the statute of limitations might have run, or vest him with a power to remove to the federal courts. Congress chose the latter course, and it is not for the courts to question the wisdom of its choice. It has, however, undoubtedly been a strong temptation to resident creditors to assign their causes of action to non-resident plaintiffs, who could remove the case thus commenced to the federal courts, and thus evade this important provision, which had existed from the adoption of the constitution. The question still remains, however, whether, as a matter of legal construction, the plaintiff is not entitled, under the act of 1867, to remove this case to the federal court. It is true that the eleventh section of the judiciary act has since been somewhat enlarged by the act of 1875, § 1; but it has been generally held that the act of 1867, with regard to removals, is still in force, and is not supplanted by the second section of the act of 1875, and such I assume to be the law, without expressing my own opinion upon that point.

Upon reading the act of 1867, and the first section of the act of 1875, there seems to be but little liberty of choice. If the eleventh and twelfth sections of the judiciary act cannot be read together, there is greater reason for saying that an act designed to amend or supplant section 12 must be treated as independent of a subsequent act passed to supply the place of section 11; and such has been, I believe, the unanimous ruling of the courts.

In *City of Lexington* v. *Butler*, 14 Wall. 282, it was held that the restriction of the eleventh section of the judiciary act did not apply to cases transferred from state courts under the act of 1867. The first reason assigned by Mr. Justice Clifford for sustaining the jurisdiction in that case was that the bonds were made payable to bearer, and therefore not within the prohibition; *secondly*, that the principle applied in the case of *Bushnell* v. *Kennedy*, above cited, should also apply to the case then under consideration.

So, in *Gaines* v. *Fuentes*, 92 U. S. 10, 19, it was declared that the act of 1867 covered every possible case involving controversies between citizens of the state where the suit was brought, and citizens of other states, if the matter in dispute exceeded the sum of $500; and the fact that the suit would not originally have lain in the federal court, was no objection to such removal.

In *Johnson* v. *Monell*, 1 Woolw. 390, Mr. Justice Miller held that the only conditions of removablity under the act of 1867 were a diverse citizenship, a cause of action exceeding $500, an affidavit by the non-resident citizen of prejudice or local influence, and a proper bond. From the further position assumed in that case, that a citizen may change his residence, after suit commenced, to another state, and thus acquire the right to remove, it would appear the learned justice has receded. *Beede* v. *Cheeney*, 5 FED. REP. 388; *Kaeiser* v. *Railroad Co.* 6 FED. REP. 1. See, also, *Sands* v. *Smith*, 1 Dill. 290; *Barklay* v. *Levee Com'rs*, 1 Woods, 254.

These are the only cases to which my attention has been called under the act of 1867, and there appears to be no diversity of opinion. Whether the same rule would apply to a case removed under the second section of the act of 1875, I express no opinion. The authorities upon this point are by no means harmonious, and seem to me to present a somewhat different question. *Southworth* v. *Adams*, 4 FED. REP. 1; *Berger* v. *County Com'rs*, 5 FED. REP. 23.

The motion to remand must be denied.

NOTE.

RIGHT OF REMOVAL. Under this section the parties must be of adverse citizenship. *Amer. Bible Soc.* v. *Grove*, 101 U. S. 610. This statute does not permit a citizen of the state in which suit is brought to make the application for removal, (*Aldrich* v. *Crouch*, 10 FED. REP. 305; *Babbitt* v. *Clark*, 103 U. S. 606; *Gurnee* v. *Brunswick Co.* 1 Hughes, 270; *Murray* v. *Holden*, 2 FED. REP. 740; *Forrest* v. *Keeler*, 17 Blatchf. 522; *Kerting* v. *Amer. Oleograph Co.* 10 FED. REP. 17;) but a non-resident plaintiff may remove a cause against a citizen of the state in which suit is brought and the citizen of another state, the latter of whom voluntarily appears, (*Akerly* v. *Vilas*, 2 Biss. 110; *Sands* v. *Smith*, 1 Dill. 290.) When defendant is a citizen of the state where suit is brought, plaintiffs cannot remove if one of them is a citizen of the same state, except where the controversy can be settled without the presence of the other plaintiffs. *Bliss* v. *Rawson*, 43 Ga. 181. See *Martin* v. *Coons*, 24 La. Ann. 169; and see *Bryant* v. *Scott*, 67 N. C. 391. Under this section intervenors may remove the cause. *In re Iowa & M. C. Co.* 10 FED. REP. 401. See *Burdick* v. *Peterson*, 6 FED. REP. 840. It is only under this section that a removal may be had at any time before a final hearing. *Johnson* v. *Johnson*, 13 FED. REP. 193.

AFFIDAVIT. The affidavit must be in substantial accordance with the words of the statute. *Balt. & O. R. Co.* v. *New Albany R. Co.* 53 Ind. 597. See *Bowen* v. *Chase*, 7 Blatchf. 255. It is not generally necessary to state the reasons or facts showing the local prejudice or influence. *Anon.* 1 Dill. 298; *Meadow V. Min. Co.* v. *Dodds*, 7 Nev. 143; *Quigley* v. *Cent. Pac. R. Co.* 11 Nev. 350. An affidavit "to the best of his knowledge and belief" is sufficient, (*Stoker* v. *Leavenworth*, 7 La. 390; *De Camp* v. *New Jersey M. L. Ins. Co.* 2 Sweeny, 481;) but that "plaintiff had reason to and does believe that from prejudice he will not be able to obtain justice in the state court," is not sufficient without facts showing the reasonableness of his belief, (*Sands* v. *Smith*, 1 Dill. 298; *Goodrich* v. *Hunton*, 29 La. Ann. 272.) The omission of the words "and does believe" is fatal. *Balt. & O. R. Co.* v. *New Albany R. Co.* 53 Ind. 597.

AFFIDAVIT—BY WHOM MAY BE MADE. It may be made by an agent or attorney, (*Dennis* v. *Alachua Co.* 3 Woods, 683; *Kain* v. *Tex. Pac. R. Co.* 3 Cent. Law J. 12; *contra*, *Miller* v. *Finn*, 1 Neb. 254,) as the authorized agent of a corporation, (*Ins. Co.* v. *Dunn*, 19 Wall. 214; *Farmers' L. & T. Co.* v. *Maquillan*, 3 Dall. 279; *Minnett* v. *M. & St. P. R. Co.*, 3 Dill. 460; *Mix* v. *Andes Ins. Co.* 74 N. Y. 53; but see *Cooke* v. *State Nat. Bank*, 52 N. Y. 96;) but if made on his belief alone it is insufficient, (*Cooper* v. *Condon*, 15 Kans. 572; *Tunstall* v. *Madison*, 30 La. Ann. 471; *Burlington, P. & C. R. Co.* v. *N. A. & S. R. Co.* 53 Ind. 597.). The reason why the party applying does not himself make the affidavit should be given. *Cooper* v. *Condon*, 15 Kans. 572. The affidavit of the secretary of a corporation must show that it is made at the instance or order of the corporation, (*Dodge* v. *N. W. U. Pkt. Co.* 13 Minn. 458,) and if made by an officer there must be proof that he was authorized to make it, (*Id.*; *Mahone* v. *M. & L. R. Co.* 111 Mass. 72; *Quigley* v. *Cent. Pac. R. Co.* 11 Nev.

350;) but the president or general manager of a railroad company is *prima facie* authorized, (*Minnett* v. *M. & St. P. R. Co.* 3 Dill. 460.)

HOW TAKEN AND CERTIFIED. The affidavit must be taken and certified in accordance with the laws of the state, (*Bowen* v. *Chase*, 7 Blatchf. 255,) and be authenticated according to such laws, (*Id.; Florence* v. *Butler*, 9 Abb. Pr. N. S. 63.) If taken out of the state it must be taken by a commissioner and be certified to by the secretary of state. *Florence* v. *Butler*, 9 Abb. Pr. N. S. 63. The seal of the commissioner is presumed to be official. *Tunstall* v. *Madison*, 30 La. Ann. 471. Objections to the certification may be waived by the adverse party, (*Bowen* v. *Chase*, 7 Blatchf. 255; (and a failure to object will be deemed such waiver, (*Mix* v. *Andes Ins. Co.* 74 N. Y. 53.) When filed it cannot be contradicted or controverted. *Stewart* v. *Mordecais*, 40 Ga. 1.—[ED.

TEAS *v.* ALBRIGHT and others.

(*Circuit Court, D. New Jersey.* August 25, 1882.)

1. JURISDICTION—SUBJECT-MATTER.

   The subject-matter of contracts made in relation to patents, where neither the validity of the patent nor its infringement are concerned in the controversy, does not give the courts of the United States jurisdiction. The rights of the patentee under the patent laws of the United States must be directly and not collaterally brought in issue to give jurisdiction.

2. REMANDING CAUSE—REMAND SUA SPONTE.

   Where, after the removal of a cause wherein the requisite citizenship and the amount in controversy do not exist, and it is found by the pleadings that the subject-matter is one in which a statute of the United States is only incidentally brought in question, the court will of its own motion remand the cause.

In Equity.

King & Woodruff, for complainant.

A. Q. Keasbey & Sons, of counsel, and *Joseph C. Clayton*, with defendants.

NIXON, D. J. The bill of complaint in this case was originally filed in the court of chancery of New Jersey, and sets forth that the complainant, being the owner of several valuable patents, did, on the first of February, 1876, enter into an agreement with two of the defendant, Cahoone and Albright, to make an assignment of the letters patent to them, in consideration of their paying to the complainant certain royalties from the profits derived from the sale of the goods manufactured under the said inventions.

It alleged that the complainant had never been able to obtain proper access to the books of account of the said defendants, although

the agreement stipulated that during all the time of its continuance their books should be open to his or his agent's inspection, for examination; that he had received five several statements from Cahoone and Albright and their agents since the execution of the agreement, from which it appeared that the complainant had been credited with the total sum of $925.03, and charged with the sum of $787.16, and that the said statements were grossly erroneous and false, both as to the credits and charges; that for some time after the execution of the agreement the said Cahoone and Albright carried on the business of manufacturing the goods described in the said patents under the name of the Cahoone Manufacturing Company ; that afterwards one Samuel E. Tompkins was taken into the business, and it was transacted under the name of "Samuel E. Tompkins, Cahoone & Co.," and that the books of these respective firms contain many items of which it is necessary for the complainant to have information, for the purposes of this suit, and in which the said Tompkins has some kind of interest; that the accounts between the complainant and Cahoone and Albright are mutual and complicated, arising from the unsettled differences existing between them as to the amount with which the complainant should be charged by the defendants, and from the way in which goods have been manufactured under the said patents—the defendants applying, in some cases, the principles of several patents to a single article of manufacture.

The prayer of the bill is that the defendants may make a full and true discovery and disclosure of and concerning all the accounts, transactions, and matters aforesaid, and that an account may be taken under the direction of the court of all dealings and transactions heretofore had between the parties, concerning the royalties and percentages claimed by the complainant under and by virtue of the said agreement, and that Cahoone and Albright may be charged with the aggregate amounts of said royalties, with lawful interest thereon from the time that the same became due, and that the said sum may be decreed to be paid by the said Cahoone and Albright to the complainant, no decree being asked for against Tompkins.

To the bill, Cahoone and Albright have signed a joint and several answer, and Tompkins a several answer.

The former admit that the agreement between them and the complainant was duly executed, and is in full force; that the patents were assigned to them by the complainant as alleged; that the patented improvements have been applied by them, in connection with other improvements owned and controlled by them, in the manufact-

ure of harness goods, and that the only consideration for the assignment of the patents was that specified in the agreement. They deny the allegations of the bill, that they have refused to the complainant proper access to their books; that they have not rendered true semi-annual statements of the accounts; that they are indebted to complainant in any sum for royalties due on manufactured goods; and that the accounts between them and the complainant are complicated, or that it will be tedious and difficult to ascertain the amounts due from time to time, under a fair construction of the agreement; although they admit that, in manufacturing the goods for the market, they have necessarily made them in such manner as required the application of the principles of several patents to one article, including patents not embraced within the scope of the agreement.

They further allege that at the time of the execution of the agreement with the complainant they were engaged in earnest litigation with Tompkins concerning the validity of certain patents for improvements in saddle-trees, owned by the said Tompkins, and concerning alleged infringements of said patents, and that in consequence of said litigation, and the rivalry in business between them, great injury resulted to the trade of both parties; and that in October, 1877, an agreement was made between them to cease litigation and unite their business, and since that time said business has been carried on in the name of "Samuel E. Tompkins, Cahoone & Co.," which firm has been entitled to use all of the patents owned by the defendants and by said Tompkins, including the improvements embraced in the patents assigned to them by the complainant; and that they, before the said change in their business, and the new firm, since the change, have applied and used these patents, to a greater or less extent, in manufacturing certain goods, in connection with other improvements covered by other patents owned by them, and that both before and since said change they have carefully kept account of all the goods which embraced any of the improvements covered by the patents assigned by the complainant, although such improvements have been in a great measure superseded and rendered useless by the control of the various patents of Tompkins, with whom they were in litigation at the time of the agreement; and that such books have been, at all reasonable times, open to the inspection of the complainant, and full statements and accounts therefrom have been from time to time furnished to him, and made the basis of frequent payments, under the said agreement.

Their answer also sets up that the firm of Samuel E. Tompkins, Cahoone & Co. is largely engaged in the manufacture of saddlery and saddlery hardware; that its business embraces a large variety of goods which have no relation to the improvements covered by any of the patents referred to in the agreement with the complainant; and that many of said goods which do embrace such improvements also embrace improvements covered by patents, being over 70 in number, owned by said Tompkins and others; that Tompkins has always disputed the validity and value of the patents referred to in said agreement, and has claimed that they were all anticipated by his own patents, and that any goods made under them were infringements of his patents; and that, so far as he was concerned, he was not bound to pay any royalties to the complainant; but that they, (Cahoone and Albright,) desiring to fulfill their agreement fairly, have always caused accounts to be kept of all goods which, on any reasonable construction, could be held to embrace or contain any of the improvements covered by any of the patents assigned by complainant, and both before and since said change in the firm have paid all sums of money due under said agreement, in full; and that if complainant demanded any further payment, or sought to make further examination of said books, it was only because he claimed, without reason, that goods made under the patents of Tompkins were infringements of his patents, assigned to defendants; and they allege that the question of such infringement could not be tried in this suit, involving a subject over which the court had no jurisdicton, and that if anything remained due to complainant under the agreement, he had a full, complete, and adequate remedy at law for the recovery of the same; praying that they might have the same advantage of said defense as if they had demurred upon that ground.

The answer of Tompkins presents substantially the same and no new or different questions.

A replication was duly filed, and the parties proceeded to take their testimony. As this seemed to be turning largely upon the fact of infringement, and matters of construction of different patents, all the defendants joined in a petition to the chancellor for an order to remove the cause into this court, on the ground "that the suit arose under the patent laws of the United States, and that the substantial controversy was one depending upon the construction of said laws, and was exclusively within the cognizance of the courts of the United States, and that the suit was removable under the act of congress of March 3, 1875."

The record being filed, the complainant gave notice of a motion to remand the cause to the state court; but before it came up for decision, under some arrangement between the parties, it was not urged; the testimony was completed, and the case put on the calendar for final hearing.

Before any argument upon the merits, the counsel for the defendants suggested that the pleadings raised the question of jurisdiction, and insisted that the court could not entertain the suit in equity, because the complainant had a plain, adequate, and complete remedy at law. Section 723 of Revised Statutes. The court was asked to dismiss the case upon that ground.

The counsel for the complainant replied that their motion to remand the suit to the state court had never been disposed of, and had been waived only upon the express understanding that all parties should agree to an adjudication here upon the merits, and that if the court was disposed to listen to the technical objection that the form of the action should have been legal, and not equitable, then their motion to remand was renewed, and the judgment of the court invoked upon that question.

It is claimed that the removal was made under the act of March 3, 1875. The fifth section of that act provides that "if in any suit removed from a state court to the circuit court of the United States it shall appear to the satisfaction of said circuit court, at any time after the suit has been removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, * * * the said court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require."

The court, then, not only has the authority, but is charged with the duty, on its own motion, or at the suggestion of the parties, at any time, to dismiss or remand a suit removed here from a state court whenever it may appear that the dispute or controversy does not come within the provisions of the law.

Looking carefully into the second section of the act, which sets forth the causes that are removable from the state to the federal courts, it is clear that the removal cannot be justified unless the matter in dispute between the parties has arisen "under the laws of the United States."

The character of the controversy must be determined by the record. Turning to that, I find that the suit was commenced by filing a bill in the court of chancery of New Jersey for an account of business

transactions growing out of a written contract between the parties. This contract embraced the transfer or assignment of certain patents from the complainant to the defendants, Cahoone and Albright, and their agreement to pay a specified royalty from the profits of their business on all goods manufactured and sold which embraced the patented improvements. The *gravamen* of the action was the failure of the defendants to perform their personal covenants, and was not to vindicate any rights which had been vested in the complainant under a law of the United States.

All rights that men have in patents are secured to them by federal laws, and all controversies which directly involve the validity of patents, or which are for the recovery of damages and profits for their infringements, are exclusively cognizable in the federal courts. This is elementary knowledge. But when a patentee sells out *all* his interest in the patent, how can any right remain which is secured to him by an act of congress?

Some confusion on this subject has, doubtless, arisen from the fact that the courts of the United States have often exercised jurisdiction over contracts for license to use patented inventions, granting relief to licensors where the licensees have failed to perform their covenants. But it will be found in all such cases that not only has the ownership of the patent been retained by the licensor, but the right of the licensee to use the patent has been conditioned on his performing certain acts or paying certain royalties. *Brooks* v. *Stolley*, 3 McLean, 523, affords a good illustration of a case of this kind. The complainants were the assignees of the Woodworth planing patent for Hamilton county, state of Ohio, and as such, licensed the defendant to run a machine in that county, under a sealed contract in which the licensee's right to use the machine was expressly conditioned on his paying $1.25 for every thousand feet of boards planed, to be paid on Monday of each week; and further, that he should render an account, if required, under oath, and also keep books to which the complainants should have access, and in which all boards planed should be entered.

After complying with the contract for some time, by paying according to its terms, the licensee refused to make any further payments, although he continued to use the machine. The bill was filed for an injunction restraining its further use. Objection was raised to the jurisdiction of the court, but Mr. Justice McLean overruled the objection on the ground that the suit was not to enforce the contract, but to secure to the licensor the rights in the patent

which he had reserved, on the failure of the licensee to perform his convenants; that his only authority for using the machine grew out of the contract; and that the court could not allow him to repudiate the contract and still use the machine. "If," he added, "the object of the bill were merely to enforce a specific execution of the contract, the circuit court of the United States could exercise no jurisdiction in the case."

In *Hartell* v. *Tilghman*, 99 U. S. 555, an intimation is thrown out that Mr. Justice McLean went too far in this case in maintaining the jurisdiction of the courts of the United States, but we may safely concede all that is claimed, and then find ample ground for denying the jurisdiction in the present case.

There is no pretense, in the present suit, that the complainant reserved any interest, absolute or contingent, in the patents which he assigned. He only retained certain royalties in the profits, and the bill is filed to have an account taken of them.

The case cannot be distinguished in principle from those of *Goodyear* v. *Day*, 1 Blatchf. 565, and *Goodyear* v. *Union Rubber Co.* 4 Blatchf. 63. The last-named case was very similar to the one under consideration in all its facts and aspects, except that the defendants were licensees, and not grantees. The owner of a patent granted a license, with covenants that the licensee should pay certain tariffs and keep correct accounts and permit his books to be examined, but there was no express provision that if the convenants were broken the rights granted should revert to the licensor. A bill was filed by the licensor against the licensee, praying for a decree that the covenants should be performed, and for an injunction to prevent the use of the patent under the license until the covenants should be performed. The citizenship of the parties not giving the court jurisdiction, the question was raised and argued whether the action could be maintained.

It was held that the subject-matter did not give a federal court jurisdiction; that the suit was not one to prevent the violation of any right of the licensor secured by any law of the United States, but to prevent the violation of the rights secured by the covenants of the license, and that the court had no jurisdiction of the case. The reasoning of the learned judge seems quite conclusive. "If," says he, "in the use of the thing granted the licensee does not perform his covenants, although there is, by such non-performance, a violation of the rights of the patentee, such violation is not a violation of the rights of the patentee as secured by a law of the United States,

but a violation of his rights as secured by the covenants. He has, by the license or grant, parted with a portion of that which was secured to him by the laws of the United States, and has, in lieu thereof, taken a right secured by a covenant. If a patentee parts with the whole right secured by his patent, either for cash or upon the purchaser's entering into a covenant to pay him a certain sum of money or to do certain other things, the patentee has, after such sale, no right vested in him secured by any act of congress. A suit to enforce the covenant would not be a case arising under a law of the United States. The use of the whole thing sold cannot be a violation of any rights of the patentee secured by the laws of the United States, so long as the deed of sale remains in full force, for he has parted with all such rights. And when a portion of the right is parted with, the rule must be the same, as it respects such portion." See, also, *Blanchard* v. *Sprague*, 1 Cliff. 289, and *Merserole* v. *Union Paper Collar Co.* 6 Blatchf. 356, in which the ground is distinctly taken that the subject-matter of contracts made in relation to patent rights, does not give the courts of the United States jurisdiction in suits to enforce them.

But without dwelling upon these cases, determined in the subordinate courts of the United States, the supreme court, in *Wilson* v. *Sanford*, 10 How. 99, put the question at rest by refusing to entertain jurisdiction of a suit which was brought by the grantor of a license to avoid a license on the ground that the grantee had not complied with the terms of the contract. As neither the citizenship of the parties nor the amount involved in the litigation, gave the court jurisdiction, the only question was whether it was "a case arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries."

The court, speaking by Chief Justice Taney, said it was not such a case; that the dispute did not arise under act of congress, nor did the decision depend upon the construction of any law in relation to patents. "It arises," he continues, "out of the contract stated in the bill; and there is no act of congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles."

The ground for the removal alleged in the petition to the chancellor was that "the suit arose under the patent laws of the United States, and that the substantial controversy was one depending upon the construction of said laws."

This view was, doubtless, taken because the pleadings and the

evidence tend to reveal that the dispute between the parties arose about the manufacture and sale of certain saddle-trees and gig-saddles—the complainant insisting that they embraced the inventions and improvements of the letters patent which he had assigned to the defendants, and they, in their turn, maintaining they were not subject to the royalties and precentages of the agreement, because they were constructed under other letters patent in which the complainant never had an interest. Questions of infringement and the construction of the claims of patents were thus necessarily involved, and it was assumed that they could only be adjudicated by the courts of the United States.

But the decisions of the courts do not justify any such assumption. Thus, in *Rich* v. *Atwater*, 16 Conn. 409, where a bill was filed for a discovery, account, and an injunction, and where the question of the validity of the Woodworth patent was raised by the pleadings, the supreme court of errors of Connecticut held that though the validity of a patent, when directly involved, was within the exclusive jurisdiction of the federal courts, yet when it came in question collaterally it was the proper subject of inquiry and adjudication in the state courts.

In *Middlebrook* v. *Broadbent*, 47 N. Y. 443, the court of appeals of New York, after a very full argument, decided that a state court had jurisdiction of an action founded upon a contract, although the validity of patent was involved therein.

And in *Merserole* v. *Paper Collar Co., supra*, Judge Blatchford held that a state court had jurisdiction to decree a license under a patent to be void; and if, in the investigation, that court was obliged to inquire collaterally into the novelty and validity of the patent as a consideration for the license, such inquiry would not deprive the state court of jurisdiction, or confer it on a court of the United States.

Being, then, clearly of the opinion that the removal here was without the authority of law, I remand the cause to the state court, without any expression of judgment on the question whether the complainant has mistaken his remedy by proceeding in equity rather than at law. If that question is presented to the learned chancellor of the state, I have no doubt he will give it a patient hearing and a wise determination.

The case is remanded, with costs.

See *Johnson* v. *Johnson*, 13 FED. REP. 193; *Evans* v. *Faxon*, 10 FED. REP. 312; *Beede* v. *Cheeney*, 5 FED. REP. 388; *Dennistown* v. *Draper*, 5 Blatchf. 566; *Stevens* v. *Richardson*, 13 Reporter, 678; *Railroad Co.* v. *Mississippi*, 102 U. S. 135; *Ryan* v. *Young*, 20 Alb. Law J. 79.

WALSER and others *v.* SELIGMAN and others.

(*Circuit Court, S. D. New York.* September 7, 1882.)

1. EQUITY—SUIT ON BEHALF OF CREDITORS AND STOCKHOLDERS.
   Creditors and stockholders of an insolvent non-resident corporation may unite in a suit in behalf of themselves and other creditors and stockholders, to enforce the liability of holders of unpaid shares of the capital stock of such corporation without making the non-resident corporation a party.
2. SAME—AUXILIARY JURISDICTION.
   Where stockholders are indebted to the corporation on stock subscriptions, the sum due may be reached by a creditor's bill; and where, by any dealings between the corporation and its stockholders the capital stock which is a fund for the payment of its debts is wrongfully diverted, a creditor can reach it. The court of equity assists him, not in the exercise of its jurisdiction over trusts, but in the exercise of its auxiliary jurisdiction in behalf of creditors.
3. SAME—CREDITOR'S BILL.
   It is only when the remedy at law has been exhausted that a creditor acquires the right to follow the property of a debtor in the hands of his trustee, and a relaxation of the strict rule requiring a creditor to exhaust his legal remedy before resorting to a creditor's bill will not be justified by the fact of the insolvency of the debtor, or that the debtor has no leviable property.
4. SAME—CREDITORS AT LARGE.
   Where some of the creditors only had recovered judgments in the state courts where such non-resident corporation existed, and had issued execution thereon which were returned unsatisfied, the suit will be treated as a creditor's bill, and the complainants as creditors at large.
5. FORCE AND OPERATION OF FOREIGN JUDGMENTS.
   Judgments obtained in another state are in this state only contract debts, and do not authorize the exercise of auxiliary jurisdiction. They do not have the force and operation of domestic judgments, except for purposes of evidence.

Geo. B. Newell, for complainants.

Evarts, Southmayd & Choate, for respondents.

WALLACE, C. J. This bill must be dismissed, because the complainants have not exhausted their remedy by legal process, a point which was not presented or considered when this cause was before my predecessor in this court upon demurrer. The complainants are creditors and stockholders of the Memphis, Carthage & Northwestern Railroad Company, a corporation organized under the laws of the states of Missouri and Kansas, and file this bill in behalf of themselves and all other creditors and stockholders who may desire to join, to enforce a liability of the defendants as holders of 60,000 shares of unpaid capital stock of the corporation. The corporation is not made a party to the suit, but its presence can be dispensed with and adequate relief granted in its absence, as it has not such

an interest in the subject of the suit that a decree without prejudice to its rights cannot be made. Sufficient reasons for not making it a party are found in the fact that it is beyond the jurisdiction of this court, and also in the fact that it is practically defunct. And it is only because the corporation is practically defunct and insolvent that any doubt arises upon the turning point in the case.

Although the stockholders may have been properly joined with the creditors, complainants as proper parties to the suit, the suit is nevertheless a creditor's suit to reach assets of the corporation. Where stockholders are indebted to the corporation for stock subscribed for and not paid in, the sum due may be reached by a creditor's bill, as debts due an ordinary debtor may be reached. Where, by any dealings between the corporation and its stockholders, the capital stock, which is a fund for the payment of its debts, is wrongfully diverted, a creditor can reach it upon the same theory that he can pursue the property of an ordinary debtor transferred in fraud of creditors. A court of equity assists him, not in the exercise of its jurisdiction over trusts, but in the exercise of its auxiliary jurisdiction in behalf of creditors. Such assets as are pursued here are commonly spoken of in the books as a trust fund for the creditors of the corporation, and they are such in the sense that a court of equity will lay hold of them and impress them with a trust in favor of creditors. So the property of copartnership is, in equity, a trust fund for the payment of the creditors, but it has never been supposed that the creditors could resort to equity to reach the property when there has been a wrongful disposition of the assets, until the remedy at law has been exhausted. *Egberts* v. *Wood*, 3 Paige, 517; *Dunlevy* v. *Tallmadge*, 32 N. Y. 457. It is only when the remedy at law has been exhausted that a creditor acquires a right to follow the property of a debtor in the hands of his trustee. *McDermutt* v. *Strong*, 4 Johns. Ch. 687; *Spader* v. *Davis*, 5 Johns. Ch. 280; *Jones* v. *Green*, 1 Wall. 330.

In all the adjudicated cases which have met my observation, except two,—and the books abound with precedents,—suits like the present have been founded upon judgments at law and unsatisfied executions. In *Wood* v. *Dummer*, 3 Mason, 308, the action wás sustained in favor of creditors at large, but the point was not considered; and in that case the corporation debtor had ceased to exist by the expiration of its charter. In *Bank of St. Marys* v. *St. John*, 25 Ala. 566, jurisdiction was asserted upon the ground of trust; but the peculiar facts were such that it was not necessary to place the decision on this ground.

There are numerous cases where creditors have been permitted to resort to equity in the first instance to enforce a statutory liability of stockholders, but these were cases where the statute authorized a direct action, and the question has generally been whether a court of law or of equity was the proper forum. These cases, of course, have no application here.

Treating the suit as a creditor's bill, the complainants in this case are merely creditors at large. True, some of them have recovered judgments and issued executions which have been returned unsatisfied against the corporation in the state courts of Missouri; but such judgments here are only contract debts, and do not authorize the exercise of auxiliary jurisdiction. *Claflin* v. *McDermott*, 12 FED. REP. 375; *Tarbell* v. *Griggs*, 3 Paige, 207. They do not have the force and operation here of domestic judgments, except for the purposes of evidence. *McElmoyle* v. *Cohen*, 13 Pet. 312.

The more doubtful question is whether the insolvency of the corporation, and the fact that it has surrendered all its property and franchises, and ceased to exercise its functions, does not dispense with the necessity of pursuing it at law. By the decisions of the courts of Missouri it is practically dissolved, (*Moore* v. *Whitcomb*, 48 Mo. 543; *State Savings Ins.* v. *Kellogg*, 52 Mo. 583; *Perry* v. *Turner*, 55 Mo. 418;) and certainly it can have no more vitality here than it has in the sovereignty that created it, and from which it cannot migrate.

On the other hand it cannot be doubted that a corporation is capable of being sued until it is formally dissolved, and it will not be seriously contended that the futility of the proceeding will justify a relaxation of the strict rule requiring the creditor to exhaust his legal remedy. It does not follow because a corporation is so far *in nubibus* that it need not be made a party to an action that a creditor will be excused from pursuing it at law before resorting to a creditor's bill. If a creditor's bill can be maintained in this jurisdiction whenever it appears that the debtor has no leviable property, and like this corporation, is moribund, it can be also when the debtor is shown to be beyond the reach of the process of the court. It would doubtless be convenient for creditors in many instances if they were permitted to maintain a creditor's bill upon such a theory, but in the absence of legislation, or any satisfactory precedent, the right to do so cannot be recognized.

The bill is accordingly dismissed.

STRONG and others *v.* WIGGINS, Ex'r, etc.

(*Circuit Court, W. D. Pennsylvania.* July Term, 1873.)

EQUITY—JURISDICTION—TITLE TO PROPERTY.

Complainants, as heirs of Clarissa Howd, deceased, filed an amended bill, alleging that said Clarissa and her deceased husband, before their marriage, agreed that each "should have nothing to do with the other's property; that his should go to his children, and hers to her heirs and relatives;" that upon the death of said Clarissa her husband had asserted his exclusive ownership to all of her property, and devised the same to his two children, against whom and the executor this bill is filed. *Held*, upon a consideration of the facts, that there was nothing in this case to give an equity court jurisdiction; that the only effect of such an agreement would be to estop the devisees and executor of the deceased husband from asserting title to the property; that the parties must proceed at law; and, the real estate having been converted into personal, the administrator of said Clarissa was the proper party to sue at law, and that the legal representatives of said Clarissa could only acquire title through administration on her estate.

In Equity.

MCKENNAN, C. J. This bill is filed by the complainants, as relatives by consanguinity of Clarissa Howd, deceased, against the executor of the will of her deceased husband and others, and prays for a decree that they deliver up or pay the value to the complainants of all the property which the said husband of Mrs. Howd derived from her estate. It alleges that Clarissa Howd was childless; that she was the recipient of a large quantity of real and personal property under the will of her first husband, Frederic Miles, which was intended, ultimately, for her blood relations; that her second husband fraudulently induced her to sell and convert into personalty a large portion of her real estate; that he had fraudulently prevented her from making a will disposing of her property among her blood relatives; that she died intestate and without issue, and that the complainants are her collateral relatives; and that, upon her death, her husband asserted his exclusive ownership of all her estate, and made his will devising and bequeathing the same to his two children. These are the main averments of the bill, as it was originally framed.

The proofs fall far short of sustaining the hypothesis of actual fraud propounded in the bill. Indeed, they show that on the only occasion when the making of a will by Mrs. Howd was discussed, she was induced to forego such purpose by the advice of one of the complainants, John C. Strong, Esq.; certainly not by any improper interference on the part of her husband. So, also, as to the sale of

Mrs. Howd's real estate; the proofs altogether fail to sustain the allegations of the bill touching the motives and agency of her husband in it.

There is evidence, however, of statements and declarations by Mr. and Mrs. Howd that, before their marriage, it was understood and agreed between them that each "should have nothing to do with the other's property; that his should go to his children, and hers to her heirs and relatives." And the bill has been so amended as to make this alleged agreement the basis of the relief prayed for.

Assuming that the ownership of the property of Clarissa Howd at her death was vested by the alleged antenuptial contract in the complainants, it is a contest between parties, each of whom claims title to the property, and the determination of this belongs properly to a court of law, in an appropriate action, and not to a court of equity; or, if the property is wrongfully in the possession of the respondents, without any claim of ownership, a court of equity is not the proper tribunal in which to recover it. Standing upon the same footing as if they had acquired the property in any other mode, a court of law is the forum in which alone they may enforce their ownership. If they claim in the character of heirs at law of Clarissa Howd, as they do, there is no such fiduciary relation between them and the respondents as would give a court of equity jurisdiction to make the decree prayed for. The only effect of the antenuptial contract would be to estop Sylvester Howd and his representatives from asserting his right as husband to the property of his deceased wife. But it could not render available to them a jurisdiction or a remedy to which they could not otherwise resort. The law devolves upon the personal representative of Clarissa Howd the title to all her personal property, and it is only through him that it can be asserted. There is, then, neither legal ownership, nor the privity incidental to the relation of trustee and *cestui que trust*, which would supply a basis of accountability by the respondents to the complainants. To whatever accountability the respondents are subject, it is to the legal representative of Clarissa Howd. Whatever right the complainants may have is as distributees of her estate, when it is collected and ascertained by the process of legal administration.

The bill is therefore dismissed at the costs of the complainants, but without prejudice.

ACHESON, D. J. **I concur fully in the foregoing opinion of the circuit judge.**

CRELLIN and others *v.* ELY and another.

(Circuit Court, D. California. August 21, 1882.)

1. EQUITY—RESTRAINING PROCEEDINGS AT LAW—TITLE.

   In 1856, J., H. & C., as tenants in common, owned certain real estate in Oakland, California. J., in that year, contracted to sell to one Henry A. Cobb his interest in one undivided third thereof, and executed a deed supposed to contain the whole thereof, but by mistake the land in controversy was omitted in the deed. Cobb went into possession and so continued until he sold to J. F. Cobb, in 1857, when a partition of the land was had, and in such partition the land in controversy was allotted to J. F. Cobb; and Crellin and others, deriving title through him, have been in possession ever since, and have erected valuable improvements on the land. J. executed in New York a conveyance in general terms of all of his property to Ely and others, who thereupon brought an action against Crellin and others to recover the land, with damages for its wrongful detention, and the rents and profits thereof; whereupon complainants filed a bill in equity to stay the proceedings at law. *Held,* that complainants were entitled to the aid of a court of equity to restrain the proceedings at law until they could perfect their title to the property, upon filing proper bond.

2. SAME—PRACTICE—SUBSTITUTED SERVICE—NON-RESIDENT DEFENDANTS.

   Where attorneys have instituted a suit at law for non-residents of the state where the suit is instituted, and a temporary injunction against such proceeding at law is allowed, a subpœna may be served upon such attorneys, and their clients will be bound thereby, although the attorneys have not been retained, except as to the proceeding at law.

Before FIELD, Justice, and SAWYER, C. J.

This is a suit in equity for relief against an action at law, commenced by the defendants against the complainants, for the possession of certain lands in the city of Oakland, in this state. Upon an affidavit of one of the complainants that their defense to the action at law arises out of matters which are purely of equitable cognizance; that the plaintiffs therein are non-residents of the state, and absent from it; and that a subpœna issued in this suit could not be served upon them by reason of such absence,—an order was issued and served upon the attorneys in the action at law to show cause why the subpœna should not be served upon them in place of the plaintiffs. Upon its return, the attorneys reply, in substance, that they have only been retained to prosecute the action at law for the recovery of the lands, and do not consider themselves authorized to appear for their clients in any other proceedings.

The complaint in the action at law is in the usual form in such cases, alleging seizin of the premises and right of possession by the plaintiffs on a day designated, and the wrongful entry of the defendants thereon, and their withholding of the same. It places the dam-

ages for such withholding at $100,000. It also asks judgment for the rents and profits of the land during the occupation of the defendants, alleging them to amount to $400,000. One of the plaintiffs is a citizen of New York; the other is a citizen of Michigan. Both of them, as stated above, are non-residents of this state, and absent from it. The defendants are either citizens of California or corporations created under its laws. They have appeared to the action and answered the complaint, denying the allegations of seizin and right of possession by the plaintiffs, and pleading, in bar of the action, the statute of limitations, and also title and seizin in themselves. But they assert that they cannot make their defense as to the seizin of the premises in themselves available, unless they obtain the relief prayed in their suit in equity; and that the statute of limitations will not bar a recovery, as the plaintiffs claim, under a patent issued within five years, upon a confirmation of a Mexican grant, which patent is deemed to create a new title as against parties not claiming under the same grant.

The complaint in this suit alleges in substance that in 1856 the premises for which the action at law is brought, with several other tracts of land, were owned by three parties, Edward Jones, John C. Hays, and John Caperton, being held by them as tenants in common; that during that year Jones contracted to sell his undivided interest for a valuable consideration to one Henry A. Cobb; that in pursuance of such contract of sale a conveyance, supposed at the time to embrace the premises in controversy, which constitute a block of land in the city of Oakland, was made to him, but by a mistake in the drafting of the deed the block, which in the contract of sale was designated by number 159, was omitted; that under the deed executed in the belief that it conformed to the contract and embraced the block, the purchaser, Henry A. Cobb, went into possession, and continued in possession with his co-tenants, Hays and Caperton, until some time in 1857, when he sold and conveyed his interest to one John Francis Cobb; that the latter went into possession under the conveyance, and afterwards made partition with his co-tenants, and in such partition the premises in controversy were allotted to him, and that he, or parties deriving title through him, including the complainants, have been in the possession thereof ever since, and have made lasting and valuable improvements thereon, claiming all the time to own the premises; that in the year 1859 the said Jones executed in the state of New York a conveyance, in general terms, of all his property to the plaintiffs in the action at law, and they claim

the premises in controversy, or some part of them, under this deed. The complainants pray that an injunction may be issued to restrain the prosecution of the action at law, and for general relief.

Cope & Boyd and *W. W. Crane*, for complainants.

Flournoy & Mhoon, for defendants.

FIELD, Justice. The case presented by the bill in equity is sufficient to justify the court in directing a stay of proceedings in the action at law until the plaintiffs therein appear to the suit, and until it is heard and determined. It is brought in aid of the defense to that action, and if the complainants are entitled to a correction of the deed executed to their grantor in 1856, or to a conveyance from the defendants, as purchasers with notice of their equity, it would be inequitable to preclude them from showing the fact and obtaining the relief prayed. In the state courts the complainants here could, as defendants in the action at law, set up in their answer their equitable defense, and obtain a decree upon it before the trial of the issue at law. *Arguello* v. *Edinger*, 10 Cal. 159; *Weber* v. *Marshall*, 19 Cal. 447. The plaintiffs in that action are allowed, by reason of their citizenship in another state, to institute their action in the circuit court of the United States, but they ought not to be permitted for that reason to deprive the defendants therein, the complainants here, of any just defense to which they are entitled under the laws of the state, although, by reason of the separate systems of law and equity in the federal courts, they are obliged to seek their relief through the more cumbersome and laborious proceeding of an independent suit.

The complainants will be allowed to serve a subpœna upon the attorneys of the plaintiffs in the action at law, and an order will be entered granting an injunction staying proceedings in that action until the hearing and determination of this suit, or the further order of the court, upon the complainants filing a bond, in the usual form in such cases, for damages, if it should be ultimately determined that they are not entitled to the relief prayed, or the suit should be dismissed—the bond to be approved in form and amount by the circuit judge.

Although the attorneys of the plaintiffs in the action at law are not specially authorized, as stated by them, to appear for the plaintiffs in any other case, their original retainer is deemed to extend to such proceedings as immediately affect the right of their clients to recover the property in controversy. The power of a court of equity to authorize substituted service in suits instituted in aid of the defense to an action at law, where the plaintiffs in such action are non-

residents and absent from the state, is well established. Says Daniell, in his Treatise on Chancery Pleadings and Practice, which is a work of approved merit:

"The jurisdiction is most frequently exerted where actions at law are brought by persons resident abroad to enforce demands which, although they have, strictly speaking, a legal right to make, it is against the principles of equity to permit it. In such cases the court will interfere by injunction, served upon the attorney employed in this country to conduct the proceedings at law, to restrain the further prosecution of such proceedings until his employer has submitted himself to the jurisdiction. In order to accomplish this purpose, it is permitted to the plaintiff in equity, in the first instance, to obtain an order directing that service of the subpœna upon the attorney employed in the cause at law shall be deemed good service." 2d Am. Ed. 518. See, also, *Burke* v. *Dickers*, 3 Bell, C. C. 23; *Stephen* v. *Cini*, 4 Ves. Jr. 359; and *Kenworthy* v. *Accunor*, 3 Mad. 550.

The same doctrine is recognized in the courts of the United States. *Hitner* v. *Suckley*, 2 Wash. C. C. 465; *Read* v. *Consequa*, Id. 174.

Order for an injunction on the bill in equity, and for the service of a subpœna on the attorneys in the action at law, granted.

DUMONT and others v. FRY, Trustee, and others.

(*Circuit Court, S. D. New York.* September 7, 1882.)

1. PRIORITY OF LIEN.

   The legal title to certain bonds being in C. & Son, bankers of New Orleans, with nothing to indicate the equitable interest of complainants therein, C. & Son, deposited said bonds with S. & Sons, bankers of New York, their correspondents and financial agents in that city, and afterwards C., who was also president of the New Orleans Banking Association, hypothecated a portion of said bonds to S. & Sons in behalf of the banking association to protect S. & Sons against any overdrafts to the extent of $100,000, that might from time to time arise in their dealings with said association. Subsequently C. & Son, the New Orleans National Banking Association, and S. & Sons, failed, and made assignments to trustees in bankruptcy. *Held*, that the trustee in bankruptcy of S. & Sons had a lien on said bonds to the extent of $100,000 for the unpaid balance due them from the New Orleans Banking Association, and also a bankers' lien on those not so pledged for the amount of the balance of account due them from C. & Son, and that such liens were first to be satisfied out of the interest of C. & Son in the bonds as between that firm and the complainants.

2. EQUITABLE INTEREST—ATTACHMENT.

   Complainants being the equitable owners of a moiety of the bonds in suit, subject, however, to the lien of C. & Son, for any balance existing in their favor in the account relating to the joint purchase of the bonds with the com-

plainants, the trustee could acquire a valid lien by virtue of an attachment upon the interest of complainants for the sum which may ultimately be recovered in his suit against complainants.

3. PRACTICE—ACCOUNTING BY TRUSTEE.

In such a case the trustee must account for the amount of all coupons collected.

4. SAME—REFERENCE TO MASTER—RECEIVER—COSTS.

Where the extent of respective interests of the parties can be arrived at without a reference to the master, such reference may be dispensed with upon counsel filing a stipulation to that effect. Under the circumstances the decree will provide for appointment of a receiver to sell the bonds, and to distribute the proceeds to the parties according to their respective rights. Costs will be allowed to the trustee.

Edgar A. Hutchins, for complainants.

Man & Parsons, and *Platt, Gerard & Bowers*, for defendants.

WALLACE, C. J. Upon the proofs the complainants are the equitable owners of a moiety of the $275,000 of the negotiable bonds in suit, subject, however, to the lien of Cavaroc & Son for any balance existing in their favor in the account relating to the joint purchase of the bonds with the complainants. As the legal title to the bonds was in Cavaroc & Son, with nothing to indicate the equitable rights of the complainants, the bonds are subject also to the liens acquired upon them by Schuchardt & Sons, through their dealings with Cavaroc & Son. The present controversy mainly involves the question as to the character and extent of these liens. During the period covered by the transactions in controversy, Schuchardt & Sons were bankers at the city of New York, and were the correspondents and financial agents there of Cavaroc & Son, bankers of New Orleans, and also of the New Orleans National Banking Association of the same city. At the same time the senior member of Cavaroc & Son was the president of the said banking association. The bonds in suit were intrusted by Cavaroc & Son to Schuchardt & Sons, in September, 1870, for the convenience of the former, and in order to facilitate the financial transactions between the parties. On various occasions Schuchardt & Sons obtained loans for Cavaroc & Son, and for the banking association, upon the security of the bonds. On one occasion Schuchardt & Sons loaned Cavaroc & Son $100,000, on the security of the bonds. While there is some evidence that the bonds were kept with Schuchardt & Sons merely as convenient depositories for Caravoc & Son, the fact that they were so frequently hypothecated by the former for the financial transactions of the latter, with their concurrence, indicates quite satisfactorily that they were placed and kept by Cavaroc & Son with Schuchardt & Sons as avail-

able securities for the financial exigencies arising from time to time between the parties. The bonds having thus been intrusted to Schuchardt & Sons, in the absence of any special understanding to the contrary, they acquired a banker's lien upon them, except as to those expressly hypothecated for the benefit of the banking association, and as to which the more difficult question arises.

The New Orleans Banking Association dealt largely in foreign bills of exchange, which it negotiated through Schuchardt & Sons. By the course of business, the amount of the foreign bills remitted from time to time by the banking association to Schchuardt & Sons was credited by the latter to the former, and the latter drew upon the former from time to time as funds were required by it. If, as sometimes happened, the bills which had been remitted and credited were not paid by the parties primarily liable upon them; they were charged back by Schuchardt & Sons to the banking association, monthly statements of account being rendered between the two banking concerns. It is in evidence that by the custom of business at New Orleans advances are made by bankers to shippers in anticipation of the actual delivery of the bills and accompanying documents, and the banking association was consequently necessitated to advance funds for that purpose before it could remit the bills and be credited by Schuchardt & Sons with their amount. In order to assist the banking association in this behalf, and undoubtedly for the mutual profit of both concerns, at times the banking association had been permitted by Schuchardt & Sons to draw in advance of remittances. December 4, 1871, such an overdraft was authorized to the extent of $100,000, upon the condition that the drafts should represent exchange actually bought and paid for. The transactions between the banking concerns were large, being sometimes over a million of dollars daily.

These being the relations and course of business between the two concerns, a hypothecation of the bonds to Schuchardt & Sons was made by one of the Cavarocs for the benefit of the New Orleans Banking Association in February, 1873, and the important question in this controversy is concerning the true construction and meaning of that hypothecation. The hypothecation arises from the following correspondence, conducted in the French language. February 6th, 1873, the cashier of the banking association wrote to Schuchardt & Sons:

"Are we still authorized to draw *a decouvert* $100,000 against purchases of exchange advised by wire."

February 11, 1873, Schuchardt & Sons replied:

"The credit of $100,000 *a decouvert* was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we supposed the agreement canceled."

February 15, 1873, the cashier of the banking association answered:

"Your letter of December 4, 1871, authorized us to draw in advance of remittance to the extent of $100,000, represented by purchases of exchange advised by telegraph. There was no mention of a deposit of city bonds to guaranty such overdraft, and we have been acting ever since under the impression that the credit was still in force. We now note that it is canceled, and beg leave to refer you to the private letter of our president upon the subject."

On the same day C. Cavaroc, the president of the banking association, wrote Schuchardt & Sons, referring to their letter of the 11th instant:

"I authorize you to consider a portion of the bonds belonging to my firm, which you have in your possession, as collateral security *en cas de decouvert.*"

February 27, 1873, Schuchardt & Sons wrote to the cashier of the banking association:

"In reply to your president's letter of the 15th instant, we take pleasure in authorizing you, in accordance with the terms therein stated, to draw on us *a decouvert* for a sum not exceeding as maximum $100,000, against exchange purchases."

The New Orleans Banking Association failed on the fourth day of October, 1873, as did also Cavaroc & Son. At the time of the failure Schuchardt & Sons had $232,000 of the bonds in controversy in their possession, and there was due from the banking association to them $4,121.92 in excess of remittances; and there subsequently resulted, by reason of the non-payment of drafts and bills, which had been remitted by the banking association and credited to it, but charged back to its account because uncollectible, the sum of $195,-315.63. Upon the account between Schuchardt & Sons and Cavaroc & Son a debit balance arose against Cavaroc & Son of $7,454.22. Subsequently Schuchardt & Sons failed.

It is now insisted by the defendant Fry, who is the trustee in bankruptcy of Schuchardt & Sons, that the bonds thus held by them are subject, not only to a bankers' lien, for their benefit, for the indebtedness of Cavaroc & Son, but also, to the extent of $100,000, were hypothecated, under the terms of the correspondence referred to, to secure Schuchardt & Sons for the payment of all advances made by

them to the New Orleans National Banking Association. On the other hand, it is insisted by the complainants, and by the assignees in bankruptcy of Cavaroc & Son, that the hypothecation simply contemplated securing Schuchardt & Sons to the extent of $100,000 in advance of transmission to them of exchange; and, to the extent that bills of exchange were transmitted, the terms of the hypothecation were satisfied, although the exchange proved uncollectible.

Some obscurity exists as to the just interpretation of the agreement, because the correspondence is in a foreign language, and the meaning of the term "*a decouvert*" is not entirely clear. On the one hand it is claimed to mean "unsecured," and on the other to mean "uncovered." But, reading the correspondence in the light of surrounding circumstances, it is not difficult to conclude that the hypothecation should be construed as intended to protect Schuchardt & Sons for any overdraft that might arise in the course of the transactions between the two banking concerns to the extent of $100,000. The bonds were evidently to be a continuing security until some new arrangement should be made. That they were to be security for an overdraft, in the ordinary meaning of that term as used between bankers, may be gathered from the correspondence. In his letter of February 15th the cashier of the banking association indicates such to be his understanding, and speaks of overdraft and drafts in advance of remittance as convertible terms. The correspondence also indicates clearly that the terms "*a decouvert*" and "overdraft" are synonymous. When the cashier asked permission to draw "*a decouvert*," and is answered by Schuchardt & Sons that the credit "*a decouvert*" was predicated upon the security of the bonds, the cashier replies that he had not understood the bonds were ever deposited to guaranty such "overdraft." Assuming that the language of the pledge is that the bonds were to be a security, to the extent of $100,000, for any uncovered balance due from the banking association to Schuchardt & Sons, that uncovered balance must be held to mean any existing overdraft which might from time to time arise. Whether at any time there was an overdraft, could only be ascertained from the accounts of the parties. As it had been their custom to debit the banking association with all remittances uncollected, the amount of such uncollected remittances became a part of the general debit balance. The amount of the overdraft from time to time could not be ascertained except by ascertaining the general debit balance against the banking association, which de-

pended, to a greater or less extent, upon the items charged back to it for uncollected exchange.

Cogent evidence of the understanding of the banking association, and of C. Cavaroc himself, that the bonds were pledged as security for an overdraft arising in part from uncollected remittances, is found in the resolution of the directors of the banking association, adopted September 20, 1873, Cavaroc himself being present, which is as follows:

"Resolved, that with a view of securing the president against any eventual loss for the 232 city of New Orleans bonds belonging to the firm of C. Cavaroc & Son, and actually pledged to S. Schuchardt & Sons as collateral security for the payment of all foreign exchange bills sent them for negotiation, and by them indorsed, that he be and is hereby authorized to select as guaranty from the portfolios of the bank such papers as he may think proper, to the extent of $100,000."

This statement is entirely inconsistent with the theory that the uncovered balance which the bonds were intended to secure was anything more or less than an ordinary overdraft. In short, it is evident from the relations of the parties, their course of business, the correspondence between them, and the construction placed upon the transaction by Cavaroc himself, that the bonds were pledged to secure Schuchardt & Sons for any overdrafts of the banking association, to the extent of $100,000, which might from time to time arise. Such overdrafts were the credit "*a decouvert*" contemplated by the parties, and constitute the unpaid balance of account due from the banking association to Schuchardt & Sons.

The conclusion is therefore reached that to the extent of $100,000 the defendant Fry, as trustee for Schuchardt & Sons, has a lien upon the bonds for the unpaid balance of the account of the New Orleans National Banking Association. In ascertaining this balance the sum on deposit with, or collected by, the Union Bank of London is to be deducted; and, as the receiver of the Louisiana National Bank has not answered, it is to be adjudged that he has no interest in the fund arising therefrom. The defendant Fry has also a lien upon the bonds to the amount of the balance of account due from Cavaroc & Son to Schuchardt & Sons. The bonds having been left by Cavaroc & Son with Schuchardt & Sons, without any special agreement, except the pledge of a portion of them for the New Orleans Banking Association, those not thus pledged are subject to the bankers' lien of Schuchardt & Sons. The liens of Fry are first to be satisfied out of the interest of Cavaroc & Sons, in the bonds as between

that firm and the complainants. Fry has also a lien by virtue of his attachment upon the interest of the complainants for the sum which may ultimately be recovered in the suit against the complainants. Of course, Fry must account for the amount of all coupons collected. It is understood from the statements of counsel that the rights of the parties being adjudged, the extent of their respective interests can be arrived at without a reference to a master. Upon filing a stipulation a reference will, therefore, be dispensed with; otherwise, a reference will be directed. Unless the parties otherwise stipulate, the decree will provide for the appointment of a receiver to sell the bonds and distribute the proceeds to the parties according to their respective rights. The defendant Fry is entitled to costs.

SECOND NAT. BANK OF TITUSVILLE, PENNSYLVANIA, v. CALDWELL and others.

(*District Court, W. D. Pennsylvania.* October Term, 1882.)

1. CONSTITUTIONAL LAW—TITLE OF ACT.
   Under the settled construction of section 3, art. 3 of the constitution of Pennsylvania, where an act of assembly is entitled, a supplement to a former named act, and the subject thereof is germane to that of the original act, its subject is sufficiently expressed.
2. SAME—REVISION AND AMENDMENT OF STATUTE.
   The constitutional provision: "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length," is sufficiently complied with if a supplement and amendatory act is set forth and published at length in its amended form.
3. TAXATION—NATIONAL BANKS—REAL ESTATE TAXABLE.
   Under the Pennsylvania act of June 10, 1881, entitled "a supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June, 1879," the real estate of a national bank is subject to taxation distinct from its other capital.
4. SAME—LICENSE TAX ON BANK.
   A license tax imposed by city ordinance upon a national bank being a tax upon the operations of the bank, and a direct obstruction to the exercise of its corporate powers is unconstitutional; but the ordinance not undertaking to make the tax a lien, and giving an action of debt only for its collection, the bank is not entitled to equitable relief by injunction.

In Equity.

Frank B. Guthrie, for plaintiff.

Samuel Grumbine and *J. W. Smith*, for defendants.

Acheson, D. J. The plaintiff's claim to exemption from local taxation on its real estate rests upon the assumption that section 17 of the act of assembly of June 7, 1879, (P. L. 112,) entitled "An act to provide revenue by taxation," is still in full force. That section enacts that "in case any bank or savings institution incorporated by this state, or any national bank, elect to collect annually from the shareholders thereof a tax of six-tenths of 1 per centum upon the par value of all the shares of said bank or savings institution, and pay the same into the state treasury on or before the twentieth day of June in every year, the shares, capital, and profits of such bank shall be exempt from all other taxation under the laws of this commonwealth." And if the plaintiff's hypothesis that this law is in operation were correct, there would be good ground for its complaint that its real estate has been illegally assessed with local taxes; for it was held in *County of Lackawanna* v. *First Nat. Bank of Scranton*, 94 Pa. St. 221, that the banking house of a bank is part of the capital represented by its shares of stock, and a tax upon the par value of the shares, is a tax upon it.

But after that decision was made, the legislature on June 12, 1881, passed an act entitled "A supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June, one thousand eight hundred and seventy-nine," the third section of which is in these words: "In case any bank or savings institution, incorporated by this state, or the United States, shall elect to collect annually from shareholders thereof a tax of six-tenths of 1 per centum upon the par value of all the shares of said bank or savings institution, and pay the same into the state treasury on or before the first day of March in each year, the shares, and so much of the capital and profits of such bank as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this commonwealth." The purpose of this section is not doubtful. Obviously the intention is to restrict the exemption from taxation conferred by the act of June 7, 1879, and to subject the real estate of banks to distinct taxation. Moreover, section 6 of the act of June 10, 1881, expressly repeals the seventeenth section of the act of June 7, 1879.

It is, however, contended on behalf of the plaintiff that the third section of the act of June 10, 1881, is inoperative and void, and for this several reasons are assigned:

1. The title to the act, it is said, is in conflict with section 3 of article 3, of the constitution of Pennsylvania: "No bill, except general appropriation bills, shall be passed containing more than one

subject, which shall be clearly expressed in its title." But it is the settled construction of this section that where an act of assembly is entitled a supplement to a former act, and the subject thereof is germane to the subject of the original act, its subject is sufficiently expressed to meet the constitutional requirement. *State Line & Juniata R. Co.'s Appeal*, 77 Pa. St. 429; *Craig* v. *First Pres. Church*, 88 Pa. St. 42. In the present case the supplement, from first to last, relates to revenue by taxation, and there is no provision in it incongruous with the original act.

2. It is insisted that the third section of the act of June 10, 1881, is in conflict with section 6 of article 3, of the constitution of Pennsylvania: "No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length." It cannot, of course, be pretended that there is here any violation of the first part of this section, for there was no attempt to revive or amend the original act, or to extend or confer its provisions, by reference to the title only. The objection, as stated in the bill of complaint, is this: "that said third section materially amends the provisions of section 17 of the act of June 7, 1879, (to which it is a supplement,) and fails to re-enact and publish at length so much of said act of June 7, 1879, as is thereby amended." But does the constitutional provision in question require that a supplemental and amendatory act must republish the original act or so much thereof as is amended? This I understand is what is insisted on. It seems to me, however, that such is not the natural or true construction of the clause. It is to be read as a whole, and thus considered its purpose is plain. It was intended to prevent covert legislation and the passage of laws whose meaning and object are not fully disclosed. If there is no attempt to legislate by reference to the title of the old law, it is, I think, sufficient if the proposed law in its amended form is "re-enacted and published at length." Treating of a similar constitutional provision, Mr. Cooley, in his work on Constitutional Limitations, page 185, well says that the requirement "is fully complied with in letter and spirit, if the act or section revised or amended is set forth and published as revised or amended, and that anything more only tends to render the statute unnecessarily cumbrous."

3. Again, it is contended that the third section of the act of June 10, 1881, in so far as it would subject the real estate of national banks to taxation for local purposes, is inoperative and void for repug-

nancy. The argument runs thus: Under the act of congress, (Rev. St. § 5219,) only the shares and real estate of national banks are taxable under state laws, and the shares are not taxable at any higher rate than other moneyed capital of individuals. In Pennsylvania the moneyed capital of individuals is exempt from all local taxation, and was so exempt prior to the passage of the acts of June 7, 1879, and June 10, 1881. At the time of the passage of the latter act the only property of national banks taxable for local purposes was their real estate, and therefore the restricting words in the third section of the act of June 10, 1881, excepted from the operation of the act the only property of national banks to which the exemption could extend, and they thus constitute a saving clause repugnant to the purview of the act, and void. But the argument is not satisfactory, and, even if the premises were conceded, the conclusion sought to be deduced could not be accepted; for it was held in *Hepburn* v. *The School Directors*, 23 Wall. 480, that shares in national banks, in Pennsylvania, may be valued for taxation at an amount *above* their par value. The act of June 10, 1881, therefore, does unquestionably leave something for its exemption clause to act on, and the argument based upon a supposed repugnancy plainly fails.

It will be perceived that neither the act of June 7, 1879, nor that of June 10, 1881, peremptorily imposes a tax of six-tenths of 1 per centum upon the par value of the shares of stock. Under each of these acts the payment of that tax is optional with the banks. The former act gave the banks the election to pay the specified tax in commutation for all other taxes under the laws of the commonwealth; the latter act gives the banks the like option in commutation for all taxes, except that on real estate. The only difference is in the extent of the exemption. It is not pretended that the method of taxation contemplated by this legislation is open to constitutional objections, or contravenes the provisions of the national bank act. Indeed, the plaintiff is satisfied with and seeks the benefit of the act of 1879. But why could not the legislature modify that act by the amendments incorporated in the act of June 10, 1881? Clearly it was competent for the legislature to do so.

I am of opinion that none of the objections which the plaintiff has raised against the validity of the local taxation of its real estate for the year 1882, are tenable.

At the hearing of this case the validity of the ordinance of the city of Titusville, in so far as it attempts to impose a tax license upon national banks doing business in that city, was not much discussed;

and at present I shall simply indicate what my impressions are on that subject. It seems to me the ordinance undertakes to tax the operations of national banks, and is a direct obstruction to the exercise of their corporate powers. I do not see that this license tax is distinguishable from the business tax involved in the case of the city of *Pittsburgh* v. *First Nat. Bank of Pittsburgh*, 55 Pa. St. 45, which the supreme court of Pennsylvania, following the authoritative cases of *McCulloch* v. *State*, 4 Wheat. 316, and *Osborn* v. *U. S. Bank*, 9 Wheat. 738, adjudged to be unconstitutional.

But it does not follow that because the tax is illegal, the plaintiff is entitled to an injunction to restrain the collection thereof; *Dows* v. *Chicago*, 11 Wall. 108; *Hannewinkle* v. *Georgetown*, 15 Wall. 547; *State Railroad Tax Case*, 92 U. S. 575; and I am of opinion that the bill does not bring the plaintiff's case within any of the recognized foundations of equitable jurisdiction. Id. The ordinance imposing the tax does not undertake to make it a lien, and it is not enforceable by any summary process. The ordinance gives an action of debt for its collection, and it is not otherwise collectible. To such action the bank can set up its defense, and therefore needs not equitable relief.

What has been said covers all the questions thus far raised, and it is only necessary to add that the motion for a preliminary injunction must be denied; and it is so ordered.

NOTE.

TAXATION ON NATIONAL BANK SHARES. A suit may be maintained by a national bank, on behalf of its stockholders, to enjoin state officers from the collection of a state tax on the shares of the bank, on the ground of an illegal assessment arising from the failure to deduct from the valuation the debts owed by the shareholders,(*a*) although payable in the first instance by such shareholder, if a multiplicity of suits can be thereby avoided, or injury to its business or credit is anticipated.(*b*) A bill to restrain the collection of a state tax on the shares of national banks must show a statute discriminating against them, or that they are rated higher in proportion to actual valuation than other moneyed corporations.(*c*) A shareholder who has made affidavit and demand for deduction of the debts owed by him from the valuation of his shares, as required by law, may bring suit to enjoin the collection of such tax.(*d*) And where it is shown that the affidavit and demand would

(*a*) Nat. Alb. Exch. Bank v. Hills, 5 Fed. Rep. 249; Hills v. Nat. Alb. Exch. Bank, 12 Fed. Rep. 93; Cummings v. Nat. Bank, 101 U. S. 153; Pelton v. Nat. Bank, Id. 143.

(*b*) City Nat. Bank v. Paducah, 5 Cent. Law J. 347. See Nat. Alb. Exch. Bank v. Hills, 5 Fed. Rep. 248; but see, also, S. C. reversed, 12 Fed. Rep. 93.

(*c*) German Nat. Bank v. Kimball, 103 U. S. 732; Hills v. Nat. Alb. Exch. Bank, 12 Fed. Rep. 93; and see Sup'rs of Albany v. Stanley, 12 Fed. Rep. 82, and note.

(*d*) Hills v. Nat. Alb. Exch. Bank, 12 Fed. Rep. 93.

have been unavailing, they may show, in an action by the bank brought on their behalf, the deductions to which they were entitled.(*e*) The taxation by a state of the capital stock of a national bank invested in United States securities will be restrained,(*f*) but injunction will not lie to restrain the collection of a tax illegally assessed by the municipal authorities upon the shares of a national bank in gross, instead of against the individual shareholders. though such municipal corporation be insolvent, as there are ample remedies at law.(*g*) Nor will it restrain the collection where the shares are taxable and no excessive valuation is complained of, although the officers arrived at a correct result by an erroneous method.(*h*)

RESTRAINING COLLECTION OF TAX. A court of equity will not restrain the collection of a tax on the mere allegation that it is illegal or void.(*i*) There must be some additional special circumstances,(*j*) under some recognized head of equity jurisdiction;(*k*) as that its enforcement would lead to a multiplicty of suits;(*l*) or produce irreparable injury;(*m*) or irremediable oppression;* or, where it is real estate, that it would create a lien, or cast a cloud on the title;(*n*) or for fraud.(*o*) Where there was no allegation of damage sustained, or that the sale of the land levied on would cloud the title, or work irreparable mischief, it was held that the court of equity had no jurisdiction to grant relief; that the remedy should be sought at law, where power to grant relief was full, adequate, and complete.(*p*)

ON GROUND OF MULTIPLICITY OF SUITS. The equity powers of the court cannot be invoked to prevent an apprehended injury save where its exercise is necessary to prevent a multiplicity of suits.(*q*) Where the rights of a large

(*e*) Hills v. Nat. Alb. Exch. Bank, 12 Fed. Rep. 93. See Sup'rs of Albany v. Stanley, 12 Fed. Rep. 82, and cases cited.

(*f*) First Nat. Bank v. Douglass Co. 3 Dill. 298.

(*g*) Nat. Com. Bank v. Mobile, 62 Ala. 284.

(*h*) St. L. Nat. Bank v. Papin, 23 Int. Rev. Rec. 343.

(*i*) Oliver v. Memphis, etc., R. Co. 30 Ark. 128; Armstrong v. Co. Ct. of Taylor Co. 15 W. Va. 190; Douglass v. Harrisville, 9 W. Va. 162; Woodward v. Ellsworth, 4 Col. 580; Clarke v. Ganz, 21 Minn. 387; Albany City Nat. Bank v. Maher, 6 Fed. Rep. 417; Greenup v. Franklin Co. 30 Ark. 101; State Railroad Tax Cases, 92 U. S. 643; Mann v. Board of Ed. 53 How. Pr. 289; Swinney v. Board, 71 Ill. 27; Leitch v. Wentworth, 71 Ill. 146; McConkey v. Smith, 73 Ill. 313; Village of Nunda v. Village of Chrystal Lake, 79 Ill. 311; Alexander v. Dennison, 2 McArth. 562; Wells v. Dayton, 11 Nev. 161; U. P. R. Co. v. Lincoln Co. 2 Dill. 297; Messick v. Sup'rs, 50 Barb. 190; Hanlon v. West Chester Co. 57 Barb. 383; Susquehanna Bank v. Broome Co. 25 N. Y. 312; Weaver v. State, 39 Ala. 535; Cook Co. v. Chicago, etc., R. Co. 35 Ill. 460; McDonald v. Murphree, 45 Miss. 705; Sayre v. Tompkins, 23 Mo. 443; First Nat. Bank v. Meredith, 44 Mo. 500; Barrow v. Davis, 46 Mo. 394; McPike v. Pew, 48 Mo. 525.

(*j*) Armstrong v. Co. Ct. of Taylor Co. 15 W. Va. 190; Douglass v. Harrisville, 9 W. Va. 162; Clarke v. Ganz, 21 Minn. 387; Parmley v. St. Lawrence, etc., R. Co. 3 Dill. 13; Barley v. Pacific, etc., R. Co. Id. 22; Murphy v. Mayor, 10 Reporter, 765; Dows v. Chicago, 11 Wall. 108.

(*k*) Armstrong v. Co. Ct. of Taylor Co. 15 W. Va. 190; Douglass v. Harrisville, 9 W. Va. 162; Clarke v. Ganz, 21 Minn. 387; Carrothers v. Board of Ed. 16 W. Va. 327; South Platte Land Co. v. Buffalo Co. 7 Neb. 253; Same v. Crete, 11 Neb. 344.

(*l*) Carrothers v. Board of Ed. 16 W. Va. 327; Armstrong v. Co. Ct. of Taylor Co. 15 W. Va. 190; Douglass v. Harrisville, 9 W. Va. 162; South Platte Land Co. v. Buffalo Co. 7 Neb. 253; Murphy v. Mayor, 10 Reporter, 765; Guest v. City of Brooklyn, 69 N. Y. 506; State Railroad Tax Cases, 92 U. S. 575.

(*m*) Douglass v. Harrisville, 9 W. Va. 102; Murphy v. Mayor, 10 Reporter, 765; Ivenson v. Hance, 1 Wyo. 270; South Platte Land Co. v. Buffalo Co. 7 Neb. 253; Guest v. City of Brooklyn, 69 N. Y. 506; Osborn v. Bank, 9 Wheat. 738.

(*) State Railroad Tax Cases, 92 U. S. 575.

(*n*) Douglass v. Harrisville, 9 W. Va. 162; Murphy v. Mayor, 10 Reporter, 765; Ivenson v. Hance, 1 Wyo. 270; South Platte Land Co. v. Buffalo Co. 7 Neb. 253; Guest v. City of Brooklyn, 69 N. Y. 506; State Railroad Tax Cases, 92 U. S. 575.

(*o*) Murphy v. Mayor, 10 Reporter, 765.

(*p*) Moody v. Jamison, 54 Tex. 492.

(*q*) Guest v. City of Brooklyn, 69 N. Y. 506; Greenup v. Franklin Co. 30 Ark. 101.

number of persons are involved, or a multitude of suits may be averted, and great individual loss and damage prevented, a court of equity may interfere to prevent the collection of a tax.(*r*) Where the case is brought under some head of equity jurisdiction, and brought in behalf of himself alone or of all other tax-payers similarly situated, if shown that the tax is illegal, to avoid a multiplicity of suits, equity will take jurisdiction by injunction,(*s*) as equity disfavors a multiplicity of suits.(*t*) Multiplicity does not mean multitude, and injunction will not be granted where the object is to obtain a consolidation of actions, or to save the expense of separate actions;(*u*) that assessment is divided into a number of installments, does not bring it within this exception.(*v*) Where an alleged illegality extends to the whole assessment, or where it affects in the same manner a number of persons, so that the question involved can be presented by one bill, filed by all or any number thus interested, such joint bill may properly be filed.(*w*) An action in equity may be maintained by any one upon whose real estate an apparent lien has been created on his own behalf, and in behalf of others in like situation, to have it canceled and to restrain its enforcement.(*x*) The rule applied to assessments for local improvements.(*y*) When brought by more than one complainant, a bill which states distinct grounds for relief, relied on by each separately, is multifarious.(*z*) When an invalid tax includes an assessment on personalty as well as on realty, a court which obtains jurisdiction to restrain the collection of the tax on the land may properly give relief to the person.(*a*)

IRREPARABLE INJURY. In no case will the collection of a tax be enjoined where it is not shown that the injury resulting from its enforcement would be irreparable;(*b*) but where irreparable injury would ensue the court will enjoin the sale;(*c*) and this fact must appear in the bill by issuable averments;(*d*) and it must clearly appear not such an indebtedness as the duty of a citizen requires him to discharge.(*e*) It must appear that his rights will be greatly or irreparably affected by the acts sought to be restrained, and the

(*r*) George v. Dean, 47 Tex. 73.

(*s*) Carrothers v. Board of Ed. 16 W. Va. 327; Deenan v. Board of Ed. 9 W. Va. 246; London v. City of Wilmington, 78 N. C. 109.

(*t*) Conkling v. Secor Sew. Mach. Co. 55 How. Pr. 269.

(*u*) Murphy v. Mayor, 10 Reporter, 765.

(*v*) Guest v. City of Brooklyn, 69 N. Y. 506.

(*w*) Brandorff v. Harrison Co. 50 Iowa, 164; Mandeville v. Riggs, 2 Pet. 482; Floyd v. Gilbreath, 27 Ark. 675; Webster v. Harwinton, 32 Conn. 131; Terret v. Sharon, 34 Conn. 105; King v. Wilson, 1 Dill. 555; Coulson v. Portland, Deady, 481; Bull v. Read, 13 Gratt. 78; Johnson v. Drummond, 20 Gratt. 419; Holmes v. Baker, 16 Gray, 259; Vanover v. The Justices, 27 Ga. 354; Lafayette v. Cox, 5 Ind. 38; Nill v. Jenkinson, 15 Ind. 425; Oliver v. Keighley, 23 Ind. 514; Harwood v. St. Clair, etc., Co. 51 Ill. 130; McMillan v. Lee Co. 8 Iowa, 311; Kerr v. Lansing, 17 Mich. 34: Scofield v. Lansing, Id. 437; Metz v. Detroit, 13 Mich. 495; Baltimore v. Porter, 18 Md. 284; Baltimore v. Sill, 31 Md. 375; Hooper v. Ely, 46 Mo. 505; Steiner v. Franklin Co. 48 Mo. 167; Barr v. Deniston, 19 N. H. 170; Manly v. Raleigh, 4 Jones, Eq. 370; Galloway v. Jenkins, 63 N. C. 147; Upington v. Oviatt, 24 Ohio St. 232; Mott v. Penn. R. Co. 30 Pa. St. 39; Page v. Allen, 58 Pa. St. 338; Stevens v. Rutland, etc., R. Co. 29 Vt. 545.

(*x*) Clark v. Village of Dunkirk, 12 Hun, 181; Meth. Epis. Church v. New York City, 27 Hun, 297; Temple Grove Seminary v. Cramer, 33 Hun, 383.

(*y*) Kennedy v. City of Troy, 14 Hun, 308; Clark v. Village of Dunkirk, 12 Hun, 181.

(*z*) Hudson v. Atchison Co. 12 Kan. 140; Kerr v. Lansing, 17 Mich. 34.

(*a*) Folkerts v. Power, 42 Mich. 203.

(*b*) Ritter v. Patch, 12 Cal. 298; South Platte Land Co. v. Buffalo Co. 7 Neb. 353.

(*c*) Oliver v. Memphis & L. R. R. Co. 30 Ark. 128.

(*d*) Ritter v. Patch, 12 Cal. 298; Frost v. Flick, 1 Dak. 131. See Sheldon v. School-dist. 25 Conn. 224; Dodd v. Hartford, Id. 232; and compare Sav. & Loan Ass'n v. Austin, 46 Cal. 415; Houghton v. Austin, 47 Cal. 646; Central Pac. R. Co. v. Corcoran, 48 Cal. 65.

(*e*) Frost v. Flick, 1 Dak. 131.

right must be clear, and the remedy at law inadequate.(*f*) This rule is applicable to an assessment for a local improvement as well as to a state and county tax.(*g*)

CLOUD ON TITLE. A court of equity will not restrain a sale for taxes where the only damage is to cast a cloud on the title;(*h*) nor will it interfere to remove a cloud on title till one exists;(*i*) as a man may protect his land from sale upon a tax warrant, or from a cloud on his title by a tax lien, by paying the tax and suing to recover it back. Such payment is not to be regarded as voluntary.(*j*) A bill to enjoin the collection of a tax, which by statute is made a lien on lands, sustained as a proper one to remove a cloud on title to lands.(*k*) But where the assessment is made a personal charge against the owner, and not a lien on the land, no other ground would authorize equitable interference than such as would exist in case of a tax on personalty.(*l*) Where a tax constitutes an apparent lien on lands, and might result in a sale and conveyance by deed, which would be *prima facie* evidence of title, a bill will lie to enjoin its collection where the tax is illegal;(*m*) and a sale by public officers under authority of law, but having no authority in fact, is such a cloud as would authorize the interposition of a court of equity.(*n*)

ON GROUND OF FRAUD. Equity has jurisdiction to enjoin the sale of personal property for taxes where the bill alleges and the proof shows that the taxes were fraudulent;(*o*) as where the property was fraudulently assessed at too high a rate;(*p*) or where there is a clear case of fraud in the valuation of the property.(*q*) In the latter case the proof must be clear and irresistible, and the injury likely to result must be considerable;(*r*) and where the bill fails wholly to show a fraudulent assessment, but only an excessive valuation and irregularities in making the assessment, injunction will not lie;(*s*) but proof of fraud is necessary only where the error or irregularity is one of those enumerated. Where not enumerated, and it is a substantial one, proceedings to vacate are maintainable without proof of fraud under the statute.(*t*) A statement in the bill that the assessment was outrageously exorbitant and was fraudulently made, without showing in what the overvaluation consists, and giving no facts or particulars, is not sufficient, as a mere allegation of fraud is not sufficient, and overvaluation of itself will not establish fraud.(*u*) If fraud is charged, equity may interfere; but courts have no right to interfere

(*f*) Normand v. Otoe Co. 8 Neb. 18; Dodd v. Hartford, 25 Conn. 232.

(*g*) Dean v. Davis, 51 Cal. 407.

(*h*) Red v. Johnson, 53 Tex. 284.

(*i*) Judd v. Town of Fox Lake, 28 Wis. 583; Milwaukee Iron Co. v. Hubbard, 29 Wis. 32.

(*j*) Seeley v. Westport, 47 Conn. 294.

(*k*) Thomas v. Gain, 35 Mich. 155.

(*l*) Brewer v. Springfield, 97 Mass. 152; Hunnewell v. Charlestown, 106 Mass. 350; Williams v. Detroit, 2 Mich. 560; Henry v. Gregory, 29 Mich. 68.

(*m*) Marquette R. Co. v. Marquette, 35 Mich. 504.

(*n*) Ottowa v. Walker, 21 Ill. 305; Chicago, B. & Q. R. Co. v. Frary, 22 Ill. 34; Barnard v. Hoyt, 63 Ill. 341; Litchfield v. Polk Co. 18 Iowa, 70; Holland v. Baltimore, 11 Md. 186: Leslie v. St. Louis, 47 Mo. 474; Burnett v. Cincinnati, 3 Ohio, 73; Culbertson v. Cincinnati, 16 Ohio, 574; Dean v. Madison, 9 Wis. 402.

(*o*) Lewis v. Spencer, 7 W. Va. 689.

(*p*) Frost v. Flick, 1 Dak. 131; Evans v. Gage, 1 Bradw. 202; Cleghorne v. Postlewaite, 43 Ill. 428; Albany Min. Co. v. Aud. Gen. 37 Mich. 391.

(*q*) Union Trust Co. v. Weber, 96 Ill. 346; Town of Lemont v. Singer & Talcott Stone Co. 98 Ill. 94.

(*r*) Union Trust Co. v. Weber, 96 Ill. 346.

(*s*) Gage v. Evans, 90 Ill. 569.

(*t*) In re Emigrant Indust. Sav. Bank, 75 N. Y. 389.

(*u*) Union Trust Co. v. Weber, 92 Ill. 346.

on the ground that the tax is unfair or unjust, unless the fundamental law of the land has been violated.(*v*)

ON PROPERTY NOT SUBJECT TO TAXATION. Where taxes are levied on property wholly exempt, their collection may be restrained.(*w*) But while courts of equity will, in many cases, enjoin the collection of a tax sought to be enforced against property exempt from taxation, yet they will not enjoin the collection of the whole tax, because, in determining the valuation of an aggregate property, exempt property may have been included as a factor.(*x*) Where the only ground of relief is a present use for religious and charitable purposes, a decree restraining the collection of taxes is erroneous.(*y*) So a school-house used and occupied for a boarding-school is not exempt.(*z*) When the board of equalization adds to the return of a tax-payer an item of property not taxable, and directs the county auditor to carry the amount so added on the duplicate, and assesses against it the rate of taxation paid for state, county, and city purposes, an injunction lies to enjoin the auditor.(*a*) When the board of equalization adds to the return of the tax-payer an item of property not taxable, and directs a person to carry the amount so added on the duplicate and assessment against it at the rate of taxation, injunction will lie to enjoin the auditor from so doing.* That land within the municipal corporation is used for agricultural purposes, and the owner derived no benefit from it, is no ground for an injunction.(*b*)

TAX ON PROPERTY OF ANOTHER. While it is a general rule that a court of equity will not interfere to restrain the collection of taxes, yet it will not refuse to restrain a tax collector by injunction, where the party against whom he is proceeding is not the tax debtor, and the property is not that on which the tax was laid;(*c*) especially where there is no remedy at law; as where the party taxed is insolvent and not ready to respond in damages.(*d*) Where a party not the owner or lessee of property, having no taxable interest therein, but who is merely in joint use with the owner for a compensation, is taxed for one-half of its value, the tax will be illegal and levied without warrant of law, and equity will enjoin its collection;(*e*) but where a railroad company, having the use of another road, agrees to advance money to the latter to pay the taxes, it cannot enjoin the collection of such taxes, which are proper and legal on the assumed ground of its ownership of the property.(*f*)

WITHOUT AUTHORITY OF LAW. A court may enjoin the collection of a tax, and will exercise its power in all cases where the tax has been levied

(*v*) Linton v. Mayor of Athens, 53 Ga. 588; Cleghorne v. Postlewaite, 43 Ill. 428; Darling v. Gunn, 50 Ill. 424.

(*w*) Frost v. Flick, 1 Dak. 131; Illinois Cent. R. Co. v. McLean Co. 17 Ill. 391; Louisville & N. Co. v. Gaine, 3 Fed. Rep. 206; Village of Nunda v. Village of Chrystal Lake, 79 Ill. 311; Union Transp. Co. v. Weber. 96 Ill. 316; Town of Lemont v. Singer & Talcott Stone Co. 9[illegible] Ill. 94; Evans v. Gage, 1 Bradw. 202; Smith v. Osburn, 53 Iowa, 474; Washington Heights M. E. Church v. New York, 20 Hun, 2[illegible]7; Albany, etc., Min. Co. v. Aud. Gen. 37 Mich. [illegible]71; Kimball v. Merchants' Sav., L. & T. Co. 89 Ill. 611; State v. Ormsby Co. 7 Nev. 392; Morris, etc., Co. v. Jersey City, 1 Beas. 227.

(*x*) Huck v. Chicago & A. R. Co. 86 Ill. 352.

(*y*) Beach v. Shoenmaker, 18 Kans. 147.

(*z*) Red v. Johnson, 53 Tex. 284.

(*a*) Jones v. Davis, 35 Ohio St. 474.

(*) Jones v. Davis, 10 Reporter, 122.

(*b*) Linton v. Mayor of Athens, 53 Ga. 588.

(*c*) Seeley v. Westport, 47 Conn. 294. But see Waterbury Sav. Bank v. Lawler, 46 Conn. 243.

(*d*) Deming v. Jones, 72 Ill. 78.

(*e*) Irwin v. N. O., St. L. & C. R. Co. 91 Ill. 105.

(*f*) Archer v. Terre Haute & Ind. R. Co. 102 Ill. 493.

without authority of law;(g) or where the persons imposing it are not authorized by law;(h) or where the persons attempting to levy are not officers *de jure* or *de facto*, and unauthorized by law;(i) or where levied by persons authorized, but who transcend their authority,(j) and exceeded the amount authorized by law;(k) or where the tax was illegally assessed;(l) or assessed in conflict with the statute.(m) Injunction is the proper remedy to prevent the sale of real estate for taxes, the levying of which is prohibited by law.(n) Courts of chancery have jurisdiction to enjoin illegal taxes or assessments by counties, cities, or other tribunals, boards or officers,(o) and such jurisdiction is not taken away by the statute.(p) Justices' courts have authority to issue injunctions in all tax suits of which they have jurisdiction.(q) The amount of the tax in dispute is the criterion of jurisdiction.(r) A party seeking by injunction equitable relief against an alleged unauthorized action of the board of equalization, must establish clearly facts showing that the board had acted illegally and without authority.(s)

ILLEGAL TAXATION. A court of equity will not interfere on the sole ground that the statute imposing the tax is unconstitutional;(t) so where the only ground is that the statute annexing the lands taxed to the municipality which had levied the tax, was unconstitutional; for if the law was valid, the tax was good, and if void, the invalidity was apparent on the face of the assessment and could not cloud the title. Injunction will not lie where the defect is patent.(u) If the tax is illegal on the face of the proceedings, or totally void, and carries with it on the record notice of its illegality, no relief can be obtained in equity;(v) but where the assessment on the face of the proceedings is valid, and it requires extraneous evidence to show that it is invalid, equity will relieve to prevent a cloud on the title.(w) So a deed given by a

(g) Frost v. Flick, 1 Dak. 131; Wright v. S. W. Ry. Co. 64 Ga. 783; Kimball v. Merchants' Sav., L. & T. Co. 89 Ill. 611; Union Trust Co. v. Weber, 96 Ill. 340; McClure v. Owen, 21 Iowa, 133; Webster v. Baltimore Co. 51 Md. 395; Marion Co. v. Barker, 25 Kan. 258.

(h) Albany, etc., Min. Co. v. Aud. Gen. 37 Mich. 391; Evans v. Gage, 1 Bradw. 202.

(i) Village of Nunda v. Village of Chrystal Lake, 79 Ill. 311; Union Trust Co. v. Weber, 96 Ill. 346; Town of Lemont v. Singer & Talcott Stone Co. 98 Ill. 94; Albany, etc., Min. Co. v. Aud. Gen. 37 Mich. 391.

(j) South Platte Land Co. v. Buffalo Co. 7 Neb. 253; Village of Nunda v. Village of Chrystal Lake, 79 Ill. 311.

(k) Town of Lemont v. Singer & Talcott Stone Co. 98 Ill. 94.

(l) Folkerts v. Powers, 42 Mich. 283; Frost v. Flick, 1 Dak. 131.

(m) Hassan v. City of Rochester, 67 N. Y. 528.

(n) Mechanics' Bank v. City of Kansas, 73 Mo. 555.

(o) Little Rock v. Barton, 33 Ark. 436.

(p) Carrothers v. Clinton District, 16 West Va. 527.

(q) Gonzales v. Lindsay, 30 La. Ann. 1085.

(r) Adams v. Board of Com'rs, McCahon, 241.

(s) International & G. N. R. Co. v. Smith Co. 51 Tex. 1.

(t) Townsend v. New York City, 77 N. Y. 542.

(u) Curtis v. East Saginaw, 35 Mich. 508; Townsend v. New York City, 77 N. Y. 542; Stewart v. Palmer, 74 N. Y. 183.

(v) Ewing v. St. Louis, 5 Wall. 413; Hannewinkle v. Georgetown, 15 Wall. 547; Mobile, etc., R. Co. v. Peebles, 47 Ala. 317; Floyd v. Gilbreath, 27 Ark. 675; Robinson v. Gaar, 6 Cal. 273; Bucknall v. Story, 36 Cal. 67; Stewart v Palmer, 74 N. Y. 183; Cox v. Clift, 2 N. Y. 118; Scott v. Onderdonk, 14 N. Y. 9; Hatch v. Buffalo, 38 N. Y. 276; Newell v. Wheeler, 48 N. Y. 486; Livingston v. Hollenbeck, 4 Barb. 9; Van Rensselaer v. Kidd, Id. 17; Bonton v. Brooklyn, 15 Barb. 375; Messerole v. Brooklyn, 8 Paige, 198; Wiggins v. New York, 9 Paige, 16; Van Doren v. New York, Id. 388; Dean v. Madison, 9 Wis. 402; Head v. James, 13 Wis. 641; Shepardson v. Millwaukee, 28 Wis. 593; Milwaukee Iron Co. v. Hubbard, 29 Wis. 51.

(w) Clark v. Village of Dunkirk, 12 Hun, 181; Meth. Epis. Church v. New York, 27 Hun, 297; Temple Grove Seminary v. Cramer, 33 Hun, 388; Dows v. Chicago, 11 Wall. 108; Hannewinkle v. Georgetown, 15 Wall. 547; Coulson v. Portland, Deady, 481; Huntington v. Cent. Pac. R. Co.

public officer is an apparent cloud, requiring extraneous evidence to remove.(*x*) Such deed is presumptive evidence that all the statutory provisions have been complied with.(*y*) Whenever the claim of the adverse party to the land is valid upon its face, and it requires extrinsic evidence to establish its invalidity and illegality, the court will entertain jurisdiction in equity.(*z*)

TAXES IN PART ILLEGAL. Courts will not interfere with the collection of taxes unless they are void, or are levied without authority,(*a*) nor restrain an extension of a tax on the tax-books unless wholly unauthorized and void in all its parts;(*b*) and not then, unless the tax-payer has paid or tendered such taxes as are legal.(*c*) If a portion of a tax is legal and a portion illegal, if the legal can be separated from the illegal, an injunction will not be granted to restrain the collection of the entire tax;(*d*) but if they cannot be separated, a sale for the collection of such mixed taxes is void.(*e*) A bill against a sheriff alone, to enjoin the collection of county taxes, cannot be maintained on the allegation that the claims for which the taxes were levied were "in great part illegal."(*f*) The payment of that portion which is legal, is a condition precedent to the right to maintain the suit.(*g*)

OMISSIONS FROM ASSESSMENT ROLL. Unlawful exemptions or omissions from the assessment rolls will invalidate the whole assessment.(*h*) Where assessors omitted from the assessment property benefited by the improvement, an action may be maintained by one or more persons assessed on behalf of themselves and others similarly situated to restrain the enforcement and col-

2 Sawy. 503; Shell v. Martin, 19 Ark. 189; Chaplin v. Holmes, 27 Ark. 414; Harmer v. Bohug, 8 Cal. 384; Webber v. San Francisco, 1 Cal. 455; Robinson v. Gaar, 6 Cal. 273; Cohen v. Sharp, 44 Cal. 29; Gage v. Rohrbach, 56 Ill. 262; Gage v. Billings, Id. 268; Reed v. Tyler, Id. 288; Gage v. Chapman, Id. 311; Barnett v. Cline, 60 Ill. 205; Reed v. Reber, 62 Ill. 240; Lee v. Ruggles, Id. 427; Harrison v. Haas, 25 Ind. 281; Lapp v. Morrill, 8 Kan. 678; Leigh v. Everhart, 4 T. B. Mon. 379; Conway v. Waverly, 15 Mich. 257; Palmer v. Rich, 12 Mich. 414; Scofield v. Lansing, 17 Mich. 437; Kenyon v. Duchene, 21 Mich. 498; Weller v. St. Paul, 5 Minn. 95; Morrison v. St. Paul, 9 Minn. 108; Lockwood v. St. Louis, 24 Mo. 20; Fowler v. St. Joseph, 37 Mo. 228; South Platte Land Co. v. Buffalo Co. 7 Neb. 253; Morris Canal Co. v. Jersey City, 1 Beas. 227; Moers v. Smedley, 6 Johns. Ch. 28; Pettit v. Shephard, 5 Paige, 493; Oakley v. Trustees, 6 Paige, 262; Van Doren v. New York, 9 Paige, 388; Hanlon v. Supervisors, 57 Barb. 283; Scott v. Onderdonk, 14 N. Y. 9; Heywood v. Buffalo, Id. 534; Ward v. Dewey, 16 N. Y. 519; Hatch v. Buffalo, 38 N. Y. 276; Allen v. Buffalo, 39 N. Y. 386; Crooke v. Andrews, 40 N. Y. 547; Overing v. Foote, 43 N. Y. 290; Newell v. Wheeler, 48 N. Y. 486; Dean v. Madison, 9 Wis. 402; Weeks v. Milwaukee, 10 Wis. 242; Jenkins v. Rock Co. 15 Wis. 11; Mitchell v. Milwaukee, 18 Wis. 92; Crane v. Janesville, 20 Wis. 305; Grimmer v. Sumner, 21 Wis. 179; Hamilton v. Fond du Lac, 25 Wis. 490; Siegel v. Outagamie Co. 26 Wis. 70; Judd v. Fox Lake, 28 Wis. 583; Shepardson v. Milwaukee, Id. 593; Weis v. Grosvenor, 31 Wis. 681.

(*x*) Beach v. Hayes, 58 How. Pr. 17.

(*y*) Beach v. Hayes, 58 How. Pr. 17.

(*z*) Lewis v. City of Buffalo, 1 Sheld. N. Y. Super. Ct. 80.

(*a*) Ottawa Glass Co. v. McCaleb, 81 Ill. 556.

(*b*) Ottawa Glass Co. v. McCaleb, 81 Ill. 556.

(*c*) Ottawa Glass Co. v. McCaleb, 81 Ill. 556.

(*d*) Burlington & Mo. Riv. R. Co. v. York Co. 7 Neb. 487; Mesker v. Koch, 76 Ind. 68.

(*e*) Shattuck v. Daniel, 52 Miss. 834.

(*f*) Beck v. Allen, 58 Miss. 143.

(*g*) Twombly v. Kimbrough, 24 Ark. 459; Adams v. Castle, 30 Conn. 404; O'Kane v. Treat, 25 Ill. 557; Taylor v. Thompson, 42 Ill. 9; Briscoe v. Allison, 43 Ill. 291; Reed v. Taylor, 56 Ill. 288; Barnett v. Cline, 60 Ill. 205; Harrison v. Haas, 25 Ind. 281; Roseberry v. Huff, 27 Ind. 12; Board of Com'rs v. Elston, 32 Ind. 271; Morrison v. Hershire, 32 Iowa, 271; Shelton v. Dunn, 6 Kan. 128; Conway v. Waverly, 15 Mich. 257; Palmer v. Napoleon, 16 Mich. 176; Frazer v. Siebern, 16 Ohio St. 614; Hersey v. Milwaukee, 16 Wis. 185; Bond v. Kenosha, 17 Wis. 284; Myrick v. La Crosse, Id. 442; Mills v. Johnson, Id. 598; Mills v. Charleston, 29 Wis. 400; Dean v. Borschsenius, 30 Wis. 236.

(*h*) New Orleans v. Fourchy, 30 La. Ann. 910; People v. McCrevy, 34 Cal. 32; Muscatine v. Railroad Co. 1 Dill. 542; Insurance Co. v. Yard, 17 Pa. 339; Morrison v. Larkin, 26 La. Ann. 702; Illinois Cent. R. Co. v. McLean Co. 17 Ill. 291.

lection of the same;(i) and the payment of part of the assessment will not prevent suit to restrain further prosecution.(j) Accidental omissions of property from the assessment roll, or omissions though purposely made under a mistake of law, and in the belief that the omitted property is not taxable, is no ground for enjoining the collection of the tax upon the property which is assessed.(k) One whose assessment is increased by an unauthorized omission of lands of another, may maintain an action against the city to restrain the enforcement of the assessment;(l) but where the proof merely shows that in the assessment of property in the city there was an undervaluation in a few cases, it is not sufficient to vitiate the whole assessment.(m)

ERRORS AND IRREGULARITIES. A court of equity will not interfere to correct an erroneous assessment and enjoin the collection of taxes thereon.(n) The remedy at law in such cases is deemed exclusive.(o) There will be no judicial interference on account of irregularities in the return or assessment;(p) as for a failure to return the assessment roll to the county clerk in time.(q) So a mere informality, which does not affect a substantial right, in no way invalidates the tax;(r) as in the mere form of the assessment,(s) or a misdescription or irregular entry in the tax list,(t) or the omission of an officer to do his duty.(u) But if the tax has been certified by mistake by the clerk to have been voted, when in fact the proposition was defeated, equity will restrain its collection.(v) A mere irregularity, either in making valuation or levying, will not vitiate unless it substantially affects the justice of the tax,(w) or unless fraudulently done,(x) or unless property is doubly taxed;(y) but the collection of taxes on the capital stock of corporations, over and above the value of its taxable property, will not be enjoined as double taxation,(z) or unless a party is denied a legal right, as the right to work out a poll tax;(a) but a failure of

(i) Clark v. Village of Dunkirk, 12 Hun, 181; Kennedy v. City of Troy, 14 Hun, 308.

(j) Clark v. Village of Dunkirk, 12 Hun, 181; Kennedy v. City of Troy, 14 Hun, 308.

(k) Burlington & Mo. Riv. R. Co. v. Saline Co. 12 Neb. 324; Burlington & Mo. Riv. R. Co. v. Seward Co. 10 Neb. 211.

(l) Hassen v. City of Rochester, 65 N. Y. 519; S. C. 6 Lans. 185.

(m) Marshall v. Benson, 48 Wis. 558.

(n) State Railroad Tax Cases, 92 U. S. 613; Powers v. Bowman, 53 Iowa, 359; Chicago, B. & Q. R. Co. v. Sidons, 88 Ill. 320; Burke v. Speer, 59 Ga. 353; Decker v. McGowan, 59 Ga. 805; Georgia Mut. L. Ass'n v. McGowan, Id. 811; Merchants' B. & L. Ass'n v. Peter, 63 Ga. 351; Thatcher v. People, 79 Ill. 597; Purrington v. People, 79 Ill. 11; Morrill v Douglass 17 Kans. 293; Beers v. People, 83 Ill. 488.

(o) Maclot v. Davenport, 17 Iowa, 379; Coulin v. Seaman, 22 Cal. 546; Emery v. Bradford, 29 Cal. 75; Nolan v. Reese, 32 Cal. 484; Chambers v. Satterlee, 40 Cal. 497; Windsor v. Field, 1 Conn. 279; Peoria v. Kidder, 26 Ill. 351; Deane v. Todd, 22 Mo. 90; Hughes v. Kline, 30 Pa. St. 280. See State v. Baxter, 36 N. J. L. 188; State v. Mayor, Id. 288.

(p) Burke v. Spear, 59 Ga. 353; Decker v McGowan, 59 Ga. 805; Georgia M. L. Ass'n v. McGowan, Id. 811; Stockle v. Silsbee, 41 Mich. 615; State Cent. R. Co. v. Mutchler, 41 N. J. L. 96; Schofield v. Watkins, 22 Ill. 66; Chicago, B. & Q. R. Co. v. Frary, 22 Ill. 34; Munson v. Minor, Id. 594; Metz v. Anderson, 23 Ill. 463; Du Page Co. v. Jenks, 65 Ill. 275.

(q) Burlington & Mo. Riv. R. Co. v. Saline Co. 12 Neb. 326.

(r) Burlington & Mo. Riv R. Co. v. Lancaster Co 12 Neb. 324; People v. Assessors of Brooklyn, 16 Hun, 196; State Cent. R. Co. v. Mutchler, 41 N. J. L. 96.

(s) State v. N. J. R. Co. 41 N. J. L. 235.

(t) George v. Dean, 47 Tex. 73.

(u) Matter of Pinckney, 29 Hun, 474; Burt v. Aud. Gen. 39 Mich. 126.

(v) Cattrell v. Lowry, 45 Iowa, 478.

(w) Law v. People, 87 Ill. 385; Sioux City & St. P. R. Co. v. Osceola Co. 45 Iowa, 168.

(x) Gage v. Evans, 90 Ill. 569.

(y) Union Trans. Co. v. Webber, 96 Ill. 346; Com. v. Sup'rs of Colby, 29 Pa. St. 121; Sav. & L. Soc. v. Austin, 46 Cal. 415.

(z) Danville Lumber, etc., Co. v. Parks, 88 Ill. 463.

(a) Miller v. Gorman, 38 Pa. St. 309; Sioux City & St. P. R. Co. v. Osceola Co. 45 Iowa, 168.

the road supervisors to give notice of the time when and place where the road tax will be worked out, does not invalidate the tax on the lands of a non-resident.(*b*) It must appear that equity alone can give redress,(*c*) and that the assessment is illegal and void as distinguished from irregular.(*d*)

REMEDY AT LAW. Equity will not restrain the collection of a tax when there is a full and adequate remedy at law,(*e*) even though fraud be alleged in the bill;(*f*) and although the levy is on real estate, except in extreme cases.(*g*) The party seeking relief in equity must be without a legal remedy, or the remedy must be practically useless.(*h*) A court of equity will not enjoin a tax collector who threatens to seize personal property without lawful authority, as such seizure would be mere trespass, remediable in a court of law;(*i*) and if a defense in a tax suit is available at law, equity will not enjoin.(*j*) There is no remedy in equity when the state statute provides a remedy for illegal assessments;(*k*) and the fact that the remedy provided by statute may be inadequate, does not justify judicial interference,(*l*) as it is in the discretion of the legislature to provide the mode of assessment, and the exercise of that discretion is not reviewable in the courts.(*m*) Where a mode is prescribed, and a tribunal established by law to provide against an illegal tax, complainant has a full and adequate remedy at law.(*n*)

EXCESSIVE VALUATION. Excessive valuation alone will not be sufficient to warrant the interference of a court of equity.(*o*) Courts of equity cannot convert themselves into assessors for purposes of taxation and reassess in every case where the assessor has erred in his judgment as to the value of property, even if the tax-payer has notified the assessor that the true value is less than that fixed in the assessment, and the collection of the tax will not be enjoined merely because of an erroneous judgment in the valuation of property, or for a mistake in deducting the proper amount of exemptions where no fraud is shown.(*p*) When the inequality of valuation is the result of a statute of the state designed to discriminate injuriously against any class of persons or species of property, the court will grant appropriate relief.(*q*)

EXCESSIVE ASSESSMENTS. The collection of a tax will not be enjoined, although the assessment is alleged to be excessive of the amount authorized

(*b*) Burlington & Mo. Riv. R. Co. v. Lancaster Co. 4 Neb. 293.

(*c*) Chicago, etc., R. Co. v. Siders, 88 Ill. 320.

(*d*) City of Delphi v. Bowen, 61 Ind. 29; Bank v. Waters, 12 Reporter, 292.

(*e*) Hewitt's Appeal, 83 Pa. St. 55; Brown v. Concord, 58 N. H. 375; Sav. Bank v. Portsmouth, 52 N. H. 17; Taylor v. Secor, U. S. Sup. Ct. Oct. T. 1875; Hagenbuch v. Howard, 34 Mich. 1; Mears v. Howarth, 34 Mich. 138.

(*f*) Hagenbuch v. Howard, 34 Mich. 1.

(*g*) Rowland v. First School-dist. 42 Conn. 30.

(*h*) Clarke v. Ganz, 21 Minn. 287.

(*i*) Baldwin v. Tucker, 16 Fla. 298; Price v. Kramer, 4 Col. 546.

(*j*) Archer v. Terre Haute & Ind. R. Co. 102 Ill. 493.

(*k*) Heckman v. New York City, 29 Hun, 590; Green v. Mumford, 5 R. I. 472; Woodward v. Ellsworth, 4 Col. 580; Magee v. Denton, 5 Blatchf. 130; Weaver v. State, 39 Ala. 535; Dodd v. Hartford, 25 Conn. 232; Missouri Riv. etc., R. Co v. Wheaton, 7 Kans. 232.

(*l*) Warren v. St. Paul, 4 Law & Eq. Rep. 556.

(*m*) King v. Portland City, 2 Or. 146.

(*n*) Brewer v. Springfield, 97 Mass. 152; Brooklyn v. Messerole, 26 Wend. 132; Woodward v. Ellsworth, 4 Col. 581; Meth. Epis. Church v. New York, 55 How. Pr. 57.

(*o*) Evans v. Gage, 1 Bradw. 202; Pacific Hotel Co. v. Lieb, 83 Ill. 602; Woodman v. Ely, 2 Fed. Rep. 839.

(*p*) Traders' Ins. Co. v. Farwell, 102 Ill. 13.

(*q*) People v. Weaver, 100 U. S. 539; Fulton v. Nat. Bank, 101 U. S. 143; Cumming v. Nat. Bank, Id. 153; Nat. Bank v. Kimball, 2 Morr. Trans 463.

by law,(r) the remedy in such case being given by statute.(s) Where a person claims that the assessment of taxes was excessive, but failed to apply to the board of appeals to have the error corrected, and no excuse given for his failure to apply at the proper time, the courts cannot interfere to stay the collection of the tax,(t) unless made excessive from corrupt and malicious motives;(u) and it will not interpose unless clearly shown that the tax is inequitable and against conscience.(v) Where the excess in the taxes is easily ascertained, the court will restrain the collection of such excess (w) Injunction in such case is the proper remedy, but before the writ is granted the court should require the complainant to pay so much of the tax as he confesses to be due.(x) The party seeking an injunction should pay so much of the tax as it can plainly be seen he ought to pay. He cannot be permitted to enjoin the collection because his tax is in excess of what is just and lawful, so as to screen himself from any tax at all, until the precise amount is ascertained by a court of equity.(y) If any part of a tax is legal, that part must be paid before the party will be heard to complain of an illegal portion.(z) The general rule is that the bill of injunction will not be sustained unless the portion properly collectible is paid or tendered.(a) And the bill is defective, even if it states grounds for relief, where it fails to aver a tender of the amount admitted to be legally due;(b) and it is not sufficient to allege that he is "willing," or "that he has paid it into court."(c) It should be shown, as near as possible, what part is just and what part is unauthorized, and that which is just should be paid as a condition of obtaining the relief sought;(d) for without tendering what he ought in equity to pay, he will be liable for costs, but if he offers to pay it, his bill ought not to be dismissed, as he has a right to judgment for the remainder.(e)—[ED.

(r) Osborne Co. v. Blake, 19 Kans. 249; Powers v. Bowman, 53 Iowa, 359.

(s) Kimber v. Schuylkill, 20 Pa. St. 366; Hughes v. Kline, 30 Pa. St. 227; Everett's Appeal, 71 Pa. St. 216; Hutchinson v. Pittsburgh, 7 Pa. St. 320. See Cleghorne v. Postlewaite, 43 Ill. 428; Darling v. Gunn, 50 Ill. 424.

(t) Johnson v. Roberts, 102 Ill. 655; Meyer v. Rosenblatt, 8 Mo. App. 602; Kittle v. Shirvin, 11 Neb. 65; Meth. Epis. Church v. New York, 55 How. Pr. 57; Houston & Tex. R. Co. v. Presidio Co. 53 Tex. 518. See Matter of Mt. Morris Square, 2 Hill, 14; Stafford v. Albany, 6 Johns. 1; Matter of Beekman St. 20 Johns. 269; Matter of Canal St. 11 Wend. 154; Matter of Canal and Walker Sts. 12 N. Y. 406; Petition of Eager, 46 N. Y. 100; Western R. Co. v. Nolan, 48 N. Y. 513; Gravel Road Co. v. Black, 32 Ind. 468; Holton v. Bangor, 23 Me. 264; Stickney v. Bangor, 30 Me. 404; Gilpatrick v. Saco, 57 Me. 277; Richardson v. Scott, 47 Miss. 236; Kimber v. Schuylkill, 20 Pa. St. 366; Hughes v. Kline, 30 Pa. St. 227; Wharton v. Birmingham, 37 Pa. St. 371; Clinton School-dist. Appeal, 56 Pa. St. 315; Stewart v. Maple, 70 Pa. St. 221; Everett's Appeal, 71 Pa. St. 216; County Court v. Marr, 8 Humph. 634.

(u) Albany, etc., R. Co. v. Canaan, 16 Barb. 244; Merrill v. Humphrey, 24 Mich. 170; Lefferts v. Calumet, 21 Wis. 688; Milwaukee Iron Co. v. Hubbard, 29 Wis. 51; Republic Life Ins. Co. v. Pollak, 7 Chi. Leg. News, 357.

(v) Stokes v. Knarr, 11 Wis. 889; Dean v. Gleason, 16 Wis. 1.

(w) Trull v. Com'rs of Madison, 72 N. C. 388.

(x) Overall v. Ruenzi, 67 Mo. 203; London v. Town of Wilmington, 78 N. C. 109; Second Nat. Bank v. Kimball, 2 Morr. Trans. 463.

(y) German Nat. Bank v. Kimball, 15 Blatchf. 398; S. C. 12 Fed. Rep. 96, note; State Railroad Tax Cases, 92 U. S. 575; Pelton v. Nat. Bank, 101 U. S. 143; Cummings v. Nat. Bank, Id. 153; Williams v. Weaver, 100 U. S. 589; Merrill v. Humphrey, 24 Mich. 170; Frazer v. Siebern, 16 Ohio St. 614.

(z) San Jose Gas Co. v. January, 57 Cal. 614; Hunt v. Easterday, 10 Neb. 165.

(a) Mobile & O. R. Co. v. Moseley, 52 Miss. 127; Mullekin v. Reeves, 71 Ind. 281; Hagaman v. Clark Co. 19 Kans. 394; Worther v. Badgett, 32 Ark. 496; Litchfield v. Webster Co. 101 U. S. 773; Durfee v. Murray, 7 Bradw. 213.

(b) Johnson v. Roberts, 102 Ill. 655; Connors v. Detroit, 8 Reporter, 335; Jones v. Davis, Id. 122.

(c) Parmley v. St. Lawrence, St. P. & Mo. P. R. Co. 3 Dill. 25.

(d) Wilson v. Weber, 3 Bradw. 125. See State Railroad Tax Cases, 92 U. S. 575.

(e) Connors v. Detroit, 41 Mich. 128. See Rio Grande R. Co. v. Scanlan, 44 Tex. 649.

In re Charles B. & James C. McVay, Bankrupts.

(*District Court, W. D. Pennsylvania.* 1882.)

1. Bankruptcy—Distinct Debt—Appropriation of Securities of Bankrupt.

The bankrupts, who were bankers, procured B. to become surety on their bond to a depositor, and for B.'s indemnity gave him certain of their bills receivable. The next day they borrowed from B. marketable securities to raise money, and delivered to him securities owned by them. In both transactions B.'s assistance was gratuitous, and to aid the bankrupts in their business at a time of general financial stringency. A set-off existed against one of the bills receivable, which the bankrupts had overlooked. *Held*, that in the absence of any express restriction as to their use, B. had the right, as against the assignee in bankruptcy, to appropriate the second lot of securities to reimburse himself from loss occasioned by the set-off against the first lot.

2. Same—Contest by Assignee.

If the assignee desired to contest B.'s right to make such appropriation, his proper course was to sue him, and he could not have the controversy determined collaterally and in a summary way by objecting to B.'s proof of a distinct and independent debt.

In Bankruptcy.

Sur issue, certified by register into court for determination, upon application to re-examine claim proved by D. W. C. Bidwell.

S. Schoyer, Jr., for Bidwell.

John M. Kennedy, for assignee.

Acheson, D. J. The bankrupts were bankers in the city of Pittsburgh. On September 30, 1873, they gave a bond to the commissioners of Ellsworth avenue to secure them on a deposit of $25,-668.47. Bidwell was surety on this bond, and for his indemnity the bankrupts on said date gave him certain of their bills receivable, aggregating $26,000. The next day (October 1) the bankrupts borrowed from Bidwell available securities amounting to $28,910, which they desired to use for the purpose of negotiating a loan in the east, and delivered to him local securities to the amount of $30,400. In both these transactions Bidwell acted without pecuniary consideration or recompense, and entirely from motives of friendship to the bankrupts. The bankrupts suspended payment and closed their doors on November 7, 1873, and on the first of December following filed their petition in bankruptcy. On November 28, 1873, they returned to Bidwell the securities they received from him, but left in his hands their own securities, and Bidwell continued to hold them until after the bankruptcy. On December 2, 1873, the Ellsworth avenue commissioners entered judgment on the bond against Bidwell, who paid them in discharge thereof $26,123.35. Owing to a

set-off existing against one of the bills receivable, he realized out of the securities delivered to him on September 30th, $23,923.53, only. After the appointment of the assignee in bankruptcy, Bidwell returned to him all the securities he received from the bankrupts on October 1st, except two negotiable promissory notes which he collected, paying of the proceeds to the assignee, on January 9 and and March 4, 1874, $5,790.90, and retaining $2,389.06, which he applied to make himself whole on the Ellsworth-avenue debt.

The claim proved by Bidwell is based upon a deposit account entirely separate and distinct from the transactions above stated. The proof is regular in form and correct in amount, and confessedly the debt is a just one. The only ground upon which the assignee seeks to have the proof expunged is that the securities which appertained to the transaction of October 1, 1873, retained by Bidwell, were assets belonging to the estate in bankruptcy, and that until he fully surrenders to the assignee the proceeds, he has no right to prove a debt or receive dividends.

The issue formed under general order No. 34, and certified by the register, presents for determination the following questions, viz.: (1) Has Bidwell the right to retain $2,389.04, of the securities he received in the transaction of October 1, 1873, to reimburse him for his loss on the securities he received in the transaction of September 30th? (2) Is the assignee entitled to a re-examination of the claim proved by Bidwell upon his deposit account, for the purpose of expunging the same because of his detention of said money?

1. If it be conceded that the case is not strictly one of "mutual credits," within the provisions of the bankrupt law as expounded by the cases of *Rose* v. *Hart*, 8 Taunt. 499; 2 Smith, Lead. Cas. 293; *Young* v. *Bank of Bengal*, 1 Moore, C. P. 150; and *Ex parte Whiting, In re Dow*, 14 N. B. R. 307; still I am of opinion that the creditor here, under the special circumstances, had the right to use the securities which came into his hands on October 1st, to make good the deficiency on those he received the day previous. The two transactions were not only nearly contemporaneous, but were intended to subserve a common purpose, viz., to aid the bankrupts in their business at a time of general financial stringency. In both instances Bidwell's aid was gratuitous on his part and wholly for the benefit of the bankrupts. The evidence discloses that when he signed the bond, on September 30th, the intention was to fully indemnify him, and it was then supposed the bills receivable handed him were ample for the purpose. The bankrupts seem to have overlooked the fact of the

existing set-off, and Bidwell was ignorant in respect to it. What, then, was the plain duty the bankrupts owed Bidwell? They were under the highest moral and legal obligation to furnish him additional security to protect him against the set-off. The succeeding day the bankrupts applied to him for further assistance, and he accorded it, receiving the second batch of securities. Now, while these latter securities were not then expressly made applicable to Bidwell's indemnity in the previous transaction, it is also true that they were not in terms restricted to the second transaction. There was, indeed, at the time no express agreement on the subject. In the absence of an express restriction as to their use, I think it would shock the moral sense of most men to hold that the bankrupts or their assignee could redeem the second lot of securities without indemnifying Bidwell from loss on account of the set-off which existed against the first.

2. But if I am wrong here, I am nevertheless of the opinion that the assignee has shown no good reason for expunging Bidwell's proof of claim. The proof is entirely regular, and the claim for an admitted debt, which has no sort of connection with the transactions of September 30th and October 1, 1873, or either of them. When the bankrupts, on November 28, 1873, delivered to Bidwell his securities, they left in his hands their own. He testifies it was then expressly understood he was to hold those of October 1st for his indemnity against the Ellsworth-avenue debt, and unless this was so, it is difficult to explain the conduct of the parties. Bidwell's retention of the $2,389.04 was under a claim of right openly avowed, and his application of that fund was known to the assignee as early as March 4, 1874. If the assignee desired to contest Bidwell's right to make that application, he could only do so by bringing a suit. He could not have the controversy determined collaterally and in a summary way by objecting to Bidwell's proof of a distinct and independent debt. *In re Forbes*, 5 Biss. 511; *In re Holland*, 8 N. B. R. 190, 192. Where a creditor has two disconnected claims, he may prove and receive dividends as to the one on which he has received no preference, without surrendering an illegal preference received on the other. *In re Richter*, 4 N. B. R. 221; *In re Holland, supra*.

Having reached the above conclusions, it is not necessary to consider a third question which the issue presents.

And now, September 9, 1882, the first and second questions certified by the register are determined in favor of D. W. C. Bidwell, and the application of the assignee to have said creditor's proof of claim expunged or diminished is denied.

SPRING and others *v.* DOMESTIC SEWING-MACHINE CO.

(*Circuit Court, D. New Jersey.* August 16, 1882.)

1. PATENT CASES—EQUITY PRACTICE—REHEARING.

   After interlocutory decree and order of reference to a master for an account, rule to show cause why the decree should not be opened and a rehearing ordered, granted.

2. SAME—GROUNDS FOR RELIEF.

   In order that the court may have jurisdiction in equity, the complainants not being entitled to an injunction, some other ground for equitable relief must be disclosed in the bill besides a naked account for profits and damages.

3. JURISDICTION—WANT OF—OBJECTION AT ANY STAGE OF PROCEEDINGS.

   Although the question of jurisdiction was not raised in the pleadings or adverted to on the final hearing, it is never too late, during the pendency of the proceedings, for the court to examine into its right and power to make a decree or enter a judgment in a case.

4. SAME—WHEN COURTS WILL DECLINE.

   In the federal courts, especially, where jurisdiction rests solely upon the facts, which appear in the record of the suits, it has long been the practice of the judges, at any stage of the proceedings, *sua sponte*, to decline jurisdiction, and dismiss the case, when the want of authority to act becomes apparent.

5. REMEDIES—CONCURRENT—AT LAW AND IN EQUITY.

   To entertain a suit in equity, when the party has a plain and complete remedy at law, is to deprive the defendant of his constitutional right of trial by jury. Notwithstanding section 723 of the Revised Statutes, there remains a limited range of cases in which equitable jurisdiction continues to be exercised concurrently with that at law. The remedy at law, although existing, seems less practical and less efficient to the ends of justice, and its prompt administration, than the remedy in equity. But where complainants are not entitled to an injunction, having an adequate remedy at law, the court in equity has no jurisdiction. *Root* v. *Lake Shore, etc., R. Co.* 21 O. G. 1112, followed.

6. PATENTS—DAMAGES FOR PAST INFRINGEMENTS—JOINT OWNERS.

   Actions may be maintained by joint owners of a patent, who have not transferred their claims for damages and profits, to recover past damages for infringement within the period of time of their ownership, though when the suit was instituted neither of the joint owners had any interest in the title to the patent.

7. SAME—WHO MAY RECOVER—INJUNCTION.

   Section 4919 of the Revised Statutes includes not merely an interest in the title of a patent, but in the damages, and not as patentee only, but as assignee as well. *Semble*, that the assignee of a part interest in a patent and accrued damages may, during the life of the patent, in a suit for damages brought in his own name, obtain an injunction against future infringement.

8. SAME—WHEN NOT GRANTED.

   Where a bill for profits and damages was for a period ending in 1876, complainants were not entitled to an injunction, the bill being filed in 1879, and before the expiration of the patent.

On Application for Rehearing.

George E. Betton and *George S. Boutwell*, for complainants.

John Dane, Jr., for defendant.

NIXON, D. J. An interlocutory decree was entered in the above-stated case, in favor of the complainants, on the twenty-second day of May, 1882, and an order of reference made to the master for an account. The defendant company now comes in and asks for a rule upon the complainants to show cause why the decree should not be opened and a rehearing ordered. Four reasons are assigned for such an order, the first and second of which are frivolous, but the third and fourth seem to have merit. The third raises the question of the want of jurisdiction of the court in equity, in view of the recent decision of the supreme court in *Root* v. *L. S. & M. S. Ry. Co.* 21 O. G. 1112; and the fourth presents evidence of the existence and public use of a machine in Watertown, Connecticut, prior to the date of the complainants' invention, which, if true, suggests very grave doubts in regard to the novelty of the complainants' patent.

The patent in controversy was originally issued to Charles and Andrew Spring, as their joint invention, for the period of fourteen years from the tenth of May, 1859. At the expiration of the term its life was extended for seven years from the tenth of May, 1873. The complainants, Charles Spring and John F. Wood, were its owners from May 12, 1873, to December 23, 1876, and the present suit was brought to recover profits and damages for its infringement by the defendant company during that period. On the twenty-third of December, 1876, Charles Spring assigned his interest to the Howe Machine Company, and there is another action pending here against the same defendant in favor of Wood and the Howe Machine Company for infringement since that date, and which has not yet been brought to final hearing. It is evident from this statement that the only claim which the complainants can maintain in this suit are the profits which they lost and the damages they sustained from the defendant's infringement during their joint ownership from May, 1873, to December, 1876. The patent had not expired, indeed, when the bill was filed, as was the case in *Root* v. *Ry. Co.*, *supra;* but these complainants, in a bill for damages and profits ending in 1876, were not entitled to an injunction restraining the defendants from infringement in 1879. Considering the peculiar relations of these complainants to the patent, and remembering that they expressly limited their demands, in their bill of complaint, for the profits and damages to the date when Charles Spring transferred his interest to the Howe Machine Company, it would seem that they had a plain, adequate, and

complete remedy at law to recover all that they were permitted to ask for in this suit. Not being entitled to an injunction, some other ground for equitable relief must be disclosed in the bill besides a naked account for profits and damages, in order to give the court jurisdiction in equity.

But, without expressing at this time any opinion on the subject, there is enough in the second and fourth reasons to justify a rule to show cause why the decree should not be opened, and it is granted accordingly. To promote the convenience of counsel, the court agreed that the rule to show cause might be argued on briefs. These have been submitted, and have had careful examination and consideration. The rule to show cause why a rehearing should not be had was granted on two allegations: (1) that the court, sitting in equity, has no jurisdiction over the case; (2) because the defendants were prepared to prove, by newly-discovered evidence, that the complainants' patent had been anticipated.

1. The question of jurisdiction was not raised in the pleadings or adverted to on the final hearing. It has been suggested now, in view of the recent decision of the supreme court in the case of *Root* v. *L. S. & M. S. Ry. Co.* 21 O. G. 1112. The learned counsel for the complainants, confounding the question with the one of the want of proper parties to the bill of complaint, has entered into a long argument to show that the objection comes too late. But it is never too late at any time, during the pendency of the proceedings, for the court to examine into its right and power to make a decree or enter a judgment in a case. In the federal courts, especially, where there is no presumption in favor of jurisdiction, but where it rests solely upon the facts which appear in the record of the suits, (*Ex parte Smith*, 24 U. S. 456,) it has long been the practice of the judges, at any stage of the proceedings, *sua sponte*, to decline jurisdiction and dismiss the case, when the want of authority to act becomes apparent. They do not wait for the question to be raised by demurrer or answer or plea, or to be suggested by the counsel. And they pursue this course for obvious reasons. It is not merely a matter of the form of procedure. To entertain a suit in equity, when the party has a plain and complete remedy at law, is to deprive the defendant of his constitutional right of trial by jury. The late Justice Baldwin, of this circuit, discusses the subject with much ability and research, in the case of *Baker* v. *Biddle*, 1 Bald. 394. See, also, the more recent cases of *Hipp* v. *Babin*, 19 How. 278; *Lewis* v. *Cocks*, 23 Wall. 466; *Dumont* v. *Fry*, 12 FED. REP. 21.

There are a number of subjects over which courts of law and equity have a concurrent jurisdiction. Notwithstanding the provisions of section 723 of the Revised Statutes, which prohibit suits in equity in either of the courts of the United States, in any case where a "plain, adequate, and complete remedy" may be had at law, there remains a limited range of cases in which the jurisdiction continues to be exercised concurrently, for the reason that the remedy at law, although existing, seems less practicable and less efficient to the ends of justice and its prompt administration than the remedy in equity. *Boyce's Ex'rs* v. *Grundy*, 3 Pet. 215.

The single question which we have to consider is, have the complainants set forth such a state of facts as entitle them to equitable relief; or have they a plain, adequate, and complete remedy at law? In granting the rule to show cause, I stated these facts with sufficient fullness to enable any one to understand the relations which the complainants sustain to the patent. Charles Spring, one of the complainants, was the absolute owner of the undivided one-half of the patent sued on from May 12, 1873, to December 23, 1876, when he transferred the legal title to the Howe Machine Company, but reserved his interest in the damages and profits for all infringements anterior to that date. George E. Betton, the assignor of John F. Wood, the other complainant, owned the remaining half during that time; but when he assigned to Wood his title, on the twenty-first of April, 1879, he included in the transfer all his claims for damages and profits which had accrued to him before the date of the assignment. If he had not included these claims in the transfer, the action, nevertheless, would have been maintainable in the joint names of Spring and Betton, and they would have been entitled to recover the past damages for infringement within the period of time specified, although neither of the actors, when the suit was instituted, had any interest whatever in the title to the patent. See *Moore* v. *Marsh*, 7 Wall. 515.

But did Wood acquire such an interest in the past damages and profits, by the assignment from Betton, that he could bring suit in his own name for their recovery? Doubtless he could not have done so if the claim for damages had been divorced from the ownership of the letters patent, and had been assigned independently of and not as an incident to the title. Such a claim, standing alone, is a mere *chose in action*, and at common law no suit could be maintained thereon in the name of the assignee. But such a difficulty has been

remedied by statute in a number of the states, and the provisions of section 4919 of the Revised Statutes seem broad enough to bring the present case within their scope and design. It is there enacted that damages for the infringement of any patent may be recovered by action in the case, in the name of the party interested either as patentee, assignee, or grantee. *Interested* in what? Not merely in the title, but in the damages, and not as patentee only, but as assignee. If I am correct in this construction of the section it is an answer to the labored argument of the counsel for the complainants that the court had jurisdiction on its equity side only, because the title of one of the complainants (Wood) was equitable and not legal.

In order to show the right of complainants to an injunction, and hence the equitable jurisdiction of the court, the learned counsel invoked the principle, so well settled in patent practice, that any person to whom a part of a patent has been assigned may maintain the suit alone for the protection of his own interest. Kerr, Inj. 404.

The right of the partial owner will not be disputed, subject, nevertheless, to the limitation that in such a case he must make his copartners in the ownership defendants in the suit, which was not done here. We must take the case as we find it, and consider it in the light of what the parties have, in fact, done, and not in the light of what they might have done. Wood's interest in the patent continued to the end of the term, and at any time before the expiration of its life, it may have been competent for him, under the circumstances of the case, to have gone into court in his own mame, and to have obtained an injunction against future infringement. But he chose to pursue a different course. Dividing his interests by the date of the transfer from Charles Spring to the Howe Machine Company, he commenced two suits,—one in connection with Charles Spring, to recover the damages and profits arising from infringement during their joint ownership, and the other in connection with the Howe Machine Company, for the damages and profits from the beginning of their joint title *to the tenth day of May, 1880, when the patent expired.* It is not necessary to determine, *until the question is raised, whether he was entitled to an injunction in the last-named suit or not.* But I cannot understand upon what principle one can be claimed in the former; none, certainly, is necessary to protect the rights of the complainants. Charles Spring has ceased to have any interest in the patent, and everything that John F. Wood ought to have he can get in his suit in union with the Howe Machine Company for the infringment subsequent to his purchase.

An injunction is a preventive remedy, having reference to the future rather than the past. The complainants not being entitled to one in this case, and the provisions of the patent law giving to one to whom has been assigned an interest in the damages for past infringement, as incidental to the transfer of the legal title, the remedy of an action on the case, I am of the opinion that this court in equity has no jurisdiction; that the interlocutory decree heretofore entered must be opened and the bill of complaint dismissed; but, under the circumstances, without costs to the defendant.

(August 16, 1882.)

On Motion for Rehearing.

NIXON, D. J. This cause having come on to be heard upon an order granted for a rehearing, based upon the petition of defendant, verified May 23, 1882; and upon the bill of complaint, filed June 2, 1879; the amendment to said bill, filed August 26, 1879; the answer thereto of the defendant, the Domestic Sewing-Machine Company; the replication of the complainant, and the proofs, oral, documentary, and written, taken and filed in said cause, and having been argued and submitted by counsel for the respective parties: Now, therefore, on consideration thereof, it is ordered that the interlocutory decree, heretofore entered, be opened and the bill of complaint dismissed without cost to defendant; and now, on motion of John Dane, Jr., Esq., counsel for the defendant, the court doth hereby order, adjudge, and decree that the complainants' said bill of complaint be, and the same hereby is dismissed, without cost to defendant.

NELLIS v. PENNOCK MANUF'G CO.*

(*Circuit Court, E. D. Pennsylvania.* August 1, 1882.)

1. PATENT—INCLUSION OF SEVERAL PATENTS IN SAME SUIT.
   Claims for infringement of several patents may be included in one suit where the subjects of the patents are correlative, and all the inventions covered by them are embodied in the same infringing machine.
2. SAME—ASSIGNMENT—RIGHT OF ASSIGNEE TO SUE IN HIS OWN NAME.
   An assignment of "the exclusive right to manufacture and sell my invention in the United States to the full end of the term for which said letters were

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

granted," vests in the assignee the entire monopoly in the patent throughout the United States, and he may bring an action in his own name for an infringement.

3. SAME—LICENSE—PARTIES TO SUIT.

The grant by such assignee to a third person of the exclusive right to manufacture and sell a particular machine containing improvements covered by the patent is only a license, and the licensee is not a necessary party to the suit for infringement.

4. SAME—VALIDITY OF PATENT.

Reissued patents Nos. 2,429, for improvement in hay elevators, and 2,260, for improvement in horse hay forks, and original patent No. 53,345, for improvement in horse hay forks, *held* valid.

Bill in Equity for an injunction against the infringement of certain patents. The facts are sufficiently stated in the opinion.

Bakewell & Kerr, for complainant.

Henry Baldwin, Jr., for respondents.

McKENNAN, C. J. On the eighteenth day of December, 1866, letters patent No. 2,429, for "improvement in hay elevators," were reissued to Edward L. Walker; on the twenty-ninth of May, 1866, reissued letters patent for "improvement in horse hay forks" were granted to Seymour Rogers, No. 2,260; and on the twentieth of March, 1866, letters patent No. 53,345, for "improvement in horse hay forks," were granted to Seymour Rogers. The title to these several patents is alleged to be vested in the complainant, and they constitute the subjects of the present controversy. The bill alleges that the inventions described and claimed in these several patents "are susceptible of connected use in practical operation in the construction of horse hay forks," and that they are embodied and contained in hay forks manufactured, used, and sold by said respondent, in violation of the exclusive rights of complainant. With this averment in the bill, it is not demurrable for multifariousness.

The inclusion of several patents in the same suit, where their subjects are correlative, and the inventions claimed are embodied in the same infringing machine, has been more than once sanctioned by the highest authority. *Nourse* v. *Allen*, 3 Fish. 65; *Seymour* v. *Osborne*, 11 Wall. 516, 559; *Bates* v. *Coe*, 15 O. G. 342.

In *Seymour* v. *Osborne* Mr. Justice Clifford says "that as all the patents sued upon refer to the same general subject, and are all embodied in the machines manufactured by the defendant, the objection, if it had been made, could not have been sustained." The demurrer for this cause is therefore overruled.

The complainant's title to the patents in question is denied in the answer, and it is insisted that the proofs do not establish his right

to maintain this suit. Patents No. 2,260 and 53,345 seem to have been regularly assigned to the complainant, in terms which vest in him the entire interest in these patents, and therefore his right to sue on them is unquestionable; but Walker's assignment of his original letters, which were succeeded by reissue 2,429, is claimed to be so restricted as to constitute the complainant only a licensee, and so to disable him from suing in his own name. That assignment is dated February 20, 1865, and, after reciting the grant to Edward L. Walker of letters patent No. 44,129, assigns to "D. B. Rogers & Sons, of Pittsburgh, Pa., and their legal representatives, the exclusive right to manufacture and sell my invention in the United States to the full end of the term for which said letters were granted," and is duly executed by Walker, and recorded in the patent-office.

There can be no doubt that this conveyed to the assignees the entire right to manufacture and sell the invention throughout the United States, to the exclusion of the patentee as well as all others. They were invested with the monopoly of manufacture and sale, and, so far as these two incidents of the franchise are involved, nothing whatever remained in the patentee. What interest, then, had he upon which he could maintain a suit for a violation of either of these rights? And why could not the party who alone is entitled to protection, invoke directly the powers of a court of equity for that purpose? Even in an action at law, in which the plaintiff must be invested with the legal title to the patent, it was held by Mr. Justice Story that "where a grant was made of a right to construct and use 50 machines within certain localities, reserving to the grantor the right to construct, and to license others to construct, but not to use them therein, the grant was of an exclusive right, under the act of 1836, in regard to patents, and that suits were to be brought in the name of the assignees;" the judge saying: "The action for the violation of an exclusive right is confined to the owner of such right." *Washburn* v. *Gould*, 3 Story, 122. But if this is not so, I think the entire monopoly in the patent is vested in the complainant. He has the exclusive right to manufacture and sell; and this carries with it the right to use the machines sold. To the extent to which the patentee transferred the right to make and sell his invention, he parted with the monopoly of its use, and authorized its use by those who had become lawful purchasers of it. But he had parted with his entire right to manufacture and sell, so that, necessarily, he could not sell to others to use, and no part of the monopoly remained in him. The complainant alone has the right to sell, and as it would

practically be nugatory without the right to use the machines sold, all that is essential to its full exercise and enjoyment must be taken to have been intended by the parties to pass with it; and nothing short of an express qualification will change this result. See *Bloomer* v. *Millinger*, 1 Wall. 340.

Such was the practical construction put upon the instrument by the parties to it. After the reissue of the original patent, to which the assignment referred to applied, to-wit, on the twenty-sixth of January, 1867, another assignment to D. B. Rogers & Sons was executed by Walker, in which the following is the granting clause:

"And do confirm to them and their legal representatives, without further fee or payment, and without liability to forfeiture, all and every right to manufacture, sell, and use, and vend to others the right to manufacture, sell, and use, hay elevators under the aforesaid letters patent, and pursuant to the aforesaid assignments, dated the twentieth day of February, A. D. 1865, as fully and entirely to all intents and purposes as if the said agreement of the same date had not been made and executed; together with the same rights, powers, and privileges in the said invention and improvements, under the reissue of the said letters patent, that has been or may be obtained."

It is true that the technical import of this instrument is to release Rogers & Sons from liability assumed by them by an agreement of even date with the original assignment, and to nullify the effect of that agreement upon the rights conveyed by the assignment; but it cannot be conceived that the assignor would "confirm" to his assignees the right "to use, and to vend to others to use," his invention, if he had not intended, and did not intend, to part with it, and unless it was understood and believed that a transfer of such right was comprehended by the previous assignment.

In addition to the "confirmation" of the rights to "manufacture, sell, and use, and vend to others to use," the invention, these "same rights" in the invention, under the reissue then obtained, or to be obtained, are also conveyed. So that in every aspect of the question it seems to me that these instruments are to be taken as intended by the parties to vest in the assignees the entire interest of the assignor in the patent. And when the parties have so expounded their contracts, it is out of place for an entire stranger to them to seek to circumscribe their scope by a technical limitation of the spirit and sense which the parties have impressed upon them.

It is further alleged that Wheeler, Melick & Co. have such an interest in one of the patents in controversy that they are necessary parties to any suit founded upon it. On the twenty-eighth day of

June, 1867, D. B. Rogers & Sons, then owning the Walker patent, made an agreement with Wheeler, Melick & Co., by which they granted to the latter "the exclusive right under said recited letters patent to manufacture and sell a certain hay elevator, which has a movable point, which also serves as and performs the functions of prongs or barbs to sustain the hay." This is not an assignment of an exclusive interest in the entire monopoly for the whole or any portion of the United States. It is a license only to manufacture and sell exclusively a specified form of hay elevator, covered by the Walker patent, the beneficial ownership of it as to all other form of hay forks, and the legal title to it, remaining in D. B. Rogers & Sons. It is in terms defined as a license in this agreement, and its character as such is conclusively apparent from other agreements between the same parties, which have been made part of the evidence. Under all the decisions, the representatives of such an interest are not indispensable parties to a suit upon the patent. Nor are they even proper parties here, because the decree asked for will not affect their interests, and they have, since the commencement of this suit, released to the complainants all rights and interest which they might have under the patents in suit.

I do not propose to assume the labor of discussing in detail the various defenses set up by the respondent. This opinion is sufficiently extended. It is only necessary to say that these defenses, and the argument in enforcement of them, have failed to convince me that the complainant ought not to have the relief which he seeks.

I am of opinion (1) that reissued patents Nos. 2,429 and 2,260, and original patent No. 53,345, are valid, and that they have been severally duly assigned to the complainant; (2) that the respondent, in the hay elevator exhibited in evidence and manufactured and sold by it, is shown to have infringed the first claim of No. 2,429, the first and second claims of No. 2,260, and the claim of 53,345.

A decree will accordingly be entered in favor of the complainant, with costs, and for a reference to a master to ascertain damages and profits.

LULL v. CLARK and others.

(*Circuit Court, N. D. New York.* 1882.)

PATENTS FOR INVENTIONS—FORMAL VARIATION—INFRINGEMENT.

Where the mechanism used by defendant's shutter hinge is a mere formal variation from that of plaintiffs' invention, having the same mode of operation, it is an infringement of the patent.

In Equity.

Livingston Gifford, and *Philip J. O'Reilly*, for plaintiff.

George J. Sicard, for defendants.

BLATCHFORD, Justice. This suit is brought on letters patent No. 10,477, granted to Harvey Lull and Richard Porter, on the invention of Lull, January 31, 1854, for 14 years from January 2, 1854, for an "improvement in shutter hinges," extended for seven years from January 2, 1868, and again extended for seven years from April 29, 1876, under the provisions of a special act of congress approved on that day. The specification says:

"Figure 1 represents the hinge as opened and locked; figure 2 represents the hinge in its position when the shutter is drawn from the wall sufficiently far to unlock it; and figure 3 represents the hinge when the shutter is closed. There are several varieties of shutter and door hinges, the greater portion of which, in being opened, bring two inclined planes in action, causing the shutter or door to rise, the object being to cause doors especially to swing clear of the carpet. Some of these are provided with a fastening which is formed of a separate piece. Another method is to make a series of planes, which admits of the door rising and falling several times in the act of swinging it open and shut. I do not lay claim to any of these hinges, for they are almost useless for shutter hinges, for which purpose my hinge is especially designed. It is well known that window shutters must swing into the frames several inches before they come to their seats, and to use either of the class of hinges before mentioned would cause the shutter to rise up against the frame and bind, or else it must be cut away, which would admit rain, snow, etc. My hinge allows the shutter to swing around horizontally until it almost reaches the wall, when it drops and locks. This is one distinguishing feature of mine over other hinges. Again, my hinge is composed of but two pieces, each entirely of cast metal, while the others which are self-locking are composed of three or more; and, indeed, many of those which work upon the planes use a friction roller to aid in causing one half of the hinge to rise on the other half, which is expensive and very liable to become disarranged, as well as adding another piece to the hinge. This constitutes a second difference. But the most essential point of difference between my hinge and those heretofore essayed consists in my being able to use a cast-iron spindle with

perfect safety, from the fact that, when the shutter is opened and locked, the force of the wind tending to close the shutter is taken entirely off the spindle and thrown upon two cast arms, and, in opening or closing the shutter, its weight is partially taken upon two square shoulders, thus relieving the spindle, which is really but a directrix to the other parts, without taking the weight of the shutter upon it. For this reason I can safely rely upon the cast-iron spindle. I do not contend, however, that cast-iron spindles have not been used, but I do contend that they are liable to be broken by any sudden slamming of the shutters, as they heretofore had to sustain its entire weight. I do not assert that my invention consists of three distinct differences between what has heretofore been done and what I have done, but I claim so combining these differences as to produce in a hinge of two pieces a very cheap, strong, and effective self-locking hinge, which has not been done before. The nature of my invention, therefore, consists in the so forming of a self-locking hinge, cast in two pieces, as that a shutter hung thereon may swing open or shut on a horizontal plane, and lock when opened to its limit, and so that, also, when locked open, the strain shall be taken off the spindle and thrown on to cam arms, and thus effectually relieve the spindle from the force of the winds.

"To enable others skilled in the art to make and use my invention, I will proceed to describe the same with reference to the drawings. My hinge is cast in two pieces of iron, or any other suitable metal, each piece being identical in form, with the exception that one carries the spindle, the other the socket. Instead of forming the inclined planes on the shoulder of the hinge, as is heretofore done, I place them outside of the shoulder, and as remote from the center of the hinge as possible, placing one, *b*, figure 3, on the arm or shank of the hinge extending from the shoulder to the wing or plate, and projecting from two-thirds to three-fourths of its inclination from the face of the hinge. The other, *a*, figure 3, is placed directly opposite, and extends the same distance from the center of the hinge, and faces in the opposite direction to that, *b*. The inclination of the planes should be about 45 degrees at the extreme outer end, and approach the vertical as they come nearer the center of the hinge. The shoulder is formed with the half next the arm standing even with the top of the planes, and the other half cut down level with the bottom of the planes. The bottom half of the hinge inverted makes the top half by substituting the hole for the pivot. When a shutter hung on these hinges is thrown open, resting on the shoulders of the hinges, it neither passes over notches nor up inclined planes, but swings freely around to a position nearly parallel with the wall, where the support of the shutter passes from the shoulders, *c*, *d*, figure 2, to the inclined planes, and the bottom of the planes, A, A, are brought to the top of the planes, B, B, as shown in figure 2, and the shutter is carried to the wall by its gravity on these inclined planes, and the hinge is locked, as shown in figure 1, one-half having dropped below its general position. In closing the shutter a slight force only is necessary, viz., to draw the shutter four or five inches, to force it up the planes, when the support of the shutter is returned to the shoulders, *c*, *d*, on which it rests, and swings horizontally to its seat, entirely preventing the planes from coming in contact as it closes, as shown in figure 3."

The claim is in these words:

"The so forming of a self-locking shutter hinge, cast in two pieces, as that the blind or shutter hung thereon may swing open or shut on a horizontal plane, and lock when opened to its limit, and so that, also, when locked open, the strain shall be taken off from the spindle and thrown on to cam arms, and thus effectually relieve the spindle from the weight or strain of the shutter, substantially as described."

In order to construe properly the claim of the Lull patent it is necessary to understand what preceded it.

The defendants have introduced two English patents to David Redmund,—one of 1821, No. 4,607, and one of 1872, No. 9,454. The Redmund hinge is in two parts, and has inclined planes on the shoulder, and also horizontal planes. But it is arranged to be so applied to a door that the door will, when it begins to open, rise up, because the inclined planes come immediately into action, and, as the door is further opened, the inclined planes go out of action, and horizontal shoulders come into action, so that the door goes on opening without rising any more. If the horizontal shoulders are left at rest the door will remain at rest. If the door is pushed so that the horizontal shoulders lap by each other it will drop, because the socket, being unsupported, drops on the spindle and the hinge is locked, so that the entire door must be raised in order to unlock the hinge. If, when the door is supported by the horizontal shoulders, it is pushed to close so far as to bring the inclined planes into action, it will close by their action and its weight without further pushing. The inclined planes face in opposite directions, and the two parts are identical in shape, except that one carries the spindle and the other the socket. It is clear that this structure does not anticipate Lull's hinge. It is useless as a shutter hinge, for that must open horizontally at first and then drop and be locked, and not rise at first in opening and then move horizontally and be locked; and it would require the moulding of the window to be cut away; and it could not be unlocked by merely pulling the shutter. It is plainly referred to in Lull's specification, and distinguished from his invention.

The Cryer hinge is substantially like Redmund's. Inclined planes come into action first, and then horizontal planes. There is no locking when the gate or door is open. To say that Redmund's and Cryer's hinges can be made to operate on a shutter by so arranging them that the horizontal planes will act before the inclined planes, is merely to say that Lull's invention might have been made by Redmund and Cryer if they had made it.

The Stewart hinge, patented April 24, 1847, locks by gravity, but it has no inclined planes, and has more than two parts, and cannot be unlocked by pulling or pushing the shutter.

Whatever there is in the Baker patent of April 13, 1852, it is shown that Lull made his invention before June 6, 1851.

The Reed patents of 1848 and 1849 are of no moment, and may be passed without observation; and so may the Robison patent of 1848, and the Peck patent of 1847, and the Palmer patent of 1843.

None of these prior hinges accomplished the object attained by Lull. One feature may be found in one structure, and another in another. But no one before Lull made a shutter hinge, cast in two pieces, which would swing open horizontally and then come to a self-locking position by the action of the weight of the shutter through inclined planes, allowing the shutter to drop, and then permit the shutter to rise by pulling it so as to bring the inclined planes into action and elevate the shutter so as to admit of its closing horizontally as it opened. In the Lull hinge, also, the strain is taken off of the spindle and is thrown onto the arms as far as possible by having the inclined planes on the arms and as far from the spindle as possible, and by having these planes face in opposite directions, and having the two parts alike, so as to reduce to a minimum the risk of breaking a cast-iron spindle.

The defendants' hinge is of the form described in letters patent No. 156,277, granted to Charles B. Clark, October 27, 1874. The specification of that patent says:

"My invention relates to that class of blind hinges which are self-locking, or those which fasten the blind, when opened, by the half of the hinge to which the blind is attached sliding down an incline on the half attached to the house, and it has for its object the more effectually to secure the blind when in an open position, and prevent its being closed by the wind or other accidental cause, and yet admit of its ready closing by hand when required; and it consists in the combination, with a gravity-locking hinge provided with gravitating locking inclines, of a projecting catch or stop formed upon the pin of the hinge, which, when the blind is swung open and the male portion descends, the inclines of the knuckle on the female portion of the hinge drops into a notch formed in the eye of the female half, and acts in conjunction with and auxiliary to the locking inclines, to increase the resistance, and thus serve to hold the blind securely in an open position. Figure 1 of the accompanying drawings is a perspective view of my improved hinge when closed; figure 2 is a plan and part section of the same when open; and figure 3 a plan of the parts detached, in which A represents the male portion inverted, and B the female portion of the hinge. In the drawings A represents the male portion of the hinge provided with the pin, *c*, and B the female

portion having the eye, *e*. The pin, *c*, is surmounted by the knuckle, *k*, and the flange, *d*, on which are formed the inclines, *m'*, *n'*. Corresponding inclines, *m*, *n*, are also formed on the proximate side of the knuckle, *h*. The part A being rotated upon the part B, the weight of the blind is borne by the under surface of the lower part of the flange, *d*, bearing against the upper surface of the higher part of the knuckle, *h*, until the blind is nearly open, bringing the double machines, *m*, *m'*, *n*, *n'*, coincident, when the blind gravitates to the bottom of the inclines, in which position it rests, being fully opened and locked against accidental causes. When desired to close it, it is disengaged by steadily pulling, the force of the hand overcoming the resistance caused by the inclines. The pin, *c*, and socket, *e*, are preferably formed cylindrical on one side, and angular on the opposite one, as seen in figure 3, leaving, however, sufficient room in the socket to admit of the pin turning freely. In gravity-locking blind hinges, constructed with inclines which engage by the gravitation or descent of one-half upon the other, when the blind is open, to lock it in that position, it is found that, although the locking inclines offer sufficient resistance to ordinary winds to prevent the closing of the blind, yet they will yield to unusually strong winds, and it is hence desirable to provide such hinges with a means which will increase the resistance to unintentional closing, and effectually prevent the same. To this end I provide the hinge with a stop, *f*, on the circular side of the spindle, situated so as to come into action when the blind gravitates down the inclines. The stop, *f*, projects radially on one side. Its other side is beveled, and its outer face inclined to correspond with the inclines, *m'*, *n'*, and its base joined with the flange, *d*. The female portion has a corresponding recess, *g*, formed in the eye next the bearing surface of the knuckle, *h*. One side of which is abrupt, and the other beveled like the stop, *f*. The positions of this projection and its recess are such that when the blind is opened to the fullest extent their abrupt sides approximate, and the blind is so firmly held by the engagement of this stop, aided by the inclines and the pin bearing against the side of the eye, that it is secure against accidental causes, such as sudden gusts of wind, etc., unlocking the blind, and yet it yields to the effort of the hand, the steady lateral pull of which raises the stop, *f*, out of the recess by the movement of the inclines, *m*, *m'*, *n*, *n'*, upon each other. It will be observed that the stop and recess offer no resistance to this movement, as they are formed parallel with or with the same inclination as the inclines, *m*, *n*, *m'*, *n'*, so that the blind may thus be closed by the hand with as much ease as if the stop were not used. The construction is such that the blind may be thrown violently open without straining the hinge, and it may be moulded and cast as readily as the old form."

The claim of the Clark patent is this:

"In combination with the locking inclines *m*, *n*, *m'*, *n'*, the auxiliary locking stops, *f*, and recess, *g*, said inclines, stop, and recess, arranged and operating in conjunction with each other, as and for the purposes herein set forth."

In the printed copy furnished in the printed record, of the specification of the Clark patent, there are some manifest errors, which are

corrected in the foregoing copy. Whenever the knuckle, *h*, on the female portion of the hinge, is intended to be mentioned, which is three times, it is misprinted *k*, which is the designation, in the drawings, of the knuckle on the male portion of the hinge. So also "the double inclines" are called on the print "the double inclines, *m*, *m*';" but it should read, "the double inclines, *m*, *m*', *n*, *n*'." And in regard to raising the stop out of the recess, the print reads, "the movement of the inclines, *m*, *m*', upon each other," whereas it should read, "the movement of the inclines, *m*, *m*', *n*, *n*', upon each other."

It is contended for the defendants that the Clark hinge does not infringe the Lull patent for these reasons:

> (1) The two parts of the Clark hinge are not identical in form, except as to spindle and socket; (2) the inclined planes on it are formed on the shoulder of the hinge, and not outside of it; (3) it does not have two inclined planes placed diametrically opposite and facing in opposite directions, but the two principal inclined planes on each shoulder face in the same direction, and there is no inclined plane on the same shoulder which faces in an opposite direction; (4) the strain is not taken off the spindle and thrown upon cam arms, there being no cam arms nor anything taking their place.

The claim of the Lull patent must be construed as a claim for mechanism. It is awkwardly drawn. It is a claim to the so forming of a hinge cast in two pieces as that certain results will follow in the use of the hinge on a shutter "substantially as described." It is a claim to the "so forming" "substantially as described." This is a claim to mechanism. The description must be looked to to ascertain what the mechanism is, and the results named in the claim must be taken into consideration in ascertaining what parts of the mechanism described enter into the claim. The claim is not one for the results mentioned in the claim.

It is very clear that the Clark hinge is a self-locking shutter hinge cast in two pieces; that it swings open on a horizontal plane, by the bearing of horizontal shoulders on each other, until the horizontal shoulders cease to bear on each other, and the shutter descends by gravity, by means of inclined planes in the hinge, and the hinge is locked in that position against ordinary movements; that the shutter may be shut by pulling it and bringing the inclined planes into action first, and then the horizental planes; and that, when the shutter is locked open, the operation of the inclines bearing against each other, in case of a movement of the shutter by the wind or otherwise, is such as to throw the strain on the knuckles to which the inclines are

attached, to an extent sufficient to make the strain on the spindle less than it would be if the inclines were not arranged as they are.

Lull, in his specification, describes the two parts of his hinge as like each other. They are so constructed. But this is not of the essence of the invention. It is undoubtedly the best form, and, with the two planes on each arm facing in opposite directions, and of the same size, and in the same relative position, their coaction with the other two planes gives the most perfect relief to the spindle. But a departure from these features to some extent, while producing an inferior hinge, in respect to relieving the spindle, still relieves it to some extent, and constitutes no departure from the invention of Lull, all the other features of his claim being used. Still it cannot be said that Clark's inclined planes are not on the shoulder of the hinge, or are outside of the shoulder, or are on cam arms such as the Lull patent has. But a fair construction of the Lull patent is that it really makes two claims. In stating the nature of the invention, the specification says that it consists "in the so forming of a self-locking hinge, cast in two pieces, as that a shutter hung thereon may swing open or shut on a horizontal plane, and lock when open to its limit." This is a construction involving certain features and parts. It involves those parts which cause the shutter to swing open on a horizontal plane, and then to lock by the operation of inclined planes, and then to shut by being pulled and rising, through the return action of the inclined planes, until it is raised far enough to shut on a horizontal plane. This operation of mechanism is independent of any relief of the spindle. Then the specification goes on to say, "and so that, also, when locked open, the strain shall be taken off the spindle and thrown onto cam arms, and thus effectually relieve the spindle from the force of the winds." The specification thus states that the nature of Lull's invention consists in the so forming of a self-locking hinge cast in two pieces, as that, when it is locked open, the result named, as to strain, will take place, in addition to the so forming of such hinge as that it will have the described operation as to swinging open or shut and locking when open. The features of mechanism which provide for the horizontal swinging and the after locking may fully exist without being in such form as to produce the effect as to strain spoken of by Lull. The language of the specification is to be taken distributively, and not as for a combination of all the features. So, too, with the claim. It is, in effect, by its structure, and by reference to the descriptive part of the specification, two claims—one for such of the described mechanism as is

necessary to secure the described swinging and locking, and the other for such of the described mechanism as is necessary to secure the result described as to strain. A reissue with a division of the claim into two claims would have been sustainable; the patent as it is is fairly capable of the foregoing construction.

The Clark hinge embodies the swinging and locking mechanism of Lull, which is a material part of his invention, and is thus separately claimed. Having the inclines on the shoulder or outside of the shoulder, on cam arms or not on cam arms, is not a matter affecting the swinging and locking, but affecting only the relief of the spindle. The feature which Clark has added, of the additional stop, is a feature not concerned with the swinging and locking through the action of the horizontal planes and inclined planes, but is something added to the locking. The Clark patent is granted for the auxiliary locking stop and recess added to and combined with the four inclines which allow the blind to descend by gravity, and be locked after it has opened horizontally. The mechanism used in the Clark hinge to cause it to open horizontally and then lock, is a mere formal variation from that of Lull, having the same mode of operation. In opening, the shutter swings freely on horizontal shoulders, and then the support passes to inclined planes, and the shutter is carried by gravity down such planes and is locked, and then is pulled by the hand up the inclined planes, and the support is returned to the horizontal shoulders and the shutter is swung shut.

There must be the usual decree for the plaintiff, for an injunction and an account, with costs.

HOLT and others *v*. KEELER and another.

(*Circuit Court, N. D. New York.* August 1, 1882.)

PATENT—VALIDITY OF REISSUE.

In the descriptive matter in the specification in the original patent for an improvement in making wheels, granted January 23, 1866, it was said that "the type wheel is provided with yielding rims or flanges, made of India rubber or other elastic material, so that the types can be depressed on the surface to be marked with the requisite force to produce the desired impression. * * * This type wheel * * * is provided with projecting flanges, *b*, made of India rubber or other soft and elastic material, so that by pressing the wheel down upon the surface to be marked the types are brought into contact with said surface with the requisite force to produce the desired impression;" and claim No. 2 was as follows: "(2) The yielding flanges, *b*, on type wheel, A, constructing and operating substantially as and for the purpose described." October 26, 1875, a reissue was granted, and in the specification the descriptive matter was altered to the following: "The type wheel is provided with rims or flanges, preferably made of India rubber or other elastic material, so that the types can be depressed on the subject to be marked with the requisite force to produce the desired impression. The rims or flanges seem to keep the surface of the type in a plane parallel with the surface to be marked, which is otherwise often difficult, owing to the different lengths of lines of type, or the position of the type at the side of the surface of the type wheel. * * * This type wheel * * * is provided with projecting flanges, *b*." The claims of the reissue were these: "(2) The combination with a handle of a type wheel provided with flanges for keeping the plane of the type paralled with the surface of the article to be marked; (3) a type wheel provided with yielding flanges, constructed and operating substantially as and for the purpose described." The wheels used by the defendants would not have infringed claim 2 or 3 of the original patent, but would infringe claim No. 2 of the reissue, because they have a handle and rigid flanges which keep the plane of the type parallel with the surface of the article to be marked. *Held*, that if there was any error in the original patent in not setting forth and claiming rigid flanges, or in stating that the flanges were to be elastic, and were to be so arranged that the types were to be out of contact with the surface to be marked until by the yielding of the flanges through pressing down the wheel the types were to be brought in contact with such surface, the error was a plain one, apparent at once to the patentee, and as capable of being promptly corrected then as by a reissue after a lapse of more than nine years, during which the manufacture of wheels substantially the same as those of the defendants had been entered upon, there being no infringement of any claim of the original patent in respect to flanges, and that claim No. 2 of the reissue could not be upheld as covering any flanges but such as were shown in the original patent, consequently the bill must be dismissed, with costs.

George W. Hey, for plaintiffs.

James A. Allen, for defendants.

BLATCHFORD, Justice. This is a suit in equity brought on reissue of letters patent No. 6,714, granted to Horace Holt, one of the

plaintiffs, October 26, 1875, for an "improvement in marking wheels;" the original patent, No. 52,169, having been granted to him January 23, 1866. As questions concerning the validity of the reissue are raised, it will be useful to place the two specifications side by side. The left-hand one is the specification of the original patent, and the right-hand one is that of the reissue. In each the parts which are not found in the other are in italics:

ORIGINAL.	REISSUE.
"Figure 1 represents a side elevation of this invention. Figure 2 is a sectional plan or top view of the same. Similar letters of reference indicate like parts. This invention consists in a revolving type wheel, arranged in a suitable handle in combination with an ink roller, in such a manner that, by carrying said type wheel over the cover of a box, or over any other surface, the types on said wheel produce an impression, and the marking of a box or other article can be effected neatly and distinctly, with little loss of time. The ink roller is composed of a hollow cylindrical reservoir, perforated with small holes, and surrounded by a strip of cloth or other absorbent material, so that the same is capable of holding a supply of ink for a large number of impressions. The type wheel is provided with *yielding* rims or flanges made of India rubber or other elastic material, so that the types can be depressed on the surface to be marked with the requisite force to produce the desired impression,	Figure 1 represents a side elevation of this invention. Figure 2 is a sectional plan or top view of the same. Similar letters of reference indicate like parts. This invention consists in a revolving type wheel, arranged in a suitable handle, in combination with an ink roller, in such a manner that, by carrying said type wheel over the cover of a box, or over any other surface, the types on said wheel produce an impression, and the marking of a box or other article can be effected neatly and distinctly, with little loss of time. The ink roller shown *in the drawings* is composed of a hollow cylindrical reservoir, perforated with small holes, and surrounded by a strip of cloth or other absorbent material, so that the same is capable of holding a supply of ink for a large number of impressions. The type wheel is provided with rims or flanges, *preferably* made of India rubber or other elastic material, so that the types can be depressed on the surface to be marked with the requisite force to produce the desired impression. *The rims or flanges serve to keep the surface of the types in a plane parallel with the surface to be marked, which is otherwise often difficult, owing to the different lengths of lines of type, or the position of the type at the side of the surface of the type wheel.*
and a coiled or other spring *is* applied to said type wheel *in such a manner that it carries* the same back, after	It is also advantageous to use a coiled or other spring, *which, when* applied to said type wheel, is

each impression, to the starting point, and thereby the types are brought in contact with the ink roller, and supplied with the requisite quantity of ink for the subsequent impression; and, furthermore, the type wheel readjusts itself in the required position for starting.

A represents a wheel made of cast iron or other suitable material, and arranged so that the desired types can be applied to or inserted in its periphery, either permanently, by means of a strip of copper or other suitable material, or so that said types can be changed at pleasure. This type wheel is mounted on an axle, *a*, which has its bearings in a forked handle, B, and it is provided with projecting flanges, *b*, *made of India rubber, or other soft and elastic material, so that by pressing the wheel down upon the surface to be marked, the types are brought in contact with said surface with the requisite force to produce the desired impression.*

As the wheel revolves, the types on its circumference come in contact with the surface of the ink roller, C, which is mounted on an axle, *e*, having its bearings in the extreme ends of the forked handle, B. Suitable springs, *d*, draw the ink roller towards the type wheel, and, by disconnecting said springs, the ink roller can be removed from its seat.

arranged to carry the same back, after each impression, to the starting point, and thereby the types are brought in contact with the ink roller, and supplied with the requisite quantity of ink for the subsequent impression, and, furthermore, the type wheel readjusts itself in the required position for starting.

A represents a wheel made of cast iron or other suitable material, and arranged so that the desired types can be applied to or inserted in its periphery, either permanently, by means of a strip of copper or other suitable material, or so that said types can be changed at pleasure. This type wheel is mounted on an axle, *a*, which has its bearings in a forked handle, B, and it is provided with projecting flanges, *b*.

As the wheel revolves, the types on its circumference come in contact with the surface of the ink roller, C, which is mounted on an axle, *e*, having its bearings in the extreme ends of the forked handle, B. Suitable springs, *d*, draw the ink roller towards the type wheel, and, by disconnecting said springs, the ink roller can be removed from its seat. *Each end of the fork of the handle has two slots,—one long and the other short,—which form main and secondary bearings for the journals of the inking roller. When it is desired that the roller and wheel should be in contact, the journals of the former should be in the long slots, as shown in the drawing, which represents the roller in its normal position; but as it is sometimes necessary that the marking wheel and*

Said ink roller may be made solid, similar to ordinary printers' rollers; but I prefer to make the same of a hollow cylindrical reservoir, *e*, to which access can be had by removing one of its heads. This reservoir is perforated with a large number of small holes, *and it* is surrounded by a strip, *f*, of cloth or other absorbent material. *By these means* a large supply of ink can be carried in the roller, and the marking wheel produces a number of impressions before it is necessary to recharge the same. A spring, *g*, applied to the axle of the wheel, A, (see figure 1,) carries the same back, until the stud, *h*, in the wheel, comes in contact with a pin, *i*, projecting from the inner surface of the forked handle. By this stud and pin the starting point of the wheel is defined, and, by the action of the spring, the wheel is carried back to this starting point after each operation. In moving back, the types, being in contact with the ink roller, are supplied with the requisite quantity of ink for the subsequent operation. It is obvious that the starting point of the type wheel can be determined by other means besides the stud, *h*, and pin, *i*. By this simple device a large number of boxes or other packages can be marked neatly and distinctly with great dispatch.

roller should revolve independent of each other, as when distributing ink on the latter, or when it is being used on a separate flat form, or when either the wheel or the roller, or both, are being cleaned, then the journals of the latter should be placed in the short slots or secondary bearings.

Said ink roller may be made solid, similar to ordinary printers' rollers; but *I have shown in the drawings* a hollow cylindrical reservoir, *e*, to which access can be had by removing one of its heads. This reservoir is perforated with a large number of small holes. *The roller* is surrounded by a strip, *f*, of cloth or other absorbent material. *By means of the reservoir, if used*, a large supply of ink can be carried in the roller, and the marking wheel produces a number of impressions before it is necessary to recharge the same. A spring, *g*, applied to the axle of the wheel, A, (see figure 1,) carries the same back until the stud, *h*, in the wheel, comes in contact with a pin, *i*, projecting from the inner surface of the forked handle. By this stud and pin the starting point of the wheel is defined, and, by the action of the spring, the wheel is carried back to this starting point after each operation. In moving back, the types, being in contact with the ink roller, are supplied with the requisite quantity of ink for the subsequent operation. It is obvious that the starting point of the type wheel can be determined by other means besides the stud, *h*, and pin, *i*. By this simple device a large number of boxes or other packages can be marked neatly and distinctly with great dispatch. *I am aware that a patent was granted Edwin Crowley, dated July* 8, 1856, *in which was shown a handle holding a type.wheel and several inking rollers,*

I claim as new, and desire to secure by letters patent:

1. The combination of the type wheel, A, inking *roller, C, and ink reservoir, e, all constructed, arranged, and operating as specified.*

2. *The yielding flanges, b, on type wheel, A, constructed and operating substantially as and for the purpose described.*

3. *The spring, g, applied in combination with the type wheel, A, stud, b, and pin, i, or their equivalents, substantially as and for the purpose set forth.*

arranged with a distributing band. This I do not claim; but I claim as new, and desire to secure by letters patent:

1. The combination, with a frame and handle, of *a type wheel, provided with a stud-pin, for defining the starting and stopping points, and an inking roller, constructed and operating substantially as specified.*

2. *The combination, with a handle, of a type wheel provided with flanges for keeping the plane of the type parallel with the surface of the article to be marked.*

3. *A type wheel provided with yielding flanges, constructed and operating substantially as and for the purpose described.*

4. *A spring in combination with a type wheel and stop pin, or its equivalent, for retracting the type wheel to its starting point, substantially as and for the purpose set forth.*

5. *The combination of a type wheel with a combined inking roller and ink reservoir, constructed substantially as and for the purpose described.*

6. *The combination of a handle and type wheel with a spring, for attracting the type wheel to its starting point, substantially as described.*

7. *In combination with an inking roller and its usual bearings, secondary bearings so arranged that the roller may revolve independently of the wheel, substantially as set forth.*

The answer in this case alleges that the surrender of the original patent was not made on account of any defect or insufficiency of the specification, but with the fraudulent design of enlarging the claims, so as to embrace inventions not made by him prior to the time when the original patent was issued, and which are not embraced therein; that the reissue, in its description and claims, embraces matters claimed therein as the invention of Holt which were not invented by him prior to the issue of the original patent, and which are not

described or alluded to therein, such enlargement of the claims of the reissue being produced substantially by the insertion of claims 1, 2, and 7, which embrace new matter not shown in the claims, specification model, or drawing of the original patent; and that the reissued patent is for a different invention from the original patent, and is void.

The only claims in the reissue which it is now contended have been infringed are claims 2 and 3. In the specification of the original patent, what is said about the flanges is this:

"The type wheel is provided with yielding rims or flanges, made of India rubber or other elastic material, so that the types can be depressed on the surface to be marked with the requisite force to produce the desired impression. * * * This type wheel * * * is provided with projecting flanges, *b*, made of India rubber or other soft and elastic material, so that, by pressing the wheel down upon the surface to be marked, the types are brought in contact with said surface with the requisite force to produce the desired impression."

The claim based on the above descriptive matter is claim 2 of the original, as follows:

"2. The yielding flanges *b*, on type wheel A, constructing and operating substantially as and for the purpose described."

The foregoing descriptive matter is altered in the specification of the reissue to the following:

"The type wheel is provided with rims or flanges, preferably made of India rubber or other elastic material, so that the types can be depressed on the subject to be marked with the requisite force to produce the desired impression. The rims or flanges serve to keep the surface of the types in a plane parallel with the surface to be marked, which is otherwise often difficult owing to the different lengths of lines of type, or the position of the type at the side of the surface of the type wheel. * * * This type wheel * * * is provided with projecting flanges, *b*."

The claims of the reissue, based on the foregoing descriptive matter in it, are these:

"2. The combination, with a handle, of a type wheel provided with flanges, for keeping the plane of the type parallel with the surface of the article to be marked. 3. A type wheel provided with yielding flanges, constructed and operating substantially as and for the purpose described."

There is in the original a distinct statement that the flanges are made of India rubber, or other elastic, yielding material, and there is no suggestion that they can consistently with the ideas of the

invention be made of any non-elastic, non-yielding material. They are also stated to be projecting flanges. This expression, with nothing more, would be satisfied by flanges projecting from and beyond the face of the type wheel, and would not necessarily mean that the flanges should project to a distance beyond the line of the impression faces of the types. But the expression is, that they are projecting flanges made of elastic material "*so that*, by pressing the wheel down on the surface to be marked, the types are brought in contact with said surface with the requisite force to produce the desired impression." This clearly implies that until the wheel is pressed down on the surface to be marked, the types are out of contact with that surface, because they are raised above it by reason of the fact that the flanges project further from the face of the wheel than the types project from said face; and that, by reason of the fact that the flanges are elastic and yielding, the pressing down of the wheel will cause the flanges to be compressed and to yield, and will allow the types to come into contact with the surface to be marked. It is true that figure 2 of the drawings of the original patent shows the face of the type projecting from the wheel to a greater distance than the flanges project from it. But in figure 2 of the drawings of the reissue the face of the type does not appear to project from the wheel to a greater distance than the flanges project from it.

Mr. Stark, an expert for the defendants, testifies that figure 2 of the drawings of the reissue shows the flanges to project more than the types, and that if they did not, the types could not be depressed in "the surface to be marked" to accomplish the result set forth in the specification. On the other hand, Mr. Robertson, an expert for the plaintiffs, testifies that he thinks the drawings of the reissue are intended to represent the types as on or about the same level as the flanges; that the word "depressed" in the connection in which it is used means that the types must be depressed into the surface of the material; and that this where hard tpyes were used would necessitate the yielding of the flanges. It is very clear, however, that where hard types are used with elastic flanges, in the Holt wheel the flanges must project to some extent beyond the faces of the types in order to be operative as elastic flanges, unless the hard types enter the material that is being marked. Nothing is said in the original specification as to the material of which the types are to be made, whether of hard metal or of elastic material, but it is shown that the model

deposited by Holt in the patent office with his original application showed types of hard metal with elastic flanges. It must therefore be held that the original patent admitted of the use of hard types with elastic flanges. This being so, it follows that the elastic flanges must have been intended to project beyond the faces of hard types in order to be operative, and that such is the meaning of the language of the original specification. That that language was so understood at the time by the inventor is stated by him in his testimony. He says that when the original specification was submitted to him by his solicitor, he objected to that part of it which says, "that force is required to bring the printing surface down to a level or below the flexible bearers so that an impression could be taken, calling his attention to the fact that the bearers on the model were no higher than the face of the types." He says that the elastic flanges in the filed model projected so as to be on a line with the face of the metal types. Yet the specification was allowed to go out in that shape. The inventor does not seem to have used rigid flanges until after the original patent was issued, or to have had any idea when he obtained his original patent of using rigid flanges. One object in obtaining the reissue clearly was to procure a claim which should cover flanges, whether rigid or not, in connection with a handle, while retaining the claim to a type wheel with yielding flanges such as the original patent describes.

One form of the defendants' wheel has rigid flanges which do not project to a distance as far as the faces of the types. In this form of wheel there is a border around the types, but it is a part of the types, and is inked and an impression taken from it, and it is not a flange in the sense of the Holt patent although it is elastic, the types being elastic and the flanges being rigid. In the other form of the defendants' wheel, called the Barnes and Allen wheel, the elastic border is omitted, the types being elastic and the flanges being rigid and not projecting as far as the face of the types. Neither of these forms of wheel would have infringed claim 2 of the original patent; nor does either of them infringe claim 3 of the reissue. They do infringe claim 2 of the reissue, as it stands, because they have a handle and rigid flanges which keep the plane of the type parallel with the surface of the article to be marked, if claim 2 can be construed as covering any flanges but such as were shown in the original patent.

The original patent was granted in January, 1866. The reissue was applied for in March, 1875, and granted in October, 1875. If

there was any error in the original patent in not setting forth and claiming rigid flanges, or in stating that the flanges were to be elastic, and were to be so arranged that the types were to be out of contact with the surface to be marked until by the yielding of the flanges through pressing down the wheel the types would be brought in contact with such surface, the error was a plain one, apparent at once to the patentee, and as capable of being promptly corrected then as after a lapse of more than nine years. Meantime, the manufacture of wheels, substantially the same as those of the defendants, had been entered upon, there being no infringement of any claim of the original patent in respect to flanges. In view of all these facts, claim 2 of the reissue cannot be upheld as a claim covering rigid flanges such as the defendants use. The decisions to this effect are numerous. *Bell* v. *Langles*, 102 N. Y. 128; *Manuf'g Co.* v. *Ladd*, Id. 408; *Manuf'g Co.* v. *Corbin*, 103 N. Y. 786; *Miller* v. *Brass Co.* 3 Morr. Trans. 419; *Bantz* v. *Frantz*, 4 Morr. Trans. 341; *Matthews* v. *Machine Co.* Id. 347; *Johnson* v. *Railroad Co.* Id. 931.

It appears that the inventor held the legal title to his patent for more than five years after it was issued, permitting the use of it by the Secombe Company for a royalty on each wheel. It does not appear that he was not at full liberty to apply for a reissue of it.

In addition to what has been said about the defendants' wheel with the elastic border, it may be said that it extends wholly around the types and does not compass the entire circumference of the wheel, and has the same operation which types in the same place would have, and its face is on the same plane with the faces of the types, and it is a part of the printing surface. In all these respects it differs from what is described in the original specification of Holt.

It follows from these views that the bill must be dismissed, with costs.

BARKER *v.* TODD.

(*Circuit Court, N. D., New York.* July 29, 1882.)

1. PATENT—INFRINGEMENT.

Plaintiff's claim No. 1 in a patent was for an elastic bucket working by suction in the bore of a chain pump, and having a drip orifice, allowing the the water above the bucket to escape down to the source of supply; and his claim No. 2 was for a solid elastic bucket with an elastic bearing edge, and a convex or contracted upper portion, so that the bucket would readily yield and go up, but resist going down. *Held*, that these claims were infringed by the Stowe and Rumsey buckets, used by defendants, as they were both of them solid elastic buckets, having an elastic bearing edge, with the upper portion convex or contracted from said edge so that the bucket readily yields to any irregularities in the pump tube, and is easily drawn up, while it will resist moving downward; and such bucket is adapted to fit and work in the bore of a pump tube to raise water by suction, and is provided with a suitable orifice or outlet, through which the water *above the bucket could escape.*

2. SAME—PREVIOUS EXISTENCE OF FEATURES CLAIMED.

Where certain features have existed before their adoption by an inventor he can only claim modifications of the form embodying such features, and if other inventions differ in form there will be no infringement,

3. PATENTS NO. 83,117 and NO. 58,368 compared with that of plaintiff, and shown not to have anticipated the features of his invention.

R. H. Duell, for plaintiff.

A. P. Smith, for defendant.

BLATCHFORD, Justice. This suit is brought on reissued letters patent granted to the plaintiff July 6, 1875, for an "improvement in buckets for chain pumps," the original patent having been granted to him June 20, 1871, and reissued to him May 19, 1874. The reissue of 1875 was sustained by this court in a suit brought by the patentee against James D. Shoots, and decided in January, 1882.

The defendant has used two forms of bucket, the Stowe bucket and the Rumsey bucket. It is very clear that both of them infringe claims 1 and 2 of the plaintiff's patent. They are both of them solid elastic buckets, having an elastic bearing edge, with the upper portion convex or contracted from said edge so that the bucket will readily yield to any irregularities in the pump tube and be easily drawn up while it will resist moving downward; and the bucket is adapted to fit and work in the bore of a pump tube to raise water by suction, and is provided with a suitable orifice or outlet through which the water remaining in the pump tube above the bucket is allowed to escape down to the source of supply. All of these features are found in the plaintiff's bucket and in the Stowe and the Rumsey

buckets. They are not shown to have existed before in unison in any bucket. These features make up claims 1 and 2. If they had existed before, the plaintiff could only claim modifications of the form embodying those features, and if the defendant's buckets differed in form they would not infringe. But the plaintiff is entitled to a broad construction of his claims. The defendant's buckets have the same structure and mode of operation so far as the above-named features are concerned. The elastic bucket working by suction in the bore and having the drip orifice is the subject of claim 1. The solid elastic bucket with the elastic bearing edge and the convex or contracted upper portion so that the bucket will readily yield and easily go up, but resist going down, is the subject of claim 2.

The patent No. 83,117, granted to Orin O. Witherell, October 13, 1868, and the patent No. 58,368, granted to Emmet R. Austin, October 2, 1866, do not show anything anticipating the plaintiff's claims. No witness testifies that they do, while there is testimony on the part of the plaintiff that Witherell's patent does not. Witherell's patent shows merely an elastic plate clamped between two metal plates. It is a lift valve raising water by lifting instead of suction, and has no such elastic bearing edge as the plaintiff's bucket has, and no drip orifice. The Austin arrangement works by lifting and there is no pump tube and no suggestion that the bucket is elastic.

The testimony of White and Wardwell is the same that was taken and introduced in the suit against Shoots. It shows only the use, not in new pump tubes, but in worn pump tubes, of a flat, thin, cylindrical disk of rubber slipped over the loop of the chain and lying flat on the metal buttons, to compensate for the wear which had taken place in the tube by the rubbing of the metal button. This was not an elastic bucket fitted to operate by suction, fitting the bore, and having a drip notch; nor was it a solid elastic bucket with an elastic bearing edge, and its upper portion convex or contracted from said edge. What was said on this subject in the decision in the suit against Shoots need not be here further repeated.

The testimony of Witherell shows the use of nothing different from what is above described. He testifies that the rubber disks which he placed on the metal buttons in the worn tubes were intended to fit about the same as it was intended the original metal buttons should fit, and were made to fit so loosely that they would not stick in the tube when the chain fell back after pumping, and would work without friction, and leave space enough between the disk and the bore of the tube for the water to escape downward.

There was no raising water by suction, and no elastic bearing edge, and so no anticipation of the plaintiff.

There must be a decree for the plaintiff for an account of profits and an ascertainment of damages, and a perpetual injunction, with costs.

ZANE and others *v.* PECK BROTHERS & Co.

(*Circuit Court, D. Connecticut.* August 26, 1882.)

1. PATENT—INFRINGEMENT—MASTER'S REPORT—PROFITS.

   In this case the defendants used the combination that gave a peculiar value to the patent faucet of the plaintiffs, and they were chargeable with damages in respect to the entire faucet, and the master's report so charging them should be confirmed.

2. SAME—MEASURE OF DAMAGES.

   The measure of damages for infringement of a patent is the profits that the plaintiffs would have made on the sales of the patented article had they supplied the customers to whom the defendants sold such article.

3. SAME—ESTIMATION OF PROFITS.

   In estimating the amount of such profits the cost of manufacture and sale should be deducted, and on sales of a large amount, clerk's hire, storage, freight, etc., should be considered as part of such cost; but in this case, as these expenses would make only a *trifling difference* in amount awarded by master, a reaccounting will not be ordered.

4. SAME—TREBLE DAMAGES.

   In this case, motion of plaintiffs for treble damages should be denied.

Thomas Wm. Clarke, for plaintiffs.

Charles R. Ingersoll, for defendants.

SHIPMAN, D. J. The questions now at issue arise upon the defendants' exceptions to the master's report. The first class of exceptions is, in substance, that the master erred "in charging the defendants with profits and damages in respect of the entire Bate faucet, when they were only chargeable in respect of the particular improvement embodied therein, which had been patented to Jenkins."

The invention was an improved self-closing faucet, and consisted in a new combination of the old devices previously used in faucets of this kind, viz., a screw follower with a quick-threaded screw, valve, and spring. The combination is a simple one, and the value of the faucet consists in its simplicity and strength, and its consequent fitness for hard, rough usage. It has gone into extensive use. The principle of the invention—

"Was a combination of the several parts by which the valve was to be forced to its seat solely by the operation of the spring and the pressure of the water, and the valve was to be removed from its seat solely by the twisting of the handle of the screw-following apparatus. * * * The connection between the screw and the valve must be by contact only, so that when the valve was returned to its seat the spring should do the entire work, and when the valve was forced away from its seat it should be effected by pushing the valve. There could be no rigid connection between the valve and the screw follower or the swivel." *Zane* v. *Peck*, 9 FED. REP. 101.

The defendants took this principle, made at first the plaintiffs' faucet with a swivel, and having been enjoined against such manufacture, made a faucet with the swivel pinned to the screw follower. This infringing device is the one now under consideration.

The faucet consisted in connection with a twisting handle, which is a portion of the screw follower in this new combination of old and common elements. There are no other parts or features in the structure apart from the ordinary induction and eduction way. Other faucets had quick-threaded screws, and valves operated by the screw follower, and probably had their own advantages, but this novel arrangement of all the elements of such a faucet had a peculiar utility which gave it its value and character, and created a wide market. When the defendants took this combination, they took that which had given the Jenkins faucet its value and success, and they took the combination which made the faucet. In this respect the case is unlike *Garrettson* v. *Clark*, 15 Blatchf. C. C. 70, an l similar cases.

The remaining class of exceptions is that the master erred in finding that the plaintiffs were damaged by the defendants' infringement, by loss of sales to the amount of $1,615.14, that amount being the profits which the plaintiffs would have made had they supplied the same purchasers. I think that the master was justified by the testimony in finding that but for the infringement the plaintiffs would have made the sales of their faucets to their old customers, which were made to them of the infringing faucets by the defendants, and that the plaintiffs' profits would have been $1,615.14.

The question in this part of the case being as to the loss or damages, in excess of the defendants' profits, which the plaintiffs sustained by reason of the infringement, and the master having properly found that, by reason of the infringement, the plaintiffs lost the specified sales, the damage is fairly estimated by the amount which the plaintiffs would have received for the goods, deducting the cost of manufacture and of sale. In the cost of sale, the store expenses, such as clerk hire, storage, freight, etc., should be estimated upon

sales of any large amount. In this case, in view of the fact that the principal part of plaintiffs' faucets are sold by Mr. Adee, of New York, this class of expenses upon sales of about $3,800 would add such a trifling amount to the existing expenses of conducting the plaintiffs' business, that it is not desirable to subject the defendants to the expense of sending the case back to the master for a reaccounting. The amount, if any, which would be deducted from the $1,615.14 would be very small.

The defendants' exceptions are overruled.

The motion by the plaintiffs for treble damages is denied.

TYLER v. GALLOWAY and others.

(*Circuit Court, N. D. New York.* July 29, 1882.)

1. PATENTS FOR INVENTIONS—SUIT AGAINST INDIVIDUAL DEFENDANTS.

   The bill in this case was filed against defendants individually, alleging that they were members of a copartnership in which the extent of the interest of each member was measured by the number of shares he held in the copartnership as a joint-stock association. *Held*, that the unauthorized use of a patent by the agents of such association, in its business, for the benefit of its stockholders, must be considered as a use by each of them, from which each of them might be enjoined in a suit of this form, notwithstanding the fact that under the laws of New York, there being more than seven shareholders, the association could have been sued as a whole by suing the president, without making all the shareholders parties, and that a decree for injunction and accounting, with costs, should be passed.

2. PRACTICE—COSTS OF DISMISSAL.

   As the evidence does not show that K. was a shareholder, although secretary, of the association, the bill must be dismissed as to him; but, as he answered jointly with D., without costs.

3. SAME—AMENDMENT AS TO PARTIES.

   Plaintiff cannot amend his bill by alleging that defendants were severally president, secretary, and directors of the association, as this is unnecessary in a suit against them individually, and would be improper if intended to make the suit one against the association as a whole.

George W. Hey, for plaintiff.

Henry R. Durfee, for defendants.

BLATCHFORD, Justice. This suit is brought on reissued letters patent No. 8,832, granted to the plaintiff August 5, 1879, for an "improvement in cheese hoops," the original patent having been granted to William Steinberg, March 21, 1871. By agreement of parties the

case has been heard and a decision rendered (12 Fed. Rep. 567,) upon all questions in the suit, except that now presented for consideration. The question reserved was "the question of the liability of the defendants in this action under its present title and form, or any other question touching their liability as individuals or members of the Macedon Cheese Association, or the liability of the Cheese Association as a company."

The bill is filed against four persons—Galloway, Durfee, Kent, and Billings—individually, as defendants. It alleges that the defendants "at Macedon Cheese Factory," in the county of Wayne, New York, have "unlawfully and wrongfully made, or caused to be made, sold, or caused to be sold, used, or caused to be used," cheese hoops containing the patented inventions.

It appears that the defendants Galloway, Durfee, and Billings were members of a copartnership called the Macedon Cheese Associtión, with other persons; that the extent of the interest of the members in the copartnership was measured by the number of shares of stock held by each in the copartnership as a joint stock association; and that the number of holders of shares was greater than seven so that the association could be sued as a whole, under the laws of New York, by suing its president as such without all the shareholders parties. The plaintiff did not attempt to sue the association as a whole. It is shown that the infringing cheese hoop was owned by the association, and was used by its agents in making cheese in its business at its works for the benefit of its stockholders. Galloway, Durfee, and Billings were shareholders. The use aforesaid was a use by each of them, quite as much as if there had been a copartnership without shares of stock, or one with shares belonging to less than seven shareholders in number. The use by each was a tort, and each is liable to be enjoined. What the extent of the liability of each for profits and damages is, will be a question to be determined hereafter after a hearing on the report of a master on a reference for that purpose.

Kent is shown to have been secretary of the association but it does not appear on the present evidence that he was a shareholder. As the case stands the bill must be dismissed as to him, but without costs, as he answered jointly with Durfee.

The motion of the plaintiff to amend his bill by alleging that the defendants were severally president, secretary, and directors of the association is denied. If intended to aid the suit as one against the defendants individually, it is unnecessary. If intended to make

the suit one against the association as a whole, the plaintiff cannot now be allowed to put this suit into that shape.

The usual decree for an injunction and an accounting against all the defendants but Kent, with costs, must be entered.

See S. C. 12 FED. REP. 567.

GOTTFRIED *v.* CRESCENT BREWING CO.

(*Circuit Court, D. Indiana.* September 21, 1882.)

PATENT FOR INVENTION—DEVICE.

A device consisting of old elements combined, and practically superseding all other known means of pitching kegs and other small receptacles, is not a mere mechanical equivalent of any other device.

Banning & Banning, for complainants.

Parkinson & Parkinson, for defendants.

GRESHAM, D. J. I have considered the proofs and arguments on the motion for a rehearing, and am convinced that in holding the complainants' patent invalid undue importance was attached to the German publications, the Cochrane and Slate patent, and the Siebel device as anticipating defenses. See 9 FED. REP. 762. The German publications are vague and uncertain, and describe no machine capable of practical and successful use by brewers for pitching casks and kegs.

It is sufficient to say of the Cochrane and Slate device, without again stopping to describe it, that, without material changes in its construction or arrangement, it cannot be made to produce the same useful results as are produced by the complainants' device.

I am still of opinion, however, that the complainants' patent cannot be sustained on the theory that they were the first to use a hot blast, from which the oxygen had been removed, in heating the interior of casks for the purpose of pitching them. Siebel, we have already seen, heated the cask with his machine for the same purpose by the application of a hot blast, which he deprived of its combustible properties by forcing it through and in actual contact with the fire in the furnace.

This furnace he inserted into the cask through the man-hole, and there operated it. Of course, this machine could not be used in pitching kegs or other small receptacles into which it could not be inserted. In this and other respects the Siebel device was crude and imperfect,

compared with the complainants' machine, which was located and operated outside the receptacle to be heated and pitched, and which was adapted to pitching barrels and small kegs as well as casks.

The complainants' device was the first, and the proof shows that it is to-day the only, means by which brewers are enabled to pitch barrels and kegs without removing the heads. This device also forces into the receptacle to be heated a much hotter blast than Siebel can apply with his machine, and with it brewers are enabled to do their pitching more expeditiously and economically.

The method or means which the complainants employed in forcing into the cask a hot blast, consisting of the same elements as the Siebel blast, produced, if not a new result, certainly a much better one than could be produced by any other method or means then known to persons engaged in the business of brewing. Compared with other means for heating the interior of casks and receptacles, the complainants produced a new mechanism or thing which enabled them to pitch casks and kegs more rapidly and economically than they had ever been pitched before. I think the complainants were entitled to a patent, not for the improved or better result or effect, but for the mechanism or means by which the result was accomplished.

It is the policy of the law to encourage useful improvements, and I am unwilling to hold that the complainants' device, consisting of old elements, combined and operated as stated in the specification, practically superseding, as it does, all other known means of pitching kegs and other small receptacles, and greatly superior, as it confessedly is, to Siebel's machine for pitching large casks, is the mere mechanical equivalent of the latter, or of any other device.

These are briefly my reasons for withdrawing my former ruling, and for now entering a decree in favor of the complainants, with an order for an account of profits.

DEFORD, HINKLE & Co. *v.* MEHAFFY and others.

(*Circuit Court, W. D. Tennessee.* September 9, 1882.)

1. REMOVAL OF CAUSES—TIME FOR FILING PETITION—PRO CONFESSO.

According to the Tennessee chancery practice a cause is not for trial until a *pro confesso* has been taken against a party not appearing, and a petition for removal is in time if filed before this has been done.

2. SAME—SEVERAL DEFENDANTS—CAUSE, WHEN TRIABLE—REMOVAL, WHEN BARRED.

If there be several defendants, and as to one there is an issue by answer, but as to others no issue by answer or *pro confesso*, the cause is removable until and during the term at which the *pro confesso* is entered. It must be at issue and triable as to all the parties to bar the right of removal as to any of them by the lapse of a trial term; and this, whether the parties as to whom there is no issue be necessary or only proper parties.

3. SAME—PRO CONFESSO ON FINAL DECREE.

And the foregoing rule is not affected by the fact that the *pro confesso* may, under the practice, be entered in the final decree itself. Nothing but an actual trial commenced will bar the right of removal at the trial term when the case is in that condition.

4. SAME—DEFECTIVE BOND—AMENDMENT—JURISDICTION.

If the removal bond be defective, and omit the condition for the payment of costs required by the act of congress, the omission is not fatal to the jurisdiction of the federal court. The defect may be cured by amendment, either in the state or federal court, or by the substitution of a new bond, containing the proper conditions, filed *nunc pro tunc*.

5. SAME—ACT MARCH 3, 1875, CONSTRUED.

(1) The only essential *jurisdictional* facts are the existence of a controversy between citizens of different states, or arising under the constitution and laws of the United States, of the character and amount described in the statute. (2) The right of removal may be barred by the lapse of time, on failure to commence the proceeding within the time prescribed by the statute, as in other cases of limitation of that nature. (3) But a perfect petition and a perfect bond for removal, or a strict compliance with the practice regulations of the statute, are not absolutely essential as *jurisdictional* requirements, but only directory and not imperative methods of procedure; regulations that should be carefully followed and reasonably enforced by the courts; but, after all, regulations that are protected by the acts of congress authorizing amendments to cure defects and omissions in legal proceedings. (4) These amendments may be made in either the state or federal courts, according to their practice, respectively.

In Equity. Motion to remand.

This is an attachment and injunction bill filed in the chancery court of Hardin county by citizens of Tennessee against a citizen of Louisiana, and certain citizens of Tennessee. It seeks an account of transactions between the plaintiffs and the leading defendant of

the sales of quantities of staves, and advances made by the defendant as a commission merchant, and avers that in such accounting the defendant is indebted to the plaintiff in a large amount. It alleges that the other defendants are indebted to the leading defendant in various sums of money, and prays for an attachment of this indebtedness on account of the non-residence, and for an injunction against paying to her until the claim of the plaintiff is satisfied. The chancellor's fiat was obtained, and the attachment and injunction were duly issued and levied. The bill was filed March 8, 1880, and publication made according to the state practice, process being served on the resident defendants, who were required by the process and allegations of the bill to answer as to their indebtedness to the other defendant. The process was all returnable to the April term 1880. There are two terms a year of that court,—in April and October. On June 23, 1880, Mrs. Mehaffy answered, and at the subsequent October term, on her application, the cause was continued. Proof was taken, and other orders not necessary to notice were made, and the cause continued by consent at the April term, 1881. Further proof was taken and filed, and orders were made in preparation of the case for trial until the October term, 1882, when Mrs. Mehaffy filed in the state court her petition and bond to remove the cause to this court. The condition of the bond is as follows: "Now, if the said Moline Mehaffy shall enter and file in the circuit court of the United States, to be held, etc., copies of all process, pleadings, depositions, testimony, and all other proceedings in this cause affecting or concerning said suit, then this obligation to be void." The transcript being filed, the plaintiffs move to remand the cause for want of jurisdiction, and the petitioner asks leave to amend the bond, or to substitute a proper bond.

Pitts & Cunningham and *Bullock & Hays*, for plaintiffs.

A. G. McDougall, A. W. Campbell, and *McCorry & Bond,* for defendant.

HAMMOND, D. J. The learned counsel for the motion here very frankly abandon all the grounds stated by them, except that (1) the application to remove was not in time; and (2) the bond is not conditioned, as the statute requires, "for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto."

The first ground insisted on depends on the proper determination of the question, which was the term of the Hardin chancery court at which this cause could be "first tried?" No order *pro confesso* has

ever been entered in the case against the defendants not answering, and the counsel for the removing defendant insist that there has never been any term at which the cause stood for trial under our state practice, while the plaintiffs' counsel contend that the question must be determined with sole reference to the removing defendant, as to whom the cause was at issue by the answer, under our practice, at the October term, 1880, when the answer was filed; that the other defendants are only garnishees, and their answers or issues made by *pro confesso* are immaterial now that the leading defendant, whose appearance was to be secured by the attachment, has appeared and answered, and that as to all the defendants the cause stood for trial at the term at which the answer of Mrs. Mehaffy was filed, and at each term thereafter. The object of the attachment was not only to compel the appearance of the non-resident defendant, but likewise to secure the debt of the plaintiffs, and that this is so is apparent from the fact that since her appearance the attachment has not been discharged, nor the injunction dissolved, and could not be against the will of the plaintiffs until their debt is satisfied. These other defendants are in one sense *garnishees*, no doubt, but not in the technical sense of the argument, in which sense they are not parties to the suit, but merely persons summoned to answer in execution or attachment as to the effects or assets of the plaintiffs' debtor, of which they have knowledge, as in the case of *Cook* v. *Whitney*, 3 Woods, 715. Here they are parties to a bill in equity, under injunction and with all the plenary rights of the other defendants to a bill in chancery, not necessary but proper parties, and I have no doubt that they must be so treated in the consideration of the question to be so determined. Nominal parties in the record cannot defeat the right of removal. *Texas* v. *Lewis*, 12 FED. REP. 1, and note. But these are more than nominal parties, and if they were only such the principle could not apply in determining the question as to the time within which removal could be had under this statute.

It is also clear to my judgment that the act of congress does not limit the consideration of this question to the condition of the record as against the petitioner to remove. The whole case must be for trial as to all the parties, and not a part of it, to bar the right of removal by a lapse of the term. The act says so. Its language is, "he or they may make and file a petition in such suit in such state court before or at the term at which *said cause* could be first tried, *and before the trial thereof*," etc. Act March 3, 1875, § 3, (18 St. 471;) Bump, Fed. Proc. § 640, p. 224, and notes. Causes are not prop-

erly, or should not be, tried piecemeal, and nothing less than unequivocal language should qualify the natural meaning of these words, and thus treat the cause as if the rule were to try it in parcels, and not as a whole. The right to remove is not gone until the trial of the cause, or the end of the term at which it could be first tried as to all the defendants, unless, indeed, the state law, which is not the case with us, permits it to be finally heard in parcels. Was the case, then, ready for trial as to all the parties at the time this petition was filed? It certainly was not. A *pro confesso*, is not, like a judgment by default at law, where that judgment is the result of a trial, and the end of the case, unless it be opened, as in *McCallon* v. *Waterman*, 1 Flippin, 654, and *Harter* v. *Kernochan*, 103 U. S. 562. In the case of *Graves* v. *Boon*, MSS. (Jackson, 1875, not reported,) I have the opinion of the late commission of appeals, in which the precise question was decided. These cases are not reported, but they are judgments adopted by the supreme court, and while, strictly speaking, not binding as authority, they are entitled, from the character of the judges and their careful adjudications, to all respect from this court, at least. The case stood on *pro confesso* as to some of the defendants, but as to Nancy Boon there was neither answer nor *pro confesso*. *McKissick*, J., says:

"The court being of opinion that as no answer was filed by defendant, Nancy Boon, and no order *pro confesso* entered as to her, the case was not at issue, and was therefore improperly heard by the chancellor; and for this error the decree of the chancellor should be set aside. * * * But as she is the trustee of these complainants, she is a necessary party to the cause, which cannot be finally heard as to the other defendants without being heard as to her; and not having been so heard, it must be remanded, to the end that it may be regularly brought to a hearing."

The court cites *Mitchell* v. *McKinny*, 6 Heisk. 83, and distinguishes it. The case was, no doubt, according to our practice, properly decided, and would seem conclusive; but it is argued that there the defendant, as to whom there was no *pro confesso*, was a necessary party, while here they are not. Possibly, if the plaintiffs chose to abandon their security afforded by the attachment and injunction, and dismiss as to these parties, that argument might avail, provided the dismissal were made promptly, and before the defendant filed the petition for removal. But even then I should think that it ought to be done under circumstances that would not prejudice the right of removal. The plaintiff could not let the case stand as to all parties until the term for removal had ended, and then, by dismissing as to some

parties, change the *status* of the cause and defeat the removal by an act of his own, which he might take for that purpose, having misled the adversary party by permitting the case to remain in a removable state until the dismissal was made. It is not necessary to decide this here, and I only allude to it, as I have had occasion to do before, to show that this right of removal is not within the power of the adversary party to defeat by any action of his which results in surprising the party desiring a removal, by a curtailment of the time which, but for that action, he would have under the statute, any more than it is within the power of the removing party to enlarge the time, after the bar of the statute has attached, by some act of his deferring the trial term. *Cramer* v. *Mack*, 12 FED. REP. 803. It is sufficient for this judgment that these parties were still on the record (and are yet) when the petition for removal was filed, at a time when the cause was not ready for trial. The plaintiffs thought proper to make them parties to secure the debt, as well as to compel the appearance of the main defendant, and we must take the case as they have made it. The defendant had a right to rely on the record as it stood in this matter of removal, and it is immaterial that the plaintiffs might have made a different case. If they had done so, either by leaving these outside parties out of the case or by dismissing them when the main defendant appeared, she might have filed the petition to remove more promptly; but without that, she was under no compulsion of this statute to act sooner than she did. There is nothing in the case of *Babbitt* v. *Clark*, 103 U. S. 606, to militate against the views above presented, but on the contrary they are supported by it. This class of questions largely depends on the state practice, and it seems plain to me that this case was never triable before the removal was asked, in any other sense than that it might have been so if the plaintiffs had promptly taken their *pro confesso*, or promptly dismissed the parties as to whom they might have done without. But this is not what is meant by the statute.

It is also argued that, under our practice, the *pro confesso* might be taken at the hearing, and in the final decree itself, and therefore this cause should not be held to be not ready for hearing for want of it. *Claybrook* v. *Wade*, 7 Cold. 555; *Clark* v. *Hays*, MSS. (Jackson Op. book 9, p. 455, not reported;) Tenn. Code, (T. & S.) §§ 4350, 4369, 4370, 4371, 4472, 4473. This is plausible, but I think not sound. If it be conceded, as I think it must, that a plaintiff may let the cause stand until called for trial, and then take the *pro confesso* against the defendants not appearing, it is still true that the *pro con-*

fesso precedes in point of time the actual trial or decree. *Bank of U. S.* v. *White*, 8 Pet. 262. It cannot be otherwise, for the decree is based on the *pro confesso*, which is the evidence on which the court acts in giving judgment. The mere fact that these distinct acts or orders of the court are embodied in the same draft is only a difference of degree, and an incident of the trial itself,—a mere factitious circumstance. If the *pro confesso* is taken, as it may be, at a rule day and immediately in default of answer, that act of preparation for trial, by making up the issues, may precede the trial many days or months, or even years; but it is none the less taken as an act of preparation for trial if done only a few minutes before or simultaneously with the trial. The entry on the minutes, or in the draft of the decree, is only evidence of what the court has already done in contemplation of law, and not the doing of it. The technical fact is that without a *pro confesso* against a defendant the pleadings do not show an issue, and the case is not *on the pleadings* triable, and this is the governing consideration. *Barney* v. *Latham*, 103 U. S. 205. Actual trial would, in such a state of the case, under the act of congress, bar removal, but nothing less, because before that event, and at the first term at which it is triable on the pleadings, the party may remove. *Removal Causes*, 100 U. S. 457; *Jifkins* v. *Sweetzer*, 102 U. S. 177, 179. Until *pro confesso* the case would not be triable, and that would be the term of trial in a case in that condition. This may seem an overnice distinction, but it is not, and is plain when we understand that the triable *status* of the case does not depend on the capability of being put in a condition for trial by the acts of the parties to bring it on, but in actually having been put in a condition *on the record* for trial. The party may remove it at the first term when in that condition, and has the whole term, unless the case be actually tried before he files the petition. He looks only to the condition of the record, and not to the state of mind of the adversary party, to determine whether the cause is triable at the time he files the petition. If he finds the issues not made up, the case is removable and he need look no further. *Blackwell* v. *Braun*, 1 FED. REP. 351; *Fulton* v. *Golden*, 20 Alb. Law J. 229; *Whitehouse* v. *Ins. Co.* 2 FED. REP. 498; *Murray* v. *Holden*, Id. 740; *Wheeler* v. *Ins. Co.* 8 FED. REP. 196; *Kerting* v. *American Oleographic Co.* 10 FED. REP. 17; *Aldrich* v. *Crouch*, Id. 305, and the note which collects the cases on this point.

The remaining question is as to the form of the bond. It contains no condition for the payment of costs, as required by the statute, and

this is said to be a fatal defect that cannot be amended, because it goes to the jurisdiction of the court. I do not find that the supreme court has ever decided this question, though I am inclined to think its decisions and intimations point quite plainly in the direction of sustaining the jurisdiction of this court as a necessary consequence of what has been decided. In the *Removal Cases*, 100 U. S. 457, there were questions about the form of the bond and the petition. The petition was not signed; and it was held the objection should have been made in the state court, so as to have afforded an opportunity there for amendment, and that it was too late to make it in the federal court. Why should not this be so as to the *bond* as well as the petition? One is of no more importance than the other. Again, the bond in that case was objected to because one of the sureties was incompetent to become so, and it was held immaterial, as there was another good surety, and it became, therefore, unnecessary to apply the same principle that was applied to the defective petition, namely, that no opportunity having been afforded to cure the defect, it came too late. But it seems to me a fair inference, from the whole decision, that these matters of practice in removal cases are subject to the general rules governing procedure in taking advantage of defects like this and their amendment. In *Parker* v. *Overman*, 18 How. 137, the petition for removal did not show the very essential fact—indeed, the most essential *jurisdictional* fact—of a difference in citizenship between the parties, and yet they were allowed to amend the record in the federal court so as to show that fact and sustain the jurisdiction by removal. And in *Robertson* v. *Cease*, 97 U. S. 646, the cause was actually remanded to give the parties an opportunity to amend the declaration, and show that fact by amendment, although it was contended this would make a new suit and be affected by the statute of limitations. It is true, this was a case brought, in the first instance, in the federal court, but, obviously, there is no reasonable distinction between the cases, nor any reason for holding a more rigid rule as to jurisdiction in removal causes than others. The rule that the record must show the jurisdictional facts is very strict; but if they can be made to appear, by amendment, in cases brought by original process, I see no reason why they may not be made to appear by amendment in *removal* causes; and a comparison of these two cases from the supreme court shows that court never thought there was a distinction. And if the petition or other parts of the record may be amended in so important a jurisdictional matter, I see

no reason why a defective bond may not be, even if we concede that a good bond is one of the essential *jurisdictional* requirements.

In *People's Bank* v. *Calhoun*, 102 U. S. 256, there was neither petition nor bond, but a *stipulation* to remove the cause. It was held, of course, that a mere agreement or consent could not confer jurisdiction. The question was reserved whether or not a stipulation agreeing to the existence of the jurisdictional facts, so as to put them on the record, would not have been sufficient, but the inference from the language used is that it would. I see no objection to such a ruling. It was held in *French* v. *Hoy*, 22 Wall. 238, and *Hervey* v. *Railroad Co.* 3 FED. REP. 707, that irregularities in proceedings for removal might be waived by neglecting to take advantage of them, and it would seem that they could be also waived by agreement. If the stipulation should state that the parties were citizens of different states, naming them, that the time had not elapsed for removal, and that *they waived the bond for costs*, etc., it would seem to me sufficient, and if so, the bond cannot be so indispensable as is insisted on here. More than this, the supreme court at last sustained the jurisdiction by removal on the stipulation, because it appeared from the record that it was a case of which the court had jurisdiction by reason of the *subject-matter*. If the petition and bond are so essential and indispensable as *jurisdictional* requirements, I do not understand how this ruling could have been made. I do not overlook what the court says about the removed case having been one that should have been properly brought only in the federal court, and the stipulation to remove having only accomplished what could have been compelled by injunction. But while it is true, as in *Dietzsch* v. *Huidenkoper*, 103 U. S. 494, the federal court could have protected its own jurisdiction by enjoining the parties (in the limited class of cases where this may be done) from proceeding in the state court, this would not operate to oust the jurisdiction of the state court, and *remove* the case there pending to the federal court, but only to stop the state-court suit, and compel a resort by original process to the federal court. Parties can no more stipulate to give the federal court jurisdiction in original than in removal suits, and if the technical defect of this decision is that the case was *removed* to the federal court, then this was done without either petition or *bond*, and they cannot be in all cases indispensable conditions precedent to the jurisdiction. This may be, I admit, pressing that case beyond the confines of an authoritative precedent, for the jurisdiction of the federal court depended on the

jurisdiction of the foreclosure suit, and it is possible the court intends to decide nothing more than that by the stipulation the parties agreed to abandon the proceeding in the state court, and take their papers—not remove the case—to the federal court, to go on as if originally commenced there. In which view it is the same thing as if they had agreed to commence over again in that court, and it was not a case of removal at all. But if the "subject-matter" is that it is a case "arising under the constitution and laws of the United States," and therefore removable, it is conclusive here that the giving of a perfect bond is not an indispensable condition precedent to give this court jurisdiction.

In the *Gold-washing Co.* v. *Keyes,* 96 U. S. 199, significant language is used. It is there settled that the petition for removal is a *pleading,* which must "set forth the essential facts not otherwise appearing in the case, which the law has made conditions precedent to the change of jurisdiction;" and in another place, that if it does not, "*and the omission is not afterwards supplied,* the suit must be remanded." It does not say that either a perfect petition or a perfect bond is an essential fact to the jurisdiction, and clearly does not mean that, but only that those facts which show that it is a removable controversy under the constitution and act of congress, describing the character of controversy to be removed, shall be made to appear, and if omitted may be afterwards supplied. Now, if these essential facts may be supplied after the case gets to the federal court, I do not understand why defects in the bond may not, be it as essential as it may. But plainly it is far inferior in the importance of its functions to that of the pleading showing the character of the controversy. It is an agreement with sureties to do certain things, and a failure to do these things may be well supplied by having them done under the direction of the court or compensated in damages; and, so far as the costs are concerned, the party is liable for them in *assumpsit* without a bond. The bond seems to me merely a matter of practice or mode of procedure, which should be strictly pursued, because it is commanded, and is an important security; but to make a perfect bond a condition precedent to our acquiring jurisdiction, and denying the right to amend it or supply its defects, seems to me to be elevating a minor matter into a cause of importance out of proportion to its inherent function, and never contemplated by the act of congress.

In *West* v. *Smith,* 101 U. S. 263, it was said that amendments in these removal causes should be allowed with the same liberality as in

the state courts, and this bond could have been amended there under our state practice. Tenn. Code, (T. & S.) §§ 2863, 2864; 1 Meigs, Dig. (2d Ed.) p. 133, subsec. 4; *Alexander* v. *Lisby*, 2 Swan, 107; *Brooks* v. *Hartman*, 1 Heisk. 36; *Jennings* v. *Pray*, 8 Yerg. 87. The state practice allows new bonds to be given in attachment, replevin, *certiorari*, and other purely and strictly-construed statutory proceedings. Our own Revised Statutes are just as liberal in allowing amendments, and one act of congress is as imperative as another. Rev. St. §§ 948, 954. Under their influence, appeal and writ-of-error bonds, which are just as jurisdictional as these removal bonds, when omitted may be supplied. *Martin* v. *Hunter*, 1 Wheat. 304; *Anson* v. *Blue Ridge R. Co.* 23 How. 1; *O'Reilly* v. *Edrington*, 96 U. S. 724; *Seward* v. *Corneau*, 102 U. S. 161, and other cases cited in Bump, Fed. Proc. 698. Why, then, should this bond in a removal proceeding be banished from the benefits of these remedial statutes, made to rectify mistakes, supply omissions, and correct errors in legal proceedings, and be the only kind of proceeding excluded from their curative effects? There is no reason. It would be a return to the barbarisms of the ancient law, which it was the object of the statutes of jeofails to abrogate, to hold this bond not amendable. It is true, the petition and bond are given in the state court, but they are the initial proceedings to bring the case here. It is settled beyond controversy now that it belongs to this court to adjudge as to their sufficiency, (*Traders' Bank* v. *Tallmadge*, 9 FED. REP. 363,) and it is not doing violence to any correct view of the subject to treat them as a proceeding in this court allowed the benefit of amendment under the imperative command of the above-cited acts of congress; or, if the state law applies, then to treat them as amendable under that practice.

Mr. Justice Miller says, in the case of *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 142, that it is always a matter of delicacy to approach these removal causes, and the right of removal should be very clear. The supreme court of Alabama, in *Ex parte Grimball*, 61 Ala. 598, expresses the true spirit of mutual "candor and good temper" that should be displayed on such occasions. The federal court should "cheerfully decline jurisdiction" whenever it appears that the controversy is not one between citizens of different states of the character described in the act of congress, or where it does not appear to be such on the record. But if the right of removal has not been barred by the lapse of time prescribed as a limitation to it by the act of congress, and the record shows such a controversy, it is a refinement of

delicacy to hold that the merely directory provisions regulating the mode of procedure are so rigid in their character that they become *jurisdictional*, are beyond correction, and fatal to the jurisdiction if defective. This theory can only be sustained on the notion that there is something extraordinary in this proceeding—so much so that it is to be discouraged and not favored by the courts, as something that is harsh and out of the ordinary course of remedial rights. I do not so regard it. It is not, in any sense, a paramount or supervisory jurisdiction of the courts of one government over those of another, but one that is concurrent and equal in all respects, and stands precisely on the same footing as similar regulations for the transfer of a cause from one court to another of equal dignity within the same jurisdiction. The strict limitations of the federal jurisdiction apply only to the subject-matter or character of the controversy, and these should never be carried beyond their plain limits. But given a controversy within those limits, and I can see no ground for converting rules of practice prescribed by the statute for bringing the suit into the federal court into conditions precedent to the exercise of the jurisdiction, so inflexible that the proceeding is withdrawn from the ordinary course of judicial treatment, and denied all correction and amendment.

The cases in the circuit courts are conflicting, and I cite those I have found bearing on the question more or less directly. *Burdick* v. *Hale*, 7 Biss. 96; S. C. 8 Chi. Leg. News, 241; *Torrey* v. *Grant Works*, 14 Blatchf. 269; *McMurdy* v. *Ins. Co.* 9 Chi. Leg. News, 324; *Webber* v. *Bishop*, 13 FED. REP. 49; *Beede* v. *Cheeney*, 5 FED. REP. 388; *Stevens* v. *Richardson*, 9 FED. REP. 191, 195; *Farmers' Co.* v. *Chicago R. Co.* 12 Chi. Leg. News, 65; *Van Allen* v. *Atchison R. Co.* 3 FED. REP. 545; *Hervey* v. *Illinois R. Co.* Id. 707; *Cooke* v. *Seligman*, 7 FED. REP. 263; *Smith* v. *Horton*, Id. 270; *Norris* v. *Mineral Point*, Id. 272; *Clark* v. *Railroad Co.* 11 FED. REP. 355; *Kaeiser* v. *Railroad Co.* 6 FED. REP. 1; S. C. 2 McCrary, 187; *Kidder* v. *Featteau*, 2 FED. REP. 616; S. C. 1 McCrary, 323; *Barclay* v. *Levee Com'r*, 1 Woods, 254; *Houser* v. *Clayton*, 3 Woods, 273. See, also, Dill. Rem. Causes, (2d. Ed.) pp. 34, 90–97, §§ 29, 74–76; Bump, Fed. Proc. 201, 202, 230; *Mix* v. *Andes*, 74 N. Y. 53; *Chamberlain* v. *American Co.* 11 Hun, (N. Y.) 370; 18 Am. Law Reg. 310. These cases are not all on the subject of defects in the bond, but defects on the removal proceedings generally, and their effect. Upon a careful review of the whole subject, I adhere to the views expressed in *McKenna* v. *Wooldridge*, 8 FED. REP. 650, which was a motion to remand for failing to file the record in this court on the first day of the term, and

an application to amend the petition for removal. I felt in that case the embarrassment of finding able judges applying the most rigid rules to the practice for removal of causes, and practically excluding, or, at least, much obstructing, the usual indulgence in the way of amendment and curative methods of procedure. And here I find the same embarrassment on the particular point in judgment, and have therefore re-examined the cases and authorities. I am perhaps, not unnaturally, confirmed in my own judgment by this examination, and feel constrained to hold, with all deference to opposing views, for the reasons above described, (1) that the only essential *jurisdictional* facts are the existence of a controversy between citizens of different states, or one arising under the constitution and laws of the United States, of the character and amount described in the statute; (2) that the right of removal may be barred by the lapse of time on failure to commence the proceeding within the time prescribed by the statute, as in other cases of limitations of that nature; (3) that a perfect petition for removal, and a perfect bond for removal, or a strict compliance with the regulations of the statute, are not absolutely essential as jurisdictional requirements, but only matters of practice, directory in their nature, and not imperative; regulations that should be carefully followed and reasonably enforced by the courts, but, after all, regulations that are protected by the statutes, authorizing amendments that may be allowed by the courts to cure defects and omissions, as in other pleadings and proceedings, and that these defects and omissions are not fatal to our jurisdiction; (4) that these amendments may be made in either the state courts or in the federal courts, according to their practice, respectively.

The motion to remand will be denied, but the petitioner for removal will be required to amend the bond or substitute a new one, conditioned as required by the statute, and to file the same *nunc pro tunc*, and, on failure to do this, the plaintiffs have leave to renew the motion to remand.

Motion overruled.

TAYLOR and others *v.* LIFE ASS'N OF AMERICA and others.

(Circuit Court, W. D. Tennessee. October 2, 1882.)

1. CORPORATIONS—INSOLVENCY—PRIORITIES—ATTACHMENT—LIEN.
   Creditors attaching the assets of an insolvent corporation, for the purpose of winding it up under the statutes of Tennessee, acquire, by the attachment, no lien or right of priority in the assets which are to be distributed *pro rata* among all the creditors residing in the state or elsewhere.
2. SAME—CONFLICT OF LAWS—INTERSTATE OR INTERNATIONAL EFFECT OF INSOLVENCY.
   While the state court may seize the assets of an insolvent foreign corporation, and administer them as a trust fund for the benefit of creditors, in the absence of a statute especially declaring a preference or lien in favor of home creditors, the distribution is *pro rata* wherever the creditors reside, and the fund belongs to all the creditors, and not exclusively to those residing in the state of Tennessee.
3. SAME—ATTACHMENT—ASSIGNMENT—RECEIVER—SITUS OF PROMISSORY NOTES.
   Where a mutual life insurance company, in which all the policy-holders are members, becomes insolvent and passes into the hands of a receiver under the decrees of a court at the domicile of the corporation, and by order of the court the company by deed assigns all its assets, wherever situated, to the receiver, the assignment will pass promissory notes of debtors residing in another state held by and in the possession of the company and the receiver, and prevails over an attachment subsequently levied by creditors in the state of the debtors. For this purpose the *situs* of the debt is the domicile of the creditor.
4. SAME—FOREIGN CORPORATION—INSURANCE—SEPARATE DAPARTMENTS—LIENS.
   Where a corporation, by its constitution and by-laws, provided for local control by boards of department directors, and required to be loaned in each department a sum equal to two-thirds of the net present terminal value or premium reserve of all premiums, paying whole life and endowment insurance policies of persons resident within such department, there is nothing in the scheme which gives policy-holders any lien or right of priority in the assets within the particular department. Such a lien or priority can only be created by apt words in the statutes, by-laws, or the contract itself, and will not be implied from that mode of doing business.
5. SAME—SUIT TO WIND UP CORPORATION IN THE STATE OF DOMICILE—SUBSEQUENT SUITS IN OTHER STATE.
   Where a life insurance company became insolvent, and under the laws of the state of its creation was, by suit instituted for the purpose, placed in the hands of a receiver to wind it up and distribute its assets, a bill filed by creditors in Tennessee, in a state court, to attach its assets in that state, and wind it up and distribute its assets there situated according to the insolvency laws of that state, will be, on removal to the federal court, if the Tennessee creditors are not entitled to any specific lien or right of priority, dismissed, and the creditors must seek satisfaction in the insolvency proceedings of the home state of the insolvent corporation.
6. REMOVAL OF CAUSES—EQUITY CASES—STATE AND FEDERAL RULES OF DECISION.
   In controversies between citizens of different states the parties may invoke, by removal, the general principles of equity prevailing uniformly in the fed-

eral courts, and in such cases the federal court cannot be governed by state statutes or rules of decision unless they constitute rules of property to be enforced. The statutes of Tennessee, authorizing the state equity courts to wind up insolvent corporations and distribute the assets in Tennessee, do not confer on Tennessee creditors any special right to the assets, or constitute rules of property which the federal courts must enforce. They merely enlarge or declare the jurisdiction of the state courts, and do not affect the jurisdiction of the federal court.

7. COSTS IN EQUITY.

Where the plaintiffs had a fair cause to suppose that separate insolvency administrations would be necessary in each state, on a dismissal of the bill here the defendant was not allowed costs, but each party was required to pay his own costs.

In Equity.

This is a bill by policy-holders residing in Tennessee, claiming a return of premiums for policies not matured by death or otherwise, filed in the state court under the provisions of the Code of that state, to attach the assets, consisting of debts due to an insolvent life insurance company of Missouri, and to wind it up and distribute the assets in Tennessee according to the laws of that state. Attachment and injunction issued, and the cause was removed to the federal court where a receiver was appointed. The corporation and its receiver, who was made a party, answered, setting up that the corporation was already being administered in insolvency by the state court of Missouri, the state of its creation, and that a receiver had been there appointed who was proceeding to wind it up according to law and the rights of the parties; that under a decree of the court the corporation had made to him a deed of assignment, conveying all its assets, wherever situated, and that he was in the possession of the notes of debtors residing in Tennessee attached by this bill. By an amended bill the plaintiffs claimed that this company did business in departments and separately in each state under separate boards of directors, and that, according to the constitution and by-laws and under the contract expressed thereby, the policy-holders in each department had a lien or priority on the assets in that department for the satisfaction of their policies. Besides the provision for the organization of departments in a state or less subdivision of a state under local boards of directors in each department, the sections of the constitution and by-laws most pertinent to this claim of lien or priority read as follows:

"Sec. 51, (charter 1869.) The net present value of the liabilities of the company under policies issued to members of each department, as fixed by the standard of valuation of the company, shall be invested and kept invested

within such department: provided, however, that no such investment shall be made except in the manner and upon the securities provided in section 52."

"Sec. 26, (charter 1872.) There shall be loaned and kept loaned in each department a sum equal to the net present value or premium reserve, as fixed by the association's standard of valuation of all policies in force upon the lives of persons resident within such department," with a similar proviso as contained in section 51.

"Sec. 23, (charter 1873.) There shall be loaned and kept loaned in each department a sum equal to the net present terminal or premium reserve (taken at the end of the preceding policy year, and computed by a net valuation of 4½ per cent. yearly interest, and the table of mortality designated by the general board of directors) of all participating full life and endowment insurance policies in force upon the lives of persons resident within such department;" followed by a similar proviso as in the sections above quoted.

Section 13 (charter 1877) is precisely like section 23 immediately preceding, except that the amount to be loaned and kept loaned in each department is reduced to "*two-thirds* of the net present terminal or premium reserve," etc.

There are other sections relied upon by the defendant as showing the unity of the company, and that those above quoted do not give a lien to resident policy-holders, but they need not be quoted here. The case was heard on final hearing upon bill, answers, and proof of representations of agents, circulars, etc.

Smith & Collier, for plaintiffs.

Wright & Folkes, for defendants.

HAMMOND, D. J. I had reached a conclusion in this case to sustain the bill and leave the question open, upon reference to a master, whether one creditor could claim any priority of satisfaction over another in the distribution of the assets, (although as the proof stands I could not see how such a claim could be sustained,) because the question could be finally determined only when the distribution is made. *Smith* v. *St. Louis Ins. Co.* 6 Lea, 564, 570. But for reasons that will presently appear I have found it necessary to determine now whether or not the plaintiffs, who are the Tennessee creditors, have any lien on the assets in this state. It may be conceded here, for the purposes of the argument, that a state may, by its insolvency laws, appropriate all the assets in that state to the payment of creditors residing there, in preference to and exclusion of all others. It is sufficient answer to say that the state of Tennessee has never done that, and its insolvency laws make no discrimination of the kind among creditors. Our attachment laws against non-resident and fraudulent debtors permit a race of diligence among creditors who

may by this process acquire liens, but the writ must be levied before any special or general assignment or transfer of the property, which is not fraudulent against the creditor. In this case the property consists of indebtedness of persons residing here, evidenced by note and secured by liens on real estate. Now, whether a statutory assignment, under the insolvent laws of Missouri, operates to transfer property of that kind in this state or not; whether these plaintiffs, who are policy-holders in a Missouri corporation of the mutual kind, where all are said to be *quasi* partners in the enterprise, are bound by the Missouri laws passed for its regulation while it is solvent, or when it becomes insolvent, or not, certainly all persons are bound by any valid, specific transfer of the property. If a citizen of Missouri holds the note of a citizen of Tennessee, and transfers it, by indorsement or otherwise, there can be no doubt the transfer would prevail over an attachment subsequently levied in Tennessee, unless it were fraudulent. Here there has been such an assignment, both by decree of a competent court, having the creditor before it, and by the creditor's own deed for the purpose; and this in the domicile of the creditor. This certainly operated to pass the title to the notes before this attachment by garnishment was levied, and to avoid its effect, and permit the Tennessee creditors to appropriate the property by attachment, the assignment must be set aside as fraudulent or inoperative for some reason. That assigned is that it was without consideration, and only an insolvent assignment, made under a decree of a court, by compulsion of law, which does not operate outside of Missouri.

In *Kirtland* v. *Hotchkiss*, 98 U. S. 491, it is said the *situs* of a debt is for the purposes of taxation, if not for all purposes, the domicile of the creditor. Where the transaction is *inter vivos*, the better rule seems to be that the *situs* of a debt is the domicile of the creditor, and this is with us the rule, even in the administration of decedent's estates, where the principle is of more doubtful application. If so, this property was situated in Missouri, and not in Tennessee, and passed by the assignment or decree, or both. Whart. Confl. Laws, (2d Ed.) §§ 359–371; *Wilkins* v. *Ellett*, 9 Wall. 740; *Goodlett* v. *Anderson*, 7 Lea, 286; *St. John* v. *Hodges*, 9 Bax. 334. Besides, the laws of Tennessee recognize the validity of an assignment in another state to pass the title to debts owed by citizens of this state, where there is notice of it before the attachment. *Flickey* v. *Loney*, 4 Bax. 170. Here the bill shows these creditors had notice of the proceedings in Missouri. Moreover, this is a mutual company, and under the laws of Missouri these Tennessee policy-holders, by its

own constitution and by-laws, *became members of the company*, and if, in any court, they are creditors, (as no doubt they are in one sense,) they cannot ignore the fact that they are creditors of a peculiar kind, and subject to all the equities or obligations that exist as between themselves and all the other policy-holders of the company. They are creditors in a very remote grade, perhaps, as it is possible their claims for premiums paid would be postponed till all other creditors have been satisfied. *Dean's Appeal*, 14 Cent. Law J. 196. What is it that gives the members of this mutual company of policy-holders whose policies had not matured by death or otherwise when the company failed, the right to disturb the principle of equality in the distribution of its assets by a race of diligence with attachments? They are only creditors as members of the company; they are mutually debtors as well as mutually creditors in their relative obligations to each other to share equally or according to their scheme in this enterprise. I do not mean to say that as individuals they are debtors instead of the corporation, for this is not so; but in their relation as members of a mutual company, and only in that relation, are they creditors. They derive all their rights through the laws of Missouri; and their contracts with each other, namely, their policies, are governed by these laws and the contract itself. They cannot, when the storm of insolvency comes, separate themselves from this peculiar relation, and claim as *creditors* in the ordinary acceptation of the term; treat their co-members as other creditors, and the corporation as an independent entity, and run a race for an inequitable preference in the assets on any notion that, as citizens of this state and creditors, they may have all the assets here. Their being citizens of Tennessee does not release them from their mutual obligation as incorporators and as policy-holders in this company. For purposes of federal jurisdiction they would be treated conclusively as citizens of Missouri; and while I do not intimate that for the purposes of this case they are to be so treated, I cite that anomalous fiction as showing how intimately a citizen of one state, who is a member of a corporation in another, is bound to that corporation. Our own state court has established that we will give effect to the laws of another state regulating its corporations whenever the rights of the litigants before the court depend upon them, as they clearly do in this case. *Talmadge* v. *American Co.* 3 Head, 337. None of the exceptions mentioned by Dr. Wharton in his text above cited apply here. We have a statute authorizing foreign receivers to sue in

our courts, and without it they may where no policy of our own is contravened. Act 1879, *c.* 135, p. 173; *Cagill* v. *Wooldridge*, 8 Bax. 580; *Booth* v. *Clark* 17 How. 322.

I do not think, therefore, that the attachment in this case gives the parties any priority of lien. Very much has been said in the argument about the rights these parties had in the state court under state statutes and state laws, and the wrong done to deprive them of these rights by removal to this court. It is familiar law here that the federal courts of equity administer only the general equity law, and that state statutes and state decisions cannot change the principles or rules of decision by which they are governed. *Payne* v. *Hook*, 7 Wall. 425, and numerous other cases cited everywhere; Bump, Fed. Proc. 126. Citizens of other states have a right to invoke the benefit of general principles of equity prevailing in the federal courts of equity by a removal of their controversies to this court, and I know of no principle which requires the federal courts to decide the cause in cases removed according to the statutory or judicial rules of equitable decision prescribed by the states any more than in original cases. If the state statutes referred to were required to give state equity courts jurisdiction to wind up foreign corporations in insolvency, it does not follow that these statutes can confer that jurisdiction on this court. If a statute gives a lien or creates a trust it becomes a rule of property, which we enforce and possibly state statutes may enlarge—they certainly cannot *restrict*—equitable remedies in such a way that federal courts of equity will administer them. I do not think this case presents that question. I have not the least doubt that the chancellor and the supreme court of Tennessee would decide the questions I am now considering just as I do here. There is nothing in the statutes that gives the creditor, who files the bill to wind up a corporation, priority over other creditors; and when the court comes to administer the assets they are distributed *pro rata*, or according to the liens or preferences existing by contract, or such other liens as exist upon them, and thus to all creditors alike, resident and non-resident. *Marr* v. *Bank of West Tennessee*, 4 Cold. 471. The object of the attachment is to secure the assets by impounding them, but it cannot be claimed that in proceedings to wind up an insolvent corporation or an insolvent estate priority is to be given to the creditor filing the bill, or to one residing at home, in preference to one residing in another state. No case so decides. The courts do not tolerate attempts to acquire such preferences. *Yonley* v. *Lavender*, 21 Wall. 276. Sometimes, in a

race of diligence among creditors, liens may be acquired by judgments or attachments before the insolvent bill is filed, which are enforced when the claim is presented; but in these statutory proceedings to wind up corporations the statute itself says that the fund shall be distributed *pro rata.* Tenn. Code, §§ 4294, 4295, 3431.

The cases of *Smith* v. *St. Louis, etc.,* 6 Lea, 564; S. C. 3 Tenn. Ch. 502; and *Liepold* v. *Marony,* 7 Lea, 128, only establish that the state courts may, under these statutes, wind up an insolvent foreign corporation; they do not decide that the home creditors would have any priority; that question is reserved. And if foreign creditors share *pro rata* in winding up a domestic corporation, there would seem to be no substantial reason for giving home creditors a preference on the winding up of a foreign corporation. It is a preference that is not given in settling insolvent estates of decedents, nor in any other insolvency proceeding; such, for example, as an insolvency assignment made within this state. Why, then, should the distinction be made here? The claim for it is founded on a misapprehension of the effect of these statutes and the doctrine of insolvency in its interstate or international relations. Because our courts will seize the property of an insolvent debtor, whether an individual or a corporation, situated within this state, and, treating it as a trust fund,—which means nothing more than that creditors and not the stockholders are entitled to subject it in a court of equity to the payment of their claims—satisfy creditors here rather than permit the property to be carried out of the jurisdiction to be distributed according to laws existing elsewhere, *non constat* that they will prefer home creditors to the exclusion of others in its distribution. A right to wind up an insolvent corporation, and distribute its assets equally among all creditors, on the theory that after insolvency the assets constitute a trust fund for distribution among creditors, instead of belonging to the stockholders or the first taker, does not become a rule of property in the sense that the creditors in this state have a lien on it or a preference to it any more than a right to sue to judgment and take out execution, becomes a rule of property. Possibly a state might, by law, adopt such a policy and give such a lien, but this state has never done it, and it would be antagonistic not only to the equitable doctrine of equality, but to all our other insolvency laws. And I do not doubt that state courts of equity, administering these assets under these statutes and decisions, would give full force and effect to the laws of Missouri, governing the members of this company *inter sese* as we would here. *Talmadge* v. *North Am. Co., supra.* Tennessee

at one time had a distinct policy of requiring foreign insurance corporations to deposit bonds, or otherwise secure our home people, as a condition precedent for a license to do business here; but that has been repealed. In such case, of course, there would be an equitable or legal right to funds so deposited, but it would grow out of the positive statute, and not the international or interstate law of insolvency.

The only other claim for priority is that based upon the departmental mode of doing business by this company. It is claimed as a *contract*, or as an implication of one, arising from the constitution and by-laws of the company, and its mode of doing business. I do not think this claim deserves serious attention. If a policy should mature while this company was in business, the holder would certainly look to the general funds for payment. It would be an anomalous scheme of insurance if he could not. It would, instead of distributing the loss throughout a large area and among great numbers, restrict it to a single state or less subdivision, and thus impair the system of extended averages on which successful insurance depends. Losses occurring in department A, if not finding there sufficient assets to pay them, would find in all the other departments priorities compelling the holders to go to some department where there was a surplus over the priorities there existing; and in this struggle for payment the whole scheme would be wrecked. Nothing less than apt and certain words in the contract, or statutes and by-laws, should bind policy-holders to so disastrous and anomalous a scheme of insurance. There are no such words in the policies, the charter, the constitution, or the by-laws of this corporation. It was evidently only a scheme to extend and invite business by requiring a certain proportion of the funds of the company to be loaned or invested within the limits of the department under local boards of directors or trustees, instead of confining the investments, as most great companies do, at or near the centers of capital and trade. In one sense this scheme affords *security* to the local policy-holders in having assets at home, the value of which they could secure by their own supervision of investments, and, if occasion required, subject by judgment and execution in local courts; but, doubtless, the main attraction of the scheme, and that upon which reliance was placed to extend business, was the feature which afforded an opportunity to borrow the money of the company and keep it in circulation here, instead of sending it away for investment. The witnesses in this case speak of an understanding derived from the representations by the agents, and in the advertisements and circulars, that they would have the assets in this state as a security

for their policies. There is nothing in these representations to justify such an understanding in any other sense of security than that just mentioned; but if there were, it could not prevail over the contract contained in the policies as interpreted by the laws, constitution, and regulations governing the business of the company; and, as before remarked, there is in none of these, in my judgment, a line, word, or syllable indicating that the policy-holders in this department were to have any lien, preference, or priority of payment out of the assets of the company invested here.

Irrespective of any right to a lien or preference of payment out of these assets, it was my own judgment that, in the absence of a uniform system of bankruptcy established by congress, we are relegated to the wretched and disastrous system of separate and independent insolvency laws in each state; that each state could claim to administer according to its own laws all the assets of an insolvent found within its jurisdiction; that while, for the purposes of taxation, transfer of title, etc., the *situs* of a debt is the domicile of the creditor, for the purposes of seizure and administration in insolvency the forum of the debtor would be taken as its *situs*, because there it must ordinarily be collected, particularly where, as in this case, it was secured by liens on real estate; and therefore it was my opinion that, ruinous as it is to have repeated administrations of the assets of this corporation in each state of the union, we could not deny the right of the plaintiffs to administer those in this state by this bill; and this, whether the rights of the parties were to be governed by the laws of Missouri or not, whether they had liens and preferences or not, and whether or not they were to be paid first, or the distribution was to be made to all creditors everywhere, of which I have no doubt. It was and is my judgment that to prevent this ruin the constitution confers on congress the power to establish a uniform system of bankruptcy, and that the only remedy is to be there found. Whart. Confl. Laws, (2d Ed.) §§ 386–390. Story, Confl. Laws, §§ 403 *et seq.*, 550 *et seq.* But it was said at the bar that, in a case in the district of Kentucky against this corporation, the learned circuit judge dismissed a bill like this. He informs me that this is true, and that he proceeded on the ground that, where the plaintiffs had no specific lien acquired by attachment or otherwise before the proceedings in Missouri were commenced, and no right of preference, the bill should be, upon principles of comity, dismissed, and the parties left to file their claims in the proceedings in Missouri. I cheerfully yield my judgment to his, as it is my duty to

do; and finding that, under our Tennessee laws, these plaintiffs, as I have endeavored to show, have no lien by their attachment or otherwise, and no right of preference, the bill must be dismissed. *Goodyear* v. *Willis*, 1 Flippin, 388. This disposition of the case likewise finds support in the adjudications made in other circuits; and, having no toleration for the disastrous determination of creditors to seek administration of these assets in many states, instead of in the one under whose laws they have all been acting, and by which they are bound in their enterprise, unless for more substantial reasons arising out of unjust discriminations in that state than any appearing in this case, I more readily yield to their authority. *Davis* v. *Life Ass'n of America*, 11 FED. REP. 781; *Rundle* v. *Life Ass'n of America*, 10 FED. REP. 720; *Relfe* v. *Rundle*, 103 U. S. 222; *Hamilton* v. *Choteau*, 2 McCrary, 509; *Hutchinson* v. *Green*, Id. 471.

The question of costs has troubled me somewhat. I am in the habit of decreeing costs against the losing party, and think that should be the general rule in equity, as at law. But in this case there are considerations upon which courts of equity may proceed in decreeing costs that are entitled to weight. Beames, Eq. Costs, 159, (20 Law Lib. 54.) These plaintiffs had, notwithstanding the impolicy of insisting on a separate administration of the assets in each state, a fair case for supposing that in the absence of a bankrupt law such administrations were probable, if not a necessity, in each state. I shall therefore decree no costs to either party against the other, but, where not already paid, in favor of the officers entitled to costs against each for his own costs, to be taxed by the master under further directions, if necessary. Bill dismissed.

NOTE. See *Taylor* v. *Life Ass'n of America*, 3 FED. REP. 465.

SOUTH PARK COMMISSIONERS *v.* KERR and others.

(Circuit Court, N. D. Illinois. 1882.)

1. EQUITY—TRUST—MONEY FOLLOWED INTO LAND.

Where land is purchased with money advanced by a bank on the faith of an agreement between a board of commissioners and one of the defendants, and in pursuance of such agreement and subject to the conditions thereof the land is conveyed to a trustee, and said board have refunded the money so advanced, *such agreement never having been actually consummated*, the money can be followed into the land; but if the conveyance of the land would work an injury

to the defendant, with whom the agreement was made, he should be allowed to refund the money, with interest, and all the parties be placed *in statu quo* as nearly as possible.

2. PRACTICE—EQUITY—VARIANCE—AMENDMENT.

Where the facts proved as entitling a party to relief do not correspond with the allegations of the bill, no relief can be granted unless the bill is properly remodeled.

DRUMMOND, C. J. This is a bill filed by the South Park Commissioners to obtain the title at the time held by Frederick A. Ingals in an undivided one-fourth part of the south fractional half of section 13, township 38, range 14, E. which it is claimed the said Ingals held in trust for them. The circumstances under which this claim is made are substantially as follows:

In October, 1878, a decree was rendered in this court terminating a litigation between Kerr and the commissioners, by which the latter were required to pay the value of certain parts of the land in controversy to Kerr, to be ascertained in the manner stated in the decree. An appeal was taken from that decree, and while the appeal was pending in the supreme court of the United States, negotiations for a settlement of the controversy were opened between Kerr, through his agent, and some of the South Park Commissioners. The result was that in May, 1879, a contract was entered into by Kerr and the agent of some of the commissioners by which it was agreed that the price of the land should not exceed a fixed sum; and certain moneys were to be advanced to Kerr, who was to purchase up any outstanding titles which might exist; and the contract contained various other provisions which need not here be stated. It was agreed that it should not be binding on the commissioners until it was adopted by the board in regular session. In fact, it never was adopted by the board, and therefore never became an operative contract between Kerr and the commissioners; but in consequence of this proposed contract various acts were done and moneys paid which have given rise to the controversy in this case.

At that time George Schneider, president of the National Bank of Illinois, was the treasurer of the South Park commission, and as such had a large balance in his hands on deposit in that bank. It was proposed to lay this contract before the board of commissioners at a future time for its adoption. Before that was done, and, as it would appear, in part execution of the arrangement which had been made between Kerr and some members of the board already mentioned, application was made to the National Bank of Illinois to obtain funds for Kerr, and some members of the board went to the

bank and stated the arrangement proposed, and that a settlement of the litigation would probably be made and ratified by the commissioners, and requested the bank to advance to Kerr the sum of $60,000. In 1872 Kerr had sold the undivided one-fourth of the premises in controversy to Mrs. Dobbins for a considerable sum of money paid at the time, and for two notes of $25,000 each, given by her husband and secured upon the property. At the time this loan was made by the bank these notes were turned over as collateral security, together with two other notes given by W. H. Nixon and L. Curry, of $30,325 and $30,225, respectively. Under these circumstances, in May, 1879, the money was advanced by the bank; but it should be added that it was done solely on the representations made by some of the South Park Commissioners, and upon their assurance that it was substantially a transaction for the benefit of the commission. The money otherwise would not have been advanced by the bank upon the notes which were given by Nixon and Curry, or upon the Dobbins notes. On the twelfth of November, 1879, the title of Mrs. Dobbins to the land in controversy was purchased by Kerr and a deed made to Ingals, and on the fourteenth of November, 1879, the bank advanced $21,000, under substantially the same assurances and circumstances as in the former case. In the latter, Mr. Bennett gave his note for the money advanced, and the bank advanced the money for the same reason as it had made the previous advances. Kerr, in the mean time, had purchased what were claimed to be some outstanding titles upon the property. On the twenty-first of November, 1879, at a regular meeting of the South Park Commissioners, at which all were present, the proposed contract heretofore mentioned was presented to the board. Objection was made, at least by one member of the board, and it was laid over for future consideration. After the advances were made by the National Bank of Illinois, application had been made to some members of the board that the money advanced by the bank should be refunded; and, accordingly, on the twenty-first of November a resolution was passed by the board apparently having that object in view. It was as follows:

"Resolved, that the president of this board is hereby authorized to make such settlement and adjustment of the litigation regarding the south half of fractional section 13, 38, 14, and such purchase of the title thereto, as, in his judgment, may be advisable, and for that purpose to draw from the treasurer of the commission a sum not exceeding the sum of $90,000 before reporting the same to this board, and that the auditor is hereby instructed to sign the necessary warrants for said sum of money, or so much thereof as is called for."

On the twenty-fourth of November, 1879, a warrant was issued for $82,800, payable to the National Bank of Illinois, and delivered to the bank on that day; and the Curry, Nixon, Dobbins, and Bennett notes, and a declaration of trust which Mr. Ingals had made, were delivered to Mr. Morgan, the president of the commission. On the twenty-sixth day of February, 1880, a second warrant for $7,200 was drawn, payable to Mr. Morgan's order, which was indorsed to the agent of Kerr, and upon which he received the money, a note having been signed by Mr. Curry for that amount and delivered to Mr. Morgan, together with a declaration of trust by Mr. Ingals. In April, 1880, Mr. Morgan turned over all these papers and securities to the secretary of the commission, who gave a receipt therefor.

It is proper to say that upon some question being made as to the condition upon which Mr. Ingals held the property, he stated in court that he had no interest of his own, but was a simple trustee, and willing to convey the property as the court might direct, notwithstanding the fact that in some of the different declarations of trust which he had given he may have stated that his conveyance was to be subject to certain contingencies; and, in fact, he has since conveyed the property to Mr. Doolittle as trustee, who has been made a party.

There is more or less difference in the testimony of the witnesses as to the number of the South Park Commissioners who individually agreed to the contract of May, 1879, but as it is admitted it was made on the condition that it was only to be binding when ratified by the board, and that it was never so ratified, this difference is, perhaps, not material.

In June, 1879, a judgment was rendered against Mrs. Dobbins in favor of Kerr on her covenant, for the payment of the two notes of $25,000 each. A motion was immediately made to set aside the judgment, which motion is still pending. Kerr has stipulated that in consideration of full payment of the two notes the judgment shall be set aside and the suit dismissed. Mr. Ingals, the trustee, in his answer claims that he owns the Dobbins title to secure the payment of the $21,000, and the $7,200 heretofore mentioned, and that he is only to convey the premises to the plaintiff upon the consummation of the contract previously referred to, of May, 1879. The testimony shows that some of the commissioners, perhaps a majority, adopted the resolution of November 21, 1879, with a view of carrying out the contract of May, 1879, and if it were not adopted by the board that the money paid to Kerr should stand as a credit upon the

amount that might be ultimately allowed for the land that was to be appropriated by the South Park Commissioners; but that some of the commissioners understood that whatever payment was made, was made for the purchase of the Dobbins title. When this title was conveyed, which is now held by Doolittle, the consideration was the $21,000 already mentioned, together with the discharge of the two notes of $25,000 each, which are now held by the South Park Commissioners under the circumstances referred to.

The difficulty in this case consists in the fact that the money was paid on different assumptions made by the different persons, no one of which was justified by the ultimate circumstances. Some of the commissioners assumed that the money was to be and was paid upon the condition that the contract of May, 1879, would be carried into effect, not upon the basis that the Dobbins or any other portion of the title was to be purchased; while others assume that the money was to be and was paid upon the basis that the Dobbins title was to be purchased. There can be no doubt that the agent of Kerr acted throughout upon the assumption that the entire south fractional half of section 13 constituted the subject-matter of the contract of May, 1879, and that it was to be carried into effect. The question is, what are the equities of the parties, because neither view turned out to be correct. In point of fact, all the money was advanced by the bank, except the $7,200, which was paid directly to Kerr's agent. The loan of May, 1879, made by the bank, was in the form technically of a discount of the notes and securities that were then deposited, and the sum actually received by Kerr was less than $60,000, the discount being deducted from that amount. The fact, then, is that up to November 21, 1879, when the resolution of the board was passed, which has already been cited, no money had actually been paid by the South Park Commissioners as a corporation, the bank having paid all the money. It was not a case, therefore, where the money was paid by the commissioners, and a deed taken in the name of Ingals. It is true that it was through the influence of some members of the board of South Park Commissioners that the National Bank of Illinois advanced the money; but it was the money of the bank, and not of the board, that was thus paid. As already said, the $7,200 was paid directly by the warrant of the board to Kerr's agent. Kerr never agreed that this money or any other should be paid in order to procure for the board the interest of Dobbins and his wife, viz., an undivided fourth of the land. If the South Park Commissioners are entitled to this land, it is only in consequence of the state of facts

which have been established, and because of the advance of the money by the National Bank of Illinois in the manner stated, and its repayment to the bank by the board; the money of the board thus being given to Kerr, and the two notes of $25,000 each being transferred over by Mr. Morgan, as already stated, to the secretary of the board, and the $21,000 being so soon reimbursed by the board after its payment by the bank.. It would seem, therefore, to be a case where the money can be followed into the property which is now held by a trustee rather than because a trust actually existed, as where money is paid by one person and the land has been transferred to another, that the board would be entitled to hold the property.

I think that the facts of the case show that the board of South Park Commissioners is entitled to follow this money into the land, inasmuch as it was transferred to Ingals under the circumstances already stated, and his grantee now holds it in trust, and, strictly speaking, in equity he ought to be adjudged to hold it subject to the rights of the board of commissioners; but not absolutely, because if they can be placed in the position they were before the money was advanced, Kerr is entitled to any equity which may exist in consequence of that being done. For, as has already been stated, he did not agree that this money should be advanced, and the property held by Ingals for the benefit of the South Park Commissioners, except *sub modo*, namely, subject to the conditions of the contract of May, 1879, to which contract the board of South Park Commissioners as a corporation was never a party; and therefore it seems to me that it is the duty of the court, if a decree requiring Mr. Doolittle to convey the property to the board of South Park Commissioners would do any injustice to Mr. Kerr, as it might, to give him the privilege of placing the board *in statu quo* by refunding the money, with interest. I am inclined to think, as the board holds the Dobbins notes, that they should be paid in full before the plaintiff should be clothed with the absolute title to the property; and as there does not seem to have been enough money advanced to make that payment, with the interest on the notes, in addition to the $21,000 which would constitute the consideration for the transfer of the Dobbins title, whatever deficiency there is ought to be made up by the board before Ingals is required to convey his title to the plaintiff.

These I consider to be the equities of the parties under the facts which are established in the case, and in which the argument of counsel has been made; but it is not possible for the court to render

a decree in favor of the plaintiffs upon the bill which has been filed. The proof and the allegations of the bill do not correspond. The facts alleged in the bill, and upon which the court must make a decree if the pleadings should stand, are different from those established by the proof. For example, it is stated in the bill that Mr. Morgan received this money as the agent of the board; that he disbursed it, and in consequence of his receipt and disbursement of the money the equity of the plaintiffs exists. In point of fact, he never received any money. He merely transferred by indorsement a warrant for the $7,200 to the agent of Kerr, who himself received the money, and Mr. Morgan never touched any portion of the rest of the money, as the evidence clearly shows. In any event, therefore, before the court could give the plaintiffs the benefit of the equity to which it is entitled, there would have to be an entire remodeling of the bill.

The bill was afterwards amended, and a decree rendered in conformity with the opinion here expressed.

RALSTON and others, Trustees, *v.* CRITTENDEN, Governor, and others.

(*Circuit Court, W. D. Missouri, E. D.* August 8, 1882.)

1. EQUITY—ACCOUNTING—INTEREST ACT OF MARCH 26, 1881.

   Under the provisions of the act of the general assembly of Missouri of March 26, 1881, it was the duty of the state officials to invest the $3,000,000 paid in by the Hannibal & St. Joseph Railroad Company as soon as practicable in the bonds and securities specified in said act, or some of them, and so save to the state as large a sum as possible, which sum so saved would have constituted, as between the state and complainants, a credit *pro tanto* upon the unmatured coupons now in controversy; and the state, in adjusting its claim against said railroad, must be held liable and chargeable with what could have been saved to the state by the investment of said $3,000,000 within a reasonable time after its payment. The sale of the railroad for the amount of interest due on coupons, which amounts to less than the sum which the company must pay in order to discharge its liability to the state, will be enjoined; and, upon the payment of interest due, such payment will be taken into account by the master to whom the case is referred in adjusting the account.

2. STATUTES—WHEN MANDATORY.

   Even if the terms of a statute are permissive only, and mean no more than the words generally employed in statutes, importing a grant of authority or power to a public officer to do a certain act, still it is well settled that all such acts are to be construed as mandatory whenever the public interests or *individual rights* call for the exercise of the power conferred.

John F. Dillon, Elihu Root, Wager Swayne, and *George W. Easley,* for complainants.

Glover & Shepley, Henderson & Shields, and *D. H. McIntyre,* Atty. Gen., for respondents.

McCRARY, C. J. By a series of legislative acts, beginning with the act approved February 22, 1851, and ending with that of March 26, 1881, the state of Missouri aided with great liberality in the construction of a system of railroads in that state.

Among the enterprises thus largely assisted was the Hannibal & St. Joseph Railroad, for the construction of which the bonds of the state to the amount of $3,000,000, bearing interest at 6 per cent. per annum, payable semi-annually, were issued. One-half of this amount was issued under the act of 1851, and the remainder under the act of 1855. The bonds issued under the former act were to run 20 years, and those under the latter act were to run 30 years. Some of the bonds have since been funded and renewed. Coupons for the interest on the entire $3,000,000 were executed and made payable in New York. These acts contain numerous provisions intended to secure the state against loss, and to require the railroad company to pay the interest and principal at maturity. Upon the hearing of the application for a preliminary injunction in this case, the question of the true construction and effect of this leglislation was fully considered, and the conclusion reached, as announced by Mr. Justice Miller, was, that it was made the duty of the railroad company to save and keep the state from all loss on account of said bonds and coupons. The treasury of the state was to be exonerated from any advance of money to meet either principal or interest. The state contracted with the railroad company for complete indemnity. She was required to assign her statutory mortgage lien only upon payment into the treasury of a sum of money equal to all indebtedness due or owing by said company to the state, and all liabilities incurred by the state by reason of having issued her bonds and loaned them to the company. The unpaid and unmatured coupons constituted a liability of the state, and a debt owing, though not due, and until these are provided for, the state is not bound to assign her lien upon the road. Such was the view of the statutes taken by the court upon the former hearing, and I am not disposed to depart from it.

Another question which was mooted at the former hearing, but not decided, is now, by the amended bill, presented for determination. It is this: What, if any, account is the state to render of the use of the $3,000,000 paid into the treasury by the complainants on the

twentieth of June, 1881? Can she hold that large sum of money, refusing to make any account of it, and still insist upon full payment by the railroad company of all outstanding coupons?

Upon this subject Mr. Justice Miller, in the course of his opinion upon the former hearing, said:

"I am of the opinion that the state, having accepted or got this money into her possession, is under a moral obligation (and I do not pretend to commit anybody as to how far its legal obligation goes) to so use that money as, so far as possible, to protect the parties who have paid it against the loss of the interest which it might accumulate, and which would go to extinguish the interest on the state's obligations."

In order to determine whether this obligation is one which may be enforced by a court of equity, it is necessary to consider the force and effect of the act of the general assembly of Missouri, approved March 26, 1881, and which is as follows:

"An act to provide for the transfer to the state sinking fund any surplus money that may be in the state treasury, not necessary to defray the current expenses of the state government, and to meet the appropriations made by law, and to authorize the fund commissioners to invest the same in the redemption or purchase of bonds of the state and bonds of the United States, Hannibal & St. Joseph bonds excepted.

"Be it enacted by the general assembly of the state of Missouri, as follows:

"Section 1. Whenever there is any money in the state treasury not necessary to defray the current expenses of the state government, and to meet the appropriations made by law, it shall be the duty of the state auditor, and he is hereby authorized and required to transfer the same to the credit of the state sinking fund, for the purpose of paying the state debt, or any portion thereof, and the interest thereon as it becomes due.

"Sec. 2. Whenever there is sufficient money in the sinking fund to redeem or purchase one or more of the bonds of the state of Missouri, such sum is hereby appropriated for such purpose, and the fund commissioners shall immediately call in for payment a like amount of the option bonds of the state, known as '5-20 bonds,' provided that if there are no option bonds which can be called in for payment, they may invest such money in the purchase of any of the bonds of the state, or bonds of the United States, the Hannibal & St. Joseph railroad bonds excepted.

"Approved March 26, 1881."

This act was passed in response to a special message of Governor Crittenden, dated February 25, 1881, in which he informed the legislature of the purpose of the Hannibal & St. Joseph Company to discharge the full amount of "what it claims is its present indebtedness to the state," and advised that provision be made for the "profitable disposal" of the sum when paid. It will be seen that the act not

only authorized, but required, the auditor to transfer the sum when received "to the credit of the state sinking fund for the purpose of paying the state debt, or any portion thereof, and the interest thereon as it becomes due."

And it furthermore required the fund commissioners, whenever there should be in the sinking fund a sum sufficient to purchase one or more of the bonds of the state, immediately to call in for payment option bonds of the state, known as "5-20 bonds," provided that if no such bonds are subject to call, the money may be invested in the purchase of bonds of the state or bonds of the United States. The purpose of this enactment evidently was to enable the officials of the state to receive the $3,000,000, and to immediately invest in the securities named, or some of them. Under the constitution of the state, no money can be drawn from the treasury except in pursuance of an appropriation, and as it was foreseen that this sum might be received at a time when the legislature was not in session, the act made the necessary appropriation in advance. The legislature wisely determined that so large a sum should not be allowed to remain in the treasury for an indefinite period unused and earning no income. It is true that the act does not specifically mention the $3,000,000 to be paid on account of the state aid bonds issued to the Hannibal & St. Joseph Railroad Company, but it clearly appears that it was passed with direct reference to that fund, and in response to the message of the governor asking that provision be made for its investment. The act was undoubtedly a part of the legislation relating to this loan, and if it did not enter into and become a part of the contract between the parties in interest, it was, at all events, binding upon the state, and the complainants had a right to rely upon it, and to pay their money to the treasurer upon the faith of it, and with the expectation that it would be obeyed and executed. Can the state disregard it, and still hold the railroad company bound for the unmatured interest to the same extent as if the $3,000,000 had not been paid? That such a view of the rights and duties of the state would be in the last degree inequitable, is too plain for argument. The state aid bonds have an average of about 10 years to run, so that the interest to be provided for amounts to about $1,800,000. The $3,000,000 now in the state treasury paid by complainants will produce nearly the whole of this sum if the officers of the state will invest it in obedience to the positive requirements of the statute. By executing the law the state can save this large sum to complainants and

still receive all that is due her. That she ought to do so upon principles of justice and equity, to say nothing of the binding force of the statute, is entirely clear. Interest is a sum paid for the use of money. It presupposes that the party paying the interest has the use of the principal. If the state is not bound to invest the $3,000,000, and account for the profits of the investment, it follows that the state has the principal sum and pays no interest, while the complainants pay interest for 10 years upon $3,000,000, the use of which is enjoyed by the state. To this it has been answered by counsel for the state: *First*, that the statute imposes merely a duty upon the state auditor as between that officer and the state; and, *second*, that the $3,000,000 was not paid with any agreement or understanding that it should be invested in accordance with the act of March last.

In substance it is claimed that in so far as the rights of complainants are concerned the state officers were at liberty to disregard the act. In this view I do not concur. Even if the terms of the statute were permissive only, and meant no more than the words generally employed in statutes importing a grant of authority or power to a public officer to do a certain act, still it is well settled that all such acts are to be construed as mandatory, whenever the public interests *or individual rights* call for the exercise of the power conferred. *Sup'rs* v. *U. S.* 4 Wall. 435; *Galena* v. *Amy*, 5 Wall. 705; *McDougall* v. *Peterson*, 11 C. B. 755; 15 Op. Atty. Gen. U. S. 621. But the terms of the act are clearly mandatory. The auditor is "authorized and *required*" to transfer the money to the credit of the sinking fund, and it is declared that upon such transfer "the fund commissioners *shall immediately* call in for payment a like amount of the option bonds of the state known as '5-20 bonds.'"

My conclusions upon the law of this case are: *First*, that the payment by complainants into the treasury of the state of the sum of $3,000,000 on the twentieth of June, 1881, did not satisfy the claim of the state in full, nor entitle complainants to an assignment of the state's statutory mortgage; *second*, that the state was bound to invest the principal sum of $3,000,000 so paid by complainants, without unnecessary delay, in the securities named in the act of March 26, 1881, or some of them, and so as to save to the state as large a sum as possible, which sum so saved would have constituted, as between the state and complainants, a credit *pro tanto* upon the unmatured coupons now in controversy; *third*, that the rights and equities of the parties are to be determined upon the foregoing principles,

and the state must stand charged with what would have been realized if the act of March, 1881, had been complied with.

It only remains to consider what the rights of the parties are upon the principles here stated. In order to save the state from loss on account of the default of the railroad company, a further sum must be paid. In order to determine what that further sum is an accounting must be had. The question to be settled by the accounting is, how much would the state have lost if the provisions of the act of March, 1881, had been complied with. That act provided for the investment of the $3,000,000 paid in by the complainants on the twentieth of June, 1881. *First,* in the "5-20 bonds" of the state, as rapidly as they were subject to call; *second,* any portion of said fund that could not be invested in the 5-20 option bonds because none were subject to call, was to be invested in bonds either of the state or of the United States. I think a perfectly fair basis of settlement would be to hold the state liable for whatever could have been saved by the prompt execution of said act by taking up such 5-20 option bonds of the state as were subject to call when the money was paid to the state, and investing the remainder of the fund in the bonds of the United States at the market rates. Upon this basis a calculation can be made and the exact sum still to be paid by the complainants, in order to fully indemnify and protect the state, can be ascertained. For the purpose of stating an account upon this basis, and of determining the sum to be paid by the complainants to the state, the cause will be referred to John K. Cravens, one of the masters of this court. The said master will examine and consider the proofs on file, and, if necessary, will take further testimony upon the subject of this reference, and will report to the next term of the court. In determining the time when the investment should have been made under the act of March, 1881, the master will allow a reasonable period from the time of the receipt of said sum of $3,000,000 by the treasurer of the state—that is to say, such time as would have been required for that purpose had the officers charged with the duty of making said investment used reasonable diligence in its discharge.

The Hannibal & St. Joseph Railroad is advertised for sale for the amount of the installment of interest due January 1, 1882, which installment amounts to less than the sum which the company must pay in order to discharge its liability to the state, upon the theory of this opinion.

The order will therefore be that an injunction be granted to enjoin the sale of the road upon the payment of the said installment of interest due January 1, 1882, and, if such payment is made, the master will take it into account in making the computation above mentioned.

Lea and another *v.* Deakin.

(*Circuit Court, N. D. Illinois.* 1882.)

Injunction—Dissolution—Indemnification—Practice.

Where an injunction has been dissolved, the better practice is for the court which issued the injunction to assess the damages caused by its issuance, and not compel the party injured to resort to an independent action at law to procure indemnification, if he can thus be indemnified.

Appleton & Collier, for plaintiffs.

Chas. E. Pope and *Geo. C. Christian*, for defendant.

Drummond, C. J. During the progress of this cause an injunction was issued against the defendant, and afterwards, on application of the defendant, the injunction was continued, upon condition that a bond with proper sureties should be given. There were thus three bonds given in this case. After the case had been decided on the merits in this court in favor of the defendant, and had gone to the supreme court of the Uuited States, and been returned to this court on a stipulation of the parties reversing the decree entered in this court, the plaintiffs voluntarily dismissed their bill at their own cost, and the injunction which was issued in the case was dissolved. Thereupon the defendant moved the court to assess the damages which he had sustained in consequence of the issuing and continuance of the injunction.

The litigation between these parties has been one of long standing, and this court has decided, on suits which have been brought upon some of the injunction bonds given during the progress of the suit, that as there was no order of this court assessing the damages of the defendant, suits could not be maintained upon the bonds. *Deakin* v. *Stanton*, 3 Fed. Rep. 435; *Deakin* v. *Lea*, 14 Chi. Leg. News, 297. The condition of these bonds was as follows: The first, "to pay all damages and costs that shall be awarded against said plaintiffs, and in favor of said defendant, Frank Deakin, upon the trial or final hearing of the matters referred to in said bill of complaint;" in

the second, "to pay all damages and costs that shall be awarded against said Lea & Perrins, complainants, and in favor of said defendant, Frank Deakin, upon the trial or final hearing of the said cause;" and in the third, "to pay all damages and costs that may be awarded against said Lea & Perrins, complainants, and in favor of said Frank Deakin, defendant, upon the trial or final hearing of said cause, or upon the dissolution of said injunction, by reason of the wrongful or improper issuance of said injunction."

The construction put by the court upon these several conditions was that they referred to damages to be assessed by the court in which the suit was pending, and under whose order the injunction bond had been given, following the case of *Bien* v. *Heath*, 12 How. 168. What was said in that case as to the right of a court of chancery to assess the damages against a party at whose instance an injunction had been obtained, has been modified by the opinion of the supreme court in the case of *Russell* v. *Farley*, decided at the last term, in which the English authorities are fully considered; and it seems to be intimated that a court of chancery has the inherent power to assess the damages under such circumstances. 4 Morr. Trans. 410. We think this view is more in accordance with the principles of equity practice against a party in whose favor the injunction is granted. That court orders the injunction, prescribes the terms upon which it shall be issued, and may require a bond, stipulation, or undertaking as a condition upon which it shall be issued or not, according to its own view of the circumstances of the case. An assessment of damages thus becomes an incident of the principal case, and enables the court to do entire equity between the parties. If the party against whom the injunction has been issued can thus be indemnified, it would seem to be the duty of the court to proceed in the case, and not compel him to resort to an independent action at law to accomplish that result.

The litigation which has grown out of the controversy in this case, and the suits which have been brought upon some of the bonds, have induced the district judge and myself to fully consider this question in the light of all the authorities which have been presented, and we have come to the conclusion that the sounder and better rule is for the court of chancery, where an injunction has been dissolved, to go on and assess the damages which the party against whom it issued has sustained, and it will accordingly be considered hereafter that practice may be adopted in this court.

HIBERNIA INS. CO. *v.* ST. LOUIS & NEW ORLEANS TRANSP. CO.*

(*Circuit Court, E. D. Missouri.* September 28, 1882.)

1. CORPORATIONS—FRAUDULENT TRANSFER OF ASSETS.
   Equity will not permit the stockholders in one corporation to organize another, and transfer all the corporate property of the former to the latter, without paying all the corporate debts.
2. SAME—ENFORCEMENT OF OBLIGATIONS.
   Where such a transfer is made, the obligations of the old corporation may be enforced against the new to the extent of the assets received by it.

For report of opinion on the demurrer to the bill in this case, see 10 FED. REP. 596.

O. B. Sansum and *George H. Shields*, for plaintiff.

Given Campbell and *Thomas J. Portis*, for defendant.

MCCRARY, C. J. This case has been considered upon the plea interposed by the defendant to the fifth subdivision of the bill, and the proofs adduced in support of the same. The bill alleges that the complainant is, by subrogation to the rights of certain shippers, a creditor of the Babbage Transportation Company, a corporation of Missouri, and that, after the creation of the indebtedness, said corporation transferred all its property to the St. Louis & New Orleans Transportation Company, another Missouri corporation, without making provision for the payment of complainant's claim. It is alleged that Henry Lourey, being the President of said Babbage Transportation Company, and the principal owner of the stock thereof, organized the said St. Louis & New Orleans Transportation Company, and caused all the property of the former to be sold and transferred to the latter, without paying or securing the debt due the complainant. It is averred that the said sale was made without the payment of any consideration by said St. Louis & New Orleans Transportation Company. Then follows the following allegations, to which the plea applies:

"*Fifth.* And your orators charge that said sale and transfer of the property of said Babbage Transportation Company to the said defendant, St. Louis & New Orleans Transportation Company, was fraudulent as against the rights of the complainants, creditors of the said Babbage Transportation Company, and that the said Henry Lourey and the said St. Louis & New Orleans Transportation Company had notice of said fraud; and so your orators allege and charge that said St. Louis & New Orleans Transportation Company was not a *bona fide* purchaser of said property for a full and valuable consideration,

*Reported by B. F. Rex, Esq., of the St. Louis bar.

without notice of the rights and claims of your orators in the premises, and that said sale and transfer of said property was made subject to the rights of all persons who had claims, debts, or demands against said Babbage Transportation Company, and the claim and demand aforesaid of your orator.

"Wherefore your orators pray process against the said St. Louis & New Orleans Transportation Company, the said Babbage Transportation Company, and the said Henry Lourey, and that they be cited to appear before this honorable court, and true answer make to all and singular the matter aforesaid, their answer under oath being hereby expressly waived, and that this honorable court will be pleased to decree payment of the aforesaid debt to your orators, with interest thereon and costs of suit, and that said St. Louis & New Orleans Transportation Company be restrained from selling or otherwise disposing of any of the said property until your orators' said debt, and interest and cost, be paid and satisfied, and that until the said debt be satisfied your orators have a lien upon said property in said Exhibit A described, and that this honorable court will be pleased to give and decree to your orators such other and further relief as to law and justice and as this honorable court shall be able to give in the premises."

The plea avers that the Babbage Transportation Company, being the owner of its property, for a valuable consideration, and with the consent of all its stockholders, sold and delivered the same to the St. Louis & New Orleans Transportation Company; that the consideration paid consisted of 500 shares of the capital stock of the last-named company, of the value of $100 a share, and the agreement of said last-named company to pay all the then known outstanding debts of the former company, not to exceed $42,000; that the sale was *bona fide*, and that neither of the parties thereto were aware that the old company was in any manner liable to or indebted to the complainant, or the parties under whom it claims by subrogation; that the stock was delivered to the old company, and the new company paid all the debts of which the parties had notice at the time of the sale. All fraud is denied. The proof shows the following facts:

(1) The Babbage Transportation Company sold all its property to the St. Louis & New Orleans Transportation Company in consideration of 500 shares of full-paid stock in the latter company, and the payment of the debts of the former company to an amount not exceeding $42,000. (2) This consideration was paid by the delivery of the stock and the payment of the debts, amounting to something more than $42,000, but not including the claim of complainant. (3) All the stockholders in the old company assented to the sale on these terms. (4) Henry Lourey was a large stockholder in the Babbage Transportation Company, and was also president, general manager, and treasurer thereof. (5) The said Henry Lourey was also then an officer of the St. Louis & New Orleans Transportation Company, and the stockholders

of the two companies were substantially identical. (6) The officers and stockholders in both corporations at the time of the sale knew of the accident and loss out of which the complainant's claim arose, but no demand had been made for the payment of the sum, and they did not know that any would be made. (7) At the time of the sale inquiry was made as to the amount of outstanding indebtedness of the Babbage Company, and the same was estimated at about $42,000.

Upon these facts this court holds that the sale by the Babbage Company of all its property to another corporation, composed mostly, if not wholly, of the same persons, was fraudulent and void as to all creditors of the former company not assenting thereto. The purchaser knew that it was buying all the property of the seller, and that, by the transaction, the latter was being deprived of the means and power of meeting any of its outstanding obligations. The fair inference from the transaction is that the old company was about to be dissolved, and to cease to be. It was to be absorbed by the new company. This is the inevitable consequence of the formation of the new company, composed substantially of the same persons, to transact the same business at the same places, and with the same property. By the transfer, the creditors of the old company were deprived of the means of enforcing their claims. Probably no officers of the old company have since been elected, and it is to be presumed that none will be. This being so, it is at least doubtful whether service of process could be obtained so as to procure a judgment at law against the old company. And if a judgment were obtained, it could not be collected out of any assets in the possession of the old company, because it had turned all its assets over to the new company. It has received, it is true, paid-up stock in the new company, but that has doubtless been disposed of; or, if it has not been, it may at any moment be transferred. Equity will not compel the creditor of a corporation to waive his right to enforce his claim against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock after they are placed upon the market. A distinction with respect to transactions of this character exists between a corporation and a natural person. A natural person may sell all his property for a fair consideration, if the transaction is *bona fide*, and the buyer will not be required to take care that the seller provides for and pays all his debts. A corporation, unlike a natural person, by disposing of all its property, may not only deprive itself of the means of paying its debts, but may deprive itself of corporate existence, and place itself beyond the

reach of process at law. At all events, equity cannot permit the owners of one corporation to organize another, and transfer from the former to the latter all the corporate property, without paying all the corporate debts; and that is the exact case now before us.

Here was a corporation engaged in a profitable business, and owning and possessing property valued at $92,000, exclusive of its franchise. It owed debts confessedly amounting to more or less than the value of its property. It ceases to transact business. Its stockholders organized themselves into another corporation, and all the property is transferred from the old to the new. It matters not that the stockholders in the two companies may not be precisely identical. We are not prepared to say that it would make any difference if the members of the new company were none of them interested in the old. The thing which we pronounce unconscionable is an arrangement by which one corporation takes from another all its property, deprives it of the means of paying its debts, enables it to dissolve its corporate existence and place itself practically beyond the reach of creditors, and this without assuming its liabilities. The fact here, however, appears to be that the owners of the two corporations are substantially identical, and hence there is a still stronger case in equity. It may be that in such a case the purchasing company might be permitted to show, by way of defense, that it has paid debts against the old corporation to an amount equal to the whole value of the property received from it, including the value of its franchise. But this is a doubtful question, which does not arise here, and we express no opinion upon it.

Treat, D. J., *concurring*. My views in this case were fully expressed in the opinion on the demurrer to the bill. In the light of the decision by the United States supreme court then referred to, the plaintiff can pursue its demand against a new corporation which is, though nominally a different corporation, actually the same under a different name, having obtained all the assets of the old.

The facility with which new corporations are formed under local statutes to succeed to rights of property by transfer from the old corporations is to be considered, and such transfers are not to be held in equity destructive of prior and existing rights. A corporation with obligations determined or undetermined cannot change its name or assume the form of a new corporation, and thus escape its obligations, or relieve the new corporation of the obligations of the old; at least, to the extent of such obligations and assets.

It is said that the new corporation acquiring the property of the old for adequate consideration should not be answerable for the debts of the old; that it could buy the property, no lien thereon existing, free from all demands at large; and consequently the new corporation, like any other purchaser, is not responsible, personally or otherwise, for the debts of the vendor. That proposition need not be disputed. But what is the case before the court? The Babbage Company had possibly incurred a liability for its violations of contracts. The original parties had not asserted their demand. The questions were whether the Babbage Company was liable for violations of contracts of affreightment. The plaintiff paid the losses and became subrogated to the rights of the shippers. In the mean time the Babbage Company ceased practically to exist, and transferred all its property to the St. Louis & New Orleans Transportation Company, whereby it had technically no property to respond to plaintiff's demand. Can the transferee, under the circumstances, be held to answer the demand?

The plea avers substantially that the new corporation purchased, for valuable consideration, the property of the old corporation, paying therefor $50,000 in stock of the new, and assuming the obligations of the old to the extent of $42,000; that said obligations have been met, and additional obligations, which Capt. Lourey has paid, to the extent of about $13,000.

It is the duty of the court to examine the whole transaction, and to cut through mere paper transfers designed to obstruct or destroy the rights of parties. The evidence sufficiently discloses that the new corporation was a mere continuance of the old, with substantially the same parties in interest—a mere change of name. Whether that change, with attendant transfers, was designed or not to defeat all outstanding demands of the old corporation, it is evident that substantially the two corporations are the same, and that the new must respond to the obligations of the old. The evidence is clear enough that there was a hidden purpose in the change of corporative existences to escape possible liabilities which equity does not tolerate. A mere change of name cannot avoid obligations. The new corporation took all the property of the old, went forward with its business, had the same stockholders, except a few formal ones, was, in short, the old corporation, and now seeks to escape the obligations of the old, rescuing the property of the latter from the demands the former was bound to meet. Can this be done? The old corporation and its property were liable to the demands of the plaintiff. The new cor-

poration must respond to the extent of the property acquired, and possibly to the full extent; that is, if property sufficient therefor is in its possession. This is a proceeding in equity, wherein mere colorable pretenses are to be disregarded. Shiftings of corporate names cannot defeat positive rights, any more than the change of the name of a natural person can absolve him from his personal obligations.

The evidence discloses that the obligations of the Babbage Company still subsist against its corporate successor; at least, to the extent of assets acquired.

If these views are not sound, a corporation with demands pending can transfer all its assets to a new corporation, and thus leave the demands inoperative, although said new corporation is the old, only in change of name. The evidence shows that since this cause was instituted a new consolidation has occurred, whereby another transfer of property has been had. Is it to be considered in equity that such transfers and practical dissolutions of corporations will prove effectual to defeat existing and valid demands? Or will the corporate successors be held to the obligations of their predecessors; at least, to the extent of the assets acquired? It may be that between the old and new, in connection with lien or general demands, an accounting may be had, so that unpaid creditors may know what remains. If the new company has paid the full value of the property acquired, then it possibly may not be answerable; but if it has merely issued to the old its stock therefor, why should it not, at least to the extent of that stock, which represents values for property acquired, meet the obligations to which such stock should fairly be held subject?

Property to the amount of $92,000 was transferred, and $42,000 indebtedness was actually paid. Hence property of the old corporation is in possession of the new to the extent of $50,000, which ought to be subject to the obligations of the old company. The fact that the new corporation has issued its stock to the old for said $50,000 cannot defeat the rights of parties.

HARRISON *v.* UNION PACIFIC RY. CO. and others.*

(*Circuit Court, E. D. Missouri.* September 21, 1882.)

1. CORPORATIONS—BONDS—GUARANTY.
   The holder of bonds issued by a company in which he is a stockholder, and guarantied by another corporation, may recover the full amount due upon the bonds from the latter company, in case of default in payment by the former.
2. SAME—CONSIDERATION.
   Where one railroad company holds stock in another, and the latter's road, when constructed, will become a feeder to the former's line, there is a sufficient consideration for the guaranty by the former of bonds issued by the latter to aid in the construction of its road.
3. SAME—CONSOLIDATION—LIABILITY OF CONSOLIDATED COMPANY.
   A. and B., two corporations, united and formed a consolidated company, which did business under the name of B. A., at the time of the consolidation, was indebted to X. The consolidated company derived sufficient assets from A. to pay the debt. *Held*, that X. could recover the full amount of his claim against A. from B.

In Equity.

The plaintiff, Harrison, is the holder of 20 bonds of the Arkansas Valley Railway Company, guarantied by the Kansas Pacific Railway Company, on which he brought his action at law in this court to recover judgment against the Union Pacific Railway Company, alleging that the latter company is responsible upon said bonds as successor in liability under a contract of consolidation between said two last-named companies, and certain statutory provisions concerning the same. The said railroad companies brought their bill in equity to enjoin the plaintiff, Harrison, from further prosecuting his action and from negotiating said bonds, and also asking for an accounting between Harrison and the Arkansas Valley Railway Company for interest paid by said company to Harrison, as well as for a surrender of the bonds so guarantied, and of two Clay county bonds alleged to be held by him. The plaintiff, Harrison, filed a cross-bill, praying alternative relief, as follows:

(1) If the court holds that the Union Pacific Railway Company is liable directly to Harrison, that the injunction be dissolved, and he be permitted to proceed with his action at law. (2) If, on the other hand, the court holds that the company is liable only to the extent of the property received from the Kansas Pacific Railway Company, then that the trust be fastened on that property, and for a discovery as to its character, identity, and present value.

*Reported by B. F. Rex, Esq., of the St. Louis bar.

The material facts with respect to the 20 bonds sued on are as follows:

(1) In 1873 the Arkansas Valley Railway Company was a corporation existing under the laws of Colorado, and had authority to construct a railroad commencing on the line of the Kansas Pacific Railway at Kit Carson, and extending to Pueblo. (2) The construction of this line was regarded as of great importance to the prosperity and success of the Kansas Pacific Railway Company, to whose line it would become a feeder. (3) In order to accomplish this object bonds were issued by the Arkansas Valley Railway Company, and guarantied by the Kansas Pacific Railway Company, and it was agreed by the former company that any one subscribing to the scheme $7,500 should receive $10,000 first mortgage bonds of the Arkansas Valley Railway Company, guarantied by the Kansas Pacific Company, $1,000 of Clay county municipal bonds, and stock of the Arkansas Valley Railway Company, $7,500, amounting to $18,500, nominal value, in consideration of a cash payment of $7,500. (4) Harrison, then being a director in the Kansas Pacific Railway Company, and that company being a stockholder in the Arkansas Valley Company, subscribed to the scheme $15,000, and accordingly became entitled to and did receive $20,000 of the bonds guarantied by the Kansas Pacific Company, $15,000 stock in the Arkansas Valley Railway Company, together with $2,000 Clay county bonds. (5) The railroad bonds were secured by mortgage upon the road, and when default in the payment of interest had occurred the trustees on the mortgage sold out the road and its belongings, and the proceeds were divided out among the bondholders, including Harrison, who credited on his bonds the sum he received. The allegations of the cross-bill with respect to the consolidation, in so far as it is deemed necessary to state them, are to be found in the opinion of the court.

The case is before the court on demurrer to the cross-bill of Harrison, which, it is conceded, presents all the material facts.

Dyer & Ellis and *George M. Block*, for Harrison.

J. P. Usher and *H. D. Wood*, for the railroad company.

McCRARY, C. J. The intention of the Arkansas Valley Railway Company was to sell the stock to Harrison for less than its par value; *i. e.*, to give him $15,000 in stock, 20 bonds of the company, guarantied by the Kansas Pacific Company, and the Clay county bonds, all for $15,000 in cash. There is nothing in the statutes of Colorado, where the corporation was created, to forbid the sale of stock at less than par, nor was Harrison forbidden to purchase the stock by reason of the fact that he was already a stockholder and director in the Kansas Pacific Railway Company. The transaction was therefore valid as between the corporation and Harrison, whatever the right of the creditors of the corporation as against Harrison may be. *Scovill* v. *Thayer*, 4 Morr. Trans. 179; S. C. 11 FED. REP. 198, note.

Such being the case, it cannot be said that Harrison obtained the bonds without consideration. He bought all the securities above mentioned for $15,000 in cash, and although the face value of the securities purchased is much more than $15,000, it does not follow that they were intrinsically worth more than that sum; and, in fact, the cross-bill alleges, and the demurrer admits that they were not intrinsically, nor in the market, worth the sum paid for them. It is, at all events, clear that the owner of such paper is at liberty to sell it at any price he pleases, unless prohibited by statute. The Kansas Pacific Company is bound by its guaranty of said 20 bonds. The pecuniary interest which that company had in the Arkansas Valley Company, and in the construction of the road from Kit Carson to Pueblo, was a sufficient consideration for the guaranty. It follows that Harrison may recover upon the bonds unless the railway company has shown some sufficient defense in equity. It is said, and it is true, that if the Union Pacific Railway Company is compelled to pay the sum due on these 20 bonds it will have the right to recover from the stockholders of the Arkansas Valley Company, including Harrison, to the extent of their unpaid stock in that corporation. But in this case there can be no decree for contribution, because the necessary parties are not before us, and the pleadings are not framed with a view to such a decree. If the Union Pacific Company is liable for the sum claimed by Harrison, it must make payment and then proceed against the stockholders, including Harrison, for contribution.

Our conclusion is that no sufficient defense, either at law or in equity, to the bonds in question has been shown, and that as against the Arkansas Valley Company, the maker, and the Kansas Pacific Company, the guarantor, of said bond, the plaintiff, Harrison, has a good cause of action.

The remaining questions are, what is the extent of liability of the Union Pacific Company, and what measure of relief is Harrison entitled to against it? The parties are now in a court of equity; and, if their rights can be determined by a decree in the present case, that is sufficient for our present purpose. It may be that there is a right of action against the consolidated company; but if so, we think it is not exclusive. If a creditor of the original corporation sees fit to proceed in equity to subject the property of that corporation in the hands of the consolidated company, he has a clear right to do so.

By the articles of consolidation it is expressly provided that "nothing herein shall prevent any valid debt, obligation, or liability of

either constituent company from being enforced against the property of the proper constituent company, which, by force of these articles, becomes the property of the consolidated company." The cross-bill alleges and the demurrer admits that the consolidated company has received from the Kansas Pacific Company all its property, amounting to more than $10,000,000, and that the original corporation has practically ceased to be, and is merged in the consolidated company, having now no officers upon whom service can be made, and no property out of which an execution can be satisfied. We are of the opinion that, under such circumstances, the consolidated corporation is liable in equity for the debts of the original corporation; at least, to the extent of the value of the property received from it. If the new corporation admits (as it does by its demurrer in this case) that it has received to its own use the property of the original corporation to an amount largely in excess of the sum claimed, no inquiry is necessary, and relief may be had in the form of a decree for the sum due. If this be denied, (as it may be by an answer,) the court will hear the proof, and in that case it would become the duty of the Union Pacific Railway Company to answer the interrogatories embodied in the cross-bill.

The demurrer to the cross-bill is overruled, and if the Union Pacific Company stands upon the demurrer, there will be a decree for the sum due upon the bonds, without prejudice to the rights of the said company to proceed against the stockholders of the Arkansas Valley Railway Company, including Harrison, to compel contribution. We do not determine the question whether a creditor of the Kansas Pacific Company may maintain an action at law against the Union Pacific Company to recover his debt. The correct determination of that question depends somewhat upon the construction of certain statutes, state and federal, some of which are not before us, and the decision is not necessary in the present case.

TREAT, D. J., concurring.

FLETCHER *v.* NEW YORK LIFE INS. CO.*

(*Circuit Court, E. D. Missouri.* September 28, 1882.)

1. INSURANCE—CORPORATIONS—COMITY.
   A foreign insurance company cannot withdraw itself from the operation of the statutes of a state in which it does business, by the insertion of clauses in its policies.
2. SAME—APPLICATION FOR INSURANCE—FRAUD.
   Where, by the terms of a policy of insurance sued on, an application signed by the assured is declared to be the sole basis thereof, evidence is admissible to show that false statements contained in the application were inserted without the applicant's knowledge by an agent of defendant, and that the applicant's signature was procured by such agent by fraud.
3. PLEADING—REPLICATION—SURPLUSAGE.
   Where sufficient probative facts appear, a reply is not demurrable because it also contains allegations as to mere matters of evidence.

Demurrer to Replication.

This is a suit upon a policy of insurance upon the life of C. S. Alford, deceased, by his executor, Thomas C. Fletcher. Defendant alleges in its answer that it is a foreign corporation; that said Alford made a written application to it for insurance upon his life, and that the application was signed by him, and was attached to and made a part of said policy when issued; that said application contained two false answers to questions material as to the risk, therein printed, and the following clause, viz.:

"And I do hereby agree that the statements and representations contained in the foregoing application and declaration shall be the basis of the contract between me and the said company,—the truthfulness of which statements and representations I do hereby warrant; and that if the same, or any of them, are in any respect untrue, the policy which may be issued thereon shall be void, and all money which may have been paid on account of such insurance shall be forfeited to said company; and inasmuch as only the officers at the home office of the company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, it is expressly understood and agreed that no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy, or to any other person, shall be binding on this company, or in any manner affect its rights, unless such statements, representations, or information be reduced to writing and presented to the officers of the company, at the home office, in the above application."

*Reported by B. F. Rex, Esq., of the St. Louis bar.

Plaintiff's reply consists, to a considerable extent, of evidentiary matter. The allegations, so far as it is deemed necessary to set them forth here, are substantially as follows, viz.: That the defendant, though a foreign corporation, was, at the time said policy was issued, authorized and licensed under the laws of Missouri to transact business in that state; that said application was taken and said policy delivered to said Alford in the city of St. Louis; that the application was taken by certain agents of defendant; that one of them read the questions therein contained, and pretended to write the applicant's answers thereto in the application; that the false answers contained in the application were not made by the applicant, but that he answered the questions to which said false answers were appended truly, and that he did not read said answers over, or have them read to him, but signed said application under the impression that his answers had been reduced to writing substantially as made. And in the second part of his reply plaintiff states that after the said application had been signed, defendant's agent took it, but that said Alford neither sent it to any officer of defendant at New York, or authorized any one else to do so; that the policy was shortly afterwards delivered to said Alford, and the premiums collected, and that he, supposing the answers in the application were taken as given, or were written to the satisfaction of defendant, did not read over the copy attached to the policy, or the policy, but was told by said agent on delivering it that it was all right, and that he was insured; that said Alford paid the annual premiums as they fell due, and that they were collected by said agent of defendant, with full knowledge of the aforesaid facts.

To the first part of said reply defendant demurred on the following grounds:

First, that the matters therein set forth as pleaded do not constitute a cause of action against this defendant, nor constitute in law any reply to the new matter set forth in defendant's answer; *second*, that any issuable facts in said portion of said reply contained are intermixed with statements of evidence and matters wholly irrelevant.

To the second part of said reply defendant demurred on the grounds—

First, that the matters therein set forth do not in law constitute any cause of action in plaintiff, nor any defense to the matters set forth and pleaded in the defendant's answer; *second*, that said part of said reply contained statements of evidence and matters wholly irrelevant.

Section 5977 of the Revised Statutes of Missouri is as follows:

"In suits brought upon life policies heretofore or hereafter issued, no defense based upon misrepresentation in obtaining or securing the same shall be valid, unless the defendant shall, at or before the trial, deposit in court, for the benefit of the plaintiffs, the premiums received on such policies."

For report of charge to jury at first trial see 11 FED. REP. 377. For report of decision upon motion for a new trial see 12 FED. REP. 557.

Carr & Reynolds, for plaintiff.

Overall, Judson & Tutt, for defendant.

TREAT, D. J. There are substantially only two questions involved: *First*. Inasmuch as the policy sued on declared that it rests on the basis of answers made to the application, and that said policy was to be issued at the home office in New York on return thereto of the application, can the plaintiff avail himself of the force of the Missouri statute? The defendant company was doing business in Missouri, with the privileges granted to it here, when said insurance was effected. It may be that the formal acceptance of the proposed contract was, by the *letter* of the contract, to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri, for salutary reasons, permit foreign corporations to do business in the state on prescribed conditions. If, despite such conditions, they can by the insertion of clauses in their policy withdraw themselves from the limitations of the Missouri statutes, while obtaining all the advantages of its license, then a foreign corporation can by special contract upset the statutes of the state and become exempt from the positive requirements of law. Such a proposition is not to be countenanced. The defendant corporation chose to embark in business within this state under the terms and conditions named in the statute. It could not by paper contrivances, however specious, withdraw itself from the operation of the laws, by the force of which it could alone do business within the state. To hold otherwise would be subversive of the right of a state to decide on what terms, by comity, a foreign corporation should be admitted to do business or be recognized therefor within the state jurisdiction. Each state can decide for itself whether a foreign corporation shall be recognized by it, and on what terms. Primarily, a corporation has no existence beyond the territorial limits of the state creating it, and when it undertakes business beyond it does so only by comity. The defendant corporation having been permitted to do business in Missouri under the statutes of the latter, was bound by

all the provisions of those statutes, and could not, by the insertion of any of the many clauses in its forms of application, etc., withdraw itself from the obligatory force of the statute. The contract of insurance, therefore, is a Missouri contract, and subject to the local law.

There are other questions involved in the demurrer which are of no small importance. It is averred that the answers to questions in the application were not only false, but as to matters which were so far essential to the risk as to fall within the terms of the statute; in other words, that the insured died of the very disease which he denied or concealed. If that be so, there can be no recovery. On the other hand, it is alleged that he made the fullest and most honest disclosures with respect thereto, and referred the soliciting agent to his physician for a fuller statement; that the soliciting agent, in his anxiety to secure the policy, and being acquainted with the applicant, wrote down as answers to the questions objected to, not what the applicant answered, but what he, the agent, chose to fill out, so as not to lose the risk. This involves the proposition whether, when under the terms of the policy the application is declared to be the sole basis thereof, any evidence will be heard to avoid its effect against the party's own signature.

This question is not a new one. Of course, a fraud will bind no one. Why, then, should a signature to an application of this kind procured by fraud be obligatory? It is not a question of estoppel, for an insurance company may have continued to receive premiums in ignorance of the false statement by the applicant, and therefore should not be held to a fraudulent contract, of whose fraudulent character it knew nothing.

The real question presented is whether the averments in the reply are sufficient to overcome the defense set up. We hold that if the statements of the reply are true, then the defense is overcome. If the disease mentioned was fatal, the plaintiff, even under the Missouri statute is driven to show that the answers to the application which he signed were, despite his signature, never made by him; in other words, that a fraud was perpetrated on him by the company's agent.

Analyzing the pleadings, there is room for comment as to the form thereof. The doctrine is clear that only probative or ultimate facts can be pleaded, and not mere matters of evidence. The reason is obvious. What issue shall be taken? Not on details of evidence tending to show a fact, but solely as to the existence of the probative fact itself.

With due regard to the rules of pleading, it appears that, despite surplusage, the replications must be held good, in the light of the legal rules stated, inasmuch as there can be no pleadings subsequent to the reply.

Demurrer overruled.

McCrary, C. J., concurs.

In re Ellerbe.*

(*Circuit Court, E. D. Missouri.* October 4, 1882.)

1. Crimes—Contempt—Rev. St. §§ 725, 1014.
   A refusal to obey a subpœna issued by a federal court is an offense against the federal government, within the meaning of section 1014 of the Revised Statutes of the United States.
2. Same.
   Where a federal court orders the arrest of a witness charged with having failed to obey a subpœna issued by it, and duly served, and the witness departs into another district before he can be arrested, any judge of the United States, having jurisdiction in the district to which the witness has removed, may order his arrest and removal back to the district in which he is charged with the offense.
3. Same—Right of Witness to a Hearing.
   In such cases the judge ordering the arrest of the witness cannot inquire into his guilt or innocence before ordering his removal.

Petition for a Writ of *Habeas Corpus.*

Chester H. Krum, for petitioner.

M. Drummond, Asst. U. S. Atty., for the United States.

McCrary, C. J. The record of this case shows that the petitioner was arrested in this district upon a warrant issued from the office of the clerk of the circuit court of the United States for the eastern district of Arkansas, which warrant was issued by the order of that court in a proceeding against petitioner for contempt. It appears that petitioner was duly subpœnaed in said eastern district of Arkansas, on the twenty-sixth day of April, 1882, to appear and testify on the twenty-seventh day of said month as a witness in a civil cause pending in said court.

When duly served with the subpœna he was temporarily within said district on professional business, but was a resident of St. Louis, within the eastern district of Missouri, more than 100

*Reported by R. F. Rex, Esq., of the St. Louis bar.

miles from Little Rock, Arkansas, where the said cause stood for trial. His arrest was ordered by that court for contempt in neglecting to attend the aforesaid court as a witness, after having been duly served with process of subpœna. The warrant for petitioner's arrest was presented to the judge of the district court of this district, who indorsed thereon his order to the marshal of this district to arrest the petitioner and deliver him to the marshal of the United States for the eastern district of Arkansas. This arrest having been made, petitioner applied to the district court for discharge upon *habeas corpus*, upon the ground that the proceedings within this district were without warrant of law, and that petitioner was unlawfully restrained of his liberty, without justification and proper authority.

Section 725 of the Revised Statutes of the United States provides that—

"The courts of the United States shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any persons in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

Section 1014 of the Revised Statutes of the United States provides that "for any crime or offense against the United States" the offender may, by any judge of the United States, be arrested and imprisoned, or bailed "for trial before such court of the United States, as by law has cognizance of the offense." And it further provides that "when any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the district judge of the district where such offender or witness is imprisoned, seasonably to issue, and the marshal to execute, a warrant for his removal to the district where the trial is to be had."

It is conceded by the counsel for the petitioner that the statute authorizes the arrest in one district of a party charged with the commission of an offense against the United States in another district. But it is contended that contempt is not such an offense. This position, however, is untenable. A refusal to obey the process of a court of the United States is an attempt to obstruct the administration of justice, and is plainly an offense against the federal government.

A proceeding in contempt, in a federal court, is a criminal case, to be prosecuted in the name of the United States. *Riggs* v. *Supervisors*, 1 Woolw. 377; *Ex parte Kearney*, 7 Wheat. 38; *New Orleans* v. *Steam-ship Co.* 20 Wall. 387.

By the express terms of section 725 of the Revised Statutes of the United States, the courts of the United States are authorized to punish contempt, and this necessarily implies that it is an offense against the United States. It has frequently been held to be an offense against the United States, within the terms of the provision of the constitution which authorizes the president to pardon such offenders. *Dixon's Case*, 3 Op. Atty. Gen. 622; *Conger's Case*, 4 Op. Atty. Gen. 317; *Rowan & Wells' Case*, Id. 458.

It is next insisted on behalf of the petitioner that he is entitled to a hearing before he can be sent out of the district, and that he has not had such a hearing as the law requires. It was, no doubt, the duty of the marshal of the eastern district of Arkansas to apply to the judge of his district for an order for the arrest of the petitioner; and it was the duty of the district judge to enter into such an investigation as was necessary to enable him to determine whether the petitioner should be sent out of the district to answer the charge against him. Precisely how far the district judge was authorized to go upon such a hearing, it is not necessary in the present case to determine. Certain it is that he had a right to inquire into the question of the prisoner's identity. This would be necessary in any case, for the judgment of a court in another district, however conclusive upon all other questions, would establish nothing with regard to the identity of the prisoner.

It may, for the purposes of this case, be assumed that the district judge could inquire into the question of the jurisdiction of the court in Arkansas to try the prisoner for the offense charged. If such be the law the jurisdiction clearly appears. I do not think, however, that in a case such as this the district judge can go further and inquire into the question of the guilt or innocence of the prisoner. There may be cases, in which the inquiry might properly extend to an examination into the question of probable guilt, but if so they are cases where there has neither been a preliminary examination nor an indictment in the district where the offense was committed, nor an order for the arrest of the prisoner by a court of the United States of competent jurisdiction and sitting in that district. See opinions of Mr. Justice Miller and Judge Love, 1 Woolw. 422.

The power to punish for contempt is inherent in every court, and, as we have already seen, is expressly conferred upon the federal courts by act of congress. The record before us shows that the circuit court of the United States in and for the eastern district of Arkansas, having jurisdiction of the petitioner, ordered his arrest to answer for a contempt of its authority. That court is the sole judge of such a question, and it would be exceedingly improper for another court to assume to revise its judgment upon the subject. Even the supreme court of the United States upon appeal will not review the action of a circuit court of the United States in imposing a fine for contempt. *New Orleans* v. *Steam-ship Co. supra.*

If the district court had, in the present case, gone so far as to question the propriety of the order for the petitioner's arrest, on the ground that he was not guilty of a contempt of the authority of the circuit court of the United States for the eastern district of Arkansas, its action would have been unwarranted in law and disrespectful to another court of co-ordinate jurisdiction. The proof, therefore, which was before the district court sufficiently established all the facts that were necessary to justify the decision of that court against the petitioner. It showed that the petitioner was within the jurisdiction of the circuit court of the United States in and for the eastern district of Arkansas, that he was served with subpœna to appear before the court as a witness in a civil cause therein pending, and that he failed to respond to the subpœna, and removed himself beyond the jurisdiction of the court.

If persons summoned to appear as witnesses in the federal courts can refuse to obey the summons and place themselves beyond the reach of the law by departing from the district, the most serious consequences would result; the administration of justice would be greatly impeded, the rights of parties in many cases would be sacrificed; and the courts of the United States would be rendered powerless to protect litigants by compelling the attendance of important witnesses.

The conclusion is that the judgment of the district court should be affirmed. And it is accordingly ordered.

NOTE. See *In re Tift*, 11 FED. REP. 463; *New York & Balt. C. P. Co.* v. *New York C. P. Co.* 11 FED. REP. 813; *U. S.* v. *Justices of Lauderdale Co.* 10 FED. REP. and note, p. 468; *In re Cary*, 10 FED. REP. 622, and note, p. 629; *Atlantic Giant Powd. Co.* v. *Dittmar Powd. Manuf'g. Co.* 9 FED. REP. 316; *Fischer* v. *Hayes*, 6 FED. REP. 63; *U. S.* v. *Memphis & Little Rock Co.* 6 FED. REP. 237; *Steam Stone Cutter Co.* v. *Windsor Manuf'g Co.* 3 FED. REP. 298;

In re May, 1 FED. REP. 737; *Bridges* v. *Sheldon*, 18 Blatchf. 507; *Van Zandt* v. *Argentine Min. Co.* 2 McCrary, 642; *Ex parte Rowland*, 104 U. S. 604; *Hayes* v. *Fischer*, 102 U. S. 121; *U. S.* v. *Jacobi*, 1 Flippen, 108; *Hovey* v. *McDonald*, 3 McArthur, 184.—[Ed.

UNITED STATES *v.* WHITTIER.

(*Circuit Court, N. D. Illinois.* August 4, 1882.)

1. CRIMINAL PROCEDURE—ERROR—STAY OF PROCEEDINGS.

   On an application to the circuit court for a writ of error to the district court, in a criminal case, if the error complained of is a matter about which there may be a serious question, it is the duty of the court or of the judge, not only to grant the writ of error, but to allow a stay of proceedings, to enable the defendant to take the deliberate judgment of the appellate court upon the question involved in the case.

2. WRIT OF ERROR—WHEN GRANTED.

   Where there is a question about which there is a doubt, as whether the defendant is charged in the indictment with a felony or a misdemeanor, and whether it was error to receive the verdict of the jury during the absence from the court of defendant and his counsel, and as to which question defendant has a right to take the opinion of the appellate court, a writ of error and a stay of proceedings should be granted.

D. A. Leake, for the United States.

Lyman Trumbull, for defendant.

DRUMMOND, C. J. This is an application to the circuit court for a writ of error, with an order for a stay of proceedings on a judgment and sentence by the district court for the imprisonment of the defendant in the penitentiary at Chester for the term of three years. The offense charged in the indictment was that the defendant deposited in the post-office a notice which gave information to the persons named in the indictment where an article for the prevention of conception could be obtained, contrary to section 3893 of the Revised Statutes, as amended by the act of July 12, 1876. The record shows that on the fifteenth of June, 1882, the defendant in person, and by his attorney, together with the district attorney and a jury, appeared in court, and that the evidence in the case was concluded, and the arguments of counsel heard, and the instructions of the court given to the jury, "and the jury thereupon retired to consider their verdict; and, after a short absence, the jury returned into court, in the absence of the defendant and his attorney, the following verdict, viz., 'We, the jury, find the defendant guilty;' and, on motion of the district attorney, it is ordered that the marshal take the defendant

into custody." It is further shown by the record that the defendant had previously entered into a recognizance for his appearance in court from time to time, and was under recognizance at the time of the trial. On the same day the verdict was rendered, the defendant came into court and entered into a recognizance to appear before the court from day to day during that term, and also from day to day, and from term to term, to answer any order which the court might make in the case, and not depart without leave of the court. It does not appear how long the interval was between the rendition of the verdict and the time when this recognizance was entered into. On the twenty-fourth day of June, 1882, the defendant appeared in court personally and by his counsel, and moved the court for a new trial, which, after argument, was overruled by the court, and thereupon the sentence of the court already mentioned was passed upon the defendant. The grounds for the motion for a new trial are not stated, nor does it appear whether an objection was or was not taken because of the absence of the defendant and his counsel when the verdict was received.

The only difficulty about this case is whether the defendant is entitled to an order for a stay of proceedings. The statute of 1879 does not make it obligatory on the circuit court to grant a writ of error to the district court in a criminal case; but the court, in favor of the rights of the citizen, would always feel inclined to be liberal in the construction of that part of the statute; and, although the view of the court might be that the judgment and sentence of the district court were right, still, unless it was a case entirely free from doubt, the court would grant a writ of error. But obviously it was the intention of the statute to give an absolute legal discretion to the court, or to the judge, whether the writ of error should operate as a stay of proceedings. It seems to me that the true rule upon the subject is this: If the error complained of is a matter about which there may be a serious question, it is the duty of the court, or of the judge, not only to grant the writ of error, but allow a stay of proceedings, to enable the defendant to take the deliberate judgment of the appellate court upon the question involved in the case. The only question of any importance, as I consider it, arises from the statement of the record that the defendant and his counsel were both *absent* at the time the verdict of the jury was rendered. They were present at the conclusion of the trial, when the evidence was finished, and when the instructions of the court were given to the jury. They then both absented themselves, for what reason and

how long the record does not show. Now, the point is not, as I think, what may be the inclination of the mind of the circuit judge as to the error assigned; but whether there may be a question about which there is a doubt, and as to which the defendant has a right to take the opinion of the appellate court. There is a conflict in the authorities. Some of the authorities which have been cited state that, this being a misdemeanor only, the court had the right to receive the verdict of the jury in the absence of the defendant. I think the counsel of the defendant is perhaps correct in saying there is no case which states that in the absence of both the defendant and his counsel a verdict is properly receivable. I cannot see that there is much distinction in principle upon this point. On a trial for felony at common law the verdict of the jury could not be rendered in the absence of the defendant. We have no clear distinction, in many of the criminal statutes of the states, between felony and misdemeanor; but there is no doubt this offense, though called a misdemeanor by the statute, is a grave one, because the punishment for the commission of the offense may be a fine of $5,000 and ten years' imprisonment, and the sentence was three years in the penitentiary. The punishment, therefore, is very serious, and whatever may be my own view, at this time, of the error assigned upon the record, I think the defendant is entitled to take the opinion, after full argument, of the appellate court upon the question.

I would add, as an additional reason for this conclusion, that the case comes before me now only on a petition for a writ of error, with a request to grant a stay of proceedings. It is quite possible that I may not finally hear this case, and though I might now have an opinion on the case, as another judge may take a different view of it, I think I ought to give the defendant a stay of proceedings. Again, the case may be heard by two judges of the circuit court, and there may be a difference of opinion, possibly, between them, and the case be certified to the supreme court of the United States, and the defendant would then have a right to take the opinion of the court of last resort upon the question.

In view of all these considerations, and for these reasons, I feel inclined not only to grant a writ of error, but a stay of proceedings in the case, and it is so ordered.

SHIPPEN v. TANKERSLEY.

(*Circuit Court, D. Colorado.* June, 1882.)

1. ACTIONS EX DELICTO AND EX CONTRACTU.

The distinction between actions founded in contract and those founded in tort is, in general, very clearly defined. If the cause of action is a wrong, with a resulting injury, the action is *ex delicio*. The sale of forged bonds, with a knowledge of the forgery, is a tort dependent upon a contract, and a suit to recover the consideration paid may properly be maintained, either as an action *ex delicto*, for the breach of duty, or as an action *ex contractu*, for the breach of contract.

2. SAME—COMPLAINT—STATUTE OF LIMITATIONS—SECTIONS 1671 AND 1686, GEN. LAWS COLORADO.

Allegations in a complaint that the defendant agreed to sell and deliver to plaintiff for $8,000 *paid*, certain bonds, but instead of delivering said bonds delivered forged imitations thereof, knowing that the bonds so delivered were not genuine, but forgeries, are sufficient, in a suit to recover the money so paid, to constitute an action *ex delicto*, and such action may be brought within six years, under the provisions of section 1671 of the General Laws of Colorado; section 1686 applying only to actions *ex contractu*.

Demurrer to answer.

Harman & Ellis, for plaintiff.

MCCRARY, C. J. This case is before the court on demurrer to the second paragraph of defendant's answer to the amended complaint, which raises the question whether the cause of action is barred by the provisions of section 1686 of the General Laws of Colorado. That section is as follows:

"It shall be lawful for any person against whom any action shall be commenced in any court of this state, where the cause of action accrued without the state upon contract or agreement, express or implied, more than two years before the commencement of the action, * * * to plead the same and give the same, in bar of the plaintiff's right of action."

That the cause of action sued on in this case accrued without the state, and more than two years before the commencement of the action, is admitted. The question is whether it is a cause of action accruing "upon a contract express or implied." In order to determine this question it is necessary to examine the allegations of the complaint and amended complaint, and to determine therefrom whether the action is *ex contractu* or *ex delicto*. The substance of the original complaint is that the defendant agreed to sell and deliver to plaintiff, for $8,000 paid, certain bonds of the county of Clark, in the state of Arkansas; but, instead of delivering such bonds, he fraudulently pretended to comply with his said agreement by delivering to

plaintiff certain printed and written sheets of paper having the semblance of, and purporting on their face to be, such bonds, which papers defendant falsely and fraudulently warranted to be the genuine and sealed bonds of said county, and plaintiff, relying upon such representation and warranty, accepted said bonds, believing them to be genuine. It is further alleged that said county never received any consideration to authorize the issuance of said obligations, and that said bonds were fraudulently and secretly made, executed, and uttered outside of the state of Arkansas, long subsequent to their ostensible dates, by persons pretending to act as officers of the county of Clark, when they did not hold such offices in fact or in law, and said bonds were by said persons fraudulently antedated; that the bonds were sealed with fraudulent and fictitious seals, manufactured and procured for such purpose; that said bonds had been materially altered, at the special instance and procurement of the defendant; that said pretended bonds were not duly registered according to law, and that defendant induced and procured what purported to be a registration by false and fraudulent means; that by reason of these facts the pretended bonds were false and spurious forgeries; that defendant knew all the foregoing facts at the time of the sale and delivery to plaintiff.

The amended complaint charges more in detail the forgery and fraud relied upon.

The distinction between actions founded in contract and those founded in tort, is, in general, very clearly defined. If the cause of action is a wrong, with a resulting injury, the action is *ex delicto*. It can scarcely be doubted that the sale of forged bonds, with a knowledge of the forgery, is a tort, and that a suit to recover the consideration paid may properly be maintained as an action in tort.

It is insisted that the complaint shows a tort dependent upon contract, and that therefore the action must be *ex contractu*. The rule is, however, in such cases that the action may be either *ex contractu*, for breach of contract, or *ex delicto*, for the breach of duty. Addison, Torts, § 27. If, therefore, it be conceded that this is a case of tort dependent upon contract, the action is not barred if the complaint states a case in tort, and we think it does. The allegations that the pretended bonds were false, fraudulent, and forged, and that the defendant well knew that such was the fact when he sold them to plaintiff, constitute the main cause of action as set out in the original complaint, the other allegations being evidently introduced rather as inducement or as part of the history of the transaction. At all events, the original complaint does contain in substance the aver-

ments necessary to constitute an action for the tort, and if it be true that the form of the pleading was objectionable, in that it contained other allegations sounding in contract, it is clear that this circumstance cannot avail the defendant.

The original complaint, considered as a complaint in an action *ex delicto*, was sufficient to stop the running of the statute of limitations from the time of its filing, and it has since been perfected as to form by the amended complaint.

In *Elgee* v. *Lovell*, 1 Woolw. 102, a suit in detinue to recover 275 bales of cotton unlawfully seized by the defendant was held to be an action in tort. It was said in that case by Mr. Justice Miller that there are authorities holding that the action of detinue is sometimes treated as an action on contract, and he added that "the allegations of the declaration set out in words a contract of bailment." He said, however, that such actions are often brought in tort, and continued: "We think it would be straining the technical point beyond its just use to hold the plaintiff to the literal words of his declaration." He further said: "It being clear, from all that appears in this case, that the suit is grounded on a tortious seizure by the defendant of the property mentioned, we will not hold, on this demurrer, contrary to the fact that the plaintiff has sued on a contract, because by the forms of pleading he has been compelled to use a fictitious form."

This ruling fully commends itself to our judgment, and it applies with peculiar force to this case. We can plainly see, from the allegations of the complaint, and assuming their truth, that the present suit is grounded on the tortious acts of the defendant, and we are asked, upon consideration of this demurrer, to shut our eyes to this fact, because some of the allegations of the original complaint are such as might be employed in declaring upon an implied contract. And we are asked to do this for the purpose of enabling the defendant to plead the bar of the statute of limitations—a defense not to be specially favored by the courts.

We hold that the section above quoted does not apply to the present action.

There has been some discussion of the question, what provision of the statute of limitations does apply; but we are clearly of the opinion that the case falls within the actions described in the subdivision of section 1671, to-wit, "All other actions on the case, except actions for slanderous words and for libels," and may therefore be brought within six years.

Although the statute of this state has abolished the distinctions of the common law as to the forms of actions, yet the words "actions on the case," as used in this statute, must have a meaning, and we understand them to refer to the nature of the action as it existed at common law, and not merely to the form. It requires that, with some exceptions, all actions which, at common law, would have been actions on the case, shall be brought within six years.

The demurrer to the said second paragraph of the answer to the amended complaint is sustained.

The same order will be made in the case of *Shippen* v. *Bowen*, where the same questions arise.

WATSON and another *v.* BROOKS and another.

(*Circuit Court, D. Oregon.* September 27, 1882.)

1. SALE OF REAL PROPERTY BY BROKER.

   A contract to sell real property for a commission is performed when the broker procures a person who is able to pay for the same to enter into a valid contract to purchase upon the terms proposed, or when he induces such person to offer to pay for the property, and take a conveyance thereof, upon being allowed a reasonable time to examine the title thereto, which offer is refused by the owner, on the ground that the time allowed the broker within which to effect the sale is about to expire.

2. TERRITORY, NOT A STATE.

   The ruling in *New Orleans* v. *Winter*, 1 Wheat. 91, that a territory is not "a state," within the meaning of that term as used in the constitution in making the grant of judicial power to the United States, and that, therefore, a resident of the former cannot sue in the national courts as a citizen of a state, followed, but questioned.

Action to Recover Damages.

William H. Effinger, for plaintiff.

H. Y. Thompson, for defendant Brooks.

Seneca Smith, for defendant Dekum.

DEADY, D. J. The plaintiffs, William P. and Matthew P. Watson, citizens of Washington territory, bring this action against the defendants, S. L. Brooks and Phœbe Dekum, of Oregon, to recover the sum of $2,500, upon the following allegations of fact:

That during the year 1881 the defendants owned a certain property at the Dalles, Oregon, "known as the Dalles Water Company," and engaged the plaintiffs, as their agents, to sell the same, within a certain number of days thereafter,

for the sum of $50,000, and authorized them to represent that they would, "upon a sale being effected, make to the purchaser a good and sufficient conveyance" of the property, "with covenants of general warranty," for which service the plaintiffs were to receive a commission of $2,500, "or all in excess of $47,500 for which they should sell the property;" that, on the last day of the time allowed, the plaintiffs secured a purchaser for the property who was able to pay the sum of $50,000 therefor, and offered to do so upon receiving a conveyance thereof, "provided the defendants would allow him, by his solicitor, to search the title to the same, so that he might be advised as to whether they could convey a perfect title thereto, but that the defendants refused to permit said search or to give time therefor, and thereby refused to complete the sale of said property," and "capriciously and without justifying cause obstructed and prevented a consummation of said sale."

The defendants demur to the complaint, for that (1) the court has not jurisdiction of the parties defendant nor the subject-matter; and (2) the facts stated do not constitute a cause of action.

The case was argued upon both points of the demurrer, and the parties desire that both should be considered by the court.

Upon the second cause of demurrer the defendants claim that the plaintiffs agreed to make a sale of the property, which was not done by simply finding a person who was willing and able to purchase the same in case the title, upon examination, proved good.

A sale of real property is an agreement by the vendor to convey the title thereto or an estate therein to the vendee for a certain valuable consideration then or thereafter to be paid.

The conveyance is not a part of the sale, but only a consequence of it; and the former is complete without the latter, even if it is not followed by it. The legal title remains in the vendor, notwithstanding the sale, until a conveyance is made to the vendee. Bouvier, "Sale," sub. 19.

The plaintiffs undertook to make a sale of this property for a certain price within a certain time, and upon a representation authorized by the defendants to the effect that the title was good. To do this, it was necessary to find some one who was not only able and willing to purchase upon the terms proposed and within the time limited, but who should also agree to do so. And this agreement, to be valid and binding, should be in writing and signed by the purchaser. Or. Civ. Code, § 775, sub. 6.

In such case it matters not whether the transaction is consummated by the delivery of the deed and the payment of the purchase money or not; the person negotiating the sale has performed his undertaking and is entitled to his compensation therefor. The sale

being effected by a valid agreement to a solvent purchaser, the broker has fulfilled his contract and is entitled to his commission; and if the purchaser fails to comply with his agreement, the vendor has his remedy thereon. And if the agreement to purchase is not reduced to writing and therefore not binding, but the parties proceed thereon and complete the transaction by the delivery of the conveyance and the payment of the purchase money, still the broker is entitled to his commission, because the sale made by him in fact is recognized and acted on by the parties, and the vendor has the benefit of his services in bringing the same about.

The case under consideration, however, is different from either of these.

The contract of sale does not appear to have been reduced to writing, nor was it followed by a conveyance of the premises to the proposed purchaser. But no objection was made by the defendants to the contract on that account, or to the solvency of the purchaser, but they refused to go on with the transaction solely upon the ground that the plaintiffs had not effected the sale within the time limited, because the purchaser required a reasonable time thereafter to examine the title to the property before paying for it and taking the conveyance. It is also well understood, and was so assumed on the argument, though it is not so distinctly alleged, that owing to the situation of the parties and the property there was not sufficient time left for the examination of the title after the contract of sale was made, and that, therefore, the refusal of the defendants to accept the offer to purchase, subject to such examination, was in fact a refusal to go on with the transaction, upon the ground that the sale was not and could not be completed within the time agreed upon. And this, it seems to me, is the turning point in this case; so far, at least, as this question is concerned. Could the plaintiffs effect a sale of this property, within the terms of their employment, subject to an examination of the title? I think they could; and that, having done so, they complied with the obligation of their contract and were entitled to their commission. If the contract of sale was made without any stipulation as to the examination of title, the right of the purchaser to the examination would be implied, and if upon such examination it should appear that there was a substantial defect in the title, he might decline to proceed, and still the plaintiffs would be entitled to their commission.

My conclusion upon this point is that the plaintiffs effected a sale of this property—procured a purchaser for it—within the terms of

their agreement, and that the defendants wrongfully refused to complete the transaction, upon the erroneous assumption that such purchaser was not entitled to examine the state of the title before paying the purchase money and taking the conveyance, unless he could do so within the time limited for making the sale. This being so, it follows that the plaintiffs complied with their engagement, and that, so far as it appears, it was the fault of the defendants that the transaction was not completed in accordance with the sale.

In *McGavock* v. *Woodlief*, 20 How. 221, the supreme court, in a case involving this question, says:

"The broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on before he is entitled to his commissions. Then he will be entitled to them, though the vendor refuse to go on and perfect the sale."

The following cases have been examined in the consideration of this question, and, though not exactly in point, they will be found to shed more or less light upon it: *Middleton* v. *Findla*, 25 Cal. 76; *Blood* v. *Shannon*, 29 Cal. 393; *Phelan* v. *Gardner*, 43 Cal. 306; *Knapp* v. *Wallace*, 41 N. Y. 477; *Fraser* v. *Wyckoff*, 63 N. Y. 445; *Cook* v. *Fiske*, 12 Gray, 491; Whart. Ag. § 325. But, upon the other point, the authorities are against the jurisdiction.

The constitution, art. 3, § 2, declares that the judicial power of the United States shall extend to controversies between citizens of different states and citizens of a state and aliens; and this jurisdiction has since been conferred on the circuit courts, where the matter in dispute exceeds the sum or value of $500. 1 St. 78; 18 St. 470.

At an early day it was held, in *Hepburn* v. *Ellzey*, 2 Cranch, 445, that the District of Columbia is not "a state," within the meaning of that term as used in the article of the constitution defining the judicial power of the United States, and therefore a resident thereof could not sue in the United States courts as a citizen of a state. Afterwards, in *New Orleans* v. *Winter*, 1 Wheat. 91, the question arose in regard to a territory, and it was held that a territory was in the same category as Columbia; and though both are states—political societies—in the general sense of the term, neither are in the sense in which the term is used in the constitution, where it is intended only to comprehend "members of the American confederacy." In *Barney* v. *Baltimore City*, 6 Wall. 287, these rulings were followed without question upon the principle of *stare decisis*.

But it is very doubtful if this ruling would now be made if the

question was one of first impression; and it is to be hoped it may yet be reviewed and overthrown.

By it, and upon a narrow and technical construction of the word "state," unsupported by any argument worthy of the able and distinguished judge who announced the opinion of the court, the large and growing population of American citizens resident in the District of Columbia and the eight territories of the United States are deprived of the privilege accorded to all other American citizens, as well as aliens, of going into the national courts when obliged to assert or defend their legal rights away from home. Indeed, in the language of the court in *Hepburn* v. *Ellzey, supra,* they may well say: "It is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the Union, should be closed upon them." But so long as this ruling remains in force, the judgment of this court must be governed by it.

The demurrer is sustained.

GENTRY *v.* GRAND VIEW MINING & SMELTING CO.*

(*Circuit Court, E. D. Missouri.* September 27, 1882.)

PLEADING—COUNTER-CLAIM.

Where the petition charged the defendant with the conversion of certain personal property, *held* that an answer which intermingled a seeming defense with a counter-claim, not arising on contract, or out of the transaction set forth in the petition, and unconnected with the subject of the action, was demurrable.

Demurrer to Answer.

Suit for damages for the conversion by defendant of silver ore owned by plaintiff.

The defendant alleges in its answer that the plaintiff came into possession of the ore in question while superintenden tof the Grand View Mining Company, and that, as superintendent of said company, he retained possession thereof until the first of April, 1881; that while plaintiff was acting as superintendent of said company, between January, 1880, and the fifteenth day of July, 1880, he misapplied and converted to his own use $7,511.11 belonging to said company, and refused to pay over or account for the same to the

*Reported by B. F. Rex, Esq., of the St. Louis bar

owner thereof; that on the first day of April, 1881, the Grand View Mining Company, for a good and valuable consideration, with the knowledge and consent of plaintiff, turned over and delivered possession of the ore described in the petition, and of its rights, title, and interest therein, to the defendant, and for good and valuable consideration, on the twenty-ninth day of August, 1881, sold, assigned, and transferred to the defendant the cause of action heretofore described against the plaintiff, and the plaintiff has refused to pay said $7,511.11 to the defendant since said assignment, although often requested so to do.

Plaintiff demurred to the second defense and counter-claim set up in defendant's answer, on the ground that "the said cause of action set up in said counter-claim does not arise out of the transactions set forth in plaintiff's petition as the foundation of plaintiff's claim, nor is it connected with the subject of the action, and plaintiff's action does not arise on contract."

Overall & Judson, for plaintiff.

Dyer, Lee & Ellis, for defendant.

TREAT, D. J. The only difficulty arises from the fact that a seeming defense and a counter-claim are intermingled. If the ore in question did not belong to the plaintiff in his own right, the defense would be complete; but instead of so averring, the pleading leaves it uncertain as to what it is designed to charge the plaintiff's relations thereto were. The counter-claim does not show that it arises from the same transaction; but, on the contrary, that the defendant is an assignee of a cause of action involving, it may be, an accounting between the plaintiff and the assignee as to a long course of dealings.

The demurrer is sustained, with leave to defendant to file an additional answer and counter-claim, if they can be brought within the rules governing the same as here stated.

DENVER & NEW ORLEANS R. CO. *v.* ATCHISON, T. & S. F. R. CO.

(Circuit Court, D. Colorado. July, 1882.)

1. CONSTITUTION OF COLORADO, ART. 15, § 4—CONNECTING RAILROADS.

 The meaning of the last clause of article 15, § 4, of the constitution of Colorado, which provides that "every railroad company shall have the right with its road * * * to connect with * * * any other railroad," is that such roads are to be connected physically, as distinguished from the business connection between roads which have approximate *termini.* It is a union of tracks admitting of the passage of cars from one road to the other, and not a mere meeting of roads which may admit of continuous traffic in some form. The evident object is the protection of the public, rather than simply to enable corporations to perform their agreement. By the union of tracks, it was intended to make the roads practically continuous for all that may come in the course of business between companies friendly to each other; that the companies are to be brought into harmony when they fail or refuse to agree in the due and proper exercise of their public functions as common carriers; and this court will not hold that a bill that alleges that complainant has connected its road with defendant's road, but that defendant refuses to grant complainant equal facilities in conducting business that it grants to a rival road, does not present a case calling for the consideration of a court of equity, and dismiss such bill on demurrer without first examining such facts as may be developed by proper evidence.

2. PRACTICE—EQUITY—PRELIMINARY INJUNCTION.

 This court will not, however, grant a preliminary injunction in a case like the present, and the motion, therefore, must be denied.

On Demurrer.

Wells, Smith & Macon, for plaintiff.

Thatcher & Gast, for defendant.

HALLETT, D. J. Article 15, § 4, of the constitution of Colorado reads as follows:

"All railroads shall be public highways, and all railroad companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any designated points within this state, and to connect at the state line with railroads of other states and territories. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad."

In this case discussion has arisen as to the meaning and effect of the last clause of the section which declares the right of a railroad company to connect its road with any other railroad in the state. Within the knowledge of all persons, there are several ways of operating railroads in connection. When the trains of different roads arrive at and depart from the same town, although from different depots, between which it may be necessary to transport passengers

and goods by wagon, we say that the roads connect at that place. In the early history of railroads in this country this method was usually pursued, and it is still extensively followed; but, as it involves a change of cars for passengers and goods at considerable expense, a more convenient method of proceeding was soon discovered by uniting the tracks and transferring the cars from one road to the other. In this way closer connections have been made between roads forming continuous lines, so that goods may be sent across the continent without breaking bulk, and passengers make long journeys without change of cars. Of the advantages of this method of operating railroads no doubt is entertained in any quarter. It saves time and money and labor, and serves the public much better than the old way. As before stated, however, the union of tracks and the passage of cars from one road to the other is not an essential element of connection, in the ordinary sense of the word, as applied to railroads. All roads which form continuous lines, and admit of continuous traffic over them in any form, are connected, even where there is no union of tracks or connection of trains.

Referring again to the constitutional provision, it is plain that the word "connect" is not used there in the largest sense, which it may have when applied to connecting railroads.

The language is, "Every railroad shall have the right with its road to * * * connect with * * * any other railroad." The roads are to be connected physically, as distinguished from the business connection always existing between roads which have approximate *termini*. It is a union of tracks admitting of the passage of cars from one road to the other, and not a mere meeting of roads which may admit of continuous traffic in some form. This was not denied at the bar, but it was said that defendant had fulfilled its constitutional obligation by permitting the tracks to be joined at Pueblo. In thus referring to and adopting the most intimate relation that can exist between railroads, what was the object of the framers of the constitution? On behalf of defendant it is contended that their object was to confer on railroad companies power and authority to unite their tracks as convenience or interest may demand, but no right whatever can accrue to either company from such union. The roads are to be firmly united, to await the time when the companies may agree in the use of them. In this view the constitutional convention was much concerned to confer a privilege which has always been enjoyed. No one has ever questioned the right of railroad companies to bring their tracks together in any way that may be acceptable to

them, and we should not assume that the framers of the constitution have studiously provided for what was never denied. It is true that in the preceding clause of the same section there is a grant of power to corporations organized for the purpose, to build roads and to connect with other roads at the boundary line of the state. But if it should be conceded that there is nothing in that clause which may be enforced against a corporation, the same may not be true of the succeeding clause. The regulations of the constitution respecting railroad corporations are, in general, limitations of the powers of those corporations for the protection of the public interests, and to facilitate the transportation business of the country. In the clause under consideration the right of a road to join on to another is declared, certainly, for the protection of the public rather than to enable corporations to perform their agreement. To say that it is an enabling act only, is to divest it of any useful purpose. It is more reasonable to believe that by the union of tracks it was intended to make the roads practically continuous for all that may come in the usual course of business between companies friendly to each other; that the companies are to be brought into harmony when they fail or refuse to agree in the due and proper exercise of their public function as common carriers. The law abhors a vain thing, and therefore it will not unite tracks upon which no car may pass from one to another, or erect a switch which must be left to rust in its socket forever. The constitution requiring that railroad tracks shall be connected, it follows necessarily that some use is to be made of the roads so united, and this we interpret to be such as is usual and customary with connecting lines throughout the country, and may be said to stand with the public convenience and a due regard for the rights of the corporations interested.

Complainant having built a road from Denver to Pueblo, in this state, has united its track with that of the Pueblo & Arkansas Valley Railroad at the place last named.

The Pueblo & Arkansas Valley Railroad is leased to defendant, and, with the defendant's road, it forms a continuous line from Pueblo to Kansas City, where connection is made with many roads traversing the country at large. It is averred that defendant, thus owning and operating a railroad from Kansas City to Pueblo, refuses to transact business with complainant; that it will not deliver to complainant, to be carried, goods and passengers received on its road and destined for points on complainant's road, or receive from complainant goods and passengers carried by complainant to Pueblo and

destined for points on defendant's road. That defendant transacts business freely with the Denver & Rio Grande Railway Company, a rival in business to complainant, which owns and operates a railroad from Denver to Pueblo and various other points, but refuses to complainant the same facilities for business in the country at large. Without going over the bill at length, we are satisfied that some portions of the relief therein asked may be allowed. But we are not called upon at present, nor would it be proper, without evidence of the facts, to define the relief to which a party may be entitled under the constitution. Probably complainant is entitled to deal with defendant on substantially the terms accorded by the defendant to the Denver & Rio Grande Railway Company, in so far as such terms agree with the general usage and practice of railroad companies operating continuous lines. What may be possible or practicable in that direction may be better seen and understood when we come to the evidence. While much of this bill is probably without the support of reason or principle, it is believed that other parts of it rest on the firmest foundation. Great, if not insurmountable, difficulties may be encountered in an effort to regulate passenger travel over roads in the management of companies hostile to each other, but in the carriage of goods the obstacle may not be so great. It seems reasonable to us that a consignor should be allowed to select the road over which his goods may be carried without consulting defendant, and there may be other matters in the bill which call for judicial control.

The demurrer will be overruled; McCrary, C. J., concurring.

(July 21, 1882.)

On Motion for Preliminary Injunction.

Hallett, D. J. In this suit plaintiff seeks to establish a right to connect its road at Pueblo with another road operated by defendant, so that passengers and freight may be transferred from one road to the other in a continuous journey over both lines. It is not shown that plaintiff at any time has enjoyed this right, but it is averred that defendant has refused to recognize it; and therefore the aid of the court is asked.

The object is, not to preserve existing relations between the parties, but to compel defendant to adopt a new course of dealing with plaintiff, as prescribed by the constitution of the state. On demurrer to the bill we had occasion to consider the matters alleged, and

it was thought that on proof thereof the plaintiff would be entitled to some measure of relief. But it was not said that such relief could be given in a summary way by preliminary injunction. That proceeding is adopted to preserve the subject of controversy pending the suit, and it has no office to perform in this instance. If, by a course of dealing or by contract, these parties had established such business relations as are recognized by the constitution of the state, we could, perhaps, maintain the *status* by preliminary injunction during the controversy. That was the course pursued in several suits between express companies and railroad companies in this circuit, following the rule that equity will preserve existing rights until the end of the controversy. But nothing of that kind is presented in this suit. Nothing in the way of provisional and temporary relief is asked in the bill, and, if sought, it could not be allowed in that form. The ultimate rights of parties are to be determined upon issue and full hearing, and the controversy in this suit relates only to such rights.

The English cases referred to were upon a statute which I have not been able to find. That statute may give authority to proceed in a summary way, or the practice of the court may be different in that country. With us I think the rule is as I have stated, to use the provisional writ only to maintain the conditions existing at the commencement of the suit, leaving all other matters to be determined by final decree. 2 Story, Eq. Jur. § 861; 1 High, Inj. § 4.

The motion for injunction will not be entertained.

In re MURRAY and others, alleged Bankrupts.

(*District Court, N. D. New York.* 1882.)

1. REFEREE'S FINDING OF FACT.

   Upon a consideration of the evidence, *held*, that the finding of the referee that no partnership existed in this case would not be reversed.

2. PARTNERSHIP—BANKRUPTCY—REMEDY IN STATE COURTS.

   Even if by failing publicly to disclaim the printed statement that they were directors, and by allowing their neighbors to believe that they were in some manner interested in a bank, parties are estopped from denying their liability to those who trusted such bank, relying upon their supposed connection with it, an appeal to a court of bankruptcy is not proper; as to declare such parties bankrupt would render them liable not only to those actually deceived, but to all who had claims against such bank, whether they were deceived or not, and those who were actually deceived have a perfect remedy in the state court.

J. B. Brooks, for petitioning creditors.

D. B. Hill, for alleged bankrupts.

COXE, D. J. On the second day of September, 1873, a petition in bankruptcy was filed by which it was sought to have the respondents declared bankrupts, as copartners, doing business under the style and firm name of "The Waverly Bank." The respondents Hugh T. and George Herrick suffered default, the others interposed answers. The issues thus formed were referred to Register Fanton, to report the evidence with his opinion. After proceedings both numerous and complicated, during the progress of which a voluminous mass of testimony was taken, the referee on the tenth day of June, 1882, presented his report, which was adverse to the petitioners. Exceptions were filed, and the controversy is now before the court upon a motion to confirm the report.

The principal contention arises over a question of fact. Were the respondents copartners? The learned counsel for the petitioners conceded, on the argument, that the proof did not establish a partnership in fact. There were no written articles; there was no parol agreement; the necessary incidents of partnership were all absent; no money was advanced for firm purposes by the respondents, or any of them; they did not participate in the profits or share in the losses. *No partnership in fact existed.* But it is asserted that, by failing publicly to disclaim the statement that they were directors, and by allowing their neighbors to believe that they were in some manner interested in the bank, the respondents are estopped from denying their liability to those who trusted the bank, relying upon their supposed connection with it. The proof relied upon by the petitioners may be classed under two heads. *First*, admissions of the respondents; *second*, advertisements that they were directors not disavowed by them. It was proved that cards on which appeared the words, "The Waverly Bank," with the respondents named as directors, were circulated to a limited extent throughout the village. A large card making a similar announcement was hung in the window of the banking house. There was evidence tending to show that the respondents knew of these cards. All this is emphatically denied. Here, then, is a pure question of fact. The referee has carefully considered all the evidence, and, even if this were a doubtful case, I should not feel justified in disturbing his conclusions. He had numberless opportunities of judging of the character, intelligence, and credibility of the witnesses, which personal contact and acquaintance alone can give, and which a court sitting simply to review the written testimony can

never have. The court should be clearly satisfied that the referee was in error before assuming to reverse his findings on the facts. I am not so satisfied.

But there is another serious obstacle in the path of the petitioners. Assume the questions of fact to be found in their favor; assume that by reason of their negligent or disingenuous acts, the respondents are liable as partners to those who trusted the bank, believing them to be directors,—is an appeal to a court of bankruptcy the correct remedy? There were many other creditors who did *not* rely upon respondents, and who never heard of them as being identified with the bank in any way. Should the respondents be held liable to them? And yet, when once declared bankrupts on the ground that they were partners transacting business under the firm name of "The Waverly Bank," the door is opened to every provable debt. They must pay not only creditors of the bank who assert that they were misled, but also those who have no conceivable claim upon them. To illustrate: If A. falsely tells B. that he is a partner in the firm of C. & Co., and B. gives C. & Co. credit, relying upon A.'s representation, A. is most certainly liable to B., and as to *him* is estopped from denying the partnership. But C. & Co., have a hundred other creditors who never heard of A. or of his declarations. Is he liable to them also? Most certainly not. And yet, if on B.'s petition it is judicially established that A. is a member of the firm of C. & Co., and they as partners are adjudicated bankrupts, all the creditors of the firm stand in as favorable a position as B. They can all collect their demands of A. The bankrupt law was never intended to work such injustice. The partnership must be actual, not constructive.

If the petitioning creditors can succeed in establishing the alleged acts of omission or commission on the part of the respondents, their remedy is perfect in the state courts. The report of the referee should be confirmed.

Motion granted.

BATE REFRIGERATING CO. *v.* GILLETT and others.

(*Circuit Court, D. New Jersey.* August 4, 1882.)

1. PATENTS FOR INVENTIONS—FOREIGN PATENT PREVIOUSLY GRANTED—REV. ST. § 4887.

Section 4887 of the Revised Statutes expressly requires the commissioner of patents, where a foreign patent has been issued for the same subject-matters, to limit the term of the domestic patent to the period of time that the foreign patent has to run; or if there be more than one, then to make it expire at the same time with the one having the shortest term: and the priority of such patent is to be determined, not by the dates of the applications for the foreign and domestic patents, but by the dates on which the letters patent were granted.

2. SAME—CANADIAN PATENT ACT.

Under sections 16 and 18 of the Canadian patent act, a patent takes effect not from its delivery to the patentee, but when it is signed, sealed, and registered.

3. SAME—EXTENSION OF FOREIGN PATENT.

An extension of the term of a foreign patent will not operate to extend the term of the domestic patent; such patent expires when the original foreign patent expires.

4. SAME—VALIDITY OF DOMESTIC PATENT.

Whether the United States patent is void *ab initio* in this case, because the term was not limited on its face to expire with that of the foreign patent, not decided.

On Petition to Dissolve Injunction.

Dickerson & Dickerson, for complainant.

George Harding and *John R. Bennett*, for defendants.

NIXON, D. J. On the fourteenth of November, 1881, a decree was entered in the above case, sustaining the validity of complainant's letters patent, and ordering an account and an injunction against the defendants, restraining them from further infringement.

The defendants now file a petition setting forth that the letters patent, for the infringement of which the suit was brought, were the letters patent of the United States, numbered 197,314, granted to John J. Bate, of the city of Brooklyn, New York, on the twentieth of November, 1877, for the term of 17 years from that date, for "improvements in the process for preserving meats during transportation and storage;" that prior thereto, to-wit, on the ninth of January, 1877, letters patent of the dominion of Canada, No. 6,938, were granted to the said Bate for the same invention or discovery; for the term of five years from January 9, 1877; that the said term for the foreign patent expired on the ninth of January, 1882, by reason whereof the letters patent of the United States, No. 197,314, expired

at the same time as the said Canadian letters patent, as provided for by section 4887 of the Revised Statutes.

The petition further alleges that the invention or discovery of Bate having previously been patented by him in the dominion of Canada, the said letters patent of the United States should have been so limited as to expire with the same time as the foreign Canadian patent, and that the granting of the patent in the United States for the term of 17 years from the twentieth of November, 1877, was in direct violation of section 4887 of the Revised Statutes, by reason whereof the same were and are null and void. The prayer of the petition is that the injunction heretofore ordered and issued may be dissolved.

Are either of these reasons sufficient to justify the court in recalling the injunction?

The affidavits used at the hearing of the motion disclosed the following facts: The inventor, Bate, filed an application for United States letters patent on the first of December, 1876. Before any action was taken by the office in Washington, to-wit, on the nineteenth day of the same month and year, he caused a like application to be filed in the department of agriculture at Ottawa, in the dominion of Canada, on which letters patent were granted, the certificate of which was dated January 11, 1877.

But the fifteenth section of the Canadian patent act, in force when the patent was issued to Bate, provides—

"That an applicant shall also deliver to the commissioner, unless specially dispensed from so doing for some good reason, a neat working model of his invention, on a convenient scale, exhibiting its several parts in due proportion, whenever the invention admits of such model."

In this case the model was not dispensed with, but was required, and notice was sent to the solicitor of the inventor that the patent was withheld until it was furnished. It was not forwarded until the eighteenth of June, 1878, when the model reached the patent-office in Canada, and on the twenty-sixth of the same month the letters patent were mailed to the solicitor. In the mean time the United States office had granted letters patent for 17 years for the same invention, which bear date at the time of their issue, to-wit, November 20, 1877.

The case obviously turns upon the question whether the invention was patented in Canada previous to the issuing of the patent in the United States, in the sense in which the word *patented* is used in sec-

tion 4887 of the Revised Statutes—the limitation of the statute being applicable only in such a case.

The provisions of the section are as follows:

"No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented, or caused to be patented, in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country, shall be so limited as to expire at the same time with the foreign patent; or, if there be more than one, at the same time with the one having the shortest term; and in no case shall it be in force more than 17 years."

The phraseology here used materially differs from the previous legislation on the subject. The power of the commissioner of patents is defined and abridged. Where a foreign patent has been granted for the same subject-matter, he is expressly required to limit the term of the domestic patent to the period of time that the foreign patent has to run; or, if there be more than one, then to make it expire at the same time with the one having the shortest term. We do not see how any language could have been employed that would more clearly express the legislative design that the life of the domestic patent should expire with the term of any outstanding foreign patent.

But the counsel for the complainant contended on the argument that the present case did not fall within the limitation of the statute, because the application for the United States patent was filed antecedent to the application for or the grant of the Canadian patent. We are at a loss to understand what the time of filing the application for the patent has to do with the matter. It is true that the eighth section of the act of 1836, and the sixth section of the act of 1839, made the date of filing the specifications, and drawings in the one case, and the date of the application for the home patent in the other, the point of time from which to reckon the six months intervening between the issue of the foreign and domestic patent. It is also true that by section 4886, and the first clause of section 4887, of the Revised Statutes, an inventor is required to file an application for his patent within two years after his invention or discovery has been in public use or on sale, from all of which the late commissioner of patents (Payne) was led to the opinion that the word "previously" used in the last clause of section 4887 had reference to time prior to the filing of the application, rather than to time prior to the

granting of the patent. See 17 O. G. 330. But this seems to be wresting the language of the section from its plain and obvious meaning, and we are not able to follow the reasoning by which such an interpretation is reached.

It was further insisted that the grant of the Canadian patent was to be determined, not by its date or issue, but by the time of its delivery to the patentee; that although dated January 9, and issued January 11, 1877, it was not delivered until June 26, 1878, a long time after the date of the American patent. Hence, it was said, "the invention had not been previously patented in a foreign country" when the patent was granted here. But this position will not stand the test of analysis or examination. It appears upon the face of the Canadian patent that it was granted and dated on the ninth and issued on the eleventh of January, 1877, and was to continue in force for five years from its date. By the eighteenth section of the Canadian patent act it is provided that—

"Every patent and instrument for the extension of time, as aforesaid, shall, before it is signed by the commissioner, or any other member of the privy council, and before the seal hereinbefore mentioned is affixed to it, be examined by the minister of justice, who, if he finds it conformable to law, shall certify accordingly, and such patent or instrument may then be signed and the seal affixed thereto, and, being duly registered, shall avail to the grantee thereof."

The invention is patented so as to be available to the patentee when signed, sealed, and registered. Owing to the neglect of the inventor in not forwarding a model to the office, it was not delivered to him until June, 1878, but it was no less a patent, securing to him the benefits of the invention and protecting him against infringement. This becomes manifest by referring to section 16 of the act, wherein it is enacted that "the patentee shall have the exclusive right, privilege, and liberty of making, constructing, and using, and vending to others to use, the said invention for the period mentioned *from the granting of the same*. Again, the proofs of the complainant show that the patent was absolutely granted as early as January, 1877, although the delivery was withheld owing to the laches of the grantee. The certificate of the assistant patent clerk of the Canadian office, the affidavit of Mr. Simpson, the solicitor employed by Mr. Bate to procure the letters patent, and the notice sent by the deputy commissioner, all reveal upon their face that the requirements of the Canadian law had been fully met, and that the invention had been in fact patented before the model was required.

It was further maintained by the learned counsel of the complainant that even if it were conceded that the American patent should be construed to terminate with the Canadian patent, the extension of the latter under the provisions of the act operated to lengthen the term of the domestic patent to the period of 15 years from the date of the first issue of the foreign patent. The seventeenth section of the Canadian law enacts that—

"Patents of invention issued by the patent-office shall be valid for a period of five, ten, or fifteen years, at the option of the applicant; but at or before the expiration of the said five or ten years, the holder thereof may obtain an extension of the patent for another period of five years, and after those second five years may again obtain a further extension for another period of five years, not in any case to exceed a total period of fifteen years in all."

By virtue of these provisions the inventor, Bate, exercised his option, and first took out letters patent for five years. He afterwards procured extensions: first, on December 12, 1881, for five years from January 9, 1882; and, secondly, on December 13, 1881, for another five years, to be computed from the expiration of the prior extension, to-wit, from January 9, 1887.

What effect had these extensions on the life of the United States patent? Under the provisions of section 4887, must its terms be made to expire with the term of the foreign patent in force when the letters patent were granted, or do these extensions of the foreign patent save the domestic patent from lapsing when the term ends which was running at the grant of the domestic patent?

The question is an interesting one, and has already received examination and answer in other circuits. It first came before the late Justice Clifford, in the first circuit, in the case of *Henry* v. *Providence Tool Co.*, decided in 1878, and reported in 14 O. G. 855. In that case the United States patent had been issued under the act of July 8, 1870, for the full term of 17 years, although at the time of the grant there was an English patent for the same invention in force, which had been granted to the patentee in Great Britain for 14 years from the fifteenth of November, 1860. The defendants claimed that the United States patent expired, by operation of law, at the same time with the English patent. The complainant, on the other hand, insisted that the language of the statute extended not only to the term of the foreign patent in force when the United States patent was obtained, but also to the term of any prolongation which the patentee might secure from the foreign government; and that, as he had obtained an extension of four years to the original term, the

owners of the domestic patent were entitled to add these four years to its life.

Judge Clifford refused to accede to such a construction of the law, but, on the contrary, held (1) that by the provisions of the act of July 8, 1870, congress never intended to extend the term of the domestic patent beyond the legal term secured to the foreign patentee when the domestic patent was granted; (2) that the prolongation of the English patent for a further term, after the expiration of the original, did not save the domestic patent from lapsing, under the statute. He was followed, in this construction of the section, by Judge Blatchford, of the second circuit, in 1879, in the case of *Reissner* v. *Sharp*, 16 Blatchf. 383. A patent had been granted by the United States, on the twentieth of October, 1874, for 17 years from that date. It appeared that, under the authority of the patentee, letters patent had been previously obtained in Canada, for the same invention, for five years from May 15, 1873. After careful consideration, the learned judge held that the United States patent expired on the fifteenth of May, 1878, although it appeared that in March, 1878, the Canadian patent had been extended for five years from May 15, 1878, and also for five years from the fifteenth of May, 1883.

There was an attempt made to distinguish the case from *Henry* v. *Providence Tool Co., supra*, (1) because the Canadian patent had not expired when the extension was granted; and (2) because the extension, by the terms of the Canadian law, was not a matter of favor, as it was under the English act. But the judge could not perceive that these considerations were of sufficient force to cause any other conclusion as to the plain meaning of the statute than that arrived at by Mr. Justice Clifford.

We are clearly of the opinion that the prayer of the petition should be granted and the injunction be dissolved. Whether the complainants' United States patent is void *ab initio*, because the term was not limited on its face to expire with the same time as the foreign patent, is not properly before the court on this motion. It was a defense to the suit, of which the defendants did not choose to avail themselves, and a formal interlocutory decree entered in the case cannot be impeached in and by any such collateral proceeding.

Equity—Remedies—Conversion of Public Property into Corporate Stock.

NEW ORLEANS *v.* MORRIS, U. S. Sup. Ct., Oct. Term, 1882. Appeal from the circuit court of the United States for the district of Louisiana. The opinion of the supreme court was delivered by Mr. Justice *Miller*, reversing the decree of the circuit court, with directions to overrule the plea and for further proceedings:

The first point raised in argument here which requires our attention is that, whether the court below was right or wrong in its decision of the case on its merits, the bill must still be dismissed for want of equity, on the ground that there is ample remedy at law by a motion to the court to compel the marshal to release his levy on the stock, because not liable to be sold on the execution. It will be observed that no such objection was made to the bill in the court below, and although one of the defendants filed a general demurrer to the bill which might have raised it, he afterwards withdrew his demurrer, and joined in the plea on which the case was decided. This plea was a defense on the merits of the case, and was to be held good or bad on precisely the same principles whether pleaded to a declaration at law or a bill in chancery. We should under such circumstances have great hesitation to permit the party who had, by tendering this issue, waived the question of the special jurisdiction of the court in equity, to raise that point for the first time on appeal. Notwithstanding, that in the ordinary case of a wrongful levy of an execution on property not subject to be seized under it, the proper remedy is by motion to the court to have the levy discharged, we think that this bill shows other sufficient grounds for the equitable jurisdiction of the court. A statute of a state legislature which, in the act authorizing a city to convert its ownership of a large and valuable property, held for the use of the public, into the shares of a joint-stock corporation, declares that these shares shall be exempt from judicial sale for the debts of the city, is an impairment of the obligation of existing contracts within the meaning of the constitution. City water-works are held for public use, and are not liable to execution for judgments against the city.

Cases cited in the opinion: Van Norden v. Morton, 99 U. S. 378; Green v. Biddle, 8 Wheat. 1; Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 How. 608.

Legislation—State Statute—Judicial Question.

AMOSKEAG NAT. BANK *v.* TOWN OF OTTAWA; POST *v.* KENDALL CO.; U. S. Sup. Ct., Oct. Term, 1881. In error to the circuit court of the United States for the northern district of Illinois. The decision of the supreme court was rendered on May 8, 1882. Mr. Justice *Gray* delivered the opinion of the court affirming the judgment.

Where the facts of the case do not essentially differ from a case which was before this court at a prior term, the principles therein affirmed must control the decision: *First.* By the law of the state of Illinois, as often declared by the supreme court of that state, before as well as after the execution of the bonds in suit, the provisions of the constitution of 1848, requiring each house of the legislature to keep and publish a journal of its proceedings, and, on the

final passage of all bills, to take the vote by ayes and noes, and ordaining that no bill shall become a law without the concurrence of a majority of all the members elect of each house, are not merely directory; but if the journals, being produced or proved, fail to show that an act has been passed in the mode prescribed by the constitution, the presumption of its validity, arising from the signatures of the presiding officer and of the executive, is overthrown, and the act is void. *Second.* Whether a seeming act of the legislature is or is not a law is a judicial question to be determined by the court, and not a question of fact to be tried by a jury. *Third.* The construction uniformly given by the constitution of a state by its highest court is binding on the courts of the United States as a rule of decision. *Fourth.* An act of the legislature of a state, which has been held by its highest court not to be a statute of the state, because never passed as its constitution requires, cannot be held by the courts of the United States, upon the same evidence, to be a law of the state. *Fifth.* That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who take them for value, and in the belief that they have been lawfully issued.

It was accordingly held that the act of the general assembly of Illinois, under which the bonds in suit were issued, having been adjudged by the supreme court of that state, upon proof that the journal did not show it to have been enacted in conformity with the requirements of the constitution, to have never become a law, and to have conferred no power, although referred to in later statutes as an existing law, those decisions must govern the action of the courts of the United States. The copies of the journals, certified by the secretary of state, and the printed journals, published in obedience to law, are both competent evidence of the proceedings in the legislature. For these reasons the act of February, 1857, under which all the bonds in suit purport to have been issued, must be held to be of no force or effect, and the plaintiffs can maintain no action on the bonds.

Cases cited in the opinion: Ryan v. Lynch, 68 Ill. 160; Miller v. Goodwin, 70 Ill. 659; Elmwood v. Marcy, 92 U. S. 283; East Oakland v. Skinner, 94 U. S. 255; Dunnovan v. Green, 57 Ill. 63; Force v. Batavia, 61 Ill. 99; Illinois Cent. R. Co. v. Wren, 43 Ill. 77; Bedard v. Hall, 44 Ill. 91; Grob v. Cushman, 45 Ill. 119; People v. De Wolf, 62 Ill. 253; Benz v. Weber, 81 Ill. 288; People v. Cambell, 3 Gilman, 466; Prescott v. Trustees, etc., 19 Ill. 324; Happel v. Brethauer, 70 Ill. 166; Watkins v. Holman, 16 Pet. 25; Bryan v. Forsyth, 19 How. 334; Gregg v. Forsyth, 24 How. 179.

DARST v. CITY OF PEORIA and another.

CLARK v. CITY OF PEORIA and another.

(*Circuit Court, N. D. Illinois.* 1882.)

1. REMOVAL OF CAUSE--PREJUDICE AND LOCAL INFLUENCE--TIME OF APPLICATION.

   An application for the removal of a cause under the act of 1867, (Rev. St. § 639, subd. 3,) made after appeal to the state supreme court, where the decree of the lower court is affirmed, and the cause remanded with instructions to enter a final decree of conformity with the judgment of the supreme court, is too late.

2. SAME--WHO MAY REMOVE--CITIZENSHIP.

   A citizen of an Indian territory, not being a citizen of a state, cannot remove a cause into the circuit court from a state court under the act of 1867, (Rev. St. § 639, subd. 3.)

Bill for Partition. Cross-bill.

BLODGETT, D. J. This case was originally commenced in the Peoria circuit court, and on the twenty-first day of June, 1882, Ben Clark, one of the defendants in the original bill and complainant in the cross-bill, filed his petition in the Peoria circuit court for the removal of the cause to this court upon the ground that he, Clark, is, as stated in the petition, a citizen and resident of the Indian Territory, and that he has good reason to believe, and does believe, that from prejudice and local influence he will not be able to obtain justice in said state court. The state court refused to make the order of removal, whereupon Clark brought a transcript of the record here and asked this court to take jurisdiction, and for leave to docket the cause. This application was resisted by the city of Peoria, the principal defendant. From the record which Clark asks leave to file in the case of some exhibits read on the part of the city of Peoria, the facts appear that the original bill was filed in the state court on the twentieth of August, 1880, for the purpose of obtaining a partition of a tract of land in the city of Peoria, one-fourth of which is claimed by Darst, one-fourth by Clark, and one-half by the city of Peoria. On the seventh of October, 1880, the defendant Ben Clark appeared and answered the original bill, setting up title in fee to an undivided one-fourth of the land, and filed his cross-bill; and on the eighth of December, 1880, the city of Peoria made answers to the original bill and cross-bill, claiming to own the entire estate, and denying that Clark or Darst had any interest in the premises. Replications were filed

and proofs taken, and the case brought to hearing before the circuit court of Peoria county; and on the twenty-fourth of June, 1881, that court entered a decree in the case, finding that Darst and Clark were each owners of an undivided one-fourth of the premises in question, and the city of Peoria the owner of the other undivided half of the premises, and appointed commissioners to make partition of the premises in accordance with the finding of the decree. From this decree the city of Peoria took an appeal to the supreme court of the state of Illinois, and the cause was heard at the September term, A. D. 1881, and at a subsequent date the opinion of the supreme court was filed reversing the decree of the Peoria circuit court and remanding the cause to the latter court for further proceedings in conformity with that opinion. It was on the redocketing of the cause in the state court, for the purpose of proceeding in conformity with the opinion of the supreme court, that Clark filed his application for removal. It is claimed on behalf of Clark that this right of removal is given by the act of March 2, 1867, amendatory of the act of July 27, 1866, in relation to the removal of causes from the state courts; while, on the contrary, the city of Peoria contends that the case had proceeded to final trial and decree in the state court, and was no longer removable under this act.

The portion of the act applicable to this case reads as follows:

"Where a suit is now pending or may hereafter be brought in any state court in which there is a controversy between a citizen of a state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of $500, exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit stating that he has reason to and does believe that from prejudice or local influence he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the suit, file a petition in such state court for the removal of the suit into the next circuit court of the United States to be held in the district where the suit is pending."

The original suit, as appears by the record offered here, involved the construction to be given to a deed made on the twelfth day of August, 1852, by George D. Morton, of the city of St. Louis, to Mary M. Clark, of the city of Peoria, whereby an estate for life was granted to the said Mary M. Clark, and at her death the fee-simple to vest in George D. and Mary Helen Morton, or the survivors of them; but if both should die, and leave no child or children before the termination of the life estate of Mary M. Clark, then at the death of the said Mary M. Clark the title was to vest in the city of Peoria for certain chari-

table purposes. It further appears that the said George D. and Mary Helen Clark died before the termination of the life estate of Mrs. Clark, and that the city of Peoria claimed to become seized of the property by operation of the deed. Mrs. Clark, it seems, had other children than those named as grantees of this remainder, of whom the defendant Ben Clark is one, and Darst has acquired the title to the other; and these parties, insisting that the limitation over the city of Peoria was void and inoperative as to one-half of the estate, claimed each of them a quarter, as representing the heirs at law of the said George D. and Mary Helen, and this view of the effect of the deed was sustained by the circuit court. The supreme court in its opinion, after an exhaustive examination of the law, so construes this deed as to make it an operative grant of the entire estate to the city of Peoria upon the death of Mrs. Clark, in case of the death of George D. and Helen Morton without issue, and remands the case to the circuit court for the purpose of entering a decree in conformity with this conclusion. The language of the supreme court is:

"Our conclusion is that the limitation over to the city of Peoria was not void as being the limitation of a fee after a fee; that the contingency upon which George D. and Mary Helen were to take never happened, and so no interest ever vested in them, and hence that the city of Peoria took and now holds under the deed the whole title."

It is obvious that this litigation has reached such a stage as that a final adjudication of the rights of the parties to the suit has been made by the state court. The supreme court has settled the rights of the parties in this controversy under this deed, and the circuit court has merely to carry that conclusion into effect by entering a decree in conformity with the holding of the supreme court. The statute in question only authorizes a removal at any time before the final hearing or trial of the suit. Here it is evident that the suit had been finally heard and tried. It is true that the supreme court had, instead of entering a final decree in accordance with its conclusion, remanded the case to the circuit court for the entry of that decree there; but the case may be said to have reached its final hearing, and therefore the right of removal no longer existed. The circuit court was only the mere ministerial agent or instrument to enter its final decree upon the rights of the parties in accordance with the directions of the supreme court; and the parties having tried a case to a decision in one court, should not be allowed to experiment to that extent, and then, after an adverse decision, remove the case to another tribunal. If the supreme court had simply reversed the case,

and sent it back for a new trial, without specific directions as to the judgment or decree to be entered, it might with some force be said that the suit had not yet been finally heard, and that it could be removed to the federal court for further trial; but that is not this case. *Stevenson* v. *Williams,* 19 Wall. 572.

It was objected further, on the part of the city of Peoria, that Clark cannot remove this case, because he is not by his own showing a citizen of any state, but is a resident of the Indian Territory. I think this point is well taken, and should of itself be a sufficient answer to the claim to remove. The statute only gives the right of removal in suits where there is a controversy between a citizen of the state in which the suit is brought and the citizen of another state; and the uniform ruling of the courts has been that a resident of a territory is not a citizen of a state, so as to give him the right to sue a citizen of another state in the federal courts. This was so held in *New Orleans* v. *Winter,* 1 Wheat. 91, and has been followed by all the federal courts since. *Hepburn* v. *Ellzer,* 2 Cranch, 445; *Vasse* v. *Mifflin,* 4 Wash. C. C. 519; *Picquet* v. *Swan,* 5 Mason, 35; *Prentis* v. *Bremnan,* 2 Blatchf. 162; *Barney* v. *Baltimore,* 6 Wall. 280; *Cissel* v. *McDonald,* 16 Blatchf. 150. These two points seem so conclusive as to make it unnecessary to pass upon the further question, made by the city of Peoria, that the controversy is not wholly between citizens of different states, as Darst, who claims by the same title as Clark, and adversely to the city of Peoria, is a citizen of Illinois.

I am therefore of opinion that this court should not take jurisdiction of the cause, and that the motion for leave to docket the case here should be denied.

See *Hobby* v. *Allison, ante,* 401, and note, 405.

DAVIES and others *v.* LATHROP.

(*Circuit Court, S. D. New York.* October 2, 1882.)

1. PRACTICE—REMOVAL OF CAUSE—WAIVER.
   A party loses his right to object to the removal of an action from a state court, when it has been removed on the ground of the diverse citizenship of the parties, by going to trial and trying the cause without raising the objection.
2. SAME—SECTION 5 OF ACT OF CONGRESS, MARCH 3, 1875.
   Although section 5 of the act of congress of March 3, 1875, regulating the removal of causes, among other things directs the remanding of a cause if it shall be made to appear at any time that it does not really and substantially involve a controversy within the jurisdiction of the circuit court, it does not apply to such a case, and was intended evidently to apply only to causes which have been collusively removed.

Benno Lowry, for plaintiffs.

R. W. De Forest, for defendant.

WALLACE, C. J. The plaintiffs having brought this action in the state court, the defendant removed it into this court upon a petition alleging the plaintiffs to be citizens of the state of New York, and the defendant to be a citizen of the state of New Jersey. The case was tried in this court and resulted in a verdict for the defendant. The plaintiffs now move to remand the action to the state court upon the ground that, in fact, one of the plaintiffs was and is a citizen of the same state with the defendant. Concededly, the controversy not being a divisible one, the defendant was not entitled to remove the cause originally, and had a motion been made by the plaintiffs before the trial of the case the motion must have prevailed. The question now is, however, whether the plaintiffs, by their conduct, have not lost their right to have the action remanded. If it can be lost by waiver in any case, it has been lost here. It is not asserted that the defendant knew or had reason to suppose that either of the plaintiffs was a citizen of the same state with himself. It is therefore to be assumed that he was acting in good faith in removing the cause, but was mistaken as to a fact which was peculiarly within the knowledge of the plaintiffs. The plaintiffs, knowing the truth, chose, instead of moving to remand, and thereby correcting the mistake, to permit the defendant to incur the burden of a trial. Apparently they concluded to take the chances of trial, with the view of remaining silent if it should result favorably, but of springing the objection if it should result adversely. Such practice will not be willingly tolerated, because it is unjust to the party who has been subjected to the expense of a futile trial, and because it imposes upon the court the labor of

a nugatory proceeding. Unless the inflexible rules which require courts to entertain jurisdictional objections whenever urged must control, it should be held that plaintiffs have waived their right to assert now what good faith and a just regard to decorous procedure required them to assert before the trial of the action. Authorities are not wanting to the effect that a party may waive his right to insist that the court has not jurisdiction over the controversy because of the *status* of the parties; and these authorities address themselves to the precise point here, and decide that a party will not be permitted to show that the plaintiff and defendant are citizens of the same state in order to oust the jurisdiction of the court, unless he has availed himself of the right to do so by conforming to established rules of practice. Thus, a defendant will be precluded from showing this fact upon the trial when he has omitted to raise the point by a plea to the jurisdiction. He waives it by answering to the merits. *D'Wolf* v. *Rabaud,* 1 Pet. 476; *Evans* v. *Gee,* 11 Pet. 80; *Sims* v. *Hundley,* 6 How. 1; *Sheppard* v. *Graves,* 14 How. 505; *Sobry* v. *Nicholson,* 3 Wall. 420.

As is said by Chief Justice Waite in *Ry. Co.* v. *Ramsey,* 22 Wall. 322: "Consent of parties cannot give the courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission." The cases referred to show that the admission may be implied from the acts or omissions of parties, and is as effectual when so implied as though explicitly stipulated.

Upon analogy and principle it should be held that the party loses his right to object to the removal of an action, when it has been removed on the ground of the diverse citizenship of parties, by going to trial and trying the cause without raising the objection.

Although section 5 of the act of congress of March 3, 1875, regulating the removal of causes, among other things, directs the remanding of a cause if it shall be made to appear at any time that it does not really and substantially involve a controversy properly within the jurisdiction of the circuit court, the context indicates that the provision is intended to apply only to causes which have been collusively removed. The section was evidently intended to protect parties and the circuit courts from an abuse of the federal jurisdiction, by transferring to these courts controversies which are only colorably and not "really and substantially" those of federal cognizance. Cases may arise where the real character of the controversy is not made manifest until the trial. The section is "for the protection of the court as

well as the parties against fraud upon its jurisdiction." *Williams* v. *Town of Ottawa*, Sup. Ct., Oct. term, 1881. It should not be construed to apply to a case like this, where the removal was not collusive, and where the party now objecting by his conduct has admitted that the court had jurisdiction to hear and determine the cause.

The motion is denied.

STEAM STONE CUTTER CO. *v.* JONES and others.

(*Circuit Court, D. Vermont.* September 15, 1882.)

1. EQUITY JURISDICTION—CLOUD ON TITLE—REMEDY AT LAW—REV. ST. § 723.

On October 7, 1870, complainants obtained an interlocutory decree against the Windsor Manufacturing Company and one Lamson, awarding them damages for infringement of a patent, and referring the cause to a master to report an account of profits, etc. On October 11, 1870, the court, on proper petition and affidavits, ordered a writ of sequestration to issue against the "goods, chattels, and estate" of the defendants, to abide and respond to the final decree in the case. On October 13, 1870, the marshal attached, as the property of the Windsor Manufacturing Company, the real estate now in controversy, lodged a true copy of the writ, with description of real estate attached, in the town clerk's office of the town where the property was located, made proper return to the court, and on October 20, 1870, delivered to the clerk of the Windsor Manufacturing Company a true and attested copy of the writ, description of real estate, return, etc., and made proper return to court of such service. On February 27, 1872, the Windsor Manufacturing Company conveyed this real estate to Jones, Samson & Co. for $23,000, and covenanted that the premises were free from incumbrances, except a $10,000 mortgage and two attachments,—the attachment here shown in favor of complainants and a subsequent attachment issued from court of chancery of the state of Vermont,—and further covenanted to warrant the title against all incumbrances save the mortgage mentioned, which grantees were to pay off. The consideration consisted of this $10,000 mortgage and a mortgage executed by grantees to secure $13,000, as in five separate credit payments. Afterwards Jones, Samson & Co. conveyed portions of the real estate to defendants George, Chase, and Ray. On April 6, 1880, the master having filed his report, a decree was entered for $23,232.75 as profits to be paid complainants by defendant the Windsor Manufacturing Company; a special execution to issue if not paid in 10 days. On June 1, 1880, execution issued. Payment was demanded by the marshal on June 3, 1880, and, payment not being made, on July 30, 1880, the execution was levied and extended on the real estate previously sequestered as the estate of the Windsor Manufacturing Company. The property was duly appraised and set out in satisfaction of the said execution and the proper return and record were duly made. The six months allowed by law for redemption having expired, complainants claim the right to enter and possess said premises, but defendants hold possession and dispute the title of complainants. Complainants file their bill in equity to set aside and annul the deeds to defendants and perfect their own title, and pray that they may be let into possession of the land, and that defendants pay damages for

their wrongful withholding of possession. *Held*, that equity will not allow a title to real estate, otherwise clear, to be clouded by a claim which cannot be enforced either at law or in equity, and consequently will interfere in behalf of the holder of the legal title to remove a cloud on the same, or an impediment or difficulty in the way of an effectual assertion of his rights in a court of law; but where in an action of ejectment possession of the land and damages for wrongful withholding of possession can be recovered under section 723 of the Revised Statutes, the suit in equity cannot extend to such relief, and the decree in this case must be confined to perfecting the title of complainants to the land in controversy.

2. PRACTICE IN CIRCUIT COURTS—RULES—PROCESS—REV. ST. §§ 913, 918.
   The forms of mesne process in equity, and the forms and modes of proceeding therein, are to be according to the usages of courts of equity, except as otherwise provided by statute, or by rules of court made in pursuance of statute. But any circuit court may alter and add to such forms and modes, subject to the right of the supreme court to regulate the matter for such circuit court. The supreme court has the power to prescribe the forms of writs and process, and to regulate the whole practice in suits in equity in the circuit courts; but any circuit court may, in any manner not inconsistent with any law of the United States or any rule prescribed by the supreme court, regulate its own practice to advance justice.

3. SAME—SAME—RULE 11—WRIT OF SEQUESTRATION.
   Rule 11 of this court, providing that "the creation, continuance, and termination of liens and rights created by attachment of property, or the arrest of a defendant, shall be governed by the laws of this state," is a valid rule, and as the writ of sequestration as a mesne process in an equity suit has always existed in the state of Vermont, such rule authorized the issuing of the writ in this case.

4. SAME—SAME—SERVICE OF WRIT.
   As the writ of sequestration is an attachment to create a lien, rule 11, in adopting the state law as to the creation of the lien, adopts the state law as to the mode of service; and as the acts of the marshal in this case were in accordance with the requirements of the laws of Vermont, the complainants obtained a valid lien.

5. NATURE OF WRIT OF SEQUESTRATION.
   The writ of sequestration in Vermont is not the writ known to the English chancery, but is a mesne security, given *pendente lite*, operating in that regard, and to that end, like a provisional injunction, or a temporary receivership, or a writ of *ne exeat*, or the filing of a *lis pendens*.

Aldace F. Walker, for plaintiff.

William M. Evarts and *E. J. Phelps*, for defendants.

BLATCHFORD, Justice. This is a suit in equity. The plaintiff, a corporation, in 1868 brought a suit in equity in this court against the defendant, the Windsor Manufacturing Company, a corporation, and one Lamson, for the infringement of letters patent. The defendants appeared and answered, issue was joined, proofs were taken by both parties, the case was heard, and on the seventh of October, 1870, an interlocutory decree was entered in favor of the plaintiff, directing a recovery of profits, and referring it to a master to take

and report an account of such profits. Afterwards the plaintiff presented to this court a sworn petition setting forth that the damages sustained by it by such infringement were large; that it had no security for the payment thereof; that the defendants were about to sell and dispose of their property within reach of the process of the court; that the defendant Lamson was about to remove from this state and district with such property as he might be unable to dispose of; and that unless it could, by writ of sequestration, fix a lien thereon, such litigation would be wholly fruitless in respect to said damages or profits. The petition prayed the court to issue a writ of sequestration in favor of the petitioner against the defendants, their goods, chattels, and estate, for such purpose. On the eleventh of October, 1870, the court, on the petition and affidavits accompanying it, ordered that such writ issue to the value of $40,000; and on that day a writ was issued in due form to the marshal of this district commanding him "to take, attach, and sequester the goods, chattels, and estate" of the defendants to the said value, "and detain and keep the same under sequestration according law, to respond to the final decree which may be made in said cause, agreeably to law in that behalf," and to notify the defendants, "as the law requires and directs." On the thirteenth of October, 1870, the marshal, by virtue of said writ, attached, as the property of the Windsor Manufacturing Company, "all the real estate in the town of Windsor, Vermont," and "all their right, title, and equity of redemption in said real estate;" and on the same day "lodged in the town clerk's office of said town for record a true and attested copy of the original writ, with a description of the real estate so attached, with this, my return, thereon indorsed;" and on the same day delivered to the president of the corporation a true and attested copy of said writ, and a list of the property attached, with his return thereon indorsed. He afterwards made to this court a return on the writ to the above effect. On the twentieth of October, 1870, the marshal delivered to the clerk of the corporation a true and attested copy of the writ, together with a list and descriptions of the real estate so attached, with his said returns thereon indorsed, and he afterwards made to this court a return on the writ to said effect.

The bill in this case sets forth the foregoing matters, and avers that the town clerk's office of the town of Windsor, being by law the office where by law a deed of such real estate was required to be recorded, thereupon and by force thereof the real estate afterwards

mentioned in the bill, being part of the real estate in said town then owned by said corporation, became duly attached, sequestered, and held, under said writ, to respond to the final decree which might be made in said cause; that thereafter said master filed his report, and a decree was entered April 6, 1880, decreeing that the said corporation pay to the plaintiff, as profits and costs of suit, $23,232.75, with interest from that date, and that if said sum should not be paid within 10 days from that date special execution should issue in favor of the plaintiff against said corporation for said sum; that said corporation having neglected to pay said sum an execution was issued June 1, 1880, to the marshal on said decree; that on the third of June, 1880, the marshal, under the execution, demanded of the secretary and treasurer of the corporation the said sum, and it having neglected to make payment thereof, and the execution being unsatisfied to the amount of $21,826.82, with interest and officer's charges, he, on the thirtieth day of July, 1880, by direction of the plaintiff, extended and levied said execution on certain pieces of land in Windsor, being the same land so sequestered and attached as the estate of said corporation in fee, all the said land being the estate of the said corporation in fee; that appraisers were appointed, who appraised the said land in parcels; that parcel No. 1, on which there was a mortgage to the Windsor Savings Bank for $10,000, on which there was due $10,351.50, was appraised, subject to said mortgage, at $11,648.50, as its just and true value in money, to satisfy in part said execution and the legal charges thereon, and said marshal set out said parcel No. 1, in part satisfaction of said execution and fees, by certain metes and bounds, which are given; that parcel No. 2 was appraised and set out in like manner at $4,000, parcel No. 3 at $1,000, and parcel No. 4, on which was a mortgage on which $20,703 was due, at $3,697, subject to said mortgage; that the amount due on said execution, with interest, costs, and charges, on July 30, 1880, was $22,468.67, leaving still due thereon $2,123.17; that said marshal made a return to said effect, on said execution, on the thirtieth day of July, 1880; that said execution was on said day, with said return, duly recorded in the land records of said town, and returned into the office of the clerk of this court and there recorded; that thereby, as against said corporation, its successors and assigns, a good title was made to said parcel No. 1 in favor of the plaintiff, its successors and assigns, forever; and that six months having elapsed since said execution was so extended, and no redemption

thereof having been made within that time, as provided by law, the plaintiff has become entitled to enter and take possession of the same.

The bill also alleges that on the twenty-seventh of February, 1872, the Windsor Manufacturing Company, by its deed of that date, for the consideration of $23,000, conveyed the said parcel No. 1 to the defendants Jones, Samson & Co., covenanting in said deed that said premises were free from incumbrance, except said mortgage of $10,000, and except two attachments,—one in favor of the Steam Stone Cutter Company, and the other in favor of Barnes and others against said Windsor Manufacturing Company,—which said attachment in favor of the Steam Stone Cutter Company was the attachment and lien created by said writ of sequestration so served, and which said other attachment was an attachment and lien existing under another writ of sequestration issued by the court of chancery in the state of Vermont and served subsequently to the service of said writ in favor of the plaintiff; that in and by said deed the said company agreed with the grantees therein named to warrant and defend said premises against all claims and incumbrances, including said attachments, except said mortgage, and said grantees were to assume and pay off said mortgage; that the consideration of said deed, being $23,000, was in part composed of said $10,000 mortgage, and the balance thereof was represented by another mortgage, executed on the same day by said Jones, Samson & Co., to said company for $13,000, represented by five notes,—four for $2,500 each, payable severally in 18, 30, 42, and 54 months from date, and one for $3,000, payable in 66 months from date,—and which conveyed the said premises in mortgage to said company as security for said notes, the same being, in said mortgage, expressed to be subject to said savings-bank mortgage and said two attachments; that said mortgage to said company still remains in force and undischarged of record, and the debt secured thereby is not paid; that subsequently said Jones, Samson & Co. conveyed portions of said premises at different times to the defendants George, Chase, and Ray, respectively; that the parcels so conveyed to George and Chase have been released by said company from the lien of its said mortgage; that much the greater part of said premises still remains unconveyed by said Jones, Samson & Co., and in their possession and occupation; that the defendants Jones, Samson & Co., George, Chase, and Ray are in possession of said real estate and refuse to permit the plaintiff to enter and take possession thereof, and deny the plaintiff's right so to do, claiming for them-

selves the right to hold and occupy the same under said conveyance; that said conveyance and mortgage constitute a cloud upon the title of the plaintiff to said real estate, and the plaintiff is entitled to the aid of this court to remove the same and to be let into the possession of the said premises; that the defendants pretend that said writ did not create a valid lien in favor of the plaintiff upon said real estate, whereas the contrary is true, and the plaintiff's title thereto under said proceedings is complete, and is paramount to any right or title of the defendants to the same, and the plaintiff is entitled in this suit to have said conveyances to said defendants annulled and set aside, and its title to said premises confirmed; that the order of this court directing said writ to issue has never been revoked, and has always been acquiesced in by said company; that said company was insolvent at and before the date of said conveyances to said defendants, and the said transfer of said premises to said Jones, Samson & Co. was made by it for the purpose of defeating the effect of said writ; and that if the plaintiff's title to said premises under said writs of sequestration and execution shall be held to be incomplete, the plaintiff is entitled to maintain this bill, on said facts, as a bill in the nature of a creditor's bill against said company and said Jones, Samson & Co., and to recover and apply in part satisfaction of said decree the amount of said mortgage debt so owing by said Jones, Samson & Co. to said company, no satisfaction of said decree having been made except as appears by said return on said execution.

The bill prays that the said conveyances may be set aside and canceled; that the plaintiff's right and title to said real estate may be established and confirmed; that the plaintiff may be let into possession of the same; that the defendants may be perpetually enjoined from interfering with the plaintiff's possession thereof, and may be decreed to pay to the plaintiff all damages occasioned by their wrongful withholding of such possession; or, in case it shall be considered by the court that the plaintiff is not entitled to said relief, then that said Jones, Samson & Co. may be required to pay the plaintiff the amount of said mortgage debt in part satisfaction of said decree.

The answer of Jones, Samson & Co. admits the various proceedings in the original suit, the issuing of the writ of sequestration, so called, its pretended service, the final decree, the issuing of the execution, the pretended levy and extension thereof on the property of the defendants described in the bill, and the return and record of said execution, all substantially as stated in the bill, and that said writ of sequestration has never been annulled or set aside by any special

order of the court in the premises; but it denies the validity or legality of said writ of sequestration, or of said pretended service thereof, or of said attempted levy or extension of said writ of execution on said property, and denies that said proceedings conveyed to the plaintiff any legal or valid title to any part of said property. It avers that said writ of sequestration was issued without warrant or authority of law, and without any legal power in the court to issue the same; that the same was and is therefore void; that the pretended service thereof by an attempted attachment of said property in the manner stated in said bill was not a legal or sufficient service thereof, even if said writ was legal and valid; that said writ nor a copy thereof was never recorded in the town clerk's office of said town of Windsor in the records of attachments, as provided by law; that said service, as made, effected no legal attachment or sequestration of said property, and created no lien thereon; and that said levy or extension of execution was void and ineffectual as against the defendants, and created no title as against them. It admits that the defendants purchased certain real estate of said Windsor Manufacturing Company, not correctly described in said bill, and took a conveyance thereof from said company on the twenty-seventh of February, 1872, a copy of said deed being annexed to the answer; that the consideration of said deed was $23,000, made up by a prior and valid mortgage on said property to the Windsor Savings Bank to secure $10,000, which mortgage the defendants assumed to pay, and by five promissory notes of the defendants to the amount of $13,000 to said company, payable at various times and secured by mortgage on said property; that the said conveyance to the defendants was duly executed, acknowledged, and recorded in the land records of said town of Windsor at the time of the date thereof, and before said levy, and conveyed a good and valid title at law in fee to the defendants, their heirs and assigns; that the consideration thereof was the true and just value of said property; that said notes were paid by the defendants before said pretended levy; and that said purchase was made, and said conveyance taken, and said notes paid by the defendants in entire good faith and in the regular course of business, without any intent or design on their part to hinder or defraud the plaintiff or any other creditor of said company, or to withdraw or cover said property from attachment or execution, and without any knowledge or notice or belief on the part of the defendants that such was the intention, design, or desire of said company in selling or conveying said property. It admits that the

defendants are, and have been since the twenty-seventh of February, 1872, in possession of the property described in the bill, claiming title thereto, except so far as they have conveyed certain portions thereof; and that they deny the validity of the plaintiff's pretended title, and refuse to relinquish their said possession. It admits that since the defendants acquired title and possession they have conveyed certain parcels of said property to the defendants George, Chase, and Ray, respectively. It avers that said conveyances were valid, and made in good faith and upon sufficient consideration, and gave to said several grantees valid and legal titles to said respective parcels, under which they are now in possession. As to the claim of the plaintiff for an accounting and decree against the defendants in respect to said mortgage notes so executed to said company by the defendants, it avers that even if said notes had not been paid, as before stated, long before the filing of the bill, the claim of the plaintiff could not be legally maintained, and the plaintiff would not be entitled to the relief sought. It avers that at the time of said conveyance of February 27, 1872, to the defendants the said company was solvent, and able to pay its debts aside from its indebtedness to its directors.

The other defendants have put in answers to the same purport and setting up the same defenses.

The case has been heard on pleadings and proofs. Irrespective of the merits of the issues raised, the defendants contend that a plain, adequate, and complete remedy may be had at law by the plaintiff in this case, and that, therefore, this suit in equity cannot be maintained. Rev. St. § 723. It is true that in an ejectment suit at law the plaintiff could establish its title to the land, and obtain a judgment for the possession of the land, and a writ of possession, and a judgment for damages for the withholding of possession. But it could not, in such suit at law, obtain a decree setting aside and canceling the conveyances made to the defendants, and an injunction perpetually enjoining the defendants from interfering with the plaintiff's possession, when such possession shall be obtained.

The case of *Ward* v. *Chamberlain*, 2 Black, 430, is authority for holding that the plaintiff is entitled to so much of the relief it prays for as involves the determination of the rights and interests of the parties in the land in question; and, if the plaintiff's title to the land is valid as against the defendant's, to a decree establishing that title, and setting aside the conveyances made to the defendants, and to the injunction asked for.

In *Ward* v. *Chamberlain* the court say:

"Equity will not allow a title to real estate otherwise clear to be clouded by a claim which cannot be enforced either at law or in equity, and consequently will interfere in behalf of the holder of the legal title to remove a cloud on the same, or an impediment or difficulty in the way of an effectual assertion of his rights in a court of law."

In that case the plaintiffs had an execution on a decree levied on lands of two of the defendants, which they owned before the decree was rendered. The other defendants claimed interests in and liens on said lands. The bill prayed that the rights of the parties, and the dates and validity of their several liens, in respect of the lands might be ascertained, and that the lands might be sold and the proceeds applied to the payment of the amount due on the decree. The plaintiffs there might, before going into equity, have proceeded to a sale under their execution. But the jurisdiction in equity was maintained, to the extent of removing the cloud on the plaintiffs' title, though not to the extent of selling the lands under the decree in equity. The plaintiffs in that case were, as is the plaintiff in this case, out of possession.

The question as to the validity of the writ of sequestration was fully considered by Judge Wheeler in the case of *Steam Stone Cutter Co.* v. *Sears*, 9 FED. REP. 8, in this court, where the same writ was involved. In that case no question was made about the propriety or regularity of the writ issued, if there was authority to issue such a writ at all, nor about the regularity of the attachment upon the writ, or of the levy of the execution and the setting out of the estate by the marshal according to the laws of Vermont, if the attachment could be effectually so made, or the estate be so levied upon, in any case in equity. The only questions made were as to whether the court had the power to issue such writs, and whether the service of such a writ, in the manner in which it was served, created a lien that would hold until decree. The court held that Rule 11 of this court covered the issuing and force of the writ; that the rule was a valid rule; that the service of the writ in the manner in which it was served, without taking possession of the land, was a valid service and created a lien on the land; and that the plaintiff was entitled to a decree establishing the validity of the attachment and levy. The questions involved in the present case have been argued very fully and ably before the circuit justice and Judge Wheeler, and have been carefully considered. The use of the writ of sequestration as mesne process of attachment,

in a suit in equity in the court of chancery of Vermont, is coeval with the institution of that court.

In the act of the legislature of Vermont passed March 7, 1797, (Tolman, Compil. *c.* 7,)—Vermont having been admitted into the Union February 19, 1791,—constituting a court of chancery, it was provided (section 5) that "pending any bill in chancery before said court" the judges should "have power, on sufficient reason being shown and verified by affidavit, to issue a writ of sequestration against the goods, chattels, or estate of the defendant or defendants in said bill; and such writ of sequestration shall be served in the same manner as is directed by law in the case of attachments on mesne process; and the estate thereby sequestered shall, in like manner, be holden to respond to the decree which shall be finally made on said bill." An enactment in substantially the same words has always existed, and still exists, in the statutes of Vermont. It is apparent that this writ of sequestration is merely an attachment by mesne process in an equity suit. It is called "sequestration." It might as well have been called something else. It is not the writ of sequestration known to the English chancery.

Rule 11 of this court, which was in force when the writ in this case was issued, reads thus:

"The creation, continuance, and termination of liens and rights created by attachment of property or the arrest of a defendant shall be governed by the laws of this state."

This rule is one of a body of rules, 55 in number, adopted by this court. They were adopted at a term of the court held by Mr. Justice Nelson and Judge Smalley, sitting together, at a time when they were the only judges of this court. This fact is one of which this court takes cognizance for itself. The fact, if otherwise, may be shown to be otherwise; but it is not so shown. There can be no doubt that rule 11 applies to a lien and right created by the attachment of property under a writ of sequestration in an equity suit, such as the Vermont statute referred to provides for. Did this court have power to adopt this Vermont writ of sequestration? It was provided as follows by section 17 of the act of September 24, 1789, (1 St. at Large, 83:)

"All the said courts of the United States shall have power to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."

This was followed by section 7 of the act of March 2, 1793, (Id. 335,) which provided as follows;

"It shall be lawful for the several courts of the United States from time to time, as occasion may require, to make rules and orders for their respective courts, directing the return of writs and process, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default and other matters in vacation, and otherwise, in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially, to that end, to prevent delays in proceedings."

In regard to these two enactments the supreme court said, in *Wayman* v. *Southard*, 10 Wheat. 1, that they "give the court full power over all matters of practice," and that congress had authority to so enact.

Prior to the act of 1793 the following provisions in regard to process were enacted by section 2 of the act of May 8, 1792, (1 St. at Large, 276:)

"The forms of writs, executions, and other process, except their style, and the forms and modes of proceeding in suits, in those of common law, shall be the same as are now used in the said courts respectively, [supreme, circuit, and district,] in pursuance of the act entitled 'An act to regulate processes in the courts of the United States,' [act of September 29, 1789; 1 St. at Large, 93,] in those of equity and in those of admiralty and maritime urisdiction, according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States, [act of September 24, 1789; 1 St. at Large, 73,] subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same: provided, that on judgments in any of the cases aforesaid, where different kinds of executions are issuable in succession, a *capias ad satisfaciendum* being one, the plaintiff shall have his election to take out a *capias ad satisfaciendum* in the first instance."

Under this statute it is very plain that each circuit court had the right, in respect to the forms of writs and other process, and the forms and modes of proceeding in equity suits, to make alterations and additions, except as to matters where the supreme court had, by rule, prescribed a practice to such circuit court.

In respect to this statute the supreme court said, in *Bank of U. S.* v. *Halstead*, 10 Wheat. 51:

"There can be no doubt that the power here given to the courts extends to all the subjects in the preceding parts of the section, and embraces as well the forms of process and modes of proceeding in suits of common law, as those of equity, and of admiralty and maritime jurisdiction. * * * Power is given to the courts over the subject with a view, no doubt, so to alter and mould their processes and proceedings as to conform to those of the state courts, as nearly as might be, consistently with the ends of justice. This authority must have been given to the courts for some substantial and beneficial purpose. If the alterations are limited to mere form, without varying the effect and operation of the process, it would be useless. The power here given, in order to answer the object in view, cannot be restricted to form as contradistinguished from substance, but must be understood as vesting in the courts authority so to frame, mould, and shape the process as to adapt it to the purpose intended."

In that case it was held that the circuit court for Kentucky had authority to alter the form of the process of execution in a suit, so as to extend to real as well as personal property, when, by the laws of Kentucky, lands were made subject to the like process from the state courts.

The act of September 29, 1789, § 2, (1 St. at Large, 93,) referred to above, provided as follows:

"Until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process, and rates of fees except fees to judges in the circuit and district courts in suits at common law, shall be the same in each state respectively as are now used and allowed in the supreme courts of the same. And the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law, and the rates of fees the same as are or were last allowed by the states respectively in the court exercising supreme jurisdiction in such causes."

Afterwards the act of May 19, 1828, (4 St. at Large, 278,) was passed, section 1 of which enacted as follows:

"The forms of mesne process, except the style, and the forms and modes of proceeding in suits in the courts of the United States held in those states admitted into the Union since the twenty-ninth day of September, in the year 1789, [of which Vermont was one,] in those of common law shall be the same in each of the said states respectively as are now used in the highest court of original and general jurisdiction of the same in proceedings in equity according to the principles, rules, and usages which belong to courts of equity, and in those of admiralty and maritime jurisdiction according to the principles, rules, and usages which belong to courts of admiralty, as contradistinguished from courts of common law, except so far as may have been otherwise provided for by acts of congress; subject, however, to such alterations and additions as the said courts of the United States respectively shall, in their discre-

tion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rules, to prescribe to any circuit or district court concerning the same."

This act was designed to apply the provisions of the act of May 8, 1792, to states which had been admitted into the Union since September 29, 1789, and by section 1 of the act of August 1, 1842, (5 St. at Large, 499,) the provisions of the said act of May 19, 1828, were made applicable to such states as had been admitted into the Union since that date. It is worthy of remark that the act of 1828 speaks particularly of the "forms of mesne process," and omits the words "forms of writs, executions, and other process," found in the act of 1792. The decisions in regard to the act of 1792 apply to the act of 1828.

In *Beers* v. *Haughton*, 9 Pet. 329, the supreme court, construing the act of 1828, said:

"This act was made after the decisions in 10 Wheat. 1, 51, and was intended to confirm the construction given in those cases to the acts of 1789 and 1792, and to continue the like powers in the courts to alter and add to the processes, whether mesne or final, and to regulate the modes of proceedings in suits and upon processes, as had been held to exist under those acts."

By section 6 of the act of August 23, 1842, (5 St. at Large, 518,) it was enacted as follows:

"The supreme court shall have full power and authority, from time to time, to prescribe and regulate and alter the forms of writs and other processes to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings in suits at common law, or in admiralty, or in equity, pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein."

The issuing and service of the writ of sequestration in this case, and all the proceedings under it prior to the issuing of execution, took place prior to the enactment of the Revised Statutes of the United States. The Revised Statutes do not re-enact that part of section 17 of the act of September 24, 1789, which is above cited. In the Revised Statutes, section 913—which is compiled from section 2 of the act of September 29, 1789, and section 2 of the act of May 8, 1792, and sec-

tion 1 of the act of May 19, 1828, and section 1 of the act of August 1, 1842, as statutes in force, as appears by the marginal references—is in these words:

"Sec. 913. The forms of mesne process, and the forms and modes of proceeding in suits of equity and of admirality and maritime jurisdiction in the circuit and district courts, shall be according to the principles, rules, and usages which belong to courts of equity and of admirality, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the supreme court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States."

In the Revised Statutes, section 917, which is compiled from section 6 of the act of August 23, 1842, as a statute in force, as appears by the marginal reference, is in these words:

"Sec. 917. The supreme court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other processes, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice to be used in suits in equity or admiralty by the circuit and district courts."

In the Revised Statutes, section 918, which is compiled from section 7 of the act of March 2, 1793, and section 6 of the act of August 23, 1842, as statutes in force, as appears by the marginal references, is in these words:

"Sec. 918. The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the supreme court under the preceding section, make rules and orders directing the return of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice, as may be necessary or convenient for the advancement of justice, and the prevention of delays in proceedings."

These enactments are the embodiment of a continuing policy applicable to all the circuit and district courts. The forms of mesne process in equity, and the forms and modes of proceeding therein, are to be according to the usages of courts of equity, except as otherwise provided by statute, or by rules of court made in pursuance of statute. But any circuit court may alter and add to such forms and modes, subject to the right of the supreme court to regulate the mat-

ter for such circuit court. The supreme court has power to prescribe the forms of writs and process, and to regulate the whole practice, in suits in equity in the circuit courts, but any circuit court may, in any manner not inconsistent with any law of the United States, or with any rule prescribed by the supreme court, regulate its own practice to advance justice.

The supreme court has prescribed rules of practice for the circuit courts as courts of equity. By rule 7 the proper mesne process, in a suit in equity to require the defendant to appear and answer, is a subpœna and a writ of attachment; and if the defendant cannot be found, a writ of sequestration is made the proper process to compel obedience to any order or decree. By rule 8 an execution is made the final process to enforce a money decree; and where the decree is for the performance of a specific act, an attachment for delinquency is provided for, with a writ of sequestration against the estate of the delinquent party, if he cannot be found. These rules do not apply to the subject of a mesne attachment in an equity suit, and there is nothing inconsistent with them in having such an attachment. The prescribing of this body of rules by the supreme court does not exclude other rules by the circuit courts as to matters not actually covered by the rules prescribed by the supreme court. *Van Hook* v. *Pendleton*, 2 Blatchf. C. C. 85. Accordingly, in rule 89 in equity the supreme court provide as follows:

> "The circuit courts (both judges concurring therein) [meaning the circuit justice and the district judge, when the rule was made] may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same."

It cannot be properly contended that the issuing of a mesne attachment in an equity suit in the circuit court in Vermont is an oppressive exercise of power, as against the owner of real estate situated in Vermont, when a like process is issuable in a suit in equity in the state court of chancery in a like case, although no such process is known in general equity practice. It is not to be supposed that any circuit court would adopt it unless it were derived from the equity practice of the state, and there seems to be great propriety in giving such process to a plaintiff in the circuit court, as otherwise he would be at a disadvantage, as compared with another plaintiff in the state court of chancery, in a suit against the same defendant, under the same circumstances. It is reasonable to say that the power conferred by

congress and the supreme court was given to be exercised for purposes such as those in this case. The view that congress may change the rule of procedure as to courts of equity which were in force in England at the time of the adoption of the constitution, and may alter the modes and forms of enforcing rights in equity, is sanctioned by what is said in the recent case of *Ex parte Boyd*, 4 Morr. Trans. 760, and congress may authorize the courts to do in that regard what it may do itself.

It is contended that congress, by its enactments in sections 5 and 6 of the act of June 1, 1872, (17 St. at Large, 197,) reproduced in sections 914, 915, and 916 of the Revised Statutes, has expressed distinctly its will that the forms and mode of proceeding in suits at common law, and remedies by attachment therein, against the property of a defendant, in the circuit and districts courts, may be made, by rules of court, to conform to the state legislation respecting the same, from time to time, and has impliedly declared that such conformity shall not be permitted in suits in equity. The rights acquired under the writ issued in the present case were acquired in 1870, before the act of 1872 was passed. But even if acquired after, under a rule of court made after, there is nothing in the legislation of 1872 which affects or interferes with the power existing under the statutes re-enacted in sections 913, 917, and 918 of the Revised Statutes, and the six sections referred to are all found in force together. Attachments in common-law suits are provided for by section 915, but that fact in no manner warrants the conclusion that there can be no attachment against property in a suit in equity in a circuit court. The legislation of 1872 does not purport to affect equity suits, either by inclusion or exclusion.

It is strongly urged that the use of mesne process, attaching property in an equity suit in advance of adjudication, is a subversion of the well-established doctrines of equity jurisprudence. It is a mesne security, given *pendente lite*, operating in that regard and to that end, like a provisional injunction, or a temporary receivership, or a writ of *ne exeat*, or the filing of a *lis pendens*. It has always been regarded by the legislators and jurists of the enlightened state of Vermont as a proper and useful equitable remedy. If it were prescribed *eo nomine* in an act of congress, the statute would not be obnoxious to the objection that it subverted the constitutional distinction between law and equity. So the only open question is whether the writ is lawfully provided for. Our undoubting conclusion is that the writ in this case was a valid process.

It is contended for the defendants that the writ was not served in any such manner as would make it effectual against subsequent legal conveyances of the property sought to be attached. It is said that possession of the property not having been taken by the marshal, but he having attempted merely the manner of service prescribed by the statute of Vermont for serving attachments, no lien was created. The view taken in the Sears case on this subject appears to be sound. The writ is an attachment to create a lien, and rule 11, in adopting the state law as to the creation of the lien, adopts the state law as to the mode of service.

It is also urged that the service was not even such as the statute of Vermont required; that by that statute the writ must not only be lodged in the town clerk's office, but must be recorded there; that the supreme court of Vermont has held that an actual record is necessary, and that a mere leaving for record is not sufficient; that in this case the writ was left in the town clerk's office, but was not recorded until after the defendant's title accrued; and that, therefore, when the defendants took their conveyance, there was no valid existing attachment. The facts in this case, as stipulated by the parties, are as follows: A copy of the writ, and of the marshal's return thereon, was lodged by him in the office of the town clerk of the town of Windsor, at the date stated in said return, October 13, 1870, and the indorsement of the town clerk appearing on said copy, "Received October 13, 1870, and filed at 10:45 o'clock A. M. Attest, JOHN T. FREEMAN, Town Clerk," was then made, and said copy was ever after kept in said office, and now there remains. It was kept in a bundle of papers consisting of attachments filed in said office by various attaching officers. No record thereof was made in any book by said town clerk, or any of his successors, until February 9, 1881, when the same was recorded in the book of special attachments by the then town clerk. Said Freeman was town clerk of the town of Windsor for 10 or 12 years prior to 1874. During his occupancy of that office he did not record attachments filed in it in any book of records, but was accustomed to treat them as the writ in question was treated, making his indorsement of receipt and filing thereon, and placing them in said bundle of attachment papers, which were kept as part of the official papers of said town clerk's office, and remained open to inspection on inquiry being made for attachments. The successor of said Freeman procured a book in which attachments afterwards made were recorded, and at some time previous to said Freeman's incumbency of said office a book or books had been then kept, in

which record had been made of attachments lodged in said office; but the use of said last-mentioned book for said purpose was wholly discontinued at and before the time said office was assumed by said Freeman.

The statute of Vermont (formerly Gen. St. *c.* 33, § 37, and now section 874 of title 11, *c.* 49, of the Revised Laws of 1880) provides as follows:

"When real estate is attached, a true and attested copy of such attachment, with a description of the estate attached, shall be delivered by the officer serving the same to the party whose estate is so attached, or left at his dwelling-house, or last and usual place of abode, and the officer shall also leave a true and attested copy of such attachment, with a description of the estate so attached, in the office where by law a deed of such estate is required to be recorded. [That is, the town clerk's office in organized towns, and the county clerk's office in other cases.] If the party whose estate is attached does not reside in the state, a copy shall be delivered to his tenant, agent, or attorney, and if no such agent, tenant, or attorney is known, then a copy of such writ, with the officer's return thereon, lodged in the office in which a deed of such estate ought, by law, to be recorded, shall be sufficient service."

A separate provision (formerly Gen. St. *c.* 33, § 38, and now section 875 of title 11, *c.* 49, of the Revised Laws of 1880) is as follows:

"When the copy of a writ of attachment, on which real estate is attached, is lodged in the office of a town or county clerk, such clerk shall enter in a book, to be kept for that purpose, the names of the parties, the date of the writ, the nature of the action, the sum demanded, and the officer's return thereon."

The case cited and relied on by the defendants as holding that an actual record is necessary to the completion of the service of the writ and to the validity of an attachment under it, is that of *Burchard* v. *Fair Haven*, 48 Vt. 327. The Vermont statute does not use the word "record," but speaks only of the entry of certain specified matters in a book. We do not understand the supreme court of Vermont to have decided that such entry or recording is necessary to the validity of the service of the attachment or to the existence of the lien, if the requirements of section 874 are followed, and if the party objecting to the validity of the lien has actual notice of the attachment, when he acquires his title, especially where the copy of the attachment with a description of the estate attached, remains on file in the proper place in the town clerk's office. In *Burchard* v. *Fair Haven* the copies left with the town clerk were lost or removed, and not recorded, and the subsequent *bona fide* grantees of the land had no notice of the attachment before the deeds to them were recorded. The only effect at-

tributed by the court to the making by the town clerk of what is called the "record," is to give notice to those who wish to obtain information whether any land has been attached; and the court cites with approval what is said in *Huntington* v. *Cobleigh,* 5 Vt. 49, that "if a creditor or person desirous of purchasing finds no such record on inquiry, he may safely attach or purchase, unless he has other notice that an attachment has been made. The "legal attachment of the land," as in *Braley* v. *French,* 28 Vt. 546, was regarded as having been made before the recording, and the question of record was regarded as a question of constructive notice, unnecessary where there was actual notice. In the present case, the writ and return were always to be found on file in the proper place in the town clerk's office. It is not shown that any inquiry or search was made in that office as to any filing or record, or any reliance had on any absence of information there, and the statement in the conveyance from the Windsor Manufacturing Company to the defendants Jones, Samson & Co. of the premises in question, under which conveyance all the defendants claim title, is that the premises are free from every incumbrance except the $10,000 mortgage to the Windsor Savings Bank, "and two attachments, one in favor of the Steam Stone Cutter Company and the other in favor of Barnes and others against said Windsor Manufacturing Company; and said Windsor Manufacturing Company hereby engage to warrant and defend the same against all lawful claims, including the above-named attachments, except said mortgage." This conveyance was sufficient notice of the writ and of the proceedings under it, taking the place of any constructive notice.

It is also urged for the defendants that the title acquired under the plaintiff's levy does not extend to the mill pond and dam embraced within the premises covered by the levy, because the Ascutney Mill-dam Company originally owned the mill pond and dam, and the rest of the premises, and excepted the dam and the pond, and the land under the water of the pond, in the mortgages it gave, under which the Windsor Manufacturing Company obtained the title which it had when the levy under the writ was made, and the same title which it conveyed to the defendants. It is claimed, therefore, that there was no legal title in the Windsor Manufacturing Company to the mill pond and dam at the time of the levy, and so no title to them in the plaintiff. The answer to this is that the plaintiff has all the title which the Windsor Manufacturing Company had, and it is of no consequence in this suit that a stranger owns some land which the plain-

tiff claims to own, but the ownership of which is disclaimed by the defendants.

The plaintiff is entitled to a decree for the equitable relief asked, and above indicated, with costs. But as to obtaining possession of the premises from the defendants, and damages, there is a plain, adequate, and complete remedy at law, and hence, under section 723 of the Revised Statutes, this suit in equity cannot extend to such relief. An ejectment suit might have been brought first, and the title tried, and possession and damages obtained, without the equitable relief here asked; but the fact that the equity suit was first brought does not authorize the overriding of the plain provision of section 723, or warrant the giving in the equity suit of the purely legal relief asked for. The statute of Vermont (Rev. Laws 1880, § 1247) authorized an action of ejectment against a person in possession of land by a person claiming its seizin or possession, and by section 1251, if the judgment is for the plaintiff, he can recover his damages, and the seizin and possession of the land. The fact that the plaintiff's title accrued under a writ issued by this court is of no force to authorize this court to give in this suit the legal relief asked, because that writ has been executed, and has passed into a title, which is now the same as any other legal title, for the purpose of relief at law. The case of *Ward* v. *Chamberlain, ut supra*, is an authority for the not decreeing possession to the plaintiff in this suit.

A decree will be entered in accordance with the foregoing views.

Judge WHEELER concurs.

McNETT, Guardian, etc., *v.* COOPER and others.

(*Circuit Court, W. D. Michigan, S. D.* September 28, 1882.)

1. CONTRACT—MENTAL INCAPACITY—BURDEN OF PROOF.

   The burden of proof is upon one alleging mental incapacity to make a valid contract, unless it is shown that the party contracting was insane *prior* to the date of the contract, when the burden is shifted, and those claiming under the contract must prove that it was executed during a lucid interval.

2. SAME—PARTIAL INSANITY.

   Partial insanity, in the absence of fraud or imposition, will not avoid a contract unless it exists with reference to the subject of it at the time of its execution; but in cases of fraud it may be considered in determining whether a party has been imposed upon.

3. EXECUTED CONTRACT.

A contract becomes executed when nothing remains to be done by either party, and where the transaction has been completed, or was completed at the time the contract was made.

4. SAME—BILL DISMISSED FOR WANT OF EQUITY.

Where a mortgage was given to secure the purchase price of personal property sold by defendants to the mortgageors, who were at the time apparently, or supposed by defendants to be, of sound mind, and the contract has become executed by maturity of the debt, foreclosure and sale, and deeding of the premises, the court having no power to restore defendants to their condition before they parted with their property, a bill to have the mortgage and all proceedings taken to foreclose it, including the deed to defendants as purchasers at the foreclosure sale, declared void, will be dismissed for want of equity.

In Equity. Hearing on pleadings and proofs.

J. L. Hawes and *O. W. Powers*, for complainant.

J. W. Breese and *L. W. Wolcott*, for defendants.

WITHEY, D. J. The bill of complaint alleges that Charlotte E. Daly was insane in May, 1871,—not competent to enter into a binding contract; that she owned land in Kalamazoo county, Michigan, and then mortgaged it to defendants to secure the payment of promissory notes for $2,900, made by her and her husband to defendants for the purchase price of a steam saw-mill. The object of this suit is to have the mortgage, and all proceedings that have been taken to foreclose it, including the sale and master's deed, given to defendants as purchasers at a foreclosure sale, declared void. The mortgage was foreclosed in 1874; the sale under the decree was in November. Daly and wife were personally served, in the foreclosure suit, with subpœna, but failed to appear and defend. In January, 1875, McNett was appointed guardian of Mrs. Daly, on the application of her husband, by the probate court of Kalamazoo county. The answer denies the alleged insanity of Charlotte E. Daly, and all knowledge and information of any claim or pretense that she was insane at the time the mortgage was executed, or at any time anterior to the foreclosure of the mortgage. It alleges that James W. Daly, husband of Charlotte, purchased from defendants a steam saw-mill for the price of $2,900, about the time the mortgage was given, and that the sale to Daly was made upon the understanding and faith that he would secure the purchase price by a mortgage upon the land in question; that at the time of the arrangement and sale of the mill they supposed the title to the land was in James W. Daly, but proved to be in his wife. They would not have sold the mill to Daly on credit without security.

The burden of proof rests on complainant to show that Mrs. Daly was not competent, mentally, to bind herself by contract on the

eighteenth day of May, 1871. If once shown that she was generally insane prior to that date, the burden would be changed, and defendants be put to show that the mortgage was executed during a lucid interval. 4 Cow. 207; 1 T. B. Mon. 264. The witnesses who have testified are those who have known Mrs. Daly more or less intimately; two of her children, and two physicians who have been called to attend upon her or some of her family. Attention will be called to some of the testimony, which exhibits the character of evidence as to Mrs. Daly's mental condition. Mrs. Higgins, a neighbor, observed a change in Mrs. Daly's mental condition about 1866 or 1867. It took the form of melancholy—a disposition to be alone; talking to herself, and reluctance to talk with others. In 1877 Mrs. Daly grew worse, talked to herself much, and acted as if seeking to drive some invisible person or object away from her; would strike at and talk as if some person were present. Mrs. Higgins noticed more or less of the same peculiarities up to 1876. Mrs. Daly's two sons testify to much the same, and add that she poured water on her head and person frequently.

In 1869 Mrs. Daly was ill with malarial fever. One of the sons testifies that it lasted about three months, but the attending physician limits the period to less than two weeks. A sister-in-law, residing at Richland, about 10 miles from Kalamazoo, where the Dalys resided in 1869 and 1870 and a part of 1871, also subsequent to 1872, who frequently saw Mrs. Daly, never observed anything peculiar in her mental condition until the time of her fever, in 1869. Mrs. Daly was at one time a believer in spiritualism, so-called, and it was noticed that she muttered and talked to herself a good deal. Dr. Stillwell made professional calls at Mrs. Daly's in 1869, 1870, 1871, 1873, and 1874. He attended Mrs. Daly in 1869, during a severe attack of malarial fever, accompanied with congestive chills, and some mental disturbance. At the close of about two weeks she was recovered in bodily health, but the mental disturbance remained to some extent, though she was much improved in that respect. The doctor at first attributed Mrs. Daly's mental condition entirely to the severity of the fever. Having learned that she read and studied the subject of spiritualism, and had attended spiritual meetings, so called, he was of opinion that these things contributed to her mental disturbance.

Dr. Stillwell, in 1870, attended a sick child of Mrs. Daly's, and then observed that she muttered and talked to herself as she had done in 1869. He observed the same thing in the subsequent years that he

saw her, but noticed no other peculiarity to indicate mental derangement. On the occasion of his first visit to the child he prescribed a medicine, and gave the directions for administering it to Mrs. Daly, which she appeared to receive with proper understanding, and at his next visit was satisfied his directions had been followed, from the condition of the patient. Other testimony is of the same import as that referred to, to establish complainant's case.

On the other hand, it appears that Mrs. Daly was placed under no restraint by her husband or family, but permitted and was accustomed to go when and where she pleased alone and without supervision. She attended to her household affairs, was left in charge of the house and of her children in the absence of her husband, and attended to her own shopping. She appears to have been treated by her family as in every way competent to look after her household and family affairs, and whatever else concerned her. In the spring of 1871, about the time the mortgage was given, Daly moved with his family to Clyde, in an adjoining county, where he was engaged, with a person by the name of Mann, in the manufacture of lumber for more than a year. The business was carried on in the name of Daly & Mann, Mrs. Daly and not Mr. Daly being a member of the firm. Mann lived in the same house with the Dalys, who kept boarders. He says Mrs. Daly at times, when alone at her work, would laugh, talk, and use profane language,—the only peculiarity he noticed in reference to her. She had charge of the work in the house, and seems to have occupied herself with the duties of the household. The notary who took the acknowledgement of Mr. and Mrs. Daly to the execution of the mortgage visited Mrs. Daly for that purpose, at her home in Kalamazoo, and was there about 15 minutes. Saw nothing indicating any mental disturbance; she acted like a sane person.

General insanity has not been proved. If there was habitual derangement it was partial, and not shown to be of a character to affect Mrs. Daly's mental capacity to transact business understandingly. If her condition was otherwise it is not proved. Mrs. Daly exhibits partial mental derangement; more or less mental delusion, exhibiting itself under a single phase; hallucination on the subject of spiritual influences and manifestations. The degree of mental derangement which will render a person incapable of entering into a contract has been the subject of frequent judicial decisions. Contracts of idiots, lunatics, and persons *non compus* are invalid. In *Jackson* v. *King*, 4 Cow. 207, a leading American case, it was declared that a person is *non compus* only when he has wholly lost his understanding, for the

common law has drawn no line to show what degree of intellect is necessary to uphold a deed or contract. Mere weakness of understanding is not of itself any objection in law to the validity of a contract, in the absence of fraud. Other judgments state the rule in a somewhat modified form. The real inquiry is whether the party had the ability to comprehend, in a reasonable manner, the nature of the affair in which he participated. If fraud has been practiced on a person of weak or impaired intellect, the presence of fraud introduces other principles of decision. 23 N. J. Eq. 509. There must be inability to know what the act is to which the contract relates. 1 Whart. & S. Med. Jur. § 2.

So long as one possesses requisite mental faculties to transact rationally the ordinary affairs of life, his contracts will be valid. 84 Ill. 371; 40 Ill. 188; 52 Me. 305. He must have sufficient intellectual capacity to know what he is doing. It is not necessary to have sufficient discernment to transact business with prudence and discretion. A person must be able to understand what he is about. 25 N. Y. 1; 10 Ind. 185. Partial insanity will not avoid a contract unless it exists with reference to the subject of it, although it may be considered in determining whether the party has been imposed upon. 40 Iowa, 90; 6 Moore, P. C. 341; 73 Ill. 269; 58 Me. 453, 459. In the last case it is said hallucination is not *per se* insanity. It does not necessarily avoid a contract. It may exist as to matters in no way affecting the capacity to contract. Worcester adopts the medicinal definition of hallucination,—a morbid error in one or more senses, etc. "The party claiming to avoid a contract, by reason or temporary hallucination or delusion, must show its existence at the time of the contract sought to be avoided for such cause, and that it was of a character affecting his capacity to make the contract."

If the mind of Mrs. Daly was laboring under hallucination for years, or permanently, and if she was insane, it would be general of partial, according to the nature and extent of the malady. 58 Me. and 23 N. J. Eq. *supra;* 73 Ill. 269; Notes to *Jackson* v. *King,* 15 Am. Dec. 361, 364.

The mortgage has become an executed contract. A contract becomes an executed one when nothing remains to be done by either party, and where the transaction has been completed, or was completed at the time the contract was made. 1 Bouv. Law Dict. 356. The mortgage was given to secure the purchase price of personal property sold by defendants to Daly on credit, and upon the faith and understanding that payment was to be secured by this mortgage.

The debt has matured, the premises have been sold under a foreclosure decree, and deeded to defendants. The mortgage was made by persons apparently, or supposed by defendants to be, of sound mind. There is no power in the court to restore defendants to their condition before they parted with their property to Daly.

Let decree be entered dismissing the bill of complaint for want of equity, and for payment by complainant of the costs of the suit.

HARRIS *v.* UNION PACIFIC R. Co.

(*Circuit Court, D. Colorado* June, 1882.)

1. NEGLIGENCE DEFINED.

Negligence is the want of that care and prudence which a man of ordinary intelligence would exercise under *all* the circumstances of the case.

2. SAME—BURDEN OF PROOF—PROXIMATE CAUSE.

Negligence is a question of fact to be found by the jury, and in order to recover, the plaintiff must establish by a fair preponderance of proof that the defendent was guilty of negligence, and that the injury complained of was the natural and ordinary result of such negligence, and that the negligence was the proximate cause of the injury which a reasonably prudent and cautious person ought to have apprehended might result from the act which he did.

3. SAME—RAILROAD COMPANY TO KEEP TRACKS CLEAR.

While a railroad company is bound to use great care in order to keep its tracks clear for the safety of its passengers, and for its employes, it is not responsible for the unlawful act of some third party in placing obstructions upon the track without its knowledge or consent, unless it be in a case where it had by its conduct done some act which it might reasonably have anticipated would lead to the placing of the obstruction upon the track.

4. SAME—MEASURE OF DAMAGES.

In determining the amount of damages, the jury should consider the pain and suffering to which plaintiff has been subjected, both mental and physical, the loss of time and loss of wages which has resulted from his injury, the nature and extent of his physical injuries, their effect upon his ability to earn his living since the accident as compared with his ability to do so before, and the probable effect of those injuries upon his future health and strength. Under all these circumstances, and in view of all these facts, they should estimate the damages, and give him such sum as they think will be a reasonable, not an unreasonable, compensation.

E. L. Johnson, for plaintiff.

Willard Teller, for defendant.

MCCRARY, C. J., (*charging jury.*) It is your province and duty to determine the facts of this case in the light of the evidence which you have heard, and of the law, which the court will now state to you. The

plaintiff sues the defendant to recover damages upon the ground that he has been injured in his person by reason of the negligence of the defendant, the Union Pacific Railway Company.

You will observe, therefore, gentlemen, that the question which lies at the foundation of this suit, and which you must decide as a question of fact, is a question of negligence. If the plaintiff has failed to establish, by a fair preponderance of the proof, that his injury was the result of the negligence of the defendant, he cannot recover; but if he has established that fact by a preponderance of evidence, he may recover.

Negligence is the want of that care and prudence which a man of ordinary intelligence would exercise under all the circumstances of the given case. You may consider the question of negligence in this light: Whether a man of ordinary care and prudence would have done the acts which are shown by the evidence to have been done by the defendant railway company, and of which this plaintiff complains. You must be satisfied that the defendant company was negligent, and also that the plaintiff's injury was the result of that negligence, or, as the law puts it, that the negligence was the proximate cause of the injury. It may be well to explain to you what is meant by the term "proximate cause;" and I think, perhaps, as good a definition as I can give you is this: that the injury must have been the natural and ordinary result of the cause; or, in other words, the question here may be stated to be whether a reasonably prudent and cautious person ought to have apprehended that the injury might result from the act which was done. Now, in this case the proof shows, and about that there is no dispute, that a "push car" was left near the track by one of the employes of the defendant, and that it was not locked or secured in any way to prevent its being placed upon the track. It was, however, placed upon the track, and by whom we are not advised. It is not to be presumed that it was done with the knowledge or consent of the defendant. If that were so, it would be incumbent upon the plaintiff to establish it by proof. So that we may take it to be established that it was placed upon the track by some third person, by some outside party, and the question for you to determine is, whether the leaving that push car in that position was an act of negligence. In order to determine that question you must consider all the facts and circumstances of the case, and, in the light of such knowledge as you have, which is common knowledge to everybody, you will decide whether the railroad company was bound to anticipate that the push car might be placed upon the track, and that injury

might therefore result to some person passing on a train. If it had been some other article besides a push car there might be no question about it; as, for example, if it had been a common road wagon which had been left by the side of the track, or if a pile of lumber had been left there, or a lot of railroad ties, we would all understand at once that the railroad company could not expect and could not be required to anticipate that somebody would come along and place one of these things upon the track. The question is, whether a different rule applies where the article is a "push car." While the company is bound to use great care in order to keep its track clear for the safety of its passengers and for the safety of its employes, it is not responsible for the unlawful act of some third party in placing obstructions upon the track without its knowledge or consent, unless it be in a case where it had by its conduct done some act which it might reasonably have anticipated would lead to the placing of the obstruction upon the track.

It is insisted by counsel for the plaintiff here that there is a well-known disposition among men to place such an article as a push car upon the track when they find it by the side of the track. There is no such disposition with regard to the other articles of which I have spoken; but with regard to an article of this character it is for you to say whether there is such a well-known disposition among men as is claimed by the counsel for the plaintiff. If that be a fact so well known that it is a matter of general understanding and general knowledge, then the defendant was bound to take notice of it, and to act upon it. And so you will come to the question whether, when the push car was left in that position, the railroad company was bound to know, bound to anticipate, that it might be placed upon the track, and thereby that some one might be injured.

The rule with regard to the negligence of fellow-servants, to which some reference has been made, I think has little, if anything, to do with the case. There is, I suppose, very little question that the company here either had no rule requiring a push-car to be locked, or that, if they had such a rule, that it was not observed; in other words, there was no rule or practice of the company that required the foreman of this division to lock his car. He left it by the side of the track, as I apprehend you will have no difficulty in determining, upon the evidence, in accordance with the usual custom in such cases upon that road. Now, if there was negligence at all, under such circumstances as that, it was the negligence of the company in not having

some rule requiring the locking of cars when left by the side of the track, and that is the question for you to determine. It is true, as counsel for the defendant has stated in discussing this question of proximate cause, that if there is any intermediate independent cause to which the injury can be attributed, then the company is not liable. But that is but another way of stating the rule that I have already stated, because, if the company was bound to anticipate that there was danger that this car would be placed upon the track, then the placing of the car upon the track by some intermediate agency was not an independent cause, but was only one of the causes included in the chain of causes which resulted in the injury. So that we must come back in the end to the question which I have already stated to you, whether the leaving of that car in that place was of itself an act of negligence; and it was not an act of negligence unless the company was bound to apprehend that it might be placed upon the track, and might cause an injury. In determining this question you are to consider all the facts and circumstances as they are developed before you in testimony. You may consider the weight and construction of the car, its distance from the track, the statute of this state against placing obstructions upon the track, under heavy penalties, the custom with regard to manner of taking care of such cars when not in use, and the fact, if it is established, that from Golden to Denver is down grade, as well as all other facts and circumstances developed in evidence before you. And if, upon a consideration of all the evidence, you conclude that the defendant was guilty of negligence in leaving the push car by the side of the track, and that that negligence resulted as the proximate cause in the injury of the plaintiff, then he is entitled to recover; but if you find either of these questions against him, he is not entitled to recover.

If you find for the plaintiff, you will then come to the question of damages. In determining that you will consider the pain and suffering to which he has been subjected, both mental and physical, the loss of time and loss of wages which has resulted from his injury, the nature and extent of his physical injuries, their effect upon his ability to earn his living since the accident as compared with his ability to do so before, and the probable effect of those injuries upon his future health and strength. Under all these circumstances, and in view of all these facts, you will estimate the damages, and give him such sum as you think will be a reasonable, not an unreasonable, compensation.

You have nothing to do, gentlemen, with the fact that this case has once been tried in this court, or with what some other jury may have determined about it. You are to consider it upon the evidence adduced before you upon this trial, and upon the instructions which I have now given you.

AMERICAN WINE CO. *v.* BRASHER BROS.

(*Circuit Court, D. Colorado.* July 24, 1882.)

1. MATERIAL ISSUE—NEW TRIAL.

   Where wine was sold to defendants, who were regular wine merchants, upon representations made by the agent of plaintiffs that such wine had a large sale in the region covered by defendant's trade, an issue as to the truth or falsity of such representations, submitted to a jury upon a suit on an accepted draft drawn for the first installment of such wine delivered to defendant by plaintiffs, is a material issue, and the submission to the jury is not ground for a new trial.

2. SAME—WAIVER— OBJECTION NOT MADE ON FIRST TRIAL.

   Where an issue is tendered as to the quality of the article sold upon the representation of the agent of the plaintiffs that it was of good quality and readily salable, and the plaintiffs go to trial upon such issue, and the jury disagree after a jury is impaneled for another trial, although as a matter of law there may be some doubt as to whether such an issue ought to be submitted to a jury upon a question of fraud and deceit in respect to the sale of such article, the plaintiffs must be held to have waived any right to object to such issue.

3. CONTRACT—RESCISSION—CONDITIONS PRECEDENT—PART EXECUTION.

   Where a contract has been induced by fraud, it is not necessary that the party seeking to rescind the contract should absolutely tender what he has received on account of the contract. But it is necessary that he should give notice of his intention to rescind, that he will not abide by the contract, and it is necessary that, upon the trial, he should be in a situation to put the other party in the situation in which he was at the time of the discovery of the fraud. That the contract is partly executed at the time of the discovery of the fraud will not, in itself, prevent a rescission, unless it may be that it has gone so far that the subject-matter of the contract, or the greater part of it, has disappeared.

4. SAME—VERDICT SUSTAINED ON CONDITIONS IMPOSED.

   In this case, the jury having found a verdict against the plaintiffs, and in favor of defendants, allowing them damages for their expenses for freight, storage, etc., on the wine, it was made a condition of sustaining the verdict that the amount actually received by defendants from the sale of a part of the wine be deducted from the amount of such verdict.

Motion for New Trial.

J. W. Hornor and *J. A. Bentley*, for plaintiff.

Charles & Dillon, for defendants.

HALLETT, D. J., (*orally.*) The American Wine Company, a corporation doing business in St. Louis, Missouri, brought suit against

Brasher Brothers, a firm of this city, upon an accepted draft of $1,360. The defendants, in their answer, admitted the execution of the draft, and averred that it was given upon the sale to them of a hundred cases of wine. In that sale certain misrepresentations were made by the agent of the plaintiff as to the quality of the wine, and the demand for it in this state and in the territory of New Mexico. The agent of the plaintiff represented that the wine was as good as foreign champagnes, which was untrue, and also that it was well known to the trade of this state and in New Mexico, and that there was a large trade for the wine in this region of country, and that also was untrue. A great many matters were set up in the answer relating to the negotiation between the parties, and correspondence between them; what took place between them from time to time in reference to this purchase; and the plaintiff made a motion to strike out some parts of the answer as irrelevant and immaterial, and that motion was sustained as to all, excepting one clause of the answer, and that clause reads as follows:

"These defendants aver that, after they received the said 100 cases of said wine, they advertised the same extensively in the newspapers of the state of Colorado, and by circulars and traveling agents, stating that they were the sole and exclusive agents for the sale of said wine, at great expense, to-wit. the expense of $600."

The answer set up that it was a part of the contract between these parties that the defendants were to make an effort to sell this wine,—"to push it," as they expressed it,—and this clause was stating one of the efforts which they made in fulfillment of their agreement. The motion was overruled as to that clause, but otherwise sustained, so that all objections which were made to the answer, except as to this clause which I have mentioned, were sustained. I state this to show that the plaintiff accepted the issues that were taken as to the quality of this wine, and as to the trade which existed for it in this country. The cause was tried before a jury last year. That jury disagreed, and were discharged when they found that they were unable to agree. At this term the cause came on for trial upon the same issues, nothing being said as to their materiality; but when we came to the trial, and a jury was impaneled and in the box, objection was made that the issues were immaterial. That objection was overruled, and parties proceeded with their evidence. The case was submitted to the jury upon the evidence. They found a verdict for the defendants, assessing damages against the plaintiff in the sum of $323. The objection that these issues were not material is renewed

by motion for a new trial. That is the matter which we have under consideration at this time.

As to the principal question, one upon which most of the testimony was offered, and which was decisive of the whole matter, I have no doubt that it was a material issue, to be determined by the jury upon the trial of the case, whether there was a trade existing in this country at the time of the sale; whether the agent of the plaintiff represented that there was such trade. It seems to me there can be no question that that was a material matter, and had some influence on the parties in making the contract. This wine was bought for sale. Defendants were merchants or traders, and they bought this to be sold again, as the agent of the plaintiff well knew; and whether there was any demand for it in the country was a very material matter for consideration. In purchasing this quantity of wine (I should have said that the contract was for a car-load of wine—it was to be delivered in lots of 100 cases each, and this was the first installment of the entire quantity,) the defendants were new in the business here. They had recently come here from Canon City, where they had for some time carried on business, but in a much smaller way than they proposed to conduct it here, and, in their purchase of so large a quantity of this merchandise, it was certainly an important question for them what disposition they could make of it; whether they could find sale for it.

As to the other question, as to the quality of the wine, there is really very considerable room for doubt whether, as matter of law, a man who deals in wine shall be allowed to say that he does not know its quality, as compared with other wines in the market. It is a matter which can be tested by the use of the article, and apparently by a very little use of it. I say, as an original question, that would be very doubtful; and, upon the evidence here, many witnesses testified that this wine was of good quality for American wine; and others, that it was not. I should say that there is room for doubt whether it is an issue that ought to be submitted to the jury upon a question of fraud and deceit in respect to the sale of the article. But it must be remembered that the plaintiff accepted this issue without objection when it was tendered to him. He made no objection whatever to that part of the answer; he made objection, as I have stated, to some other parts—the correspondence between parties—what took place between them; but as to this part of the answer he said nothing, and accepted it; replied to it. He not only accepted it

then, but throughout one trial, and after we had had a jury to disagree upon the question, which occasioned considerable expense to the parties and the government in respect to the trial, and up to the time of another trial, and after the jury was impaneled for another trial. Upon that I think it ought to be said that although it is a matter of some doubt whether it is a question that ought to be ruled against the defendants, as matter of law, that the plaintiff has waived any right it had to raise the question in this form and at this time. Upon that I have not discovered anything in the authorities or reports which is directly in point; but there is here something that is said by the supreme court of Wisconsin in respect to a doubtful averment in a complaint, (*Potter* v. *Taggart*, 11 N. W. Rep. 678:)

"The learned counsel for the respondent insists—*First*, that the complaint does not show that the appellant was injured by the alleged fraudulent representations and concealment of the respondent, and so fails to state any reason for a rescission of the contract; and, *second*, that it fails to show that he has returned, or offered to return, the note and mortgage to the respondent before the action was commenced, and in that respect, he fails to show himself in a position to demand his purchase money back.

"We are inclined to hold that, after answer upon an objection for the first time to its sufficiency, the complaint is sufficient in both respects. In the case of *Hazleton* v. *Union Bank*, 32 Wis. 34–43, Justice Lyon, in delivering the opinion, says:

"'The rule is well settled that a greater latitude of presumption may be indulged in to sustain a complaint where the objection that it does not state a cause of action is taken for the first time at the trial, and after an issue of fact has been taken upon it by answer, than where the same objection is taken by demurrer.'

"The same rule was stated in *Teetshorn* v. *Hull*, 30 Wis. 162–167; *Hamlin* v. *Haight*, 32 Wis. 238–242; *Luth. Ev. Church* v. *Cristzau*, 34 Wis. 328; *Johnson* v. *Ashland Lumber Co.* 47 Wis. 326; *Johannes* v. *Youngs*, 45 Wis. 445; *Wittmann* v. *Watry*, Id. 493.

"Under the rule established by the cases cited, we think the complaint sufficiently alleges that the respondent was guilty of making either a fraudulent representation or a fraudulent concealment of the fact that a part of the property described in the mortgage had been released before the date of the sale, and that such fraud was injurious to the appellant."

The court then go on to discuss the question of fraud, as alleged. I think what is said there is applicable to a case of this kind, where an issue is tendered of a doubtful character, and parties come to say after trial that there is an immaterial issue.

The more difficult question presented in the case, and which I believe was fully presented at this trial, if not at the other, is,

whether the defendants were in a position to rescind the contract, and object to the payment of the draft which they gave for the wine at the time that they attempted to rescind. They gave notice of their intention to rescind the contract in the last days of October, 1880, the draft having been drawn on the twenty-ninth day of June. Precisely when it was accepted does not appear; but the notice of their intention to rescind was given nearly four months after the acceptance of the draft, and at that time they had sold some 20 cases of the wine. In their letter they said nothing about the sale of the 20 cases, stating that they held the wine subject to the order of the plaintiff. Upon the letter it might be assumed that they held all the wine still in their possession, and were also ready to turn it over to the plaintiff and resist the payment of the draft, on the ground that they were misled at the time of making the purchase of plaintiff's agent in respect to the matters which I have stated. It is contended that, having sold a part of the wine, they had no right then to rescind the contract; the situation of the parties was so changed that they could not put the plaintiff in the condition in which it was at the time the draft was given, and therefore there could be no rescission of the contract; that whatever remedy defendants have must be by way of diminishing the damages in an action for the value of the wine. And there are many cases which state the proposition in general terms, that, in order to rescind, the other party must be put in the same situation in which he was at the time of entering into the contract; that the party offering to rescind must restore whatever he has received under the contract, and if he is not in a situation to do that, he cannot rescind at all. One case in the seventy-fifth Illinois reports is very much in point on that subject. *Wolf* v. *Deitzsch*, 75 Ill. 206. The defendant there ordered 81 gallons of Affenthaler red wine, the quality to be good. The price agreed upon was $2.50 per gallon; the defense set up, that when received, it was not good, but very sour, and wholly unsalable as wine. Some 20 gallons of the wine were sold by appellee, and for the value of this the judgment was for appellants; but for the value of the residue the judgment was against them.

The court go on to discuss the question as to the quality of this wine, and its condition at the time it was shipped to the defendant. They arrive at the conclusion that the weight of evidence is to the effect that the wine was according to the contract; in fact, several witnesses testified that it was of that quality, while the defendant

himself testified it was not good wine; that it was in bad condition when received. But the conclusion of the court evidently is that the plaintiffs in the suit complied with their contract. They then go on to say that—

"On appellee's own evidence, however, the law is against him, and the instructions ought not to have been given without modification. The doctrine repeatedly announced by this court is that a party cannot affirm a contract in part, and rescind it as to the residue. If he rescind he must do so *in toto.* He must put the opposite party in as good a condition as he was before the sale, by a return of the property purchased, unless it is entirely worthless. And where a vendee has a right to object that goods delivered are different in quality from those he purchased, he must do so within a reasonable time, and before exercising acts of ownership over them. If, before objecting to their quality, he exercises any act of ownership over them, as by selling a part, etc., he cannot afterwards repudiate the contract, so as to wholly defeat the vendor's claim for the price."

In that case it is obvious that, from the nature of the objection, the wine was of inferior quality and in bad condition when received; that the defendant ought to have discovered it as soon as he opened it; and that his act in disposing of some of it after he must have had knowledge of its quality, was in affirmance of the contract, so that the general rule, as stated by the court, was directly applicable to the facts as presented.

In this I think the facts are somewhat different. Here the misrepresentation is alleged to have occurred in respect to the demand for the wine in Colorado and in New Mexico, and that is a matter which could only be determined by experience. Defendants could not know whether there was a demand for this wine until they should for some time make some effort to sell. This certainly required some time. They could not discover that within a day or week, or perhaps a month, after they took the wine from the plaintiff. That point was submitted to the jury directly; they were told that defendants must rescind as soon as they discovered that they had been imposed upon, and it was a question for them to consider whether they had acted in time in this instance. In returning a verdict for the defendant, the jury must have decided upon the evidence that the notice was given in season. In support of the verdict of the jury, and to the effect that the plaintiffs were not precluded from rescinding the contract by having dealt with the wine and having disposed of some of it, the defendants cite 2 Parsons, Cont. 780. He says that:—

"Where the right to rescind springs from discovered fraud, there is an exception to the rule. The defrauded party does not lose his right to rescind because the contract has been partly executed, and the parties cannot be fully restored to their former position."

The authorities cited do not bear him out. I have examined all of them. In my judgment none of them support this conclusion. That is not an extraordinary thing with this author, but it seems that some courts have accepted the proposition as stated.

In *Hendrickson* v. *Hendrickson*, 51 Iowa, 68, a defendant asked the court to instruct the jury as follows:

"If you find from the evidence that the defendant, as part of the purchase price of the team, paid a debt due from the plaintiff, and $58 (dollars) money due from her husband's estate, for which the same was liable, then the plaintiff cannot rescind the contract and reclaim the property without placing the defendant in the same position he was before the trade was made, by repaying or offering to repay the money paid out by him, unless the defendant was guilty of some fraud practiced upon her, and you should find for the defendant; but if you find he practiced fraud, she can recover without tendering what she received from him."

The court say that this instruction was supported by Mr. Parsons' view of the law, and that it ought to have been given. "The foregoing instruction is in strict accord with this authority. It should, therefore, have been given." Whether they would have declared it to be a correct statement of the law if the instruction had come from the other side, may be somewhat doubtful. It will be observed that the defendant was stating the law against himself, and stating it very strongly, and the court refused to give it as he stated it. The supreme court say the court ought to have complied with his request; but at all events the court seem to have accepted Mr. Parsons' view of the law, and gone a little further than he does, for, as the proposition is there given, it is to the effect that one who has been defrauded is under no obligation whatever to make restitution of what he has taken, and Mr. Parsons does not state the proposition so strongly as that.

In another case, in 32 Vt., the proposition is stated apparently with some care in this way: "But a *defrauded party* does not lose his right to rescind because the contract has been in part executed, and the parties cannot be fully restored to their former position, but he must rescind as soon as the circumstances will permit." That is the proposition as Mr. Parsons states it, I believe.

In this Wisconsin case, which is a very late one,—decided in March of this year,—the proposition is stated somewhat differently, and here the facts were very much controverted. The authorities are extensively reviewed. It is evident that the subject received a good deal of attention:

"The rule as to the rescission of contracts, stated by Leake in his Digest of the Law of Contracts, is as follows: 'The fact that the contract was induced by fraud gives the party defrauded the right, on discovering the fraud, to elect whether he will continue to treat the contract as binding, or avoid it; but the contract continues valid until he has determined his election by avoiding it. He must determine his election to rescind by express words to that effect, or by some unequivocal act, under circumstances which render such words or act binding.'

"The complaint in this action states that as soon as the appellant ascertained that he had been defrauded in the purchase of the note and mortgage, he immediately went to the respondent, 'for the purpose of demanding of him a return of the $403.91 so paid by the appellant to the respondent, and to return to him the said note and mortgage; but the respondent then and there refused to do anything in regard to the matter, and then and there refused, and still does refuse, to return to plaintiff said sum, or any part thereof.' It is true, this allegation does not state in express words that the appellant offered to return the note and mortgage to the respondent; but we think it is fairly to be inferred, from the language used, that he did make such offer. He says he went to the respondent for the purpose of making such offer, and to demand his money back, and that the respondent refused to do anything in regard to the matter, and 'then and there refused, and still does refuse, to return the money, or any part thereof.' The refusal of the respondent to do anything about the matter, and to return the money, or any part thereof, clearly implies that he was requested by the appellant to do something about it, and to return the money.

"In order to rescind a contract by a purchaser, when a ground for rescission exists, it is not necessary to make any formal tender of the property held by the purchaser; it is sufficient to make return of the same, (see *Van Trott* v. *Wiese*, 36 Wis. 439-448; *Mann* v. *Stowell*, 3 Pin. 220;) and if the vendor refuses to receive the property back and return the purchase money, or do anything except to keep what he has, no formal tender of the property is necessary. The right of the vendor to have the property formally tendered is waived by his refusal to accept it in advance.

"In *Wright* v. *Young*, 6 Wis. 127, this court say: 'In this case the appellant has, from the outset, resisted the performance of the contract, and insisted that it was not binding on him. Any tender to him while occupying this ground of defense would have been an idle ceremony.'

"So, in the case at bar, the respondent insists that the appellant has no right to rescind the contract, and refuses to return the purchase money, or any part thereof. By taking that position he relieves the appellant from making any formal tender of the note and mortgage. The appellant has done all that is necessary to maintain his action when he shows that he has

offered to return what he had received upon the contract, and that the respondent had refused to receive it and return the purchase money. The following cases hold the same rule: *Bank* v. *Keep*, 13 Wis. 209–214; *Corbitt* v. *Stonemetz*, 15 Wis. 186; *McWilliams* v. *Brookens*, 39 Wis. 334; *Cunningham* v. *Brown*, 44 Wis. 72.

"If the vendor in such case is ready to rescind on his part, then it becomes necessary for the purchaser to tender and return to the vendor all he has received under the contract. When the vendor refuses to do anything in the matter, and the vendee brings his action to recover the purchase price, he must prove on the trial that he is in a condition to restore to the vendor what he received upon the contract, and should make restoration upon the trial."

The principle, I think, of that case, and of the other one in Vermont, and of many cases which I have examined, is that in case of fraud, where the contract has been induced by fraud, that it is not necessary that the party seeking to rescind the contract should absolutely tender what he has received on account of the contract. It *is necessary* that he should give notice of his intention to rescind—that he will not abide by the contract; and it *is necessary* that upon the trial he should be in a situation to put the other party in the situation in which he was at the time of the discovery of the fraud. That the contract is partly executed at the time of the discovery of the fraud will not in itself prevent a rescission, unless it may be that it has gone so far that the subject-matter of the contract has disappeared, or the greater part of it. To illustrate that matter: if these parties had sold all, or nearly all, of the wine, there could be no question about it; but having sold but a small part, as relates to the entire quantity which they were to purchase, which was a car load, I think, by that act, the act being within the contemplation of the parties at the time they made the contract, they will not be precluded from rescinding it, and the circumstance that, at the time of notifying the plaintiff of their intention to rescind, they did not state to plaintiff that they had sold a portion of this wine, is not controlling; they did express the intention to rescind the contract, and if now they can put the plaintiff in substantially the position he then held, I think they ought to be allowed to rescind.

Now, as to the money which was received for this wine, nothing was said about it at the trial. It was not mentioned to the jury in the charge which was given then, and it is fair to assume that it escaped the attention of counsel also; that they were so intent upon maintaining the principle issue, to recover the full amount of this draft, they gave no attention to this subject of the sale of the wine.

If my attention had been called to it, I should have asked the jury to allow upon the damages which they found for the defendants, if they found any, the value of this wine; but nothing was said to them upon the subject, and the presumption is that they made no allowance whatever for it.

But the matter is not beyond control. If they did not allow for it, we may do so at this time. The value of that wine can be easily ascertained, and it is competent now to deduct it from the amount returned by the jury. The jury have said in their verdict, with more than usual particularity, "we assess the damages, including freight and storage, to the amount of $323." Under the charge which was given them, as those were the matters submitted to them, and they were advised with reference to the expenditures of defendants for advertisements in their effort to sell this wine, that they were so indefinite, so difficult to be determined, that they could make no account of them, I have not a doubt that the verdict was for these two items, the storage and the freight. The freight amounted, I believe, to something like $214. I think the value of the wine which was sold, to be ascertained, probably, at the rate of $13.60 per case, as that was the rate at which it was all sold, is to be deducted from the allowance of the jury,—that is, if the defendants assent to that,—and on that the motion for new trial will be overruled.

There were some other questions presented, as that one witness was absent at the time of the trial, and some other matters which I do not clearly recall, but I think them unworthy of attention, and have no disposition to comment upon them. If the defendants will deduct from the amount of their damages whatever these 20 cases of wine come to, I shall be inclined to enter judgment upon the verdict.

Defendants remitted $272 from the damages returned by the jury, and judgment was entered on the verdict.

CASE OF THE CHINESE MERCHANT.

In re LOW YAM CHOW.

(*Circuit Court, D. California.* September 5, 1882.)

1. CHINESE MERCHANT'S CERTIFICATE OF CHINESE GOVERNMENT.

   Chinese merchants who resided, on the passage of the act of congress of May 6, 1882, in *other countries than China*, on arriving on a vessel in a port of the United States are not required by said act to produce certificates of the Chinese government establishing their character as merchants as a condition of their being allowed to land. Their character as such merchants can be established by parol evidence. The certificate mentioned in section 6 of that act is evidently designed to facilitate proof by Chinese, other than laborers, coming from China and desiring to enter the United States, that they were not of the prohibited class. The particulars which the certificate must contain show that it was to be given by the Chinese government to those then residing there, as their place of residence in China is to be stated.

2. SAME—ACT OF CONGRESS CONSTRUED.

   The act of May 6, 1882, was intended to carry out the provisions of the supplementary treaty of November, 1880, modifying the treaty of 1868 between China and the United States, and its purpose must be held to be what the treaty authorized,—to put a restriction upon the emigration of *laborers*, including those skilled in any art or trade,—and not to interfere with the commercial relations between China and this country, by excluding Chinese merchants, or putting unnecessary and embarrassing restrictions upon their coming to this country.

3. STATUTES—RULE OF CONSTRUCTION.

   All laws are to be so construed as to avoid an unjust or absurd conclusion; and general terms are to be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.

4. CHINESE MERCHANT COMING FROM CHINA—EVIDENCE.

   Whether a Chinese merchant, teacher, etc., arriving from *China* and failing to produce the certificate required by section 6, could by satisfactory evidence of his real character overcome the presumption that he is a laborer raised by the absence of the certificate, and establish the right secured by the treaty to go and come of his own free will and accord, it is not necessary to decide in this case. HOFFMAN, D. J.

Habeas Corpus. The facts sufficiently appear in the opinion of the court.

McAllister & Bergin, for petitioner.

Milton Andros, for respondent.

Philip Teare, Dist. Atty., for collector of port.

Before FIELD, Justice, and HOFFMAN, D. J.

FIELD, Justice. The petitioner is a subject of the emperor of China, and alleges that he is restrained of his liberty on board of the American steamship City of Rio de Janeiro, in the port of San Francisco, by its captain, in contravention of the constitution and the

treaty between the United States and his country. He states in his petition in substance as follows: That he is a Chinese merchant by occupation, and not a Chinese laborer; that he was such merchant in Peru for about 10 years; that upon the breaking out of the war between that country and Chili he left Peru and established himself at Panama, in the republic of New Granada; that for the last five years he has also been a member of the firm of Chow Kee & Co., merchants in San Francisco; that on the thirty-first day of July last he took passage at Panama on the steam-ship which arrived at the port of San Francisco on the seventeenth of August, and that its captain refuses to allow him to land, but detains him on board of the vessel under the claim that his landing in the United States is prohibited by the act of congress of May 6, 1882, "to execute certain treaty stipulations relating to Chinese;" that such claim is unfounded; that the petitioner has been a merchant by occupation for the last 12 years, and has never been a laborer within the meaning of the treaty. He therefere prays that a writ of *habeas corpus* be issued to the captain to produce him, and that he be discharged from his arrest. The writ being issued, the captain makes a return admitting the detention of the petitioner, and justifying it under the act of congress.

On the hearing, proof was received, against the objection of counsel, of the truth of the petitioner's averment that he is a merchant by occupation, and has been such for years either in Peru or at Panama. No attempt to impeach this evidence was made.

Two questions are thus presented for determination: (1) Whether Chinese merchants, who resided, on the passage of the act of congress, in other countries than China, on arriving on a vessel in a port of the United States, are required to produce certificates of the Chinese government establishing their character as merchants, as a condition of their being allowed to land; (2) whether their character as such merchants can be established by parol proof. For a correct solution of these questions some reference must be had to the treaties between China and this country: In the fifth article of the one concluded in July, 1868, generally known as "the Burlingame treaty," the contracting parties declare that "they recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other, for purposes of curiosity, of trade, or as permanent residents." In its sixth article they declare that "citizens

of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may be enjoyed by the citizens or subjects of the most favored nation."

While these articles remained in full force no legislation by congress looking to a suspension of or restriction upon the immigration of Chinese, engaged in any lawful occupation, was possible without a breach of faith towards China. And yet it was discovered that the physical characteristics and habits of the Chinese prevented their assimilation with our people. Conflicts between them and our people, disturbing to the peace of the country, followed as a matter of course, and were of frequent occurrence. Chinese laborers, including in that designation not merely those engaged in manual labor, but those skilled in some art or trade, in a special manner interfered in many ways with the industries and business of this state. Their frugal habits, the absence of families, their ability to live in narrow quarters without apparent injury to health, their contentment with small gains and the simplest fare, gave them great advantages in the struggle with our laborers and mechanics, who always and properly seek something more from their labors than sufficient for a bare livelihood, and must have and should have something for the comforts of a home and the education of their children. A restriction upon the immigration of such laborers was therefore felt throughout this state to be necessary, if we would prevent the degradation of labor and preserve all the benefits of our civilization. Through the urgent and constantly-repeated appeals from the Pacific coast, the government of the United States was induced to make application to the government of China for a modification of the treaty of 1868; and the supplementary treaty of November, 1880, was the result. The first article of this treaty provides that "whenever, in the opinion of the government of the United States, the coming of *Chinese laborers* to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it;" declaring at the same time that "the limitation or suspension shall be reasonable, and shall *apply only to*

Chinese who may go to the United States as laborers, other classes not being included in the limitations." The second article further declares that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body or household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

The act of May 6, 1882, was framed in supposed conformity with the provisions of this supplementary treaty. In the inhibitions which it imposes upon the immigration of Chinese there is no purpose expressed in terms to go beyond the limitations prescribed by the treaty. And we will not assume, in the absence of plain language to the contrary, that congress intended to disregard the obligations of the original treaty of 1868, which remains in full force except as modified by the supplementary treaty of 1880. This latter treaty only authorizes suspensive or restrictive legislation with respect to the importation of Chinese laborers. It provides, in express terms, as seen above, that the limitation or suspension shall apply only to them, "*other classes not being included in the limitations.*"

The act of congress declares in its first section that after the expiration of 90 days from its passage, and for the period of 10 years, "the coming of *Chinese laborers* to the United States" is suspended, and that during such suspension "it shall not be lawful for any *laborer* to come, or, having so come after the expiration of said 90 days, to remain within the United States." And its second section makes it a misdemeanor, punishable by fine and imprisonment, for the master of any vessel to knowingly bring within the United States on such vessel, and land or permit to be landed, any *Chinese laborer* from any foreign port or place.

The third section excepts from these provisions Chinese laborers who were in the United States on the seventeenth of November, 1880, or who shall have come before the expiration of 90 days from the passage of the act, and shall produce to the master of the vessel and the collector of the port certain prescribed certificates of identification, containing the name, age, occupation, last place of business, and physical marks or peculiarities of the laborer.

The act, conforming to the supplementary treaty, is aimed against the immigration of *Chinese laborers*—not others. The sixth section,

which is supposed to cover the present case, was not intended to prohibit the coming to the United States of other classes of persons, but to prevent, by a prescribed mode of proof, the evasion of the prohibition against the coming of laborers. Its language is as follows: "That in order to the faithful execution of articles 1 and 2 of the treaty in this act before mentioned, every Chinese person other than a laborer, who may be entitled by said treaty and this act to come within the United States, and who shall be about to come to the United States, shall be identified as so entitled by the Chinese government in such case, such identity to be evidenced by a certificate issued under the authority of said government, which certificate shall be in the English language, or (if not in the English language) accompanied by a translation into English, stating such right to come, and which certificate shall state the name, title, or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, *and place of residence in China* of the person to whom the certificate is issued, and that such person is entitled, conformably to the treaty in this act mentioned, to come within the United States. Such certificate shall be *prima facie* evidence of the facts set forth therein, and shall be produced to the collector of customs, or his deputy, of the port in the district of the United States at which the person named therein shall arrive."

The certificate mentioned in this section is evidently designed to facilitate proof by Chinese other than laborers, coming from China and desiring to enter the United States, that they are not within the prohibited class. It is not required as a means of restricting their coming. To hold that such was its object would be to impute to congress a purpose to disregard the stipulation of the second article of the new treaty, that they should be "allowed to go and come of their own free will and accord." Nor is it required, as a means of proving their character, from merchants and others not laborers domiciled out of China when the law was passed, and coming here from such foreign jurisdiction. The particulars which the certificate must contain show that it was to be given to those then residing there, for their *place of residence in China* is to be stated. Independently of this consideration, that government could not be expected to give, in its certificate, the particulars mentioned of persons resident—some, perhaps, for many years—out of its jurisdiction. Neither the letter nor the spirit of the act calls for a construction imputing to congress the exaction of a condition so unreasonable.

The general language of the twelfth section, "that no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate required in the act of Chinese persons seeking to land from a vessel," is to be construed as applying to such persons as are by previous sections prohibited from coming, not as extending the prohibition.

We repeat what we said in the case of Ah Tie and other Chinese laborers, that all laws are to be so construed as to avoid an unjust or an absurd conclusion; and general terms are to be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. In addition to the illustrations of this rule there given, we may refer to two instances furnished by the decisions of the supreme court. A law of congress declares that whoever willfully obstructs or retards the carrier of the mails of the United States, shall be deemed guilty of a public offense and be punished by a fine. A mail carrier in Kentucky was arrested by the sheriff upon a charge of murder, and for the arrest the sheriff was indicted. The supreme court held that the general language of the act of congress was not to be construed to extend to the case; for it could not be supposed that congress intended to interfere with the enforcement of the criminal laws of the state, in its legislation to prevent unnecessary obstruction in the carriage of the mails. It would have been absurd to hold that in order to secure the speedy transportation of the mails, immunity from punishment for a crime was given to the mail carrier. *U. S.* v. *Kirby*, 7 Wall. 482.

So the act of congress for the recovery of the proceeds of captured and abandoned property during the late war required the claimant in the court of claims to prove that he had never given aid or comfort to the rebellion; yet the supreme court held that one who had been pardoned by the president was relieved from this requirement. The general language of the act covered his case, but as the pardon in legal effect blotted out the guilt of the offender,—that is, closed the eyes of the court so that it could not be considered as an element in the determination of his case,—the pardon was deemed to take the place of the proof, and relieved him from the necessity of establishing his loyalty.

"It is not to be supposed," said the supreme court, "that congress intended, by the language of the act, to encroach upon any of the prerogatives of the president, and especially that benign prerogative of mercy which lies in the pardoning power. It is more reasonable to conclude that claimants restored

to their rights of property by the pardon of the president were not in contemplation of congress in passing the act, and were not intended to be embraced by the requirement in question. All general terms in statutes should be limited in their application so as not to lead to injustice, oppression, or any unconstitutional operation, if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature." *Carlisle* v. *U. S.* 16 Wall. 153.

These cases would be sufficient to justify us in giving a construction to the act under consideration in harmony with the supplementary treaty, even were the general terms used susceptible of a larger meaning. Its purpose will be held to be, what the treaty authorized, to put a restriction upon the emigration of laborers, including those skilled in any trade or art, and not to interfere, by excluding Chinese merchants, or putting unnecessary and embarrassing restrictions upon their coming, with the commercial relations between China and this country. Commerce with China is of the greatest value, and is constantly increasing.* And it should require something stronger than vague inferences to justify a construction which would not be in harmony with that treaty, and which would tend to lessen that commerce. It would seem, however, from reports of the action of certain officers of the government—possessed of more zeal than knowledge—that it is their purpose to bring this about, and thus make the act as odious as possible.

We are of opinion that the section requiring a certificate for Chinese merchants coming to the United States does not apply to those who resided out of China on the passage of the act of congress, and that proof of their occupation may be made by parol.

It follows that the petitioner must be discharged, and it is so ordered.

*According to the statement furnished by the Chinese consul, the value of of exports to China from the United States, and from China to the United States, for the year in which the Burlingame treaty was concluded, (1868,) amounted to $15,365,013, and for the fiscal year ending June 30, 1881, amounted to $27,765,409, almost doubling our commerce in 13 years. Of this latter amount $16,185,165 of the merchandise passed through the port of San Francisco, and 70 per cent. of it was shipped by Chinese merchants. When the Burlingame treaty was concluded the export of flour from California at the port of San Francisco amounted to about 20,000 barrels a year. The export of this article has steadily increased since, until in the last year (1881) it amounted to 271,118 barrels, 90 per cent. of which was shipped by Chinese merchants.

HOFFMAN, D. J. The petitioner alleges that he is unlawfully restrained of his liberty in contravention of the constitution of the United States, and of the treaty between the United States and the empire of China, commonly known as the Burlingame treaty; that he is a Chinese merchant, and not a Chinese laborer; that he was a Chinese merchant at Peru for about 10 years, and that thereafter, upon the outbreak of war between Chili and Peru, he left the latter country and established himself as a merchant at Panama, in the republic of New Granada, where he still resides; that for the last five years he has been a member of the firm of Kwong Sing Lung, Chow Kee & Co., merchants, in this city; that on the thirty-first day of July, 1882, he took passage at Panama on board the American steam-ship Rio de Janeiro, and arrived at this port on the said steam-ship on the seventeenth day of August, 1882; but that he is unlawfully restrained of his liberty, and not allowed to land by the master of said steamer, upon the claim that under provisions of the act of May 6, 1882, entitled "An act to execute certain treaty stipulations relating to Chinese," he has no right to land. The return of the master of the steamer admits the allegations of the petition as to the embarkation of this petitioner at Panama and his arrival at this port, but disavows all knowledge or information sufficient to enable him to admit or deny the allegation of this petitioner that he is a Chinese merchant and not a Chinese laborer. But he claims that the petitioner cannot lawfully land in the United States by reason of the non-production by him to the collector of the certificate of identification, etc., and by said act of May 6, 1882, required to be produced by every Chinese person other than a laborer arriving in the United States.

On the hearing, the truth of the allegations of the petition was established beyond doubt or controversy. It appeared that the petitioner is, as he claims to be, a Chinese merchant residing in Panama; that the firm in this city, of which he is a member, is largely engaged in commerce, and that his object in visiting San Francisco was to make purchases for his establishment at Panama, and to adjust his accounts with his partners in this city. The proofs offered by petitioner were corroborated by his dress, appearance, and manners. He evidently did not belong to the class of Chinese laborers or coolies which the treaty and the act of congress intended to exclude; but, on the contrary, he belongs to a class which, by the express terms of article 2 of the treaty, are allowed to go and come "of their own free will

and accord," and to enjoy "all the rights, privileges, immunities, and exemptions accorded to the citizens and subjects of the most favored nation."

But it is strenuously urged by the district attorney that under the provisions of the sixth section of this act no evidence is admissible to prove the petitioner not to belong to the prohibited class, except the production of the certificate of identification therein required, and that the failure to produce such a certificate raises a conclusive presumption that the person so failing to produce it is a Chinese laborer. He even contends that an indictment against the master for landing, or permitting to land, a Chinese laborer would be sustained by proof that the person so landed did not produce to the collector the certificate of identification required by section 6.

The argument chiefly pressed by the district attorney in support of this construction was that to admit parol evidence as to the character of the immigrant would open the door to endless evasions of the act, and that any Chinese laborer could procure any number of witnesses who would swear him to be a merchant, student, teacher, or traveler from curiosity, and that this testimony the United States would rarely be able to controvert. The suggestion is not without force, though the danger is, I think, exaggerated. It would not be easy, in all cases, for a Chinese laborer or coolie, whom alone it was the intention of the act to exclude, to simulate the dress, manners, and general appearance and bearing of the merchant, student, teacher, or traveler, who, in China, almost as much as in India, are separated from the common laboring classes by social and external differences which almost amount to a distinction of caste. But even if the apprehensions of the district attorney were well founded, the construction he contends for would be inadequte to prevent the evil, unless we also hold that on an indictment against the master or a libel against the ship, the non-production of the certificate shall be conclusive evidence that the passenger landed is a laborer. For if the master or the claimant of the vessel be allowed to show his true character by parol, the door would be opened to all the evasions of the law which the district attorney fears.

Section 6 is as follows:

"That in order to the faithful execution of articles 1 and 2 of the treaty in this act before mentioned, every *Chinese person* other than a laborer, who may be entitled by said treaty and this act to come within the United States, and who shall be about to come to the United States, shall be identified as so en-

titled by the Chinese government in each case, such identity to be evidenced by a certificate issued under the authority of said government, which certificate shall be in the English language, or (if not in the English language) accompanied by a translation into English, stating such right to come, and which certificate shall state the name, title, or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, *and place of residence in China* of the person to whom the certificate is issued, and that such person is entitled, conformably to the treaty in this act mentioned, to come within the United States. Such certificate shall be *prima facie* evidence of the fact set forth therein, and shall be produced to the collector of customs or his deputy of the port in the district of the United States at which the person named therein shall arrive."

It will be observed that the terms of this section lend no support to the position taken by the district attorney. A certificate of identification is, it is true, required to be produced to the collector, but it is not provided that the Chinese person failing to produce it shall not be allowed to land, much less that the certificate shall be the only proof of the right of the passenger to come within the United States, and that in its absence he shall be conclusively presumed to be a Chinese laborer, and that this presumption exists even in a criminal proceeding against the master for "landing, or permitting to land, a Chinese laborer."

In the debates in the senate on the original bill, which contained provisions nearly identical with those of section 6 in the bill which obtained the president's approval, it was strenuously urged that to exact a compliance with "the cumbersome and burdensome provisions" with regard to certificates of identification, and which are required of the subjects of no other power, was a violation of the treaty which allows the permitted classes to go and come of their own free will and accord, and which guaranties to them all the rights, privileges, immunities, and exemptions accorded to the citizens and subjects of the most favored nation. To this it was replied that the provisions in the bill were merely for purposes of identification; that they were in the interest of the classes permitted to come; that it was no hardship to the permitted classes to leave it to the Chinese government to say who are merchants, traders, teachers, etc., and therefore not within the excluded class. But if the bill had declared, or had been supposed to declare, by necessary implication, that no Chinese person unprovided with a certificate should, under any circumstances, be allowed to land, and that its *non-production* should be conclusive evidence that the passenger was a Chinese laborer, while

its production should only be *prima facie* evidence of the facts set forth therein, the bill might have encountered an opposition which which would have endangered its passage.

The circumstances of the case before us do not require a definitive decision of the question whether a Chinese merchant, teacher, etc., arriving from China, and failing to produce the certificate required by section 6, might not overcome, by satisfactory evidence of his real character, the presumption that he is a laborer raised by the absence of the certificate, and establish the right secured by the treaty to go and come of his own free will and accord. The petitioner has been for many years a resident of this city, of Callao, and latterly of Panama. He comes to the United States on a temporary visit for purposes of trade. At the time of his embarkation on board an American vessel at Panama, the law which requires the production of a certificate had not gone into effect. By referring to the terms of section 6, which have been cited, it will, we think, be apparent that the persons contemplated in its provisions are Chinese merchants, etc., coming *from China* to the United States, and not Chinese merchants coming to this country from other parts of the world. The certificate is to be furnished by the Chinese government, or under its authority. It must state the name, age, height, and all physical peculiarities, former and present occupation, and *place of residence in China*, of the person to whom it is issued. How could a Chinese merchant who has resided, it may be for 10 or 20 or 30 years, in London or Calcutta or Callao or Panama, obtain such a certificate? Certainly not without going to China for the purpose. And how, if he should revisit his country with that object, could the certificate state, as required, "*his place of residence in China?*" The evil which the treaty and the law were intended to remedy, was the unrestricted immigration from the teeming population of China of laborers, whose presence here in overwhelming numbers was felt by almost all thoughtful persons to bear with great severity upon our laboring classes, and to menace our interests, our safety, and even our civilization. But, while anxious to attain this end, an equal solicitude was felt to adopt no legislation which should violate the plighted faith of the nation, unnecessarily give offense to the Chinese government, or hinder or impede our large and growing commerce with China. Congress may therefore reasonably be supposed to have thought that the great object of the bill would be sufficiently attained by exacting certificates of identification from Chinese emigrants from China, from whence the great influx of laborers was feared,

and from whence it chiefly comes. And it may have advisedly refrained from imposing the same requirement upon Chinese merchants, etc., residents in other countries,—a requirement which it would be almost impossible for them to fulfill; nor can we suppose that the Chinese government would regard such an exaction, which practically excludes all their subjects residing abroad from coming to the United States, as a reasonable or even honest compliance with the treaty stipulation which guaranties to Chinese merchants, etc., the right to come and go of their own free will and accord.

In the case before us, not only was it impossible for the petitioner to obtain the certificate required, but at the time he embarked on board an American ship at Panama no law was in operation requiring him to do so. If he is not permitted to land, it will not be because he has no right to do so under the treaty,—for he has clearly and indisputably shown that he does not belong to the excluded class,—but because he does not produce evidence which it was impossible for him to procure, and which, when, by embarking on board an American ship, he came under our flag and within our jurisdiction, he was not required by any law then in effect to obtain.

We are clearly of opinion that the case is not within the provisions of the sixth section of the act.

Some further observations may not be inappropriate. It is well known that the law under consideration encountered wide-spread and vehement opposition. It was attacked as the servile echo of the clamors of the sand lot; as fraught with danger to our commercial relations with China; as inconsistent with our national policy; as obstructing the spread of Christianity; and as violative not only of the treaty, but of the inherent rights of man. It was defended as absolutely indispensable to the preservation of our social and political systems and even to our safety. Nothing would more gratify the enemies of the bill than that in its practical operation it should be found to be unreasonable, unjust, and oppressive. If Chinese merchants coming here from all parts of the world are excluded because they fail to produce a certificate impossible for them to obtain; if a merchant long resident here, and on his way to New York by a route which for a short distance passes through Canada, is to be stopped at Niagara bridge for want of a certificate, and on retracing his steps is to be stopped at Detroit on a similar pretext, and on the ground that in each case he is to be regarded as coming to the United States from a foreign country, within the true intent and meaning of the treaty and the law; if a Chinese merchant similarly resident in this

city, and desirous of temporarily visiting British Columbia or Mexico, is to be refused, as it seems he must be, a certificate by the custom-house authorities, under section 4, on the ground that he is not a laborer, and on his return, after a few weeks' absence, is to be prohibited from landing on the ground that he has no certificate of identification issued by the Chinese government under section 6; if, in these and similar cases, the operation of law is found to work manifest injustice, oppression, and absurdity,—its repeal cannot long be averted.

I am satisfied that the friends of this law do it the best service by giving to it a reasonable and just construction, conformable to its spirit and intent, and the solemn pledges of the treaty, and not one calculated to bring it into odium and disrepute.

See *In re Quong Woo, ante,* 229; *In re Ah Sing, ante,* 286; *In re Ah Tie, ante,* 291, and note.

UNITED STATES v. HUNNEWELL.

(Circuit Court, D. Massachusetts. October 18, 1882.)

1. LEGACY DUTY—ACT OF CONGRESS CONSTRUED.

   Under the provisions of sections 124 and 125 of the act of congress passed June 30, 1864, *c.* 255, the legacy duty imposed thereby is made payable on the estates of those persons only whose domicile at the time of their death is in the United States.

2. DISTRIBUTION OF ESTATE—LAWS OF DOMICILE TO GOVERN.

   The act of congress does not make the duty payable when "the person possessed of such property" dies testate, if it would not be payable if such person died intestate; and if a woman dies intestate her heir takes a distributive share by the intestate laws of the place of domicile of his mother at the time of her death.

The United States Attorney, for plaintiff.

George H. Gordon, for defendant.

Before GRAY and LOWELL, JJ.

GRAY, Justice. This is an action to recover the amount of a legacy duty upon American securities given by the will of the Marchioness de la Valette, who was at the time of her death, in 1869, a citizen of and residing in France, to her son, then and ever since also a resident of France. Her will was executed in conformity with the law of France, and was duly proved there. A copy thereof was filed in the probate office of the county of Suffolk and commonwealth of Massachusetts; and the defendant, a citizen of Boston, was appointed by

the probate court of that county executor in this commonwealth, and accepted the trust, and as such executor, in the course of the same year, transferred to the son of the testatrix the securities in question, of which but a small part represented property situated in this commonwealth. The question presented by the statement of facts upon which the case has been submitted to our determination is whether this legacy is subject to a duty under the act of congress of June 30, 1864, *c.* 255, §§ 124, 125.

The cases cited at the bar exhibit some difference of opinion upon similar questions. In Great Britain it has been determined upon much consideration by the highest authority that an act of parliament imposing a legacy duty does not apply to property of a person whose domicile at the time of his death is not within the realm. *Thomson* v. *Advo. Gen.* 12 Clark & F. 1; S. C. 4 Bell, 1. In the courts of North Carolina and of Missouri, on the other hand, it has been held that all personal property within the state is liable to such a duty, whether the owner's domicile at the time of his death is within or without the state. *Alvany* v. *Powell,* 2 Jones, Eq. 51; *State* v. *St. Louis County Court,* 47 Mo. 594.

But congress, in the act of 1864, has made its intention clear that the legacy duty should be payable on the estates of those persons only whose domicile at the time of their death is within the United States. Section 124 imposes a duty on legacies or distributive shares arising from personal property "passing from any person possessed of such property, either by will, or by the intestate laws of any state or territory;" it does not make the duty payable when "the person possessed of such property" dies testate, if it would not be payable if such person died intestate; and if Madame de la Valette had died intestate, her son would not have taken a distributive share "by the intestate laws of any state or territory," but, if at all, by the law of France, the domicile of his mother at the time of her death. And section 125, by requiring the executor or administrator to pay the amount of this duty "to the collector or deputy collector of the district of which the deceased person was a resident," leads to the same conclusion.

Judgment for the defendant.

NOTE.

SUCCESSION TAX. The "succession tax" imposed by the acts of June 30, 1864, and July 13, 1866, on every "devolution of title to real estate," was not a "direct tax" within the meaning of the constitution, but an "impost" or "excise," and was constitutional and valid. So a devise of an equitable inter-

est in real estate in which personal property had been invested by the trustee with the assent of the devisor before making his will, was a "devolution of the real estate," within the meaning of the act of June 30, 1864, and July 13, 1866, and the devisee is liable to the "succession tax" imposed thereby in respect of it, if he has received its value, although in proceedings for partition he has had assigned to him only personal property. "Successor" is employed in the act as the correlative of predecessor. The subject-matter of the assessment is the devolution of the estate, or the right to become beneficially entitled to the same, or the income thereof, in possession or expectancy, under the circumstances and conditions specified in the other parts of the sections. Such a tax is neither a tax on land nor a capitation exaction.(*a*) A tax on collateral inheritances is not a tax on property, but on the privilege of succeeding to the inheritance.(*b*) An inheritance may be taxed as a privilege, although the property may also be taxed.(*c*) Such duties are a charge upon the income of the *cestui que trust* under a will made before the passage of the statute, which bequeaths a fund to trustees "to receive and collect the income and produce thereof, and after deducting all needful and proper costs, etc., to pay the residue of said income" to the beneficiary.(*d*) The act of 1862, so far as it imposes a tax *in personam*, imposes it on the executor or trustee, and not on the legatee or *cestui que trust*, and no suit *in personam* can be maintained against the legatee.(*e*)

DEVISE—REMAINDER OVER. On the first day of October, 1870, the legacy and succession tax was repealed, saving, by a proviso, all provisions for levying and collecting taxes properly assessed, or liable to be assessed, the right to which had already accrued, or which hereafter may accrue, or where the right had become absolute.(*f*) Where property was devised before the act to one for life, remainder to another, and the tenant for life died after the act, the tax accrued on the interest of the remainder man at that time, as there is then a succession or devolution of the title.(*g*) A., who died in October, 1846, devised his real estate to his daughter for life, remainder to her son, should he survive her. She died in September, 1865. *Held*, that the tax was properly assessed.(*h*) A., who died December 4, 1867, devised his real estate to his widow for her life, with remainder over to B. She died June 17, 1872, when B. entered. *Held*, that an internal-revenue tax could not be legally assessed May 15, 1873, on B.'s succession.(*i*) It is not within the saving clause of the act of 1870, repealing the tax, although as to the remainder man it is not payable till the death of the life tenant.(*j*) A. died, leaving all his estate by will to an illegitimate and only child, who was legitimized after A.'s death by an act of the legislature. There were numerous collateral heirs. *Held*, that the state was entitled to a collateral inheritance tax out of the estate, as this right had

(*a*) Scholey v. Rew, 23 Wall. 331.

(*b*) Eyre v. Jacob, 14 Grat. 422. See William's Case, 3 Bland. Ch. 186; Tyson v. State, 28 Md. 577.

(*c*) Eyre v. Jacob, 14 Grat. 422.

(*d*) Sohier v. Eldredge, 103 Mass. 345.

(*e*) U. S. v. Allen, 9 Ben. 154; S. C. 23 Int. Rev. Rec. 192.

(*f*) Mason v. Clapp, 1 Holmes, 417; S. C. 21 Int. Rev. Rec. 268. But see May v. Slack, 16 Int. Rev. Rec. 134.

(*g*) Blake v. McCartney, 4 Cliff. 101; S. C. 10 Int. Rev. Rec. 131.

(*h*) Wright v. Blakeslee, 101 U. S. 174.

(*i*) Clapp v. Mason, 94 U. S. 589; S. C. 23 Int. Rev. Rec. 144.

(*j*) Clapp v. Mason, 94 U. S. 589; S. C. 23 Int. Rev. Rec. 144; Brune v. Smith, 13 Int. Rev. Rec. 54; U. S. v. N. Y. Life & T. Co. 9 Ben. 413.

vested on A.'s death, and before his child's rights were established.(*k*) Testator died in 1807, having by deed of settlement conveyed to his daughter certain real estate for life, and to her descendants in remainder. The daughter accelerated the succession by an amicable agreement in the state court by which she received absolutely one-sixth of the value of the property and the remainder men five-sixths, a succession tax was properly assessed.(*l*)

DEVISES IN TRUST. Property devised to trustees to pay to the testator's grandchildren, so much of the income thereof as they in their discretion deem necessary, and at the expiration of a certain number of years to pay over the trust funds and profits to testator's heirs at law, is an accumulating fund in the hands of individuals for the future benefit of heirs, and under the Massachusetts statute, is taxable only to the heirs at law, and not to the trustees.(*m*) Land was devised to plaintiff to manage and pay taxes till sold, and on its sale, after deducting expenses and paying certain legacies, to pay the residue to defendant. Defendant executed a quitclaim deed of the lands to the heirs of testator. *Held*, that the devise gave to plaintiff the legal estate, subject to the right of defendant to enforce performance of the trust, and that the quitclaim deed conferred no title; and that the plaintiff had no cause of action against the defendant, even if he had paid to the grantees the proceeds without deducting the tax.(*n*) A testator devised property in trust for his daughter for life, and after her death in trust for the use of such persons as she should appoint. The daughter devised the property to her brothers and sisters. *Held*, that the property passed to them by the will of their father, and was not liable to taxation under the act of Pennsylvania taxing collateral inheritances.(*o*) A testator devised his whole estate to executors in trust for legatees and devisees. The widow refused to take under the will, but subsequently, by an arrangement with the executors, approved by the orphans' court, accepted $80,000, which was less than her share of the estate, and relinquished her claim to the residue. *Held*, that she took this sum under her paramount title as widow, and not as a payment out of the fund bequeathed to the executors in trust; and that it was not subject to the collateral inheritance tax.(*p*)

LEGACY TAX. Personalty received by a distributee in the state from the estate of one residing abroad, is taxable in the state under a statute taxing property distributed "to or among the next of kin" of an intestate.(*q*) Money received by claimants under a will, in virtue of a compromise contract with the executor, is not a legacy or distributive share such as was liable to tax under the internal-revenue laws.(*r*) Bequests to colleges, etc., are taxable under the general statute taxing bequests, though after being received they would be exempt under a general provision exempting the property of such institutions.(*s*) A tax on legacies to aliens is not a tax on commerce, nor is it an infraction of the constitutional powers of congress.(*t*) A legacy payable in cash, from a fund to be raised by the sale of lands, is not subject to the

(*k*) Galbraith v. Com. 14 Pa. St. 253.
(*l*) Brune v. Smith, 13 Int. Rev. Rec. 54.
(*m*) Hathaway v. Fish, 13 Allen, 267.
(*n*) Duvall v. English Evang. L. Church, 53 N. Y. 500.
(*o*) Com. v. Williams, 13 Pa. St. 29.
(*p*) Commonwealth's Appeal, 34 Pa. St. 204.
(*q*) Alvany v. Powell, 2 Jones, Eq. 51.
(*r*) Page v. Rives, 1 Hughes, 297.
(*s*) Barringer v. Cowen, 2 Jones, Eq. 436.
(*t*) Mager v. Grima, 8 How. 490.

tax or duty imposed upon legacies arising from personal property. In limiting the scope of the law to legacies arising from personal property it was intended to exempt such as were payable from the proceeds of real estate.(*u*) Where a testator died in 1869, leaving a will making pecuniary legacies arising out of personal property, but the legatees did not become entitled to the benefit of the legacies until 1875, the executor became liable at the latter date to pay the tax, notwithstanding the intervening repealing act.(*v*) The tax on a pecuniary legacy accrues on the death of the testator, though it is not payable until the legatee becomes entitled to the benefit of the legacy.(*w*) A testator who died December 4, 1867, bequeathed certain personal property to trustees, to be held by them in trust for his widow during her life, and on her death to his children. She died June 17, 1872. *Held*, that the legacy tax upon the property was, without authority of law, assessed in April, 1873, as no right to the payment thereof had accrued at the date when the act of July 14, 1870, *c.* 255, (16 St. 256,) repealing the tax, took effect.(*x*) M. died February 23, 1870, testate, and bequeathed certain pecuniary legacies, which were paid by his executors in 1871. The act of July, 1870, repealed taxes on legacies on and after October 1, 1870, saving taxes already accrued. *Held*, that a tax was properly assessed as "accrued" upon said legacies under the saving clause contained in section 17 of the act of 1870.(*y*)

WHO LIABLE FOR TAX. The person liable to pay a tax on a "succession" is the person beneficially interested in the property, and not the trustee or executor in whom the legal title is vested, or to whom a power in trust is given for the benefit of such person.(*z*) A beneficial interest in possession is a "succession" conferred by will, and is subject to a succession tax.(*a*) An alien, to whom a devise of an interest in real estate has been made, and who has received its value in proceedings for partition, is estopped to set up, against a demand for a succession tax thereon, that by the law of the state where the estate is, the devise is absolutely null and void.(*b*) No one can be compelled to pay a share of the succession tax due on descent of a tract of land greater than his share in the land.(*c*) The provision that the interest of any successor in moneys arising from the sale of real estate, under any trust, shall be deemed to be a succession chargeable with duty under the act, and the said duty shall be paid by the trustee, executor, or other person having control of the fund, does not apply to sales in partition of lands passing by descent, and the sheriff is not such "other person having control" of the funds.(*d*) Where property was given by will by a wife to her husband, a succession tax is due, notwithstanding the property was bought and paid for by the husband and deeded to the wife under an understanding that she was to devise the same at her death to her husband.(*e*) An estate held under an adopting act changing the name of the heir, and making her capable of taking, etc., is subject to the collateral inheritance act.(*f*) An estate passing to a grandmother, as next of kin, is subject to the collateral inheritance

(*u*) U. S. v. Watts, 1 Bond, 580.

(*v*) Hellman v. U. S. 15 Blatchf. 13; Clapp v. Mason, 94 U. S. 589; S. C. 23 Int. Rev. Rec. 144.

(*w*) Hellman v. U. S. 15 Blatchf. 15.

(*x*) Mason v. Sargent, 104 U. S. 689; S. C. 23 Int. Rev Rec. 155.

(*y*) Jay v. Slack, 16 Int. Rev. Rec. 134.

(*z*) U. S. v. Tappan, 10 Ben. 284.

(*a*) Wright v. Blakeslee, 13 Blatchf. 419.

(*b*) Scholey v. Rew. 23 Wall. 331.

(*c*) Wilhelmi v. Wade, 65 Mo. 39.

(*d*) Wilhelmi v. Wade, 65 Mo. 39.

(*e*) Ransom v. U. S. 8 Reporter, 164.

(*f*) Sharp v. Com. 58 Pa. St. 500.

tax.(g) An adopted child is not exempted by the statute from paying the collateral inheritance tax.(h) Where the United States received a tax of 1 per cent. on the clear value of the estate at the time of the death of the testator of an estate for life, it satisfies the requirements of the act.(i) It is in accordance with the principles of natural justice and the spirit of the constitution that the tax upon such a subject should be regulated in strict proportion to the value of the benefit which it secures.(j)—[ED.

(g) McDowell v. Addams, 45 Pa. St. 430.
(h) Com. v. Nancrede, 32 Pa. St. 389.
(i) U. S. v. New York Life Ins. & T. Co. 9 Ben. 413; S. C. 24 Int. Rev. Rec. 118.
(j) Eyre v. Jacob, 14 Grat. 429; See Mager v. Grima, 3 How. 490; Williams Case, 3 Bland, Ch. 186; Tyson v. State, 28 Md. 577.

In re WM. H. BLUMER & Co., Bankrupts.*

(*District Court, E. D. Pennsylvania.* September 8, 1882.)

BANKRUPTCY—PARTNERSHIP—GUARANTY BY ONE PARTNER OF FIRM OBLIGATION.

Where, after the failure of a firm, and while they are endeavoring to settle with their creditors, one partner, at the request of a holder of a firm obligation, guaranties its payment, such guaranty is without legal effect and does not entitle the holder to prove against the separate estate of the guarantor upon a subsequent adjudication of bankruptcy.

Exceptions to report of register disallowing the claim of Ephraim Knauss against the separate estate of Jesse M. Line, a member of the firm of W. H. Blumer & Co., bankrupts.

The testimony before the register was to the effect that after the firm of W. H. Blumer & Co. had failed, and while they were endeavoring to settle with their creditors, but before any suits had been brought or the bankruptcy proceedings commenced, Mr. Knauss, who was the holder of a certificate of deposit for $1,575, issued by said firm in the course of their business as bankers, called at the place of business of the firm, and saw Jesse M. Line, one of the partners, who assured him that the claims would all be paid. Two days afterwards Knauss called, with the following guaranty indorsed on the certificate, viz., "I guaranty the payment of the within certificate," and asked Mr. Line to sign it, which the latter did. Subsequently bankruptcy proceedings were commenced against the firm, under which they were adjudicated bankrupts. Mr. Knauss then made claim against the separate estate of Jesse M. Line upon the guaranty. The register (Edwin T. Chase) was of opinion that there was no consideration for

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

the guaranty, and disallowed the claim. Exceptions were filed to this ruling.

W. H. Sowden, for exceptant.

John Rupp, for other creditors.

BUTLER, D. J. This exception must be dismissed. Mr. Line's indorsement on the certificate was without any legal effect. It was in terms a guaranty of his own debt. As a member of the firm which issued the certificate, he was liable to be called upon individually to pay it, and his guaranty was therefore unmeaning. The creditor obtained no additional obligation whatever, and has no right to participate in the distribution of the debtor's individual estate at this time.

In re WM. H. BLUMER & Co., Bankrupts.*

(*District Court, E. D. Pennsylvania.* September 8, 1882.)

BANKRUPTCY—PRINCIPAL AND SURETY—ACCEPTANCE OF BOND FROM SURETY—RETENTION OF CLAIM AGAINST CO-SURETIES.

The treasurer of a city defaulted, and the city council passed a resolution that the sureties might give their individual bonds, payable in 18 months, for their *pro rata* of the balance due, but that the old bond should be retained and remain in full force. Five of the seven sureties gave individual bonds in accordance with this resolution, each for one-fifth of the debt. The other two sureties were insolvent, proceedings in bankruptcy having been commenced against them. *Held*, that their estates were not released by the acceptance of the bonds of their co-sureties, and that the city might prove against their estates for the whole debt.

Exception to report of register allowing a claim of the city of Allentown against the separate estates of Jesse M. Line and William Kern, members of the firm of William H. Blumer & Co., bankrupts.

From the report of the register (Edwin T. Chase, Esq.) it appeared that Jesse M. Line and William Kern, with five others, had become sureties to the city of Allentown upon the official bond of one Jacob A. Blumer, treasurer, who afterwards defaulted, leaving a deficiency of $9,357.30 to be paid by his sureties. Afterwards the city councils passed a resolution reciting the concurrence of the city in a proposition of the bondsmen of said Jacob A. Blumer, and directing that said bondsmen should give their individual bonds for their *pro rata* of the balance due by said defaulting treasurer, with such bondsmen

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

as should be approved by the finance board, payable in 18 months, and "that the old bonds should be retained and remain in full force and virtue." Seven days before the passage of this resolution proceedings in bankruptcy had been commenced against the firm of William H. Blumer & Co., of which Jesse M. Line and William Kern were members, and they did not give bond in accordance with the resolution. The remaining five sureties, however, each gave their individual bond to the city for one-fifth of the debt. Subsequently, the firm of William H. Blumer & Co. being adjudicated bankrupts, the city presented a claim against the separate estates of Jesse M. Line and William Kern upon the original debt. It appeared that the city had collected $1,114.68 from the estate of the defaulting treasurer, and that one of the sureties, who had given his individual bond, had since paid $871.46 thereon. The register allowed the claim of the city for the $9,357.30, less the $1,114.68 received from the estate of the treasurer. Exceptions were filed to this report.

P. K. Erdman and *Edward Harvey*, for exceptants.

R. E. Wright, Jr., contra.

BUTLER, D. J. The question raised is one of construction. If the transaction with the five co-sureties was intended to be a *discharge of the original obligation,* no recovery can now be sustained against the estates of Line and Kern; or if it was intended as a *discharge of the five co-sureties* from the obligation, Line's and Kern's estates can only be looked to for two-sevenths of the deficiency. If, on the other hand, the transaction was intended as a conditional discharge only, —the obligation to remain in force until Blumer's default was made good,—it had no effect whatever upon the city's rights against Line and Kern. The rule of law applicable is plain, and no authorities need be cited.

In my judgment, the latter view of the transaction is the only one justified by the evidence. The city was careful to reserve its rights under the original bond—stipulating in plain terms that the obligation shall continue in force. Of course, if the new bonds had been paid, and the claim of the city had been thus satisfied, the original obligation would have been discharged. But until this should be done the original obligation was to continue in force. Nothing has occurred to interfere with Messrs. Line's and Kern's right to contribution for what they may pay beyond their just proportions.

The exception must therefore be dismissed.

BUSH *v.* UNITED STATES.

(Circuit Court, D. Oregon. October 2, 1882.)

1. BILL OF REVIEW.

   A bill of review is a proceeding in the nature of a writ of error, and it may be brought to modify or reverse a decree given in a suit in equity in favor of the United State for errors apparent upon the face thereof.

2. SAME—SERVICE OF SUBPŒNA IN.

   Upon a bill of review to correct a decree given in favor of the United States, the subpœna to appear and answer may be served on the district attorney.

3. QUI TAM ACTION UNDER SECTIONS 3490-3493 OF THE REVISED STATUTES.

   In an action brought by an informer upon sections 3490-3493 of the Revised Statutes, to recover damages and forfeitures for collecting false claims from the treasury, the person who sues represents the United States therein, and also in all suits and proceedings brought or taken in aid of an execution, or to enforce the judgment therein, and is entitled to control the same.

Bill of Review.

George H. Williams, for plaintiffs.

James F. Watson, for defendant.

DEADY, D. J. On August 1, 1882, the plaintiffs filed in this court a bill of review, to procure, as to them, the modification of a final decree of this court, given in the case No. 356 of the *United States* v. *William C. Griswold and others*, including said plaintiffs, and signed and enrolled on August 12, 1881, for error apparent upon the face thereof. The bill of review states that on January 29, 1880, the amended bill was filed by the United States in the original suit, and sets it forth in full. From this, among other things, it appears that on May 27, 1877, the United States, by B. F. Dowell, informant, brought an action against W. C. Griswold, under sections 3490 and 5438 of the Revised Statutes, to recover certain damages and forfeitures for knowingly collecting from the treasury of the United States, on January 11, 1879, false claims to the amount of $17,000, in which, on July 30, 1879, the plaintiff obtained judgment for $35,228, and costs and disbursements amounting to $2,821.60; that said Griswold, at the date of such judgment, was the owner of certain real property situated in Salem, Oregon, including the west half of lots 1, 2, 3, and 4, of block 73, and lot 8, in block 10, which had been illegally sold and purchased by the plaintiffs herein, upon certain judgments held by them against said Griswold, contrary to the priority of the United States, and asked to have said proceedings set aside

and the property sold, and the proceeds applied upon the aforesaid judgment of the *United States* v. *Griswold*.

By the final decree it was provided, so far as the plaintiffs herein are concerned, that the property aforesaid should be sold by the master of this court, and the proceeds applied, first, to the satisfaction of the plaintiffs' liens thereon, and the remainder, if any, upon the judgment of the United States. In the bill of review it is alleged that the United States had no right to priority of payment out of this property, and therefore the decree, so far as it provides for its sale and the disposition of the proceeds is erroneous. On August 2d, the subpœna issued upon the bill of review was served on Mr. James F. Watson, the United States district attorney, together with a copy of the bill, and a notice from the plaintiffs to the effect that the bill had been filed for the purpose, so far as they are concerned, of procuring a reversal of the decree of August 12, 1881, and requiring him "to appear and answer said bill on the first Monday in September, 1882, or judgment thereon will be taken for the want of an answer." On September 4th the district attorney filed a motion to dismiss the bill for the reasons following: (1) That the United States "cannot be sued herein without its consent," and that it has not nor does not consent "to be made a party herein;" (2) no process has or can be served on the United States by which it has been or can be "brought as a defendant into this court;" and (3) this court neither has nor can acquire "jurisdiction over the United States herein." The motion to dismiss has been argued by counsel without any question being raised as to this mode of making the objection to the jurisdiction of the court.

It is well understood that the United States cannot be sued unless with its own consent, and that it has not given such consent except in a few instances, of which this is not one. *U. S.* v. *Eckford*, 6 Wall. 487. But an auxiliary or supplemental proceeding against the United States, growing out of an action instituted by it, is not generally considered a suit against the United States in that sense. Therefore a writ of error to reverse a judgment obtained by the United States may be sued out and prosecuted by the defendant therein. The proceeding by this writ, though technically a new action brought to set aside the judgment in the old one, and it may be to recover what was lost by it, is nevertheless regarded from this stand-point as one in which the United States is not thereby brought into court to answer the claim of the plaintiff in error without its consent, but rather one by which it is continued in court for the purpose of con-

testing the allegations of error in an action voluntarily instituted there by itself. Now, a bill of review, particularly as in this case, when it is brought for error in law apparent upon the face of the decree, is in the nature of a writ of error. Story, Eq. Pl. § 403 *et seq.* Indeed, the former has the same scope and purpose in a suit in equity that the latter has in an action at law,—"to procure an examination and alteration on a reversal of a decree made upon a formal bill" between the same parties. Id. § 403. No case has been cited by counsel in which this question has been directly considered.

U. S. v. *Atherton,* 102 U. S. 372, was a suit to set aside a decree of the district court of California confirming a claim, under the act, for the settlement of private land claims in that state. But this decree was given upon a bill of review brought by the grantee of the claimant against the United State four years after the court had, by a former and first decree, rejected the claim. No question seems to have been made as to the jurisdiction of the district court to give a decree upon a bill of review against the United States, and Mr. Justice Miller, in the consideration of the case, said: "It is not denied by counsel, nor can it well be doubted, that the district court had jurisdiction, by bill of review, to set aside and correct the former decree."

In the cases of the *U. S.* v. *McLemore,* 4 How. 287, and *Hill* v. *U. S.* 9 How. 386, it was held that the defendant, in a judgment obtained by the United States, could not maintain a suit to enjoin the latter from enforcing the same, upon the ground that the United States could not be sued without its consent. But in the subsequent case of *Freeman* v. *Howe,* 2 How. 460, it was held that "a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under mesne or final process, is not an original suit, but auxilary and dependent, supplementary merely to the original suit out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties."

This statement of the law seems to be in conflict with the ruling in the cases of the *U. S.* v. *Lemore* and *Hill* v. *U. S. supra;* for if the court has jurisdiction of such auxiliary suit without reference to the citizenship or residence of the parties, it must be because, having acquired jurisdiction of the subject-matter and the parties in the original suit, it does not thereafter lose it because, at some subsequent stage of the litigation before it, the exigency of its legal procedure requires the parties to change position as plaintiff and defendant.

And with like reason, if the court acquires jurisdiction in an action in which the United States is plaintiff, it must retain that jurisdiction so long as the litigation may properly be continued before it according to the usual course of procedure therein. True, the United States is a sovereign and cannot be sued in its own courts without its consent, but when it elects to go into court as a suitor, it must submit to the usual course of procedure therein; at least, so far as may be necessary to enable the defendant to maintain his rights.

A bill of review is an established mode of proceeding in a court of equity by which the defendant may have a decree given against him reviewed for errors upon its face by the court that pronounced it. It is only a more formal mode of rehearing the case, and is an incident of the original suit. When called upon to answer such a bill the United States is not sued in any proper sense of the term, but only to show why a decree which it has obtained against the plaintiff, that is alleged to be erroneous and unjust, shall not be modified or reversed. My conclusion is that the plaintiffs may maintain this bill to review the decree against them, and the next question is, how shall the United States be served with the subpœna or notified of the proceeding? Being a body politic, service must be made upon some natural person for it. In the absence of any statute upon the subject, all considerations of fitness and convenience point to the district attorney as the proper person.

In Conkling's Treatise, 687, it is stated that in the case of a writ of error against the United States, the citation must be served upon "the district attorney, for the time being, of the district in which the judgment was rendered."

In *U. S.* v. *McLemore* and *Hill* v. *U. S. supra,* the district attorney appeared and answered, but whether in obedience to a subpœna or notice, does not appear.

In the English chancery, in the case of a bill to stay of proceedings at law or a cross-bill, if the plaintiff in the action at law or the original bill was "abroad"—beyond seas—the practice was, upon motion of the plaintiff, to order service of the subpœna to be made upon the attorney for his absent client. 1 Smith, Ch. 116, 605. And, *ex necessitate rei,* the same practice prevails in the national courts when the plaintiff in the action at law or the original bill is a non-resident of the state where the court is held and cannot be served personally therein. Conk. Treat. 181; *Segee* v. *Thomas,* 3 Blatchf. C. C. 15; *Kamm* v. *Stark,* 1 Sawy. 550, and cases there cited.

But when the United States is the party to be served, it being

known that it cannot be served personally at any place, I think the process may be served on its attorney at once, without any previous direction from the court. My conclusion is that the service of the subpœna to appear and answer upon the attorney for the United States is proper and sufficient.

A question was made in the course of the argument as to who is the attorney of the United States in this case. The judgment in the action at law to recover the damages and forfeiture under sections 3490–3493 of the Revised Statutes is the foundation of this litigation. That action was brought by B. F. Dowell in the name of the United States, as well as for himself as it, and at his own expense. The statute authorizing him to bring it gave him the sole control of it, except that he could not dismiss it without the consent of the judge and the district attorney. In effect, this made him the representative of the United States, so far as that litigation is concerned. The subsequent suit in equity to subject certain property of the defendant in that action to the satisfaction of the judgment therein, was an incident of such action. It was brought in the name of the United States, apparently by the district attorney,—at least, the bill is signed by him as such,—and it is not alleged therein that B. F. Dowell sues for himself and the United States, or in anywise. The bill is also signed by Dowell, as solicitor for the United States.

Both Dowell and the United States are interested in the judgment obtained in the action at law—one-half the principal and all the costs belonging to the former. He also has the right, I think, to institute and control all proper suits and proceedings in the name of the United States to enforce such judgment for their joint benefit. His signature to the bill, as solicitor, is an assertion that he is acting as attorney for the United States in the premises; but being there in company with, if not in subordination to that of the district attorney, may be construed to be an admission that he consents to the United States conducting or joining in the conduct of the suit by its ordinary attorney—the attorney for the district of Oregon. Upon this theory of the case the United States has two attorneys in the suit, wherein the decree is sought to be reviewed by this bill—the ordinary one and a special one; and it may be that both ought to be served with the subpœna. But as the district attorney must have come into the case with the consent of, if not at the solicitation of, Dowell, I think he may be considered, for the time being, as the attorney for both Dowell and the United States.

The motion to dismiss is not allowed.

UNITED STATES v. HUFF.

(*Circuit Court, W. D. Tennessee.* October 2, 1882.)

1. CRIMINAL LAW—REVOLT ON STEAM-BOAT—MATE—CREW—REV. ST. §§ 5359, 5360.

   A statute punishing "any one of the *crew* of an American vessel" for making revolt, or endeavoring to make revolt, on board, within the admiralty and maritime jurisdiction of the United States, embraces the *mate* and all other officers inferior to the master.

2. SAME—MATE DISRATED OR DISCHARGED.

   Nor will the fact that the master displaces the mate from his position on the boat and discharges him, release the latter from the operation of these statutes while he remains on board, and certainly not while he is acting, or claiming to act, as an officer. Every member of the crew, while on board, is bound to obedience and subordination to all proper control and discipline.

3. SAME—CONSTRUCTION OF STATUTES—ACT APRIL 30, 1790, §§ 8, 12—ACT MARCH 3, 1835.

   The act of March 3, 1835, carried into the Revised Statutes as sections 5359-60, enlarges the original act of April 30, 1790, by adding distinct offenses to the "endeavor to make a revolt" contained in it.

4. SAME—REVOLT—ENDEAVOR TO MAKE REVOLT—DISOBEDIENCE—RESISTANCE.

   These statutes do not include every case of simple passive *disobedience* of the master's orders on the part of one of the crew, not participated in by others; but do embrace every case of *resistance* to the free and lawful exercise of the master's authority, when accompanied by force, fraud, intimidation, violence, a conspiracy among the crew, or concerted action in such resistance or disobedience by one of them.

5. SAME—UNLAWFUL CONFINEMENT OF MASTER.

   An unlawful confinement of the master, under section 5359, is not restricted to a physical confinement of his person. If the master is prevented or restrained by force, intimidation, or threats of bodily injury from the free use of every part of the vessel in the performance of his functions as master, it is a confinement within the meaning of this statute.

Criminal Informations.

Two informations were filed against this defendant by the district attorney after a preliminary examination before one of the commissioners of this court. The first is drawn under section 5359 of the Revised Statutes, and contains four counts, in substance as follows: That the defendant on, etc., at, etc., "did endeavor to make a revolt on board the steam-boat Henry Lourey, whereof one John H. Long was then and there master, by then and there resisting the said master in the free and lawful exercise of his authority and command on board," the defendant at the time being mate of the boat. The second count differs from the first only in charging an "endeavor to make a mutiny on board" instead of a revolt. By the third count it is charged

that defendant "did unlawfully confine the said master;" and in the fourth that he "did solicit certain of the crew of said steam-boat * * * to disobey and resist the lawful orders of the said master, and to refuse and neglect their proper duty on board."

The other information, containing three counts, charges violations of section 5360 of the Revised Statutes. In the first count it is charged that defendant "did make a revolt on board said steam-boat, by then and there unlawfully and with force resisting the said master in the free and lawful exercise of his authority and command on board said steam-boat." The second count is like the first, except that the resistance is alleged to be "by intimidation" instead of "with force;" and the third charges that defendant "did make a revolt and mutiny on board said steam-boat, by then and there unlawfully, and with force and by intimidation, resisting and preventing the said master in the free and lawful exercise of his authority and command on board," etc. At the trial of these cases the following special verdict was found by the jury in each case:

"We, the jury in the above-entitled case, do find the following facts as a special verdict: That on or about the thirtieth day of April, A. D. 1882, the steam-boat Henry Lourey, which was and is an American vessel, owned by American citizens, was employed and engaged in commerce and navigation on the Mississippi river between St. Louis, Missouri, and New Orleans, Louisiana, and intermediate ports; that John H. Long was master of said steam-boat, and that the defendant was mate thereof under a contract of monthly wages made at St. Louis, no time of service being specified nor shipping articles signed; that in the night of said day, on the up trip of the boat, above Memphis, and between the Tennessee shore of said river and Cheek island, (said island being a part of the state of Tennessee,) the outside starboard barge of the tow of said boat struck a snag, which tore out its front end to within six or eight inches of the water line; that the master, mate, carpenter, watchman, and others of the crew at once ran out on the tow, the mate being just ahead of the master, and that the master, on ascertaining the nature of the accident, ordered the injured barge to be swung round end for end, but the mate said the barge could be repaired, and that there was no need of turning it round; that the master then stepped back upon the barge next to the injured one (the mate remaining on the injured barge with some of the crew) and gave orders to the mate as to the handling of the lines in swinging the barge, but the mate did not obey the master's orders in handling the ropes. Then the master gave the order, 'Hurry along with the lines quick,' when the mate answered, 'We are hurrying.' The master said, 'It doesn't seem like it;' and the mate replied, 'You are a G—d d——d liar, puppy, and low-down son of a b——h.' Upon this insulting language passed between the two, when the master finally said, 'Lee, you're the d——st meanest man I ever saw. I've tried to make a man of you, but you and I can't steam-boat together any longer. Come off the barges upon the boat and I will pay you off. You are

no longer mate.' This the mate refused to do, saying he would shoot the master or any man who attempted to remove him from the barges; whereupon the master said to him, 'If nothing but fight will do you, Lee, as I am unarmed and you are a bigger man than I am, I will get you a knife and take one myself, and we will go out on the bank and cut this matter out.'

"The master then ordered the mate to give no further instructions to the men, which he refused, and continued to give them instructions, and ordered the men not to obey the commands of the master, as he (the defendant) was mate, and proposed to act as mate. Thereupon the boat was landed on the east shore of Cheek island, when the master, having made fast the barges to the bank, again ordered the mate to come aboard the boat, that he might return with him to Memphis and be paid off. This the mate stoutly refused to do, swearing that the master hadn't crew enough to take him off the barges, not even if the whole steam-boat were a cannon; that he was mate of that steam-boat, and nobody could remove him from that position on the boat; that he intended to stay, and die on those barges; and that the only way the master could get him off was to blow him off. The mate then called upon several of the crew to come upon the barges with him, but the master ordered them to remain on the boat, which they did. The master then came to Memphis with the boat to obtain the assistance of the United States marshal, leaving one or two men in charge of the tow. The mate, however, called upon different men to come off the boat upon the barges to help guard them than the master ordered, but the men obeyed the master. The master left his boat and came to Memphis for assistance, because he felt it unsafe to proceed on the voyage with the defendant on board."

John B. Clough, Asst. U. S. Atty., for the United States.

John T. Moss, for defendant.

HAMMOND, D. J. Sections 5359 and 5360, under which these informations are drawn, prescribe the punishment of offenses committed by "any one of *the crew* of an American vessel," etc., and it is argued for the defendant here that inasmuch as he is charged by the pleadings and shown by the special verdict to have been *the mate* of the steam-boat at the date of the offense, he is not obnoxious to this statute, because the mate, being an officer of the boat, is not included in the term "crew." By title 52 of the Revised Statutes, prescribing the regulations for steam-vessels, masters, chief mates, engineers, and pilots are required to be licensed as officers, and penalties are attached for their serving without proper license. Qualifications are prescribed by this title for such officers, a system of examinations provided for ascertaining their qualification, and an oath must be taken before the granting of the license for the faithful and honest performance of duty by the licensee, and boards of inspectors are given power under the statute to investigate acts of incompetence and misconduct of these licensed officers. Rev. St. §§ 4438, 4452. But

these and similar provisions do not create any new or other officers on shipboard than existed before the passage of the acts containing them, and a master or mate of a vessel, for instance, has no further, other, or different authority by virtue of his license, and the compliance with the regulations of such statutes, than he would otherwise have when in fact acting in such capacity on board.

The evils to be prevented and punished by these sections of the Revised Statutes against revolt and mutiny are just as great, and would naturally be attended with graver consequences, when the offense is committed or engaged in by any of the officers inferior to the master, than when the common seamen merely are engaged in the unlawful enterprise; and for obvious reasons. By the construction contended for, the mischiefs to be remedied by the statute would, in many instances, not be reached; and while I, of course, yield to the doctrine that penal statutes are to be strictly construed, yet such construction is not of necessity the most restricted one that can by any possibility be adopted. *Schooner Industry,* 1 Gall. 117. And where the case is within the language of the statute and the evident intention of congress, and the remedial influence of the enactment, courts are bound to adopt such construction as will give effect to the legislative intent. But, on authority, I cannot adopt the argument of the defendant in this regard. The question first indirectly arose in *U. S.* v. *Sharp,* 1 Pet. C. C. 118, 131, decided by Justice Washington in 1815, which was an indictment for making a revolt and confining the master under the act of 1790. The defendants were shipped by an American consul, on the homeward voyage of the vessel, under an act of congress providing passage at the expense of the United States of foreign seamen to a port of the United States, and the court held that they were within the act, although not shipped under a contract by the master.

In *U. S.* v. *Savage,* 5 Mason, 460, under the same act of 1790, the defendant was mate of the ship, and the point was directly made that he was not within the provision of the act; but Justice Story ruled otherwise on the trial, holding "that the mate is a seaman, and is to be so deemed for all the purposes of the statute," though he reserved the question for further consideration in case the defendant was convicted; but the trial resulted in an acquittal.

In 1838 the case of *U. S.* v. *Winn,* 3 Sumn. 185, was decided by the same learned judge, after full argument on motion for a new trial. Defendant was indicted under a section punishing " any master or other officer of an American ship * * * [who] shall * * *

beat, wound, or imprison any one or more of the crew of such ship or vessel;" etc. The defendant was master, and the facts at the trial established an imprisonment of the chief officer or mate, and the only question considered in the able opinion was whether *the mate* was one of *the crew*, and, "after much deliberation," the court decided the question in the affirmative. In illustrating his argument in that case, Judge Story cites the statutes under which the defendant, Huff, is now being prosecuted, and uses this language:

"Why is not an officer, not being the commanding officer, to be deemed within the purview of the section? The offense would be even more reprehensible when committed by a subordinate officer than by a common mariner. So far from there being any public or presumed policy in exempting such an officer from the reach of the penalties of the section, there would seem to be a very strong ground for holding him within it. Why, then, should the general import of the word 'crew' be restricted in his favor?" See, also, *Bailey* v. *Grout*, 1 Ld. Raym. 632.

Another position taken for the defendant, in argument, is that after the master said to Huff, "Come off the barges upon the boat and I will pay you off; you are no longer mate," the defendant from that moment ceased to be mate, was no longer one of the crew, and was thenceforth bound to no obedience to the master, and therefore in no event amenable to these statutes for anything that afterwards occurred, although his conduct might otherwise render him guilty. The cases already cited show conclusively, to my mind, that the authority of the master on shipboard cannot be made to depend on so unstable a foundation as the logical conclusions to which such an argument would lead. It is conceded here that, under the contract of shipment made between the boat and the defendant, the right to terminate the service as mate of the steam-boat belonged equally to the master and to the defendant, under proper and reasonable circumstances. This is undoubtedly true; and had the mate at the inception of the difficulty said, "I am no longer mate," and thereupon proceeded to create a revolt on board, he could not, according to the argument, be punished under these statutes. Of course, such a doctrine cannot be acceded to. While any member of the crew remains on board, no matter in what capacity, he is bound to obedience and subordination to all proper control and discipline to the ship's officers in authority over him, and any other rule would entirely subvert the discipline of the ship and the management of its crew.

In *U. S.* v. *Savage, supra,* this question was presented to the court, and in reply to the argument Judge Story says:

"How far has the master right to displace the mate? We are of opinion that he has this authority absolutely, and the mate is in such case bound to submit. The master is the lawful agent of the owner for this purpose, and the authority is intrusted to him from motives of great public policy to secure due subordination on board, and to promote the vital interests of navigation and trade. * * * If he displaces the mate, the latter is bound to abstain from all further exercise of his ordinary authority on board the ship. * * * But, like every other person on board, he is bound to submit to all reasonable commands, and to conduct himself in a quiet and inoffensive manner. Being no longer in office he is to be deemed a *quasi* passenger, and his remedy for any grievance lies by an appeal to the laws of his country for redress, and not by any attempts to avenge his wrongs, or to inflict personal chastisement on the master." See, also, *U. S.* v. *Sharp, supra.*

But the principal question for determination by the court in these cases is whether the acts and conduct of the defendant make him in any view guilty as charged in these informations. For the defendant it is strenuously insisted that under any, even the most unfavorable, view of his conduct, it cannot be held to amount to the gravity of a revolt, or of an endeavor to incite revolt; while for the government it is contended that any act of mere disobedience of the master's orders, accompanied by intimidation or force, is within the statute. Section 8 of the original act of April 30, 1790, provided that "if any seaman * * * *shall make a revolt in the ship,* every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted shall suffer death;" and section 12 of said act provides that "if any seaman *shall confine the master* of any ship or other vessel, or *endeavor to make a revolt* in such ship, such person or persons so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding $1,000." 1 St. at Large, 114, 115.

In 1826 the supreme court of the United States, in *U. S.* v. *Kelly,* 11 Wheat. 417, (1826,) which came before the court on a certificate of division on the question whether it is competent for the court to give a judicial definition of an "endeavor to make a revolt," decide the point in the affirmative and say: "We think the offense consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to

some other person." Justice Washington delivered the opinion of the court, and was one of the judges before whom the case was originally tried. S. C. 4 Wash. C. C. 528. But in *U. S.* v. *Haines*, 5 Mason, 272, (1829,) Mr. Justice Story, who, as one of the justices of the supreme court concurred in the above definition, in reply to the argument of defendant's counsel uses this language: "In truth, I consider the definition given by the supreme court not to have been designed to have more than an affirmative operation; that is, to declare that such acts would amount to an offense, and not negatively, that none others would."

By the act of March 3, 1835, (4 St. at Large, 775, 776,) entitled "An act in amendment of the acts for the punishment of offenses against the United States," the provisions composing sections 5359 and 5360 of the Revised Statutes were enacted, which are as follows:

"Sec. 5359. If any one of the crew of any American vessel, on the high seas or other waters within the admiralty and maritime jurisdiction of the United States, endeavors to make a revolt or mutiny on board such vessel; or combines, conspires, or confederates with any other person on board to make such revolt or mutiny; or solicits, incites, or stirs up any other of the crew to disobey or resist the lawful orders of the master or other officer of such vessel, or to refuse or neglect their proper duty on board thereof, or to betray their proper trust; or assembles with others in a tumultuous or mutinous manner; or makes a riot on board thereof; or unlawfully confines the master or other commanding officer thereof,—he shall be punished by a fine of not more than $1,000, or by imprisonment not more than five years, or by both such fine and imprisonment.

"Sec. 5360. If any one of the crew of an American vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, unlawfully and with force, or by fraud or intimidation, usurps the command of such vessel from the master or other lawful officer in command thereof; or deprives him of authority and command on board; or resists him in the free and lawful exercise thereof; or transfers such authority and command to another not lawfully entitled thereto,—he is guilty of a revolt and mutiny, and shall be punished by a fine of not more than $2,000, and by imprisonment at hard labor not more than 10 years."

The act of 1835 was passed "in amendment" of statutes already in existence. It defines the original offense of making "*a revolt in the ship*" to consist (1) of usurping from the master the vessel's command; (2) depriving him of authority and command; (3) resisting or preventing him in the free and lawful exercise thereof; or (4) transferring such authority and command to one not entitled to it. And it enlarges the "*endeavor to make a revolt in the ship*," as contained in the act of 1790, by adding as distinct offenses a conspiracy to make

such revolt; a solicitation, etc., of others of the crew to disobey or resist the master; an assemblage with others in a tumultuous or mutinous manner, and the making of a riot on board; while the offense of unlawfully confining the master is the same in both acts, except that the act of 1835 extends this offense to the unlawful confinement of any "commanding officer" on board.

I cannot accede to the argument of the defendant's counsel, therefore, that the Revised Statutes above quoted contain no other or further offenses than the original act. While this may be true as to section 5360, which merely defines what shall constitute a revolt or mutiny, the argument cannot, in my judgment, avail as to the construction of section 5359, especially in view of the definition of the "endeavor to make a revolt" as contained in *U. S.* v. *Kelly*, 11 Wheat. 417, and which, it is urged, is the only test by which the section can be construed. The reported cases, decided under the act of 1835, and which I have carefully examined, are *U. S.* v. *Peterson*, 1 Wood. & M. 305; *U. S.* v. *Staly*, Id. 338; *U. S.* v. *Forbes*, Crabbe, 558; *U. S.* v. *Seagrist*, 4 Blatchf. 420; *U. S.* v. *Cassedy*, 2 Sumn. 582; *U. S.* v. *Winn*, *supra*; *U. S.* v. *Nye*, 2 Curt. 225; *U. S.* v. *Almeida*, Phila. 1847, cited in Whart. Prec. Indict. 724. Of these cases, *U. S.* v. *Forbes* was an indictment for a revolt simply against a single seaman, who "refused to do duty" and killed the mate in the latter's attempt to arrest him. The defendant was convicted, and sentenced to six years' imprisonment. In his charge to the jury Judge Randall defines revolt in the very language of the supreme court in *U. S.* v. *Kelly*, and no reference whatever is made to any distinction between the act of 1790 and that of 1835.

In *U. S.* v. *Peterson* four of the crew were indicted for "resisting the master with force while in the free and lawful exercise of his authority," (section 5360,) and for "assembling together in a tumultuous manner," (section 5359;) and the question now under consideration was there presented for adjudication. In commenting on the cases decided under the act of 1790, Judge Woodbury held that "the law now in force (act of 1835) made the mere resistance to the master's lawful authority punishable, and that to make them guilty of this offense it was not necessary that they should either deprive the master of his command or usurp it themselves or transfer it to another; but it was enough if he issued lawful orders, which they disobeyed, and with violence resisted their enforcement. * * * It is not sufficient to have no intention to assume command of the vessel or to destroy her, or to carry her off like pirates, but there must be no insub-

ordination, no disobedience, no violence towards those who, by law as well as contract, are to rule and not to be ruled on board the ship." The defendants were convicted and sentenced.

U. S. v. *Seagrist, supra,* was an indictment for an endeavor to make a revolt and mutiny on ship board, and contained three counts, charging offenses in almost identical language with the case at bar. In discussing the language of the act Judge Betts says:

"It is practically unimportant whether the provisions * * * are expounded as so many instances or methods in which the offense of an endeavor to make a revolt may be manifested, or whether they are taken distributively and understood to be so many separate and distinct offenses, each being sufficient of itself to sustain an indictment. The three counts of this indictment are so framed as to secure to the United States the advantage of either construction."

The defendants in *U. S.* v. *Almeida, supra,* were indicted for making a revolt simply, and the indictment was drawn in accordance with the precedents under the act of 1790. In sustaining the motion in arrest of judgment, because the offense was not charged under the act of 1835, Judge Kane, in an exhaustive opinion, reviewing all the authorities, says: "In 1835, however, a new act of congress was passed, which, obviously referring to the language of the supreme court in Kelly's case, yet not adopting it, proceeded to declare what violations of law should thereafter be deemed to constitute the crime of revolt;" and his analysis of the statute classified the offenses into four categories, the first of which is "simple resistance to the exercise of the captain's authority." "It is impossible," says the learned judge, "to analyze the section as I have done without remarking that the offenses which it includes, however similar in character, differ widely in degree. The single act of unpremeditated resistance to the captain cannot be identified with his formal degradation from the command, still less with the usurpation of his station, without overlooking the gradations of crime and confounding the accidental turbulence of a heated sailor with the deliberate and daring and triumphant conspiracy of mutineers."

The case of *U. S.* v. *Cassedy* was an indictment of six of the crew for an endeavor to commit a revolt, and probably contained a count for conspiracy. The proof was that the chief mate succeeded to the command of the ship on account of the master's ill-health, and the defendants thereupon "refused to do any further duty on board." For this they were convicted under the charge of Judge Story. And *U. S.* v. *Nye, supra,* was a similar case against the entire crew, who

were convicted under proof that, on account of a change of master and alleged unseaworthiness of the vessel, the men refused to go forward and make sail in answer to the order of the master, and "declared they would not go to sea in the vessel. They were perfectly sober and offered no violence. They only unitedly refused to obey the orders of the master to make sail or get the anchor." Judge Curtis presided at the trial. As the result of these cases and of my investigation of this subject I am well satisfied that the special verdict in these cases renders the defendant guilty of the offenses charged against him. And while I cannot think it was the intention of these statutes to make the courts of the United States a place to discipline every member of a ship's crew who is guilty of simple disobedience of the master's orders, I have no doubt that every case of mere resistance to his free and lawful exercise of authority and command on board is so punishable if accompanied by force, fraud, intimidation, violence, or a conspiracy among the men. *Disobedience* and *resistance* are not synonymous words in the construction of these provisions of the law; while the latter embraces the former, it implies much more, and requires an active element of opposition to authority in connection with the refusal or neglect to obey. A mere passive act of disobedience on the part of a single member of the crew, unaccompanied by any element of force, intimidation, or fraud upon the master or other officer in command, and free from all conspiracy with and incitement of others of the crew to join in the act, cannot, in my judgment, be a violation of either of these statutes. It is difficult to define, beyond the definitions of the statute, what particular acts would or would not be an incitement to revolt; and, perhaps, it is not desirable to have such particularity of definition, lest, like the attempt to define fraud, it should result in encouraging an evasion of the statute. Much depends upon the circumstances of the case and the intention of the accused at the time. If his conduct, taken altogether, shows that his purpose is to actively resist the master, or to excite his comrades and procure their assistance in the act of resistance and disobedience he is determined on or engaged in, it subjects him to the punishment of this statute, as well as all who unite or conspire with him by yielding to such solicitations, whether their conduct results in an accomplished and successful revolt against the master or not. These views are otherwise sustained by cases on other statutes of a somewhat similar nature. Section 5398, *ex. gr.*, punishes "every person who knowingly and willfully *obstructs, resists,*

or *opposes* any officer of the United States in serving or attempting to serve" process, etc.

In the case of *U. S.* v. *Lowry*, 2 Wash. C. C. 169, resistance and obstruction of the marshal in serving writs of possession were charged, and the proof exactly corresponds with that portion of the special verdict here relied upon to support a conviction for resistance, viz.: "Defendants were armed, threatened to kill the officer if he attempted to dispossess them, declaring they would lose their lives rather than permit the execution of the writs, in consequence of which the marshal was prevented." Justice Washington, in deciding that case, said: "The offense * * * is complete when the person in possession refuses, and by threats of violence, which it is in his power to enforce, prevents the officer from dispossessing him;" and again, in reply to the argument that a mere threat to resist is not an offense, "If, when the officer having the writ proceeds to the land and is about to execute it, such a threat is made by a person retaining the possession, accompanied by the exercise of force, or having the capacity to exercise it, in consequence of which the officer cannot do his duty," the offense is complete. "The officer is not obliged to risk his life or expose himself to personal violence; it is enough that he is prevented by the exercise of force, or the threat of force by one in condition to execute it, from proceeding in the lawful exercise of his functions. It is not necessary for him to proceed to the length of a personal conflict with the defendant." So, in *U. S.* v. *Lukins*, 3 Wash. 335, which was an indictment for resistance of the officer, the same learned judge, in charging the jury, uses this language: "It was the duty of the defendant to come with the officer, and if he says he will not come, and does not come, this is a resistance of the officer within the prohibitions of the law, and no excuse will serve him;" the facts of the case being that, "on the marshal's attempting to execute the warrant, the defendant resisted in a violent and abusive manner, refusing to accompany him."

Applying the foregoing principles to the facts found by the special verdict here, we find persistent and repeated acts of deliberate and willful disobedience of the master's commands on the part of this defendant, accompanied by gross and insulting language, threats of violence and killing, and this, too, from a man armed and prepared to carry his threats into execution, besides an endeavor to prevent the crew from obeying any of the master's commands. And such conduct of the defendant was continued and persisted in until the

master was compelled to desist from a further prosecution of his voyage, leave his tow, and return to the city for the assistance of the officers of the law, deeming it unsafe to proceed. That an actual revolt on board did not occur, even under the older definitions given by the courts of that term, was due, not to the want of effort on the part of the defendant to produce it, but to the fact that the crew were true to the master and loyal in the performance of their duty. One of the counts in the indictment under section 5359 charges an unlawful confinement of the master. The confinement forbidden by the statute need not necessarily be a physical confinement of the master's person by depriving him of the use of his limbs, or shutting him in the cabin. If he is prevented by either force or intimidation from the free use of every part of the vessel, (*U. S.* v. *Sharp*, 1 Pet. C. C. 118,) or by threats of bodily injury in the performance of his proper functions as master, (*U. S.* v. *Smith*, 3 Wash. C. C. 78,) or if he is in any way restrained by conduct on the part of his crew, or any of them, such as would reasonably intimidate a firm man, (*U. S.* v. *Bladen*, 1 Pet. C. C. 213,) in every such or like case it is in law a confinement. *U. S.* v. *Thompson*, 1 Sumn. 168; *U. S.* v. *Hemmer*, 4 Mason, 105; *U. S.* v. *Savage*, 5 Mason, 461; *U. S.* v. *Henry*, 4 Wash. C. C. 428; 2 Whart. Am. Crim. Law, §§ 2872*a*, 2872*b*; 3 Jac. Fish. Dig. 3560; *Regina* v. *Jones*, 11 Cox, C. C. 393; *Regina* v. *McGregor*, 1 Car. & K. 429; *Rex* v. *Hastings*, 1 Moody, Cr. C. 82; 1 Russ. Cr. 92; 3 Archb. Crim. Pr. & Pl. 485, (Waterman's notes.)

JUDGMENT.

The judgment, therefore, on the special verdict will be that the defendant is guilty of the offenses as charged in the informations, and it is so ordered.

NOTE. In the celebrated charge of Sir Lionel Jenkins, that ancient repository of curious learning concerning the criminal jurisdiction of the admiralty, he says: "You are to inquire of all mutinies, riots, fightings, bloodshed, maiming, cursing, swearing, blaspheming, in any ship or vessel, within the flowing and reflowing of the waters, particularly of such mariners as have assaulted their masters, being disobedient and rebellious against their lawful commanders; as also such masters as treat their mariners inhumanly, and do not pay them the wages they have honestly earned." 2 Browne, Civ. & Adm. Law, 485, 486.

See Desty, Ship. & Adm. §§ 193, 194.

UNITED STATES *v.* EAST TENNESSEE, VIRGINIA & GEORGIA R. CO.

(*Circuit Court, E. D. Tennessee.* 1882.)

RAILROADS—REV. ST. § 4386—UNLOADING SHEEP, ETC.

Section 4386 of the Revised Statutes of the United States, imposing a penalty upon railroads carrying sheep, swine, etc., if they allow such sheep, swine, etc., to be more than 28 consecutive hours confined without unloading them for at least five hours for rest, water, and feeding, does not apply to a railroad carrying sheep, swine, etc., *from a point within a state to another point therein*, but only to such as convey swine, sheep, etc., from one state to another.

KEY, D. J. This is an action for a penalty under sections 4386 *et seq.* The declaration alleges that defendant is a railroad company operating a line of railroad over which cattle, sheep, swine, and other animals are conveyed from Georgia and Tennessee to Virginia and other states; and that defendant received and loaded upon its cars at Limestone, Tennessee, a lot of swine consigned to Chattanooga, in said state; and that they did not have proper food, water, space, and opportunity to rest, and were confined for more than 28 consecutive hours without being unloaded for rest, food, and water, and that in consequence the penalty of $500 imposed by the statute has been incurred. Defendant demurs to this declaration upon the grounds—*First*, that the declaration shows that the swine were shipped within the state to a point within the state, and therefore the transaction falls not within the terms of the statute; *second*, if the terms of the statute embrace such a case, the statute is unconstitutional, because it interferes with the internal commerce of a state, in so far as it applies to such a transaction as the one alleged in the declaration. So far as I know or am informed the questions raised under this statute have not been before our courts for adjudication.

I have been referred by the district attorney to *Hall* v. *De Cuir*, 95 U. S. 487, as bearing by analogy upon this case. In that litigation the state of Louisiana had passed a law for the regulation of the business of carriers of passengers within the state. This law had been disregarded by the defendant in that action, who was running a steam-boat from New Orleans, Louisiana, to Vicksburg, Mississippi. The plaintiff had got upon the boat at New Orleans to be carried to a landing on the Mississippi river, called Hermitage, in Louisiana. The points of embarkation and destination, as well as the river between them, were in Louisiana. A judgment was rendered in favor of the plaintiff in the inferior court of the state, and affirmed upon appeal

to the supreme court of the state, from whence it was taken to the supreme court of the United States and there reversed. The court say:

"The river Mississippi passes through or along the borders of 10 different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state would provide for its own passengers, and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it would prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river, or its tributaries, he might be required to observe one set of rules and on the other side another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route, is a necessity in his business, and, to secure it, congress, which is untrammeled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be." 95 U. S. 489.

In the case at bar the state of Tennessee has enacted no law in respect to the subject-matter of this contention. She has not entered the field of this legislation. It is occupied by congress alone, and the case must stand or fall upon the proper construction of the terms of the act of congress. If the act, by its terms, does not embrace a shipment of swine from one point within the state to another within it, over a line entirely within the state, the action must fail, and the other point raised by the demurrer will need no consideration.

Section 4386 of the Revised Statutes says:

"No railroad company within the United States, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, * * * shall confine the same in cars * * * for a longer period than 28 consecutive hours without unloading the same for rest, water, and feeding for a period of at least five consecutive hours."

The first part of the paragraph describes the railroad to be affected by the statute as one forming a "part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another." This does not include and cannot include any other animals than such as are conveyed from one state to another. It is

so limited by its plain, unambiguous language. When the statute prescribes the rule or regulation by which the railroad is to be governed, it says, "the same" shall not be confined, etc. The word "same" is here an adjective, and is defined to mean "not different or other; identical." If we supply the ellipsis in the sentence, the law will read: "No railroad company within the United States, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, shall confine the cattle, sheep, swine, or other animals to be conveyed from one state to another for a longer period," etc. A simple grammatical construction of the language used, confines the duties imposed to animals conveyed over the line of road from one state to another, and has no reference or relation to such as are shipped within the state to a point therein over a road within its limits. This view of the case renders it unnecessary to consider the other point raised by the demurrer. Whether congress has the power to impose duties similar to those embraced in this statute in respect to shipments of animals within a state over railroads of the state to points within it, does not arise. Congress in this statute, according to the view taken, has not attempted to do so.

The demurrer will be sustained and the bill dismissed.

WHITFORD *v.* CLARK COUNTY.*

(*Circuit Court, E. D. Missouri.* October 10, 1882.)

1. MUNICIPAL BONDS—COUPONS—FRAUDULENT ISSUE—RIGHTS OF HOLDER.
   A purchaser with notice cannot recover upon detached interest coupons fraudulently issued after maturity.

Suit upon coupons of Clark county bonds.

H. A. & A. C. Clover and *Fisher & Rowell*, for plaintiff.

Glover & Shepley, for defendant.

TREAT, D. J. The court, sitting without the intervention of a jury in the trial of this cause, finds the facts to be: That said county subscribed, in the year 1871, for 2,000 shares of the capital stock of the Missouri & Mississippi Railroad Company, to be paid in the bonds of said county at par, running for the term of 20 years, and bearing interest at the rate of 8 per cent. per annum; said bonds, or the pro-

*Reported by B. F. Rex, Esq., of the St. Louis bar.

ceeds thereof, to be used in the construction by said company of that part of the railroad lying within said county. The county was, under said contract of subscription, to deliver its bonds forthwith to a financial agent to be chosen by its county court, who was to give his bond as agent, subject to the approval of the company and of the court, for the use of the county and of the company, conditioned for the faithful performance of his duties as such agent, he to have the power to sell the bonds through the St. Louis bond and stock board, or through Bartholow, Lewis & Co., bankers of St. Louis, and to pay over to the railroad company the said bonds, or the proceeds of the sale thereof, on the order of the said railroad company, as fast as the work progressed on the railroad in said county; each payment to include all work and necessary expenses expended in said county to the date of said payment. The bonds, with interest coupons annexed, were accordingly delivered to one Tinsman, who had been duly appointed such financial agent, and given his official bond conditioned and approved as required. The county also appointed an agent to vote its stock, and received a certificate therefor. Said financial agent deposited the bonds and coupons with Bartholow, Lewis & Co.

The railroad company entered into a contract with a construction company in 1872 to build the road and to receive in part payment therefor the bonds of Clark county. At the instance of said construction company the county bonds and coupons then in possession of Bartholow, Lewis & Co. were removed to and deposited with the Exchange Bank at Pana, Illinois, in 1873; said construction company, with sureties, indemnifying said Tinsman, the financial agent, for said removal, and making provision also for a lien said Bartholow, Lewis & Co. had on said bonds and coupons to the amount of about $30,-000. There were deposited with the said Exchange Bank in 1873, to the credit of said Tinsman, agent, Clark county bonds to the amount of $190,000, and detached coupons to the amount of $24,000.

The construction company obtained and used the bonds, but never did all the work required, nor did the railroad company, and the Exchange Bank failed. The construction company coupons in suit continued in possession of the former president of said bank after its failure until 1878, when he delivered them to said Tinsman, the said financial agent. Said Tinsman retained possession of them until 1881, when he delivered them, without consideration, to his brother-in-law, Roseberry, who was one of the sureties on his (Tinsman's) official bond. At that time Clark county was negotiating with its bondholders for a compromise on its bonds and coupons issued for

its subscription to said railroad stock, as heretofore stated. The coupons in suit had been for many years detached from the bonds and treated as a distinct and matured obligation. The plaintiff, through his agents, negotiated for and bought of said Roseberry said coupons for the sum of $2,500, of which sum Tinsman's wife, the sister of Roseberry, received from Roseberry $1,150. The condition of said coupons, and the general facts and circumstances of the controversy between the bondholders and Clark county concerning the alleged fraudulent issue of the bonds and coupons, were known to the plaintiff when he bought the coupons in suit.

Whereupon the court declares that the plaintiff is not entitled to recover, and orders judgment for the defendant.

WASHINGTON MILLS EMERY MANUF'G CO. *v.* COMMERCIAL FIRE INS. CO.

SAME *v.* ROGER WILLIAMS INS. CO.

SAME *v.* MERIDEN FIRE INS. CO.

SAME *v.* TRADE INS. CO.

SAME *v.* COLUMBIA FIRE INS. CO.

(Circuit Court, D. Massachusetts. October 14, 1882.)

1. INSURANCE—BREACH OF CONDITION.

   Plaintiff, a corporation, had conveyed certain ground on which the buildings insured were situated to the city of Boston, with the right to remove the buildings within a certain time, or they would be forfeited. *Held*, that until forfeiture it still owned the buildings, and that its not notifying the insurance company of its conveyance to the city was not a breach of the condition in the policy providing that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, or so expressed in the written part of the policy, otherwise the policy shall be void."

2. RESERVATION—EXCEPTION—DEED.

   The clause in the deed "that the grantor corporation excepts and reserves to itself all of the buildings, etc., standing on the granted lands," etc., is an *exception* and not a *reservation;* for a reservation is a clause in a deed whereby the grantor reserves some *new thing* to himself out of that which he granted before, and differs from an *exception*, which is ever a part of the thing granted, and a thing *in esse* at the time.

3. INSURANCE—MEASURE OF DAMAGES.

In a case like this the measure of damages is the real value of the buildings at the time of the fire, and not their relative value to the assured for the purpose of the removal.

Motion for a New Trial.

Solomon Lincoln, for plaintiff.

J. P. Treadwell, for defendants.

Before LOWELL and COLT, JJ.

COLT, D. J. On November 20, 1877, the plaintiff sold the land upon which its works were situated to the city of Boston, excepting and reserving the buildings, machinery, and fixtures, provided the same were removed by the first of October following, and if not so removed the grantor forfeited all right thereto, and they became the absolute property of the city of Boston. In April, 1878, the plaintiff took out policies of insurance for various amounts in the defendant companies. The policies ran for one year, and were renewals of other policies. The fire took place August 17, 1878, destroying, in great part, the buildings and their contents. No notice of the deed to the city of Boston was given to the insurance companies, and they were ignorant of the fact until after the fire. These suits were first brought in the state court, and afterwards removed to this court. The cases were sent to an auditor, who found for the plaintiff, reserving to each party questions of law. At the last term of court the cases were tried together before a jury, and verdicts rendered for the plaintiff. The present motion for a new trial raises several questions. The defendants contend that the policies are void by reason of the breach of certain conditions contained therein, especially the following, which are in substance the same in all the policies:

"If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void. * * * If the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, * * * or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy, * * * this policy shall be void."

These contracts are to be sustained if they fairly can be. Conditions of this character, inserted for the benefit of the insurers, are, as against them, to be strictly construed. If the building stands on leased ground it must be so expressed in the written part of the policy;

but further than this, there is nothing in these conditions which requires the assured to give notice that he is not the owner of the land upon which the property insured is situated. The land is not insured, and if the actual property covered by the risk conforms to these various conditions as to absolute ownership it would seem to be sufficient. The assured owned the buildings originally, and it had never parted with any interest in them. While it had conveyed the land upon which they were situated to the city of Boston, it had not parted with either the title or possession of the property insured. It had only agreed that if the buildings were not removed within a certain time they should be forfeited. So far as appears, the assured was preparing to remove them within the time stated, unless a further extension should be granted. Until the ownership was taken away by forfeiture or otherwise it would seem to be complete.

In *Hope Ins. Co.* v. *Brolaskey*, 35 Pa. St. 282, it was held that a lessee for a term of years, with the right to remove the buildings to be erected thereon at the termination of the lease, was the absolute owner of the buildings, and had a right to insure them as such, and that the condition did not require that he should give notice that he was not the owner of the land. The condition of the policy was as follows:

"If the interest in the property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company, and, expressed in the policy in writing, or otherwise the insurance shall be void."

In *Fowle* v. *Springfield Ins. Co.* 122 Mass. 191, there was the following condition in the policy:

"The interest of the assured, whether as owner, consignee, factor, lessee or otherwise, in the property to be insured, shall be truly stated in the policy, otherwise the same shall be void; and such interest shall also be set forth in the proofs of loss, with the names of the true owners of the property."

In the proofs of loss the plaintiffs stated under oath that the building belonged to them, and that no other person or party had any interest therein. The insurance, as stated in the policy, was on "their two-story brick and graveled-roof building * * * on leased land," etc. It turned out that by the terms of the lease the future buildings erected (of which this was one) were to be kept insured for the benefit of the lessor, and the buildings were to be delivered up to him at the end of the term. The majority of the court sustained the policy. In both the opinion of the court and the dissenting opinion the case of *Hope Ins. Co.* v. *Brolaskey* is referred to apparently with approval.

In *Ins. Co.* v. *Haven*, 95 U. S. 242, it was decided that the owner of the land and buildings, who leased the same before the buildings were erected, was still the entire, unconditional, and sole owner of the property, and that the buildings did not stand on leased land within the meaning of the policy. Nor can it be said that the assured, at the time of the fire, was a tenant at will of the grantee, and so a lessee, or that the buildings stood on leased ground. The facts go to prove that the grantor was to remain by consent in possession of the premises without payment of rent until October 1, 1878, which shows possession under a license rather than a lessee. As between grantor and grantee the general rule is not to imply a lease from occupation if the relation can be referred to any other distinct cause. Taylor, L. & T. § 25; *Russell* v. *Erwin*, 38 Ala. 44; *Dakin* v. *Allen*, 8 Cush. 33.

The defendants further maintain that the clause in the deed to the city of Boston in reference to buildings is a reservation, and not an exception, and that therefore the title to the buildings passed to the grantee, subject to the right of removal by the grantor. The clause is as follows:

"The grantor corporation excepts and reserves to itself all of the buildings and structures standing on the granted lands, with all machinery and fixtures: provided, however, that the same shall be removed from the granted premises by the grantor corporation, at its sole expense, before the first day of October next; and if not so removed, the grantor forfeits all rights thereto, and the same shall thenceforth be the absolute property of said city."

The cases cited by the defendants do not support their view.

In *Rich* v. *Zeilsdorff*, 22 Wis. 544, the clause in the deed reserved the *right* to cut timber for two years, and this was held not to carry the timber, but only the right to cut the timber; the opinion being based upon the fact that the deed did not except a portion of the estate *in esse* from the original grant, but created something new, namely, the right to cut timber. The court adopted the following distinction:

"A reservation is a clause in a deed whereby the grantor doth reserve some *new thing* to himself out of that which he granted before. This doth differ from an exception, which is ever a part of the thing granted, and a thing *in esse* at the time." Shep. Touch. 80.

The case of *Judevine* v. *Goodrich*, 35 Vt. 19, decided that a reservation in a deed of buildings and stone upon the land reserves no title in the grantor to the property if not removed within the specified time.

In *Perkins* v. *Stockwell*, 131 Mass. 529, the right to the pine trees and timber mentioned in the deed was lost by the failure to conform to the terms of the reservation.

In the deed to the city of Boston the intent is apparent, and it is clear from the language used that the buildings, as a part of the estate *in esse*, are excepted from the grant. They did not pass to the grantee, but remained the property of the grantor, subject to forfeiture if not removed before a certain time.

In *Sanborn* v. *Hoyt*, 24 Me. 118, where a tract of land was conveyed, "excepting and reserving all the buildings on said premises," the court held that the land passed to the grantees, but that the buildings remained the property of the grantors.

Again, the defendants claim that the rule of damages to be adopted should be the value of the buildings for the purpose of removal, rather than their actual value. The plaintiff cites the case of *Laurent* v. *Chatham Fire Ins. Co.* Hall, 41, to the contrary. To our mind the reasoning of the court in that case is satisfactory and conclusive. The true measure of damages is the real value of the property, and not its relative value to the assured; consequently the amount recoverable in this case is the real value of the buildings at the time of the fire, and not their relative value to the assured for the purpose of removal.

Motion for a new trial denied.

GAY *v.* JOPLIN.*

(Circuit Court, E. D. Missouri. October 18, 1882.)

1. EVIDENCE—BURDEN OF PROOF.

   Where, in a suit for rent, the defendant admits the fact of the tenancy at the rate stated in the petition, the burden of proof is upon him to show that the rent has been paid.

2. LANDLORD AND TENANT.

   In the absence of any agreement, a tenant is not entitled to compensation for improvements voluntarily placed by him upon the leasehold.

3. PRACTICE—AMENDMENT OF VERDICT—REV. ST. § 954.

   Section 954 of the Revised Statutes of the United States authorizes the amendment of informal verdicts, so as to make them conform to technical requirements.

Suit for Rent. Motion for new trial.

* Reported by B. F. Rex, Esq., of the St. Louis bar.

The petition in this case sets out in form three distinct causes of action, viz., the balance of rent due for each of three successive years under a lease from year to year. The answer sets up a counter-claim for work done upon the leased property during the period of the tenancy by the lessee, at the lessor's request.

The case was tried before a jury. During the trial the plaintiff asked leave to amend by consolidating the three causes into one. The defendant objected, and the court said that the amendment was unnecessary, as the court would in its charge present the case to the jury as for the whole amount of rent due. The charge to the jury was as follows:

TREAT, D. J., (*charging jury.*) As it is admitted in this case that the defendant was the tenant of plaintiff at the rate stated, of $650 a year, the burden of proof is upon him to show that the rent has been paid, or how much has been paid, and also to establish his counter-claim. It is for you, in the light of the evidence that has been given, to ascertain what amount of rent is still due, if any. Having ascertained that, proceed to the next inquiry concerning this counter-claim.

Probably it is quite as familiar to you, and possibly more so than to the court, that what has been done by a tenant in the office of good husbandry he gets no compensation for against his landlord, because it is expected that each tenant tilling the land and attending to it will do whatever is essential to good husbandry.

It is contended, on the part of the defendant here, that there was an agreement or understanding that either he should have a 10-years' lease, or that the landlord, the plaintiff in this case, would compensate him for such permanent improvements as he might make. Now, if such an agreement or understanding existed, and permanent improvements were made, the party would be entitled to receive proper compensation therefor. If there was no understanding of that nature in regard to it, then any voluntary improvements that he made he cannot charge against his landlord. Consequently the question with regard to the counter-claim is, as has been stated to you, was there an agreement or understanding of the nature contended for by the defendant with regard to any of these improvements, for which he puts in this counter-claim? Remarking, however, gentlemen, as it is admitted by the plaintiff, that the item in the counter-claim of $35 would be allowed under any circumstances, if, after ascertaining what rent is due, you reject the counter-claim, you will give the amount thus ascertaind in your verdict for the plaintiff. If you allow the counter-claim, strike a balance, and if the balance is

in favor of the plaintiff, give him the balance. If there is a balance against him, give the balance in favor of the defendant.

The jury found a verdict in gross for the defendant.

The plaintiff thereupon moved the court to set aside the verdict and grant a new trial for the following, among other, reasons, viz.:

(2) Because the court erred in refusing to allow plaintiff to amend his petition to conform the sum to the proofs in the case, when leave so to do was asked by plaintiff before the case was submitted to the jury. (3) Because the court erred in matter of law in the charge and instructions given to the jury. (4) Because the court instructed the jury to render their verdict in gross upon the three causes of action stated in the plaintiff's petition, together with six causes of action stated in defendant's counter-claim. (5) Because the verdict is not responsive to the issues made in the pleadings. (6) Because the verdict is contrary to the law and the evidence, and the weight of evidence. (7) Because the verdict is uncertain, indefinite, and informal, and insufficient to sustain a judgment.

Opinion of the Court upon Motion for a New Trial.

Edward Cunningham, for plaintiff.

Dinning & Byrns, for defendant.

TREAT, D. J. The petition does not count on a written lease, nor was such a lease filed with the petition as the statute requires, hence the trial proceeded as on a verbal lease for $650 per year, which the answer admitted. If a written lease contained specific terms or provisions of which the plaintiff desired to avail himself, these terms should have been set out or averred and the lease filed. The answer and counter-claim informed the plaintiff of the nature of the defense; showing, if there was a written lease of whose terms the plaintiff sought advantage, the necessity of conforming to the statute; otherwise the proofs would not conform to the pleadings, and the defendant be, at the trial, taken at disadvantage and surprise.

The petition sets out in form three distinct causes of action, viz., the balance due for rent on each of three successive years. After the trial had progressed for some time the plaintiff asked to amend by consolidating the three causes into one, and the court remarked that such an amendment was unnecessary, against defendant's objection; for in its charge the court would present the case to the jury as for the whole amount of rent due.

The charge was given accordingly, The plaintiff, therefore, had all the benefits he sought by his proposed amendment.

It is now objected that the verdict did not state the finding of the jury separately as to each of the three causes of action. It is man-

ifest, especially in connection with the charge, what the jury must have found with respect thereto, and with respect to the counterclaim. The defect was one merely of form, and the verdict is amendable. The court could then have conformed it to technical requirements, and can do so now if necessary. The statutes of the United States, and the many rulings thereunder by the United States supreme court, sustain this view of the question. Without reviewing the many decisions, reference is made to the following, which enunciate the doctrines governing the motion in arrest. *Shaw* v. *Railroad Co.* 101 U. S. 557; *Lincoln* v. *Iron Co.* 103 U. S. 412; *Koon* v. *Ins Co.* 104 U. S. 106; Rev. St. § 954.

Both motions are overruled.

NOTE.

AMENDMENTS—IN GENERAL. Section 954 is remedial, and should be liberally construed, (*Parks* v. *Turner*, 12 How. 39; *Tobey* v. *Claflin*, 3 Sumn. 379; *Gregg* v. *Gier*, 4 McLean, 308;) but amendments are not allowed with such liberality in penal actions or forfeitures, as in civil actions, (*U. S.* v. *Batchelder*, 9 Int. Rev. Rec. 98;) and a criminal information cannot be amended at the trial in any manner affecting the charge, (*Columbia* v. *Herlihy*, 1 McArthur, 466.) The power to amend at common law was limited to trivial errors, and could not be exercised after final judgment, (*Smith* v. *Allyn*, 1 Paine, 453; *Nelson* v. *Barker*, 3 McLean, 379;) but this section empowers generally any United States court to disregard mere defects in form in giving judgment, except those which the party demurring sets down as the cause of the demurrer, (*Rosenbach* v. *Dreyfuss*, 1 FED. REP. 394;) and authorizes the allowance of amendments during the trial, (*Bamberger* v. *Terry*, 1 Morr. Trans. 581.) It embraces every step in the cause down to the judgment. *Roach* v. *Hulings*, 16 Pet. 319. Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others, (*Tilton* v. *Cofield*, 93 U. S. 163;) and amendments of mere form, not going to the merits, and not of such a character as to prejudice, will not entitle respondents to costs, (*The Edwin Post*, 6 FED. REP. 314.) A defect is formal when a defendant must of necessity be guilty of a breach of the law, and liable to an action if the declaration is true. *Jacobi* v. *U. S.* 1 Brock. 520. This section, except the last clause, relates to defects which are mere matters of form, and the last clause embraces matters of substance. *Smith* v. *Allyn*, 1 Paine, 153. The power is confined to process and pleadings, and reaches all defects, but does not extend to the judgment. Id. It extends to actions brought by the United States. *Jacobi* v. *U. S.* 1 Brock. 520.

AMENDMENT OF VERDICT. The words "or course of proceeding whatever" are broad enough to include verdicts, (*Parks* v. *Turner*, 12 How. 39;) so if a verdict is general it may be amended so as to apply to the count under which the evidence is given, (*Matheson* v. *Grant*, 2 How. 263; *Stockton* v. *Bishop*, 4 How. 155.) Leave may be granted to amend a verdict in replevin after the jury had returned and another cause had been tried. *Argueles* v.

Wood, 2 Cranch, C. C. 579. A verdict in *assumpsit*, "that defendant is guilty in manner and form as alleged," is amendable. *Lincoln* v. *Iron Co.* 103 U. S. 412. On a stipulation that the jury, if the court be not in session when they agree upon their verdict, may sign, seal, and deliver it to the officer in charge and disperse, the entry of the verdict in proper form is allowed by this section. *Koon* v. *Ins. Co.* 104 U. S. 106; S. C. 3 Morr. Trans. 125.

AMENDMENTS AFTER VERDICT. A defective pleading may be cured after verdict, (*Garland* v. *Davis*, 4 How. 131; *Clark* v. *Sohier*, 1 Wood. & M. 368;) and the rule that a defective statement of a good cause of action is cured by the verdict extends to penal actions, (*Smith* v. *U. S.* 1 Gall. 261.) All circumstances necessary in form or in substance to make out a cause of action, though imperfectly stated, must be proved at the trial; hence the defect is cured by the verdict, (*Pearson* v. *Bank*, 1 Pet. 89; *Matheson* v. *Grant*, 2 How. 263; *Stockton* v. *Bishop*, 4 How. 155; *De Solry* v. *Nicholson*, 3 Wall. 420; *Corcoran* v. *Dougherty*, 4 Cranch, C. C. 205; *Scull* v. *Higgins*, Hemp. 90; *Stanley* v. *Whipple*, 2 McLean, 35; *Kemble* v. *Lull*, 3 McLean, 272; *Gray* v. *James*, Pet. C. C. 476; *Dobson* v. *Campbell*, 1 Sumn. 319;) as an allegation under a *videlicet*, (*Ingle* v. *Collard*, 1 Cranch, C. C. 152; *Woodward* v. *Brown*, 13 Pet. 1;) or the omission to join a party as plaintiff who ought to have been joined, (*Greenleaf* v. *Schell*, 6 Blatchf. 225;) or to give the time when the injury was done, (*Stockton* v. *Bishop*, 4 How. 155;) or to aver the value of the foreign money in an action on a bill of exchange, (*Brown* v. *Barry*, 3 Dall. 265;) as a declaration in debt is in the *debit* as well as the *detinet*, (Id.; *Gardner* v. *Lindo*, 1 Cranch, C. C. 78;) but if it omits to show matters essential to the jurisdiction, (*Smith* v. *Allyn*, 1 Paine, 486,) or to state a cause of action, it is not cured by the verdict, (*Smith* v. *Allyn*, 1 Paine, 486; *Renner* v. *Bank*, 9 Wheat. 581; *McDonald* v. *Hobson*, 7 How. 745; *Washington* v. *Ogden*, 1 Black, 450;) or if a libel *in rem* does not show the commission of an offense. See *The Virgin*, Pet. C. C. 7. An alternative allegation in an action of debt for a penalty, can only be objected to by a demurrer, and is cured by a verdict. *Jacobi* v. *U. S.* 1 Brock. 520. An objection that the declaration does not make *profert* of letters of administration cannot be taken after verdict. *Gardner* v. *Lindo*, 1 Cranch, C. C. 78; *Matheson* v. *Grant*, 2 How. 263. If a declaration merely assigns the non-payment of the penal sum on a bond, an omission to assign a special breach of the condition, in a replication to a plea of performance, is cured by a verdict. *Minor* v. *Mechanics' Bank*, 1 Pet. 46. A verdict will cure a discontinuance caused by the failure of the executor to appear within the proper time after suggestion of the death of the plaintiff. *Brent* v. *Coyle*, 2 Cranch, C. C. 287. An allegation under a *videlicit* may be disregarded. If the breach alleged is not a breach of the covenant, error is not cured by verdict. *Ingle* v. *Collard*, 1 Cranch, C. C. 152. A plea of *non assumpsit*, in an action on the case, is not cured by a verdict. *Garland* v. *Davis*, 4 How. 131. Where two pleas present substantially the same issue, the fact that an immaterial issue is joined on the replication to one plea is no reason for arresting a judgment and awarding a repleader, (*Erskine* v. *Hornbach*, 14 Wall. 613; *Pegram* v. *U. S.* 1 Brock. 261;) so if plaintiff replies to only one, (*Laber* v. *Cooper*, 7 Wall. 565.) Although a decision sustaining a demurrer to a plea is erroneous, yet if the defense can be presented under

another plea filed, the judgment will be good. *Junction R. Co.* v. *Bank*, 12 Wall. 226. Where there is a defect in a pleading, yet if the issue be such as required proof of the facts so defectively stated or omitted, and without which it is not to be presumed the judge would have directed a verdict, such defect is cured. *Lincoln Township* v. *Cambria Iron Co.* 2 Morr. Trans. 563.

JUDGMENTS AND DECREES. All judgments, decrees, or orders are under control of the court which pronounces them during the term at which they are rendered, and may be set aside, vacated, or modified. *Bronson* v. *Schulten*, 3 Morr. Trans. 500. But amendments to judgments or decrees can not be made except as to formal defects, (*Allers* v. *Whitney*, 1 Story, 310;) where the entry was erroneously made, (*U. S.* v. *Bennett*, Hoff. 281;) or where there is a verbal mistake of the clerk in using a superfluity of words in entering judgment, (*Shaw* v. *Railroad Co.* 101 U. S. 557;) or where by a misprision of the clerk the judgment had not been entered according to the declaration,(*Woodward* v. *Brown*, 13 Pet. 1;) or where the clerk had omitted to enter judgment allowing interest, (*Bank* v. *Wistar*, 3 Pet. 431;) or if a judgment by confession is entered without declaration or rule to plead, (*Ault* v. *Elliott*, 2 Cranch. C. C. 372;) or if made by only one of several joint defendants, (*Hyler* v. *Hyatt*, Id. 633; *Newton* v. *Weaver*, Id. 685; see *Ringgold* v. *Elliott*, Id. 462;) or if entered in a wrong case, (*Pierce* v. *Turner*, 1 Cranch, C. C. 433;) or if made by an attorney by mistake,(*Bank* v. *McKinney*, 3 Cranch, C. C. 173.) A judgment may be amended by striking out a part which the court has no authority to make, (*The Hiram Wood*, 6 Chi. Leg. News, 135;) or where it was entered by mistake,(*U. S.* v. *Fearson*, 5 Cranch, C. C. 95,) any clerical error may be corrected after the lapse of the term,(*Scott* v. *Blaine*, Bald. 287; *Brush* v. *Robbins*, 3 McLean, 486;) as by making it payable in gold or silver coin, (*Cheang Kee* v. *U. S.* 3 Wall. 320.) A judgment or decree cannot be stricken out after the lapse of the term at which it is rendered, (*Brush* v. *Robbins*, 3 McLean, 486; *Wood* v. *Luse*, 4 McLean, 254; *Scott* v. *Blaine*, Bald. 287;) but if irregularly entered it may be set aside, (*Union Bank* v. *Crittenden*, 2 Cranch, C. C. 238;) or for a mistake in the assessment of damages,(*Crooks* v. *Maxwell*, 6 Blatchf. 468;) or if considered as a nullity, (*Wood* v. *Luse*, 4 McLean, 254; *Harris* v. *Hardeman*, 14 How. 334.) Though the court cannot change the essential parts of a decree after the term at which it is entered, yet it may subsequently amend the decree as to the mode of execution, manner of sale, time of publication, and distribution of proceeds, (*Turner* v. *I., B. & W. R. Co.* 8 Biss. 380;) but an interlocutory decree is always open to amendment and correction, (*De Floven* v. *Reynolds*, 8 FED. REP. 434.)—[ED.

Phelan *v.* O'Brien.*

(Circuit Court, E. D. Missouri. October 4, 1882.)

1. Bankruptcy—Limitation of Action—Rev. St. § 5057.

   Where a deed of trust upon real estate, executed by A. to secure certain promissory notes, was foreclosed by B., who, as assignee in bankruptcy of the estate of C., held one of said notes, and all parties in interest were present or represented at the sale under said deed, and B., with the sanction of the court by which he had been appointed, became the purchaser for the benefit of C.'s estate, and with the knowledge of A. paid the holders of the other notes their *pro rata* of the purchase money, *held*, that proceedings instituted by A. against B. more than two years after the date of said sale, to set it aside, were barred by the limitations of the bankrupt act.

2. Same—Estoppel.

   Held, also, that the fact that B. represented to C. after the purchase that he would permit her to redeem the land upon payment of the debt, but without fixing any time for redemption, did not estop him from setting up the statute of limitations.

In Equity.

Appeal from the United States district court, sitting as a court in bankruptcy.

For statement of facts and report of the opinion of the district court see 12 Fed. Rep. 428.

Donovan & Conroy, for complainant in cross-bill.

Walker & Walker, contra.

McCrary, C. J. The respondent, Elizabeth O'Brien, brought a suit in equity in one of the state courts of this state to set aside a sale of certain lands to the complainant as assignee in bankruptcy of the Central Savings Bank, which sale was made under a deed of trust given by her to secure certain debts, including one due to the bankrupt. The complainant filed his original bill herein to enjoin the proceedings in the state court, and a preliminary injunction was issued. Thereupon respondent filed her cross-bill herein, renewing substantially her suit as originally brought in the state court.

One defense to the cross-bill is that the cause of action therein set forth was barred by the provision of section 5057 of the Revised Statutes of the United States, which provides that "No suit, either at law or in equity, shall be maintained in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such as-

*Reported by B. F. Rex, Esq., of the St. Louis bar.

signee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

The assignee purchased the property at trustees' sale on the twentieth day of September, 1878, and on the twenty-third day of that month the trustee in the deed of trust conveyed the property by deed to him, as assignee. The suit in the state court to set aside the sale was commenced January 10, 1881, more than two years after the purchase by the assignee and the conveyance to him. The court is constrained to hold that the bar of the statute is a complete defense.

It has been repeatedly held by the supreme court of the United States that the limitation embodied in the section above quoted applies to all judicial contests between an assignee and other persons touching the property or rights of property of the bankrupt transferred 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; *Gifford* v. *Helms*, 98 U. S. 248.

It is suggested that the statute does not apply to a controversy between an assignee and other persons respecting property acquired by the assignee after the bankruptcy, and not conveyed to him by the original assignment. The *Case of Conant*, 5 Blatchf. 54, is cited to sustain this view, and it seems to do so. That case arose under the limitation clause of the bankruptcy act of 1841, which is substantially analogous to the provision now under consideration; and it holds that the limitation has no reference to contests growing out of the dealings of the assignee with the estate after it comes into his hands. A later ruling of the supreme court of the United States in the case of *Banks* v. *Ogden*, 2 Wall. 57, would seem to support very strongly the opposite view. The court in that case impliedly held that the limitation applies to a cause which accrued after the bankruptcy, and that it limited the time within which to commence an action to two years from the time when such cause of action accrued. The language of the court is as follows:

"The limitation certainly could not affect any suit, the cause of which accrued from the adverse possession taken after the bankruptcy, until the expiration of two years from the time of such possession."

In the case of *Norton* v. *De La Villebeuve*, 13 N. B. R. 304, precisely the opposite view of the statute was urged upon the consideration of the court. It was there insisted that the limitation only applies to new causes of action arising in favor of the assignee after

the bankruptcy, and not to those which had existed before the bankruptcy, and had come to the assignee by the assignment.

In the elaborate opinion announced by *Woods*, circuit judge, it was held to apply to both classes of cases. The court said:

"In our view, on all material claims and demands the cause of action accrues to the assignee at the day of the assignment; all others from their maturity, or at the time when an action will lie; and he must sue within two years from these dates respectively."

The object and purpose of the limitation in question was to insure a speedy disposal of the bankrupt's property, and a prompt closing up of his estate. This object is declared by the supreme court, in *Bailey* v. *Glover, supra,* to be second only in importance to equality of distribution. It is easy to see that the construction of the statute insisted upon by counsel for respondent would defeat this object. If the ordinary statutes of limitation were to apply to all controversies arising between the assignee and other parties pending the proceedings in bankruptcy, the settlement of estates might be delayed almost indefinitely. The assignee threatened with a suit could not, with safety, close his administration until after the expiration of the limitation fixed by the General Statutes upon this subject. Suits might be instituted against him within the periods fixed by such statutes, but near the close of such periods, which might remain in the courts for many years. In fact, the limitation contained in the bankrupt act would, in many cases, prove ineffectual as a means of speeding the settlement of estates in bankruptcy, if it were not applied to controversies such as the one before us. Besides, the language of the statute is so general as not to admit of the limitation insisted upon. It applies to all suits, whether at law or in equity, touching any property or rights of property transferred to or vested in the assignee. It therefore includes suits touching property transferred to an assignee by the assignment, and also those touching property vested in such assignee either by the assignment or otherwise.

Proof has been offered to show that this assignee ought to be estopped from pleading the statute of limitations, because, after his purchase, he represented to the respondent that he would permit her to redeem the land upon payment of the debt. There is proof tendng to show that such was the fact; but this alone is not sufficient to take the case out of the statute of limitations. No time for redemption was fixed, and no attempt to redeem is shown. The most that can be claimed is that respondent was to have the right or privilege to redeem indefinitely. If such was the agreement, it was void for

want of materiality, and not sufficient to prevent the running of the statute of limitations. *Taylor* v. *Reed,* Supr. Ct. of Illinois, June, 1882; *Kellogg* v. *Carrico,* 47 Mo. 157; *Mansur* v. *Willard,* 57 Mo. 347; *Medsker* v. *Swaney,* 45 Mo. 278; *Carter* v. *Abshire,* 48 Mo. 300; *Martin* v. *Smith,* 1 Dill. 96; *Langdon* v. *Doud,* 10 Allen, 433; Bigelow, Estoppel, 481–483.

The result is that, without considering the various questions touching the merits of the controversy, the decree of the district court must be affirmed, and it is so ordered.

DARLING, Assignee, etc., *v.* BERRY and Wife, and others.

(*Circuit Court, D. Iowa.* 1882.)

1. BANKRUPTCY—REV. ST. § 5045—HOMESTEAD EXEMPTION.

   By the passage of the act of March 3, 1873, embodied in section 5045 of the Revised Statutes, it was the intention of congress to prescribe by its own direct legislative authority, irrespective of state laws, the *conditions* upon which the homestead exemptions should exist, making the provisions of the state laws "existing" in 1871 the *measure* or *criterion* as to the *amount* allowed.

2. SAME—SAME—SAME—TIME DEBT WAS CONTRACTED.

   Under section 5045, Rev. St., the bankrupt's homestead exemption is valid against *all debts*, whether reduced to judgment or not, without regard to the *time* when contracted, and regardless of state constitutions, laws, and decisions.

3. SAME—SAME—CONSTITUTIONALITY OF.

   A bankrupt, revenue, or naturalization law, which, by its terms, is made applicable alike to *all* the states, without distinction or discrimination, is not unconstitutional merely because its *operations* may be wholly different in one state from another.

4. RULE AS TO CONSTRUCTION OF LAW.

   Where the constitutionality of a law is a matter of doubt, and the decisions upon the question are conflicting, to set aside such an act as unconstitutional would be presumption in an inferior judge.

The plaintiff in this case is the assignee in bankruptcy of the firm of Parsons, Berry & Warren, of which the defendant William A. Berry was a member. The object of the bill is to assert the claim of a creditor of the said firm, D. W. Grimes, against the homestead of said Berry. It is conceded that the debt of the claimant Grimes was contracted prior in time to the purchase and acquisition of the homestead, and therefore that by the law of Iowa the homestead was not exempted from the payment of the debt. By the law of Iowa the claimant had a clear right to enforce his claim against the homestead

by judgment and execution. The claimant may, therefore, we think, through the present plaintiff, as assignee in bankruptcy, maintain this bill, unless he had been deprived of his right to subject the homestead to the payment of his claim by the amendment to the bankrupt law, passed March 4, 1873. That amendment provided that there should be exempted from the operation of the assignment in favor of the bankrupt such property "as is exempt from levy and sale upon execution, or other process or order of any court, by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each state, as existing in the year 1871, and such exemptions shall be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court; any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding."

John C. Power and *P. Henry Smythe*, for plaintiff.

A. M. Antrobus, Thomas Hedge, Jr., and *Anderson Bros. & Davis*, for defendants.

LOVE, D. J. *First.* The plaintiff's counsel contend that "the bankrupt law did not intend to exempt anything which the legislature of the state had not exempted or sought to exempt by its law," and counsel say: "We deduce, therefore, that if the bankrupt law only intends to exempt such property as the state law did, or meant to make the the state law the measure of exemption, then the property here is not exempt for the reason that it is not by the state statute." *Secondly.* Counsel insist that "if the bankrupt law did not intend to go further and create a new exemption by the bankrupt law itself, and which the state law did not give, it is void, being unconstitutional, there being no uniformity in it."

With respect to the first of these propositions, which involves the construction of the amendment of March, 1873, (Rev. St. § 5045,) I must confess that my own judgment was, when the case was argued before me in the district court, with the plaintiff's counsel; but I have been led by a more thorough consideration of the question to change my opinion upon that point.

The question is, was it the purpose of congress, in giving the bankrupt's homestead exemptions, simply to recognize the state laws as furnishing the rule with respect to both the amount exempted and the conditions of exemption, or was it intended by congress to pre-

scribe by its own direct legislative authority, irrespective of state laws, the conditions upon which the homestead exemptions should exist, making the provisions of the state laws "existing" in 1871 the measure or criterion as to the "amount allowed?" As a matter of course, congress could not have intended to prescribe directly and by its own authority the conditions of the homestead, and at the same time, by the same act of legislation, accept the conditions provided by the various state laws. We must inevitably accept one hypothesis or the other, and not both, in the construction of the act. The true purpose of congress may be demonstrated by considering the causes and events which led to the amendment of 1873. It is undeniable—indeed, it is admitted on all hands—that the condition of things in Virginia, growing out of her legislation, constitutional and otherwise, regulating homestead exemptions, led to the amendment of 1873.

By article 11 of the constitution of that state, adopted in 1869, it was provided that every householder or head of a family should be entitled, in addition to the articles then exempt from levy or distress for rent, to hold exempt from levy and sale under execution, etc., issued on any demand for any debt theretofore or thereafter contracted, his real and personal property, etc., to the value of $2,000, to be selected by him. An act of the general assembly of Virginia, approved June 27, 1870, gave effect to this provision by prescribing in what manner and upon what conditions such householder could set apart and hold such exemptions. Under the bankrupt law, as originally enacted, there was exempted from the assignment of property required to be made to the assignee, among other such property as was exempt from levy and sale under execution by the laws of the state, etc., to an amount not exceeding that allowed by the state exemption law in the year 1864.

By an amendatory act passed on the eighth of June, 1872, this provision was changed so as to give the bankrupt the benefit of exemption laws in force in 1871. In 1872 the court of appeals of Virginia unanimously decided (22 Grat. 266) that the provision of the constitution just referred to, and the statute giving effect to the same, so far as they applied to contracts entered into or debts contracted before their adoption, were a violation of the constitution of the United States, and therefore void. After this decision on the third of March, 1873, congress passed another act, which is substantially the same as section 5045 of the Revision. The amendment of 1873 is as follows:

"Be it enacted, etc., that it was the true intent and meaning of the act approved June 8, 1872, entitled, etc., that the exemption allowed the bankrupt by said amendatory act should, and it is hereby enacted that they shall, be the amount allowed by the constitution and laws of each state, respectively, as existing in the year 1871, and that such exemption be valid against debts contracted before the adoption and passage of said state constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court; any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding."

Here we find that the law of Virginia giving retrospective homestead exemptions was declared null and void because it impaired the obligation of contracts. Such exemptions, therefore, did not exist in Virginia when the amendment of 1873 was passed. Congress, it is admitted, aimed by the amendment to do what Virginia had not been able to accomplish, namely, to give the bankrupt the benefit of the retrospective homestead exemptions which had been annulled in Virginia. This congress was fully empowered to accomplish. Congress could, by its own direct legislation, pass a law impairing the obligation of contracts, but congress could not make a state law, which violated the constitution, valid. Did congress intend to recognize and adopt, as furnishing a rule to its courts in the administration of the bankrupt law, state legislation which was utterly void by reason of its violation of the federal constitution? Could congress breathe the breath of life into a dead state law—dead by reason of its repugnance to the constitution? So far from its being the purpose of congress to adopt or respect the law of Virginia touching homestead exemptions, it was manifestly intended by the amendment to overrule and disregard the state law; for, by the law of Virginia as it stood after the decision in 22 Grattan, the creditor had a clear right to satisfaction out of the debtor's property, without regard to his claim of homestead, and the creditor might have secured a lien upon the property claimed as a homestead by the judgment or decree of the Virginia courts. Congress, therefore, could not effect its purpose by giving a retrospective homestead in Virginia under the bankrupt law without utterly disregarding the Virginia law, and overriding any liens which might be established by the judgments of its courts; and if there is any meaning in words this is precisely what congress aimed in express terms to do.

It being thus manifest that no valid law existed in Virginia creating a retrospective homestead, congress could not establish such an exemption by adopting or recognizing what did not exist. Congress,

therefore, could accomplish its admitted purpose in Virginia only by direct legislation giving the bankrupt a homestead against debts which had been adjudged to be valid claims upon the homestead under the law of that state. Now, is this consistent with the view that congress intended to adopt state laws "in existence," whether in force or not, whether repealed or not repealed, whether constitutional or otherwise, as a measure of the amount of property to be exempted. The original bankrupt act of 1867 limited the amount of exemption by the state laws in force in 1864, though possibly repealed or not in force in 1867, or when the proceeding in bankruptcy should be commenced.

I have hitherto considered the question with reference to the intention of congress to prescribe a homestead in Virginia without reference to the laws of that state; or, rather, in contravention of its existing law. I have so considered the question because there can be and is no serious doubt that congress intended, with reference to the condition of things in Virginia, at least, to provide for a homestead by its own direct legislative power to pass a general and uniform bankrupt law. But although congress, in adopting the legislation in question, had in view the exigency existing in Virginia, yet it could not pass a special law to meet the state of things relating to the homestead in that state, without applying its provisions to the other states; since such a law applicable to the condition of things in Virginia alone, and not to the other states, would clearly have been unconstitutional. It would not have been a uniform bankrupt law. Congress could not, without a flagrant violation of the federal constitution, have so framed a law as to give the bankrupt in Virginia a homestead exemption in disregard of the state law, and in contravention of liens by judgment and decree, without making the same provisions applicable to other states. It would have been simply absurd for congress to have attempted to make such a provision for bankrupts in Virginia by its own direct legislation, and to have provided, as to the other states, that their own laws should prescribe the conditions as to debts upon which the bankrupt should be entitled to the homestead. Hence congress was compelled, in order to provide a homestead against antecedent debts in Virginia, where no such homestead law was in force, to frame a law with general provisions, applicable alike to Virginia and all other states where homestead laws existed. This could only be accomplished by a law of congress prescribing directly the conditions of exemption against prior creditors for all the states alike, without reference to state statutes, except in so far as they might be

taken as a criterion or measure of the amount of property to be exempted.

From these general views, which seem to my mind conclusive, let us turn to the particular language of the amendment. It is provided that "such exemptions shall be valid against debts contracted before the adoption and passage of such state constitutions and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court; any decision of any such court rendered since the adoption and passage of such constitutions and laws to the contrary notwithstanding." These words must have some construction; they cannot be rejected as surplusage; they are not ambiguous. What do they mean? What can they mean, except that the bankrupt's homestead exemption shall be valid against all debts, without regard to the time when contracted, and regardless of state constitutions, laws, and decisions? The exemption shall be valid against debts contracted before and after the passage of laws, etc., "in existence" in 1871, and against the judgments and decrees of *any* state court. Time before and after an event includes all time, and therefore the words used in the amendment imply that the exemption shall be valid against debts at whatever time contracted. They can mean nothing else. To extort any other meaning from them by interpretation would be to violate the fundamental maxim of construction. "The first maxim of interpretation," says Vattel, "is that it is not allowable to interpret what has no need of interpretation;" and he proceeds to point out the fatal and mischievous consequences of violating this rule in the interpretation of deeds and treaties.

The words "debts contracted" before and after the passage of a law, etc., must, *ex vi termini*, mean *all* debts, and not some particular debts to the exclusion of others. If we reject this interpretation how shall we discriminate between debts which are and debts which are not included in the provision? What rule of classification shall we adopt? Congress manifestly did not intend to make any such discrimination, for congress in express terms made the exemption valid against the very highest class of debts, namely, such as were made *liens* against the homestead by the solemn judgments and decrees of state courts. It had been the policy of all bankrupt laws to respect and preserve the liens of creditors under state laws and decisions; and the doctrine that the adjudications of the state courts upon state constitutions and laws should be accepted and enforced in all federal tribunals, had, long before the legislation we are now consider-

ing, been embedded in the very foundations of federal law. Yet here we find congress providing that the bankrupt's homestead exemption should prevail against state laws, and state decisions and liens established by the solemn judgments and decrees of state courts. By what possible terms could the will of congress have been made more conclusively manifest that the bankrupt's homestead should prevail, by the exclusive authority of congress, against all debts in spite of state laws, decisions, and judgments? We know positively that such was the intention of congress with respect to debts secured by the laws, judgments, and judicial decisions of the state of Virginia, and how can we suppose that congress did not intend that debts in other states should be subject to the same conditions as against the homestead? Did congress intend to make one law for Virginia and another and different law for the other states?

The claimant's debt is a mere float. It has never been reduced to judgment. It is no lien upon the bankrupt's homestead. It is a valid claim under the law of Iowa against the homestead; nothing more. This debt is clearly, at whatever time contracted, whether before or after the passage of certain *state* laws, within the express terms of the act of congress postponing debts to the homestead exemptions. What reason is there to take the plaintiff's claim out of the act? Is it because it was valid under the law of Iowa against the homestead? So were the debts in Virginia, which, it is admitted, the amendment intended to set aside in favor of the homestead. Nay, it would appear that some of the Virginia creditors had established their claims as liens against the homestead by the judgments and decrees of the courts of their state; and these liens against the homestead as well as other judgment liens, it was the manifest purpose of the amendment of 1873 to subvert. Would it not, then, be most unreasonable to suppose that it was the purpose of the amendment of 1873 to subvert and set aside the judgment liens of other creditors against the homestead, and save such mere floating claims as that of the plaintiff? Suppose the claimant had reduced his demand to judgment, and had thus made it a lien upon the homestead: he would then have brought himself within the very words of the amendment, that the exemption should be valid "against liens by judgment or decree of *any* state court." In that case, would not the amendment have set aside his lien in favor of the homestead; and is he now better off because his claim remains in its original shape, of a floating claim against the homestead exemption.

I can see no difference between the case of the creditors under the Virginia law which congress intended to set aside in favor of the homestead, and the claimant's case under the law of Iowa. The claimant had a right by the law of Iowa to satisfaction out of the bankrupt's property without respect to the homestead. He might have enforced his claim by judgment and secured a lien. The same is true with respect to the rights of the creditors in Virginia under the law of the state. It cannot be doubted that congress intended to postpone the Virginia creditors to the right of homestead, and to establish the same even as against liens by judgment and decree. Why should a different intention be imputed to congress in regard to an Iowa creditor? Why should not the same result to which the Virginia creditors were exposed occur to an Iowa creditor, if the bankrupt act is a uniform law?

The section (5045) which we are considering provides that there shall be exempted—

"Such other property, etc., as is exempted from levy and sale upon execution or other process, or order of any court, by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each state as existing in the year 1871."

The word "existing" is here evidently used for a purpose. There was no law giving a retrospective homestead exemption "in force" in Virginia in 1871. The law which had been passed being unconstitutional, and so declared by the highest court of the state, was a dead letter; it was not in force, but in one sense it existed in 1871. It had no potential "existence," but it "existed" in form. So there may have been in other states exemption laws which "existed" either potentially or in form in 1871, but which, perhaps, were not in force when the amendment of 1873 was passed. I think it must have been the purpose of congress to adopt these state laws "existing" in 1871, whether potentially or in form, whether repeated or not, whether in force or not in force, so far as they furnished a measure of the amount of homestead exemption. If there was in any state no law at all existing in 1871, "either potentially or in form," it is clear that the legislation of the section of the bankrupt law in question could not be applied to bankrupt estates in such states. I can see no other construction of section 5045 by which the provision last above quoted can be made to harmonize with the terms of the section immediately following, upon which the present case turns.

Let us now proceed to consider the constitutional question. With due deference, I venture to suggest that the judges who have discussed the constitutionality of this amendment have applied to it an erroneous test of uniformity. They seem to me to treat the question as depending rather upon the operation or working of the law, than upon its application according to its own terms to the various states of the Union. In my opinion, when a bankrupt, revenue, or naturalization law is made by its terms applicable alike to all the states of the Union, without distinction or discrimination, it cannot be successfully questioned on the ground that it is not uniform, in the sense of the constitution, merely because its operation or working may be wholly different in one state from another. The circumstances and conditions existing in the states of this Union are infinitely various. No law which human ingenuity could possibly frame, would be uniform in the sense of operating equally or alike in the various states, with their different conditions and diversified interests. The constitution provides that "all duties, imposts, and exercises shall be uniform throughout the United States." Now, suppose one or more states should succeed in suppressing utterly the manufacture and sale of ardent spirits and malt liquors, then a federal tax upon these commodities would be entirely inoperative in such states. In such case millions might be collected under an excise law in Illinois, and not a cent in Iowa. The operation of such a law would then be anything but uniform in the two states; but would any court for that reason declare a general law imposing a tax of the kind unconstitutional? Again, a tariff law might be anything but uniform in its operation upon different states. It might foster the industry of a manufacturing state and oppress that of a strictly agricultural state. But could it on this account be said to be not a uniform law within the meaning of the constitution, and therefore void? Suppose, again, congress should in a bankrupt law, as it did in 1867, adopt the homestead exemptions prescribed by state laws in force at a specified time; and suppose there should in some states be no law giving homestead exemptions, while in others such exemptions should by law exist,—then the operation of the bankrupt law would not be uniform with respect to the homesteads; but would it be for that reason unconstitutional? All that the constitution intends is that congress shall not pass partial revenue and bankrupt laws. It shall not prescribe one law for this state or section, and a different law for that state or section. The law must be general and uniform in its provisions, but its working and operation may be very different in different states, owing to

their diverse conditions and circumstances. Congress can prescribe a uniform law, but it cannot create uniform conditions and circumstances in the various states of the Union.

Now, applying these principles, I am not able to see that the amendment of 1873 is unconstitutional. The amendment does not by its terms apply to any state or section. It is prescribed for all the states alike. Congress by this amendment prescribed by direct legislation in contravention of state laws the conditions upon which the bankrupt should take his homestead. These conditions are applicable to all the states without distinction. The act of 1867 provided that the bankrupt should be entitled to the homestead allowed by the state of his domicile, in force when the proceedings in bankruptcy were commenced, "not exceeding that allowed by the state exemption laws in force in 1864." It is clear that under this act one law of the state might prescribe the conditions of the right of homestead and another regulate the amount of property to be allowed. But in the amendment of 1873 the conditions are prescribed directly by the act of congress, and the amount to be regulated by the state law. The bankrupt law of 1867 has been declared constitutional by the highest judicial authority in this circuit below the supreme court. *In re Beckerford*, 1 Dill. 45. Now this act did not directly prescribe a homestead exemption. It adopted the state laws regulating homesteads. If in one state there was by law no homestead, the bankrupt, under the act of 1867, would get none, and the creditors would be entitled to all his property; while in another state, with a homestead law in force, the bankrupt would get the exemption and the creditors take subject to it. This surely would not be uniformity in the working or operation of the law; nevertheless, such a law would be held uniform in the constitutional sense of the word.

This view enables us, I think, to see clearly the unsoundness of Chief Justice Waite's argument in *Re Eckert*, 10 N. B. R. 5. The burden of the chief justice's argument seems to be that a law of congress which adopts the exemptions under the state laws as they are enforced in the states is uniform because the creditors get just what they are entitled to in *pro rata* distribution. They are entitled to all the property of the bankrupt not exempt from execution by the state law, and this they get in the distribution under a bankrupt law which adopts the state law. This is just, and it is uniform. That it is just, there is no doubt; that it is uniform, may be questioned. It will not do to confound the justice and uniformity of the law in considering this constitutional question.

It follows, from Chief Justice Waite's view, that if there was in a state no law giving any exemption, the creditors would take the whole of the bankrupt's property. If the amount exempted in one state was large, and another small, the sum distributed to the creditors would vary accordingly; but still they would get all they could have reached by the state execution laws. This argument is plausible, and it might be irrefragable if the creditors only were to be considered in judging of the uniformity of a bankrupt law. But if the question of uniformity is to be solved by considering the operation of the law on classes of persons, why are the bankrupts in the several states to be ignored any more than the creditors? Are not the bankrupts to be provided for as well as the creditors? If there is no law in one state giving the bankrupt any homestead exemption at all, while in another state the exemption is trifling in amount, and in still another large, is there any uniformity in the operation of a bankrupt law adopting such state laws, as far as the bankrupt is concerned? If two bankrupts lived in sight of each other across a state line, and one held property under the law worth five or ten thousand dollars and the other nothing, it would be hard to convince them that a bankrupt law working out this result was uniform in its operation. Manifestly, if the bankrupts in the different states are to be considered, the argument of uniformity advanced by the chief justice must be fallacious.

But I think it is open to another fatal objection. If the view of the chief justice be correct, it follows that congress could not by direct provision, without reference to state laws, prescribe the conditions and the amount of homestead exemption. For congress would, if it had no reference to state laws, be compelled to prescribe the same conditions and the same amount of exemption for all the states. This is self-evident. Congress could not provide the different conditions and amounts for the different states. What would be the result? The chief justice's theory of uniformity would be overthrown. The creditors in a state with no law giving a homestead exemption would not get in distribution what they are entitled to under the state law. They would be compelled to suffer a deduction equal to the amount of exemption engrafted by congress upon the bankrupt's estate. And so, whether the homestead exemption under the state laws were great or trifling would make no difference whatever to the creditors; all would be compelled to suffer the same deduction under the law of congress; none would secure under the bankrupt law, in *pro rata*

distribution, what they would be entitled to as exempt from execution under their respective state laws. Moreover, all estates, great and small, would be subject to exactly the same amount of exemption. In some cases, the exemption under the congressional law might take the whole estate; in others, it would amount to a mere trifle in proportion to the whole value of the estate. Now, will any one seriously contend that congress might not in a bankrupt law fix the conditions and amount of homestead exemption without reference to state laws? I think not; and yet congress could not do this if the chief justice's theory be correct, that uniformity in a bankrupt law consists in the equal and *pro rata* distribution among creditors of all the bankrupt's property not exempt from execution under the state laws. In the following cases the constitutional question seems to have been decided adversely to Chief Justice Waite's opinion: *Re Beckerford,* 1 Dill. 45; *Re Jordan,* 8 N. B. R. 180; *Re Kean,* Id. 367; *Re Smith,* Id. 401; *Re Everitt,* 9 N. B. R. 90; *Re Jordan,* 10 N. B. R. 427; *Re Smith,* 2 Woods, 458.

Finally, it is undeniable that the constitutional question involved in the case is a very doubtful one. The utter conflict of opinion and decision in the southern district is the best possible evidence of the doubt and difficulty which surrounded it. On the one hand we have the judgments of Chief Justice Waite, Judge Bond, and Judge Bryant, holding the amendment of 1873 to be unconstitutional; on the other, the decisions of numerous judges sustaining the law as constitutional. Now what is the duty of any court with respect to a law of doubtful constitutionality?

Chief Justice Marshall, in the *Dartmouth College Case,* 4 Wheat. 625, speaking for the whole court, said:

"This court can be insensible neither to the magnitude nor delicacy of the question. The validity of a legislative act is to be examined, and the opinion of the highest law tribunal of the state is to be revised, etc. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has decided that in no doubtful case would it pronounce a legislative act to be unconstitutional."

So spoke the supreme court of the United States, by the mouth of its illustrious chief, concerning the constitutionality of a state statute, and this doctrine has been often reiterated by other courts and jurists. What, then, would it be becoming an inferior federal court to do touching an act of Congress, the constitutionality of which is, to

say the least, a subject of the gravest doubt? To disregard and set aside *such* an act as an infraction of the constitution would, I think, be in an inferior judge evidence of the most inexcusable presumption.

There is no doubt that congress, in this amendment, passed a sweeping retrospective law. Now, is there anything extraordinary in this, since all the bankrupt laws are in their essence retrospective? The amendment in question interferes with the relation of debtor and creditor, and works injustice to the latter. But the question with us is not the justice, but the uniformity, of the law. All bankrupt laws proceed upon considerations of policy and humanity, rather than strict justice. In this respect they are like statutes of limitations. Congress, seeing that the bankrupt was, with or without his consent, to be stripped of all his property for the benefit of his creditors, provided out of the wreck a shelter for his family against all debts, whether contracted before or after the passage of state homestead laws. Clearly there was no ground of equity upon which an exception could be made in favor of the creditor whose debt was contracted before the acquisition of the homestead in preference to the creditor whose debt was contracted before the passage of the state homestead law. The first had no merit over the last. In both cases the creditors had contracted with the bankrupts upon the faith of their entire property before any homestead existed. A state exemption law could not be retrospective because it impaired the obligations of contracts. Therefore, a creditor whose debt was contracted before the passage of the state homestead law, equally with a creditor whose claim antedated the purchase of the homestead, was entitled, by both equity and the state law, to satisfaction out of the homestead property. Both classes of creditors standing thus upon the same ground of equity and strict law, what reason is there to assume that congress intended to include one class and exclude the other in passing the retrospective amendment of 1873?

Judgment for defendant.

Judge McCrary concurs.

PALMENBING *v.* BUCHHOLZ.

SAME *v.* BAUMAN.

SAME *v.* HOHLWECK.

(*Circuit Court, S. D. New York.* October 2, 1882.)

PATENT NO. 76,394—DISPLAY DUMMY.

A patent for a dummy to display clothing in form, substantially like the wire dummies in previous use, but made of *papier mache*, a material that had been previously used to make lay figures, representing various personages, many of whom were draped in suitable clothing, cannot be considered as valid because the device is destitute of patentable novelty.

Frank V. Briesen, for complainant.

Frost & Coe, for defendants.

WALLACE, C. J. These suits are founded upon letters patent No. 76,394, granted to W. E. Brock, and bearing date April 7, 1868, for an improvement in dummies for displaying clothing. Such devices are used by designers and sellers of wearing apparel to test and display the cut, style, and general appearance of the garments. The specification describes the invention to consist of a shell of paper or *papier mache*, resembling in configuration the body of a human being, with legs and arms, if desired. A head-piece of wood or other suitable material is secured in the neck or upper end of the shell, into which is fitted a vertical supporting shaft, which extends centrally through the shell and is furnished at its lower end with an appropriate base. The shaft is provided with radial braces, which serve to retain the shell in proper position upon the shaft. It is designed to be an improvement upon the wire dummy in ordinary use for displaying clothing, and contains the same parts and arrangement of parts, except that the paper or *papier mache* shelf is substituted for the skeleton frame of the wire dummy. It is shown by the proofs that paper and *papier mache* had been used in constructing lay figures representing various celebrated personages, and was well known as a suitable material for that purpose previous to its use by the patentee. These lay figures were hollow, and the paper or *papier mache* was used to form the shell or exterior surface of the figures, but the faces and hands were usually made of wax. They were clothed with costumes appropriate to the personages represented.

Inasmuch as the wire dummies did not contain the paper or *papier mache* shell, and the lay figures did not contain head-piece, shaft

braces, or base of the patented device, they were not anticipations of it. The proofs show that the patented dummy has commended itself to the public interested in such devices. It is a better model of the human figure, and because of the continuous surface of the shell clothing can be made to fit more accurately upon it than upon the intersticial frame or shell of the wire dummy. But the patent cannot be sustained because the device is destitute of patentable novelty. If the substitution of the paper or *papier mache* for the wire of the shell or frame was obviously practicable, the patentee was not an inventor. If mechanics, skilled in the particular department of construction, could have seen at a glance the feasibility of the change, then, although the device may have been mechanically new, it was not intellectually novel. The paper which was substituted for the wire had been used to make the shell of a figure in imitation of the human body, and the figures in which it was thus used had been employed for displaying clothing. The displaying of clothing was not the primary purpose for which these lay figures were intended, but that use was not only suggested, but was very obviously one of the ends in view. Not only, therefore, had the material that the patentee substituted for the wire been employed, as he employed it, to make the shell or frame of a figure resembling the human body, but it had also been applied to perform the same office. The new application of an old material to a cognate use will not generally support a pattent, but here it was employed in the same use.

The bill in the several cases is dismissed.

GOTTFRIED *v.* STAHLMANN, and thirteen other cases.

(Circuit Court, D. Minnesota. October 23, 1882.)

PATENTS FOR INVENTIONS—VALIDITY.

The validity of letters patent No. 42580, for a new and improved mode of pitching barrels, sustained on the authority of *Gottfried* v. *Crescent Brewing Co. ante*, 479.

Banning & Banning, for complainants.

J. B. & W. H. Sanborn and *C. K. Davis*, for defendants.

Before MCCRARY and NELSON, JJ.

PER CURIAM. At the conclusion of the argument on the final hearing in these cases, the court on consultation were convinced that the

patent should be sustained, but deferred announcing an opinion until a decision should be reached by Judge Gresham, of the Indiana circuit, who had under consideration the validity of the patent in the case of *Gottfried* v. *Brewing Co.*, in which and the cases before this court substantially the same testimony is presented. Judge Gresham, after a rehearing, sustained the patent. We concur with this decision, and think it unnecessary to give any reasons additional to those announced by him.

Decree will be entered in favor of the complainants, with costs, which are to be divided between all of said cases equally.

See *Gottfried* v. *Crescent Brewing Co. ante*, 479, withdrawing the ruling in same case, 9 Fed. Rep. 762.

The Golden Grove.

(District Court, D. Delaware. 1882.)

1. Admiralty—Collision—Sail and Steam-Vessels.

While it is the duty of a steam-vessel to avoid a sailing vessel, it is no less the duty of the latter to afford the steamer all the means and signals the law, custom, and common prudence prescribe to enable her to make this avoidance; and if in any respect she fails therein and thereby produces the disaster, she must either bear the whole loss, or her share thereof, as her fault was the *sole* or *partial* cause of the collision.

2. Same—Same—Loss.

The evidence in this case showing that no fault was to be imputed to the brig in regard to her lights, or in not changing her course when approaching the steamer, but that the steamer was in fault (1) because she had not proper and sufficient lookouts; (2) because her officers and men were careless, ignorant, and incompetent; and (3) because when the collision was imminent her speed was not slackened or arrested, or the engine reversed in time to avoid collision,—the entire loss resulting therefrom must be borne by the steamer.

3. Same—Loss of Freight—Apportionment.

In cases of total loss before freight is fully earned by delivery, the owners of the vessel, if not in fault, are entitled to the agreed freight, less costs, charges, and expenses of the remainder of the voyage, from which the accident discharges them.

Bradford, D. J. This is a cause of collision civil and maritime, in which the owners of the brig Kremlin, (the vessel sunk by the collision,) and of the freight pending on the cargo on board the said brig at the time of the collision, on behalf of themselves, and of the officers and crew of the said vessel at the time of her said loss, owners of charts, books, instruments, and personal effects on board said ves-

sel at the time of her loss, the owners of the cargo of sugar on board of the said vessel at the time of her loss, and the owners of the chronometer on board of the said vessel, are complainants, and John S. Smailes, the master of the British steamer Golden Grove, intervening for the interest of the owners thereof, is the respondent.

There are facts in this case admitted on both sides, or so clearly proven as to leave no resonable doubt as to their verity, a statement of which will simplify and shorten its examination:

On the morning of Tuesday, July the 9th last past, at about 1 o'clock, the brig Kremlin, then on a voyage from Cienfuegos to Boston with a cargo of sugar on board, was run into and sunk by the said Golden Grove; the place of collision being about 30 miles S. by ½ a degree E. from the island of Nantucket. The Kremlin was sailing N. E. by E. She was a hermaphrodite brig of about —— tons burden, and was moving at the rate of six and a half knots an hour. Her length was about 117 feet; depth, 15 feet; and beam, 30 feet. She was sailing with a free breeze aft, about one and a half points on the starboard quarter. The night was not dark, neither was it perfectly clear. The horizon was smoky and hazy, though not so cloudy as to prevent stars well above the horizon from being seen. There was no gale—only the ordinary breeze of a summer night on the waters.

The British steamship Golden Grove was on her voyage from Cardiff to the Delaware breakwater for orders. Her course was W. ½ S., and she was sailing at the rate of eight and a half knots per hour. At the time of the discovery of the steamer by the Kremlin the former bore about two and a half points on the starboard bow of the latter. The Kremlin did not change her course in the least degree until she was struck by the steamer. The Golden Grove had but one watch on deck for some time before the collision took place. On the first discovery and report by the watch of the steamer of the bright light or flash-light on the Kremlin, the helm of the Golden Grove "was at once put hard a-port," and from that time to the time of the collision she kept her helm hard a-port, and in that time changed about five points of the compass. No attempt was made until some time after this maneuver to arrest the speed of the steamer; not, indeed, until within some 200 feet of each other, when the attempt which was then made proved utterly inefficacious. Immediately on the discovery of the approach of the steamer the captain of the Kremlin had a torch lighted on the starboard side of his vessel, on which side the steamer was approaching. It was relit twice after it had been first extinguished. It was such an one as was commonly used by sailing vessels on the approach of steamers in the night-time. The Kremlin had no other bright light on board. The red light on the steamer was seen from the Kremlin distinctly before the torch-light was lit.

While it is true that it is the duty of the steam-vessel to avoid the sailing vessel, it is no less the duty of the latter to afford the steamer all the means and signals the law, custom, and common prudence prescribe to enable her to make this avoidance; and if in any respect

she fails therein and thereby produces the disaster, she must either bear the whole loss, or her share thereof, as her fault was the sole or partial cause of the collision.

The libelants say that the Kremlin in all respects obeyed the requirements of the law and usage as regards the conduct and management of sailing vessels, particularly those provisions concerning the exhibition of signals required by law, and that the collision was the result of carelessness, recklessness, ignorance, and the violation of the simplest rules for the preservation of safety on the part of the watch and officers of the steamer. The claimant on the other hand contends that the collision was not the result of any fault on the part of the officers, or of any of the crew of the steamer, but was produced by a series of improper acts and maneuvers on the part of the Kremlin—*First*, (as stated in the printed argument of the claimant, page 22,) by placing her lights so that they did not cover ten points; *second*, by flashing three consecutive lights in such a way as to obscure those lights and make them useless; and, *third*, by failing to do, when the catastrophe was imminent, the only thing which could have been done to prevent the accident, or at least to attenuate its consequences.

It must be evident that this is a case in which the collision was not the result of any accident in the legal sense of the word. Signals were shown and seen. There was ample time in case of doubt, as will be fully shown hereafter, to have arrested the speed of the steamer before an accident was possible. There was nothing in the character of the night as to darkness or storm or dangerous coast to interfere with the full exhibition of signals, their prompt discovery if properly exhibited, and their intelligent interpretation by every man fit to be on the lookout or to navigate a steam-ship. This collision was therefore not the result of accident, but of fault somewhere, either wholly by the steamer or wholly by the brig, or jointly by both. In the investigation of this question of fault I shall take up the subject in the order in which it has been considered by the claimant's counsel:

1. Had the brig proper side lights, and were they properly placed; that is, placed so in the vessel as that no object intervened so as to obstruct the green light on the brig from the lookout on the steamer? It is not contended that the lights, green and red, as required by the rules for preventing collisions on the water, (enacted by the congress of the United States and to be found re-enacted in the late revised edition of the Laws of the United States, § 4233, p. 815,

and in the articles and regulations now in force under orders in council in Great Britain for preventing collisions at sea, to be found in Holt's Rule of the Road, articles 3 and 5, and pages 8 and 9,) were not of the precise kind required by law, as to form, size, quality, and construction of the lantern and fenders. The character of the lights and lanterns and fenders was so abundantly proven by witnesses who spoke to that point, and by the production of a lantern as Exhibit D, which was proven to be of the proper kind, and exactly like those on board of the Kremlin, that it must be assumed as an undeniable fact that the Kremlin had on board the night of the collision, such lights, red and green, and their proper screens or fenders. In this connection it may be stated that it was proven that the lights were larger than those usually used on brigs of the size of the Kremlin, and were of the same size as those used by the steamer.

2. The next question for investigation is, were these lanterns properly trimmed, or prepared and made ready to burn brightly, as they were intended to do and as they were capable of doing? And did they, in point of fact, burn in such a manner during that evening until the collision? On this point we have the testimony of Frank Morgan, who was on board of the Kremlin as cook and steward at the time of the collision. In answer to the question, "State whether or not on the day before the collision you did fill and trim the lamps, and if you state that you did, state fully and in detail all you did to them;" he replied: "Yes, sir; I did every morning, sir. I took the lanterns out and cleaned the glass; I cleaned the reflectors, I trimmed the wick, and I filled them up with oil, and at last I cleaned them all around the bottom and sides." He further said that the lights he lit "were exactly like this one;" putting his hand on the one produced as Exhibit D in this cause. Now this testimony is natural, explicit, and is denied by nobody. Were these lights lit on the night of the collision, and were they burning as they were intended to burn up to the time of the collision? The first mate of the Kremlin, Carlston, says, (page 29, testimony,) in answer to the question, "Do you know who put up the lights that night?" "Yes, sir; the man that was drowned and I myself. I put up the starboard light; the man that was drowned put up the other." So far there can be no doubt that the side lights of the brig were filled, trimmed and lit on the evening of the collision.

It has been asserted by the claimant and respondent that the green light of the Kremlin was burning dimly; that it was not emitting that brightness or intensity of light of which it was capable, and for which

it was constructed; and as that was the side light on the brig, over the port bow of the steamer, from this alleged defect of light, which could have been and ought to have been corrected by the brig, the steamer was prevented from discovering the motions of the brig. The evidence as to the dimness of this green light (outside the question of obstruction) is intended to reach this result, or it amounts to nothing. The matter of having side lights burning with the usual and proper intensity is of importance in the cause; perhaps as of much importance as their proper disposition or placing on the brig. The testimony on behalf of the claimant on this point is as follows: Charles Atwood, ordinary seaman on the steamer, on deck keeping watch on the night in question, just before the collision, in reply to the question, "How was that (meaning the green) light burning?" replied, "*Dim, sir.*" Page 110, testimony. William Wintle, able seaman at the wheel on the steamer, in reply to the question, "When you saw the green light of the brig, how was it burning?" replied, "Dim, sir." Page 121, testimony. Edmund Lee, the lookout on the steamer, in reply to the question, "How was the green light you saw burning?" said, "It was dull, sir." Page 139, testimony. McAdam, second mate of the steamer, in reply to the question of "How the green light was burning," replied, "Very dim." Page 154, testimony.

It is to be remarked that this is the testimony of the lookout, the watch on deck at the time of the collision, the sailing master, and the man at the wheel of the steamer,—the steamer which ran down the brig,—every one of whom were specially, on that occasion, charged with the prompt and accurate observance of signals. Again, that the statement of three of these witnesses—two, that the light was dim, and the other, that the light was dull—are very indefinite and uncertain in their meaning. Again, that this very green light was seen by the men on the steamer in the short intervals between the flare-up or flash-lights. Doubtless this green light was dimmed, if not totally obscured, while the torch-light was burning, but it was clearly seen in the intervals of comparative darkness. How far the one witness, who swore that the green light was very dim, was affected by the confusion of lights, in view of the direct evidence on the other side, it would be useless now to inquire.

The evidence on the part of the brig Kremlin, as to the proper condition of her lights, is as follows: The fact of their having been trimmed, filled, and burnished, affords a very reasonable presumption that they both afterwards did burn in their accustomed manner. The *Vivid*, 7 Note of Cas. 127. The captain of the Kremlin, Haskell, says

(page 3, testimony) that in answer to his question to the mate on the Kremlin, "If our lights were all right," that the mate then walked forward of the mainmast, and walked from the starboard side of the vessel to the port, and said, "Our lights are all right." In answer to the question, "How long before the collision had you seen these lights, or either of them, with your own eyes?" he said, "Thirty minutes, about." In answer to the question, "In what condition were they when you saw them 30 minutes before the collision?" he replied, "They were burning bright as usual." In answer to the question, "Did you see them, or either of them, after the collision?" he replied, "Yes, sir; I saw both of them when the water was coming over the top of that vessel's forward house, burning bright." Pages 8 and 9, testimony. Carlson, the chief mate on the Kremlin, says, on page 29, "I went and looked at the lights;" they were "burning clear;" and this immediately on the discovery of the steamer by her masthead light. John Smith, able seaman on the watch and lookout on the Kremlin, says, (on page 51,) "I saw the side lights before the collision;" and that "they were in good condition as far as he could see." And in answer to the question, "How they were as to being bright or dull," replied, "Bright, sir." Page 51. Nelson, able seaman at the wheel of the Kremlin on the night of the collision, says, (page 58, testimony,) "I saw the side lights three or four minutes past 12, when I came to relieve the wheel;" "they were then in good condition, burning clear as usual." Harding, second mate of the Kremlin, says, (on page 66, testimony,) that "by the captain's order he noticed the side lights at 10 o'clock, when he came from the wheel," and that then they were in "proper condition" and "burning bright." He further states that by the captain's order he looked at the lights at 12 o'clock, and that then they were in "proper condition" and "burning bright." In weighing this testimony on both sides, and considering all the circumstances under which it was given, and the opportunities for correct observation on either side by the various witnessess, the uncertainty and indefiniteness of the testimony of three of the claimant's witnesses as to the degree of light emitted from the green lantern, I have no reasonable ground to doubt that the green light on the starboard side of the Kremlin was burning, before and at the time of the collision, in its usual manner; that is, with the brightness it was capable of showing and intended to show. The only testimony in direct conflict with this result is that of McAdam, the second mate of the steamer, who speaks of the green light as "very dim;" but his testimony alone, as against that of five explicitly-clear witnesses on the brig to the con-

trary of his statement, should have little weight, as will be seen hereafter.

3. The next matter to be determined is, were these side lights properly placed on the brig? That is, were they so placed as not to be intercepted by any object aboard from showing 10 points of the compass from directly ahead to two points abaft the beam? There is no positive law fixing the place where side lights on such a vessel as the Kremlin shall be carried. The objects to be secured are safety to the lights from storm and sea, and unobstructed and continued visibilty of the lights over the points of the compass above named. It would appear that the accustomed place, the very generally used place, and the universally used place on American hermaphrodite brigs of the make and rig of the Kremlin, where the said side lights were placed, ought to be the right and proper place, if any reliance is to be had in the very obvious interest for the safety of the crew, the cargo, and the vessel by their owners and masters. Haskell (page 8) says brigs like the Kremlin carry the lights in the "main rigging." J. A. Wyman, former captain of the Kremlin says, (page 73,) "Hermaphrodite brigs like the Kremlin usually carry their side lights in the main rigging, because they can best be seen there, and when placed there they are not obstructed by the foresail, so that they cannot be seen as they are designed to be seen." John S. Emery, one of the owners of the Kremlin, (on page 76,) says, "Vessels of this rig [that is, of the Kremlin] usually carry their side lights in the main rigging. I think it is the only proper place on a hermaphrodite brig." In answer to the question, "State why you think so," he says, "Because, if properly placed, no sail can obscure them, and they can be carried there with safety from being extinguished by sea or spray." Mr. Caudage, marine inspector for the record of American and foreign shipping at the port of Boston, (on pages 81 and 82,) says, "In American hermaphrodite brigs there are many that carry their side lights there, [*i. e.*, in the main rigging,] but I should think—it is my judgment only—that more carry them on the quarter." In answer to the interrogatory, "Is not the main rigging, in your judgment, a proper place to carry them?" he replied, "It is." Moses H. Small, master mariner, says, (page 88,) "Hermaphrodite brigs usually carry them [side lights] in the main rigging, and that, in his judgment, it was the proper place to carry them." He also said, on cross-examination, (same page,) "I have never seen them carried in any other place on board American vessels," (*i. e.*, hermaphrodites.) George W. Carlisle, master mariner, (on page 90,) says that "hermaphrodite brigs usually

carry their side lights in the main rigging, and that in 'his' judgment it was the proper place." In an answer to the question, "Is there or not, in your judgment, any danger that the side lights placed in the main rigging will be obstructed by any sail or sails from view of any approaching vessels?" he said, "In my judgment there is not." John Dunbar, shipping master, Boston, said he was familiar with hermaphrodite brigs, had commanded several of them, and that, "speaking of hermaphrodite brigs, they [the side lights] are carried in the main rigging invariably, and, in my judgment, I certainly think it the proper place." Mr. Spencer, surveyor, *Bureau Veritas*, classification of ships, etc., a witness for the claimant, in reply to the question, "Is it or not, in your judgment, a proper place on board a hermaphrodite brig to put the regulation lights in the main rigging?" answered, "It is not the proper place unless they are rigged out as far as the vessel is wide."

This is all the evidence bearing on the point as to the usual and proper place of fixing the regulation or side lights on a hermaphrodite brig, and it settles the fact conclusively that the main rigging, in which they were placed on the Kremlin, was the usual and proper place on such a vessel. But it was contended by the claimant that admitting all this, they were improperly placed on the Kremlin,—*i. e.*, so placed as not to be visible to approaching vessels, as required by law; that there was that peculiarity in the make, fashion, and position of the foresail and rigging to the foremast, and their relative position to the lights as they were fastened in the main rigging, which obstructed and prevented these lights being seen as required by law. It is very true that the important question in this connection is not, where was the usual and proper place for side lights to be placed on such brigs as the Kremlin, but were they in fact so placed on the night in question as to cast an unobstructed light, as required by law?

In view of the fact that this green light might have been seen before the lighting of the torch-light by a vigilant watch on the steamer,—such a watch as she was required to keep,—and the further fact that such discovery of the green light without any bright white light on the vessel would have presented the certain signal of a moving vessel, and thus enable the steamer easily to have avoided all danger, I shall examine at some length the question of fact of the actual obstruction or non-obstruction of the side lights on the night in question. It will be understood that the green side light was fastened in the main rigging of the starboard side of the brig. The brig was moving in the course above named at the rate of speed above named,

with a free breeze about one and a half points off of her starboard quarter. Her mainsail was swung over her port side. Her foresail was changed from the square from one to two points forward on the starboard side, the yard being about in a line with the bottom of the sail. The lower clews of the foresail were led forward on the starboard side, and the clews on the port side were hauled back or drawn in. There was no boom or yard to the lower part of the foresail. The angle made by the two lines drawn from the green light to the outer sides of the foresail was somewhat narrowed by reason of the canting of the foresail, and additionally by reason of the clews being drawn to the sides of the vessel, and the bottom of the foresail was considerably raised by reason of the action of the wind in causing it to belly. (1) There was no evidence as to the width of the foresail if stretched along a boom; none as to the width of the foresail relatively to the width of the vessel; none as to the comparative width of the vessel at the foremast and mainmast. The evidence was only general that the Kremlin was rigged as all hermaphrodite brigs usually are. Satisfactory evidence on these points would have closed the case, as far as the obstruction of the lights by the width of the foresail was concerned. Failing this evidence, the proof of the fact of actual obstruction is to be found in the statement of witnesses present on the occasion, and who then and there examined these lights with a view to their "being right," as they expressed it; that is, being visible without any obstruction for the ten points of the compass, as required by law. (2) In the proof of the relative positions of the lights to the sails and rigging, as matters of fact, by persons on board the brig, her owners and former masters; and (3) by expert testimony as to the fact of obstruction and the amount of obstruction to side lights on the brig on the night in question, to be drawn from a suppositious or hypothetical state of facts.

1. I shall not repeat what the witnesses for the libelant have said as to the side lights having been lit, placed in the rigging, and burning brightly, but state briefly what they have testified to as to the fact of their visibility from their own observation. Haskell, pp. 3, 9; Nelson, p. 64; Harding, p. 67; Wyman, p. 73. Capt. Haskell (page 3 of the testimony,) says that at his suggestion the mate, just before the torches were lit, walked forward of the mainmast, and from the starboard side of the vessel to the port, and said our lights are "all right." This was an act of examination made at the time when safety to life and property might depend on the fact of these lights being "all right," and it is but fair to presume that "all right" meant

as they were intended to show; *i. e.*, showing 10 points of the compass from directly ahead to two points abaft the beam of the brig. On page 9, in answer to the question, "As the lanterns were placed could the lights have been obstructed by any of the sails?" he replies, "No, sir; the sails could not obstruct the light in any shape from showing from two points aft to straight ahead." This is the evidence of the captain of the vessel as to the actual obstruction of the lights of the brig by objects on board. This witness certainly enjoyed every opportunity of exact knowledge on this subject. Nelson, able seaman on board the brig, in reply to the question, "State whether or not in your opinion, or according to your best judgment, the foresail of that vessel, as set upon her at any time while you were on board of her, would obstruct her lights, or either of them, as they were made to show;" replied, "No." Page 64, testimony. Harding, second mate of the Kremlin, (page 67,) says that "he never saw her sails set in such a way as that they would obstruct her side lights, or prevent them being seen in such a way as they were designed to be seen, and that he remembered how the sails were trimmed that night." J. A. Wyman, former master of the brig for two and one-half years until September before the collision, after answering that the side lights were properly carried in the main rigging, because they "can best be seen there," replied to the following interrogatory, viz.: "When placed there are they obstructed by the brig's foresail or not, so that they cannot be seen as they are designed to be seen?" "They are not." So much as to the proof from witnesses on the brig on the night in question, (all but Wyman,) on the point of the actual obstruction of the side lights by the sails of the Kremlin.

We will now examine the fact of actual obstruction as an inference to be drawn or not from other facts proven in the cause. It will be remembered in this connection that the steamer was two and one-half to three points off the starboard bow of the brig; that the brig was sailing with the breeze aft on her starboard quarter as described; that the yard of her foresail canted from one to two points forward from the square, and the clews of her foresail were led forward on the starboard side and pulled back on the port side. The brig had a shear that made her deck from fifteen to eighteen inches higher at the foremast than at the mainmast, and she was about one foot lower at the stern than at the bows when loaded. The evidence proves that the side lights were from seven and one-half feet to eight feet from the deck of the brig at the mainmast; the rail was about

two feet from the deck at the mainmast, and the lights were from five and one-half to six feet above the rail.

It remains now to find out how far the lower part of the foresail, if stretched along a boom, was from the deck, and we then can determine certainly whether there was any obstruction to the lights from it, and, if any, how much, by reason of the foresail falling lower than the side lights. The rail is the same in height at the foremast as the mainmast. Haskell says (at page 14, testimony) that the foot or the clew of the foresail was about five and one-half feet (with the yard square) from the rail of the vessel. This would place the foresail, if stretched along a boom, seven feet and a half from the deck. Add to this eighteen inches for the shear of the vessel, the difference in height being fifteen to twenty inches greater at the foremast than at the mainmast, (Haskell's testimony on second examination,) and three inches (for settling by the stern, one foot on account of load) between foremast and mainmast, and we have the stretched foresail nine feet three inches in height above the deck at the mainmast. The lights are about seven and one-half feet above the deck at the mainmast, as aforesaid, which leaves on a horizontal line drawn forward from the lights towards the foresail a space between that line and the bottom of the sail of twenty-one inches. Giving the respondents the benefit of the three inches greater height at mainmast, which the proof will not warrant, it will still give eighteen inches under the sail for the lights to be seen. Now the lifting of this sail up by the wind somewhat at the clews or corners, and considerably as you approach the center from each clew, it will be seen that the lights must have been clearly visible under the foresail, and that this evidence we have been discussing fully corroborates that heretofore quoted as to the lights being set so that they were not in any way obstructed by the sails or rigging of the brig, so as to prevent their showing as they were intended to do by law. It is true, Nelson, able seaman on the Kremlin, states he "guessed" that the lower part of the sail was four or five feet from the rail; but at the same time, in answer to interrogatory 27, page 64, he said that "the lights of the vessel were so set upon her that the foresail never obstructed them," which could not be the case unless they shone under the foresail. I do not consider that his testimony affects or necessarily conflicts with the proof as above established.

But the respondents still insist that the foresail was so much lower than the lights as to obstruct their being seen straight ahead; and

this result is based upon calculations made upon *data* proven by Carlson, mate of the Kremlin. First, Carlson, "guesses" the boom of the mainsail was "seven feet from the deck of the vessel," and then is asked, "Is the boom of the mainsail as high as the clew on the foresail?" His answer is, "Yes, sir; and higher." "How much higher?" *Answer.* "Don't know, sir; could not tell exactly." *Question.* "Was it a foot, or three feet, or five feet?" *Answer.* "It was not five feet; I should call it three feet." Now the argument of the respondents is, assuming the distance of the lights from the deck at the mainmast to be eight feet, and the distance from the boom of the mainsail to the deck seven feet, and the clews of the foresail three feet lower than the boom, then the foresail will fall two feet below the lights, and thus obstruct them from being seen from straight ahead to two points abaft of the beam. Even upon this calculation, eighteen inches for the shear of the vessel being allowed, and three inches for increased height of deck at foremast over that at mainmast,(from loading the vessel,) will bring the clews and lights nearly on a level, to say nothing of the rising of the lower part of the foresail by bellying, and the undulations of the waves, which make the lights show ahead even if somewhat higher than the bottom of the foresail. But the weakness of this argument arises from the uncertainty of the *data* from which the conclusion is drawn, and the generally indefinite and contradictory statement of fact by the witness. First, he "guesses" the height of the boom of the mainsail above the deck to be about seven feet, (at what point in its length is not stated.) Next, he places the height of the rail from the deck "from three to four feet,—four, he thinks,—" and afterwards at "about two,"(near its real height.) And then he infers that the clew is three feet lower than the boom of the mainsail.

We think this evidence is completely disproved by all the other witnesses who speak of this non-obstruction of the lights of the vessel. It is to be observed here that these lights, to have complied with the regulations, must have shown under the foresail. That sail extended over the sides of the vessel, and does in all like rigged vessels, so as to obstruct the lights several points of the compass off the port and the starboard bows, so that it would be impossible to show lights straight ahead unless under the foresail; and, such being the case, all the witnesses who speak of the lights being so fixed as to show as they were intended to show, must be understood as meaning that they showed under the foresail. It is unnecessary, therefore, to examine any theory as to the obstruction of the lights of this vessel drawn from experts; for, if it be true that the lights showed under

the foresail, there is an end of controversy on this point. But to close the door on all doubt it will be found that admitting the foresail dropped so low as to shut out the light from straight ahead, yet all of the expert testimony based on supposititious cases failed to bring the green light of the brig within the obstruction caused by the sails. I conclude, therefore, this branch of the case by stating my conviction that the brig Kremlin had her regulation side lights burning and showing as they were intended to do over ten points from straight ahead to two points abaft the beam.

The *second* proposition is that the sailing vessel violated the regulations imposed upon her by flashing three consecutive torches in such a way as to obscure those lights—*i. e.*, her regulation lights—and make them useless. The captain did, when he saw a steamer approaching him in the night, just what he was required to do by the act of congress especially made for such an emergency. Section 4234, p. 8, 18 U. S. St. (last Rev. Ed.) says: "Every such vessel (*i. e.*, sailing-vessel) shall, on the approach of any steam-vessel during the night-time, show a lighted torch upon that point or quarter to which such steamer shall be approaching." This act of duty is enforced by a penalty of $200 for every omission or neglect in its performance. The sailing vessel was not only permitted to show the torch-lights, but was required to do so, and the captain did it in the manner required by law. He was not to consider whether the other vessel would be confused by such torch light being shown. He had a right to assume that an act of congress creating signals governing the conduct of the American marine in American waters would surely be understood by all the masters and officers of steam-vessels of every country competent to navigate them in such waters. While it is true that, by the common law of the sea, sailing vessels were not required to show these torch-lights to steamers approaching them, yet there was no reason for a moment's confusion or hesitancy or embarrassment (supposing the British captain and officers ignorant of the American law) after the first torch-light was extinguished. The theory and ground of defense of the respondents is that they supposed they were meeting a stationary or anchored vessel—a fishing vessel or open boat. But by the ninth article of Holt, Road, 55, it is provided that "fishing vessels and open boats, when at anchor or attached to their nets and stationary, shall exhibit a bright white light;" and next paragraph, "Fishing vessels and open boats shall, however, not be prevented from using a flare-up in addition, if considered expedient." This is not the time to comment on the conduct

of the officers of the steamer in interpreting signals on the sailing vessel. Such remarks will find a proper place further on in this opinion. Suffice it to say that whatever were the capacities of the steamer and its officers to rightly interpret the signals of the successive torches, the duty was no less imperative on the brig to show those torches not only once, but as often as she supposed they would aid her in warding off danger.

The *third* point made by the respondent is that the Kremlin was in fault "by failing to do, when the catastrophe was imminent, the only thing which could have been done to prevent the accident, or at least to attenuate its consequences." The customary or common law of the sea, and the rule of navigation as adopted by the navigation laws of the United States, are one and the same on the matter of a sailing vessel keeping on her course. The fifteenth article of the regulations adopted in Great Britain is in these words: "If two ships, one of which is a sailing ship and the other a steam-ship, are proceeding in such directions as to involve risk of collision, the steam-ship shall keep out of the way of the sailing ship." Article 18 is in these words: "When by the above rules one of two ships is to keep out of the way of the other, the other shall keep her course, subject to the qualifications contained in the following article." This article is the nineteenth, and is in these words: "In obeying and construing these rules due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger." In the rules for the navigation of the American marine as prescribed by the acts of congress, as above quoted, rule 20 is the same in substance, and nearly in language, with the article 15 above quoted, and identical in meaning. Rule 23 is in these words: "When, by rules 17, 19, 20, and 21, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule 24." Rule 24 is identical with article 19 above quoted in meaning, and nearly so in language. The result of these rules and articles is that the sailing vessel is to keep her course when the steamer approaches her in such a way as to involve a risk of collision. Indeed, on no other basis of action on the part of the sailing vessel could the steamer perform intelligently and with safety the duty of avoiding the former. An absolute certainty that the sailing vessel will pursue a certain course up to the time of immediate danger is essential for prompt, confident, and efficient maneuvers on the part of the steamer to avoid the

former. This would seem to be what was required from the sailing vessel without an additional article or rule to enforce it, as provided in the article 18 and rule 23 already quoted. But these rules render this conduct—*i.e.*, keeping on her course—absolutely imperative on the sailing vessel, unless it should be modified by the provisions of rule 24. In this rule the only reasons permissible for changing the course of the sailing vessel were dangers of navigation, or special circumstances existing, rendering a departure from this rule necessary to avoid immediate danger.

Now there were no "dangers of navigation" to the brig existing in this case which would justify her in changing her course, nor were there any "special circumstances" justifying her in doing so unless the peril was so near and impending that only in that way could she prevent a collision. Many cases have been cited bearing on the duty of the sailing vessel to hold on to her course to the last moment until imminent danger made it necessary to change it. *St. John* v. *Paine*, 10 How. 557; *Crockett* v. *Newton*, 18 How. 581; *New York & Liverpool U. S. M. S. S. Co.* v. *Rumbull*, 21 How. 372; *Haney* v. *Balt. S. Packet Co.* 23 How. 287; *The Potomac*, 8 Wall. 590; *The Fannie*, 11 Wall. 238; *The Lucille*, 15 Wall. 676; *The Commerce*, 16 Wall. 33; *The Free State*, 91 U. S. 200; *The Colorado*, Id. 692; *The Indiana and Buffalo*, Newb. 115; *Port* v. *Castilian*, Holt, Rule Road, 190; *The Iron Duke of Dublin*, Id. 227; *The Clement*, 2 Curt. 363. But granting the brig's ability to avoid collision by a sudden change of course when the danger was very imminent, or at least to have rendered a collision less dangerous, it should not be imputed as a fault to the sailing vessel, if, in the excitement, confusion, hurry, and terror of the moment, produced by the position in which the steamer had wrongfully placed her, she failed to act at all or to maneuver successfully, so as to free herself from danger. *The Carroll*, 8 Wall. 302; *Genesee Chief* v. *Fitzhugh*, 12 How. 443; *Bentley* v. *Coyne*, 4 Wall. 509; *The Lucille*, 15 Wall. 676; *The Falcon*, 19 Wall. 75.

In my judgment, however, when these vessels approached within two or three hundred feet of each other, at the rate of speed above stated, it was simply impossible to avoid a collision, and such was the opinion of Capt. Haskell at the time, (p. 2, testimony.) They were crossing each other's paths, and the real practical question when the green light of the steamer was shut out from the brig was, which vessel would run down the other. As it was, the steamer struck the brig from the front at an acute angle, nearly at right angles aft of the cat-head, on her starboard bow. The result of starboarding

the helm of the brig at the distance of 300 feet, would certainly have been slightly to have arrested the speed of the brig, and very slightly to have put her bows a-port. Remembering that these vessels are continuing at about the same speed, and in the same general direction, the result most probably would have been that the steamer would have passed ahead of the brig, but not so far as to escape from a blow given her by the sailing vessel, somewhere through her length on her port side; and I am confirmed in this opinion, notwithstanding the testimony of experts Mulford, Spencer, and Fremont. Supposititious cases are presented to them, which are essentially wanting in those *data*, on which a correct conclusion could be based. It may be true that no harm could be done by starboarding the helm of the brig when the steamer was two to three hundred feet from her, with her green light shut out, as was thought proper by these witnesses; and if good seamanship consists in doing what can do no harm, but which, in all probability, will be utterly unavailable for any good result, then the course suggested by the experts as proper may be considered good seamanship. But the fact is that neither of the experts had a correct idea of the speed of these respective vessels, and the relative bearing of each on the other, when they gave their opinions as to what good seamanship would, under the circumstances, require. Mulford (second testimony) has the speed of the brig,—*i. e.*, six knots per hour—in his mind, but not that of the steamer, which was eight to eight and a half knots per hour; nor is the exact course of the steamer in his mind at the moment,—only generally, the green light of the steamer seen from two to three hundred feet off on the starboard bow of the brig,—two very essential elements in determining the possibility of avoiding a collision when within, say, 300 feet of each other. Such also appears, from the testimony of Mr. Spencer, to have been the absence from his mind of the material facts necessary to form an opinion of the possibility of avoiding a collision; and he, as Mr. Mulford, under the same supposed state of facts, would have starboarded the helm of the brig to have avoided one. John C. Fremont, master in the United States navy, supposed the course to have avoided a collision was to "have starboarded the helm of the brig, and this would have brought the vessels nearly parallel, and so have lessened the force of the collision; or, if the brig's speed was equal, or greater, than that of the steamer, it would make her pass ahead of the steamer, or turn back out of the steamer's course." In point of fact the sailing vessel was two knots slower

than the steamer, and thus one of the elements in his calculation disappears. He also appears to have had no more accurate estimate of the relative speed of both vessels, and their exact bearing on each other, than the other experts.

I repeat, therefore, when we consider the speed of these vessels, which had not been changed,—that of the brig not at all until the time of the collision, and that of the steamer not until within 200 or 300 feet of the brig,—their relative courses approaching each other, the actual angle at which the blow was struck by the steamer, the place on the brig which was struck,—when we weigh duly these facts, it is a matter of demonstration that no starboarding the helm at the distance of 300 feet could have prevented a collision. Allowing 30 seconds to make a point, by no possibility could she have made more than two-thirds of a point in passing over 300 feet,—and this is a result of mathematical calculation,—and by no possibility could the speed of the brig have been so retarded by starboarding her helm as to allow this steamer, of between 200 and 300 feet in length, to have passed in front of her; and it is almost a demonstration that the only result of starboarding the brig's helm would have been to have inflicted on the port side of the steamer a most serious blow. There was no time to throw the bows of the brig so far to port as to make her take a glancing or slanting blow from the steamer, and the course of the steamer (which struck the brig, as before stated, at an acute angle from the front) could not have changed her course so much as to have prevented a serious blow from the brig, very different in its consequences from a glancing one. I am firmly convinced, therefore, that to have starboarded the helm within 300 feet of the steamer could not have avoided a collision.

So far as to the conduct of the brig. We will now consider the case of the steamer. While there is no material difference between the proctors in this case as to the questions of law arising, yet it may be proper to state the general propositions which will govern as regards the actions of the steamer, as has already been done regarding the actions of the sailing vessel. (1) The obligations and duties of steam-vessels are to be rigidly enforced. See opinion of Chief Justice Taney in 3 Campb. 602, in *Haney* v. *The Louisiana*, and also 23 How. in *Haney* v. *Balt. S. Packet Co.* 287. (2) When a steamer is meeting a sailing vessel it is the duty of the former to keep out of the way of the latter. See articles in Holt, Rule Road, and Regulation of the Rev. St.; *Steamer Oregon* v. *Rocco,* 18 How. 570; *Haney* v. *Balt. S. Packet Co.* 23 How. 287; *The Carroll,* 8 Wall. 302; *The Lucille,* 15 Wall.

676; *The Sea Gull*, 23 Wall. 165; *The Free State*, 91 U. S. 200; *The Indiana and Buffalo*, Newb. 115; *The Monsoon* v. *The Neptune*, Holt, Rule Road, 186; and other cases too numerous to cite. (3) Ocean steamers and lake steamers are required to have sufficient lookouts. See 21 How. 584; 3 Wall. 268; *The Atlantic*, Newb. 139, and 91 U. S. 692. (4) Owners of steam-ships are responsible for accidents occurring by the ignorance and incompetency of subordinates placed in charge of the deck. See *Chamberlain* v. *Ward*, 21 How. 548; *The Colorado*, 91 U. S. 692; *The Sea Gull*, 23 Wall. 165; *Haney* v. *Balt. S. Packet Co.* Id. 287; *St. John* v. *Paine*, 10 How. 537. (5) Steamships being bound to keep out of the way of sailing vessels, by reason of their great powers of rapid self-movement in any direction, are required, in approaching a sailing vessel under circumstances involving a risk of collision, to slacken speed, or, if necessary, stop and reverse.

Upon a careful examination of this case, I conclude that the steamer was at fault in three essential particulars: (1) She had not a proper and sufficient lookout just before the collision. 21 How. 548. (2) The officers and men in charge of and directing the movements of the steam-ship were careless, and grossly ignorant of the meaning of signals, which would have been promptly interpreted by men of ordinary intelligence and fitness for their situations. (3) When it was apparent to any one of ordinary observation and intelligence as a sailor that these vessels were moving towards each other with great risk of collision, no step was taken to slacken the speed or arrest or reverse the motion of the steam-vessel until they were within two or three hundred feet of each other, when the effort made was utterly inefficacious, although there was ample time to have done so and avoided all possible harm.

The law requires a sufficient lookout on all vessels, both steam and sailing. The supreme court, in 21 How. 548, and in 91 U. S. 692, have said that it was usual for ocean steamers to have two lookouts in addition to the officer of the deck, and with no other duties to perform; and in the latter case faulted a large steam-propeller called the Colorado for having an insufficient lookout, though the watch consisted of the mate, one wheelsman, one engineer, and one lookout—precisely the number of the watch on the Golden Grove on duty just before the report of the bright white light on the Kremlin. It is true that the collision in the case of the Colorado took place on a dark night, still the court took occasion to say that such a watch could hardly be deemed sufficient even in a clear night. And this decided fault in not having a sufficient lookout is brought into very probable

connection with this casualty. Certainly there is more probability of discovering dim lights on the ocean by two pairs of watchful eyes than by one, or two pairs would not have been customary on steamships. Now, a discovery and report of the green light or starboard light on the brig would have solved all doubts as to her being moving or stationary, and have rendered the order to port the helm of the steamer manifestly improper. The red light on the port side of the steamer was seen without difficulty from the brig, and there is no reason to believe that the green light of the brig could not be as well seen at that distance between the two vessels immediately before the flash or torch-light was shown. Indeed, upon an examination of the whole testimony as to the distance, the green light could have been seen on such a night; it is quite likely it was visible from the steamer before the torch-light was lit, and Lee, lookout on the steamer, on page 139, testimony, in answer to the question, "At the distance you saw the first bright light could you have seen the green light if burning regularly," replied, "Yes, sir; I could." The proof being convincing that the lights of the brig (to use the language of the witnesses) were burning regularly, it is reasonable to suppose that such green light would have been discovered by a sufficient lookout. Considering the size of the Golden Grove, and her speed, and that she was "in the much-frequented pathway of commerce," the haziness of the night, and that she had a large crew from which to increase the number of her lookouts, I have no hesitation in coming to the conclusion that one lookout was not a sufficient lookout for such a vessel under these circumstances.

2. A gross fault for which the steamer and her owners must be held responsible, and out of which directly grew this catastrophe, was the ignorance and incompetency of those who had charge of the reporting and interpreting of signals and the movements of the steamer. Mr. McAdam, the second mate of the Golden Grove, was not (in the language of the supreme court in *Chamberlaine* v. *Ward*, 21 How. 548) a competent and skillful officer in charge of the deck. He had never before sailed either as seaman or officer on a steam-ship. The law in reference to the responsibility of ship-owners for employing incompetent subordinates is thus laid down in the case just cited: "Owners of steamships must employ skillful and competent officers; and the remark is just as applicable to the under officers, whether the mate or second mate, as to the master, during all the time they have charge of the deck." Mr. McAdam was in charge of the deck at the time of the report of the bright white light by Lee, and the relighting and ex-

tinguishing of the torch-lights, and on the authority of the case above cited he was in fault because he did not seasonably slow the steamer or stop her engines, to avoid all possibility of collision, after it was discovered (upon the extinguishment of the first torch-light, as should have been done without any difficulty whatever) that they were approaching a moving vessel instead of a stationary one.

The respondent insists that he had a right to consider the bright white light reported by the lookout to the master of the deck as the bright white light of a stationary vessel; and he complains as a very great hardship that a British steamer in American waters should be expected to know of a rule of navigation enacted by the congress of the United States, which required sailing vessels meeting steamers in such waters to show a torch-light on the quarter towards which the steamer was approaching. He says he took this torch-light for the bright white light of article 9 and rule 13,—the light carried by a stationary vessel, a fishing vessel, or open boat at anchor. The first question which arises here is, ought the steamer to have mistaken this torch-light for the regulation light, the indispensable white bright light of a stationary vessel? Was such a light distinguishable from a "flare-up," a "torch-light?" Sailing Master Fremont had no difficulty in distinguishing between such lights, and had never mistaken them even in hazy nights for other lights,—steady lights. Testimony, p. 6. Leaving out of the question the sudden extinguishment of the torch-light, which with absolute certainty makes manifest the difference between the two lights, and cannot be therefore the difference referred to by Mr. Fremont, was it not perfectly practicable to distinguish the "flare-up," or "torch-light," the moment it was lit, from the "indispensable bright white light" of the stationary vessel, at the distance of a mile or a mile and a half? The difference between the two lights was such as to be very observable. The bright white light was a steady light—burning continuously and steadily, and not flaring up or moving about over the ship. The flare-up, when lit, was an unsteady light—flaring up, flickering, carried from place to place, now higher, now lower, and throwing lights on the sails in different places with every change of movement. Now, if Mr. Fremont had no difficulty in distinguishing between these lights, the officers of the steamer should have had the same capacity.

It must be remembered that there was no other bright white light on the brig but the "flare-up" or "torch-light," and if it was recognized as such flare-up or torch-light then, at the same moment it would be revealed that there was not the indispensable "bright white light" of

the stationary vessel, and the porting the helm became a fearful blunder. We will, however, give the steamer the advantage of not being able to discover the true character of the torch-light or flare-up until it was first extinguished; but when that event took place, and the sails ceased to reflect the flaring, flashing light, and out of the instantaneous succeeding darkness sprung up the green light of the brig, which at that time in all probability must have been clearly discernible, and there was no bright white light whatever on the vessel, (the indispensable light on a stationary one,) why, still, was the helm of the steamer kept hard a-port, as if with a set purpose to run down the brig? Why was not the steamer's speed instantly arrested; her movement forward stopped or reversed, if necessary? It can be accounted for on no other grounds than the carelessness, incompetency, and stupidity of those in charge of the steamer, in not observing, interpreting, and acting upon the plainest signals, and evidences of a vessel moving and not stationary.

That the steamer was approaching a moving vessel is made evident by the comparative sameness of the position of the bright white light on the brig over the port bow of the steamer from the time of its discovery until almost immediately before the collision, although the steamer had made a change in her course of five points after porting her helm. Edward Lee, lookout, (on page 150,) says that this bright white light "at any time was not more than one point over the steamer's port bow." Charles Atwood (page 109) places the bright light, *i. e.*, two bright lights, one succeeding the other, at from straight ahead to one point on the port bow of the steamer. Wintle, helmsman on the steamer, (page 119,) thought the lights of the brig at the time of lighting the second torch-light were four points over the port bow of the steamer. McAdam, second mate of the steamer, (page 159,) says that the bright light the moment before the ships struck, when the brig was broad on her bows, was about four points on the port bow of the steamer. Now, this may be true, as the vessels were thus brought into juxtaposition with each other, meeting almost at right angles; the white light having been carried amidships on the near approach of the steamer to the bows of the Kremlin. We therefore do not think that the evidence of McAdam as to the position of the brig's light immediately before the collision conflicts materially with that of Lee as to the general bearing of the brig's light over the port bow of the steamer.

Regarding all the testimony as to the position of the brig's lights over the port bow of the steamer, we are satisfied that there was suf-

ficient, in this comparatively-unchanged position of the brig's lights, to have caused serious apprehension that the steamer was advancing on a moving and not a stationary vessel, and that she should at once have stopped (and was in fault in not doing so) so as to have discovered the exact condition of things before she proceeded further. See parallel case, *The Grey Eagle*, 2 Biss. 25; 9 Wall, 505.

No blame is to be attached to the captain of the steamer for not knowing that a torch-light was required to be shown on the brig to the steamer from the quarter to which the latter approached. But the steamer was in fault for not knowing the common law of the sea laid down in article 9 and rule 17, requiring the showing of a bright white light on stationary vessels or fishing vessels, or open boats at anchor, such as the Kremlin was supposed to be. No alleged confusion arising from the consecutive flash-lights could blot it from the mind of an intelligent, observing sailor, immediately on the extinguishment of the first flash-light, that the vessel must be a moving one, and not stationary, because she had not the latter's indispensable signal, *i. e.*, the bright white light. The steamer then—*i. e.*, at the extinguishment of the first torch-light — must have known that there was danger of a collision, or if she did not, it was gross incompetency on the part of her officers to be ignorant of that fact. Under these circumstances, her duty was a simple and imperative one, and that was to retard her speed, stop, or reverse if necessary, until matters were made clear and all danger past.

It was claimed in argument by the respondent's proctors that as stationary vessels, such as they supposed the Kremlin to have been, were permitted to use "flare-ups" if considered "expedient," that the fact that the light shown was a flare-up in no manner undeceived them, but rather confirmed them in the belief that the vessel thus using them was a stationary one. Now both the article and rule referred to allowed the use of two different lights on fishing vessels and open boats stationary in the night-time,—the one a bright white light, made indispensable at all times, and the other a "flare-up" or torch-light, "in addition" to the first-named light. It is very evident these lights were essentially different in character, and intended to be so; one being a continuously-burning light, and the other a "flare-up," a torch-light,—a light burning but a few minutes and relit to meet some special necessity. The use of the term "flare-up," as contrasted with the term "bright white light," and the words "in addition thereto," are conclusive on this point. If, then, it had been impossible to have ascertained accurately when the flare-up was first

lit, whether it was the bright light required both by the rule and the article, it was certainly discovered on its extinguishment that the other bright light, the indispensable light of the stationary vessel, was not there.

After the extinguishment of the first torch-light on the brig, was there time for the steamer to have slackened her speed, stopped, and reversed her motion, so as to have avoided all danger? To answer this question satisfactorily we must know approximately the distance between the two vessels. The means of measuring this distance is afforded with a reasonable degree of accuracy by the length of time three torch-lights were burning; from the time the first was lit until the last was extinguished, which was immediately before the collision. These vessels were approaching each other nearly head on, at the rate of 15 knots per hour,—the rate of the brig being 6½ and that of the steamer 8½ knots per hour. They were approaching each other at the rate of a mile in four minutes. There is a difference of opinion between the parties to this suit as to the length of time each torch-light burned before it was extinguished.

Capt. Haskell, at page 17, testimony, says these torches used on this evening were "kept lit at least eight minutes;" on page 5, "that there was an interval of 45 seconds between lighting and the extinguishment of the torches." On page 20 he says that to the best of his judgment "it was more than ten minutes from the time that light (which we understand to be the mast-head light of the steamer) was seen until we were struck." On page 5 Haskell says: "These torches burned on that night not less than three minutes each time they were lit." On page 21 Haskell says, "On board of a vessel we calculate that a torch will burn five minutes;" and as the result of experiments since made by the captain of the brig, "with such an one as they were using on the night in question, that he burned the first in a little over four minutes, and put it out as soon as he saw it burn dim one particle; the second in three minutes and a half, putting it out when it began to burn dim; and burned the third torch-light three and a half minutes, and then put it out because it burned the side of his face." This is the evidence of the master, who was instrumental in lighting and relighting the torches, and who made experiments since with exactly such a torch as was used on the Kremlin; and, without going any further into an analysis of this evidence, I think we may safely say that these flare-ups burned for the space of two minutes each, with an interval of twice 45 seconds, or a minute and a half, for relighting them, making seven and a half minutes from the time the mast-head light on

the steamer was discovered until the time of the collision. Nor do we think that the testimony offered by the respondent of experiments in New York bay by certain witnesses, accompanied by one of the proctors in the cause, by which it is shown, on hearsay testimony, that a certain torch-light, not made an exhibit in this case, or proven to have held the same quantity of combustible matter (*i. e.*, kerosene) as the Kremlin's, or, in other words, not "such" as was burned by the brig on the night in question, burned one minute or 80 seconds only, should overcome the explicit testimony of Capt. Haskell on this point.

Taking for granted, then, the courses of the two vessels and their speed, and that there was an interval of seven and a half minutes between the lighting of the first flare-up and the collision, we think it cannot be fairly claimed that these vessels were nearer to each other at the lighting of the first flare-up than one and three-quarters of a mile. There is evidence from the steamer, however, as to the time which intervened between the first report of a bright white light ahead and the order given to stop and reverse the motion of the steamer. Charles H. Atwood, on pages 108 and 113, states substantially that on passing from the main deck to the forecastle to relieve the lookout, Lee, he heard him report a bright light ahead, and that, as he passed the chart-house where the clock was placed, about midships of the steamer, on his way to the forecastle, it was between four and five minutes past 2, or not quite five minutes past. It is proven by the assistant engineer of the steamer, C. Ante, (on page 128, testimony,) and also by David Smith, chief engineer, (on page 134,) that it was between nine and ten minutes past 1 when the first order to stop the engine was given, showing by the ship's time there must have been between four and five minutes before any order was given to arrest the speed of the vessel after the discovery of the bright light, moving, as before said, towards each other at the rate of a mile in four minutes. They must have been, then, over a mile apart. Now, giving the steamer the benefit of the time of the burning of the first flare-up to its extinguishment, up to which moment they may be, for the sake of the argument, considered blameless in not discovering the difference between the character of a flare-up and the indispensable bright white light of a stationary vessel, the next question to be considered is, how far were the vessels from each other at the time of the extinguishment of the first flare-up? Charles H. Atwood (on page 108) says that the light was extinguished in about two seconds after he saw it, and that was immediately after it was reported.

McAdam, officer in charge of the deck of the steamer, says (on page 152) "he did not continue to see it (the light) long—it disappeared."

It will thus be seen by the evidence given for the respondent that the first flare-up must have nearly burned out before it was reported; and by the same evidence that it only burned two seconds before it was extinguished. Deducting that time from the period of between four and five minutes elapsing between the report of the bright white light and the order to stop the engine, and we still have by calculation a distance of over one mile for this steamer to arrest her speed, to stop, or reverse, as might be necessary. Now, it was not pretended that any effort was made to do this until the green light of the Kremlin was just under her port bow; that is, within two or three hundred feet of the steamer.

We are now assuming the distance between the vessels to have been about a mile when the first torch-light was extinguished, (and not a mile and a half, as was more probably the case,) and we say there was ample time for the steamer to have avoided all danger, and it was her manifest duty to have done so by immediately arresting her progress, stopping, and reversing, if necessary. The Golden Grove was a powerful steam-propellor of —— tons burden, and between two and three hundred feet in length. By the testimony of her assistant engineer, Clements Ante, her engine run at 72 or 73 revolutions, and she could come to a full stop in one minute and thirty seconds; it took thirty seconds more to come to half speed astern, and two seconds to come to full speed astern. This is the testimony of respondent's witness, and is not modified or contradicted by that of any other person. It is thus evident that, taking the nearest distance between the two vessels as based on the testimony of the respondent alone, *i. e.*, about a mile, there was ample time to have avoided all danger by adopting the obvious and imperative precaution in all cases of doubt of slackening speed, stopping, or reversing, if necessary. For the law bearing upon this point, see the following citations: Rule 21, Rev. St. 818; Holt, Rule Road, art. 16, p. 12; *Peck* v. *Sanderson*, 17 How. 178; *Steamer Louisiana* v. *Isaac Fisher*, 21 How. 1; *Chamberlain* v. *Ward*, Id. 548; *Nelson* v. *Leland*, 22 How. 48; *The Hypodame*, 6 Wall. 216; *The Sea Gull*, 23 Wall. 165; *The City of Paris*, 9 Wall. 634; *The Boughvainville* v. *James C. Stevenson*, 2 Asp. 2; Law Cases, 1; *The Rena* v. *The Ava*, Id. 182; *The Duke of Sutherland*, Id. 478; *The Magnet and The Fanny M. Carville*, Id. 479; *The Port* v. *The Castilian*, Holt, Rule Road, 190; *The Joseph Straker* v. *The Carla*, Id. 200; *The*

Emperor v. *The Lady of the Lake*, Id. 202; *The Monsoon* v. *The Neptune*, Id. 186.

For the reasons above given, the court thinks that the Golden Grove was wholly in fault in causing the collision between herself and the Kremlin, and so adjudges and decrees. As a legal consequence, she must bear all the losses sustained by reason of such collision. *The Sunny Side*, 91 U. S. 208; *The Atlas*, 93 U. S. 302.

The value of the Kremlin at time of loss,	$13,000 00
The value of the chronometer lost,	150 00
The value of John Smith's personal effects,	80 00
The value of Capt. Haskell's personal property lost was,	254 19
Value of charts lost,	281 25
Value of clothing, etc., wife of Capt. Haskell lost,	500 00
Value of (mate) Carlson's clothes lost,	198 00
Value of clothes of Nelson, (able seaman) on the Kremlin, lost,	76 00
Value of clothes lost by Charles Harding, (second mate,)	111 00
Value of goods lost by Charles Smith, deceased sailor,	75 00
Value of goods lost by Morgan, (cook,)	193 53
Value of goods lost by ——— Francais,	75 00
Value of cargo, including original cost of sugars and export duties,	30,431 21
Provisions on Kremlin at time of loss,	121 35
Freight earned by the owners of brig if cargo delivered,	2,336 45

In cases of total loss before freight is fully earned by delivery, the owners of the vessel, if not in fault, are entitled to an apportionment of freight, *i. e.*, to the freight agreed upon, less the costs, charges and expenses of the remainder of the voyage from which they have been discharged by the accident. *The Baltimore*, 8 Wall. 386. In this case, as the voyage had nearly been completed, (as between Cienfuegos and Boston,) and as there has been no proof as to the charges and expenses saved, we will deduct from the freight $336.45 as a reasonable amount, leaving the sum of $2,000 to stand as the freight to which the owners of the vessel are entitled.

Let a decree, therefore, be prepared awarding and decreeing to the owners of the lost property, according to their respective shares, the values of the properties lost, according to the proof in this cause as above stated, together with interest on the several sums of money so awarded them, at the rate of 6 per cent. per annum from the ninth day of July, 1878. That portion of the decree as to the payment for the loss of the deceased sailor's clothes and effects, and also for the loss of the property of the captain's wife, to be made in favor of their personal representatives, when they shall have been appointed and presented the proper evidences thereof before this court.

THE GOLDEN GROVE.

(*Circuit Court, D. Delaware.* October 6, 1882.)

1. ADMIRALTY—COLLISION—STEAM AND SAILING VESSEL.

When a sail-vessel and a steam-vessel are moving in directions which may involve risk of collision, the latter must keep out of the way of the former. It is the right and duty of the sailing vessel to keep her course, except under "special circumstances" rendering a departure from it necessary to avoid immediate danger.

2. SAME—REV. ST. § 4234—TORCH.

Section 4234, Rev. St., which provides that "every sail-vessel shall, on the approach of any steam-vessel during the night-time, show a lighted torch," etc., is as applicable to navigation on the sea as to inland navigation.

3. SAME—EVIDENCE TO SUSTAIN DECREE.

The evidence in this case showing that no fault was to be imputed to the brig, but that the steamer was in fault, the decree of the district court should be affirmed.

In Admiralty.

John C. Dodge and *E. G. Bradford, Jr.*, for libelants.

Coudert Brothers and *Levi C. Bird*, for claimants.

MCKENNAN, C. J. This is an appeal from the decree of the district court of Delaware, awarding damages against the steamer Golden Grove, resulting from a collision with the brig Kremlin.

The following conclusions of fact are the result of the pleadings and evidence in the cause:

(1) On the morning of Tuesday, July 9, 1878, the hermaphrodite brig Kremlin, laden with a cargo of sugar, was on a voyage from Cienfuegos to Boston, and at 1 o'clock was about 30 miles southerly from the island of Nantucket, on the coast of Massachusetts, her course being N. E. by E., with a south-west wind, and a speed of six and a half knots per hour; the course of the steamer being W. ½ S. (2) The weather was calm, an ordinary breeze blowing and the night not dark, but somewhat hazy, not, however, to prevent the stars from being visible. (3) The brig carried the regulation lights,—a green one on her starboard, and a red one on her port side,—which were set in her main rigging, were trimmed, and burning brightly, and were of the character required by the rules of navigation. (4) The main rigging is not only the place in which the side lights are generally set in vessels of the class of the brig; but it is also the place from which they can be seen best. (5) As soon as the steamer was sighted by the brig, which was when they were some two miles apart, the steamer bearing about two and a half points on the starboard bow of the brig, the captain of the latter caused a torch-light to be exhibited on her starboard side. After burning for several minutes it was extinguished, and was twice relit, the brig meanwhile steadily maintaining her course without any variation. (6) This torch-light was distinctly seen by the lookout on the steamer, whereupon her helm was put hard a-port, and was so kept, changing

her course about five points, but her speed was not reduced until the collision was imminent, when an ineffectual attempt was made to that end. (7) The steamer had a single lookout on her deck, from which was visible the starboard light of the brig, inasmuch as it was unobstructed and was burning brightly, and as the mast-head light of the steamer was seen from the brig when the latter first sighted her. (8) The tracks of the vessels were intersecting, and they were thus nearing each other to the point of intersection; yet, if the steamer had kept her course as the brig did hers, she would have passed under the stern of the brig, and the collision could not have occurred; or if, when the steamer changed her course, she had "slackened her speed," or had "stopped and reversed," the brig would have passed beyond the point of peril before the steamer could strike her. (9) The steamer struck the brig about midnight, just aft the cat-head, causing her to sink almost instantly, and involving the total loss of the vessel and her cargo, of everything on board, and the lives of two persons on board of her. (10) The total damages resulting from the sinking of the brig, as of date July 9, 1878, are $47,828.98, which are claimed respectively by the owners of the cargo, of the vessel, and of the personal property lost on board.

It is a fundamental rule of navigation and the common law of the sea, recognized by statute and enforced by the English and American courts, that if a sail-vessel and a steam-vessel are moving in directions which may involve risk of collison, the latter shall keep out of way of the former. Hence, it is not only the right, but the duty of the sailing vessel to keep her course; and this is always imperative, except under "special circumstances which may exist in every particular case rendering a departure from it necessary in order to avoid immediate danger."

There were no circumstances in this case which required a departure from this rule by the brig. She was not derelict in any respect. She had up, in their proper place and condition, the signal lights required by law. She seasonably and accurately observed the approach and movements of the steamer, warned her of her proximity by the exhibition of a torch-light, and kept her course. Thus she fully performed her duty. Her course was obliquely across the line of movement being pursued by the steamer. The place of the collision was beyond the point at which the paths of the vessels crossed each other, so that the brig had passed the point of possible collision if both vessels had kept their course. This is evident from the acknowledged deflection of the steamer to starboard, and from the direction and effect of her impact upon the brig.

Under these circumstances, then, the presumption of culpability is against the steamer, and the burden rests upon her to repel it. This she has undertaken to do on two grounds: (1) That the star-

board light of the brig was burning dimly, and was so obstructed by her rigging that it could not be seen on the steamer; (2) that the exhibition of the torch-light by the brig was unwarranted, and misled the steamer.

The first hypothesis is, it seems to me, so decidedly against the weight of evidence that I dismiss it with the remark that it is unsustained.

It is earnestly urged that, both by the statutes of the United States and the "law of the sea," the brig was not permitted to show a torch-light. The argument is founded upon the assumption that section 4234 of the Revised Statutes is applicable only to inland navigation. This is an unwarranted limitation of the effect of the section. It enacts that—

"Collectors, or other chief officers of the customs, shall require *all* sail-vessels to be furnished with proper signal lights, and *every such vessel* shall, on the approach of any steam-vessel during the night time, show a lighted torch upon that point or quarter to which such steam-vessel shall be approaching."

This language is not only unambiguous—comprehending *all* sail-vessels—but it is imperative, and no sufficient reason is found in the collocation of the section in the original act, of which it was a part, for an arbitrary restriction of the amplitude of its import. But conceding that the brig was not under any legal obligation to show a torch-light, in so doing she did not violate any law, and no fault can be imputed to her for conforming to the laws of her nationality. *The Scotia*, 14 Wall. 185. In that case, Mr. Justice Strong, speaking of our navigation laws, says:

"They are not in terms confined to the regulation of shipping in our waters. They attempt to govern a business that is conducted on every sea. If they do not reach the conduct of mariners in its relations to the ships and people of other nations, they are at least designed for the security of the lives and property of our own people. For that purpose they are as necessary and useful on the ocean as they are upon inland waters. How, then, can our courts ignore them in any case? Why should it ever be held that what is a wrong when done to an American citizen, is right if the injured party be an Englishman?"

In either aspect of the question, then, whether the brig obeyed an imperative requirement of the law of her own country, or merely conformed to a regulation prescribed by such law as useful and necessary for the protection of life and property at sea, she cannot be condemned as in fault. But the steamer was decisively in fault in

omitting to obey the "law of the sea" which required her "when approaching another vessel so as to involve risk of collision, to slacken her speed, or, if necessary, to stop and reverse." She not only did not reduce her speed, but she changed her course, and to each of these causes the collision was attributable. That she was conscious of the risk of collision is demonstrated by the fact that she deemed a change of her course necessary to avoid it, and so effected the change. She observed the torch-light on the brig, and thus was warned of the proximity of another vessel when she was at a sufficient distance to enable the steamer to adopt effective precautions against collision. But she recklessly or inconsiderately maintained her speed, and thus rendered the destruction of the brig inevitable.

For these reasons I am of opinion that the cause was rightly decided by the learned judge of the district court, who exhaustively considered it; and it is therefore ordered that the same decree be entered at length in this court which was rendered in the district court, together with the interest to the date, in favor of the respective libelants and against the respondents and their stipulators, with all the taxable costs in the case.

See *The Golden Grove*, *ante*, 674.

THE E. A. BAISLEY.

(*District Court, E. D. New York.* October 9, 1882.)

ADMIRALTY—SERVICES OF COOPER—PERFORMANCE ON REQUEST.

Where a vessel laden with sugar was discharged at quarantine in New York harbor, the master being sick and the mate temporarily in charge, and a master cooper thereafter libeled the vessel for services said to have been performed by one of his men in coopering casks on board, and the claimants of the vessel, in defense, undertook to show that the cooper was accidentally there, and was not employed by any one on behalf of the ship, *held*, that the facts proved—the presence of the cooper; that casks were necessarily coopered; that the mate who had charge brought the cooper there; and that a bill rendered for the work was not objected to by the mate, save one item, which was corrected,—were sufficient to warrant the conclusion that the mate directed the work to be done on behalf of the vessel with apparent authority, and that the cooper performed it at his request.

Beebe, Wilcox & Hobbs, for libelant.
Benedict, Taft & Benedict, for claimant.

BENEDICT, D. J. The necessity for the services of a cooper in behalf of the vessel is shown by the evidence that the lightermen refused to receive the cargo until the casks were coopered. The testimony to this fact is not contradicted. The presence of the cooper, Kippel, on board the vessel while the cargo was being delivered to the lighter is proved not only by the libelant's witnesses, but also by the claimant's witness Lewis; and it does not appear that Kippel had any business there unless it was to cooper the cargo. Two witnesses testify that the mate of the vessel employed Kippel to cooper the cargo before it left the vessel, and brought him to the vessel for that purpose. This testimony is not contradicted. The claimant's witness Lewis proves that the mate had charge of the delivery of the cargo to the lighters, showing that if the cargo required to be coopered the mate would naturally have been the man to order it. The mate is not called in behalf of the vessel, and his absence is not accounted for. Kippel made a demand of the libelant for labor performed by him in coopering this cargo, and he has been paid therefor by the libelant. When Lewis saw the bill of libelant for Kippel's labor and one empty cask, the only objection he made was to the item of the cask, and the bill was corrected in that particular. These facts compel the conclusion that the services sued for were rendered on board the vessel by Kippel, and that they were performed at the request of the mate, who had an apparent authority to contract therefor. The liability of the vessel follows, of course.

Upon the evidence the libelant can recover for four days at five dollars per day. There is no evidence as to the quantity or value of material furnished. Let the decree be for $20 and costs.

SHIRLEY *v.* WACO TAP R. CO. and others.

(*Circuit Court, N. D. Texas.* October 13, 1882.)

1. REMOVAL OF CAUSE—SUIT PENDING—APPLICATION TOO LATE.

In a suit pending at the time of the passage of the act of March 3, 1875, and thereafter tried in the state court, wherein judgment was rendered and the cause carried to the supreme court of the state, the application for removal by new parties defendant comes too late, unless the making of the new parties was in effect the institution of a new suit.

2. SAME—TRUSTEES OF DEFUNCT RAILROAD AS PARTIES—TEXAS CODE.

Under the provisions of the Revised Code of Texas, if a party holding a deed in trust of a railroad company sells out the road-bed, track, franchise, and chartered powers and privileges of such company, a suit pending against such company does not thereby abate, and subsequently making the directors of such defunct company parties to such suit is merely a continuance of the original suit, and the application of such directors to remove the cause into the circuit court, made after two trials and judgments, and two appeals, comes too late.

This cause was removed from the state courts by the defendants. Motion to remand made by the plaintiff.

E. A. McKinney, for plaintiff.

Alexander & Winter, for defendants.

PARDEE, C. J. This suit was instituted in the district court of McLennan county, of this state, in 1870, by the plaintiff against the Waco Tap Railroad Company for a breach of contract. Pending the various proceedings, including two trials and judgments, and two appeals to the supreme court of the state, the Houston & Texas Central Railroad Company, holding a deed in trust granted by the Waco Tap Railroad Company, sold the road out and became the purchaser, all of which resulted in making the Houston & Texas Central Railroad Company a party defendant to the original suit. After the last appeal, decided in 1880 and reported in 54 Tex. 125, resulting in a reversal of a judgment of the lower court and a remanding of the case, a consolidated and amended petition was filed, making John T. Flint and others, constituting the board of directors of the Waco Tap Railroad Company at the time of the sale in the proceedings under said trust deed, parties defendant, and asking against them as trustees for all the relief that the plaintiff could have demanded from the Waco Tap Railroad Company had it continued in existence. This last making of parties was done, and perhaps necessarily so, under the provisions of sections 4264 and 4265. Rev. Code of Texas, § 4264, provides that whenever a sale is made of the road-bed, track, franchise, and

chartered powers and privileges of a railroad company, as provided by the laws of Texas, (unless other persons are named by some court or the legislature,) the directors or managers of the sold-out company at the time of the sale shall be the trustees of the creditors to settle up the remaining business and affairs of the sold-out company, and as such trustees may sue and be sued, etc. Section 4265 reads:

"No suit pending for or against any railroad company at the time that the sale may be made of its road-bed, track, franchise, and chartered privileges shall abate, but the same shall be continued in the name of the trustees of the sold-out company."

Citation was issued against the said trustees, who thereupon appeared in the state court and filed petition, affidavit, and bond for the removal of the cause to this court, on the ground that the case involved a controversy between citizens of different states, the plaintiff being a citizen of the state of New York, and the defendants all citizens of the state of Texas. The transcript having been filed in this court, the plaintiff moves to remand the case on several grounds, only one of which, however, is it necessary to consider. It is objected that the petition for the removal came too late. The case was one pending or instituted at the time of the passage of the act of 1875, under which the removal was made. It was thereafter tried in the state court. Judgment was rendered, and the cause was carried by appeal to the supreme court of the state. The removal, therefore, came too late, unless the making of the trustees parties, so as to continue the suit in the name of the trustees under section 4265, was in effect the institution of a new suit against the defendant trustees so made parties. It can hardly be denied that the trustees made defendant could not have moved for the removal of the cause before they were made parties, and if they were entitled to remove the case they would have, after being cited, up to and during the term at which the case against them could be first tried (provided it was before the trial) within which to ask for the removal. So that if the defendant trustees had the right to remove the case at all, the removal was not too late, as it was applied for at the time of entering appearance.

The whole question, then, turns upon the force and effect of said section 4265 of the Texas Code. We are of the opinion that under said section and the preceding ones, in relation to the effect of a sale of the road-bed, track, etc., of a railroad, there was no abatement of the suit then pending against the Waco Tap Railroad Company by the sale made to the Houston & Texas Central Railroad Company,

and therefore there was no revivor even, when the defendant trustees were made parties, much less the beginning of another or new suit against any of the defendants. The language of the section 4265 expressly stipulates that there shall be no abatement of the pending suit; and, on principle and authority, if there had been an abatement and a revivor under the statute, no case being make against the trustees of the defunct corporation in *autre droit*, the new parties so made could not have removed the cause at the stage it had then reached. See *Clark* v. *Matthewson*, 12 Pet. 164. The new parties made in this case stand in the shoes of the defunct company they represent, and their citizenship is the same. The right to remove the case apparently existed for the defunct company on the grounds the trustees claim as making their right to remove the case. Had the defunct company desired to remove the case to this court, it should have taken the proper steps after the passage of the act of 1875, and before or at the term the cause was first ready to be tried in the state court. Not having taken the proper steps within that time, the right to remove was lost, and the company accepted the jurisdiction of the state court, beyond their power thereafter to decline it. The trustees made parties under section 4265, Rev. Code of Texas, have no other rights than the company had, and they are made parties to continue the old case without any abatement thereof, not to change the old case into the institution of a new suit.

The motion to remand is granted, and the proper order will be entered.

Judge McCORMICK concurs.

WALLACE v. WILDER and others.

(*Circuit Court, D. Massachusetts.* October 23, 1882.)

1. ARBITRATION BOND—LIABILITY OF SURETY.

Upon a consideration of the facts of this case, and an examination of a bond given by defendants in an arbitration proceeding, it appeared that the questions considered and passed upon by the arbitrators were properly before them, and it was *held* that the fact that the surety did not understand the real purport of the bond, or that he may have been misled by the belief of the principal as to certain things, did not relieve him from liability on account of the refusal of the principal to abide by the award, and that judgment must be rendered in favor of plaintiff for the penal sum of the bond, with interest thereon from the date of the breach thereof. Pub. St. Mass. *c.* 171, § 9.

2. SAME—FRAUDULENT REPRESENTATIONS OF PRINCIPAL.

Even when fraudulent representations are made by a principal, the surety cannot be permitted to show them as a defense against the obligee of a bond in a suit for the breach thereof.

S. N. Aldrich and *Ball, Storey & Tower*, for plaintiff.

T. L. Wakefield, for defendants.

COLT, D. J. This is a suit upon a bond. The parties having waived a jury trial, the case was heard by the court. To a proper understanding of the case it is necessary to state the facts in some detail:

In 1871 the firm of Wallace & Co., composed of David Wallace, James Wallace, John Wallace, George G. Wilder, and George W. Bancker, was formed, for the purpose of carrying on the dry goods business in the city of New Orleans. By the articles of copartnership David Wallace was to furnish as capital the sum of $250,000, and James Wallace the sum of $75,000. David Wallace was to have 50 per cent. of the profits, James Wallace 15 per cent., John Wallace 10 per cent., George G. Wilder 15 per cent., and George W. Bancker 10 per cent., but David and James Wallace and Wilder were not to draw more than $10,000 a year, and John Wallace and Bancker not more than $7,500 a year, from the profits. Should the partners at any time disagree, either during the partnership or its liquidation, they were to submit their differences to amicable compounders, whose decision should be final.

The firm continued until November, 1875, when it became insolvent. On December 6, 1875, the other partners conveyed all the property of the firm to David Wallace as liquidator, to effect a settlement, if possible, with the creditors by compromise or otherwise, Wallace agreeing to settle with the partners "for their interest in any amount of profit arising from a compromise of the liabilities of the firm;" the settlement to be "made monthly, commencing on or before one year from the date of compromise." Wallace was to account to the partners "for any profit made by this settlement, according to the respective interests of each partner, as stipulated in their several acts of copartnership." Any disagreement that might arise in the settlement was to be decided by arbitration. Each partner was allowed to draw $500 per month from the first day of December, 1875, during the time of their services in the liquidation. Another paper signed the same day provided for the settlement of confidential debts and borrowed money. By an agreement dated December 7, 1875, between David Wallace and Bancker, the former agreed that Bancker, in addition to the rights guarantied to him in the transfer of December 6th, should not be liable for the amount of the debit of his account to the extent of $7,500 per annum from January 1, 1871; and the sum of $500 per month, during his term of service, was guarantied to him for one year from January 1, 1876.

On March 7, 1876, a composition was brought about with the creditors under the bankrupt act, and a final decree entered in the United States district court of Louisiana. This settlement was effected by the payment of 33⅓ per cent. of the indebtedness.

On March 23, 1876, a more formal transfer of the firm property to David Wallace, as liquidator, was made by the other partners. This agreement provided that David Wallace should "hold the surplus funds, if any, realized out of said assets, for account of the partnership, subject to the rights of the respective partners, according to the provisions of the several copartnership papers, and the several agreements of the sixth of December, 1875, and other dates."

On April 26, 1877, Bancker and Wilder filed a petition in the fifth district court for the parish of Orleans against David Wallace, for a proper distribution of the partnership assets in his hands. James Wallace and John Wallace were joined as parties defendant. The petition sets out the partnership, the share of Bancker and Wilder in the profits, and the embarrassment of the firm in the latter part of 1875. It refers to and makes part of the petition the agreements entered into by the parties, by which the firm property was placed under the control of David Wallace as liquidator. It recites the composition effected with the creditors, and then states the amount required to pay such composition, and the amount of firm property and assets realized, claiming there is a large balance in the hands of David Wallace, which he neglects and refuses to account for. It charges various irregularities on the part of David Wallace in the administration of the assets in his hands, and alleges, among other things, that he seeks to charge against the partnership of Wallace & Co. obligations contracted in violation of the articles of partnership; that in order to increase his apparent capital in the firm of Wallace & Co., he seeks to charge $20,000 of stock of little or no value, illegally claiming this amount must be allowed before any share of profits is paid to the petitioners. It further alleges that over $10,000 are now due and owing to each of petitioners from David Wallace, upon a proper accounting and settlement, and that such accounting and settlement are necessary. The petioners pray for an injunction, and that a receiver may be appointed and put into possession of all the assets, property, books, and papers of the firm, to liquidate said firm, in accordance with law and the agreements of parties, under the orders of court; that a proper accounting and settlement may be had of the partnership of Wallace & Co.; that such sums may be paid the petitioners as are lawfully due them; and that the other partners may also be paid their just shares.

On June 30, 1877, before any answer was filed, an agreement was entered into between the partners to take the case out of court and submit all their differences to arbitration. This agreement recites that, whereas, the parties "are now engaged in a litigation in the fifth district court of this city, with reference to the settlement of the partnership that formerly existed between them under the style of Wallace & Co.; and, whereas, all parties, in advance of the decision of the court on the questions now submitted to it, are desirous of submitting all their differences to arbitrators and amicable compounders," therefore, "they mutually agree to submit all their differences, and all questions arising out of the settlement of the partnership of Wallace & Co., and all disputes which may arise between the parties in the course of the arbitration with reference to said partnership affairs, to arbitrators, who shall have the power of amicable compounders." After some provisions as to the arbitrators,

it then states that "Bancker and Wilder on the one part, and the Wallaces on the other, are to enter into a penal and security bond to each other, with good and solvent security, to be accepted by the parties, in the sum of $15,000, to be condititioned as follows, to-wit: that they will abide by the award as made by the amicable compounders, and will pay the sums adjudged against them within 60 days from the date of the award, the bankruptcy of the parties not excepted, otherwise they and their sureties to be liable for the amount of the award, and the amount of the penalty fixed in the bond."

This clause is so far modified in a later part of the agreement that Bancker and the Wallaces are to give bonds to each other in the sum of $10,000, and Wilder and the Wallaces in the sum of $5,000. All parties signed this agreement in person but Wilder; Bancker, as agent, signed for him.

The arbitrators appointed in pursuance of the submission proceeded to act. At their second meeting in January, 1878, Bancker and Wilder filed a protest against their exceeding their jurisdiction, contending that the question submitted is what distribution shall be made between the respective partners of the surplus remaining after payment of the composition in bankruptcy; that the discharge operated in favor of each partner, as well against his several copartners as against third parties, therefore there could be no claim existing in favor of one partner as against another. They further claimed that under the agreement of December 6, 1875, David Wallace was to distribute the surplus ratably among all the partners, as distributions were made under the articles of copartnership; that the surplus is in law profits, and is so regarded by the letter of said agreement, which reads: "And shall settle with them (his copartners) for their interest in any amount of profit arising from a compromise of the liabilities of the firm;" that this view is confirmed by the succeeding clause, which provides "that David Wallace shall make monthly settlements with his copartners," and is further confirmed by the fact that this arbitration has been substituted for the suit in the fifth district court, which had for its object a distribution of the surplus in the hands of David Wallace.

In May, 1878, the arbitrators awarded judgment against Wilder and in favor of David Wallace for $13,059.15. In their award they state that "there is no reason in law or in practice, so far as shown, that the separate interests of this copartnership should be settled in any other way than by the laws which govern all ordinary business copartnerships, and no law which changes the relations between the parties as to the surplus remaining after the composition debts are paid." They therefore find "that the surplus must be divided among the partners with reference to the individual accounts of each partner with the partnership, and with his copartners, and that the capital must be replaced to the partners who put in capital before there can be any division of profits." They further find that Bancker and Wilder put in no part of the capital; that the assets, after the composition, would not be sufficient to replace the capital of the Wallaces, allowing for all over-drafts; that, therefore, in no event could there be any surplus of profits coming to Bancker or Wilder. They further find Wilder indebted for over-drafts and money received by him during the existence of the firm, and since it went into liquidation, over and above the amount he was allowed to draw of $13,-

059.15. Bancker, by reason of certain agreements personal to him, was discharged from any liability.

The award was afterwards made executory in the fifth district court for the parish of Orleans, and upon appeal to the supreme of the state judgment was affirmed, and a motion for a rehearing denied. George G. Wilder having failed to pay the award, this suit is now brought by David Wallace against him and Herbert A. Wilder upon the bond for $5,000, given in conformity with the agreement to arbitrate. Both are principals in the bond, though, in fact, Herbert A. Wilder signed as surety. George G. Wilder having died since the suit was commenced, it is continued against the surviving defendant. Pub. St. Mass. *c.* 165, § 12.

The main controversy in this case turns upon the proper construction of the condition in the bond, which is as follows:

"Whereas, George W. Bancker and George G. Wilder have agreed with said David Wallace to submit to arbitration certain matters in difference between them and said Wallace, appertaining to the distribution among the partners of the late firm of Wallace & Co., of New Orleans, of the assets of said firm now in the hands of said David Wallace, hereby ratifying the action of said Bancker in the matter of said agreement to arbitrate: Now, if the said George G. Wilder shall abide the decision of the arbitrators, and pay to said David Wallace such amount as shall be awarded to be paid to him, within 60 days from the date of the award, then this obligation shall be void, otherwise it shall be and remain in full force and virtue."

The language and meaning of this instrument, in the light of what had transpired between the parties, seem clear and unmistakable. Differences had arisen, as we have seen, in relation to the distribution of the assets in the hands of David Wallace; these differences Bancker and Wilder had agreed to submit to arbitration, and Bancker's action in signing the submission for Wilder is ratified.

The defendants contend, however, that the agreement to arbitrate is broader than the bond; that it embraces all differences between the parties, while the bond only covers such differences as appertain to the distribution of the assets; and that while the bond may include all questions relating to such distribution, it covers nothing more.

We agree with the defendants that strictly the bond only includes differences appertaining to the distribution of the assets in the hands of David Wallace, and that all questions in the submission not appertaining to such distribution would not come within the letter of the bond. But the defendants wish us in effect to go beyond this, and hold that these words mean a distribution according to their understanding of the agreement of December 6, 1875; that is, a distribution of the assets as profits, subject only to an accounting during the time of liquidation. But this is assuming that the bond means

that the main difference between the parties on the subject of distribution should be decided in the defendants' favor; for David Wallace took quite a different view of the agreement of December 6th. He claimed that before there could be any profits to divide, a general accounting should be had between the partners prior as well as subsequent to the time of liquidation, and that he should be allowed in such accounting for the capital he put into the firm; and this was the view taken by the arbitrators. To say that we must assume the defendants' construction of the agreement of December 6th to be correct, and that the only differences submitted were such as might follow upon such an assumption, is manifestly wrong. Why should one construction of the agreement be adopted rather than the other? If the defendants so understood the agreement, the bond should have been so worded as only to cover the differences that might arise upon such a construction.

Questions appertaining to the distribution of the assets being within the scope of the bond upon the narrowest construction, we must hold that the proper interpretation of the agreement of December 6th, and the question of accounting growing out of it, were within the bond. It follows as a consequence that, so far as the award only embraced such questions, the bond would be good, though the submission may have been broad enough, owing to the general terms used, to have comprehended other differences.

An examination of the record, however, discloses that all the real differences between the parties, so far as we know, related directly to the distribution of the assets, and that however comprehensive the submission may have been by reason of the use of general terms, it was only intended to be acted upon and was only in fact acted upon in respect to matters relating to such distribution, and such matters were alone considered in making up the award. In other words, the cause and source of all the differences between the parties grew out of the subject of distribution. Is there any matter of controversy over the meaning of the agreement of December 6th, or contained in the suit brought by Bancker and Wilder, or mentioned in the submission, or referred to in the protest or the award, which does not clearly appertain to the manner in which the surplus assets shall be distributed?

Bancker and Wilder claimed that according to law, and the agreement of December 6th, the surplus was to be distributed as profits, and that no accounting could be had prior to the time of liquidation.

Wallace claimed that according to law, and the agreement of December 6th, before there could be any profits to divide there must be

an accounting during the time of the partnership as well, and that he should be allowed for the capital he furnished. Surely these, the main questions in dispute, were most significantly connected with the distribution of the assets.

The suit brought by Bancker and Wilder is termed by them in their protest before the arbitrators a suit for the distribution of the assets, and an examination shows that the matters therein alleged related directly to this.

The agreement to arbitrate distinctly says that it is to be substituted for this suit.

In their protest before the arbitrators the defendants are far from showing that questions foreign to the distribution of the assets were under consideration. They simply claim certain things as law, and a certain construction and understanding on their part of the agreement of December 6th. If the arbitrators had held their law or their construction of the agreement to be sound, undoubtedly the questions to be passed upon would have been narrowed; but these very questions involved the main issues between the parties on the subject of distribution.

We find the award turned upon the issues thus raised, being the questions of partnership accounting and allowance of capital,—subjects vitally connected with such distribution.

It is unimportant, therefore, that the submission may have employed terms broad enough to cover other differences, if, from the beginning to the end, the whole controversy centered about and turned upon questions which related to the manner of distribution. The fact is, the real point in dispute was not between matters which related and matters which did not relate to the distribution of the assets; but at what period of time should the accounting, in such distribution, according to law and the agreements of parties, begin? No distribution could well take place without an accounting of some character; but should such accounting cover only the period of liquidation, or the partnership as well? Now that the accounting during the time of liquidation should appertain to the distribution of the assets, and be covered by the bond, as the defendants admit, but the accounting prior to such liquidation and during the partnership should not appertain to such distribution, and not be included in the bond, can hardly be true. Of course, the defendants here fall back upon what they say they understood the agreement of December 6th to mean, and what they believed the law to be as to any partnership accounting after a discharge in bankruptcy. But this is no answer,

because what the agreement of December 6th meant and what was the law were the very questions which met the arbitrators on the threshold of their investigation.

We are not deciding the merits of the original controversy. Our inquiry is directed to ascertaining the subject-matter covered by the bond, and we are of the opinion that the bond embraces all questions acted upon in the submission and governing the award. But, looking for a moment at the agreement of December 6th, we can hardly agree with the construction put upon it by Bancker and Wilder. Whatever may have been their understanding of it at the time, or the spirit of it, as Bancker terms it, its express provisions nowhere state that Wallace is to hold the surplus as profits, subject to no accounting back of the time of liquidation. Nor is this by any means to be reasonably inferred from what is said. Wallace agrees to account *for such interest* as the other partners may have in the profits, which is essentially different.

Again, if the understanding of this agreement was that the surplus should be distributed as profits, subject to no partnership accounting of any kind back of the time of liquidation, why should Bancker on the following day obtain an additional agreement from Wallace not to debit his account with the $7,500 a year he drew during the continuance of the firm? Why should he obtain verbal and written agreements which fully protected him upon any such back accounting?

In the further paper of March 23, 1876, which was a more formal transfer of the firm assets to David Wallace as liquidator, why did not Bancker and Wilder make their understanding of the agreement of December 6th clear? In the suit brought by them in April, 1877, against David Wallace, they allege that he wrongfully seeks to have allowed $20,000 of worthless stock as capital, thus raising the question themselves of an allowance of capital, and so of an accounting prior to liquidation. Nor do they specifically deny that the good capital furnished should not be replaced, or that the accounting should not go back of insolvency. On the contrary, while the object of the bill is for a distribution of the assets in the hands of Wallace, it calls at the same time for the usual accounting had upon a dissolution of a partnership.

If Wilder understood that the agreement to arbitrate and the bond were only to cover an accounting since the liquidation, why did he not, on arriving at New Orleans, and discovering, as he claims for the first time, the breadth of the submission, repudiate Bancker's

authority to sign for him a submission of such a character, instead of ratifying it by his acts and by the language of the protest?

It seems to us that the explanation of George G. Wilder's conduct lies in his confidence that legally there could be no accounting between the partners prior to bankruptcy, and that when he found the arbitrators took a different view, on his arriving at New Orleans, by calling for the firm books, he fell back on the agreement of December 6th, which he also thought protected him. But with all that preceded the submission it would seem as if he must have known that David Wallace took different views upon these questions from his own; at least, sufficient had happened to put him upon his guard in signing any submission or bond in connection therewith. If he took the risk and gave a bond covering differences appertaining to the distribution of the assets, neither he nor his surety can complain because he was mistaken, in the opinion of the arbitrators, as to the law and the construction of the agreement of December 6th.

Holding as we do that the bond covers the questions acted upon in the submission and governing the award, there is no force in the point, so far as this action is concerned, that Wilder did not authorize Bancker to sign so broad a submission, because Bancker's action in matters covered by the bond is ratified in the recital. Again, the acts of Wilder in attending all the meetings of the arbitrators but one without denying Bancker's authority, and the language of the protest signed by him, in which he speaks of the submission as signed "by all parties in interest," place the question of ratification beyond any reasonable doubt. Nor can the fact that the surety Herbert A. Wilder did not understand the real purport of the bond, or that he may have been misled by the belief of George G. Wilder as to certain things, relieve him from liability. *Western N. Y. Life Ins. Co.* v. *Clinton*, 66 N. Y. 326; *Ladd* v. *Board of Trustees*, 80 Ill. 233. Even where fraudulent representations are made by the principal, it has been held the surety cannot be permitted to show them as a defense against the obligee. *George* v. *Tate*, 102 U. S. 564; *Dair* v. *U. S.* 16 Wall. 1. Nor, if the bond in suit is sufficiently broad to make him liable, can the fact that Herbert A. Wilder refused to sign the first bond that was drawn make any difference. This earlier paper was certainly very general and somewhat indefinite in its terms, but even this received the signature of George G. Wilder. Nor can the fact that the corresponding bond, given by Wallace to protect Wilder, was not actually signed by him, affect this case. Wallace gave a similar bond, with surety, which, so far as appears, was satisfactory and acceptable to

Wilder. Even if the submission calls for a bond signed in person by Wallace, which he disputes, after a bond had been given which was apparently satisfactory, and the arbitrators had gone on and acted and made an award, it is too late for Wilder now to attack the validity of his own bond on this ground.

There is still less merit in the technical objection raised by the defendants that the award was in favor of David Wallace, liquidator, while the bond was to pay David Wallace. The whole arbitration proceeds upon the theory of an accounting between Wallace and the other partners, and the award is clearly the sum due from Wilder to Wallace personally; therefore the fact that he is termed liquidator must be considered, as urged by the plaintiff, merely a manner of designation or description,—not as meaning a distinct capacity in which the fund should be held.

Verdict should be given in favor of the plaintiff for the penal sum of the bond, with interest thereon from the date of the breach, July 2, 1878, and judgment so entered. Pub. St. Mass. c. 171, § 9; *Leighton* v. *Brown*, 98 Mass. 515; *Bank of Brighton* v. *Smith*, 12 Allen, 243; *Ives* v. *Merchants' Bank*, 12 How. 159, 165.

SEARLS *v.* WORDEN.

(*Circuit Court, E. D. Michigan.* 1882.)

1. CONTEMPT—PENALTY.

   It seems that in fixing a penalty for contempt in the violation of a temporary injunction in a patent case, the court may ascertain the amount of defendant's profits, together with complainant's costs and expenses, and impose the aggregate sum by way of fine, and direct the same to be paid over to the complainant in reimbursement of his damages.

2. SAME—A CRIMINAL OFFENSE.

   But as such contempt is a criminal offense, the fine should bear a just proportion to the magnitude of the offense, and ought not in general to exceed such amount as would ordinarily be imposed as a fine, when paid over to the government.

In Equity.

J. P. Fitch, for complainant.

Sprague & Hunt, for defendant.

BROWN, D. J. This is an application to fix a penalty for contempt in selling 62 gross of whip-sockets in violation of an injunction against the sale of such sockets, which had been adjudged to be an

infringement of complainant's patent. The sockets were sold in bulk to one Havens, upon the day the injunction was issued, and Havens thereafter disposed of them in small lots, received the money therefor, and paid it over to the defendant. This sale to Havens was, under the circumstances, adjudged by this court to be merely a subterfuge, the defendant Worden was adjudged guilty of contempt, and the case was referred to a master to compute the amount of profit realized by the defendant, together with complainant's costs and expenses. The question now arises as to the amount of fine to be imposed, and its distribution. The main question is whether the fine ought to be assessed at a gross sum, in the nature of a penalty, to be paid over to the government, as in an ordinary criminal proceeding, or whether it may be determined by the amount of profit realized by the defendant, and the costs and expenses incurred by the complainant, and the aggregate ordered to be paid over to the complainant in reimbursement of his damages. If the question were to be determined at all by the laws of this state, there could be no doubt of our power to indemnify the complainant in this manner, since the Compiled Laws, § 5709, provide that "if an actual loss or injury has been produced to any party by the misconduct alleged, the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him, and to satisfy his costs and expenses, instead of imposing a fine upon such defendant." This section is copied from a similar New York statute, and the practice has been enforced in several cases in that state. *People* v. *Spaulding*, 2 Paige, 326; *People* v. *Bennett*, 4 Paige, 282; *People* v. *Davis*, 15 Wend. 602. It is unnecessary to say that this statute has no application to cases in the federal courts, nor is there anything in the English or American books upon equity practice which seems to justify an order of this kind, although damages are frequently allowed to a *defendant* upon a dissolution. High, Inj. *c.* 21. But I notice that in several cases the federal courts have adopted an analogous practice, and imposed a fine equivalent to the profits made by the defendants, and the costs and expenses of complainant, and directed the same to be paid over to the latter by way of reimbursement. *In re Mullee*, 7 Blatchf. 23; *Doubleday* v. *Sherman*, 8 Blatchf. 45.

The validity of this practice is not discussed in these cases, and, without expressing any opinion of my own, I am disposed, with some hesitation, to follow them until corrected by a higher court. In this class of cases it is certainly consonant with justice. This renders it

necessary to ascertain the amount of profits realized by the defendant, and the amount of complainant's costs and expenses.

The cost of these whip-sockets seems to have been $15 per gross, or $930 for 62 gross. They were sold at $30 per gross by Havens, but he seems to have been bound to account for them to this defendant only at the rate of $26 per gross. I am disposed, to allow the four dollars per gross as commission on the sales, although I have already had occasion to express my opinion that the sale to Havens was itself a subterfuge. Estimating the 62 gross at $26 per gross, and deducting the cost, we find a profit of $682. Complainant also proved expenses by items to the amount of about $500, besides counsel fees, which are charged at $1,000. The expenses, I think, should be allowed. I am not disposed, however, to impose upon the defendants the burden of paying the fees of complainant's counsel, brought here from a distance, to press this motion. I was at first disposed to allow a portion of this charge, but upon reflection it has seemed to me that as this was a criminal proceeding, (*New Orleans* v. *Steam-ship Co.* 20 Wall. 387, 392,) and probably not reviewable by the supreme court, (*Hayes* v. *Fisher*, 102 U. S. 121,) the punishment should bear some just proportion to the magnitude of the offense, and ought not in general to exceed the sum which would ordinarily be imposed by way of fine; although, if these statutes applied, there would seem to be no discretion. If, for instance, the master had reported defendant's profits at only five dollars, the imposition of a fine of $1,500, for expenses and counsel fees, would seem not only an unwarrantable encouragement of proceedings of this nature, but a possible infraction of the constitutional provision against cruel and unusual punishments.

The aggregate of the other items is $1,182, which is imposed as a fine upon the defendant for the violation of this injunction; and it is ordered that he be committed to the custody of the marshal until this fine be paid, and that the amount of such fine, when collected, be paid over to the complainant in satisfaction of his damages.

See *In re Cary*, 10 FED. REP. 622, and note, 629.

GLEASON *v.* FIRST NAT. BANK OF LAPEER.

(*Circuit Court, E. D. Michigan.* October 16, 1882.)

1. ACTION—MONEY HAD AND RECEIVED—DEFENSES.
   In an action for money had and received, the defendant may avail himself of any defense showing that, equitably, he is entitled to retain the money as against the plaintiff.
2. INSURANCE—POLICY PAYABLE TO CREDITOR—PURCHASE AT EXECUTION SALE.
   Where the owner of property caused it to be insured, and made the policies payable to a creditor, who subsequently brought suit against the owner for the debt secured by the policies, obtained judgment, levied an execution upon the property insured, and bought it in upon the sheriff's sale, and shortly after the sale, the property was burned, and the creditor received the proceeds of the insurance, it was *held* that, while the purchase of the property was technically an extinguishment of the debt secured by the policies, yet that the creditor was equitably entitled to retain the proceeds of the insurance, but must credit the same upon the amount of his bid, in case the debtor saw fit to redeem.

On motion for a New Trial.

This was an action for money had and received. The facts were that one Alexander Mair, the plaintiff's assignor, had borrowed money of the bank to the amount of $5,000, and had given his note therefor, secured by five policies of insurance upon certain mill property, to the amount of such note. Subsequently he became further indebted to the bank, a suit was begun for the entire indebtedness, judgment on *cognovit* obtained, and execution issued on the same day. The execution was in due time returned satisfied by a sale of all of Mair's property, including the mill upon which the aforesaid policies of insurance had been underwritten, the bank being the purchaser. About two months after the sale upon execution the mill burned, and the bank collected the money upon these policies of insurance, which had been *made payable to the bank.* This suit was brought by the assignee of Mair to recover the amount collected by the bank. Upon this state of facts the court charged that, while technically the purchase of the mill property by the bank for the full amount of the judgment was an extinguishment of the debt for which the policies were given, yet that equitably the bank was entitled to the money representing the value of its mill, and directed a verdict for the defendant.

C. D. Joslin, for plaintiff.

Mr. Williams, for defendant.

BROWN, D. J. The action for money had and received is an equitable action, and, as Mr. Greenleaf says, (vol. 2, § 117,) "may in

general be proved by any legal evidence showing the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff. * * * But if the defendant has any legal or equitable lien on the money, or any right of cross-action upon the same transaction, the plaintiff can only recover the balance after satisfying such counter-demand."

In *Eddy* v. *Smith*, 13 Wend. 488, it is said that the same principle which allows the *plaintiff* in an action of *assumpsit* to recover what *ex æquo et bono* he is entitled to, operates in favor of the *defendant* when called upon to pay the money. If he can show the better equity, he will be permitted to retain it. This was a case where the purchaser of an equity of redemption demanded from a mortgagee the surplus remaining in his hands after satisfying the mortgage and the expenses of a sale, and the mortgagee showed that subsequent to the mortgage he obtained a judgment against the mortgageor, which was a lien upon the land, at the time of the transfer of the equity of redemption, to an amount equal to the surplus; and it was held, in an action of *assumpsit* by the purchaser against the mortgagee, that he was not entitled to recover such surplus. See, also, *Moses* v. *Macferlan*, 2 Burr. 1010.

We do not dispute plaintiff's contention that a policy of insurance is a personal contract; that a mortgageor and a mortgagee, or other owner and lienholder, have separate insurable interests, and that the right of subrogation does not exist as between them. If the mortgageor insures the mortgaged property in his own name and it is burned, the money belongs to him and not to the mortgagee, though the latter may thereby lose his whole debt. Leading cases upon this point are: *Columbian Ins. Co.* v. *Lawrence*, 10 Pet. 507; *Carpenter* v. *Provident Washington Ins. Co.* 16 Pet. 495,—in which it was held that the mortgagee had no claim to the benefit of a policy of insurance underwritten for the mortgageor.

McDonald v. *Adm'r of Black*, 20 Ohio, 185, was a case where a policy effected by a mortgageor contained the words "for whom it may concern," but it was held that the mortgagee could not claim the benefit of insurance if at the time the mortgage had not become absolute at law by failure to pay the money.

In *Plympton* v. *Ins. Co.* 43 Vt. 497, a person having acquired title by levy of an execution upon premises insured by the execution debtor, was held not entitled to the proceeds of the policy in case of loss by

fire. I had occasion to apply the same principle to a case where the owner of a vessel, injured by collision, sought to recover from the owners of the vessel in fault, which had been sunk by the collision, the amount of certain policies of insurance underwritten upon her. *The Peshtigo*, 9 Cent. Law J. 285. On examining the law in this case I became entirely satisfied that libelant's lien upon the vessel for his damages did not attach to her policies of insurance, for the reason that the policies were written for the benefit of the owners and not for that of the creditors of the vessel.

A moment's consideration, however, will show there is but a slight analogy between these cases and the one under consideration. Here the policies were originally *made payable to the defendant* for its security, and until its debt was actually paid defendant had a right to the proceeds of the policy. Had the property burned before sale upon execution, the amount realized from the policies would have belonged to the defendant, by virtue of their assignment to him. He ought not to be placed in a worse position because his title had been changed from that of a creditor to that of a purchaser upon execution, with a right of redemption reserved to the debtor. It is true that the purchase of the property upon execution was a technical extinguishment of the debt, or, rather, a satisfaction of the execution which represented it, but it was so only upon the theory that the defendant became thereby the owner of the property, or a lienholder to the amount of its purchase money. It has always been held that if a sheriff levy upon and sell lands not belonging to the execution debtor, the court will require the moneys to be refunded, the return of the sheriff corrected, and a new execution to be issued for the unpaid portion of the judgment. *Adams* v. *Parmeter*, 5 Cow. 280; *Tudor* v. *Taylor*, 26 Vt. 444; *Warner* v. *Helme*, 1 Gilman, 220; *Zeigler* v. *McCormick*, 14 Reporter, 440. If in this case the loss had occurred before the sale, defendant would have recovered the amount of the policies as payee thereof, and would have bid just so much less for the property as was represented by the amount so recovered; but as the mill was burned after the sale, defendant was entitled to the money as the payee of the policy, and the plaintiff was entitled to a credit of this amount upon the amount of the bid, in case he saw fit to redeem. A different rule would work a manifest injustice, and hold out a strong inducement to the destruction of the property. It would, in short, take $4,500, the amount of the policies, from the defendant's vaults, and put it into the plaintiff's pocket; in other

words, plaintiff would have paid his debt, and recovered back the money used in paying it.

The case of *Mickles* v. *Rochester City Bank*, 11 Paige, 119, is in point. It was held in this case that where a judgment creditor of a corporation insured its real estate in the joint names of himself and the corporation, and the property was afterwards sold under his judgment and bid in by him, and after such sale the property was partially destroyed by fire, and the property was not redeemed from the sale, he was entitled to the money received from the insurance company on account of such loss.

It seems to me entirely clear that the plaintiff has no right to the money sought to be recovered. The motion must therefore be denied.

The Railroad Tax Cases.

County of San Mateo *v.* Southern Pacific R. Co.

(*Circuit Court, D. California.* September 25, 1882.)

1. Constitutional Laws—Equal Protection of the Laws—Taxation.

   The fourteenth amendment of the constitution, in declaring that no state shall deny to any person within its jurisdiction the "equal protection of the laws," imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation.

2. Same—Burdens to be Equally Imposed—Unequal Taxation Inhibited.

   The "equal protection of the laws" to any one implies not only that he has a right to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also that he is exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. This equal protection forbids unequal exactions of any kind, and among them that of unequal taxation.

3. Same—Uniformity in Taxation—Rule of, Construed.

   Uniformity in taxation requires uniformity in the mode of assessment as well as in the rate of percentage charged.

4. Same—Rule Applies to Artificial as well as Natural Persons.

   By the thirteenth article of the constitution of California, "a mortgage, deed of trust, contract, or other obligation by which a debt is secured, is treated, for the purposes of assessment and taxation, as an interest in the property affected thereby;" and, "except as to railroad and other *quasi* public corporations," the value of the property affected, less the value of the security, is to be assessed and taxed to its owner, and the value of the security is to be assessed and taxed to its holder. Section 4. But by the same article "the franchise, road-way, road-bed, rails, and rolling stock of all railroads operated in more than one county" are

to be assessed at their actual value, and apportioned to the counties, cities, and districts in which the roads are located, in proportion to the number of miles of railway laid therein, no deduction from this value being allowed for any mortgages on the property. *Held*, that in the different modes thus prescribed of assessing the value of the property of natural persons and the property of railroad corporations as the basis of taxation, there is a departure from the rule of equality and uniformity.

5. SAME — CORPORATIONS — AS PERSONS— RIGHTS UNDER FOURTEENTH AMENDMENT.

Private corporations are persons, within the meaning of the first section of the fourteenth amendment, and are entitled, so far as their property is concerned, to the equal protection of the laws.

6. SAME—CONFLICT OF LAW—CONSTITUTIONAL GUARANTY.

Neither the constitution nor the laws of California relating to the assessment of railroads operated in more than one county provide for notice to the owner, or an opportunity for him to be heard at any stage of the proceeding. In this respect both conflict with the guaranty that no one shall be deprived of his property without due process of law.

7. SAME—PROTECTION OF PROPERTY RIGHTS—DUE PROCESS OF LAW.

Whatever the character of the proceeding by which one is deprived of his property, whether judicial or administrative, and whether it takes the property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law.

8. SAME—REVENUE AND TAXATION—STATE CONSTITUTION—CONSTRUCTION.

The provisions of article 13 of the constitution of California, treating of revenue and taxation, are not conditions upon the continued existence of railroad corporations.

9. SAME—CORPORATION—PROTECTION OF PROPERTY GUARANTIED.

The state possesses no power to withdraw corporations from the guaranties of the federal constitution. Whatever property a corporation lawfully acquires is held under the same guaranties which protect the property of natural persons from spoliation.

10. SAME—STATE POWER OVER CORPORATIONS—VESTED RIGHTS.

Under the reserved power to amend, alter, or repeal the laws under which private corporations are formed, the state cannot exercise a control over the property of a corporation, except such as may be exercised through control over its franchise, and over like property of natural persons engaged in similar business. It cannot divest property or rights which have become vested.

11. STATE STATUTE—PASSAGE OF BILLS—JUDICIAL INQUIRY.

The constitution of California (Section 15, art. 4) provides that "on the final passage of all bills they shall be read at length, and the vote shall be by yeas and nays upon each bill separately, and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of the members elected to each house." Under this provision the court, to inform itself, will look to the journals of the legislature, and if it appear therefrom that the bill did not pass by the constitutional majority, then it will not be regarded as a law. SAWYER, J.

12. SAME—JOURNALS OF LEGISLATURE AS EVIDENCE.

The journals of the legislature show that the act of March 14, 1881, mentioned in the opinion, never became a law. SAWYER, J.

This was an action commenced by the county of San Mateo, of California, under the provisions of an act of the state of 1880, (St. 1880, p. 136,) for the recovery of state and county taxes claimed to be due from the defendant to the plaintiff for the fiscal year 1881–1882. The complaint is in the form prescribed by the statute. The amended answer contains a general denial of every allegation of the complaint, and sets up special matters as a defense. With this general denial the court does not deal; it deals only with the special matters pleaded, it having been agreed by counsel that if they constitute a defense to the action judgment final shall be entered for the defendant, otherwise for the plaintiff.

The material averments of the answer in this respect are that the defendant is a corporation existing under the laws of the United States and of the state of California, having its principal place of business in the city and county of San Francisco; that it was organized in the year 1878 under an act of the legislature of the state entitled "An act to provide for the incorporation of railroad companies, the management of the affairs thereof, and other matters relating thereto," approved May 30, 1861; that the term of its existence was to be 50 years from the date of its organization; that it is still in existence under said laws, except in so far as its existence and character are affected by the federal enactments referred to and made part of the answer; that many of its stockholders and members now are and ever have been citizens of the United States, residents of the state of California, while many other stockholders and members are citizens of the United States, and residents of states other than the state of California; that it constructed a line of railroad known as the Southern Pacific Railroad, which commences at the city of San Francisco, and extends in a southerly direction to connect with the Texas & Pacific Railroad, and the Atlantic & Pacific Railroad, both of which are chartered by act of congress; that prior to the first day of January, 1881, it was indebted to divers persons, citizens of the United States, many of them citizens and residents of the state of California, in large sums of money, which were advanced for, and used in the construction and equipment of, the defendant's railroad; that to secure the payment of such indebtedness the company, prior to the first day of January, 1881, executed and delivered a mortgage upon its railroad, rolling stock, appurtenances, and franchise, and upon divers tracts of land belonging to it, and situated in different parts of the state; that the indebtedness so secured exceeds $3,000 per mile,

and is still subsisting, secured as aforesaid, no part thereof having been paid except its accruing interest.

It is further averred that the assessment, according to which the taxes claimed were levied, was made on the second day of May, 1881, by the board of equalization of the state of California; that the board assessed against the defendant the whole of its railroad property, and failed to deduct from its value the mortgage given thereupon to secure said indebtedness; that the assessment was made without notice to the defendant, and that neither the constitution nor the laws of the state of California provided in respect to such assessment an opportunity of time, place, or tribunal for the defendant to be heard, or for any notice to the defendant before its liability was fixed; that all owners of railroad property situated in said state, and operated in more than one county, as is the property of the defendant, are denied any protection from the laws of California, which require with respect to other property that notice of its assessment shall be given to the owners; which require that before its liability shall be fixed an opportunity to be heard shall be afforded to them; which give to them an appeal from the assessor to a board of equalization; which require the assessment to be made in the counties in which the property is situated, and prevent its being made in localities distant from the *situs* of the property; and which allow deductions from its valuation for indebtedness secured by mortgage.

It is further averred that at and before and ever since the adoption of the constitution of California now in force, there were and have been existing, under the laws of said state, corporations of various kinds, formed for the purpose of, and actually operating and doing business, and holding and using property in more than one county in the state; that at all said times there were, and there are now, divers natural persons, residents of said state, operating property in more than one county; that at all of said times there were, and now are, railroads owned by corporations formed under the general laws of said state which are operated only in one county; that by the provisions of section 10, art. 13, of the state constitution persons operating railroads in more than one county in the state have been singled out from other persons operating property in more than one county in the state, and denied the right common to all other persons to apply for relief from overvaluation of their property by the assessor to local boards of equalization, and denied the rights and privileges accorded by law to all other persons in that respect.

It is further averred that the franchise of defendant is held, and its corporate powers exercised, under authority of the government of the United States; that by the several acts of congress set out in the answer the defendant was selected by the government of the United States as a means and instrument of that government to construct the railroad in question, and to keep and maintain the same in repair, to the end that the government of the United States might, when occasion required, use the same for the transportation of its armies, military stores, and mails, and for such other purposes as said government, in the exercises of its powers, might desire to use the same; that the government of the United States has never given to the state of California the right to lay any tax on the franchise, existence, or operation of defendant; that such a tax would hinder and impede the lawful operations of the government of the United States, and would hinder, delay, and prevent the defendant from performing the obligation imposed upon it by said act of congress, and would wholly nullify and prevent the enforcement of the same; and that in the assessment, which constitutes the basis of plaintiff's action, the valuation of the franchise of the defendant—its right to exist—is so blended with the valuations affixed to the road-way, road-bed, rails, and rolling stock, that it can neither be distinguished nor separated from them.

Upon the matters thus averred, it was alleged and claimed by the defendant that in the assessment of its property, according to which the taxes in suit were levied, an unlawful and unjust discrimination was made between its property and the property of individuals to its disadvantage, in that it was not allowed any deduction from the valuation of its property for the mortgage thereon, which is allowed for mortgages in the assessment of property of individuals; and that the company was thus subjected to an unequal share of the public burdens; and that, as this discrimination was made in pursuance of provisions of the constitution of the state, the company was denied the equal protection of the laws guarantied by the fourteenth amendment of the federal constitution.

It was further alleged and claimed by the defendant that the assessment of its property was illegal and void, because made in pursuance of the provisions of the state constitution, which gave no notice to the defendant, and afforded it no opportunity to be heard respecting the value of its property, or for the correction of any errors of the state board, thus depriving it of its property without due process of law guarantied by that amendment.

It was also averred and claimed that the franchise of the defendant was exempt from state taxation, the defendant having been selected by the government of the United States as a means and instrument to construct the road, and to keep the same in repair, for the transportation of the troops, military stores, and mails of the United States, and for such other purposes as the government, in the exercise of its powers, might desire.

The case was argued before Mr. Justice FIELD and Judge SAWYER, the argument commencing on the twenty-first day of August, 1882, and closing on the 29th. The opinions were read in the circuit court on September 25, 1882.

A. L. Rhodes, *A. L. Hart*, Atty. Gen., and *Tolles* and *Ware*, Dist. Attys., for plaintiff.

Creed Haymond, *J. Norton Pomeroy*, *T. I. Bergin*, and *T. B. Bishop*, for defendants.

FIELD, Justice. This action is brought to recover of the Southern Pacific Railroad Company, a corporation formed under the laws of California, certain state and county taxes levied upon its property for the fiscal year of 1881 and 1882, alleged to be due to the plaintiff, with 5 per cent. added for their non-payment, and interest. It was commenced in one of the superior courts of the state, and, on application of the defendant, was removed to this court.

The railroad company, besides a general denial of the allegations of the complaint, sets up as a special answer to the action that in the assessment of its property, according to which the taxes claimed were levied, an unlawful and unjust discrimination was made between its property and the property of individuals, to its disadvantage, subjecting it to an unequal share of the public burdens, and that it was not afforded an opportunity of being heard respecting the assessment, and that such discrimination was made and proceeding had under the provisions of the constitution of California, adopted in 1879, which in that respect are in conflict with the fourteenth amendment of the constitution of the United States.

By the constitution of California, all property in the state, not exempt under the laws of the United States, is, with certain exceptions, to be taxed in proportion to its value, to be ascertained as prescribed by law; but in the ascertainment of its value as a basis for taxation, a distinction is made between the property owned by individuals and that owned by railroad corporations. By the thirteenth article, "a mortgage, deed of trust, contract, or other obligation by which a debt is secured," is treated, for the purposes of assessment and taxa-

tion, "as an interest in the property affected thereby," and, "except as to railroad and other *quasi* public corporations," the value of the property affected, less the value of the security, is to be assessed and taxed to its owner, and the value of the security is to be assessed and taxed to its holder. Section 4. But by the same article "the franchise, road-way, road-bed, rails, and rolling stock of all railroads operated in more than one county" are to be assessed at their actual value, and apportioned to the counties, cities, and districts in which the roads are located in proportion to the number of miles of railway laid therein. No deduction from this value is allowed for any mortgages on the property.

By the constitution there is also a different system of assessment provided for "the franchise, road-way, road-bed, rails, and rolling stock" of railroads operated in more than one county from that provided for other property. The assessment of other property is to be made in the county, city, or district in which it is situated in the manner prescribed by law; and the supervisors of each county constitute a board of equalization of the taxable property of the county, and must act upon prescribed rules of notice to its owners. A state board of equalization is also created to equalize the valuation of the taxable property of the several counties, so that equality may be preserved between the tax-payers of the different localities, and its action in this respect must likewise be upon prescribed rules of notice.

The assessment of the franchise, road-way, road-bed, rails, and rolling stock of railroads operated in more than one county in the state is to be made by this state board. And in making it, the board is not required to give any notice to the owners, nor is any provision made for affording them an opportunity to be heard respecting the valuation of their property. The tenth section of the article which confers this power of assessment has been held by the supreme court of the state to be self-executing, requiring no legislation for its enforcement.

The defendant, as already stated, is a corporation formed under the laws of the state, and operates a railroad through several counties. The entire length of its road in the state is a little over 711 miles, of which twenty-five miles and one-tenth of a mile pass through the county of San Mateo. Its principal place of business is at San Francisco. Its stockholders are, and always have been, citizens of the United States, some of whom are residents of this state, and some of other states. Previously to January 1, 1881, it was indebted to different citizens of the United States, many of them residents of this

state, in large sums, advanced to construct and equip the road; and to secure this indebtedness it executed, prior to that date, a mortgage upon its road, its franchise, and its rolling stock and appurtenances, and also upon a large number of tracts of land situated in different counties. The indebtedness secured exceeds $3,000 a mile of the road, no part of which, except the accruing interest, has been paid; the whole remains a valid and subsisting obligation of the company.

In the fiscal year of 1881 and 1882, the state board of equalization assessed the franchise, road-way, road-bed, rails, and rolling stock of the defendant at $11,739,915,—that is, at the rate of $16,500 per mile,—and apportioned to the county of San Mateo $414,150. Upon the amount thus apportioned the taxes were levied for which the present action is brought. In the assessment no deduction was allowed for the mortgage, but the property was assessed at its entire value independently of the mortgage. Nor was any notice given to the company by the board of its action, nor was any opportunity allowed the company to be heard respecting the assessment. These facts are admitted by the demurrer, and the validity of the defense rests upon the application of the law to them.

The railroad company contends that the taxes are invalid and void on two grounds:

(1) Because the assessment, according to which they were levied, was made in pursuance of the discriminating provisions of the state constitution, in the enforcement of which the company was not allowed any deduction from the valuation of its property for the mortgage thereon, and was thus subjected to an unjust proportion of the public burdens, and denied the equal protection of the laws guarantied by the fourteenth amendment of the federal constitution; and (2) because the assessment was made in pursuance of provisions of the state constitution, which gave no notice to the company, and afforded it no opportunity to be heard respecting the value of the property, or for the correction of any errors of the board, thus depriving it of its property without due process of law guarantied by that amendment.

The plaintiff, on the other hand, contends:

(1) That the power of taxation possessed by the state is unlimited, except by the constitution of the United States, and that its exercise cannot be assailed in a federal court, either for the hardship or injustice of the tax levied; (2) that the classification of property for taxation, and the apportionment of taxes according to such classification, are not forbidden by the constitution of the United States, and that within this principle the taxes on the property of the railroad company were lawfully imposed; (3) that the fourteenth amendment of the constitution of the United States was adopted to protect the newly-made citizens of the African race in their freedom, and

should not be extended beyond that purpose; (4) that corporations are not persons within the meaning of that amendment; (5) that the statute fixing the sessions of the state board of equalization, and requiring a statement in writing from the defendant of the amount and value of its property, afforded all the notice and hearing essential to the validity of the assessment made; and (6) that the provisions of article 13 of the constitution, as to the taxation of railroad property, are to be treated as conditions upon the continued existence of railroad corporations.

We do not state the positions of the several counsel who argued the case in their precise language, for they were presented in various forms, but we give their substance and purport.

The questions thus presented for our determination are of the greatest magnitude and importance. The answer to them concerns not merely the railroad corporations of this state, but all corporations other than municipal within the United States. It is of the highest interest to them all to know whether their property is subject to the same rules of assessment and taxation to which the property of individuals is subject, or whether it can be separated and distinguished from that of individuals and made liable to such different burdens in the way of taxation as the state may choose to impose. The questions have been argued with great ability and learning by distinguished counsel on both sides, and they have received from the court the most patient and thoughtful examination. Indeed, their examination has been accompanied with a painful anxiety to reach a right conclusion, aware as the court is of the opinion prevailing throughout the community that the railroad corporations of the state, by means of their great wealth and the numbers in their employ, have become so powerful as to be disturbing influences in the administration of the laws; an opinion which will be materially strengthened by a decision temporarily relieving any one of them from its just proportion of the public burdens. That consideration, however, cannot be allowed to affect the judgment of the court. Whatever acts may be imputed justly or unjustly to the corporations, they are entitled when they enter the tribunals of the nation to have the same justice meted out to them which is meted out to the humblest citizen. There cannot be one law for them and another law for others.

It is undoubtedly true that the power of taxation possessed by the state may be exercised upon any subject within her jurisdiction, and to any extent not prohibited by the constitution of the United States. As stated by the supreme court: "It may touch property in every shape,—in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be de-

termined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted,—in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal constitution, the power of the state as to the mode, form, and extent of taxation is unlimited where the subjects to which it applies are within her jurisdiction." *State Tax on Foreign-held Bonds*, 15 Wall. 319.

It is also undoubtedly true that the hardship and injustice of a tax levied by the state, considered with reference to its amount, are not subjects of federal cognizance. Whether a tax upon property, subject to taxation, be 1 per cent. of its value, or 10 per cent., or 20, or more, is a mere matter of state discretion; a question of policy and not of power. So we often find in the reports language to the effect that the state's power of taxation is without limitation; language which may be correct when applied to the special facts of the cases in which it is used, but which should always be read with a reservation that the exercise of the power does not conflict with any of the inhibitions of the federal constitution.

There are in the very nature of the federal government, and the powers with which it is clothed, many prohibitions upon the taxing power of the states. Within the sphere of its action that government is supreme, and no impediment to the free and full exercise of its power is permissible. The state cannot, therefore, place any restrictions upon the agencies of the federal government; otherwise it m ght embarrass and even defeat the operations of that government. It was long ago said by Chief Justice Marshall that the power to tax involves the power to destroy; and that there would be a manifest repugnance in allowing one government to control the constitutional measures of another government in respect to which the latter is declared to be supreme. When, therefore, congress had created a bank of the United States as an agency in the management of the finances of the government, it was held that the states were inhibited from taxing the institution.

"If the states," said that great judge, "may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states." *McCullough* v. *Maryland*, 4 Wheat. 432.

For like reasons the public securities of the United States are exempt from taxation by the states, except so far as such taxation is permitted by congress. A tax imposed by the city of Charleston upon all personal estate in its limits, including among other things stock of the United States, was therefore adjudged to be invalid. The court said that the tax was upon a contract between the government and individuals, and therefore operated directly upon the power to borrow money on the credit of the United States; that if the right to impose it existed with the states, it was a right which in its nature acknowledged no limits, and might be exercised to an extent which would seriously embarrass the government. Its existence was therefore held inconsistent with the supremacy of the government in the exercise of its granted powers. *Weston* v. *Charleston*, 2 Pet. 449.

Other illustrations might be given of implied inhibitions of the federal constitution to taxation by the states. The powers of the general government cannot be interfered with, or their exercise embarrassed in any respect, by such taxation; as has often been held with reference to attempted taxation on goods imported, while retaining the character of imports in unbroken packages, and on goods in transit from one state to another. The power to regulate commerce, foreign and interstate, cannot be thus trammeled by state action. *Brown* v. *Maryland*, 12 Wheat. 434; *Welton* v. *State*, 100 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344.

So in regard to the express prohibitions upon the states contained in the federal constitution; they apply equally to taxation and to any other action of the state. They cannot be evaded under the plea that the state possesses the unrestricted power to tax. Where, for example, a state has stipulated for a valid consideration to exempt certain property from taxation, as it has been repeatedly held that it may do, the stipulation cannot subsequently be withdrawn, and the property subjected to taxation. The provision which secures the inviolability of contracts against state legislation stands as a perpetual interdict against the imposition of the charge. It is to no purpose in such case to speak of the power of taxation as an attribute of state sovereignty which cannot be surrendered; that sovereignty, whatever its extent, must be exerted in subordination to the prohibition of the constitution, which is the supreme law of the land. Many of the attributes of sovereignty which the states would possess if independent political communities, have been in like manner surrendered to the federal government, such as the power to declare war, to make peace, to enter into treaties of alliance, and to regulate commerce

with foreign nations. The question in all cases presented to a federal court, where complaint is made of a tax levied by the states, is whether there is any inhibition, express or implied, in the constitution of the United States upon the imposition of the tax. If there be, it is the duty of the court to enforce the inhibition, it matters not whom its decision may affect, nor how great and irresponsible the power of the state may be independently of such prohibition.

The fourteenth amendment to the constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. Whatever the state may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to every one on similar terms,—in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances.

Unequal exactions in every form, or under any pretense, are absolutely forbidden; and of course unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible; where different persons may be taxed on their property of the same kind, similarly situated, at different rates; where, for instance, one may be taxed at 1 per cent. on the value of his property, another at 2 or 5 per cent., or where one may be thus taxed according to his color, because he is white, or black, or brown, or yellow, or according to any other rule than that of a fixed rate proportionate to the value of his property.

In the constitution of several states a provision is found requiring "equality and uniformity" in the taxation of property, and this is held to mean that taxes must be levied according to some fixed rate or rule of apportionment, so that all persons shall pay the like amount upon similar kinds of property of the same value. As it seemed to one of the judges of the supreme court of Michigan:

"To compel individuals to contribute money or property to the use of the public without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation

whatever to that paid by another, is to levy a forced contribution, not a tax, duty, or impost, within the sense of these terms as applied to the exercise of powers by any enlightened or responsible government." *Woodbridge* v. *City of Detroit*, 8 Mich. 301; Burroughs, Taxation, c. 5.

Absolute equality and uniformity may not be attainable in practice, but an approximation to them is possible, and any plain departure from the rule will defeat the tax.

What is called for under a constitutional provision requiring equality and uniformity in the taxation of property must be equally called for by the fourteenth amendment. The forced contribution from one which would follow taxation of his property without reference to a common ratio, would be inconsistent with that equal protection which the amendment requires the state to extend to every person within its jurisdiction.

The application of the amendment to taxation has been recognized by the legislation of congress. Soon after the adoption of the constitutional amendment, abolishing slavery and involuntary servitude, measures were proposed to give practical freedom to the emancipated race, which resulted in the passage of the civil-rights act. This act gave citizenship to persons of that race, and then declared that citizens of the United States of every race and color, without regard to any previous condition of slavery or involuntary servitude, should have the same right in every state and territory to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, own, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and should be subject to like punishments, pains, and penalties, and to none other. After the adoption of the fourteenth amendment, congress re-enacted this act, and to the clause that all persons within the jurisdiction of the United States should enjoy the same rights as white citizens, and be subject only to like punishments, pains, and penalties, it added, and subject only to like "*taxes, licenses, and exactions of every kind, and to no other.*" Rev. St. § 1977.

The adjudications as to the meaning of the rule of equality and uniformity to be observed in taxation, may, therefore, be properly referred to in construing the requirement of the fourteenth amendment, when it is invoked with respect to burdens imposed by taxation. In *Lexington* v. *McQuillan's Heirs* the supreme court of Kentucky said that the legislature of the state had no constitutional authority to exact from one citizen the entire revenue of the common-

wealth; and though the distinction between constitutional taxation and the taking of private property for public use by legislation might not be definable with perfect precision, the court was clearly of the opinion that whenever the property of a citizen was taken from him by the sovereign will and appropriated without his consent to the benefit of the public, the exaction could not be considered a tax unless similar contributions were made by the public itself, or rather exacted by the same public will from such constituent members of the same community as own the same kind of property; and that, though there may be a discrimination in the subjects of taxation, still persons of the same class, and property of the same kind, must generally be subjected alike to the same common burden. 9 Dana, (Ky.) 513.

In *State* v. *Township of Readington* the supreme court of New Jersey said:

"Taxation operates upon a community, or a class in a community, according to some rule of apportionment. When the amount levied upon individuals is determined without regard to the amount or value exacted from any other individual or classes of individuals, the power exercised is not that of taxation, but of eminent domain. A tax upon the persons or property of A., B., and C. individually, whether designated by name or in any other way, which is in excess of an equal apportionment among the persons, or property of the class of persons or kind of property subject to the taxation, is, to the extent of such excess, the taking of private property for a public use without compensation. The process is one of confiscation, and not of taxation." 36 N. J. Law, 70.

As the foundation of all just and equal taxation is the assessment of the property taxed,—that is, the ascertainment of its value,—in order that the tax may be levied according to some ratio to the value, uniformity of taxation necessarily requires uniformity in the mode of assessment as well as in the rate of taxation; or, to quote the language of the supreme court of Ohio expressing the same thought: "Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation." *Exchange Bank of Columbus* v. *Hines*, 3 Ohio St. 1.

If we now look at the scheme of taxation prescribed by the constitution of California for the property of railroad companies, we shall perceive a flagrant departure from the rule of equality and uniformity so essential to equality in the distribution of the burdens of government. Whenever an individual holds property incumbered with a mortgage he is assessed at its value, after deducting

from it the amount of the mortgage. If a railroad company holds property subject to a mortgage, it is assessed at its full value, without any deduction for the mortgage; that is, as though the property were unincumbered. The inequality and discriminating character of the procedure will be apparent by an illustration given by counsel. Suppose a private person owns a farm which is valued at $100,000, and is incumbered with a mortgage amounting to $80,000: he is, in that case, assessed at $20,000; if the rate of taxation be 2 per cent. he would pay $400 taxes. If a railroad corporation owns an adjoining tract worth $100,000, which is also incumbered by a mortgage for $80,000, it would be assessed for $100,000, and be required to pay $2,000 taxes, or five times as much as the private person. There is here a discrimination too palpable and gross to be questioned, and such is the nature of the discrimination made against the Southern Pacific Railroad Company in the taxation of its property. Nothing can be clearer than that the rule of equality and uniformity is thus entirely disregarded.

The case of *People* v. *Weaver*, 100 U. S. 539, decided by the supreme court, respecting the taxation of shares of the national banks, may be cited in this connection. Without the permission of congress, the shares of these banks could not be taxed by the states. Congress gave the permission on condition that the taxation should not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state, and that the shares owned by non-residents of the state should be taxed at the place where the bank is located. Rev. St. § 5219. In the case cited the court held, with regard to such taxation:

(1) That the prohibition imposed by congress against discrimination had reference to the entire process of assessment, and included the valuation of the shares as well as the rate of percentage charged; (2) that a statute of New York which established a mode of assessment by which such shares were valued higher in proportion to their real value than other moneyed capital, was in conflict with the prohibition, although the same percentage on such valuation was levied; and (3) that a statute which permitted a party to deduct his debts from the valuation of his personal property, except so much as consisted of those shares, taxed the shares at a greater rate than other moneyed capital.

The assessment thus held to be a discrimination against the shares of national banks in the taxation system of New York is similar to what we hold to be a discrimination against the property of railroad corporations in the taxation system of California.

In the case of the *Evansville Bank* v. *Britton*, decided at the last term of the supreme court, the doctrine of the *Weaver Case* was affirmed, and it was held that the taxation of shares in the national banks, under the revenue laws of Indiana, without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, which was allowed in the case of other investments of moneyed capital, was a discrimination against the act of congress and illegal. 105 U. S. 322.

It is no answer to this discrimination to say that property in the state may be divided into classes, and different rates prescribed for them. Undoubtedly property may be classified for purposes of taxation. Real property may be subjected to one rate of taxation; personal property to another rate. Property in particular districts may be taxed for local purposes, while property elsewhere may be exempt. Taxation on business in the form of licenses may also vary according to the calling or occupation licensed, and the extent of business transacted, but even then there must be uniformity of charges with respect to the same calling or occupation in the same locality. It is, however, only with the taxation of property that we are concerned in this case, and the whole object of classifying property is that each class may be subjected to a special rate of taxation. There is no difference in the rate prescribed by the law of the state for the property of railroad corporations, and the rate prescribed for the property of individuals. There is only one rate for all property. There is, therefore, no case presented for the application of the doctrine of classification. The discrimination complained of arises from the different rule adopted in ascertaining the value of the property of railroad corporations as a basis for taxation, not from any different rate of taxation when the value is established. In all taxes upon property, whatever its form or nature, the property is taken as representing a pecuniary value; as standing for so much money invested. The tax is the rate per centum of this pecuniary value. The value being ascertained, the law fixes the rate. The ground of complaint here is that the law requires a higher value to be placed upon the defendant's property than upon the property of individuals similarly incumbered, or rather requires the assessor of the defendant's property, in estimating its value, to disregard and set aside certain elements materially affecting its amount, which are to be considered in estimating the value of the property of individuals. It is not classifying property to make this distinction in determining its value. It

is not classifying property to provide that the property of certain parties, which has a mortgage upon it, shall be assessed at its value after deducting the mortgage; and that the property of other parties, also having a mortgage upon it, shall be taxed at its full value without any deduction. That is not providing for a different rate of taxation for different kinds of property, but for unequal taxation according to the character of the owner.

Is the defendant, being a corporation, a person within the meaning of the fourteenth amendment, so as to be entitled, with respect to its property, to the equal protection of the laws? The learned counsel of the plaintiff, and the attorney general of the state, take the negative of this question, and assert with much earnestness that the amendment applies, and was intended to apply, only to the newly-made citizens of the African race, and should be limited to their protection.

It is undoubtedly true that the amendment had its origin in a purpose to secure to these newly-made citizens the full enjoyment of their freedom. When the amendment abolishing slavery and involitary servitude was adopted, there were men in congress who believed that it was intended to make every one born within the United States a freeman, and as such to give to each the right to pursue his happiness, in the ordinary vocations of life, subject to no restraint except such as affects others, and to enjoy equally with them the fruits of his labor. They therefore proposed the civil-rights bill, and secured its passage, the substantial provisions of which we have stated. Notwithstanding this expression of the national legislature as to the purpose of the amendment, the newly-made citizens were subjected in several of the states to various disabilities and burdens, and curtailed of their rights to such an extent that their freedom became of little value. To quote from the opinion of Mr. Justice Miller, speaking for the court, in the *Slaughter-house Cases*:

"They were in some states forbidden to appear in the towns in any other character than as menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain and hire, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were inefficient, or were not enforced." 16 Wall. 70.

There was probably much exaggeration in what was reported of their treatment, but the statements made produced a profound impression upon congress. The validity of the civil-rights act was also

called in question, and in some instances was adjudged by state courts to be invalid. Reports also prevailed that loyal men of the south were treated with exceptional harshness, and that men from the north seeking residence there were met with marked hostility and aversion. It is not surprising that such was the fact, for notwithstanding the fiery courage and martial spirit of her people, their battalions had gone down before the forces of the Union. With the sound of the tread of the victorious army still ringing in their ears; with the desolations of war all around them, and the sudden rupture of their social relations by the emancipation of their former slaves,— it would have been a miracle if bitterness towards their recent foes had not lingered in their hearts and been exhibited in their conduct. A proud and brave people feel more keenly than others the sting of defeat. Undoubtedly much misconception and falsehood were mingled with the statements made respecting their action; nevertheless they led to the introduction into congress of the proposition for the fourteenth amendment. The discussion which followed, indicated that the purpose of its framers and advocates was to obviate objections to legislation similar to that contained in the first section of the civil-rights act, and to prevent for the future the possibility of any discriminating and hostile state legislation against any one.

Mr. Stevens, of the house of representatives, in presenting the proposition, after stating the provisions of the first section, said:

"I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted in some form or other in our declaration or organic law. But the constitution limits only the action of congress, and is not a limitation on the states. This amendment supplies that defect, and allows congress to correct the unjust legislation of the states so far *that the law which operates upon one man shall operate equally upon all.*"

In reply to an objection that the first section of the amendment was in substance the civil-rights bill, which congress had passed over the president's veto, and that by voting to so amend the constitution as to put the bill into it was to admit that the bill was unconstitutional, Mr. Garfield, then also a member of the house, said:

"We propose to lift that great and good law above the reach of political strife, beyond the reach of plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil-rights bill unconstitutional, I am glad to see that first section here."

Though the occasion of the amendment was the supposed denial of rights in some states to newly-made citizens of the African race, and the supposed hostility to Union men, the generality of the language used extends the protection of its provisions to persons of every race and condition against discriminating and hostile state action of any kind. Its effect in preserving free institutions, and preventing harsh and oppressive state legislation, can hardly be overstated. When burdens are placed upon particular classes or individuals, while the majority of the people are exempted, little heed may be paid to the complaints of those affected. Oppression thus becomes possible and lasting. But a burdensome law operating equally upon all will soon create a movement for its repeal. With the amendment enforced, a bad or an oppressive state law will not long be left on any statute book.

The argument that a limitation must be given to the scope of this amendment because of the circumstances of its origin is without force. Its authors, seeing how possible it was for the states to oppress without relief from the federal government, placed in the constitution an interdict upon their action which makes lasting oppression of any kind by them under the form of law impossible.

The amendment prohibiting slavery and involuntary servitude, except as a punishment for crime, had its origin in the previous existence of African slavery. But the generality of its language makes its prohibition apply to slavery of white men as well as that of black men; and also to serfage, vassalage, villenage, peonage, and every other form of compulsory labor to minister to the pleasure, caprice, vanity, or power of others.

The provision of the constitution prohibiting legislation by states impairing the obligation of contracts had its origin in the existence of tender laws, appraisement laws, stay laws, and installment laws passed by the states soon after the revolution, when their finances were embarrassed and their people were overwhelmed with debts. These laws, according to Story, prostrated all private credit and all private morals, and led to the adoption of the prohibition, by which such legislation was forever prevented. But in its construction the provision has not been limited to mere commercial contracts. In the *Dartmouth College Case* it was urged that the charter of the college was not a contract contemplated by the constitution, because no valuable consideration passed to the king as an equivalent for the grant, and that contracts merely voluntary were not

within the prohibition. But Chief Justice Marshall, after showing that the charter was a contract upon a valuable consideration, said:

"It is more than possible that the preservation of rights of this description was not particularly in view of the framers of the constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not in itself be of sufficient magnitude to induce a rule, yet it must be governed by the rule when established, unless some plain and strong reason for excluding it can be given." And again: "The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception." 4 Wheat. 644.

Following that authority, we cannot adopt the narrow view for which counsel contend, and limit the application of the prohibition of the fourteenth amendment to legislation touching members of the enfranchised race. It has a much broader operation. It does not, indeed, place any limit upon the subjects in reference to which the states may legislate. It does not interfere with their police power. Upon every matter upon which previously to its adoption they could act, they may still act. They can legislate now, as they always could, to promote the health, good order, and peace of the community; to develop their resources, increase their industries, and advance their prosperity; but it does require that in all such legislation hostile and partial discrimination against any class or person shall be avoided; that the state shall impose no greater burdens upon any one than upon others of the community under like circumstances, nor deprive any one of rights which others similarly situated are allowed to enjoy. It forbids the state to lay its hand more heavily upon one than upon another, under like conditions. It stands in the constitution as a perpetual shield against all unequal and partial legislation by the states, and the injustice which follows from it, whether directed against the most humble or the most powerful; against the despised laborer from China, or the envied master of millions.

The adoption of the federal constitution met, as all know, with most determined opposition from a large class who believed that the exercise of the powers delegated to the general government would cripple and embarrass the states in the administration of their local

affairs. The dread of centralization disturbed the minds of some of the purest and greatest statesmen of the day. This feeling continued after the adoption of the constitution, and finally led to the first 10 amendments. The population of the country was sparse; each state afforded security to its people, and was to them the special object of attachment. They enjoyed under its laws protection in their property, in their homes, and in their business. They felt a natural distrust of a power wielded by officers not selected by themselves. They apprehended that the rights which they enjoyed might be encroached upon, if not destroyed. So the amendments proposed contained limitations upon the powers of congress, many of which were, indeed, unnecessary, but were adopted in order to prevent "misconception or abuse of the powers of the general government." They declared, among other things, that certain liberties should not be abridged, such as the free exercise of religion, the freedom of speech and of the press; that certain rights should not be taken away, such as the right of the people to peaceably assemble and petition for a redress of grievances, and to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures; that certain securities against wanton prosecution for public offenses should not be withdrawn, such as that no person should be held to answer for a felony except upon the presentment or an indictment of a grand jury; that in all prosecutions the accused should have the benefit of a speedy trial; should be informed of the nature and cause of the accusation; should be confronted with the witnesses against him, and should have compulsory process for obtaining witnesses, and the assistance of counsel; that certain guaranties against oppression of person and spoliation of property should not be violated, such as that no person should be deprived of life, liberty, or property without due process of law, and that private property should not be taken for public use without just compensation; that the enumeration in the constitution of certain rights should not be construed to deny or disparage others retained by the people; and that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, were reserved to the states, respectively, or to the people. These were all restraints upon the general government. Had the population of the United States continued as sparse as when the constitution was formed, and the means of more rapid intercourse between the states had not been invented, it is possible that further amendments would not have been demanded. But the immense development of the resources of the country, the

great increase of population, the constant intercourse between the states by steamer, railway, and telegraph, changed the business and commercial relations of the states to each other, and led the people of one section to seek a closer union, and to desire a greater authority to be exercised by the central government, while the peculiar institutions of the other section, and the different industries they developed, led its people to desire to limit, rather than to strengthen, the central authority. Differences of opinion in matters of internal policy, and the estrangement engendered by controversies growing out of the existence of slavery in some of the states, ultimately culminated in civil war. Men then saw that danger was to be apprehended in a direction opposite to that which led to the original amendments. Restraints upon the power and action of the states were therefore suggested, and to impose them and to abolish slavery, the great cause of the civil conflict, the new amendments—the thirteenth, fourteenth, and fifteenth—were adopted.

"While, therefore," to quote the language of an admirable writer and eminent jurist, Judge Cooley, "the first amendments were for the purpose of keeping the central power within due limits, at a time when the tendency to centralization was alarming to many persons, the last were adopted to impose new restraints on state sovereignty, at a time when state powers had nearly succeeded in destroying the national sovereignty. Of these amendments it may be safely affirmed that the first ten took from the Union no power it ought ever to have exercised, and that the last three required of the states the surrender of no power which any free government should ever employ."

It would tend, therefore, to defeat the great purposes of the late amendments, if to any of them we should give the narrow construction for which counsel contend.

Private corporations are, it is true, artificial persons, but with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some legitimate business. In this state they are formed under general laws; and the Civil Code provides that they "may be formed for any purpose for which individuals may lawfully associate themselves." Any five or more persons may by voluntary association form themselves into a corporation. And, as a matter of fact, nearly all enterprises in this state, requiring for their execution an expenditure of large capital, are undertaken by corporations. They engage in commerce; they build and sail ships; they cover our navigable streams with steamers; they construct houses; they bring the products of earth and sea to market; they light our streets and buildings; they

open and work mines; they carry water into our cities; they build railroads, and cross mountains and deserts with them; they erect churches, colleges, lyceums, and theaters; they set up manufactories, and keep the spindle and shuttle in motion; they establish banks for savings; they insure against accidents on land and sea; they give policies on life; they make money exchanges with all parts of the world; they publish newspapers and books, and send news by lightning across the continent and under the ocean. Indeed, there is nothing which is lawful to be done to feed and clothe our people, to beautify and adorn their dwellings, to relieve the sick, to help the needy, and to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations. There are over 500 corporations in this state; there are 30,000 in the United States, and the aggregate value of their property is several thousand millions.* It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion. On the contrary, we think that it is well established by numerous adjudications of the supreme court of the United States and of the several states, that whenever a provision of the constitution, or of a law, guaranties to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents.

The case of the *Society for the Propagation of the Gospel in Foreign Parts* v. *Town of New Haven*, 8 Wheat. 464, furnishes an apt illustration of this doctrine. The sixth article of the treaty of peace with Great Britain of 1783 provided that there should be "no future confiscations made, nor any prosecutions commenced, against any person or persons for or by reason of the part which he or they may have taken in the present war, and that no person shall on that account suffer any future loss or damage, either in his person, liberty, or property." An English corporation claimed the benefit of this article with reference to certain lands in Vermont granted to it before the revolution, which the legislature of that state had undertaken to give to the

*NOTE. The number of corporations here stated is much less than the number actually existing. There are over 5.000 corporations in California alone.

town where they were situated. It was contended that the treaty only applied to natural persons; that it did not embrace corporations, because they were not persons who could take part in the war, or could be considered British subjects; but the position was held to be untenable. The court, speaking through Mr. Justice Washington, said that the argument proceeded upon an incorrect view of the subject, and referred to the case of *U. S.* v. *Devaux,* 5 Cranch, 86, to show that the court, when necessary, will look beyond the name of a corporation to reach and protect those whom it represents.

The constitution, in defining the judicial power of the United States, declares that it shall extend to "controversies between citizens of different states;" and in the case referred to by Mr. Justice Washington the question arose whether a corporation composed of citizens of one state could sue in the circuit court of the United States a citizen of another state, and it was held that it could. In deciding the question, the court, speaking through Chief Justice Marshall, said:

"However true the fact may be that the tribunals of the state will administer justice as impartially as those of the nation to parties of every description, it is not less true that the constitution itself either entertains apprehension on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and citizens, or between citizens of different states. Aliens or citizens of different states are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision because they were allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen, but the persons whom it represents may be the one or the other, and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate names, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals. Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction."

The same point was presented in another form in the case of *Marshall* v. *Baltimore & O. R. Co.* 16 How. 326. There the question was whether a citizen of one state could sue in the circuit court of the United States a corporation of another state, and a similar conclusion was reached. After referring to the clause of the constitution extending the judicial power of the United States to controversies be-

tween citizens of different states, the court proceeded to consider the objections urged to treating a corporation as a citizen, so far as it might be necessary to protect the corporators:

"A corporation," observed Mr. Justice Grier, speaking for the court, "it is said, is an artificial person, a mere legal entity, invisible and intangible. This is no doubt metaphysically true in a certain sense. The inference, also, that such an artificial entity 'cannot be a citizen' is a logical conclusion from the premises, which cannot be denied. But a citizen who has made a contract, and has a controversy with a corporation, may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served on an imaginary entity, but on men and citizens; and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners.

"The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing, and being sued in a ficititious or collective name. But these important faculties, conferred on them by state legislation, for their own convenience, cannot be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism, which deals subtly with words and names, without regard to the things or persons they are used to represent."

The fifth amendment to the constitution declares that—

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

From the nature of the prohibitions in this amendment it would seem, with the exception of the last one, as though they could apply only to natural persons. No others can be witnesses; no others can be twice put in jeopardy of life or limb, or compelled to be witnesses against themselves; and therefore it might be said with much force that the word "person," there used in connection with the prohibition against the deprivation of life, liberty, and property without due process of law, is in like manner limited to a natural person. But such has not been the construction of the courts. A similar provision is found in nearly all of the state constitutions; and everywhere, and at all times, and in all courts, it has been held, either by tacit assent or express adjudication, to extend, so far as their property is con-

cerned, to corporations. And this has been because the property of a corporation is in fact the property of the corporators. To deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value. Their interest, undivided though it be, and constituting only a right during the continuance of the corporation to participate in its dividends, and on its dissolution to receive a proportionate share of its assets, has an appreciable value, and is property in a commercial sense, and whatever affects the property of the corporation necessarily affects the commercial value of their interests. If, for example, to take the illustration given by counsel, a corporation created for banking purposes acquires land, notes, stocks, bonds, and money, no stockholder can claim that he owns any particular item of this property, but he owns an interest in the whole of it which the courts will protect against unlawful seizure or appropriation by others, and on the dissolution of the company he will receive a proportionate share of its assets. Now, if a statute of the state takes the entire property, who suffers loss by the legislation? Whose property is taken? Certainly, the corporation is deprived of its property; but at the same time, in every just sense of the constitutional guaranty, corporations are also deprived of their property.

The prohibition against the deprivation of life and liberty in the same clause of the fifth amendment does not apply to corporations, because, as stated by counsel, the lives and liberties of the individual corporators are not the life and liberty of the corporation.

Nor do all the privileges and immunities of citizenship attach to corporations. These bodies have never been considered citizens for any other purpose than the protection of the property rights of the corporators. The *status* of citizenship, entitling the citizen to certain privileges and immunities in the several states, does not belong to corporations. The special privileges which citizens acquire by becoming incorporated in one state cannot, therefore, be exercised in another state without the latter's consent, as was held in *Paul* v. *Virginia*, 8 Wall. 168, although such consent will generally be presumed in the absence of positive prohibition.

Decisions of state courts, in harmony with the views we have expressed, exist in great numbers. But it is unnecessary to cite them. It is sufficient to add that in all text writers, in all codes, and in all revised statutes, it is laid down that the term "person" includes, or may include, corporations; which amounts to what we have already said, that whenever it is necessary for the protection of contract or prop-

erty rights, the courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in its name. All the guaranties and safeguards of the constitution for the protection of property possessed by individuals may, therefore, be invoked for the protection of the property of corporations. And as no discriminating and partial legislation, imposing unequal burdens upon the property of individuals, would be valid under the fourteenth amendment, so no legislation imposing such unequal burdens upon the property of corporations can be maintained. The taxation, therefore, of the property of the defendant upon an assessment of its value, without a deduction of the mortgage thereon, is to that extent invalid.

If there were no other objection to the assessment we might, perhaps, order judgment for the amount of taxes due upon the valuation of the property, after deducting therefrom the amount of the mortgage; but there is another objection, of equal significance, which goes to the validity of the whole assessment. No opportunity was afforded to the defendant to be heard respecting it before the state board of equalization. It was made by the board under the tenth section of article 13 of the constitution, which declares that "the franchise, road-way, road-bed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, towns, townships, and districts."

Other articles of the constitution, and laws supplementing their directions, provide for the assessment by county officers of all property except "the franchise, road-way, road-bed, rails, and rolling stock" of railroads operated in more than one county, for a hearing by property holders respecting the assessment, and for its equalization by county boards. Ample security is thus afforded to individuals against erroneous and arbitrary assessments. But the assessment of the property mentioned, of railroads operated in more than one county, is placed entirely with the state board.

In *People* v. *Sup'rs of Sacramento County* the supreme court of the state said that—

"It is the manifest intent of the constitution that the valuation of the railroad property mentioned in section 10 of article 13 shall be finally fixed and determined by the state board of equalization. The state board has the

exclusive power to assess and equalize its value. Thus the constitution furnishes a system for the assessment of railroads operated in more than one county, which is separate and distinct from that provided for the assessment of other property." And again: "The portion of the section quoted (the portion above) is clearly self-executing. We are at a loss to imagine how any statute could make the duty of the state board any clearer than does this distinct and positive mandate of the constitution. If any doubt could possibly be built upon the words cited it would be dispelled by the first clause of the same section: 'All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law.' Thus by the very language of the constitution all other but the railroad property mentioned must be assessed by local assessors, in the manner prescribed by statute. The railroad property must be assessed in the manner prescribed by the section of the constitution, that is, by the state board, without the aid of statute." 8 Pac. Law J. 103.

The Political Code provides that the assessment shall be made by the state board on or before the first Monday in May of each year; that the president, secretary, cashier, or managing agent, or such officer of the corporation as the board may designate, shall furnish to the board, on or before the first Monday of April of the year, a statement, signed and sworn to by him, showing in detail the whole number of miles of railway owned, operated, or leased in the state by the corporation, and the value thereof per mile, and all its property of every kind located in the state, the number and value of its engines, passenger, mail, express, baggage, freight, and other cars, or property used in operating or repairing the railway in the state, and on railways which are parts of lines extending beyond its limits, the amount of the rolling stock in use during the year, the annual gross earnings of the entire railway, and the proportionate annual gross earnings of the same in the state, and such other facts as the board may in writing require; and that if the officer or officers designated fail to make and furnish such statement, the board shall proceed to assess the property; and the valuation fixed shall be final and conclusive. The law also provides that the property shall be assessed at its actuul value; that the assessment shall be made of the entire railway in the state, including the right of way, road-bed, track, bridges, culverts, and rolling stock; that the state board shall transmit to the county assessor of each county through which the railway runs, a statement showing the length of its main track within the county, and its assessed value per mile, as fixed by a *pro rata* distribution per mile of the assessed value of the whole property;

that this statement shall be entered on the assessment roll of the county, and that at their first meeting after its receipt by the county assessor the board of supervisors of the county shall cause an order to be entered in the proper record book stating the length of the main track and the assessed value of the railway lying in each city, town, township, school-district, or lesser taxing district in the county through which the railway runs, as fixed by the state board, which shall constitute the taxable value of the property for taxable purposes in the district, and that such property shall be taxed at the same rates as the property of individuals.

We have no doubt that further legislation might have been adopted providing for notice to the company, and a system of procedure by which it might have been heard respecting the assessment. We do not understand that the supreme court of the state intended by the decision cited to hold that the tenth section of the thirteenth article is self-executing, except to the extent that it vests complete power in the state board to make the assessment of the property; not that legislation may not be had providing for the mode in which the powers of the board shall be exercised. Indeed, the concluding section of the article authorizes any legislation necessary to give effect to its provisions. Unfortunately, no such legislation has been had. The attempted legislation failed, because it did not receive in the legislature the constitutional majority, as is clearly shown by the circuit judge in his opinion. It is unnecessary to go over the ground he has completely covered.

The presentation to the state board by the corporation of a statement of its property and of its value, which it is required to furnish, is not the equivalent to a notice of the assessment made and of an opportunity to be heard thereon. It is a preliminary proceeding, and until the assessment the corporation cannot know whether it will have good cause of complaint. No hearing upon the statement presented is allowed, and when the assessment is made the matter is closed; no opportunity to correct any errors committed is provided. The presentation of the statement can no more supersede the necessity of allowing a subsequent hearing of the owners, than the filing of a complaint in court can dispense with the right of the suitor and his contestant to be there heard.

There being, then, no provision of law giving to the company notice of the action of the state board, and an opportunity to be heard respecting it, is the assessment valid? Would the taking of the com-

pany's property in the enforcement of the tax levied according to the assessment be depriving it of its property without due process of law? It seems to us there can be but one answer to these questions. There is something repugnant to all notions of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording to him an opportunity of being heard respecting the correctness of their action. And the injustice is strikingly apparent when the property consists of the great number of particulars which go to make up the taxable estate of a railroad company, requiring for any just estimate of their value accurate knowledge upon a multitude of subjects, not usually possessed without special study. We cannot assent to any such doctrine. It conflicts with the great principle which lies at the foundation of all just government, that no one shall be deprived of his life, his liberty, or his property without an opportunity of being heard against the proceeding. The principle is as old as *Magna Charta*, and is embodied in all the state constitutions, and in the fourteenth amendment of the federal constitution. The provision in this amendment is in the form of an interdict upon the states—"Nor shall any state deprive any person of life, liberty, or property without due process of law." And by due process is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and it must give to the party to be affected an opportunity of being heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding, it would be anything but due process. If it touched life or liberty, it would be wanton punishment, or rather wanton cruelty; if it touched property, it would be arbitrary exaction. It is significant that the guaranty against the deprivation of property without due process of law is contained in the clause which guaranties against a like deprivation of life and liberty; and it means that there shall be no proceeding against either without the observance of all the securities applicable to the case recognized by the general law, by those principles which are established in all constitutional governments for the protection of private rights. Notice is absolutely essential to the validity of the proceeding in any case; it may be given by personal citation, and in some cases it may be given by statute; but given it must be in some form. If life and liberty are involved, there

must be a regular course of judicial proceedings; so, also, where title or possession of property is in contention. But in the taking of property by taxation the proceeding is more summary and stringent. The necessities of revenue for the support of government will not admit of the delays attendant upon judicial proceedings in the courts of justice. The statute fixes the rate of taxation upon the value of the property, and appoints officers to estimate and appraise the value. Due process of law in the proceeding is deemed to be pursued, when, after the assessment is made by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity, at a time and place to be designated, to be heard respecting the correctness of the assessment, and to show any errors in the valuation committed by the officers. Notice to him will be deemed sufficient, if the time and place of hearing be designated by statute. But whatever the character of the proceeding, whether judicial or administrative, summary or protracted, and whether it takes property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding.

In *Davidson* v. *New Orleans* the supreme court of the United States assumed this position to be unquestionable. In that case an assessment levied on certain real estate in New Orleans for draining the swamps of that city was resisted on the ground that the proceeding deprived the owners of their property without due process of law; and the court refused to disturb it for the reason that the owners of the property had notice of the assessment and an opportunity to contest it in the courts. After stating that much misapprehension prevailed as to the meaning of the terms "due process of law," and that it would be difficult to give a definition which would be at once perspicuous, comprehensive, and satisfactory, the court, speaking through Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case:

"That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge

thus imposed, in the ordinary course of justice, with notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." 96 U. S. 104.

In *Stuart* v. *Palmer* the meaning of these terms is elaborately considered by the court of appeals of New York with reference to numerous adjudications on the subject. In that case a law of the state imposed an assessment on certain real property for a local improvement without notice to the owner, and a hearing or an opportunity to be heard by him, and the court held that it had the effect of depriving him of his property without due process of law, and was therefore unconstitutional. Mr. Justice Earl, speaking for the court, said:

"I am of the opinion that the constitution sanctions no law imposing such an assessment without a notice to, and a hearing, or an opportunity of hearing, by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing, and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutional validity of a law is to be tested, not by what has been done under it, but what may, by its authority, be done. The legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice." And, again, that "no case, it is believed, can be found in which it was decided that this constitutional guaranty [against depriving one of his property without due process of law] did not extend to cases of assessments; and yet we may infer, from certain *dicta* of judges, that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced, not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also; and by it he may just as much be deprived of his property, and in the same sense, as the judgment debtor is deprived of his by the judgment." 74 N. Y. 188, 195.

We concur fully in the views thus forcibly expressed.

It remains to consider the last position of counsel, that the provisions of article 13 of the constitution of the state, as to the taxa-

tion of railroad property, are to be treated as conditions upon the continued existence of railroad corporations. On the hearing, this position seemed to us to possess some force, but on careful consideration its supposed force is dissipated. The argument is that on the original creation of the corporation the state might have imposed any conditions whatever as to the manner and the amount in which its property should be taxed; that under the reserved power of amendment of the law creating the corporation, the state could at any time afterwards impose such a condition; that the new constitution, in continuing the defendant and other railroad corporations in existence, and at the same time authorizing the taxation of their property upon a valuation different from that at which the property of individuals is assessed, imposed that condition upon them, and that the subsequent exercise of its franchises by the defendant implies an assent to such condition.

There are two answers to this argument. In the first place, article 13 is not intended to make any change in the powers or rights of corporations under the laws of the state. It treats entirely of revenue and taxation, and of the rules which shall govern the assessment of the property of individuals, and of railroad and other *quasi* public corporations. It is in another article that provisions are made for the control of railroad corporations; and the duties and responsibilities of corporations generally, and the power of the state over them, are declared.

In the second place, the state, in the creation of corporations, or in amending their charters, or rather in passing or amending general laws under which corporations may be formed and altered, possesses no power to withdraw them when created, or by amendment, from the guaranties of the federal constitution. It cannot impose the condition that they shall not resort to the courts of law for the redress of injuries or the protection of its property; that they shall make no complaint if their goods are plundered and their premises invaded; that they shall ask no indemnity if their lands be seized for public use, or be taken without due process of law, or that they shall submit without objection to unequal and oppressive burdens arbitrarily imposed upon them; that, in other words, over them and their property the state may exercise unlimited and irresponsible power. Whatever the state may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution. It may confer, by its general laws, upon corporations certain capacities of

doing business, and of having perpetual succession in their members. It may make its grant in these respects revocable at pleasure; it may make the grant subject to modifications and impose conditions upon its use, and reserve the right to change these at will. But whatever property the corporations acquire in the exercise of the capacities conferred, they hold under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation. It cannot be taken without due process of law, nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances.

The state grants to railroad corporations formed under its laws a franchise, and over it retains control, and may withdraw or modify it. By the reservation clause it retains power only over that which it grants; it does not grant the rails on the road; it does not grant the depots along-side of it; it does not grant the cars on the track, nor the engines which move them, and over them it can exercise no power except such as may be exercised through its control over the franchise, and such as may be exercised with reference to all property used by carriers for the public. The reservation of power over the franchise,—that is, over that which is granted,—makes its grant a conditional or revocable contract, whose obligation is not impaired by its revocation or change. The supreme court established, in the *Dartmouth College Case*, that the charter of a private corporation is a contract between the corporators and the state, and that it was, therefore, within the prohibition of the federal constitution against the impairment of contracts. To avoid this result the states have generally inserted clauses in their constitutions reserving a right to repeal, alter, or amend charters granted by their legislatures, or to repeal, alter, or amend the general laws under which corporations are allowed to be formed. The reservation relates only to the contract of incorporation, which, without such reservation, would be irrepealable. It removes the impediment to legislation touching the contract. It places the corporation in the same position it would have occupied had the supreme court held that charters are not contracts, and that laws repealing or altering them did not impair the obligation of contracts. The property of the corporation, acquired in the exercise of its faculites, is held independently of such reserved power, and the state can only exercise over it the control which it exercises over the property of individuals engaged in similar business.

The case of *Detroit* v. *Detroit & Howell Plank-road Co.*, in the

supreme court of Michigan, is in point on both of the propositions stated. An act of the legislature of the state, amending the charter of the company, required it to remove without the limits of the city of Detroit a toll-gate on its road, then within the limits. The effect of the act was to take from the company about two and a half miles of its road, upon which it collected tolls. The act under which the company was incorporated reserved a power in the legislature to repeal and amend it at any time, and the question was whether, under this reservation, the legislature could require the removal of the toll-gate out of the city; and it was held that it could not. Ordinarily a law requiring the removal of a toll-gate from one place to another on a road would be a mere police regulation, but here it was something more; it deprived the company of compensation for the use of its road within the city limits; that is, for a large part of the travel over it. The court, speaking through Mr. Justice Cooley, observed that there were cases in which amendments to charters having some resemblance to this had been sustained, and cited several which involved a mere police regulation, such as requiring a railroad company to build a station-house and stop its trains at a certain locality; to permit and provide for the crossing of its track; and to unite with others in a common passenger station for trains entering a city.

"But [the court added] there is no well-considered case in which it has been held that a legislature, under its power to amend a charter, might take from a corporation any of its substantial property or property rights. In some cases the power has been denied, where the interest involved seemed insignificant. The case of *Albany, etc., R. Co.* v. *Brownell*, 24 N. Y. 345, is an illustration. It was there decided that although the legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes to the same burden, except in connection with the provision for compensation. The decision was in accord with that in *Com.* v. *Essex Co.* 13 Gray, 239, 253, in which, while the power to alter, amend, or repeal the corporate franchises was sustained, it was at the same time declared that 'no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.' The same doctrine is clearly asserted in *Railroad Co.* v. *Maine*, 96 U. S. 499, and is assumed to be unquestionable in the several opinions delivered in the *Sinking-fund Cases*, 99 U. S. 700.

"But for the provision of the constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The

reservation of the right leaves the state where any sovereignty would be, if unrestrained by express constitutional limitations and with the powers which it would then possess. It might, therefore, do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired,—whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the state; it is enough that it has become private property, and it is then protected by the 'law of the land.'" 43 Mich. 140–147; [S. C. 5 N. W. Rep. 275.]

We have already extended this opinion to a great length, and we do not think it necessary or important to notice other positions urged by counsel with great learning and ability against the validity of the taxes for which the present action is brought. We are satisfied that the assessment upon which they were levied is invalid and void, and judgment must be accordingly entered on the demurrer for the defendant, and, by stipulation of parties, the judgment must be made final.

SAWYER, C. J., *concurring*. The facts of this case are fully stated by Mr. Justice FIELD, and need not be repeated here. The questions presented are of the gravest character, and of the utmost importance to the people of California. While I concur, generally, in the conclusions, and in the line of argument adopted by my associate, I shall also state as briefly as I reasonably can, considering the gravity of the questions discussed, my conclusions upon the points involved.

1. In my judgment, the word "person," in the clause of the fourteenth amendment to the national constitution, "No state shall * * * deprive any person of life, liberty, or property without due process of law, nor deny to any *person* the equal protection of the law," includes a private corporation. It must, at least, through the corporation include the natural persons who compose the corporation, and who are the beneficial owners of all the property, the technical and legal title to which is in the corporation in trust for the corporators. The fact that the corporators are united into an ideal legal entity, called a corporation, does not prevent them from

having a right of property in the assets of the corporation which is entitled to the protection of this clause of the constitution. Nor does the intervention of this artificial being between the real beneficial owners and the state, for the simple purpose of convenient management of the business, enable the state, by acting directly upon the legal entity, to deprive the real parties beneficially interested of the protection of these important provisions. In the language of Mr. Pomeroy, one of the counsel, which I adopt:

"Whatever be the legal nature of a corporation as an artficial, metaphysical being, separate and distinct from the individual members, and whatever distinctions the common law makes, in carrying out the technical legal conception, between property of the corporation and that of the individual members, still, in applying the fundamental guaranties of the constitution, and in thus protecting the rights of property, these métaphysical and technical notions must give way to the reality. The truth cannot be evaded that, for the purpose of protecting rights, the property of all business and trading corporations is the property of the individual corporators. A state act depriving a business corporation of its property without due process of law, does, in fact, deprive the individual corporators of their property. In this sense, and within the scope of these grand safeguards of private rights, there is no real distinction between artificial persons, or corporations, and natural persons."

This principle is recognized, and the question settled for all time, in an early case by Chief Justice Marshall, in which he says:

"Aliens, or citizens of different states, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provisions, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in the law, between those persons suing in their corporate character by their corporate name for a corporate right, and the individuals against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals." *Bank U. S.* v. *Devaux*, 5 Cranch, 87.

It is upon this principle that the national courts have ever since entertained jurisdiction on the ground of citizenship of the corporators in cases wherein corporations are the parties to the record. The cases in the supreme court upon this point are numerous, and too familiar to require further citation.

In *Society, etc.*, v. *New Haven*, 8 Wheat. 464–489, it was held that a corporation was protected under the sixth article of the treaty with

England, of 1783, which reads: "There shall be no confiscations made, nor any prosecutions commenced against any *person* or *persons* for or by reason of the part which he or they may have taken in the present war, and that no *person* shall, on that account, suffer any future loss or damage, either in person, liberty, or property," etc. The word "person" in the civil-rights act of congress of April 20, 1870, (17 St. 13,) was held on the circuit to include a corporation. *N. W. Fert. Co.* v. *Hyde Park*, 3 Biss. 481.

In *Railroad Co.* v. *Richmond*, 96 U. S. 529, the supreme court assumes that a corporation is included in the word "person," as thus used in the fourteenth amendment.

The word "person" is, unquestionably, much broader in its signification than the word "citizen," and the change from the word "citizen," in the first clause of the section, to the word "person" of so much larger import, in the last, must have been well considered, and have been intended to extend the shield of the constitution to all cases which might require the protection of this wholesome and greatly-needed guaranty. There is nothing in the context to indicate a purpose to limit the meaning of the word "person" to a narrower sense than the word ordinarily and naturally imports, or to make the application of the provision partial only. To exclude corporations from its import, would be to leave, perhaps, at this day, the far larger portion of the vast capital of the country employed in great enterprises, either commercial, manufacturing, mining, or otherwise, beyond the pale of its protection. There is no good reason for excluding the property of corporations from the same protection extended to other property. It is subject to all the burdens, and it should be entitled to all the immunities, of other property. It is, at last, the property of natural persons. The provision is protective and remedial, not punitive in character, and should, therefore, be *liberally*, not *strictly*, construed. No restriction should be put upon the term not called for by the exigencies of the case, or by the public interest; and it must be manifest that the public interest requires that the broadest signification should be adopted.

Blackstone treats of corporations under the head of "Rights of Persons;" chapter 18 under this head being devoted to the subject. He says: "Persons, also, are divided by law into either natural persons or artificial;" giving a definition of each. Book 1, p. 123. So, also, does Kent, (2 Kent, 316.)

In *U. S.* v. *Amedy*, 11 Wheat. 412, wherein a person was indicted, under an act of congress, for destroying a vessel belonging to a cor-

poration, the supreme court held that a corporation is a person within the meaning of the act. The court, among other things, says: "The mischief intended to be reached by the statute is the same, whether it respects private or corporate persons. That corporations are in law, for civil purposes, deemed persons is unquestionable." And the court in this case holds the same for criminal purposes also; and in criminal cases statutes are *strictly* construed. So, in regard to the provisions of the fourteenth amendment under consideration, "the mischief intended to be reached" by the amendment, "is the same, whether it respects private or corporate persons." See, also, cases cited in the opinion. The authorities to a similar effect are numerous. See, as examples, *People* v. *Ins. Co.* 15 Johns. 588; *Planters' Bank* v. *Andrews*, 8 Porter, 404; Kyd, Corp. 15; *Douglas* v. *P. M. S. Co.* 4 Cal. 304; *State* v. *Nash. University*, 4 Humph. 166. There are many other cases affording support, more or less direct, to this view.

In *Ins. Co.* v. *New Orleans*, 1 Woods, 85, it was held on the circuit that a corporation is not embraced in the word "person," as used in the amendment under consideration, and the supreme court of California, upon the authority of that case, made a similar ruling in *C. P. R. Co.* v. *State Bd. of Equalization*, 8 Pac. Coast Law J. 1155. But notwithstanding their high character for ability, and my respect for the decisions of the judges taking that view, I am compelled to adopt a different conclusion. I think, both upon reason and authority, that the other is the better view. Again, with respect to corporate property, I adopt the language of counsel, which expresses my view accurately and clearly:

"The property of the corporation is in reality the property of its individual corporators. A state statute depriving a corporation of its property does deprive the individual corporators of their property. These clauses of the fifth and fourteenth amendments, and the similar clauses of the state constitution, apply, therefore, to private corporations, not alone because such corporations are 'persons,' within the meaning of that word, but also because statutes violating their prohibitions, in dealing with corporations, must necessarily infringe upon the rights of natural persons. In applying and enforcing these constitutional guaranties, corporations cannot be separated from the natural persons who compose them."

It is upon this principle that the decision in *Dodge* v. *Woolsey*, 18 How. 331, rests, which establishes the right of stockholders to maintain a suit against the directors of the corporation and state officers to restrain the payment by the one, and the collection by the other, of a tax illegally assessed against the corporation. See, also, *Mar-*

shall v. *B. & O. R. Co.* 16 How. 327. But a corporation itself is, in my judgment, a "person," within the meaning of the constitutional provision in question. Such has been the ruling in all cases under statutes containing the word "person," unless the context clearly indicated a more limited signification.

2. I shall not spend much time in discussing the question whether the fourteenth amendment applies only to the African race. Undoubtedly, the negro furnished the immediate occasion and motive for adoption of the amendment; but its benefits could not have been intended to be limited to the negro. The protection afforded is as important to others as to him, as is clearly shown by experience under this provision. A whole race, not African, large numbers of whom came to our shores under the solemn guaranties of stipulations in a treaty suggested and sought, and in a great part framed, by ourselves, to promote our then supposed interests, were among the first to invoke this very provision of the fourteenth amendment to protect them, under the word "person," in the right to earn an honest living, by honest labor; and its protecting power was not invoked in vain. *Parrott's Chinese Case*, 6 Sawy. 349; *In re Ah Chong*, (*Chinese Fisherman Case*,) Id. 451. Who, in view of past experience, shall say there was no occasion to extend the signification of the word "person" beyond the negro? And are all other races, including our own, to be now withdrawn from its protecting power by so narrow and unnatural a construction. I apprehend not. If the line cannot be drawn at the negro, then no other can be adopted that will not embrace every human being in his individual character, or in his legal association with his fellows, for the more convenient administration of his property, and more successful pursuit of happiness. I apprehend that it would have struck the world with some astonishment, when this amendment was proposed to the people of the United States for adoption, if it had read: "Nor shall any state deprive any person of the *negro race* of life, liberty, or property without due process of law; nor deny to any person of the *negro race* within its jurisdiction the equal protection of the laws." Yet so it must, in effect, be read if its operation is to be limited to that race. The rights of the negro are, certainly, no more sacred or worthy of protection than the rights of the Caucasian or other races; and the security of the rights of corporations, and, through them, the rights of the real parties,—the corporators,—is as of great public importance as the security of any other private interests.

3. Does the assessment in question, made in strict pursuance of the provisions of the constitution of California, violate that clause of the fourteenth amendment of the national constitution which says that no state "shall deprive any person of life, liberty, or property without due process of law?"

The provision of the state constitution under which the assessment was made is as follows:

"The franchise, road-way, road-bed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of road-way laid in such counties, cities and counties, cities, towns, townships, and districts."

This is the only provision affecting this question.

To take one's property by taxation is to take or deprive one of his property; and if not taken in pursuance of the law of the land—in some due and recognized course of proceedings, based upon well-recognized principles in force before and at the time this clause was first introduced into the various constitutions, and the legislation of the country—is to take it "without due process of law." The signification of these words has been the subject of judicial consideration and discussion in a vast number of cases, and their import has been determined to be the same as that of equivalent phrases in *Magna Charta*, from which the principle adopted was derived.

I shall not attempt to give an accurate definition of the term "due process of law," applicable to all cases. It is not necessary for the determination of this case to do so. It is enough to say that it has been settled by judicial decision, as I think, that whether the proceeding be judicial, administrative, or executive, if it affects life or liberty, or takes property directly, or imposes a charge which becomes the basis of taking property, some kind of notice, or opportunity to be heard on his own behalf, and to defend his rights, given to the person whose life or liberty is to be affected, or whose property is to be taken, or burdened with the liability, is an indispensable element—an essential ingredient—of "due process of law." No one, I apprehend, would for a moment contend that a man's life, or his liberty, could be legally taken away without notice of the proceeding, or without being offered an opportunity to be heard; or that a proceeding whereby his life or liberty should be forfeited, or permanently

affected, without notice or opportunity to be heard in his own defense, could, by any possibility, be by "due process of law." In such cases there could be no just conception of "due process of law" that would not embrace these elements of notice and opportunity to be heard. Any conception excluding these elements would be abhorrent to all our ideas of either law or justice. If these elements must enter into and constitute an essential part of due process of law, in respect to life and liberty, they must also constitute essential ingredients in due process of law, where property is to be taken; for the guaranty in the constitution is found in the same provision in the same connection, and in the identical language applicable to all. One meaning, therefore, cannot be attributed to the phrase with respect to property, and another with respect to life and liberty.

Having stated the principle, which I conceive to be established by an unbroken line of authorities, I shall refer to some of them. One of the latest and most instructive cases upon the subject was recently decided by the court of appeals of the state of New York, from which I shall extract a passage which I adopt as expressing my own views, and presenting the question in a very clear and satisfactory light. It involved the validity of an assessment for a public street improvement, and but one question, which was decisive of the case, was examined or determined. The question was as to the validity of the law under which the assessment was made. The court, by Mr. Justice Earl, says: "The latter assessment could be made without any notice to or hearing of any person. The law requires no notice, and a provision for notice cannot be implied. Upon the assumption that the law was valid, there was ample authority for the commissioners to make the assessment without any notice or hearing." *Stewart* v. *Palmer*, 74 N. Y. 186. The judge proceeds:

"I am of the opinion that the constitution sanctions no law imposing such an assessment without a notice to and a hearing, or an opportunity of a hearing, by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require a notice to them, and give them a right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such law, that the assessment has in fact been fairly apportioned. The constitutional validity of a law is to be tested, not by what has been done under it, but what may by its authority be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice. * * *" Id. 188.

"The legislature can no more arbitrarily impose an assessment for which property may be taken or sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of

natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defense of his rights; and the constitutional provision that no person shall be deprived of these without due process of law, has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the federal or state constitutions. It is a limitation upon arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the legislature cannot do, nor authorize to be done. 'Due process of law' is not confined to any judicial proceedings, but extends to every case which may deprive a citizen of his life, liberty, or property, whether the proceedings be judicial, administrative, or executive in its nature. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights. * * *" Id. 190.

"No case, it is believed, can be found in which it was decided that the constitutional guaranty did not extend to cases of assessments, and yet we may infer from certain *dicta* of judges that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced, not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also, and by it he may just as much be deprived of his property, and in the same sense, as the judgment debtor is deprived of his by the judgment." Id. 195.

Much more is worth quoting, but it would extend this opinion to an unreasonable length.

Thus, it is determined in the case cited that a party is not only entitled to notice and an opportunity to be heard, but that the law, or constitution itself, must expressly provide for notice. This decision was approved by the supreme court of California in October last, in *Mulligan* v. *Smith*, involving the validity of a tax. 8 Pac. Coast Law J. 499. Said *McKinstry*, J.: "In my opinion the statute provides no notice or process by means of which the property owners can be subjected to the judgment of the county court. The act is therefore void;" citing *Stewart* v. *Palmer, supra;* Cooley, Taxation, 266, and other cases; and *McKee*, J., in the same case said:

"It is a principle which underlies all forms of government by laws that a citizen shall not be deprived of life, liberty, or property without due process of law. The legislature has no power to take away any man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him, and for a full opportunity of time, place, and tribunal to be heard in defense of his rights. This constitutional guaranty is not confined

to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature."

In *Patten* v. *Green*, 13 Cal. 329, Mr. Justice Baldwin, all the justices, including Mr. Justice Field, concurring in the opinion, said: "We think it would be a dangerous precedent to hold that an absolute power resides in the supervisors to tax land as they may choose, without giving any notice to the owner. It is a power liable to great abuse. The general principles of law applicable to such tribunals oppose the exercise of any such power." The raising of the tax by the board of equalization was held void for want of notice. Mr. Webster, in the *Dartmouth College Case*, defined due process of law, or "the law of the land," as "the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." He adds: "Everything which may pass under the form of an enactment is not 'the law of the land.'"

In *Cooper* v. *Board of Works*, 108 Eng. C. L. R. 181, in which was in question the action of the board of public works, in pursuance of a statute which did not require notice, *Willes*, J., said: "I apprehend that a tribunal, which is by law invested with power to affect the property of one of her majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that that rule is of universal application, and founded upon the plainest principles of justice." In the same case, *Byles*, J., said: "The judgment of Mr. Justice Fortescue, in *Dr. Bentley's Case*, is somewhat quaint, but it is very applicable, and has been the law from that time to the present." He says: "The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he called upon him to make his defense. 'Adam, where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?'" See, also, *Philadelphia* v. *Miller*, 49 Pa. 448; *Matter of Ford*, 6 Lans. 92; *Overing* v. *Foote*, 65 N. Y. 263; *Westervelt* v. *Gregg*, 12 N. Y. 209; Cooley, Const. Lim. 355; *Butler* v. *Sup'rs Saginaw*, 26 Mich. 22, 29; Sedg. St. & Const. Constr. (Pomeroy's Ed.) 474 *et seq.*, and notes; Cooley, Taxation, 266, 267.

In *Davidson* v. *New Orleans*, 96 U. S. 97, it was not questioned,

but assumed, that the party taxed must have an opportunity to be heard, and decided upon that theory.

In my judgment the authorities establish beyond all controversy that somewhere in the process of assessing a tax under a law, or a state constitution, at some point before the amount of the assessment becomes finally and irrevocably fixed, the statute or the state constititution must provide for notice to be given to the owner of the property taxed, and an opportunity to be afforded to make objections, and to be heard upon them. In some form or manner he must be afforded an opportunity to defend his interests. In this case the constitution makes no provision for notice or a hearing, and the answer alleges that there was none, which is admitted by the demurrer.

4. On behalf of the plaintiff, what purports to be a statute passed March 14, 1881, (St. 1881, p. 83,) is cited, which, it is insisted, supplements the constitution, and provides for a notice and hearing upon a petition filed within five days after the assessment is made upon a railroad. But it is claimed that, although published in the volume of statutes for the year 1881 as a statute, the bill never constitutionally passed, and that it is consequently no law. Section 15 of article 4 of the constitution of California provides that "on the final passage of all bills they shall be by yeas and nays upon each bill separately, and shall be entered on the journals, and no bill shall become a law without the concurrence of a majority of the members elected to each house." Under section 5 of the same article the house consists of 80 members, of whom it would require 41 to constitute a majority of the members elected to the house. Upon reference to the published journals of the legislature it appears that the bill in question passed the house and was sent to the senate, where it was amended by adding a long provision, being the very provision, if any there is, which gives the owners of railroads of the class in question, dissatisfied with the assessment, a right to file a petition, "within five days after the assessment is made and entered of record on the books of the board," to have the assessment corrected, and providing for proceedings upon said petition. On March 4th the house considered the senate amendment, and upon a call of the yeas and nays, as required by the constitution, 39 members voted for the amendment and 32 against it, there being four paired and not voting. Thus the votes in favor of the amendment were two less than a majority of members elected to the house, and the bill failed. It does not appear that the bill was "read

at length." The speaker declared that this was not the final action of the house, and that the amendment concurred in by a vote of 39 ayes to 32 nays was adopted. An appeal having been taken from this decision of the chair, it was afterwards laid upon the table. Thereupon two members filed each a separate protest against the decision of the speaker, and the certificate that the bill had passed, on the expressed ground that it did not receive the vote of a majority of the members elected to the house. All this appears upon the journal. If this was not the final action of the house, then, as there was no further action, the act never finally passed, even by the numbers indicated. Assembly Journal, 24th Sess. pp. 472-475.

The bill, therefore, never was constitutionally passed, and never became a law. Whether the bill became a law is a question of law of which the court will take judicial notice. *Sherman* v. *Storey*, 30 Cal. 253; *Ottawa* v. *Perkins*, 94 U. S. 268; *Gardner* v. *The Collector*, 6 Wall. 509, 510; *Post* v. *Sup'rs*, 105 U. S. Under the decisions of the courts upon constitutional provisions in all respects similar to that in the present constitution of California, it is settled that the court, to inform itself, will look to the journals of the legislature. So the supreme court of the United States holds where it is so decided by the state courts in construing their own constitutions and laws. See cases last cited. I am not aware of any decision of the supreme court of California giving a different construction to the state constitution as it now stands. Unless this mode is adopted of resorting to the journals to ascertain whether a statute has been legally passed or not, experience, and the number of cases that have already arisen under similar constitutional provisions, demonstrate that the requirement of the constitution that the vote shall be taken by yeas and nays, and a majority of the members required to vote in the affirmative on the final passage of an act, would be of little avail.

While we think the case of *Sherman* v. *Storey* correctly decided under the constitution as it then was, we are of the opinion that the change in the constitution requires a change in the rule. When California adopted from other states the provision now found in its constitution substantially as found in the constitution of Illinois, it must be deemed to have adopted with the provision the settled construction put upon it by the courts of the state from which it was taken. The leading cases upon the point are *Spangler* v. *Jacoby*, 14 Ill. 278; *Prescott* v. *Board of Trustees, etc.*, 19 Ill. 326; *Osborn* v. *Staley*, 5 W. Va. 89; and the cases cited in *Sherman* v. *Storey*, and

in those from the United States supreme court. In this case there is something more than an omission in the journals, for it affirmatively appears what the vote was, and that the bill did not pass by the vote required by the constitution.

Statutory provisions, also, have been adopted, which appear to be designed to give effect to this change in the constitution. Section 255 of the Political Code requires the minute clerks of the senate and assembly to "keep a correct record of the proceedings of their respective houses." And sections 256 and 257 require the daily proceedings to be recorded in the journals, and that they "must be read by the secretary each day of meeting, and then be authenticated by the signatures of the president and speaker of the respective houses." Section 1875, Code C. P., provides that "courts take judicial notice of the following facts: * * * Public and private official acts of the legislative, executive, and judicial departments of this state, and of the United States," etc. * * * "In all these cases the court may resort for its aid to appropriate books of documents of reference." Section 1888 provides that "public writings are (1) the written acts or records of the acts of the sovereign authority of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state or of the United States," etc. And section 1918 provides that "official documents may be proved as follows: * * * (2) The proceedings of the legislature of this state, and of congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions." Thus the journals of the legislature are put upon the same footing as the statutes. We think there can be no doubt, under the constitution of the state and these statutes, that we may look to the journals to see what action was in fact had with respect to any apparent law as published in the volumes of the statutes of the state; and looking to the journals it affirmatively appears that the act upon the statute book in question never did become a law.

Even if the act had passed, it is at least extremely doubtful whether the notice, or time for filing the petition, is sufficiently definite to be of any effect. The assessment, under the provision, might be made, even if the party is bound to notice the state of the record on the first Monday of May, the five days might elapse, and the assessment be transmitted to the county, before the party assessed would know, under the law, that it had been made. All the acts of assessment may have transpired, and the assessment become final, before the first Monday of May. The board, however, is not required to make it before

that day, although it might do so, and the party assessed can scarcely be expected to watch its proceedings, from day to day, before the time fixed by the law.

There being, then, no such statute as is relied on in existence, the validity of the assessment must rest alone upon the constitutional provision quoted, and the act of 1880, adding sections 3664 and 3665 to the Political Code; and neither provides for notice of any kind, or for an opportunity to be heard in any stage of the proceedings. It was therefore made without due process of law, as we understand the meaning of that provision as used in the fourteenth amendment in question.

Section 3664 of the Political Code, as adopted in 1880, requires the president, or some other designated officer of the class of corporations in question, to furnish the state board of equalization, on or before the first Monday of April in each year, a detailed statement of the whole number of miles of road operated, the number of cars, amount of rolling stock, and their value, the gross earnings, and various other particulars; and requires the said board, on or before the first Monday in May, to assess the franchise, road-way, road-bed, rails, and rolling stock. It is urged on the part of the plaintiff that this provision furnishes sufficient notice and opportunity to be heard, to constitute due process of law on this point, within the meaning of the constitutional provision. In our judgment, this position is clearly untenable. This is simply a mode adopted for obtaining information as to the amount and general value of the property of the corporation, as a basis in part, at least, for their future consideration and action in making the assessment. It is but a preliminary step and not the assessment, or any part of the assessment. The board is under no obligation to adopt either the statement as to what the property is, or its value. It may reject it altogether and adopt an entirely different basis. The party interested is entitled, at some point of the proceeding, to know what action the board takes, or proposes to take; and to an opportunity to be heard, as to its propriety, before the assessment becomes fixed and irrevocable. Other classes of property holders, also, are required to file a statement of their property under oath, yet in the scheme provided for their assessment an opportunity to be afterwards heard is provided for.

The constitutions of the state and nation provide that private property shall not be "taken for public use without just compensation." When parties cannot agree, there must be some mode provided for

ascertaining the value of property so proposed to be taken for public use under the sovereign right of eminent domain. Suppose a statute should provide a board, or even a court, to assess the value of property proposed to be taken under this power for railroad purposes, or other public use, and should give the owner of the property no notice or opportunity to be heard, other than to require him at some time, say a month anterior to the consideration and determination of the amount to be paid, to furnish such board or court a similar statement as to the description and value of the property to that required by section 3664, which the party might do or omit to do; would a subsequent *ex parte* determination of the value, by the board or court, be in pursuance of due process of law within the meaning of the constitution? I apprehend that no court would sustain such a proceeding. I also think that a taking for the purposes of taxation under such an assessment, without notice or opportunity to be heard, would be equally without the protection of due process of law, and equally void.

The state supreme court has held the provision in the constitution of California, authorizing the state board of equalization to assess, finally, the railroads of the class in question, to be self-executing, requiring no legislation of any kind to carry it into full effect; also that the provision is mandatory, *S. F. & N. P. R. Co.* 8 Pac. Coast Law J. 1061.

It is insisted by defendant that, this being so, it is incompetent for the legislature to add to or take from the requirements found in the constitution, and that the additional provision of section 3664, as adopted in 1880, is void. The view already expressed upon the section renders it unnecessary now to determine that question, although presented by the record and argued by counsel. It would seem, however, that there can be no constitutional objection to legislating upon details for the purpose of more effectually carrying out the scheme of the constitution, so far as the legislation is not inconsistent with any of its provisions. It is a general rule that a state legislature has all legislative power not inhibited by the constitution, state or national. *S. P. R. Co.* v. *Orton*, 6 Sawy. 186.

This being so, it would seem that the legislature might supplement the constitutional provision by statutory provisions intended to more perfectly protect the rights of the parties by other safeguards which are not inconsistent with the constitutional provision. But as this is a question more properly belonging to the state courts, we do not deem it desirable to finally determine it now.

5. Is the provision of the state constitution, under which the assessment in question was made, in conflict with the provision of the fourteenth amendment to the national constitution which provides that no state "shall deny to any person the equal protection of the law?" The circuit justice has discussed this question so fully and satisfactorily that I shall have little to add. The provision is:

"A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other *quasi* public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security. If paid by the owner of such security, the tax so levied upon the property affected thereby shall become a part of the debt so secured. If the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof; provided, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

Whatever the property, then, real or personal, mortgaged to secure a debt, the value of the debt so secured, in the case of everybody except "a railroad and other *quasi* public corporations," is to be deducted from the value of the property mortgaged; and the value only of the property mortgaged, "less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof;" that is to say, that, whatever the property, it shall be taxed to the real owner. But in the case of "a railroad or other *quasi* public corporation," there is to be no reduction of the value of the mortgaged property, and the whole is to be taxed to one party, whether he owns the whole or not. In one case, if property is mortgaged to the extent of half its value, the owner is assessed upon one-half the value, and the owner of the debt secured is taxed upon the other half. But in the other case the owner of the legal title to the property is assessed and taxed upon the whole value of the property, and the other party, who is interested to the extent of one-half, upon none. A., a natural person, has $50,000 in cash—all the property he has—and purchases of B., another natural person, a piece of real estate for $100,000,

that being its actual value, paying one-half down, and giving a mortgage for $50,000 to secure the balance of the purchase money. The constitution in effect says—and in this instance such is the real, actual state of facts—that A. and B. each has $50,000 in the property, one-half not having been paid for by A., and each shall be assessed and pay a tax upon his own interest in it, amounting to $50,000. A., in this instance, is worth only $50,000, and if he pays taxes upon a larger amount he pays taxes upon property he does not own—upon property owned by somebody else. This seems to be a self-evident proposition.

C., "a railroad or other *quasi* public corporation," also has $50,000 cash, and purchases of B., for its proper use, an adjoining piece of real estate for $100,000, which is also its actual value, paying $50,000, and giving a mortgage to secure the balance of the purchase money. In this case, as in the other, the actual interest of each in the property is $50,000. They stand precisely upon the same footing in all particulars with reference to the property. C. has only $50,000 in the property,—it not having paid for the other half,—and B. the rest. But in this case the constitution says that C. shall, nevertheless, be assessed for, and pay taxes upon, the whole property, double the amount he owns, and B. shall not be required to pay anything; that is to say, that C. shall not only pay the tax on its own property, but the tax upon B.'s property; that money, to the amount of the tax assessed upon $50,000 belonging to B., shall be taken by the state or county from C., and appropriated to the use and for the benefit of B., to liquidate B.'s share of the public burdens. This sum, being so much more than C.'s share of the public burdens, and being in fact B.'s share, the result of the operation is not only to take so much property from C. for public use without compensation, but also to arbitrarily take it from C., and apply it to the use and benefit of another private party, B., without compensation. The result would be the same whether the property of A., B., and C., thus situated and mortgaged is land, a railroad operated in one or more counties, or any other kind of property. Does a law which authorizes such proceedings—such discriminations—bear or press equally upon A. and C., or equally upon B. and C.? Is C. equally protected in his rights of property with A., or equally protected with B.? Although situated precisely alike with reference to their property, do they feel the pressure of the public burdens equally and alike? The question does not appear to me to admit of argument. Upon the very statement of the proposition it seems to me to be self-

evident that a law authorizing and requiring such proceedings does not afford, but expressly denies, the equal protection of the law. The constitution in the one case says that "the mortgage, deed of trust, contract, or obligation" shall be "deemed and treated as an interest in the land affected thereby," which, in the cases supposed, together with the debt secured, it undoubtedly in fact is; but in effect the constitution says it is not so in the other case. Different kinds of property may require to be taxed in different forms and modes, in order to be equally taxed; and classifications of property, for purposes of taxation, should have reference to the just equality of burdens, so far as that is practically attainable. Classification should have reference to the different character, situation, and circumstances of the property, making a different form or mode of taxation proper, if not absolutely necessary. It cannot be arbitrarily made with mere reference to the nationality, color, or character of the owners, whether natural or artificial persons, without any reference to a difference in the character, situation, or circumstances of the property. If the arbitrary discrimination and classification found in this case can be legally made under the constitution and the law of the land, then the constitution or the law can be so framed as to dispose of a man's rights in property of all kinds by arbitrary classification and definition, without regard to the real facts, circumstances, or condition of the property. A person may be classified and defined out of the equal protection of the law; and if so with reference to this provision, he can also be classified and defined out of uniformity in the operation of the law in other particulars; out of the protection of due process of law, and of the provision forbidding a law impairing the obligation of contracts, or taking property for public use without just compensation; and, indeed, out of all the guaranties of the constitution, state or national. I am not arguing that property of all kinds may not be taxed where it is found; but in this case there is a personal liability sought to be enforced against the defendant for taxes not imposed upon others in like circumstances, without any means provided for reimbursement, such as are applicable to others similarly situated, by the party who ought to pay the tax.

What constitutes the equal protection of the law is well stated in *Ah Kow v. Nunan*, 5 Sawy. 562; *In re Ah Fong*, 3 Sawy. 144; *Pearson* v. *Portland*, 69 Me. 278; *Portland* v. *Bangor*, 65 Me. 120; *Missouri* v. *Lewis*, 101 U. S. 22. See, also, *Live Stock, etc., Ass'n*, v. *Crescent City Co.* 1 Abb. 398; *Parrott's Chinese Case*, 6 Sawy. 377. That inequality and different principles of taxation of persons simi-

larly situated, as in this case, is a violation of this provision seems to be already determined by the supreme court of the United States. The civil-rights act, as re-enacted in 1870, and again in the Revised Statutes, provides that—

"All persons within the jurisdiction of the United States shall have the same right in every state and territory * * * to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 16 St. p. 144, § 16; Rev. St. 1977.

The congress which passed this act embraced many of the members who were in the congress which framed and proposed the fourteenth amendment, and they may be supposed to be well informed as to the purpose and scope of that amendment. This act was passed in pursuance of the last clause of the amendment, as a part of the appropriate legislation to enforce its provisions. It is therefore a legislative construction as to the scope of the provision inhibiting the states from denying to any person the equal protection of the law. The United States supreme court gives the amendment a similar construction as to its scope. In *Strauder* v. *West Virginia* the court says that sections 1977 and 1978 of the Revised Statutes "partially enumerate the rights and immunities intended to be granted by the constitution," and after quoting section 1977, as above set out, adds: "This act puts in the form of a statute what had been substantially ordained in the constitutional amendment. It was a step towards enforcing the constitutional provision." 100 U. S. 311.

In *Ex parte Virginia* the court, referring to *Tennessee* v. *Davis* and *Strauder* v. *West Virginia*, said:

"We held that the fourteenth amendment secures, among other civil rights, to colored men, when charged with criminal offenses against a state, an impartial jury trial, by jurors indifferently selected, or chosen without discrimination against such jurors because of their color. We held that immunity from any such discrimination is one of the equal rights of all persons, and that any withholding it by a state is a denial of the equal protection of the laws, within the meaning of the amendment. We held that such an equal right to an impartial jury trial, and such an immunity from unfriendly discrimination, are placed by the amendment under the protection of the general government, and guarantied by it. We held, further, that this protection and this guaranty, as the fifth section of the amendment expressly ordains, may be enforced by congress by means of appropriate legislation." 100 U. S. 345.

If discrimination in fixing the qualifications of jurors inferentially violates the provisions of the fourteenth amendment, as denying the equal protection of the law, it is not easy to perceive why discriminations in the assessment and collection of taxes expressly made are not equally so.

Thus it appears that the supreme court regards the section quoted as within the scope of the fourteenth amendment, and the act provides that every person "shall be subject to like * * * taxes, licenses, and exactions of every kind, and to no other," as "white citizens;" and this is held to be appropriate legislation to enforce the amendment. We have already seen that this defendant is subjected to taxes and exactions other than and different from those imposed upon "white citizens." We have already held that the word "person," as to property rights, as used in the amendment in question, includes a corporation, and, as used in the provision of the statute cited, it includes a corporation by express definition of the statute itself, which says, in terms: "In determining the meaning of the Revised Statutes * * * the word 'person' may extend and be applied to partnerships and corporations." Page 1, tit. 1, *c.* 1, § 1.

The provision of the constitution of the state of California in question, therefore, violates the provision of the fourteenth amendment in denying to defendant the equal protection of the law. "An unconstitutional law is void, and is no law." *Ex parte Siebold*, 100 U. S. 376. "The constitution and laws of the United States are the supreme law of the land, and to those every citizen of the United States owes obedience, whether in his individual or official capacity. * * * The laws of the state, in so far as they are inconsistent with the laws of congress on the same subject, cease to have effect as laws." Id. 392, 397.

6. It is further urged on the part of plaintiff that, under the state constitution, the legislature is authorized to alter or repeal the laws under which corporations are formed,—they cannot be properly called charters,—and that this mode of taxing corporations, in effect, operates as an amendment of the act authorizing the formation of corporations, and that corporations hold their franchises in subordination to that provision.

The proceeding in question is either taxation or something else; either an exercise of the sovereign right of taxation, or the exercise of some other power; either taxation or not taxation. The provision, in terms, purports on its face to provide for taxation. The convention that framed the article, and the people, when they adopted it,

evidently must have supposed they were providing a scheme of taxation. The provision admits of no other construction.

The provision is found in the chapter entitled "Revenue and Taxation," and the section says: "For the purpose of assessment and taxation," etc. If the proceeding is taxation, then it provides, and can only provide, for taking from the defendant an amount of money equal to its just share of the public burden relieved by the taxation, and nothing more. Anything beyond that is taking private property for public use without compensation. If the proceeding is taxation, there is no necessity for resorting to any other provision of the constitution. If it is not taxation,—if the amount demanded, or the principle adopted, is imposed as a condition of continued existence, or as a limitation of its rights to exercise its franchises,—then it is an annual bonus demanded for the franchise, or the privilege of existence, such as was formerly often demanded and paid by corporations for the special privileges given by special charters, when there were no restrictions upon the legislative power upon the subject, and is not taxation. If it is a bonus demanded and paid for this right, then, in addition, the corporation is subject to taxation upon its property; for under the constitution all property must be taxed. "All property in the state," says the constitution, "not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law." Article 13, § 6, says that "the power of taxation shall never be surrendered or suspended by any grant or contract to which the state shall be a party." If, therefore, the provision of section 4 relative to "railroad or other *quasi* public corporations" is a term or condition of the contract upon which its existence and further exercise of its franchises depend, then it must still be liable to taxation on its property in the proper mode. By a contract authorizing certain persons to form a corporation and exercise its franchises, however valuable the consideration received, the state cannot, as we have seen, surrender or suspend its right to tax its property besides, as all other property is taxed. Other tax-payers are entitled to have the property of corporations properly taxed. Again, if the submission to this mode of what is called taxation becomes a valid condition of the continuance of the further existence of the corporation, and the further exercise of its franchises, then a refusal to pay the tax is a violation of the conditions of its being, and the courts, upon a proceeding for the purpose by the state in the nature of a *quo warranto*, would probably adjudge the forfeiture of its charter and wind up its affairs. This would be the appropriate rem-

edy. I apprehend that no court would so adjudge under the present constitution on that ground. It is clear to me, therefore, from these considerations and the express terms themselves of the constitution, that the provision in question attempts to provide only for exercising the sovereign power of taxation,—has no other end to accomplish, and accomplishes no other purpose,—and that the rights of the parties must be determined on that hypothesis alone. Again, the general act authorizing the formation of corporations confers upon those complying with its provisions certain rights, franchises, and privileges. It endows the parties as organized with certain faculties and capacities, the result being to give them in their united character, under a certain name, a capacity to do business and acquire property. A law merely authorizing the formation of a corporation gives the corporation formed no property. That must be acquired by the corporation for itself. The legislature, under the various guaranties of the constitution, state and national, can only take away, limit, enlarge, or modify that which it gave. And what is given in the creative act is, simply, its capacities; its legal faculties, including all such as are essential to its corporate existence; all those powers which are strictly corporate, being those powers which can only be given by legislative act; powers not possessed by natural persons or partnerships, acting in their natural, individual, or associate characters, independent of legislation. These strict corporate powers I attempted to define in *Orton's Case*, 6 Sawy. 187. The powers thus given, essential or otherwise, and their future exercise, may be modified, or otherwise affected, by subsequent legislation. A corporation having been formed with capacity to acquire and hold property, the legislature may, doubtless, grant to it, as well as to natural persons capable of taking, property rights; but such rights of property, when once vested, can no more be withdrawn than the property acquired from other sources, or than property granted to, or acquired by, natural persons. The property acquired in the exercise of its corporate faculties, from whatever source derived, is the property of the metaphysical being called the corporation, held, however, in trust for the sole benefit of the corporators. As such, it is protected like all other property, and can only be taken by the law of the land, in some one of the modes not inhibited by the constitution. It cannot, in my judgment, be taken even as a further condition of corporate existence without the assent of the corporation or its corporators. There is no consent in this case to submit to any such conditions, and that is not the basis upon which the action is brought. There is no promise

to pay a bonus set out in the complaint upon which an action can be maintained. I apprehend that a mere provision in the form of a statute, or a state constitution adopted after the formation of a corporation, that corporations under the laws should cease to exist unless they surrender to the state all the property theretofore acquired by the corporation, would be void. And power to demand a part, as a condition of existence, however small, is power to demand all. Such a statutory demand would be but a flimsy guise or pretext for evading all the guaranties of the constitution, which would not for a moment be tolerated. It would be to seek indirectly what could not be attained directly; the accomplishment of an unlawful end by what, at best, is but apparently lawful means. See, on this point, *Parrott's Chinese Case*, 6 Sawy. 349; opinion of *Hoffman*, J. In that case I had occasion to say:

"The end being unlawful and repugnant to the supreme law of the land, it is equally unlawful and equally in violation of constitution and treaty stipulations to use any means, however proper or within the power of the state for lawful purposes, for the attainment of that unlawful end, or accomplishment of that unlawful purpose. It cannot be otherwise than unlawful to use any means whatever to accomplish an unlawful purpose. This proposition would seem to be too plain to require argument or authority. Yet there is an abundance of authority on the point, although, perhaps, not stated in this particular form. *Brown* v. *Maryland*, 12 Wheat. 419; *Ward* v. *Maryland*, 12 Wall. 431; *Woodruff* v. *Parkham*, 8 Wall. 130-140; *Hinson* v. *Lott*, Id. 152; *Welton* v. *Missouri*, 91 U. S. 279-282; *Cook* v. *Pennsylvania*, 97 U. S. 573."

The observations of Mr. Justice Field in *Cummings* v. *Missouri*, 4 Wall. 325, are pertinent in this connection. He said:

"The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law-maker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same; for what cannot be done directly cannot be done indirectly. The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." See, also, *Henderson* v. *Mayor of N. Y.* 92 U. S. 268; *Chy Lung* v. *Freeman*, Id. 279; *Railroad Co.* v. *Huson*, 95 U. S. 472.

The foregoing observations apply equally well to any effort to obtain the property of corporations by irregular means not applicable to natural persons. It seems to me that under our general system embodied in the constitution, providing for corporations, which for-

bids the granting of any special privileges not enjoyed by all other persons, it was intended to put corporations, with respect to their property and to all other matters, except what is in fact granted by the laws, in all particulars upon the same footing as natural persons.

In my judgment, the state constitutional provisions under consideration, and the laws passed to carry them out, violate the provision of the fourteenth amendment in question in two vital particulars: (1) They assess railroad and other *quasi* public corporations upon a different basis from that adopted with respect to the natural persons similarly situated, in the particulars herein pointed out; (2) they provide, with respect to natural persons, notice and an opportunity to be heard in the course of the proceeding to assess their property before the assessment becomes fixed, while they afford no such notice or opportunity to be heard to railroads and other *quasi* public corporations; and in both these particulars deny to the latter the equal protection of the law within the meaning of the fourteenth amendment to the national constitution.

Again, this suit is for a tax and nothing else. It proceeds upon that idea, and the idea alone, that a valid tax has been assessed against the defendant, which this action is brought under the statute to recover. The suit cannot be maintained upon a liability imposed under other and different provisions of the constitution. If it cannot be maintained as for a tax it must fail. The recovery, if any is had, must be upon the cause of action alleged.

We do not conceive that a provision for assessing railroads operated in more than one county, by the state board of equalization, while other local property is assessed by the local assessors, would be denying the equal protection of the law, provided the assessment in the former case is, in all respects, made upon the same basis, under the same rules, and upon the same principles as to value, notice, opportunity to be heard, etc., as in the latter. The presumption would be that all the officers would perform their duties justly under the law, and that the assessments so made upon property, differently circumstanced, would operate equally. Nor do we think that the assessment of the "franchise, road-way, road-bed, rails, and rolling stock of all railroads operated in more than one county in the state," "by the state board of equalization," as a unit, and apportioning the amount of the assessed value to the several counties, etc., in proportion to the number of miles in each, is objectionable, on the ground that it denies the equal protection of the law to the owner of the road.

Indeed, this seems to be the only practicable way of assessing such a road. It is owned and operated as a unit, and cannot be otherwise usefully employed. Its income, expenses, and management, and all its operations, are as a unit. Its rolling stock is at one point at one moment, and at another at a different point of time, but it is all working together as a unit to the accomplishment of one end. In fragments and isolated parts, the road would be comparatively valueless as property. It is only as a unit that it can be properly considered or properly taxed. To tax it otherwise would be to tax it upon principles materially different from those applicable to other property necessarily considered and used as a unit. The character and circumstances of the property are such as seem to justify a classification for this purpose. These points, also, seem to be determined in favor of the plaintiff in the *State Railroad Tax Cases*, 92 U. S. 575. The other points determined in this case are not involved in those cases.

Whatever public inconvenience may temporarily result from our decision,—and it must necessarily be great,—being satisfied, as we are, that the provisions of the state constitution now in question violate the inhibitions of the fourteenth amendment, our duty is plain, and we cannot, if we would, shrink from its performance. There must be judgment for the defendant.

Since the argument in these cases commenced, apparently in anticipation of what must necessarily be the result, various means, more or less violent, have been suggested, through the public press and elsewhere, to prevent railroad corporations from escaping the payment of their just share of the public burdens: such as taking away their franchises; seizing and appropriating their property first, and litigating the right afterwards; and punishing by the severest penalties the officers of all such corporations, in all cases where resistance to payment of a tax is made in the courts, however illegal the exaction or whatever the ground of complaint on their part may be. Violent counsels of this character usually result in constitutional and statutory provisions such as those we have been considering and held void; which render it necessary to seek the protection of our national *magna charta*. It would be idle—utterly futile—to insert a provision in the national constitution guarantying to every person within its jurisdiction his life, his liberty, and his property, if certain classes can be selected out in the subordinate legislation of the country to be visited with condign punishment if they even seek to invoke the protection of this beneficient guaranty against discriminating and wrong-

ful legislation. If a single individual can be deprived of the protection of this provision by such means, so can all. If such things can be, wherein does the protection of the guaranty consist?

A far wiser and more statesmanlike proceeding would seem to be, to avoid all occasion for resistance to wrong in the guise of void laws, by coolly and calmly re-examining the subject in the light of past experience, and so amending our state constitution and statutes as to bring them into entire harmony with all the guaranties of the fourteenth amendment, "the crowning glory of our national constitution"—that noblest and best written constitution ever devised by the wisdom of man.

If the life, liberty, property, and happiness of all the people are to be preserved, then it is of the utmost importance to every man, woman, and child of this broad land that every guaranty of our national constitution; whatever temporary inconvenience may be felt, be firmly and rigorously maintained at all times and under all circumstances. In the language of the supreme court of the United States:

"The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man, than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism." *Milligan's Case*, 4 Wall. 120.

I concur in the judgment ordered by the circuit justice.

ORDER STAYING PROCEEDINGS.

As the questions we have considered are of the greatest importance, and their correct solution concerns not merely the railroad corporation, which is the defendant, but corporations of every kind, other than municipal, we shall order a stay in all the other cases (not decided to-day) now pending in this court involving the same questions, until these cases can be brought before the supreme court of the United States, and the questions involved shall have received by its judgment their final and authoritative determination. If the decision now reached be there sustained, the state will be obliged to order a new assessment, in making which the defendant will be allowed a deduction in the valuation of its property for the mortgage thereon, and also a hearing before the state board of equalization with respect to the assessment. If, on the other hand, the decision be reversed,

the other cases can be at once disposed of. By taking out a writ of error immediately on the judgment now rendered, it is possible that the case may be advanced on the calendar and be heard at the coming term.

NOTE.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT. The fourteenth amendment to the federal constitution contains prohibitions which have exclusive reference to the action of the state government, (*Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, Id. 339; *U. S.* v. *Cruikshank*, 92 U. S. 542,) and is a guaranty of protection against state action, (Id.; *Slaughter-house Cases*, 16 Wall. 36.) It created no new right, but operated upon legal rights as it found them established and declared that such as they were, in each state, they should be enjoyed by all persons alike, (*Ward* v. *Flood*, 48 Cal. 36,) and furnished an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen, as a member of society, (*U. S.* v. *Cruikshank*, 92 U. S. 543; *Virginia* v. *Rives*, 100 U. S. 313; *Van Valkenburg* v. *Brown*, 43 Cal. 43; *U. S.* v. *Hall*, 13 Int. Rev. Rec. 181,) by preventing states from doing that which will deprive the person of property, and not from regulating the use of property, (*Munn* v. *Illinois*, 94 U. S. 134.) The object of the constitution is justness and fairness. *Wisconsin Cent. R. Co.* v. *Taylor Co.* 52 Wis. 43. The amendment was designed to secure equal rights to all persons, (*Ex parte Virginia*, 100 U. S. 339;) and it applies to all persons, whether native or foreign, while within the jurisdiction of the United States, (*Ex parte Ah Fong*, 3 Sawy. 144.)

EQUAL PROTECTION OF THE LAWS. The provision as to equal protection of the laws contemplates the protection of persons and classes of persons against unjust discrimination by a state, (*Missouri* v. *Lewis*, 101 U. S. 22,) but it does not relate to territorial or municipal arrangements made for different portions of the state, (Id.;) for a state may establish one system of law in one portion of its territory and another system in another portion, provided it does not abridge the privileges and immunities of citizens of the United States, nor deprive a person of his rights without due process of law, nor deny any person within its jurisdiction an equal protection of the law, (Id.) Equal protection of the law implies not only equal accessibility to courts for the protection or redress of wrongs and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind. *Ex parte Ah Fong*, 3 Sawy. 144. A law which declares that one class of persons shall have no redress, which redress is given to all by the general statutes, is in conflict with this amendment. *Pearson* v. *City of Portland*, 69 Me. 281. While the general statute remains in force for the protection of one class of persons within the jurisdiction of the state, it must remain in force for the protection of all others similarly situated. Id. A state constitution is a law in so far that it cannot violate the provisions of the federal constitution; so held as to the provision relating to the impairment of the obligations of contracts. *Dodge* v. *Woolsey*, 18 How. 331; *Groves* v. *Slaughter*, 15 Pet. 449; *Railroad* v. *McClure*, 10 Wall. 511; *Delmas* v. *Ins. Co.* 14 Wall. 667; *Gunn* v. *Barry*, 15 Wall. 610; 8 N. B. R. 1; *Moultrie Co.* v. *Savings Bank*, 92

U. S. 632; *In re McLean*, 2 N. B. R. 173; *Marsh* v. *Burroughs*, 1 Woods, 463; *Osborn* v. *Nicholson*, 1 Dill. 235; *Hawkins* v. *Filkins*, 24 Ark. 286; *Jacoway* v. *Denton*, 25 Ark. 625; *McNealy* v. *Gregory*, 13 Fla. 417; *Homestead Cases*, 23 Grat. 266; *Furman* v. *Nichol*, 8 Wall. 44; *Moore* v. *Ill. Cent. R. Co.* 4 Chi. Leg. News, 123; *Edwards* v. *Jager*, 19 Ind. 407; *Logwood* v. *Planters' Bank*, 1 Minor, 23; *Chicago* v. *Rumsey*, 87 Ill. 348; *Ex parte Lee's Bank*, 21 N. Y. 9; *Rutland* v. *Copes*, 15 Rich. 84; *Hazen* v. *Union Bank*, 1 Sneed, 115; *Keith* v. *Clark*, 2 South. Law Rev. 24; *Union Bank* v. *State*, 9 Yerg. 490; *Jones* v. *Brandon*, 48 Ga. 593; *Chambliss* v. *Jordan*, 50 Ga. 81. And so of a constitutional amendment, (*Pacific R. Co.* v. *McGuire*, 20 Wall. 36; *Keith* v. *Clark*, 97 U. S. 454;) or a change in a state constitution, (*Dodge* v. *Woolsey*, 18 How. 331; *Matheny* v. *Golden*, 5 Ohio St. 361.)

DUE PROCESS OF LAW. The principle is universal that no man's property can be taken from him without his consent, express or implied, except by due course of law. *Blackman* v. *Lehman*, 63 Ala. 547. "Due process of law" means such an exertion of the powers of government as the settled maxims of the law permit and sanction. *Bertholf* v. *O'Reilley*, 18 Am. Law Reg. (N. S.) 119; *Ex parte Ah Fook*, 49 Cal. 402. It means law in its regular course of administration through courts of justice, (*Barker* v. *Kelly*, 11 Minn. 480; *Rowan* v. *State*, 30 Wis. 129; *State* v. *Becht*, 23 Minn. 413;) the law of the land, (*Matter of Meador*, 1 Abb. U. S. 331; *Murray* v. *Hoboken, etc., Co.* 18 How. 472; *James* v. *Reynolds*, 2 Tex. 251;) a present existing rule, and not an *ex post facto* law, (*Hoke* v. *Henderson*, 4 Dev. 15; *Taylor* v. *Porter*, 4 Hill, 146; *Wynehamer* v. *People*, 13 N. Y. 393; *Norman* v. *Horst*, 5 Watts & S. 171;) a law existing at the time of vesting of rights, (*Wilkinson* v. *Leland*, 2 Pet. 658; *Osborn* v. *Nicholson*, 13 Wall. 662.)

The fourteenth amendment does not employ the phrase "due process of law" in any new sense but as employed in the state constitution. *Munn* v. *Illinois*, 94 U. S. 118. The term, when applied to judicial procedure, means a course of legal procedure according to those rules and principles established by our jurisprudence for the protection and enforcement of private rights, (*Pennoyer* v. *Neff*, 95 U.S. 714,) and generally implies and includes parties, judge, regular allegations, and a trial according to some settled course of judicial proceedings, (*Murray* v. *Hoboken, etc., Co.* 18 How. 272; *Huber* v. *Reily*, 53 Pa. St. 112; *Rees* v. *Watertown*, 19 Wall. 122; *Westervelt* v. *Greg*, 12 N. Y. 202;) a timely and regular proceeding to judgment and execution, (*Dwight* v. *Williams*, 4 McLean, 586;) a legal proceeding under direction of a court (*Newcomb* v. *Smith*, 1 Chand. 71) intended to secure the right of trial according to the forms of law, (*Parsons* v. *Russell*, 11 Mich. 113.)

The phrase "due process of law" does not in all cases necessarily require judicial proceedings, (*McMillan* v. *Anderson*, 95 U. S. 37; see, to same effect, *Pearson* v. *Yewdall*, Id. 294; *Murray* v. *Hoboken, etc., Co.* 18 How. 272; *Davidson* v. *New Orleans*, 96 U. S. 897; *Greene* v. *Briggs*, 1 Curt. 311; *Murray* v. *Hoboken, etc., Co.* 18 How. 272; *Hoke* v. *Henderson*, 4 Dev. 15; *Taylor* v. *Porter*, 4 Hill, 146; *Van Zandt* v. *Waddel*, 2 Yerg. 260; *State Bank* v. *Cooper*, 2 Yerg. 599; *Jones* v. *Perry*, 10 Yerg. 59,) and does not necessarily import a trial by jury, (*Ex parte Meador*, 1 Abb. U. S. 317; *Petition of McMahon*, 22 N. Y. Daily Reg. 881;) but includes summary remedies, (*Martin* v. *Mott*, 12

Wheat. 19; *U. S.* v. *Ferreira*, 13 How. 40; *Murray* v. *Hoboken, etc., Co.* 18 How. 272.) A summary seizure of lands for non-payment may be authorized by state laws, and this is not a violation of the provision as to due process of law. *McMillan* v. *Anderson*, 95 U. S. 37. It simply requires that a person should be brought into court and have an opportunity to prove any fact for his protection. *People* v. *Essex Co.* 70 N. Y. 229. It implies the right of the person affected thereby to be present before the tribunal which pronounces judgment, to be heard by testimony or otherwise, and to have the right to controvert by proof any material facts which bear on the question of right; and if any question of fact or liability is conclusively presumed against him, it is not due process of law. *Zeigler* v. *S. & N. R. Co.* 58 Ala. 594; *Wilburn* v. *McCalley*, 63 Ala. 436. There must be a competent tribunal, and the party affected must be brought within the jurisdiction. *Pennoyer* v. *Neff*, 95 U. S. 714. It is a fundamental principle that before a person can be deprived of a right, even by judicial suit, he must have notice and reasonable opportunity to be heard in defense of his rights. *Gilmore* v. *Sapp*, 100 Ill. 297.

Although differing from proceedings in courts of justice the general system of procedure for the levy and collections of taxes, established in this country, is, within the meaning of the constitution, due process of law. *Kelly* v. *Pittsburgh*, 104 U. S. 78. The revenue laws of a state may be in harmony with the fourteenth amendment, which declares that no state shall deprive any person of life, liberty, or property without due process of law, although they do not provide that a person shall have an opportunity to be present when a tax is assessed against him, or that the tax shall be collected by suit. *McMillen* v. *Anderson*, 95 U. S. 37. A statute which gives a person against whom taxes are assessed a right to enjoin their collection, and have their validity judicially determined, is due process of law, notwithstanding he is required, as in other injunction cases, to give security in advance. Id. An act which makes ample provision for judicial inquiry in matters therein mentioned, is due process of law. *Pearson* v. *Yewdall*, 95 U. S. 294. A party is not deprived of his property without due process of law by the enforced collection of taxes, merely because they, in individual cases, work hardships or impose unequal burdens. *Kelly* v. *Pittsburgh*, 104 U. S. 78. It is a difficult attempt to give an authoritative definition of what it is for a state to deprive a person of his life, liberty, or property without due process of law, within the meaning of this amendment. The enunciation of the principles which govern each case as it arises is the better mode of arriving at a sound definition. *Davidson* v. *New Orleans*, 96 U. S. 97. Neither the unlimited power of a state to tax, nor any of its large police power, can be exercised to such an extent as to work a practical assumption of the power conferred by the constitution upon congress. *Railroad Co.* v. *Husen*, 95 U. S. 465.

PRIVILEGES AND IMMUNITIES OF CITIZENS. The first clause of the first section of the fourteenth amendment applies to the colored race, and its purpose is to establish the citizenship of the negro, and secure to the colored race the benefit of the freedom previously accorded to them. *Slaughter-house Cases*, 16 Wall. 36. The second clause protects from hostile legislation of the states the privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the state. *Slaughter-*

house Cases, 16 Wall. 36; *Frasher* v. *State*, 3 Tex. Ct. App. 267. Whether the amendment had other, and if so, what purposes, not decided. *Strauder* v. *West Virginia*, 100 U. S. 303. A corporation created by and doing business in a particular state is to be deemed to all intents and purposes a person, although an artificial person, an inhabitant of the state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person. *Louisville, etc., R. Co.* v. *Letson*, 2 How. 497. This decision put an end to the controversy on that point, and also put an end to what has long been felt, by the profession as well as the bench, to be an anomaly in our jurisprudence, (see *Greely* v. *Smith*, 3 Story, 76,) and is accepted as a precedent, (*Marshall* v. *Balt. & Ohio R. Co.* 16 How. 314; compare *Northern Ind. R. Co.* v. *Mich. Cent. R. Co.* 15 How. 223; *Lafayette Ins. Co.* v. *French*, 18 How. 404;) and as to a corporation being a citizen, it has been ever since adhered to, (*Covington Draw-bridge Co.* v. *Shephard*, 20 How. 227.) A corporation is deemed a "person" within the penal statutes as well as for civil purposes, (*U. S.* v. *Amedy*, 11 Wheat. 392;) within the statute of usury, (*Thornton* v. *Bank of Washington*, 3 Pet. 36;) within the treaty clause against confiscation and prosecution, (*Society for Prop. of Gosp.* v. *New Haven*, 8 Wheat. 464.)

So a corporation is deemed a citizen for the purposes of jurisdiction in the courts of the United States,—see Desty, Fed. Proc. (2d Ed.) § 629,—and as to the right of removal of a cause into the federal court, see Desty, Rem. Causes, § 10*k*. When the legislature provides for taxing the property of individuals, the constitution requires it to tax the property of corporations for pecuniary profit to the same extent and for the same purposes. *Mayor, etc., of Mobile* v. *Stonewall Ins. Co.* 53 Ala. 570; *City of Davenport* v. *C. I. & P. R. Co.* 38 Iowa, 633.

STATE POWER OF TAXATION. The power of taxation is an attribute of sovereignty of every government. *Transportation Co.* v. *Wheeling*, 99 U. S. 281. The power of the state to tax is an inherent and indispensable incident to sovereignty, (*Western U. Tel. Co.* v. *Mayer*, 28 Ohio St. 53; *Dobbins* v. *Com'rs*, 16 Pet. 435;) and exists independent of the constitution of the United States, (*McCulloch* v. *Maryland*, 4 Wheat. 316; *Lane Co.* v. *Oregon*, 9 Wall. 77; *Railroad Co.* v. *Peniston*, 18 Wall. 29; *Nathan* v. *Louisiana*, 8 How. 73; *People* v. *Coleman*, 4 Cal. 46.) By the revolution the powers of government devolved upon the people of the United States. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Green* v. *Biddle*, 8 Wheat. 1; *Ogden* v. *Saunders*, 12 Wheat. 213; *Cherokee Nation* v. *Georgia*, 3 Wall. 585. The power is supreme unless the subject be beyond the borders of the state, or the property within the state has been ceded to the United States, and within its separate and exclusive jurisdiction; and this supremacy cannot be questioned by the judiciary. See Desty, Fed. Const. 59, and cases cited. The power to tax *all* property within the jurisdiction, does not include public property; the word "all" in the state constitution applies only to private property. *People* v. *Doe G.* 36 Cal. 220. Except as restricted by the constitution, the state has full power of taxation over all subjects, (Id. note 5;) and to every object of value, except as restricted by the constitutional provisions as to the means and instrumentalities for carrying out the powers of government, and such as are neces-

sarily implied as falling within the category of such means and instruments, (*Day* v. *Buffington*, 3 Cliff. 387; *Transportation Co.* v. *Wheeling*, 99 U. S. 279; *Savings Society* v. *Coite*, 6 Wall. 604; *State Tonnage Tax Cases*, 12 Wall. 204;) such as national banks; (*McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank*, 9 Wheat. 860; *National Coml. Bank* v. *Mobile*, 62 Ala. 284; *Hills* v. *Nat. Alb. Exch. Bank*, 12 FED. REP. 95; *Evansville Nat. Bank* v. *Britton*, 25 Alb. L. J. 432; *Bank Tax Case*, 2 Wall. 200; *Farmers' Nat. Bank* v. *Dearing*, 91 U. S. 29;) or United States bonds; (*Bank of Commerce* v. *New York*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *Chicago* v. *Lamb*, 52 Ill. 414; *Bank of Kentucky* v. *Com'rs*, 9 Bush, 46; *Op. Just.* 53 N. H. 634;) or treasury notes or other government securities; (*The Banks* v. *Mayor*, 7 Wall. 16; *Bank* v. *Sup'rs*, Id. 28; *Montgomery Co.* v. *Elston*, 32 Ind. 27; *State* v. *Haight*, 37 N. J. Law, 128; Desty, Fed. Const. 63;) or government revenue stamps; (*Palfrey* v. *Boston*, 101 Mass. 329;) or money in the treasury; or precious metals in the mint; or the lots, structures, ships, materials of war, or other property devoted to the public purposes of the United States, (*City* v. *Churchill*, 33 N. Y. 693; S. C. 43 Barb. 550,) situated within its limits, (*Anon.* 9 Op. Atty. Gen. 291.) These exemptions depend upon the effect of the tax,—whether it will hinder the efficient exercise of the powers of the government, (*Railroad Co.* v. *Peniston*, 18 Wall. 5; *Nat. Bank* v. *Com'r*, 9 Wall. 353; *Dobbins* v. *Com'rs*, 16 Pet. 435; *Waite* v. *Dowley*, 9 Chi. Leg. News, 263;) but do not apply where a tax only remotely affects its exercise, (*Railroad Co.* v. *Peniston*, 18 Wall. 5;) so a railroad company was held not exempt from state taxation, as being a means or instrument employed by the national government for the transportation of the mails, arms, and munitions of war of the United States. *Huntington* v. *Cent. Pac. R. Co.* 2 Sawy. 503. See *State Bank Tax Cases*, 92 U. S. 595.

EQUALITY AND UNIFORMITY OF TAXATION. The provision of the constitution of the United States, art. 1, § 8, subd. 1, was designed to secure uniformity as between the states, not as between different kinds of property; in the language of Judge Story, "to cut off all undue preferences of one state over another in the regulation of subjects affecting their common interests." And the object of the state constitutions was to secure the same equality as between different kinds of taxable property that the other designed to secure as between the states. And this can only be attained by a uniform rule. *State* v. *Winnebago Lake & F. R. P. Co.* 11 Wis. 42; *Exchange Bank* v. *Hines*, 3 Ohio St. 1. See *Western Union Tel. Co.* v. *Mayer*, 28 Ohio St. 592; *Waring* v. *Savannah*, 60 Ga. 93; *Marsh* v. *Clark Co.* 42 Wis. 502. The object of such constitutional provisions is to regulate the powers of taxation by such limitations and restrictions as will protect against unjust or arbitrary action. *West. U. Tel. Co.* v. *Mayer*, 28 Ohio St. 533. See *McCulloch* v. *Maryland*, 4 Wheat. 316; *Providence Bank* v. *Billings*, 4 Pet. 519; *North. M. R. R.* v. *McGuire*, 20 Wall. 46. To be uniform, taxation need not be universal. Certain objects may be made its subjects and others be exempted, but as between subjects of the same class there must be equality. *New Orleans* v. *Fourchy*, 30 La. Ann. 910; *State* v. *Poydras*, 9 La. Ann. 165. The legislature has the power to prescribe not only the property to be taxed, but the rule by

which it must be taxed, and the only limitation of that power is that the rule shall be uniform. *Wisconsin Cent. R. Co.* v. *Taylor Co.* 52 Wis. 37, 43, and cases cited. Uniformity means that all kinds of property not absolutely exempt must be taxed alike by the same standard of valuation equally with other taxable property, and co-extensively with the territory to which it applies. . *Gilman* v. *Sheboygan*, 2 Black, 510. They must be uniform in respect to persons and property within the jurisdiction of the body imposing the same, (*Hanscom* v. *Omaha*, 11 Neb. 37,) and all property of any particular class must be taxed alike. *Wisconsin Cent. R. Co.* v. *Taylor Co.* 52 Wis. 43, and cases cited; *Home Ins. Co.* v. *Augusta*, 50 Ga. 543. It is uniform when it is equal upon all persons belonging to the described class upon which it is imposed. *Gatlin* v. *Town of Tarboro*, 78 N. C. 119. To render taxes uniform it is essential that the tax district should confine itself to objects of taxation within its limits, but this with the understanding that the *situs* of personal property may be the domicile of the owner. *Barton* v. *Kalloch*, 56 Cal. 95; *People* v. *Townsend*, 56 Cal. 633; *People* v. *Placerville*, 34 Cal. 656.

The constitutions of some of the states, in terms or by necessary implication, require all private property to be taxed in proportion to its value. *O'Kane* v. *Treat*, 25 Ill. 557; *Mobile* v. *Dargan*, 45 Ala. 310; *Mobile* v. *Street Ry. Co.* Id. 322; *Washington* v. *State*, 13 Ark. 752; *McGehee* v. *Mathis*, 24 Ark. 40. The constitution of Kansas differs from the constitution of other states, requiring only a uniform "rate" of taxation and not requiring *all* property except that which is exempt to be taxed by a uniform rule; hence railroad property in that state may be assessed in one manner and other property in a different manner, and personal property be assessed on different rules, and still all the assessments be held valid. *Com'rs of Ottawa* v. *Nelson*, 19 Kan. 238; *Gulf R. Co.* v. *Morris*, 7 Kan. 210. The constitution of California, art. 13, § 1, providing that all property in the state, not exempted under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, requires that the assessor shall proceed to ascertain such value in the manner provided by law. *Hyatt* v. *Allen*, 54 Cal. 353. And the provisions requiring that all taxes shall be uniform on the same class of subjects within the territorial authority levying the tax, is merely declaratory of the law before the adoption of the new constitution. *Kitty Roup's Case*, 81* Pa. St. 211. Where the constitution requires that the valuation must be uniform, and in all cases alike and equal, and the legislature prescribes a different rule, the act is a departure from the constitution and void. *Knowlton* v. *Sup'rs Rock Co.* 9 Wis. 410. Equality of taxation means apportioning the contributions of each person towards the expenses of government so that he shall feel neither more nor less inconvenience from his share of the payment than every other person experiences. *Kirby* v. *Shaw*, 19 Pa. St. 258. Perfectly equal taxation is perhaps unattainable, (*Grim* v. *School-dist.* 57 Pa. St. 433;) it can never be but approximation, (*Allen* v. *Drew*, 44 Vt. 174;) as from the nature of the case there can be no uniform rule for making the assessments, (*Coite* v. *Soc. for Savings*, 32 Conn. 173;) and for that reason equality of taxation is not enforced by the bill of rights, (*Kirby* v. *Shaw*, 19 Pa. St. 258;) but where a moral obligation exists the legislature may give it legal effect, (*Lycoming* v. *Union*, 15 Pa. St. 166.)

UNJUST DISCRIMINATIONS. The principle of equality running through our constitutional system does not admit of discrimination in behalf of one citizen to the detriment of another. *Mason* v. *Trustees*, 4 Bush, 408. Taxes should be regulated by fixed general rules, and be apportioned by law according to a uniform ratio of equality, (*Sutton* v. *Louisville*, 5 Dana, 28; *Woodbridge* v. *Detroit*, 8 Mich. 274; *Grim* v. *School-dist.* 57 Pa. St. 433; *Knowlton* v. *Rock County*, 9 Wis. 410;) the object being protection of the tax-payer against discriminating exactions, (*Lexington* v. *McQuillan*, 9 Dana, 513.) The constitution of Illinois precludes discrimination against classes of persons or property, (*Primm* v. *Belleville*, 59 Ill. 142,) and against railroad property, (*Bureau County* v. *Chicago, etc., R. Co.* 44 Ill. 229; *Chicago, etc., R. Co.* v. *Boone County*, Id. 240.) Restrictions may be necessary to prevent abuses which may not amount to a violation of the rule of uniformity. There may be *uniform* abuses of the taxing power by reckless and improvident management on the part of local authorities, and the provisions of the constitution requiring the legislature, in establishing municipal corporations, to restrict their powers of taxation so as to prevent abuses, etc., is designed to give further protection in addition to that furnished by the rule of uniformity. *Weeks* v. *Milwaukee*, 10 Wis. 242. When the inequality of valuation is the result of a statute of the state, designed to discriminate injuriously against any classes of persons or species of property, the court will grant appropriate relief. *People* v. *Weaver*, 100 U. S. 539; *Fulton* v. *National Bank*, 101 U. S. 143; *Cumming* v. *National Bank*, Id. 153; *National Bank* v. *Kimball*, 2 Morr. Trans. 463. A statute in derogation of the rights of property, or which takes away the estate of the citizen, must be strictly construed, (*Sharp* v. *Spier*, 4 Hill, 76; *Bloom* v. *Burdick*, 1 Hill, 130;) but courts will not interfere on the ground that the tax is unfair or unjust, unless the fundamental law of the land has been violated. *Linton* v. *Mayor of Athens*, 53 Ga. 588; *Cleghorn* v. *Postlewaite*, 43 Ill. 428; *Darling* v. *Gunn*, 50 Ill. 424. See *Second Nat. Bank* v. *Caldwell*, *ante*, 429, and note. Where a law is unconstitutional courts will hold it void, but upon no other ground can it be disregarded. *P., C. & St. L. Ry. Co.* v. *Brown*, 77 Ind. 45. So, where statutes impose taxes on false and unjust principles, or operate to produce gross inequality, courts may interpose and declare such enactments void. *Com.* v. *Savings Bank*, 5 Allen, 428. See *Lowell* v. *Oliver*, 8 Allen, 247; *Ould* v. *Richmond*, 23 Grat. 464; *Howell* v. *Bristol*, 8 Bush, 493. But they cannot afford relief from the enforcement of laws prescribing modes and subjects of taxation if they neither trench upon the federal authority nor violate any right secured by the constitution. *Kirtland* v. *Hotchkiss*, 100 U. S. 491. Courts ought not to declare a law void without a strong and earnest conviction, divested of all reasonable doubt, of its invalidity. *Chicago, D. & V. R. Co.* v. *Smith*, 62 Ill. 268; *Lane* v. *Dotman*, 4 Ill. 238; *People* v. *Marshall*, 6 Ill. 672.

An act which fixes absolute liability in a corporation, and which does not provide "due process of law," is in violation of the bill of rights. *Zeigler* v. *S. & N. R. Co.* 58 Ala. 594. See *Plumer* v. *Marathon County*, 46 Wis. 163. A statute which attempts to make an assessment conclusive evidence of the amount due for taxes is invalid. *Plumer* v. *Marathon Co.* 46 Wis. 163. Where a statute establishes a rule for the estimation of the value of railroad

property for taxation which is in contravention of the constitution, the assessment of taxes made in obedience thereto is invalid. *Board of Assessors* v. *Ala. Cent. R. Co.* 59 Ala. 551. A statute which permits deductions for indebtedness to be made from the assessed value of property does not operate to render taxation unequal. *Wetmore* v. *Multnomah Co.* 6 Or. 463. Where debts existed which ought to have been deducted, but were not deducted, the assessment was held voidable but not void, the assessors being entitled to notice of the existence of debts which he was entitled to have deducted. *Supervisors* v. *Stanley*, 12 FED. REP. 82. That they are totally void, see same case, dissenting opinion of *Bradley*, J., p. 91. An act of the legislature which refuses to the shareholders of a national bank the same deduction for debts due by him from his shares of stock that it allows to others who have moneyed capital otherwise invested, is in conflict with the act of congress permitting shares of national banks to be taxed. *Williams* v. *Weaver*, 100 U. S. 539; and see *Ruggles* v. *Fond du Lac*, 53 Wis. 436; *People* v. *Weaver*, 100 U. S. 539; *People* v. *Dolan*, 36 N. Y. 59; *Ankeny* v. *Multnomah Co.* 4 Or. 271; S. C. 3 Or. 386; *Pelton* v. *National Bank*, 101 U. S. 143. That a suit to enjoin the collection of a tax under such an act may be enjoined, see *Hills* v. *Nat. Alb. Exch. Bank*, 12 FED. REP. 93; and see *Second Nat. Bank* v. *Caldwell*, *ante*, 429, and note.

JOURNALS OF THE LEGISLATURE AS EVIDENCE. By the provisions of the state constitution a bill must be read at length on three separate days in each house, unless, in case of urgency, two-thirds of the house, by a vote taken by yeas and nays, dispense with the provisions either as to the manner of reading or the reading on separate days. *Weill* v. *Kenfield*, 54 Cal. 111. That the journals of the legislature may be examined to ascertain that a bill was constitutionally passed, see *Walnut* v. *Wade*, 103 U. S. 683; *Perry County* v. *Railroad Co.* 58 Ala. 546; *Harrison* v. *Goody*, 57 Ala. 49; *Walker* v. *Griffith*, 60 Ala. 361.—[ED.

THE SONOMA COUNTY TAX CASE.

SAN FRANCISCO & N. R. CO. *v.* DINWIDDIE and others.

(*Circuit Court, D. California.* September 23, 1882.)

1. STATE CONSTITUTION—CONFLICT OF LAW.

   An assessment made in strict accordance with the provisions of the state constitution relating to the assessment of railroad property which violates the provisions of the fourteenth amendment to the constitution of the United States is void.

2. PAYMENT—RECOVERY BACK—DURESS.

   A payment under it is not a payment under duress, but is voluntary and cannot be recovered.

This case was argued with the *San Mateo Case*, *ante*, 722, and the opinion was delivered at the same time.

James A. Johnson, for plaintiff.

District Attorney Ware, for defendant.

SAWYER, C. J. This is an action on the official bond, as tax collector of Sonoma county, of defendant Dinwiddie against Dinwiddie as principal, and the other defendants as his sureties. The action is to recover something over $18,000, paid by plaintiff to defendant Dinwiddie, under protest, for taxes assessed for the fiscal year 1881–82. The tax is alleged to have been assessed in pursuance of the provisions of section 10 of article 13 of the constitution of the state of California; and it is urged that such assessment is absolutely void, because said provision, under which the assessment was made, violates the fourteenth amendment to the constitution of the United States, in not giving notice, or affording an opportunity to be heard, and consequently the assessment, if it could be enforced, would take the property of the plaintiff without due process of law. The complaint alleges, as a breach of the condition of the bond, that defendant Dinwiddie advertised the said property assessed, being the franchise, road-way, road-bed, rails, and rolling stock, for sale for said taxes so assessed, and threatened to sell said property, when, to prevent a sale and save its property, and to prevent a cloud being cast upon its title, the plaintiff paid the amount of the tax under protest. The defendant demurs to the complaint.

In *San Mateo County* v. *S. P. R. Co., supra*, we have fully examined the question as to the validity of the provision of the state constitution under which this assessment for the tax in question was made, and have held that an assessment made in strict accordance with this provision is in violation of that provision of the fourteenth amendment to the constitution of the United States which says that no "state shall deprive any person of life, liberty, or property without due process of law," and is therefore void. As the assessment was utterly void, it would have afforded no justification for a forced collection of the tax. Being void, as plaintiff alleges that it is, it is insisted by the defendants that the payment was voluntary, and, being so, the money paid cannot be recovered from defendants. This is clearly a voluntary payment within the rule laid down by the supreme court of California in *Bucknall* v. *Story*, 46 Cal. 599. It cannot be distinguished from that case. There was no possession of the property in the tax collector to be released in this case. He had never seized and he did not detain, and he did not even threaten to seize or detain any property. He was simply proceeding to sell property out of his possession upon an assessment of a tax that was wholly

void upon its face. Neither the sale nor a conveyance under it could create any cloud on the title. The facts were fully known to the plaintiff, and the plaintiff at least maintained that the assessment and proceedings were absolutely void; and on this proposition the plaintiff turns out to be right. The assessment was claimed to be void, and it was on that very ground that the plaintiff objected to the sale, and paid the money under protest. The means of knowledge of plaintiff were equal to those of the tax collector. One or the other must suffer, if more money than the tax ought to have been, was actually, paid. But the tax collector was a public officer, and was required by the terms of the law, at least, to collect this tax, which was assessed in form, in accordance with the provision of the state consititution, and it is so alleged. There is no more reason for his determining, at his peril, whether the constitutional provision under which he was required to act was valid, than there was for the plaintiff to pay, or decline to pay, at his peril. The defendant, at least, acted in good faith upon what appeared in terms to be the constitution and laws of the state. The plaintiff was bound to know the law. If the plaintiff paid, when there was no actual seizure or restraint of its goods, merely from a fear that it might be mistaken as to the law, it acted upon its own judgment as to what was the best course to pursue. It was merely a question of *policy* and *not coercion.* If there was a mistake on its part, it was a mistake of law, which it was bound to know, and not a mistake of fact. It was, in fact, right in its view of the law. At all events the payment was clearly voluntary under the laws of California as settled in *Bucknall* v. *Story*, *supra*, and we know of no subsequent decision of the supreme court of the state to the contrary. This being the law of the state, we are required to follow it. Had this been the only question, we should have had no jurisdiction, and the case would have been remanded to the state court, where this rule of law would have been enforced. The case was retained only because it presented the question arising under the fourteenth amendment, and being obliged to retain the case for the determination of that question, it is necessary to dispose of all the questions necessarily arising in it. So, also, there was no duress, as that term is defined in the Civil Code, § 1569. There was, certainly, no duress of the person, and there was no "detention of property" at all, it never having been seized, and, consequently, no "unlawful detention of the property of the plaintiff." All the other cases referred to have some difference in circumstances, such as actual seizure and detention, constituting duress, as thus defined by the

Code, or some other circumstances distinguishing them, or else the facts are so defectively stated as not to show upon what precise point the case turned.

The case of *Detroit* v. *Martin*, 34 Mich. 173, is also a strong case in support of the views we have adopted. In that case it was distinctly decided that a threat to enforce payment of a void tax, no seizure of the goods or the person having been made or threatened, where the officer had no authority to compel payment otherwise than by the sale of the land, which could injure no one, would not constitute a payment made in consequence thereof anything but a voluntary payment; that a protest cannot, alone, change what would otherwise be a voluntary payment into an involuntary one, or change the rights of the parties. It was further held that one who had knowledge of the facts, being conclusively presumed to know that an assessment which is laid under a statute which is unconstitutional and void cannot be made the basis of a sale that could constitute a cloud on his title, and therefore, to know that he could not be injured by it.

It is alleged that the tax deed would, under the statute, be *prima facie* evidence, at least, of title, and that the case would come within the principle of *Pixley* v. *Huggins*, 15 Cal. 127. But in this, counsel are mistaken. The tax deed under a sale upon the tax in question, if offered in evidence, would show upon its face that it was for a tax levied upon a railroad, its franchise, etc., under the provisions of the constitution of California claimed, and by us held, to be void. It would present a question of law arising upon a comparison of the deed with the law without other evidence. It would appear that a tax levied in pursuance of the constitutional provision could not be valid. The deed would be rejected as void. No counter-evidence would be required to overthrow it. The tax deed cannot be evidence that there is a valid law under which the tax could be assessed. We take notice of the law. It would appear at once that a valid assessment could not under any circumstances be made under that provision of the constitution, and the statute in force. If made in accordance with those provisions it would be void. It would therefore not constitute any cloud upon the title. This is the doctrine of *Pixley* v. *Huggins*, cited. In *Williams* v. *Corcoran* the supreme court of California also held that "parties" are presumed to know the law; to know that the provision of the act in respect to the assessment of property within the district was void. "A tax deed," said the court, "based upon the assessment in this case, would constitute no cloud

on their title to the lands;" that a threat by the collector to sell without lawful authority was idle, and did not constitute coercion. 46 Cal. 556. Mr. Cooley states the same rule with respect to clouds upon titles. Cooley, Taxation, 542. The same principle, as we have already seen, was adopted in *Detroit* v. *Martin*, before cited.

We are of opinion that no cause of action is shown by the complaint, for the reasons stated and upon the authorities cited, and that the demurrer must be sustained, and it is so ordered.

Let final judgment be entered for defendants on the demurrer.

TAXES PAID UNDER PROTEST—RECOVERY BACK. Taxes assessed without authority of law are void. *Stephens* v. *Daniels*, 27 Ohio St. 527; *Welker* v. *Potter*, 18 Ohio St. 85; *Hersey* v. *Sup'rs*, 37 Wis. 75; *Marsh* v. *Sup'rs*, 42 Wis. 502; *Schettler* v. *Fort Howard*, 43 Wis. 48; *Plumer* v. *Marathon Co.* 46 Wis. 163; *North Carolina R. Co.* v. *Alamance*, 77 N. C. 4. Taxes illegally assessed, if paid under protest, may be recovered back. Id. So of a railroad tax. *Cade* v. *Perrin*, 14 S. C. 1. So of express and telegraph companies. *West. U. Tel. Co.* v. *Mayer*, 28 Ohio St. 521. A suit to recover back a portion of a tax illegally assessed, must be brought in time, the money must not have been voluntarily paid, and the taxing officers must have acted with turpitude. Where both parties are innocent and both in fault the payment cannot be recovered back. *Galveston Co.* v. *Gorham*, 49 Tex. 279. When there is no legal duress the payment will be deemed voluntary and it cannot be recovered back. *Wills* v. *Austin*, 53 Cal. 152. So, where there was no process or compulsory proceedings, the payment will be deemed voluntary, and it cannot be recovered back. *Com'rs* v. *Norris*, 62 Ga. 538.—[ED.

MISSOURI, K. & T. R. Co. *v.* SCOTT and others.

(*Circuit Court, N. D. Texas.* October 19, 1882.)

PRACTICE—INJUNCTION TO STAY SUITS IN STATE COURTS, REV. ST. § 720.

Where the United States court acquires jurisdiction of a case by removal or otherwise, and afterwards parties institute proceedings in state courts that will, if successful, defeat the jurisdiction of the United States court or deprive plaintiffs therein of all benefit of any decree or judgment rendered in their favor, the United States courts may by injunction lay hands on the parties and control their proceedings, although proceedings in a state court may be thus indirectly stayed or ended; yet section 720 of the United States Revised Statutes prohibits the granting of injunctions except in bankruptcy cases when the state court has first regularly acquired jurisdiction of the case.

In Equity. Hearing on application for injunction *pendente lite.*

The hearing is on the bill and exhibits; so that all the matters of fact well pleaded may be taken as true. The bill makes a

case showing that a proceeding or controversy was instituted in the county court of Tarrant county, under the laws of Texas, for the condemnation in favor of complainant of certain lands of the defendant Scott for right of way of complainant's railroad; that under the laws of Texas the preliminary proceedings had been had up to the report of the commissioners as to the amount of damages the defendant Scott was entitled to, and including the filing of objections to the report by the dissatisfied parties; that thereupon the complainant filed in said county court its petition and bond for removal of said cause to this court; that the defendant Scott, and defendants Henry Furman and J. Y. Hogsett, attorneys for Scott, and J. F. Swayne, clerk of the county court of Tarrant county, also made defendant, are proceeding with said cause in said county court, in defiance of the said petition and bond for removal of the cause to this court, and will continue to so proceed; that their said proceedings in said cause in said county court will annoy, harass, and damage complainant, compelling it to litigate in two different jurisdictions, and, by causing delays, deprive complainant of certain rights and remedies it has against the International Improvement Railway Company under certain contracts made with that company. Further, that there is now pending in this court a suit brought by defendant Scott against complainant for title to the lands in controversy and for damages, and involving the same issues as the case sought to be removed from the county courts of Tarrant county.

Complainant asks for an injunction in the premises to restrain all of the defendants, Scott, the party to the suit, Furman and Hogsett, attorneys, and Swayne, clerk of the county court, "from taking any further proceedings in said county court, or filing or issuing any further papers, writs, precepts, or ligitating, or forcing or compelling any ligitation, or taking any further action of any kind or nature in said county or any other court in the state of Texas," etc.

H. M. Herman, for complainant

S. P. Greene, for defendants.

PARDEE, C. J. Several grounds have been argued as conclusive against the right of complainant to an injunction as asked for, such as, whether the cause was removable at all from the county court of Tarrant county, whether the removal was asked for in time, and whether complainant's bill shows any equity entitling the complainant to an injunction. The conclusion we have reached renders it unnecessary to pass on these questions at this time. The injunction asked for is clearly and in terms one to restrain or stay proceedings

in a state court. The federal courts are prohibited from granting such injunctions except in certain specified cases.

Section 720, Rev. St., provides: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." This statute prevents this court from granting the injunction asked for, even if complainant has otherwise a proper case for such relief. See *Haines* v. *Carpenter*, 91 U. S. 254. In so holding, it is not intended to decide that in proper cases, where the United States court is first seized of jurisdiction, and parties are instituting thereafter such proceedings in state or other courts as will, if successful, defeat the jurisdiction of the United States court or deprive complainant therein of all benefit of any decree or judgment rendered in his favor, the United States court cannot by injunction lay its hands on parties, and control their proceedings, although thereby proceedings in a state court may be indirectly stayed or ended.

Such a case is that of *French* v. *Hay*, 22 Wall. 231. In that case the United States court had prior jurisdiction, and the enjoined party was seeking to execute, in a state court, a decree which to all intents and purposes had become the decree of the United States court, and had been annulled and vacated by the court. The case here, where we are asked to enjoin all further proceedings, etc., is one where the state court undoubtedly had prior jurisdiction, and the question as to whether that jurisdiction is ended is in dispute between the parties; the state court undoubtedly still claiming jurisdiction, notwithstanding the petition and bond filed therein to remove the case to this court.

The injunction asked for must be refused, and such order will be entered in the case.

McCormick, D. J., concurring.

UNITED STATES v. ONE RAFT OF TIMBER.

(*Circuit Court, D. South Carolina.* May 6, 1882.)

1. ADMIRALTY—REV. ST. §§ 4233, 4234—RAFTS.

   Sections 4233 and 4234 of the Revised Statutes were intended to embrace all classes of vessels, including rafts; and a raft that fails to carry proper torch-lights violates the statute, and is liable to the penalty imposed by section 4234, although rafts are not specially named in said section.

2. SAME—SEIZURE—JURISDICTION—LIBEL.

   As in cases of seizure the jurisdiction depends upon the fact and place of seizure, these must be averred in the libel; and if not, the libel may be objected to and dismissed at any stage of the proceedings.

BOND, C. J. This case comes up on an appeal from the district court sitting in admiralty. The libel alleges that under the Revised Statutes of the United States rafts and other water-craft, when anchored in or near the channel of any river or bay, shall carry one or more good white lights, in such manner as the board of supervisors might prescribe, and that upon a failure so to do they are liable to pay to the United States the sum of $200, for the payment of which such crafts may be seized and proceeded against summarily by way of libel. It further alleges that the raft in question, on the night of the twenty-seventh day of January, 1880, while navigating Wappoo Cut, a bay or river of the United States in the district of South Carolina, by hand-power and sail, and by the current of the river, and being anchored or moored in the channel of said bay or river, failed to carry such lights as above provided. The libel, therefore, prays the ordinary process, and that the raft be decreed liable to the said penalty, and be sold to pay the same. The answer, which is in the nature of a demurrer, raises the legal objection that there is no provision of law subjecting rafts to the penalty claimed.

The district court sustained the demurrer, and rendered a decree dismissing the libel on this ground, holding that although there is statutory requisition that rafts must carry lights, yet congress has not provided any penalty now existing which can be enforced against a raft by reason of not carrying lights. The question now before the court is therefore purely one of law.

Section 4233 of the Revised Statutes of the United States prescribes certain rules for the navigation of vessels of the navy and mercantile marine of the United States.

Rule 12 of this section requires that "coal boats, trading boats, * * * rafts, or other water-craft navigating any bay, harbor, or

river by hand-power, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fair-way of any bay, harbor, or river, shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the board of supervisors, inspectors of steam-vessels."

Section 4234 provides that "collectors * * * shall require all sail-vessels to be furnished with proper signal lights," and every such vessel "shall show a torch to a steam-vessel approaching at night." The same section then goes on to provide that "every such vessel that shall be navigated without complying with the provisions of this and the preceding section shall be liable to a penalty of $200, one-half to go to the informer; for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense."

There is no penalty other than the above prescribed for the violation of any or all the various and important rules contained in the preceding section. Unless, therefore, this cause applies, these rules may be violated with perfect impunity.

It is contended by the defense that this penalty is, by a proper construction of the words, limited only to sailing vessels, being the class immediately before referred to, and that this is further made out from the side notes to this section, and from an examination of the former acts of which this section formed a part before the Revision of the United States statutes was made; and that, therefore, there is no such remedy as a libel *in rem* against a raft upon a seizure given by the statute. In this view the court does not concur. Although an examination of the former acts is often of great assistance, still they are not controlling. The court must be governed by the Revised Statutes as they were enacted by congress, not by the former acts which that Revision replaces. And, although the side notes are a great assistance in enabling a more ready reference to the statutes, still, it is the text of the statutes, and not to these marginal notes, that we must look for the law. Statutes must be so construed as to carry out the intention of the legislature in passing them; and what this intention is must always be more or less a matter of inquiry.

These navigation laws are not, strictly speaking, penal laws. But, even if they were, "we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and the mischiefs to be within the remedial influence of the statute." We must "adopt that sense of the words which har-

monizes best with the context, and promotes in the fullest manner the apparent policy and object of the legislature." *U.S.* v. *Winn*, 3 Sumn. 212; *The Enterprise*, 1 Paine, 33; *The Industry*, 1 Gall. 117. This chapter in the Revised Statutes is on the subject of "navigation." Section 4233 prescribes rules for the "navigation" of vessels of all kinds and characters.

The importance of these rules is inestimable and undisputed. Upon their rigid enforcement depends the preservation of both life and property. In the same rule, in very many instances, like provision is made both for sail-vessels and vessels of other kinds. A violation of the rule by any other kind of vessel is as equally fraught with danger as if such violation were by a sail-vessel. In many instances the risk and danger would be greater; and yet to adopt the argument of the defense would be to hold that congress has been guilty of class legislation; that it has provided a penalty for the violation of these rules by sail-vessels, while a similar violation of the identical rule by a vessel of a different class is unnoticed and goes unpunished; that the object in view was not to enforce by proper penalties, rules necessary to the safety of the commercial world, and to enforce them upon all vessels alike, but merely to single out one class of vessels as alone liable to punishment for this infringement. This cannot prevail. Congress was dealing with a general class and with a general subject. It was providing general rules, and it provided a general penalty. As already stated, the subject of the chapter is "navigation."

The first sentence of section 4233 states that the rules are to govern "the navigation of vessels;" and the penal clause provides that "every such vessel that shall be navigated without complying with the provisions of such section shall be subject to the penalty." Manifestly it includes all vessels, to govern the navigation of which these rules were adopted. If this sentence stood by itself as a distinct section, or if sections 4233 and 4234 were united as one section, there could be no shadow of a question. Without the change of a single word or the addition of a single syllable it would undoubtedly embrace every class of vessel referred to; and therefore the only confusion arises from this sentence in the subdivision of the statutes being put as a part of section 4234.

"But," to adopt the appropropriate words of Judge Story in a similar case, "what possible difference can it make in the construction of a statute that there is a subdivision into sections?

"Suppose this act contained no such subdivision, might it not be read in precisely the same manner now as it would then read, and be interpreted in the same way? Clearly it might; for statutes are construed by the import of their words, and not by the mere division into sections or periods or sentences. The intention of the legislature does not break itself into sections. It is to be drawn from the entire *corpus* of this act, and not from a single passage.

"Where there, as here, a clause is found in one section which in its general language and import is equally as applicable to other sections and provisions of the same act as it is to the very section in which it is found; where, as here, the main object of those sections, and the true object and policy of the act, will be best promoted by reading it as applicable to all those sections; and where, as here, public mischiefs equally within the scope of the statutes would be thereby prevented, and upon a different construction those mischiefs would be left without redress,—there certainly is very strong ground to say that the clause ought to be so constructed as to suppress the mischiefs, and not promote or protect them; that as its language is appropriate, so it shall be construed as intended to include them. Where the public mischief is the same, and the words are sufficient to cover all the cases, it would be against all just rules of interpretation to confine the language to one case only." *The Harriett*, 1 Story, 251.

The decree of the district court is for these reasons overruled, and the penalty imposed by section 4234, with the mode of enforcement, is held to be applicable to all classes of vessels and water-craft mentioned in section 4233.

It is further objected, however, by the defense that the court has no jurisdiction in this case, because, being a case of seizure, there is no averment of seizure and place of seizure in the libel; that the libel must therefore be dismissed upon this ground. This objection is raised for the first time in this court. An examination of the pleadings shows that no such averments are there made.

It is settled law that in cases of seizure the jurisdiction depends upon the fact and place of seizure, not upon the place where the offense was committed; and that such seizure must be subsisting at the time the libel is filed; and this objection to the proceeding can be taken at any stage of the proceedings. *The Ann*, 9 Cranch, 289; *The Fideliter*, 1 Abb. 577.

As it nowhere appears in the record that any seizure was made before the libel was filed, or that there was any subsisting seizure at that time, this objection must be sustained.

It is therefore adjudged and decreed that the appeal be dismissed upon the ground that no seizure was made prior to the filing of the libel.

THE MARK LANE.*

(*District Court, E. D. Pennsylvania.* September 15, 1882.)

MARITIME LIEN—STEVEDORE—SUBCONTRACTOR.

Where the master of a vessel employs a stevedore to discharge cargo, and the latter employs laborers for that purpose, such laborers have no lien upon the vessel.

Libel of Alexander Baird *et al.* against the steam-ship Mark Lane to recover wages. The facts disclosed were as follows:

The Mark Lane arrived at Philadelphia April 30, 1882, with a cargo of potatoes, part of which were rotten. The master contracted with one James Steen, a stevedore, to discharge the cargo, sound and unsound, at a price of 40 cents a ton. Steen in turn employed the libelants. The board of health afterwards ordered the master to remove the rotten potatoes from the city as a nuisance, and Steen thereupon contracted with the laborers at increased wages. The sound potatoes were discharged upon the wharf, and the steamship proceeded down the river with the libelants and discharged the rotten part overboard. A dispute afterwards arose between Steen and the libelants, he claiming that they were to be paid for the time they actually worked and the time spent in going up and down the river, and they claiming wages from the time of leaving the wharf to the return to the city. Libelant failing to obtain from Steen the amount claimed, filed this libel.

J. Joseph Murphy and *W. P. Swope*, for libelants

Henry G. Ward, for respondent.

BUTLER, D. J. The defense urged is two-fold—*first*, that no lien arose from the service; and, *second*, if a lien did arise it was in favor of Steen, who alone was known to respondent. As the second point is, in my judgment, well taken, and is fatal, the first need not be considered. Steen contracted to discharge the cargo, and employed libelants as laborers for that purpose. When the prohibition to discharge upon the wharf came, and arrangements were made to do it elsewhere, the relations between Steen and his employers continued, except as to the extent of wages. Their rights were in no other respect affected. As between them and the ship Steen performed the service. No other view of the subject is supported by the evidence. The libelants are entitled to payment from Steen according to the rate of wages contracted for with him. If he is in default they have a remedy elsewhere. They are here pursuing the ship only because he and they disagree respecting their contract. He having been paid in full for the service, the claim here seems especially inequitable.

The libel must be dismissed, with costs.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

WALDMAN v. PENNSYLVANIA R. CO.*

(*District Court, S. D. New York.* 1882.)

REMOVAL OF CAUSES—PRACTICE.

Where a case is removed into the United States circuit court after it has been put on the calendar and noticed for trial in the state court, it stands ready for trial in the circuit court immediately upon the record being filed therein.

This action was begun in the marine court of the city of New York. On May 29, 1882, the defendant served its answer, whereupon plaintiff filed a note of issue, and on June 7, 1882, noticed the case for trial for June 13th. On June 23d the defendant filed a petition and bond for removal into this court, and a removal was on that day duly had. The defendant filed the record on the first day of the present term of this court, (October 16th,) and it appears that the plaintiff had previously put the case upon the calendar of this court and again noticed it for trial.

The defendant moved to strike the cause from the calendar as improperly on, for the reason that the clerk could not put it upon the calendar, and plaintiff could not notice it for trial in this court, until after the record had been filed. The plaintiff, in opposition, claimed that, the cause standing "for trial" before removal, his practice had been regular, and cited section 6, Act of 1875, and *Railroad Co.* v. *Koontz*, 104 U. S. 13-18.

B. Lewinson, for plaintiff.

Robinson, Scribner & Bright, for defendant.

SHIPMAN, D. J. Under the rules of the circuit court I think that this case is now in a condition to be assigned for trial at any time at the present term.

*From *N. Y. Daily Register*, November 4, 1882.

Stout and others *v.* Yaeger Milling Co. and others.*

(*Circuit Court, E. D. Missouri.* October 30, 1882.)

1. Corporations—When Directors may Take Security from.

   The directors of a solvent corporation may lawfully pledge its securities to secure individual demands of directors and others, due and to accrue, for money loaned to it.

2. Same—Pledge—Delivery.

   Where the directors of a corporation placed the company's policies of insurance in the hands of two of its directors without any formal assignment, to secure loans made and to be made by such directors and others to the corporation, *held*, that there was a sufficient delivery to sustain the pledge.

3. Same—Fraudulent Preference.

   Where A., a bank which held stock in B., an insolvent corporation, and and which was a representative in B.'s board of directors, took security from B. for money due it from B., and for advances to be made by it on B.'s account, and thereafter made large advances on the faith of the security received, *held*, that A. was bound to account to unsecured creditors for their *pro rata* of the proceeds of such securities.

In Equity. Creditors' bill.

The Yaeger Milling Company, of St. Louis, was on the seventeenth day of August, 1880, and for several years prior to that date had been, a corporation engaged in the manufacture of flour, and owned a large mill and wheat warehouse, with elevator machinery, for the prosecution of its business. Both building and the machinery therein were unincumbered. On August 17, 1880, the company's mill and warehouse were both destroyed by fire. Several years prior to the fire, and while the company was solvent, it had placed a number of policies of insurance upon its mill, warehouse, etc., in the hands of two of its directors, which, together with their renewals, it agreed to allow to remain in said directors' hands as pledges to secure loans which had been, and which might thereafter be, made to it by defendants and others to enable it to carry on its business. There was no formal assignment of the policies—they were simply placed in the directors' hands. At the time the fire occurred John Crangle, Henry C. Yaeger, George D. Capen, Arnold Hussmann, H. D. McLean, and G. L. Joy were directors of the milling company. They represented stock owned by the Citizens' Insurance Company, the Second National Bank, and the Fourth National Bank, all of which were creditors of the milling company, having loaned it money and accepted as security the above-mentioned pledge of the company's policies of insurance.

*Reported by B. F. Rex, Esq., of the St. Louis bar.

H. D. McLean was also an individual creditor of the company, and was secured in the same manner as the corporations named. After the milling company's buildings were destroyed by fire the insurance was collected and distributed among the creditors who had loaned the company money and been secured by the policies. At the time the fire occurred the milling company was doing its banking business through the Fourth National Bank, and as the fire had left the company insolvent the Fourth National refused to pay a number of drafts outstanding against the company, or to pay any checks drawn by it, unless it received security, not only for future advances, but also for overdrafts which the company then owed it. The milling company then gave it, as security for said overdrafts and future advances, a bill of sale of all its personal property and a mortgage upon its real estate, and the bank thereafter advanced the milling company large sums of money upon the faith of the security received. The plaintiffs in this action are partners. The Yaeger Milling Company having failed to pay for machinery they had sold it, they recovered judgment therefor, but failed to collect it upon execution. They now bring their bill against said company, and its above-named creditors and directors, charging that the directors of the Yaeger Milling Company acted unlawfully in distributing the proceeds of said policies among themselves, and in giving the Fourth National Bank said bill of sale and mortgage.

Overall & Judson, for complainants.

Noble & Orrick, for the Yaeger Milling Company and the Second National Bank.

G. U. Stewart and *Paul Bakewell,* for H. D. McLean.

Paul Bakewell, for Henry C. Yaeger.

Lee & Chandler, for Fourth National Bank and Arnold Hussmann.

TREAT, D. J. The theory of the bill, as stated by plaintiffs' solicitors, is correct, viz.: That the assets of an insolvent corporation are a trust fund for the benefit of all the creditors, to the extent, at least, that the directors, while it is under their management, cannot appropriate the assets thereof to the payment of demands due to themselves individually, to the exclusion of other creditors and by way of preference to themselves. Starting with that proposition, the next inquiry is concerning securities pledged prior to insolvency to secure the individual demands of directors and others—demands existing and to accrue for money loaned. The facts as shown by the evidence are not so clear as they ought to be; for it is evident that the enterprise was carried forward upon an understanding that the principal

creditors of the former establishment should furnish funds for the new, resting for their security upon the solvency and property of the company in common with all other creditors, and also upon the insurance fund, especially pledged for their advances and money loaned. The principal defendants in this case being creditors when the prior milling establishment was destroyed by fire, chose to embark in the new enterprise, instead of receiving that insurance fund. It is not necessary to comment upon the violation of the national bank law committed by some of the defendants in investing the funds of their banks and engaging in operations not authorized by their charters. This case, however, shows the wisdom of the United States laws on that subject; but it cannot depend upon or be controlled by any such considerations.

Was the pledge of the insurance policies, under the facts and circumstances, a valid and subsisting pledge in favor of the parties in interest, entitling them to appropriate the proceeds thereof, as was done? The cases cited, notably *Casey* v. *Cavaroc*, 96 U. S. 467, turn upon the actual delivery of the pledge for the benefit of the pledgee, so as to avoid secret preferences and pledges to the detriment of other creditors. Where bills of exchange, promissory notes, etc., as in that case, are alleged to have been pledged, there should be some evidence thereof by way of indorsement or assignment, without which the pledgee could not recover thereon. Such bills, notes, etc., are a part of the assets of the pledgeor, and subject to the payment of his debts, unless validly transferred. How is it with policies of insurance? They are no part of the security for general creditors, except so far as assets therefrom may become assets of the company or pledgeor after the contingency happens, viz., loss by fire. If policies are taken out by creditors for their own benefit, or if, to secure present and prospective creditors, the debtor agrees to take out such policies and does so for the benefit of prescribed creditors, no fraud is practiced on other creditors. It is a matter of daily occurrence that creditors require their debtors to insure their property and assign or pledge the same as security. They are not willing to trust the event of the debtor's solvency if his property is destroyed by fire, and hence exact such security in addition to his personal liability. In the absence of such an arrangement the creditor may well be supposed to rely upon his debtor's ability to meet his liabilities, irrespective of the contingency by fire. The debtor was not bound to insure, and if he did not, the creditor had no recourse except upon his remaining assets. If he did insure, and the proceeds thereof became a

part of his general estate, they became subject to the demands of his creditors, equally with other assets. But if the insurance was made, not for the general benefit, but solely or primarily for the security, of a specified class of creditors, by agreement with them, why should not the transaction be upheld; and by what legal or equitable right could the unsecured creditors claim that they should share in such securities?

The question, however, in this case is as to the pledge of the policies and their renewals for the purposes alleged. There was no formal assignment, and no consent of the insurance companies to such assignments. The original policies were placed in the hands of Nulsen for the benefit of specified creditors, and as changes occurred the renewals were placed in the hands of Capen and McLean, that they might cause those securities to be kept alive for the purpose of the original pledge. When the fire occurred and the amount of losses was collected, the sums so collected would necessarily have to be paid over to the pledgeors, to the amount of their demands secured. The fact that the creditors were directors, and the company, pledgeor, and directors were the trustees for the benefit of said creditors, cannot affect the good faith of the transaction, if the agreement to pledge existed at the time of the advances, and the creditors were within the terms of the pledge. Other or general creditors who had not taken such securities have no ground of complaint. There was no preference, within the admitted rule, but merely an enforcement of securities. Hence the allotment of the policies of insurance as pledged, does not fall within the inhibited act. There is a difficulty as to the bill of sale and mortgage made after the fire to the Fourth National Bank. If its prior advances fell within the terms of the pledge, it had a right to its *pro rata* compensation from the proceeds of the insurance; but it seems that it did not rely upon that fund. It took for overdrafts and new advances, after the fire, a bill of sale and mortgage for these demands, which, as the company was insolvent, the directors had no legal authority to grant, that bank being a stockholder and representative in the directory. Hence the bank must account to the plaintiffs for their *pro rata* of the proceeds of such bill of sale, and of the mortgage which it received.

The decree will be that said Fourth National Bank be held to account for and pay over to the plaintiffs their *pro rata* of the securities acquired by said bank after the fire occurred,—the bill being

retained as to other parties to abide the result of said preference to said bank. The amount for which said Fourth National Bank is liable under this ruling being undetermined, an order will be entered, unless the parties agree to said amount within 10 days herefrom, to refer the same to Thomas G. C. Davis as special master, to hear testimony and report to the court said amount.

YOUNG *v.* NORTHERN ILLINOIS COAL & IRON CO.

(Circuit Court, N. D. Illinois. February, 1880.)

1. MORTGAGE—INCOME OF MORTGAGED PROPERTY.
   Until the mortgagee of an insolvent corporation takes possession in person or by receiver, the mortgagor is entitled to income derived from operating the same.
2. SAME—ASSETS—RIGHTS OF MORTGAGOR.
   A company indebted to its employes prior to the appointment of a receiver assigned to a creditor certain drafts drawn upon various corporations for the approximate amounts of their various indebtedness, and after the appointment of a receiver gave to the said creditor drafts upon the same corporations for the actual amounts due. *Held,* that the mortgagor had the right to pledge or assign such drafts, they being assets of the mortgagor, to secure the creditor, and the assignment of the later drafts was but the consummation of the previous agreement, and was valid and passed the title to the creditor. That the mortgagor company, at the time of the appointment of the receiver, was largely in debt to its employes, and that the mortgagees advanced the sums necessary to pay off these debts, would not give them the right to the proceeds of the drafts as against the creditor.

In Equity. Bill to foreclose.

Mattocks & Mason, for petitioner.

Lawrence, Campbell & Lawrence, for respondent.

BLODGETT, D. J. The original cause is a bill in equity to foreclose a mortgage given by the Northern Illinois Coal & Iron Company to complainant's testator upon certain coal mines and coal lands situate in La Salle county, in this state.

The mortgageor continued in possession of the mortgaged property and operated its mines in the usual manner, by raising and selling coal therefrom, until after this bill was filed.

On the twenty-ninth day of July, 1876, an order was made in the cause appointing a receiver, and directing him to take possession of the mortgaged property, and to collect outstanding dues, demands, and accounts of the company.

On the first day of August the receiver gave bond and qualified, and on the second day of August he took possession of the mines and mining property.

It also appears that for several years prior to the appointment of the receiver the company had had dealings with the First National Bank of Mendota, mostly in the way of short loans of money and discount of drafts drawn by the company upon the persons and railroad companies to whom the coal company had sold coal, and I think the fair inference from the disclosed facts is that these drafts, when given, were treated rather as collateral security for the amounts advanced upon them by the bank to the company, than as an absolute transfer to the bank of the indebtedness against which the drafts were drawn, because the proof shows that the money due from customers on the drafts was often collected by the officers of the coal company and paid over to the bank, and on one or more occasions such money was retained and used by the coal company, and the bank paid from other sources by the coal company.

On or about the seventh day of July, 1876, the bank agreed with the officers of the coal company to discount, presumably, upon the basis of their former dealings, three drafts, to be drawn by the coal company, as follows:

On the Clinton, Dubuque & Minnesota R. Co. for - - -	$ 900
On the Illinois Central R. Co., - - - - - -	2,000
On the C., R. I. & P. R. Co., - - - - - - -	1,100
	$4,000

Instead of taking these drafts to the bank to be discounted, after making the arrangement, the superintendent of the company took to the bank the notes of the company, indorsed by Col. Taylor, for $4,000.

The bank at first refused to discount these notes, but finally concluded to do so, provided the superintendent would write across the face of the notes, "To be paid in drafts on the respective roads," which was done, and the bank thereupon discounted the notes. At the same time the bank discounted for the company a note of the Chicago Stove Works for $291, and a note made by Warren, Clark & Co. for $523. The net proceeds of the $4,000 note and the two small notes, paid by the bank to the coal company, was $4,741, $1,608 of which was applied to the payment of indebtedness then due the bank from the coal company, and the balance of $3,133 was paid in cash to the coal company, and the money so obtained was applied

by the coal company to the payment, as far as it would go, of its laborers. Within a few days after this transaction, Col. Taylor returned from New York, when the $4,000 notes were taken up and three drafts drawn by the company, and indorsed by Col. Taylor and his wife, in favor of the bank, substituted in their place.

Draft July 7, 1876, at 30 days, on C. H. Booth, Treas. Clinton, D. & M. R. Co., - - - - - - - - -	$ 900
Draft July 7, 1876, at 30 days, on J. C. Willing, Treas. Illinois Central R. Co., - - - - - - - -	2,000
Draft of July 7, 1876, at 30 days, on W. G. Purdy, Treas. C., R. I. & P. R. Co., - - - - - - - - -	1,100
	$4,000

And on the fourth day of August, 1876, four days after the receiver was appointed and qualified, the superintendent of the coal company delivered to the bank four drafts, as follows:

Draft dated August 1, 1876, due August 25th, on C. H. Booth, Treas. C., D. & M. R. Co., for - - - - - - - -	$ 756 00
Draft dated August 1, 1876, due August 15th, on J. C. Willing, Treas. Illinois Central R. R., for - - - - - - -	1,539 30
Draft dated August 1, 1876, due August 15th, on W. G. Purdy, Treas. C., R. I. & P. R. Co., for - - - - - - -	1,356 20
Draft dated August 1, 1876, at 10 days' sight, on J. W. Parker & Co., for - - - - - - - - -	900 00

The last set of drafts drawn on the Illinois Central, Chicago, Rock Island & Pacific Railroad Company, and the Clinton, Dubuque & Minnesota Railroad Company, were for the actual amounts due from those companies to the coal company for coal delivered them by the coal company during the month of July.

The J. W. Parker & Co. draft was given to make up the full amount of the paper taken up, and notice was given the receiver of the giving of the new drafts.

At the time the receiver took possession there was no entry of these drafts upon the books of the coal company, but the amounts represented by them stood in the form of open accounts against drawees.

On the second day of August, Col. Taylor, as president of the coal company, called at the office of the Illinois Central Railroad Company and signed a receipt in full for the coal delivered in July, and requested that a check be sent the bank for the amount of the draft of August 1st.

The bank notified the treasurer of the Chicago, Rock Island & Pacific Company that draft had been drawn, by letter dated August 10th, and asked payment to bank, or that money be held by railroad company, subject to the decision of the court. None of these drafts were ever accepted on their face by the drawees thereof.

On the fourth day of August, 1877, an order was entered by this court directing that the drawees of these drafts should pay the several sums due from them to the coal company, to the receiver, without prejudice to the right of the bank to claim and receive said indebtedness from the receiver, in case the claim of the bank to said moneys, as set up in this intervening petition, should be established; and in pursuance of this order the amounts due from the Illinois Central Railroad Company, and from the Chicago, Rock Island & Pacific Railroad Company, to the coal company have been paid into the hands of the receiver.

It also appears that at the time the receiver took possession of the mines, the coal company was in arrears to its laborers for labor in the working and care of the mines to the amount of about $9,000, and that the receiver was, by order of the court, directed to raise the money and pay off this indebtedness by the issue of certificates, which should be a lien on all the assets of the coal company in the hands of a receiver.

It appears to me, upon more mature reflection, that the money advanced by the bank to the coal company on the transaction of July 7th was, in fact, advanced upon the faith that the bank was to be secured by the pledge of drafts upon these railroad companies,—a memorandum to that effect was made upon the $4,000 notes at the time,—and on Col. Taylor's return the notes were taken up and drafts given to the amount of the notes. These drafts were drawn for the assumed or approximate amounts of the coal bills which would be due to the coal company from the drawees, on the July accounts, because the coal for the month had not been delivered, and the exact amount of the accounts could not be then ascertained. Yet I think the facts show that these drafts were intended by the parties to operate as an equitable assignment to the bank of whatever should be due from the railroad companies to the coal company for coal delivered in July. That the coal company had the right to do this there can be no doubt. *Gilman* v. *Ill. & Miss. Tel. Co.* 91 U. S. 616; *Galveston R. Co.* v. *Cowdrey*, 11 Wall. 459.

Until the mortgagee takes possession of the mortgaged property, either in person or by receiver, the mortgageor has the right to the

income of the property. Especially is this true in case of a mortgage of property like this, which does not bear a fixed rental, but where the income is derived by working or operating the property, requiring a constant expenditure of money to make it productive.

The accounts due from the drawees of these drafts did not, in any sense, either legally or equitably, belong to the mortgagee. They belonged to the coal company, and its officers had the right to pledge them, even in advance, for the purpose of securing the means of carrying on the business of the company; and I have no doubt that the transactions between the parties were intended as a pledge or assignment of these accounts, and should be so considered by the court.

The notes for $4,000, given July 7th, and the first set of drafts, were evidently intended only as temporary securities, to stand until the correct amounts for which drafts should be drawn on each customer of the coal company could be ascertained, and the drafts of August 1st were only the consummation of the previous agreement of the parties.

It is quite clear, I think, that the bank could have held and collected these funds, as against the coal company, on the drafts of July 7th, given to take up the notes; and if it could have done so, then it can and should be allowed to hold and collect the indebtedness which those drafts represent as against the mortgagee; for, in respect to these claims, the receiver stands only in the tracks of the coal company, and must be bound by whatever binds that company.

It is urged that, inasmuch as the receiver found the coal company in debt to its miners, and was obliged to raise a large sum of money to pay off this indebtedness, a stronger equity attaches to this fund in favor of the mortgagee, who was obliged to make the advances necessary to pay the men. But it must be remembered that this indebtedness to the bank, and that to the men, were both the debts of the coal company, and the demands represented by these drafts were assets of the coal company. Clearly, the coal company had the right to assign or pledge these claims to secure the debt due the bank, and the court must respect the right of the bank thus created. The coal company had in effect specifically appropriated these claims to the bank, and the appointment of the receiver cannot defeat rights which have thus been created. If these assets had come to the hands of the receiver unincumbered by any previous pledge or assignment by the coal company, I have no doubt the court could have directed their application to the payment of debts of the coal company incurred in the operation of the property, but the court cannot divest

rights to these funds which had accrued prior to the appointment of the receiver. Besides, it may be said that the mortgagee was under no legal or moral obligation to pay these laborers' claims. They were ordered paid because it was deemed expedient to do so, rather than incur the risk of a riot or strike by the employes of the mine.

Order that receiver pay to bank the sums collected on accounts due from the Illinois Central and the Chicago, Rock Island & Pacific Railroad Companies, and costs.

BURTON, Receiver, *v.* BURLEY, Receiver.

(*Circuit Court, N. D. Illinois.* January, 1880.)

NATIONAL BANK—TRANSACTIONS—ESTOPPEL—AUTHORITY OF PRESIDENT.

Where the president of a national bank instructed its correspondent bank to charge up against the bank of which he was president the amount of a note given by him, in payment of such note, and an account was rendered showing the transaction, the bank was estopped from denying the correctness of the charge in an action by a receiver, subsequently appointed, seeking to set aside the transaction.

I. Holmes and *Losey & Bunn*, for complainant.

Monroe & Ball, for defendant.

DRUMMOND, C. J. At the time the transactions which are the subject of controversy in this case took place, the City National Bank of Chicago was the correspondent of the First National Bank of La Crosse, and a large amount of business was done between the two banks, amounting often to the sum of $100,000 per month. Generally the Chicago bank had a large balance in its hands to the credit of the La Crosse bank; and it was the custom of the Chicago bank to transmit regularly copies of the accounts between the two banks, showing the debits and credits, and these accounts were in all cases acknowledged by the La Crosse bank; and if there was any error or mistake it was pointed out. During the time this business was transacted, the La Crosse bank was in the habit of drawing checks and directing payment out of the funds in the hands of the Chicago bank; and everything concerning the matters in controversy in the case was done substantially in the same way as in other business matters between the banks; and not only was no objection made to the disputed charges, but they were admitted by the La Crosse bank, and everything that was done between the two banks was on the

basis that the disputed charges were at the time acknowledged by the La Crosse bank.

Sutor was formerly connected with the City National Bank of Chicago. He went to La Crosse and became the cashier of the First National Bank of that place, and remained in that position some time; and the result was that he obtained the control of that bank and subsequently became president. There may have been some circumstances which enabled the president of the City National Bank, who held that position up to January, 1874, to know that Mr. Sutor was not a man of very large means, and that he would not have resources enough of his own to obtain control of that bank; but admitting that to be so, the question is whether there were facts known to authorize the officers of the bank here to conclude that at the time these various transactions took place, which are the subject of controversy, there was a fraud practiced upon the bank of La Crosse by Mr. Sutor. Fraud is not to be presumed. It must be proved. It is sufficient, of course, if it is proved by circumstances, which are sometimes the most satisfactory evidence to establish fraud.

Mr. Sutor owed the bank here for a loan that had been made. He had executed his note for the amount, ($7,000,) and when he became president of the bank at La Crosse he gave instructions to the bank here to charge the sum of $2,000 to the La Crosse bank, and it was done; and he stated at the same time that he gave these instructions that the balance of the amount which he personally owed, which, I take it for granted, referred to the note for $7,000 which he had given, would soon be paid, and accordingly instructions were subsequently given to charge to the La Crosse bank the $5,000 which was still due upon the note, and it was so charged. Besides this, which constitutes the main controversy in the case, it seems that a transaction took place between Mr. Sutor and Mr. Miner, the cashier of the City Bank, by which the former purchased of the latter some real estate in Chicago or its vicinity, upon which Mr. Miner owed a balance evidenced by note, and this note Mr. Sutor had agreed to pay. That accordingly was taken up when it became due by Mr. Sutor in the same way, namely, by instructions to charge the amount to the La Crosse National Bank. If that were all there was in these transactions, it might be contended with some plausibility on the part of the plaintiff that it was not liable for the charges that were made by the City National Bank. But that is not all. Accounts were made out from time to time and transmitted to the La Crosse National Bank, in which were included the charges which are the subject of

controversy, and made against the La Crosse bank by the City National Bank, and entered as payment *pro tanto* on the amount due from the Chicago bank to the La Crosse bank for deposits made by the latter from time to time. The receipt of these accounts was acknowledged by the La Crosse bank as they were forwarded, and it was then stated that the accounts conformed to the books of the La Crosse bank, although it turned out that, in fact, they did not so conform, which fact, however, was unknown to the Chicago bank. One of the notes, it seems, was transmitted to Mr. Sutor—the note which he was to pay for Miner. There is no evidence what became of the other note, but the facts prove the existence of the note given by Sutor to the bank here, and its payment in the way stated, viz., in consequence of instructions from the president of the La Crosse bank.

In relation to the checks given in Chicago by Mr. Sutor as president of the bank, it is true that the general business of an officer of a national bank is to be transacted at its regular place of business. At the same time we know that, in the course of business between banks, occasionally officers of banks do give orders and instructions away from the place of business of the bank. And if they are within the general scope and authority conferred upon the officers, they may be binding upon the bank. But all accounts of this kind were included in those transmitted to the La Crosse National Bank. What security can there be in the business relations between banks if accounts of this kind are not considered conclusive and binding upon the respective banks, unless, indeed, there is a mistake, or it can be shown that there has been a fraud practiced upon the bank against which the charges are made, and that fraud known to the other bank or its officers? Unless that can be done, there would be no safety in the transactions of banks with each other. One bank would never know what to do on instructions given, or a charge made. Here is an "individual" account which one bank has against a particular person. Another bank with which it is transacting business, and with which it has an account, instructs that bank to charge this individual indebtedness to it. The charge is made and the account rendered showing it is done, and the bank which makes the charge knows nothing of any wrong being done, or of any mistake, or of any fraud being practiced by the officers of the bank. That being so, it must foreclose the bank, or else banks must cease doing business with each other. And it ought to be so. Where a bank, established under an act of congress, or any other way, elects its own offi-

cers, the men who are interested in the bank—the stockholders, the depositors—ought to be bound by the authorized acts of the officers, or those which appear to be authorized, whether they are or not, and by the general mercantile usage of banks. So that, in any view that I can take of this case, it seems to me that the plaintiff cannot maintain its action; that it must be concluded by the course of the business which has been done. *Non constat* but that, admitting all that is claimed on the part of the plaintiff, Mr. Sutor may have presumptively made some arrangement justifying his action with his own bank. The natural presumption that would arise in the minds of the officers of the city bank was that Mr. Sutor had made some transactions with the La Crosse bank by which he was authorized to act, and by which the La Crosse bank had assumed the individual debt which Sutor owed to the City National Bank. If the defendant insists, the court must certify to the balance due from the La Crosse bank to the city bank, because I hold that these items of account which are the subject of controversy constitute a valid charge against the La Crosse National Bank.

This is a controversy between the creditors of two insolvent banks, and I think the loss occasioned by the wrong of the officers of the La Crosse bank should fall on the creditors of that bank, rather than on those of the Chicago bank.

In re WALL.

(*Circuit Court, S. D. Florida.* March, 1882.)

1. ATTORNEY AT LAW—DISBARRING.

An attorney may be disbarred for participation in an unlawful, tumultuous, and riotous gathering, and advising, encouraging thereto, and taking from the jail therewith and hanging a prisoner, although no complaint under oath has been filed against him; and he would be liable for the offense charged against him by indictment in the state court, though no such indictment has as yet been fonnd.

2. SAME.

An attorney is an officer of the court, admitted to practice under its rules amenable to it, and liable to have such relations sundered upon satisfactory evidence of dishonest professional conduct, habits of general immorality, or any such single act of crime or vice as may show him unfitted for the trusts and confidence reposed in him as such attorney.

3. SAME—NOTICE OF CHARGES.

While an attorney is entitled to notice of the charges preferred agains‘ him, and an opportunity to answer before being disbarred, such notice is sufficient if it clearly intimates the misconduct with which he is charged.

LOCKE, D. J. It has been charged that the defendant, J. B. Wall, an attorney of this court, did, with an unlawful, tumultous, and riotous gathering, he advising and encouraging thereto, take from the jail of this county and hang a man, to the court known only as John. To this charge he has filed an answer, demurring to the action of the court because—*First,* no complaint under oath has been filed; and, *secondly,* because he has been charged with an indictable offense, of which this court has no jurisdiction before indictment and conviction; and denying that he counseled, advised, encouraged, or incited an unlawful, tumultuous, and riotous gathering or mob to take one John from the jail and cause his death by hanging. The offense in which Mr. Wall is charged to have participated came to the personal knowledge of the court. As the judge was leaving the court-house for dinner, a prisoner was brought into the yard in custody of officers. Upon his return in the afternoon the dead body of the same person hung in a tree directly in front of the court-house door. No legal execution had taken place. The evidence shows that a person, whose name has not appeared, was taken from the jail, and, in the immediate vicinity of the court-house, hung to the limb of a tree; that said J. B. Wall was present, went with several others to the sheriff's house, returned thence to the jail, where they took therefrom the prisoner; that he walked in immediate proximity to him in going to the tree, so along beside him that the witness thinks he had hold of him, and was then lost to sight in the crowd until after the man was hanged.

This is an action to determine the right of an attorney to retain his position as an officer of this court, and as such is instituted by it for its own protection, and the preservation of its integrity through the characters of its officers, and does not require the intervention of a third party by affidavit or otherwise.

No court is bound to await the complaint of a third party before investigating any matter touching misconduct of its officers, when information considered sufficient is received, and the circumstances demand its interposition. *Randall* v. *Brigham*, 7 Wall. 540.

An attorney is an officer of the court admitted to practice under its rules, amenable to it, and liable to have such relations sundered upon satisfactory evidence of dishonest professional conduct, habits of general immorality, or any such single act of crime or vice as may show him unfitted for the trusts and confidence reposed in him as such. *Percy's Case*, 36 N. Y. 651; Hawk. P. C. 212; *Bryant's Case*, 24 N. H. 155; *Ex parte Brownsal*, 2 Cowper, 829; 12 Geo. I. *c.* 29; 4 Henry IV. *c.* 18; *Case of Austin*, 5 Rawle, 204; *McLaughlin* v. *Dist.*

Court, 5 Watts & S. 272; *Dickens' Case*, 67 Pa. St. 169; *Mill's Case*, 1 Mich. 392; *Potter's Case*, H. 26 G. 3 K. B. He has a right to an opportunity to appear and answer in his own behalf before a final judgment against him; but any notice, rule, or summons does not require the technical nicety in its allegations, nor the exactness of proof, of a criminal proceeding. *Sanborn* v. *Kimball*, 64 Me. 140; *Leigh's Case*, 1 Munf. 481.

It is sufficient if the grounds are so set out as to give him knowledge of the matter with which he is charged, so that he may not be misled, and the true facts ascertained upon such investigation may be considered and decided upon. *Randall* v. *Brigham*, *supra*. It is true that the English courts have in some instances declined to take summary action against attorneys for indictable offenses unless conviction has first been had, but such practice seems to have been considered as within the discretion of the court at the time and not as a rule. Lord Denman remarks, in 3 Nev. & P. 389: "Would not an indictment for perjury lie upon these facts? We are not in the habit of interfering in such a case, unless there is something amounting to an admission on the part of the attorney which would render the interposition of a jury unnecessary." Also, in 5 Barn. & Ald. 1088, he remarks: "It is not usual to grant the rule if an indictable offense is charged." Yet, notwithstanding a conviction, the question of guilt or innocence seems to have been deemed within the discretion of the court, as in Dowl. P. C. 110, although verdict had been found against the defendant, the judges still considered there might have been some doubt and refused the rule; and in *King* v. *Southerton*, 6 East, 127, nothwithstanding the defense was urged that the defendant had been convicted of an offense not cognizable by law, Lord Ellenborough remarked that "enough appeared to satisfy the court that the defendant was an improper person to remain an attorney."

While such may have been the practice in the courts of England, it has not been accepted by American courts; *Anon.* N. J. Law, 163, being the only case found when judgment has been refused on that ground. On the contrary, in *Re Hirst & Ingersoll*, 9 Phila. 216, although the court, in the motion to disbar, say that "the offense charged—subornation of perjury and conspiracy against justice—is within reach of an indictment," they make the rule absolute dismissing one party and suspending the other during the existence of the court.

In *Smith* v. *State*, 1 Yerger, 228, the information was exhibited by one of the judges of the circuit, and although it was alleged that an indictment had been found in a foreign state, no trial nor conviction had been had, and the court remarks:

"Law, administered in the usual form, is tardy, and any course short of special ministration would lose much of its beneficial effects. The mazy round of special pleadings, miscarriages before juries, and delays incident, afford a labyrinth for the wily to take shelter, if not escape; therefore, it is not deemed prudent to allow one so charged the right to demand forms of trial directly calculated to defeat the end."

In *Fields' Case*, 1 Martin & Y. 168, where the power of courts to remove their officers was under consideration, the court says:

"By change of venue and writs of error the criminal could easily have kept off the punishment for two years, and by this means put himself above the law, if the court had not the power of removal. The conviction, when produced, would only be evidence of the facts alleged, and these facts the court have for this purpose as much right to inquire into as the jury." "In this country it would most probably be unconstitutional to inflict punishment upon the person of the offender otherwise than by conviction upon indictment. But the removal from office being a civil proceeding not affecting the person, and being no bar to an indictment for the same offense, the finding of a jury is not necessary to authorize the court to remove."

The supreme court of New Hampshire, in *Delano's Case*, 58 N. H. 5, take a similar view of the law by disbarring an attorney for an indictible offense without conviction.

In this action against Mr. Wall this court unquestionably has jurisdiction, but in a criminal prosecution it has none.

Can it be argued that it is then compelled to wait in its action for the movement of a foreign tribunal, and that it is helpless as against the local inactivity, neglect, or prejudice of the prosecuting officers or jurors of any one county of the district? Such a view of the law cannot be accepted, and so much of the answer as demurs to this action must be overruled.

The only question remaining to decide is whether a person guilty of presence and participation, under the circumstances, and on such an occasion, shall retain his position as attorney of this court or not. If he had been there in any other capacity than either principal, or aider and abettor, it was within his power to show it; but this he has not attempted to do, and the necessary presumption is of his active participation.

The slight difference between the language of the rule and that of the evidence is of no importance in this matter, if the evidence shows ground for judgment. The gist of the action is not the death of a certain individual as described by name, but the conduct of Mr. Wall on an occasion and in a certain matter to which I consider his attention has been sufficiently called. He was in an unlawful gathering, as it was resisting the protestations of the sheriff and mayor, although it may not have been tumultuous. He denies having been encouraging or advising at the time charged. I am too well aware of his influence in this community not to know that his presence would be ample encouragement to others on such an occasion. It is not alone by words that one advises and encourages, and the fact of his presence and action is sufficient not only to find an encouraging thereby, but raise a presumption on his doing the same by words.

The duty of an attorney is not alone to deport himself as such in his professional relations, but so to demean himself in all things. For an officer of a court to bear about with him two characters, that of a supporter of the law, as a lawyer, and an open violator and contemner of it outside his professional duties, as a man, is utterly inconsistent with the dignity of his position, and of the court that bestows the same upon him.

The facts proven show that the transaction was not an ordinary crime, but a combination to lynch a prisoner, and in this, it is presumed, is the only explanation, though it makes a party none the less liable; the legal responsibility is the same, as is well known to any lawyer.

It is true that Mr. Wall alone, of the many shown to have been engaged, has been called upon to answer, but this has not been that others may not have been fully as culpable, or from personal feeling, or inclination, or disinclination. This court claims no jurisdiction over the crime committed, nor is it seeking to inflict a penalty for its commission; but it is compelled to protect itself against those who appear as open violators, or regardless of the law which it is their duty to support and defend, and he alone of the many has been found amenable to its jurisdiction.

Lynch law, stripped of all the sophistries with which it is surrounded by the ingenuity of its supporters, is, in its plain, naked self, not only a violation of the law, but an attack upon, and a flaunting insult to, its courts and officers. It is an open expression, by those indulging in its execution, of distrust in the law, and an accusation

of inefficiency against the sheriffs, jurors, and courts having the criminal and the crime in charge. Are we—is the world—to understand, in this case, that this community distrusts the capacity of the sheriff to keep a criminal in his charge, or the willingness and ability of the state attorney to prosecute crimes? Does it impeach the jurors of this county of honesty in dealing with criminals given them to try, and the court of inefficiency in dealing with cases presented to it?

Lynch law either does this, or it is simply and undisguisedly a giving way to passion and revenge, and a gratification of those barbaric feelings which, more or less latent, exist in man, and which are bound to be controlled either by the individual himself or by the law.

The injury to a community by such is apparent. It tells of a weakness of legal authority, or a strength of willful passion that no one desires to encounter, much less be surrounded with, and the recklessness of a few ends in the injury of all.

Reckless passion in one direction begets reckless passion in another, and from a violation of law in taking the life of a prisoner, an easy approach is afforded to a violation of law in taking the life of a neighbor or a friend upon the slightest provocation.

Sections of our state are spotted with the graves of citizens sacrificed to this reckless disregard of human life in violation of law.

If any possible excuse might be offered for mob or lynch law by a layman or ordinary citizen, there can be none for one in the position of an attorney; and while I accept the representation that in whatever was done there was no intentional disrespect to the court, yet the presence of an attorney at such a time and under such circumstances can only be accounted for upon the theory of either a willful violation or an impulsive forgetfulness of his duty as such.

Nothing, in my opinion, could seem more abhorrent to a lawyer, with such a respect for law as his profession should imply, than the engaging in any such lawless outrage.

In the case of *Smith* v. *State*, 1 Yerger, 228, where the charge was accepting a challenge and killing an adversary in a duel, the court use the following language:

"By the laws of God, the laws of England from the days of Edward, by the laws of Kentucky and Tennessee and every civilized land, he is declared to have been guilty of wicked and malicious murder, and a felon escaping justice. Is it possible that any well-balanced mind can for a moment believe that a man whom the law thus condemns is a fit person to be an aider and adviser in the

sanctuaries of justice. We are told that it is but an honorable homicide. The law knows it to be a wicked and willful murder, and it is our duty to treat it as such."

Can language more fitting to the case under consideration be found? I believe it the duty of every good citizen, and especially of the courts and all officers of the law, to denounce and condemn such acts of lawlessness until they cease, and every one feels that legitimate power is sufficient for protection. For the honor of this court and the profession, as well as for Mr. Wall's sake, I would gladly declare that there had not been found against him reason for enforcing an order of court, but the proofs of a presence and participation in this act of lawless violence are too direct and positive to be ignored.

This court cannot shield itself behind a defense of minor technicalities, either of allegation or evidence, without proving recreant to the trusts reposed in it, and it is ordered that J. B. Wall be prohibited from practicing at the bar of this court until further order herein.

NOTE.

Suspension and Disbarment of Attorney. The power of the court to admit an attorney implies the power to strike off his name from the roll, (*People* v. *Goodrich*, 79 Ill. 148;) and the court may either suspend or expel. (*Ex parte Burr*, 2 Cranch, C. C. 379.) Such power, in a summary manner, should be exercised with great caution. *Rice* v. *Com.* 18 B. Mon. 472. Under the Illinois statute the circuit court can only suspend; the power to disbar is vested in the supreme court. *Winkelman* v. *People*, 50 Ill. 449. An attorney is an officer of the court, and may be removed for misconduct after opportunity to be heard. *Penobscot Bar* v. *Kimball*, 64 Me. 140. Any court of record having jurisdiction may suspend an attorney for causes specified in the statute. *Mattler* v. *Schaffner*, 53 Ind. 245. Where the statute prescribes the causes, courts cannot debar for causes not therein specified, (*Ex parte Smith*, 28 Ind. 47; see *Redman* v. *State*, Id. 205;) but in Michigan the court may suspend or remove attorneys for other causes than those specified in the statute, (*Matter of Mills*, 1 Mich. 392.) The application to strike the name of an attorney from the rolls should be denied where the evidence is conflicting as to whether he received the information which he disclosed, and which was alleged as misconduct. *People* v. *Schufeldt*, 56 Ill. 299. An order to suspend or remove for contempt should not be made unless the offense is of a gross or serious nature, (*Watson* v. *Citizens' Sav. Bank*, 5 S. C. 159;) and the matter must be established before the rule is issued, (*State* v. *Kirk*, 12 Fla. 278;) and the rule must be served on the party, (Id.) The precise cause must appear in the order for suspension. *State* v. *Watkins*, 3 Mo. 338. An order of a territorial supreme court cannot be vacated by *mandamus* from the United States supreme court. *Ex parte Secombe*, 19 How. 9. The authority of the supreme court will not be exercised unless the conduct of the court below was irregular or flagrantly improper. *Ex parte Burr*, 9 Wheat. 529. The district court

has no authority to disbar an attorney admitted in the supreme court; and *mandamus* will issue to restore him. *People* v. *Turner*, 1 Cal. 190. See *People* v. *Justices*, 1 Johns. Cas. 181. In Indiana an appeal is given by statute, but such appeal will not authorize the attorney to do anything which he is forbidden to do by such judgment. *Walls* v. *Palmer*, 64 Ind. 493. The appellate court should not refuse to review the decision, although it will not reverse unless a plain case is shown. *Matter of Wool*, 36 Mich. 299.

GROUNDS FOR DISBARRING. An attorney may be suspended or disbarred for any matter showing his unfitness to practice in the courts, whether it be a criminal offense or creates a civil liability or not. *Ex parte Cole*, 1 McCrary, 405. The circuit court has inherent power to disbar an attorney for an assault upon the judge thereof, on notice to such attorney, and opportunity to be heard in his defense. *Beene* v. *State*, 22 Ark. 149; *Ex parte Heyfron*, 8 Miss. 127; *Saxton* v. *Stowell*, 11 Paige, 526. Unprofessional or disrespectful conduct, though amounting to contempt, will not justify disbarring him, (*Withers* v. *State*, 36 Ala. 252;) but an attorney who obtains a change of venue by means of an affidavit forged by him may be disbarred, (*Ex parte Walls*, 64 Ind. 461.) So for violation of his official oath by not conducting himself in his office with fidelity to his client. *Strout* v. *Proctor*, 71 Me. 288. Collision by a husband's attorney with the wife, to manufacture deceptive evidence to enable the husband to procure a divorce, is professional misconduct. *In re Gale*, 75 N. Y. 526. Advertising to procure divorces without compliance with the requisites of the law is a ground for striking his name off the roll. (*People* v. *Goodrich*, 79 Ill. 148;) so where the attorney substituted the name of his client for his own in an affidavit to procure alimony, his name was stricken from the roll, (*People* v. *Leary*, 84 Ill. 190.) Taking legal papers from the files of the court must be stated with sufficient particularity to enable accused to make his defense. *People* v. *Allison*, 68 Ill. 151. Erasing the word "not" in a letter from a judge advising another judge to allow bail for one indicted for murder is a ground, (*Baker* v. *Com.* 10 Bush, 502;) so for withholding from his client and his client's administrator money collected by him, (*People* v. *Cole*, 84 Ill. 327; *Kepler* v. *Klingensmith*, 50 Ind. 434; S. C. 41 Ind. 341;) or for refusal to pay over money to client, (*People* v. *Palmer*, 61 Ill. 255.) The institution of proceedings by one attorney from improper motives, and without just grounds to disbar another, is misconduct. *Matter of Kelly*, 62 N. Y. 198. On being convicted of a felony an attorney loses his right to practice in court without an order of the supreme court removing him. *Matter of Niles*, 5 Daly, 465. He may be disbarred for the bribery of a witness, (*Walker* v. *State*, 4 W. Va. 749;) or for a false oath taken, or any unprofessional statement made without a prior conviction for perjury, (*Perry* v. *State*, 3 Iowa, 550;) or for any fraudulent conduct, although not so gross as to be criminal; (*U. S.* v. *Porter*, 2 Cranch, C. C. 60;) or for obtaining money by false pretenses in matters intrusted to him, (*People* v. *Ford*, 54 Ill. 520.) The offense need not be such as to subject him to indictment, but its character must be such as shows him unfit to be intrusted with the powers of the profession. *Baker* v. *Com.* 10 Bush, 592. Discreditable acts, if not connected with his duties, will not give the court jurisdiction, (*Dickens' Case*, 67 Pa. St. 169;) as attempting to make an opposite attorney drunk, (Id.)

Indulgence in vices not affecting his personal or professional integrity is not sufficient ground. *Baker* v. *Com.* 10 Bush, 592. So, ignorance of the law is not a good cause. *Bryant's Case*, 24 N. H. 149. An attorney cannot be disbarred for refusing in presence of the court to make answer in writing to a rule, upon the ground of punishing the refusal as a contempt. *Ex parte Robinson*, 19 Wall. 505. Contempt of process and refusal to appear before an examiner is not sufficient ground, (*Com.* v. *Newton*, 1 Grant, Cas. 453;) but a threat of personal chastisement, made to a judge out of court, is ground for striking his name off the rolls, (*Bradley* v. *Fisher*, 13 Wall. 335.) Contempt and gross misbehavior in office generally are distinct offenses. *Ex parte Bradley*, 7 Wall. 364.

PROCEEDINGS TO DISBAR. Proceedings to disbar for commission of a criminal act may precede criminal prosecution therefor. *Ex parte Walls*, 64 Ind. 461. *Watson* v. *Citizens' Sav. Bank*, 5 S. C. 159. The North Carolina statute requires a prior conviction upon an indictment and verdict, and it takes away the common-law power to strike from the rolls. *Kane* v. *Haywood*, 66 N. C. 1. See *Ex parte Schenck*, 65 N. C. 358. Such proceedings are designed to afford a remedy to the creditor to collect the money from the attorney. *Matter of Browne*, 2 Col. T. 553. An attorney's license cannot be suspended except on accusation and notice and a day in court. *State* v. *Start*, 7 Iowa, 499. An order to show cause is the improved mode of procedure. *In re Percy*, 36 N. Y. 651. In a summary proceeding for malpractice the fact must be known to the court by having occurred in its presence. *Walker* v. *Com.* 8 Bush, 86. In case of malpractice out of the presence of the court, the proceeding is by complaint or information made on oath. *Walker* v. *Com.* 8 Bush, 86. For any other misconduct than contempt he can only be held on specific charges, and he is entitled to a full defense and an appeal. *Dickenson* v. *Dustin*, 21 Mich. 561; *Matter of Mills*, 1 Mich. 392. The court must order an information against him and inflict the punishment, on the plea of guilty, found on such information. *Fisher's Case*, 6 Leigh, 619. An order to show cause why he should not be struck from the rolls may be based on a decree against him on a charge of fraud or gross abuse of confidence, or it may be incorporated in the decree itself. *Matter of Wool*, 36 Mich. 299; *In re Percy*, 36 N. Y. 651. In analogy to the limitation of prosecutions for misdemeanors there must be a limit to the time for filing informations against attorneys. *People* v. *Allison*, 68 Ill. 151. In proceedings to disbar on the ground of fraudulently procuring admission, defendant is entitled to a change of venue if the judge is prejudiced. *Matter of Peyton*, 12 Kan. 398. A proceeding upon charges preferred by a private prosecutor is a special proceeding, wherein a change of venue for prejudice of the judge may be granted. *State* v. *Clarke*, 46 Iowa, 155. Proceedings to strike an attorney from the roll for alleged fraud is a *quasi* criminal case and no appeal lies from the judgment, (*State* v. *Tunstall*, 51 Tex. 81;) but an appeal lies from a summary order, issued without compliance with the statute, (*Ex parte Trippe*, 66 Ind. 531; see *Thomas* v. *State*, 58 Ala. 365.) The charge should be clearly supported by the evidence. *Matter of* ———, 1 Hun, 321. The grounds of complaint must be brought to the notice of the supreme court at general term, in the first instance, which will direct an investigation and a motion if deemed proper. *Matter of Brewster*, 19 N. Y.

Supr. Ct. 109. For malpractice the case should be free from doubt. *People* v. *Harvey*, 41 Ill. 277. Notice of grounds of complaint and an opportunity to be heard must be given to the accused. *Ex parte Robinson*, 19 Wall. 505. Where motion is made to suspend and issue joined, defendant is entitled to a trial by jury. *Reilly* v. *Cavanaugh*, 32 Ind. 214. In such proceedings, where the charges are denied, the common-law rules of evidence apply. *In re Eldridge*, 82 N. Y. 161. For fraudulently misleading his client, there must be proof of the fraud tending to mislead. *Barker's Case*, 49 N. H. 195.—[ED.

CARSTAIRS and others v. MECHANICS' & TRADERS' INS. CO. OF NEW YORK.

(*Circuit Court, D. Maryland.* October 13, 1882.)

SERVICE OF PROCESS ON FOREIGN INSURANCE COMPANY.

The Maryland legislature having required every foreign insurance company doing business in that state to execute a power of attorney appointing an agent upon whom process might be served, to have the same effect as if served on the company, and by the act defining "process" to be any writ issued upon any action by any court, *held*, that a foreign insurance company, having executed such a power of attorney, has agreed to be "found" in the state as fully as if it were a domestic corporation; and that service of process of the United States circuit court on such an agent is valid, notwithstanding the suit may be upon a cause of action of which the state courts could not take jurisdiction, because of an act of the legislature restricting their jurisdiction, in suits against foreign corporations, to cases where the plaintiff is a citizen, or the cause of action has arisen within the state.

John H. Thomas, for plaintiffs.

John S. Tyson, for defendant.

MORRIS, D. J. The defendant moves the court to dismiss this suit because the defendant, at the time of the alleged service of process, was not found in this district, and because the service of process on Henry Tolle was not a lawful service on the defendant corporation. The plaintiffs are citizens and residents of Pennsylvania, and the defendant is a corporation of the state of New York, and the policy of insurance, which is the cause of action, was not executed or delivered in Maryland. Before the issuing of the policy sued on, the defendant corporation, for the purpose of being authorized under the laws of Maryland to take risks and transact the business of insurance in this state, executed and filed with the insurance commissioner of Maryland a power of attorney to Henry Tolle, a citizen and resident of Maryland, in compliance with the provisions of article 42, § 4, of the Maryland Revised Code, regulating insurance companies. This

section of the Maryland Code prescribes the conditions to be complied with by foreign insurance companies doing business in this state, and among other conditions it enacts that—

"It shall not be lawful for any insurance company * * * of any other state * * * to transact any business of insurance in this state * * * until the following conditions have been fully complied with: There must be filed with the insurance commissioner * * * a power of attorney appointing a citizen of this state, resident within the state, the agent or attorney for the said company, upon whom process of law can be served; * * * and said * * * power of attorney shall stipulate and agree, on the part of the company making the same, that any lawful process against said company, which is served on such agent, shall be of the same legal force and validity as if served on such company within this state. * * * The term 'process,' used above, shall be held to include any writ, summons, or order whereby any action, suit, or proceeding shall be commenced, or which shall be issued in or upon any action, suit, or proceeding by any court officer or magistrate."

There is another section of the Maryland Code contained in the article relating to corporations, (article 67, § 36,) by which it is provided that suits against any foreign corporation doing business in the state may be brought in the state courts by a resident of the state, for any cause of action, and by a plaintiff not a resident of the state where the cause of action has arisen or the subject-matter of the action shall be situate in the state. The defendant now contends, in support of its motion, that the agent appointed by the above-mentioned power of attorney executed by it was not authorized to accept service of process in this case because the cause of action is not one which could have been sued on in the state courts. In this court there is no question of jurisdiction, either as to the subject-matter of the suit or the parties, provided the defendant, which is a New York corporation, was "found" in this district at the time of serving the writ.

In *Lafayette Ins. Co.* v. *French*, 18 How. 407, it is said:

"A corporation may sue in a foreign state by its attorney there, and if it fails in the suit be subject to judgment for costs. And so, if a corporation, though of Indiana, should appoint an attorney to appear in an action brought in Ohio, and the attorney should appear, the court would have jurisdiction to render a judgment in all respects as obligatory as if the defendants were within the state. The inquiry is not whether the defendant was personally within the state, but whether he, or some one authorized to act for him in reference to the suit, had notice and appeared, or, if he did not appear, whether he was bound to appear or suffer a judgment by default."

In the leading case, *Ex parte Schollenberger*, 96 U. S. 369, under a Pennsylvania statute similar, but not nearly so broad in its terms as the Maryland act relating to insurance companies, the supreme

court held the foreign corporation must be considered to have consented to be found within that state, and that process from the United States circuit court, served according to the mode adopted by the state statute, gave the circuit court jurisdiction. In that case the cause of action was one of which the state courts of Pennsylvania would also have had jurisdiction, and it must be conceded that this case cannot be distinguished from it unless by the fact that the cause of action here is one which the state courts of Maryland could not entertain.

It is urged that, as the defendant executed the power of attorney to Henry Tolle in compliance with the state law, it is to be treated, notwithstanding its very broad terms, as an authority to accept process of service only in such cases as by the state law the state courts have jurisdiction of, and that to hold otherwise would be to extend his powers beyond the authority which it is fair to presume the legislature intended should be conferred upon him. I am not convinced that either the language of the letter of attorney or the intent of any of the legislative enactments justifies this contention. It is to be noticed that the two enactments—the one requiring the appointment by foreign insurance companies of an agent by letter of attorney, and the other restricting the causes of action upon which suits may be brought against any foreign corporations in the state courts—are not in any way parts of one general scheme of legislation, or in any way necessarily connected with each other. The Maryland court of appeals, construing these statutes, has held that the restriction as to the subject-matter of the suits which may be brought in the state courts has nothing to do with the power of attorney or the service of process, because the restriction is upon the jurisdiction of the court; and where the restriction applies, even if the foreign corporation should waive all question of service of process, the state court would have no jurisdiction. *Myer* v. *Ins. Co.* 40 Md. 601; *Cromwell* v. *Ins. Co.* 49 Md. 382.

The language of the letter of attorney is as broad and unrestricted as it is possible to make it. By it the corporation agrees that any lawful process served on the agent therein named shall be of the same legal force and validity as if served on the company itself, and it is expressly enacted that the term "process" shall include any writ which shall be issued in or upon *any action*, suit, or proceeding by *any* court, officer, or magistrate. It would appear to have been the intention of the legislature to require foreign insurance companies doing business in the state to consent to be "found" therein, as

fully as any company incorporated under its own laws, and to leave all courts within the state with just such jurisdiction in respect to suits against them as by any statutes applicable to such courts they might respectively exercise. If the legislature should at any time repeal these restrictions upon the state courts the service of their process would certainly be good, notwithstanding the enlarged jurisdiction, and the corporation would not be heard to say that these letters of attorney, although executed before the repeal, had reference only to such suits as might have been instituted when they were executed. The purpose of the legislature in restricting the state courts was, doubtless, to spare the state and its courts the expense and burden of litigation to which its own citizens were not parties, or which had not arisen within its limits, and this purpose it accomplished by limiting the jurisdiction of the state courts, and not by limiting the authority of the attorney required to be appointed to accept service of process.

The question to be now decided is, it seems to me, reduced to this: Is it inconsistent with public policy, or an unreasonable condition to be imposed upon a foreign corporation, that it should be required by a state law, before it is permitted to transact business within the state, to appoint an attorney to accept service of process from all courts within the state in suits founded upon causes of action of every nature whatsoever, whether instituted by citizens or not, or arising within the state or not? Undoubtedly, there may arise hardship from requiring a corporation to submit to a condition which renders it liable to be sued at the caprice of a non-resident plaintiff in any of the United States in which an agent so empowered may be found, but every natural person who journeys through these states is liable to a similar hardship, and I am not persuaded that the hardship is likely to be so great that such a condition is to be pronounced unreasonable, or that any rule of public policy forbids it. *Merchants' Manuf'g Co.* v. *Grand Trunk R. R.* 13 FED. REP. 358; *Mohr* v. *Ins. Co.* 12 FED. REP. 474; *Brownell* v. *Troy & Burton R. R.* 3 FED. REP. 761; *Moch* v. *Virginia Fire Ins. Co.* 10 FED. REP. 700; *Grover* v. *American Ex. Co.* 11 FED. REP. 386.

Motion denied.

See *ante*, note, 360; 12 FED. REP. 476, note.

McCabe *v.* Illinois Cent. R. Co.

(Circuit Court, N. D. Iowa. April, 1882.)

FOREIGN CORPORATIONS—NON-RESIDENTS—STATUTE OF LIMITATIONS.

A foreign corporation that by the laws of a state within which it comes on business can sue and be sued, is not a *non-resident* in the sense that would prevent it from setting up the statute of limitations as a defense in an action against it; and section 2533 of the Code of Iowa, that provides that "the time during which a defendant is a non-resident of the state shall not be included in computing the period of limitation," has no reference to such a case.

This is an action for personal injuries. The defendant is an Illinois corporation. It appears that the cause of action accrued more than two years before the commencement of the suit. The defendant pleads the Iowa statute of limitations, which provides that "actions founded on injuries to the person or reputation, whether based on contract or not, or for a statute penalty, shall be commenced within two years after their causes accrue." This provision is qualified by section 2529, as follows:

"The time during which a defendant is a non-resident of the state shall not be included in computing any of the periods of limitation above described."

Shiras, Vanduzee & Henderson, for plaintiff.

Griffith & Knight, for defendants.

LOVE, D. J. The plaintiff contends that a foreign corporation cannot in any case plead the statute of limitations in this state because it is a non-resident of the state. It is an artificial person existing only by the law of its creation. It has no existence and can have no existence outside of the state by whose laws it has been created. It cannot change its abode; it is incapable of emigration; its fixed residence is in the state of its creation. It may have agents in other states; it may do business in them; it may, by the laws of such states, sue and be sued therein; but it can have but one residence, which must be and is in the state to which it owes its existence.

This is the plaintiff's argument, but does it not proceed upon an erroneous assumption? Can it be truly said that a corporation has really a residence anywhere? It is said that a corporation is an artificial person, and by a natural transition of thought a place of residence is ascribed to this artificial person. But is it not by a mere fiction of law that personality, and residence in place, are ascribed to a corporation? What is a corporation? Would it not be more accu-

rate to call it an artificial being—a mere legal entity—than an artificial person? Doubtless a corporation is a legal being and has a legal existence in the state of its creation, but it is difficult to conceive the idea of a residence in place for it. If you search for a corporation, how will you find it and do any manner of business with it? You will find and know the corporation by and through its agents; through them alone will you be able to do any business whatever with the corporation. The agents of the corporation can be seen; it cannot. They can be served with process; it cannot. If you wish to sue the corporation, you must make service of legal process upon the agents of the corporate body. These agents have residences and can be found, but they are not the corporation. The president and directors are not the corporation. They may all die and none be elected to take their places; yet the corporation still lives. The president and directors are merely the agents of the corporate body. Neither are the stockholders the corporation. They can as such neither sue nor be sued on account of the corporation. They are not even its agents to make contracts, receive notice, or accept legal service. The corporation is a something—a legal entity—an artificial being or person—entirely distinct from both the stockholders and president and directors. Now, the stockholders and the president and directors have a residence, but the ideal, invisible, legal being called the corporation has none. Indeed, the legal existence of a corporation may be in one state or place, and the residence of every stockholder, as well as the president and directors, in another, unless the law creating the corporation requires their residence in the state or place of its creation. Thus, with respect to a corporation created by the laws of New York or of Iowa, every stockholder and the president and directors might reside in New Jersey or Illinois.

Since, then, a corporation cannot be said, except in legal fiction, to have residence anywhere, non-residence cannot, in a strict sense, be ascribed to it. In construing the word "non-residence," therefore, as used in section 2533, we must consider, not so much what may or may not be the "residence" of a corporation in the abstract, as what the legislature intended by the use of the word "non-resident" in the connection in which we find it. We must not stick in the bark; not confine our view solely to the meaning of the word "non-resident," but take in the whole scope of this legislation. We must consider the matter, not in the abstract, but in the concrete.

Seeing, then, that corporations cannot be said to have literally any residence in a place, and that they cannot be known and dealt with

and sued except by and through their agents, and seeing that the legislature provided in section 2611 of the same Code that foreign as well as other corporations may be sued in this state by service on the agents whom they have appointed to carry on their business here, can we doubt that the legislature intended that the presence of the agent in this state subject to process should be deemed, as to the legal purposes of a suit, with all its incidents and defenses, the presence of the corporation? Can we suppose the legislature intended that a foreign corporation might be sued in this state in the way prescribed, and yet deprived of one of the essential rights accorded to every other defendant?

A strict and literal interpretation of section 2533 would, as against foreign corporations, rob it of all reason; for the sole reason for providing that the "time during which the defendant is a non-resident of the state shall not be included in computing any of the periods of limitation," is to save the rights of the plaintiff, where, by reason of the defendant's absence, the plaintiff cannot get service upon him. But the facilities for suing foreign corporations doing business in Iowa are greater than those which the law furnishes against individuals residing here. A foreign corporation may be sued in any county where its agent may be found carrying on its business, and it cannot do business without agents. An individual must be sued in the county of his residence. To say, therefore, that a plaintiff may sue a foreign corporation anywhere in the state, and at any time after the cause of action accrues and yet that the corporation is to be deemed a non-resident, and may not, therefore, plead the statute of limitations, is to make the statute purely arbitrary. It is equivalent to saying that the corporation shall be deemed resident, or at least present, for the purpose of being sued, but not resident with respect to this defense of the suit. This construction of the statute, while wholly unnecessary to protect the plaintiff's rights, would work infinite detriment to foreign corporations doing business in Iowa; for with this construction they might be sued upon stale claims resting in parol, or for personal injuries 10 or 20 years after the cause of action accrued, and long after the witnesses of such transactions have passed away. Thus would the very policy and purpose of the limitation law be subverted by a too literal interpretation of one of its own provisions. The legislature could surely not have intended that the statute of limitations should be so construed as to annul and defeat the very purpose for which it was enacted.

There is nothing in the decisions of the supreme court of the United States, when properly understood, to impair our conviction of the soundness of the views we have expressed. That court has often laid down the doctrine that a corporation is a legal entity, having no existence beyond the limits of the state of its creation; that it cannot change its abode; that it cannot migrate from one state to another; that it cannot at will transfer itself as a legal being or person from one jurisdiction to another, etc. This doctrine is undoubtedly entirely sound, but what does it decide as to the mere residence of the corporation, and, more especially, as to the meaning of the word "non-resident," as used in the Iowa statute? Legal existence and residence are by no means the same thing. Indeed, while the artificial being called a corporation has a clearly-defined legal existence, who can safely affirm that, considered in the abstract and apart from its agents, it has any residence whatever? This abstract being, this incorporeal legal entity, cannot, for manifest reasons, migrate from one state to another. Since it cannot transfer the law of one state to another state, how can it, being as it is a mere creation of the law of the state to which it belongs, exist in any state other than the one in which the law of its life prevails? The law of the state creating a corporation is the breath of its life. Such I understand to be the doctrine announced in the cases cited below, and it has generally been laid down with reference to the citizenship of corporations. The supreme court have, we know, by a legal fiction, endowed corporations with citizenship in the states by which they are created, and they cannot transfer this citizenship from a state where the law alone gives them life to a state in which no law exists to keep them alive. As a natural person passing from vital air into vacuum dies, so a corporation transferred from its state of life-giving law to a place where it has no law ceases to live.

But does it follow from this doctrine that a corporation may not have a legal residence, through its agents, in a state other than the one of its creation, with the assent of the state in which it is so present, for business or other purposes? May it not, when so present, make contracts, commit torts, sue and be sued? And if so, why may it not be deemed to have a legal residence or presence, if you will, so far as the statute of limitations is concerned? Is it a strained construction of the word "residence," as used in our statute, which leads to a conclusion at once so just and rational? Indeed, the supreme court of the United States, in *Ex parte Schollenberger*,

compelled the circuit court of the United States for Pennsylvania, by *mandamus*, to take jurisdiction of certain causes against a foreign corporation, commenced by a citizen of Pennsylvania and dismissed by the circuit court for want of jurisdiction. The ground of this decision was that the foreign corporation was carrying on business in Pennsylvania, and had agents there subject to legal process. 96 U. S. 369, 376.

The chief justice, speaking for the court, says:

"The language of this court in *Railroad Co.* v. *Harris*, 12 Wall. 65, through Mr. Justice Swayne, is; 'It [a corporation] cannot migrate, but it may exercise its authority in a foreign territory upon such conditions as may be prescribed by the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented, and will be bound accordingly.'"

See *Bank of Augusta* v. *Earle*, 13 Pet. 588; *Ohio & Miss. R. Co.* v. *Wheeler*, 1 Black, 295; *Runyan* v. *Coster's Lessee*, 14 Pet. 129; *Louisville, C. & C. R. Co.* v. *Letson*, 2 How. 497; *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227, 233; *Paul* v. *Virginia*, 8 Wall. 168, 181.

We repeat that the true question is not what is to be deemed the residence of a corporation in the abstract, but rather in what sense did the legislature of Iowa use the word "non-resident" in the section under consideration? This question is by no means answered, as counsel seem to suppose, by the decision of the supreme court of the United States in *Tioga R. Co.* v. *Blossburg & C. R. Co.* 20 Wall. 137. The court in this case simply follows the courts of the state of New York in expounding the statute law of that state, which decisions, it may be conceded, sustain the plaintiff's position in the present case. Far, however, from expressing any approval of the decisions of the New York courts, Mr. Justice Bradley, in delivering the opinion, intimates that the supreme court of the United States considered them on principle unsound, and Mr. Justice Miller, in his dissenting opinion, emphatically condemns the doctrine of the New York courts. Mr. Justice Bradley, delivering the opinion, says:

"The courts of New York have decided that a foreign corporation cannot avail itself of the statute of limitations of that state. These decisions upon construction of the statute are binding upon us, whatever we may think of their unsoundness upon general principles."

The case in the supreme court of the United States most resembling the present case, in which that court, not being bound by any state decision, gives its independent judgment, was the *Ex. Co.* v.

Ware, 20 Wall. 543. The statute of the state of Nebraska (though not fully given in the report) provides that the time of the defendant's absence from the state is not to be computed, but in case of a foreign corporation, if it has a managing agent in the state, service of the suit may be made upon such managing agent. This is substantiantially the same as our legislation on the same subject.

The circuit court of the district of Nebraska instructed the jury as follows:

"If you find that the defendant had a managing agent within the state at the time of the loss, then the statute began to run from that time, and if it had such agent in the state for the next five years after the loss, then this action is barred, but otherwise it is not. In other words, to bar this action the plaintiff must have been able, for five years before the suit was brought, to have sued the defendant in this state, and compelled it to answer the suit by a service upon a managing agent therein."

The supreme court of the United States affirmed the correctness of this instruction, saying they could see no error in the charge, and this is in accord with the Iowa and Illinois adjudications. The decisions of the state courts upon the questions under consideration are in conflict. Indeed, upon what question of the least doubt are they not in conflict? The decisions of the courts of New York are, as we have seen, opposed to the view we have taken above. Those of Illinois, on the contrary, fully sustain our position. See *Bank of N. A.* v. *C., D. & V. R. Co.* 82 Ill. 495; *Pennsylvania Co.* v. *Sloan*, 1 Bradw. 64; *Bristol* v. *Chicago & A. R. Co.* 15 Ill. 436.

But it is, of course, to the decisions of the supreme court of Iowa that we must chiefly look in expounding the statutes of this state; and if there was any decision of that tribunal directly upon the question before us, it would be our duty to follow it. There is, perhaps, no such decision to guide us, but the whole tenor and scope of the state supreme court decisions favor strongly the conclusion at which we have arrived. Thus the supreme court of Iowa, in *Baldwin* v. *M. & M. R. Co.* 5 Iowa, 519, cite with approval the language and doctrine of *Bristol* v. *C., A. & R. R. Co.* 15 Ill. 438, as follows:

"The residence of a corporation, if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised. It is present where it is engaged in the prosecution of the corporate enterprise. This corporation has a legal residence in any county in which it operates the road or exercises corporate powers and privileges. In legal contemplation, it resides in the counties through which its road passes, and in which it transacts its business."

Again, in *Richardson* v. *B. & M. R. R. Co.* 8 Iowa, 263, the court say:

"The material question is whether the defendants had a residence in Henry county. And this must be regarded as settled by the case of *Baldwin* v. *M. & M. R. Co.* 5 Iowa, 518. It was there held that a corporation like a railway company resides in counties through which the road passes and in which it transacts its business; that it has a legal residence where it exercises corporate powers and privileges."

It is no answer to this to say that these cases relate to Iowa corporations, since the question is, what is the true interpretation of the words "residence" and "non-residence," in our legislation, when applied to railway corporations? Our legislation has distinctly recognized the right of foreign railway corporations to run and operate their roads and exercise their franchises in Iowa, and this surely brings them within the doctrine as to what constitutes legal residence laid down in the cases cited. See, also, *Penley* v. *Waterhouse*, 1 Iowa, 498, and *Savage* v. *Scott*, 45 Iowa, 132. These cases, though dissimilar in their facts to the present case, and therefore not directly in point, do, nevertheless, favor distinctly the doctrine that the true test of legal residence is the fact that the defendant is within the jurisdiction and subject to legal process.

In *Cobb* v. *Ill. Cent. Ry. Co.* 38 Iowa, 608, the defendant pleaded the statute of limitations and the court sustained the plea, but it is said that the "question now under consideration was not raised, considered, or decided." This may be true as far as counsel were concerned in that case, but it would seem that when the question was directly made by the plea of the statute, the court must have passed upon it.

STINSON *v.* HAWKINS.*

(*Circuit Court, E. D. Missouri.* October 30, 1882.)

1. EVIDENCE—SHERIFF'S RETURN.

   Where A. brings suit against B. by attachment and the sheriff executing the writ seizes property belonging to C., the sheriff's return is conclusive as to the fact of seizure and the articles seized, in a suit by C. against A. for damages.

2. FRAUD—CONVEYANCES TO HINDER AND DELAY CREDITORS.

   A mortgage executed to hinder and delay the mortgageors' creditors is void as to such creditors, even when for full value, if the mortgagee is aware of the fraudulent intent.

*Reported by B. F. Rex, Esq., of the St. Louis bar.

Motion for a New Trial.

The plaintiff in his petition states that the defendant, on or about August 23, 1880, wrongfully, without leave, and with force and arms, attached, levied upon, seized, and took away certain personal property therein described, belonging to the plaintiff, all of the value of $4,000, and converted and disposed of the same to his, the defendant's, own use; for which he asked damages. The defendant, in his answer, states that at or about the date mentioned in the petition he began a suit by attachment against one George King, in the circuit court of the county in which said property was situated; that the attachment was executed by the sheriff of said county, by seizing and taking into his possession the property mentioned in said petition; that thereupon the plaintiff in this suit filed an interplea in said attachment suit, claiming that said property belonged to him by virtue and force of a certain mortgage from said King to him, to which interplea the defendant herein filed a denial; that said cause was thereupon removed to this court at the instance of plaintiff, so far as it involved the issues upon said interplea; that at the trial of the cause in the state court the case turned upon the question of whether or not the mortgage under which the plaintiff claims was given to hinder and delay creditors, and that the verdict and judgment was for the plaintiff therein; that the branch of said cause removed to this court was thereafter remanded to the state court, and plaintiff's interplea was then dismissed by him; wherefore defendant claims plaintiff is estopped from reasserting title to said property under said mortgage.

TREAT, D. J., (*charging jury.*) The propositions for you to consider are very few. It is admitted, or not controverted to any extent, that the mortgage in question was executed as it is said to have been, and that there was a seizure and levy under attachment of certain property described in the mortgage, and set out or claimed in the plaintiff's petition. If you find for the plaintiff, in estimating his damages you will have to ascertain the value of the property seized, and, so far as the growing corn is concerned, its value as it then was, looking over all the testimony that has been presented to enable you to ascertain what the real value of that corn was at the time. You are permitted, if you find for the plaintiff in this case, after you have ascertained that sum, too add interest thereto from the date of the seizure to the present time at the rate of 6 per cent. per annum.

But the main proposition involving the right of the plaintiff to recover depends upon this inquiry: Was this a *bona fide* mortgage; that

is, made in good faith, to secure a sum due to this plaintiff from Mr. King? Under the law of Missouri a debtor can sell or mortgage his property to any one between whom and himself there are transactions justifying the act; in other words, he may prefer one creditor in that way and leave his other creditors unsecured. So far as the testimony that has been offered to you is concerned, you must remember, gentlemen, that you are the sole judge of the weight to be given to it; that is your exclusive province; as it is also your exclusive province to determine the facts in the light of the testimony offered. Fraud is not to be presumed; it has to be proved; and it remains for you to determine whether the testimony offered by the defendant in this case has satisfied you that this was a fraudulent mortgage. In the eye of the law a mortgage given to secure a pretended debt—a debt not existing, whereby other creditors of the party giving the mortgage are hindered and delayed—is necessarily fraudulent.

The question, then, narrows itself down to this inquiry: Did Mr. King honestly owe Mr. Stinson, the plaintiff, the sum of money represented by the mortgage, or anything near that? In other words, it is not for the jury carefully to compute the amount within a few dollars or cents. If the parties had an accounting between themselves, and a lawful rate of interest was allowed, the debtor had a right to allow that rate of interest. But did Mr. King owe this sum of money represented by the large note, even including interest? or was that note made up of sums largely in excess of what actually is due from Mr. King to Mr. Stinson? If it was made up of sums largely in excess of the debt due—or, in other words, if it was given for an amount largely in excess of what actually was due,—the mortgage is, in law, fraudulent and void. Gentlemen, take the case.

The jury found a verdict for the plaintiff in the sum of $900, with interest from August 23, 1880.

The defendant moved the court to set aside the verdict and grant a new trial, because, among other reasons, the verdict of the jury was contrary to the weight of evidence, because the court admitted improper testimony, and because the court gave the jury erroneous instructions.

David Murphy, for plaintiff.

Vallaint & Thoroughman, for defendant.

TREAT, D. J. The first point presented is as to the conclusiveness of the sheriff's return against this defendant, who was plaintiff in the attachment suit. That suit was instituted by this defendant against

King, and the return states what property was seized thereunder. The defendant's counsel in this case urged that it was only *prima facie* and not conclusive; and that, as this court on the trial held otherwise, error was committed. Authorities are cited for defendant: 59 Mo. 80; Crocker, Sheriffs, § 45. The foot-notes to Crocker refer to several cases, and more especially to 2 Cow. & H. Notes, 795 *et seq.;* to Phil. Ev.,—in which all the cases therein decided are briefly stated.

Without reviewing the many cases in which defendant, on the relation of parties to the controversy, claims that the official return is to be considered *prima facie* or conclusive, this court can find no well-considered case, nor can it find any sound reason, for other than the ruling made at the trial, viz.: That, as between the parties to this suit, the sheriff's return was conclusive against this defendant as to the fact of seizure and articles seized. True, the plaintiff was not a party to the attachment suit, and was not concluded by what was done therein, but the defendant was a party thereto, and the moving party. He caused the seizure, obtained the judgment, and reaped the fruits thereof. The suit now before this court is one in which the plaintiff alleges that the property seized and sold under judicial process in that attachment case against King, at the instance of this defendant, who was plaintiff in that attachment case, was not King's property, but the plaintiff's. The judicial record in the attachment case shows what was done adverse to the alleged rights of Stinson, for which Hawkins is liable. Hawkins was not only the moving party in that case, but through judicial sale, as the record discloses, received the benefits thereof. Can he dispute the record to which he was a party in this collateral proceeding? True, the plaintiff here, not being a party thereto, would not be concluded thereby, but the defendant is. Hence, no error is found as to that point.

The second ground of error is that the court's charge was too narrow, and must have misled the jury. As to this, the defendant is correct, in the light of decisions quoted. A sale of property, even for full value, in order to hinder or delay creditors, both vendor and vendee knowing the fraudulent purpose, cannot be upheld. Does a different rule obtain when a mortgage is given, especially for an antecedent debt, and particularly one of long standing? The circumstances of this case called for fuller instructions than were given; but as the line of evidence and the special contention was, by defendant, that plaintiff's mortgage was largely in excess of any sum justly his due from King, and that the jury should so find, the court

pointed the inquiry sharply in that direction, and other elements were omitted.

As the case will again have to go to a jury, it is not proper to analyze or discuss the testimony. A party giving and a party receiving a preference can ordinarily uphold the transaction; but the *good faith* thereof is still open to investigation. Was the alleged preference merely to secure a valid, subsisting demand, and made in good faith, or was it given, not to secure the mortgagee, but to cover up the mortgageor's property, so that honest creditors could not reach the same, and the mortgageor practically or actually remain in the possession and enjoyment thereof? In other words, was the mortgage given for a fraudulent purpose, and assailable for fraud, despite the alleged consideration?

The motion for a new trial is sustained.

WHITFORD *v.* CLARK COUNTY.*

(*Circuit Court, E. D. Missouri.* October 26, 1882.)

1. DEPOSITION—ADMISSION IN EVIDENCE—PRESENCE OF DEPONENT.

   A deposition duly taken in a civil action because the witness resides more than 100 miles distant from the place of trial, is admissible in evidence, subject to the right of the adverse party to place the deponent on the witness stand if present at the trial.

2. COUNTY BONDS—DETACHED COUPONS—FRAUDULENT ISSUES.

   Where certain county bonds and a number of detached coupons were placed in the hands of an agent of the county to be issued by him conditionally, and the agent issued them fraudulently, and transferred the detached coupons to A., his brother-in-law, and where B., who, while said county was disputing the validity of said bonds and coupons, and negotiating for a compromise with the holders thereof, had, with a full knowledge of the facts, entered into a contract with said county to procure said bonds and coupons for surrender, purchased the coupons transferred to A., in the name of C., and C. brought suit thereon against the county, *held*, that C. was not a *bona fide* holder for value, and could not recover.

On Motion for New Trial.

H. A. & A. C. Clover and *Fisher & Rowell*, for plaintiff.

Glover & Shepley, for defendant.

TREAT, D. J. This case having been tried without the intervention of a jury, the facts were specially found. The plaintiff urges for error that the deposition of Cherry, residing more than 100 miles

*Reported by B. F. Rex, Esq., of the St. Louis bar.

from the place of trial, and within the district, was permitted to be read against defendant's objection that he (the deponent) was present in court. The court holds the rule to be that when a deposition in a civil action has been duly taken, because the witness resides more than 100 miles distant, said deposition is admissible, subject, however, to the right of the adverse party to place him on the witness stand if present.

Such is understood to be the true rule, although decided cases are not fully in accord. It is further urged that the court erred in its special finding wherein it stated:

"The condition of said coupons, and the general facts and circumstances of the controversy between the bondholders and Clark county concerning the alleged fraudulent issue of the bonds and coupons, were known to the plaintiff when he bought the coupons in suit."

The ground of the alleged error is that there never was such a controversy concerning the bonds, etc. The terms on which the bonds were issued in payment of the subscription were fully shown, and are set out in the special finding.

Testimony was taken in this case to prove that the bonds and coupons were fraudulently delivered; that is, were delivered by the financial agent in disregard of the conditions agreed,—a fact known to the railroad company. There was a dispute as to the fraudulent issue of the bonds and coupons. But the more important inquiry was as to the coupons sued on. The testimony showed that they were detached coupons, never beyond the control of the county's agent; and that he, without authority, turned them over to his brother-in-law, under the circumstances detailed in the special finding. While the county was negotiating for a compromise of the outstanding bonds and coupons connected with the railroad subscription, Coquard entered into a contract with the county to procure for surrender said bonds and coupons. His attorneys ascertained that the brother-in-law of the county's agent had possession of these disputed coupons. They negotiated with him for the purchase thereof, and, acting for Coquard, concluded the purchase for the sum of $2,500, causing the name of Whitford to be used, at the consummation of the sale or transfer, instead of Coquard. It is obvious that the substitution of the name of Whitford instead of Coquard was to take the transaction apparently out of the contract of Coquard with the county, and thus to give to Whitford, as purchaser, a supposed right to recover of the county the face value of the coupons, with interest. The court could not shut its eyes to what was apparent from the

whole transaction, and enable such a recovery to be had in the face of Coquard's agreement with the county. This suit was not on that agreement, but by an alleged *bona fide* holder for value of negotiable coupons, who acquired the same long after they were due, and delivered by the financial agent to his brother-in-law, as stated. See *Koshkonong* v. *Burton*, 104 U. S. 668; *Stewart* v. *Lansing*, Id. 505.

The only difficulty in the mind of the court arose from the narrowness of the issues presented by the defendant; and hence its special finding was restricted thereto. If an issue had been tendered as to the relation of Whitford with Coquard, whereby whatever was done under the Coquard contract with the county Whitford should be held bound for, another inquiry would have been before the court. As the pleadings were framed, the question was whether plaintiff, under the facts and circumstances proved, could, as if a *bona fide* holder for value, recover on these coupons fraudulently issued by the financial agent of the county. The court held that he could not recover on them; and on review of the whole case finds no error in its finding or legal conclusions.

The motion for a new trial is overruled.

DEPOSITIONS—ADMISSION OF, IN EVIDENCE. A deposition taken *de bene esse* can only be read upon proof that the attendance of the witness himself upon the trial cannot be procured. *The Samuel*, 1 Wheat. 9; *Bowie* v. *Talbot*, 1 Cranch, C. C. 247; *Jones* v. *Greenolds*, Id. 339; *Weed* v. *Kellogg*, 6 McLean, 44. If the other party can prove that the witness is within reach of the process of the court, (*Ridgeway* v. *Ghequier*, 1 Cranch, C. C. 4;) except that where the witness lives at a greater distance than 100 miles from the place of trial, it is incumbent on the party by whom the deposition was taken to show that the disability to attend continues, (*Patapsco Ins. Co.* v. *Southgate*, 6 Pet. 604; *The Thomas and Henry*, 1 Brock. 367.) If the witness lives at a greater distance than 100 miles his deposition may be read, although he was at the place of trial during the sitting of the court, unless the fact was known to the party at whose instance the deposition was taken. *Pettibone* v. *Derringer*, 4 Wash. C. C. 215. If the witness lives within a hundred miles, the party offering the deposition in evidence must prove that he used due diligence to procure the attendance of the witness, (*Park* v. *Willis*, 1 Cranch, C. C. 357; *Penn* v. *Ingraham*, 2 Wash. C. C. 487; *Bannert* v. *Day*, 3 Id. 343; *Pettibone* v. *Derringer*, 4 Wash. C. C. 215; *Read* v. *Bertrand*, Id. 558;) or that he cannot attend personally, (*Park* v. *Willis*, 1 Cranch, C. C. 357; *Leatherberry* v. *Radcliffe*, 5 Cranch, C. C. 550; but see *Browne* v. *Galloway*, Pet. C. C. 201.) A deposition cannot be read in an action at law if the witness at the time of the trial is in the place where the court is held, and is able to attend. *Weed* v. *Kellogg*, 6 McLean, 44.—[ED.

ROWSWELL *v.* EQUITABLE AID UNION.

(Circuit Court, N. D. New York. 1882.)

1. BENEFICIAL UNION—DEFAULT IN PAYMENT BY MEMBER—ESTOPPEL.

A party to whom a certificate of membership in an aid union had been duly issued, subsequent to a default in payment, and who thereafter had been twice assessed as a member by the union, must be considered as entitled to the benefits of the union, although he had not paid the $1.30 required to be paid within 30 days after the presentation of his application. The issuing of the certificate and making these assessments estop the union, after his death, from setting up this default.

2. SAME—UNWARRANTED ASSESSMENT.

A failure to pay an assessment levied on a member for a death which occurred prior to the date of his certificate, the assessment being contrary to the plain provisions of a by-law of the union, will not invalidate the claim of his representatives to benefits.

Motion for New Trial.

Ansley Wilcox, for plaintiff.

Benjamin H. Williams and *W. H. Tennant*, for defendant.

COXE, D. J. This action is brought upon a benefit certificate issued by the defendant. It was tried at the June term and resulted in a verdict for the plaintiff. The defendant now moves for a new trial. But two questions of importance are involved:

1. The assured neglected to pay the sum of $1.30 required to be paid within 30 days after the presentation of his application. The application was dated April 10, 1880. It doubtless was presented to the subordinate union on that day—*First*, because, in the absence of proof to the contrary, the presumption is that it was presented on the day it bears date; and, *second*, for the reason that on that day—April 10th—the medical examiner, Dr. Wage, who was also president of the local union, examined and certified the risk, and indorsed his allowance on the application. The provisions of the constitution, by-laws, and application make the subordinate union the accredited agent of the defendant to receive payments and to make the contract for insurance. The benefit certificate was delivered to the assured by the authorized officers of the defendant on or after May 12, 1880,—32 days or more from the date and presentation of the application. The certificate, then, was issued with full knowledge of the default. When an act of commission or omission is of such a character as to preclude the idea of ignorance, knowledge must be presumed. It is difficult to perceive how the defendant or its authorized agent could have supposed the amount paid, when neither had

received it, and their own books showed that it was not paid. Yet the certificate is issued, reciting, *inter alia,* that the assured "*is* a beneficiary member of Pioneer Union No. 46, E. A. U., *in good standing.*" Subsequently he was recognized as a member by two assessments being levied upon him.

These acts waived the default. Having formally and deliberately declared the assured to be a member in good standing, and having twice demanded his money as such member, it is too late after his death to assert the contrary. Carried to its logical conclusion, the doctrine contended for would enable the defendant to nullify a certificate after it had for years recognized the holder as a member, and assessed him as such. It is unreasonable to argue that the assured could be a member for the purpose of making contributions to others, but not a member when advantage to him or his beneficiary accrued —a member not to receive, but only to give. The evidence fails to show any act on the part of the defendant, its officers, or agents, indicating that during his life they regarded the assured other than as a member in good standing,—liable to the assessments, and therefore entitled to the benefits incident to membership. The defendant is concluded by its own acts.

2. An assessment occasioned by the death of one Spoor was levied on the fifteenth day of May, 1880. The amount was not paid by the assured. It is argued that the non-payment relieves the defendant from liability. Plaintiff contends, on the contrary, that there was no obligation to pay, and for the reason that Spoor died prior to the date of the benefit certificate. One of the defendant's rules provides that "no member shall be assessed for a death that occurred prior to the date of his benefit certificate."

Defendant seeks to evade the plain provision of this law by proof tending to show that the amount due to Spoor's beneficiary was paid out of a fund in the home treasury, and that the assessment subsequently made was not for the death of Spoor, but to replenish the treasury. In order to make the position tenable, the defendant is compelled to restate the rule as follows: "No member shall be assessed *to pay* a death," etc. But is this view the correct one, even conceding for a moment the rectitude of the foregoing interpretation? I cannot think so. If the defendant, by the adoption of such a plan, could legally assess the assured, similar tactics generally employed would reduce the rule quoted to a mere nullity. Except in rare and exceptional circumstances it would never be necessary to assess *to pay a death, eo nomine.*

When the assured joined the union it owed $3,000 to the beneficiary of Spoor. It was expressly stipulated that he (assured) should not be called upon to pay any part of that debt, except as he had already paid in advance to the general fund, and he had a right to rely upon the agreement being faithfully executed. It cannot be possible that, because for its own convenience the defendant advanced the money, the assessment immediately made was any the less for Spoor's death. As it was unlawful to compel assured to contribute, the law did not permit the defendant by indirection to accomplish that result. If a construction can be placed upon the words quoted which gives them force and effect, it should be adopted, rather than one which renders them utterly meaningless and inoperative.

But the defendant does not correctly construe the rule. The meaning of the language, "No member shall be assessed *for* a death," etc., seems very plain. No member shall be assessed *because of*, or *with respect to*, or *concerning*, or *by reason of* a death which occurred prior to the date of his benefit certificate. No matter what the machinery used may be, no money shall be taken from him, directly or indirectly, because of a death which occurred in the union before he became a member of it. The language of the defendant's admission with regard to Spoor, viz., "that the death which was the occasion of the death assessment * * levied May 15, 1880, occurred prior to the date of the benefit certificate," brings this case directly within the rule. No subtilty of reasoning can successfully answer the argument based upon the undisputed facts that the assessment was made because Spoor died, and that his death occurred prior to the date of the benefit certificate in this action.

These conclusions have been reached after a careful examination of the elaborate briefs presented, and it is believed that the result attained must eventually be recognized as correct, and acquiesced in by an organization concerning which its projectors have declared: "It has been the leading aim, as it will be the crowning ambition, of the authors of the Equitable Aid Union to build it upon such a foundation of equity, liberality, and economy that perpetuity must necessarily be inseparable from it."

The motion is denied.

GENTRY *v.* GRAND VIEW MINING & SMELTING CO.[*]

(*Circuit Court, E. D. Missouri.* October 30, 1882.)

1. CODE PLEADING—COUNTER-CLAIM—REV. ST. MO. § 3522.

Under the Missouri practice act, the defendant in an action for a tort cannot, as assignee, set up as a counter-claim an unliquidated demand against the plaintiff arising on contract, and unconnected with the cause of action set forth in the petition.

Demurrer to Amended Answer. For report of opinion in original answer see *ante*, 544.

This suit was brought to recover damages for the alleged unlawful taking, converting, and disposing, by the defendant, of certain ores, to the immediate possession of which the plaintiff was entitled. The defendant, in its amended answer, admitted that it was a corporation, denied the other allegations in plaintiff's petition, and alleged that the plaintiff was the superintendent in Colorado of the affairs of the Grand View Mining Company, a corporation organized under the laws of New York, from its organization until about the fifteenth day of July, 1880; that during the time he was such superintendent he received and had charge of moneys belonging to said company, which he promised to pay to it upon demand; that he misappropriated and converted to his own use before the first day of August, 1881, a large portion of such moneys, to-wit, $7,511.11, whereby he became indebted to the said company in that sum; and that on the twenty-ninth day of August, 1881, the Grand View Mining Company, for a valuable consideration, assigned and transferred to the defendant their cause of action and counter-claim heretofore described against the plaintiff, wherefore the defendant prayed judgment for the amount of the claim so assigned, with interest. The plaintiff demurs to the counter-claim set up in the amended answer, on the ground that "the said cause of action set up in said counter-claim does not arise out of the transaction set forth in plaintiff's petition as the foundation of plaintiff's claim, nor is it connected with the subject of the action, and plaintiff's action does not arise on contract."

The Revised Statutes of Missouri (section 3522) contain the following provisions, viz.:

"The counter-claim * * * must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: *First*,

*Reported by B. F. Rex, Esq., of the St. Louis bar.

a cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action; *second*, in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. The defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, in such a manner that they may be intelligibly distinguished, and refer to the cause of action which they are intended to answer."

Overall & Judson, for plaintiff.

Dyer, Lee & Ellis, for defendant.

TREAT, D. J. Only one question is presented, viz.: Whether, under the practice act of Missouri, a defendant can, as an assignee of a demand arising on contract unliquidated, counter-claim the same, and thus compel an investigation of demands not connected with plaintiff's cause of action. The Missouri statute is not broad enough to admit such a counter-claim; otherwise any defendant might by assignments, irrespective of the solvency of the parties, draw to the court not only the determination of the plaintiff's cause of action, but of an indefinite number of other causes of action, independent of plaintiff's demand, though assignments of such other demands.

The demurrer to amended counter-claim is sustained.

COE *v.* MORGAN and others.

(*Circuit Court, N. D. New York.* September, 1882.)

PRACTICE—EXTENSION OF TIME TO FILE BILL OF EXCEPTIONS.

Where an attorney, through unfamiliarity with the rules of practice, has failed to have a bill of exceptions served, settled, and signed within the prescribed time, or to obtain an extension of time at the trial term, the court may, before judgment is entered and while the case is still pending in the circuit court, in its *sound discretion, to prevent manifest hardship*, relax the rule and allow additional time in which to serve and settle the proposed bill of exceptions.

Beach & Brown, for plaintiff. *P. C. J. De Angelis*, of counsel.

E. Wood, for defendant. *W. F. Cogswell*, of counsel.

COXE, D. J. This is a motion by plaintiff for leave to serve a bill of exceptions. The action involves over $30,000, and indirectly over $60,000. The questions of law presented are both novel and important. That the case is one which should be examined by the su-

preme court is not disputed. The failure to serve the bill of exceptions in time arose wholly through inadvertence, and because of the unfamiliarity of the attorney for the plaintiff with the practice in the federal courts. As soon as he was informed of his error he served the proposed bill. This was about three weeks subsequent to adjournment of the court at which the action was tried. No bad faith is alleged, and no injury to the defendants by reason of the delay is suggested. But it is contended that because the plaintiff did not procure the bill of exceptions to be served, settled, and signed, or obtain an order extending time at the trial term, he is now out of court and remediless. The attorney was no doubt guilty of laches, but the punishment suggested is out of all proportion to the fault. No judgment has been entered; the parties are still in the circuit court. In the absence of a positive statute there can be no valid reason why the court, in the exercise of a sound discretion should not relax its rules sufficiently to provide for a case of such manifest hardship.

In the cases relied on by the defendants, (*Walton* v. *U. S.* 9 Wheat. 651; *Muller* v. *Ehlers*, 91 U. S. 249; and *Hunnicutt* v. *Peyton*, 102 U. S. 333,) the bill of exceptions was not filed or signed until after judgment, and, in the last two cases named, not until after writ of error. These cases are clearly distinguishable from the case at bar. It is conceded by the defendants that if the attorney had applied either to the court or to the opposing counsel the requisite time would assuredly have been given. Should the failure of the attorney to observe this conventional procedure, in a practice not altogether free from obscurity, be regarded as a fatal and incurable error, and be visited upon the client with the possible loss of $30,000?

It is thought that the court is not fettered by rules so unyielding; that this default is one which may in the discretion of the court be opened; and that plaintiff has shown a sufficient excuse to warrant the granting of the relief asked for.

An order may be entered allowing the plaintiff 10 days in which to serve his proposed bill of exceptions, and the defendants 30 days in which to serve amendments; all proceedings on the verdict to be stayed until the bill of exceptions is signed. In accordance with the suggestion of defendants' counsel, the order may also provide that all papers used on this motion be made part of the record, to be transmitted for review to the supreme court.

BILL OF EXCEPTIONS. The time for drawing up and presenting to the court a bill of exceptions depends on the rules and practices of the court and its judicial discretion, (*Yates* v. *Turner*, 16 How. 14; *U. S.* v. *Breitling*, 20 How.

252;) but it cannot be signed after the term, unless during the term an express order has been made allowing such a period to prepare it, (*Bradstreet* v. *Thomas*, 4 Pet. 102; *Greenway* v. *Gaither*, Taney, 227;) and if the court adjourns the term without an application for an extension of time, the order at a subsequent term permitting it to be filed as of the date of the trial is a nullity, (*Muller* v. *Ehler*, 91 U. S. 249; *Herbert* v. *Butler*, 14 Blatchf. 357.) The signing of the bill of exceptions is not regulated by practice of the state courts unless that practice is adopted by rule. *U. S.* v. *Breitling*, 20 How. 252; *Whalen* v. *Sheridan*, 5 FED. REP. 436. Notwithstanding the rule of court requiring a bill of exceptions to be drawn up within 10 days after the trial, a case may be excepted from the rule when it is just to do so. *Marye* v. *Strouse*, 5 FED. REP. 494. The power to reduce exceptions taken at a trial to form, and have them signed and filed, is confined under ordinary circumstances to the term at which judgment is rendered. *Whalen* v. *Sheridan*, 5 FED. REP. 436. Poverty or pecuniary embarassment is not a sufficient ground for a motion to file a bill of exceptions *nunc pro tunc;* it is not such "an extraordinary circumstance" as will defeat the rule of diligence in civil procedure in federal courts. *Whalen* v. *Sheridan*, 10 FED. REP. 661.—[ED.

STANSELL, Surviving Partner, etc., *v.* LEVEE BOARD OF MISS., DIST. No. 1.

(*District Court, N. D. Mississippi.* June Term, 1881.)

1. POWER OF UNITED STATES COURT—STATE COURT.

   Where a remedy could be enforced by a state court, this court has power to adopt the same remedy in favor of a non-resident creditor who has obtained a decree against a resident defendant.

2. PRACTICE—PREVIOUS ORDER AFFIRMED.

   Upon an examination of this case it was *held* that the order of court previously granted should be affirmed, except in regard to taxes for 1880, which were inadvertently included therein.

HILL, D. J. The questions now for decision arise upon the application of certain tax-payers of said levee district to set aside the order heretofore made providing for the collection of the back and uncollected taxes, to satisfy the decree heretofore obtained by complainant against said levee commissioners, for the building of the levees to prevent the overflow within said district. The questions presented are of unusual importance to both the complainant and tax-payers, and present unusual difficulties to my mind in arriving at a satisfactory conclusion as to the proper disposition of them; involving, as they do, the powers of this court to enforce its own decrees, and the power of the legislature of the state to defeat such enforce-

ment. These questions have been most ably and exhaustively presented and argued by the distinguished counsel on both sides, and have received all the thought and consideration of which I have been capable, with the sole purpose of securing to the complainant his just and legal rights, and at the same time avoiding any interference with the just rights of the tax-payers, or the exercise of any powers not properly belonging to this court. A brief statement of facts is necessary to a proper understanding of the questions presented.

The results of the war, among other things, broke down and destroyed the levees erected and maintained upon the Mississippi river front, which had, before that time, protected the territory embraced within levee district No. 1 from overflow. In consequence of the overflows from the river, these lands were rapidly losing their value; to remedy which the owners of the lands within the district applied to the legislature of 1871 for an act creating and incorporating a board of levee commissioners, with power to rebuild and maintain the necessary levees for their protection. The act was passed creating the board with all necessary powers. To meet the costs and expenses of the enterprise, the following provision was made:

"And the lands embraced and included in said levee district shall be, and are hereby declared to be, and are, made chargeable and liable, as hereinafter declared, for all costs, outlays, charges, and expenses to be made or incurred for the levees, works, and improvements provided for and contemplated by this act, or in maintaining the same. That for the purpose of building, repairing, constructing, and maintaining the levees and works aforesaid, and for carrying into effect the objects and purposes of this act, a uniform charge and assessment of 2 per cent. per annum on the value of every acre of unimproved and improved lands and cultivated lands in said levee district is hereby fixed, levied, and made, which shall continue and be collected in each and every year for the period of 12 successive years from the date of this act, and shall be due and payable annually, on or before the first day of September in each and every year, for said period; and the valuation of every acre of unimproved lands so taxed is hereby fixed, for the purposes of this act, at $5, except Sunflower and Tallahatchie counties, which shall be $3; and every acre of improved and cultivated land at $30, except Sunflower and Tallahatchie counties, which shall be $20; and every acre which shall be improved and fenced, but not cultivated, at $15, except Sunflower and Tallahatchie counties, which shall be $10 per acre: provided, that as soon as such unimproved lands shall have been improved, and said uncultivated lands shall have been put in cultivation in any year, the same shall be valued, for the purposes of this act, at $30 per acre; the intention of this act, in its exercise of the taxing power, being that every acre of land cultivated in any year during the period of taxation shall be valued at the maximum assessment, and made

liable to taxation accordingly; and, in all assessments made, the lands described as cultivated shall be held as such, when a crop shall have been pitched thereon, or the same shall have been used in anywise for production, or for any other use, in the year for which the assessment shall have been made."

The foregoing provisions are contained in the eighth section of the act.

Section 10, among other things, provides "that said charges and assessments, by this act fixed and made as aforesaid on said lands, shall not be subject to repeal, alteration, or suspension during the time for which they are fixed, levied, and made, as aforesaid, until all the bonds, obligations, and liabilities of said board shall have been first paid and discharged."

To raise the necessary means for the purposes of the enterprise, the ninth section authorized the board to issue bonds, with interest coupons attached, to be sold or otherwise disposed of for the purposes of the act; the interest coupons and bonds, when due, to be receivable in payment of the taxes imposed. The act provides for the appointment of a tax collector, and defines his duties, and also the duties of other officers. The most important provisions, so far as they relate to the questions involved in this controversy, are found in section 10, and immediately follow the quotation above made from that section, and read as follows:

"And should any of said charges and assessments not be collected as herein provided, then the holder of any bond or obligation of said board, which may be due and unpaid, may apply to the judge of the circuit court or chancery court of any district included in the levee district for a *mandamus*, directed to said board, by which said board shall be ordered and compelled to proceed to have collected and paid over said charges and assessments as herein provided; or, instead of said *mandamus*, the said judges may, in their discretion, appoint one or more special commissioners, with authority to collect and pay over said charges and assessments, and for the collection of such charges and assessments the said commissioners so appointed shall have all the powers given by this act, and shall proceed in the same manner as by this act prescribed to the collectors of said board for the enforcement and collection of the same. And such commissioners, before they act, shall give bonds in proper penalties, with good and sufficient sureties, to be approved by said judge," etc.

The eleventh and twelfth sections of the act prescribe the manner in which the tax collector shall collect the taxes, and the mode of sales of the lands in case of non-payment, which shall be for cash. As a mode of classifying the lands as cultivated, fit for cultivation, and not cultivated, and as wild lands, the twenty-eighth section provides—

"That every tax-payer of each county, within the levee district herein defined, shall be and is hereby required to file with the levee tax collector of said county a statement under oath setting forth the number of acres of land which he owns or represents, and for which he is chargeable under this act; the number of acres cleared and uncleared, the number under fence, and the number under cultivation; that this statement shall be filed, as provided, on or before the first day of September in each year, beginning on the first day of August, 1871; that in case of failure so to file it, the party failing shall be held taxable to the extent of 25 per cent., in addition to the amount of taxes which he would have been otherwise liable for under this act; and that any error remaining in the assessment of the lands of the parties so failing in consequence of his failure or otherwise, shall not be held to affect in anywise their lands when conveyed under this act, by sale for non-payment of taxes."

The twenty-ninth section provides that the tax so imposed shall be held a tax *in rem,* and that upon failure to pay the same the lands shall be sold, and the sale shall vest a good title in the purchaser, subject to redemption, without further assessment. These are all the provisions that need be quoted from this act to an understanding of the questions presented.

By an act of the legislature, approved April, 1876, the treasurer and auditor of the state were substituted for the former levee board, and the sheriff of each county for the levee tax collector; and it was further provided that the assessment of the lands for the year 1875 should remain until otherwise ordered by law, etc. The concluding section of this act provides for the repeal of so much of the former act as conflicts with its provisions.

Complainant, with one Partee, now deceased, as copartners, contracted to rebuild certain portions of these levees at certain specified rates, and agreed to receive in payment the bonds of the levee board. They proceeded to rebuild the levees, and to receive the bonds in payment, but upon final settlement a disagreement arose as to the sum due, and the board refused to deliver any more bonds. The result was a suit on the equity side of this court, and a decree in favor of complainant, as surviving partner, against the present levee commissioners, for the sum of $71,623.67, rendered on the nineteenth day of June, 1879. Upon this decree an execution was issued and returned by the marshal *nulla bona.* Whereupon complainant applied for and obtained an order providing for the collection of the alleged unpaid taxes imposed by the act of 1871, and of this order complaint is now made.

From the foregoing statements it is apparent that the levee scheme so provided was at the instance and for the benefit of the tax-payers,

in order to protect and enhance the value of their lands embraced within the levee district. The board and the commissioners were only their agents to make and carry out their contracts. The scheme received the proper legislative sanction, and the whole proceeding was valid under the rulings of the highest judicial tribunal of the state. See *Williams* v. *Cammack*, 27 Miss. 209, and *Alcorn* v. *Hamer*, 38 Miss. 752. It is true that many of the lands may have changed owners since this scheme was entered into, and since the levees were rebuilt, but they were taken *cum onere*, and, whether held by the original owners or subsequent purchasers, they are alike enjoying the protection and enhanced value resulting from the labor and outlay of Partee and Stansell, and for which every principle of justice and equity demands that they shall be compensated, if it can be done under the legitimate powers of this court. The contract of Partee and Stansell was entered into with the board, the agents of the tax-payers, with the charge upon the lands valued and classified as stated, and the mode for ascertaining the quantity embraced within the different classes, in each and every year during the period stated, fixed and specified. At the time the act was passed, and the contract entered into, it was doubtless expected that the area to be put in cultivation would, as a consequence of improvement, be greatly enlarged from year to year, and thus increase the amount of taxes to be collected, and the means of payment of the bonds to be issued, and which it was contracted would be received in payment for the work, but which the board, the agent of the tax-payers, refused to deliver after the work was done, and thereby compelled complainant to take a money decree for their estimated value, which it is now insisted, although greatly reduced in amount, is subordinate to and payable in the bonds and coupons. The tax-payers, the contractors, are certainly estopped from setting up this distinction between the bonds and complainant's decree, so that this question will not be further considered. The act of 1871, which must be held in all its substantial bearings to be the basis of and constitute a part of the contract between Partee and Stansell and the board, provided that if the taxes and charges were not paid as provided by the act, then the holder of any bond or obligation of said board, which might be due and unpaid, might apply to a judge or chancellor for the summary proceedings provided for their collection and payment. The fair construction of this provision is that the sum collected should be paid to such claimant, and this provision became as much a part of the contract as any other; and all the provisions of the act, so far as the rights of the

creditors were concerned, were by the act itself declared to be irrepealable, and had it not contained that declaration the constitution of the United States and of this state would have made that impress upon it.

This brings us to consider the effect of the act of 1876, upon which petitioners mainly rely in support of their motion to set aside the order complained of. This act substitutes the present levee commissioners for the former board, and the sheriffs of the different counties for the former collectors. To this there is no objection, as neither change interferes with the substantial rights of the complainant, or any other creditor. But so far as it attempts to exonerate the taxpayers from giving in from year to year the quantity of improved and cultivated land, and consequently from the payment of the increased taxes upon it, and also from the summary remedy for the payment of the back and unpaid taxes, if such was the intention, it must be held as violating and impairing the contract, and, under the constitution, null and void. But a fair construction of the act does not justify the conclusion that it was so intended. It does not do so in terms, and we are not to presume that the legislature intended to pass an act violative of the constitution. The above conclusions are sustained by the case of *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, and authorities referred to in that case, and by other decisions made by the same court since that time, and especially the recent case of *Meriwether* v. *Garrett*, 102 U. S. 472. This brings us to consider the question of power in this court to enforce this summary remedy.

The order of the court does not undertake to levy the tax, or to change it. The levy was made by the legislature in the act of incorporation, and it was further provided that it should not be repealed until all the charges and obligations were paid and discharged. The same legislative act gave any holder of a past-due obligation upon the fund made a charge upon the lands embraced within the levy district, this summary remedy for its collection. That this remedy could be enforced by the judges and officers of the state mentioned is not denied. Such being the case, this court has the power to adopt the same remedies in favor of a non-resident creditor who has obtained a decree against a resident defendant. This position is sustained by the following cases: *Ex parte Biddle*, 2 Mason, 472; 2 McLean, 556; 6 McLean, 395; 13 Pet. 195; 2 Dill. 598; 92 U. S. 20; and especially *Sup'rs* v. *Rogers*, 7 Wall. 175, and the case of *Meriwether* v. *Garrett*, above referred to. The order follows the directions of the act of the legislature, except that it is made by this court, or

the judge in vacation, (the objection on account of its not being made in term time is not insisted on;) and that in the case of the collector in Tunica county, upon the refusal of the sheriff to collect the tax, the marshal was appointed in his stead. This was authorized by the rule announced by the supreme court in the case of *Sup'rs* v. *Rogers*, above referred to, and is not in conflict with the ruling in the case of *Meriwether* v. *Garrett* so much relied upon by counsel for the tax-payers. This brings us to consider the objection to that portion of the order which requires a portion of these delinquent taxes to be paid in cash, and is the one to which objection is mainly urged. Neither this nor any court has power to require the regular payment of taxes as required by the law, within the time limited, in any other than past-due bonds and coupons. Indeed, the act of 1876, in requiring such tax payments to be made to the extent of 2 per cent. in cash, was in conflict with the constitution, and not binding upon the tax-payer who paid his taxes within the time prescribed by law. The taxes required to be collected by the order do not belong to this class, but belong to the class forfeited to the creditor who may see proper to pursue them, in consequence of the failure of the owner of the land to return them and pay the taxes within the prescribed period, and who by his neglect has forfeited his right to pay in bonds and coupons. The order permitting 35 per cent. to be paid in bonds and coupons is a concession to the tax-payer.

When sales are made, the act requires that payment shall be made in cash. This is the result of a failure to pay within the prescribed time. There is no difference in the owner's permitting his land to be sold for cash, and paying himself in cash, after he has neglected to return his lists, and pay within the required time. It is said in argument that the owner may redeem, or rather repurchase, and pay in bonds and coupons, and therefore the back taxes may be paid in the same way. This is an argument the other way, as it required special provision for such payment. But the parties stand on a different footing in the case of redemption. The board of commissioners are but redeeming their own promise. In the case of the creditor, and especially the complainant, who has been compelled to take the reduced value of that which had been promised, it is claiming only that which has long been due him. The tax-payer who, either by negligence or fraud, has so long delayed discharging the charge upon his land, has no just ground of complaint because he is required to pay in cash the sum demanded. It is insisted that it is inequitable to require payment in cash, as the tax-payers relied upon the act of 1876, but at the

same time it is said that there is less land now in cultivation than then. If so, the order relieves rather than oppresses the tax-payer.

It is also claimed that the assessment and payment of taxes made, though erroneous, is conclusive; that the action of the officers in such assessment and collection exhausted all the powers on the subject. This point is particularly pressed by the able and distinguished jurist and lawyer who made the closing argument for the tax-payers,—a gentleman for whose opinions I entertain the highest regard on all questions, but especially upon questions of law, to which profession he has devoted more than half a century. There is, however, one provision of the act of 1871 which has escaped the learned jurist's attention, and that is, that for a failure to make the required return the delinquent shall be charged a penalty of 25 per cent. on the amount of his taxes. If it be true, as contended, that the return made is conclusive, and that the tax collector had no power to add to the assessment roll that which had been omitted, there was no power to add this penalty. The act certainly intended that the collector should ascertain the whole quantity omitted, according to the classification, and then add the penalty; and I am satisfied that this was the case, whether the whole or only a part was omitted according to the classification.

The returns made by the tax-payers are to be considered *prima facie* correct. It is to be only so considered, and on behalf of a creditor, for either fraud or mistake, is subject to correction, whether the mistake be in favor of or against the tax-payer. It would be unjust to make the correction against the tax-payer, and in case of mistake not allow him the benefit of the correction. The correction, under the order complained of, is first submitted to the tax-payer himself. I take it that there have been but few cases in which his return has been disputed, and, when such has been the case, the order provides a cheap and easy mode for settling the dispute, so that there is no just ground for complaint on this subject. Lastly, the statutes of limitation of three and six years are invoked on behalf of the tax-payers. To this the answer is that the acts of the legislature provide no limitation, and the court cannot supply one. It is not seriously contended that the limitation of three years could be made to apply. If by analogy the limitation of six years could be invoked, it would stop at the filing of the petition, and would include all unpaid taxes since the seventh day of February, 1874. The order does not embrace any taxes due after the first day of January, 1880.

After a careful consideration of the questions involved, aided by the authorities referred to, and the able arguments of counsel on both sides, I am brought to the conclusion that the order made on the seventh day of February, 1880, was authorized by law, and the practice prevailing in such cases in the state and federal courts, and is not violative of the just rights of the tax-payers. Therefore, the petitions and motions made on behalf of these tax-payers will be dismissed, and the costs of this proceeding paid, as the other costs of the cause, out of the taxes collected.

DECREE.

The petition of D. M. Russell, W. H. Stovall, and H. P. Reid, for themselves, as tax-payers of the county of Coahoma and state of Mississippi, and on behalf of all other tax-payers of said county; and the petition of Archibald Wright, Thomas W. Allen, and W. C. Folkes, and other tax-payers of the county of Tunica, in the said state; and the petition of A. M. Clayton, a tax-payer of Tunica county, aforesaid, praying to be relieved against an order made in the above-entitled cause by the judge of this court at chambers, on the seventh day of February, A. D. 1880, coming on to be heard, and the same having been fully argued by counsel, and maturely considered by the court, and it now, at this time, in open court, appearing to the satisfaction of the court that the petitioners are not entitled to be relieved touching any of the matters in the said petitions contained, except in regard to the taxes of the year 1880, accruing after the first day of January, 1880, which were inadvertently embraced in the said order: It is therefore ordered, adjudged, and decreed that the prayers of the said several petitions, except as to the said taxes of the year 1880, be denied, and that the said petitions be dismissed; and that the said order, made February 7, 1880, be amended by striking out the words "including the tax of the current year" wherever the same occur.

And it is further ordered, adjudged, and decreed that the costs of the said petitions be paid out of the taxes collected under and by virtue of the said order.

And inasmuch as it has been questioned whether the said order made on the seventh day of February, 1880, and another order made in the said cause, at chambers, on the fourth day of November, 1880, in relation to the collection of the taxes in the county of Tunica, ought not regularly to have been made in open court in term time,

and not at chambers, therefore, in order to obviate any question of that kind,—

It is further ordered, adjudged, and decreed that the said two orders so made at chambers be approved, adopted, ratified, and confirmed, except as aforesaid, as the acts of the court, in the same manner as if the same had been originally made and passed in open court on the days of their respective dates; and all acts done in pursuance of said orders shall have the same effect as if done in pursuance of orders regularly made in open court and recorded in the minutes.

And it appearing to the court, on the construction of the acts of 1871 and 1876, that the sales of land for the said levee taxes are required to be made at the same time as sales of land for state and county taxes—

It is further decreed that sales of land under the said orders shall be made at the times and places appointed by law for sales of land for payment of the state and county taxes.

And it is further ordered that the 7 per cent. on taxes collected, allowed by said order to the assessor and collector, shall, so far as the county of Tunica is concerned, be divided between the sheriff of said county, who made the assessment of said county under said order, and the marshal, in the following proportions, to-wit, 2 per cent. to the assessor and 5 per cent. to the said marshal.

It is further orderrd and decreed that the restraining orders heretofore granted, to stay proceedings under the said orders, be and the same are hereby dissolved and discharged.

Ordered this, the eleventh, day of June, 1881.

R. A. HILL, Judge.

NOTE.

LOCAL TAXATION—LEVEE DISTRICTS. Municipal corporations, counties, or other artificial districts or subdivisions, have no inherent power of taxation. The right to tax is by delegation from the state, (*Daily* v. *Swope*, 47 Miss. 367,) so far as necessary for good government, (*Smith* v. *Corp. of Aberdeen*, 25 Miss. 458.) The legislature has power to impose a tax on a local district for the construction of local improvements, (*Williams* v. *Cammack*, 27 Miss. 210; *Alcorn* v. *Homer*, 38 Miss. 652; *Daily* v. *Swope*, 47 Miss. 367;) and the protection of lands subject to overflow is a proper object for the exercise of the power of local improvement and taxation, (*Daily* v. *Swope*, 47 Miss. 367.) The legislature may prescribe the result of a popular vote of the district as the contingency upon which a law shall go into operation or not. *Alcorn* v. *Hamer*, 38 Miss. 652. The power to sell the land upon failure to pay the tax assessed is but a means to an end legitimate and proper, and in itself a mere incident to

the power of taxation. *Williams* v. *Cammack*, 27 Miss. 209. Levees are not public improvements, but improvements for special local purposes, made by assessment on the property improved, (*McGehee* v. *Mathis*, 21 Ark. 40;) and such assessment for levee purposes is not a tax within the meaning of the constitution, (*Yeatman* v. *Crandall*, 11 La. Ann. 220; *Wallace* v. *Shelton*, 14 La. Ann. 498; *Richardson* v. *Morgan*, 16 La. Ann. 429.) That a charge imposed on all the property of a district, to be used in the construction of levees to protect the district from overflow, is a tax and not an assessment, see *People* v. *Whyler*, 41 Cal. 351. Lands not benefited are not within the provisions of the act, (*Shelby* v. *Levee Com'rs*, 14 La. Ann. 434, reaffirmed; *Bishop* v. *Marks*. 15 La. Ann. 147.) The act forming a levee district to be composed of several parishes is constitutional. *Yeatman* v. *Crandall*, 11 La. Ann. 220. The existence of a reclamation district as a public corporation may be established by implication arising from acts of the legislature. *People* v. *Recl. Dist.* 53 Cal. 346. See *People* v. *Williams*, 56 Cal. 647; *Recl. Dist. No.* 104 v. *Coghill*, 56 Cal. 607. An act authorizing an assessment of an annual tax on alluvial lands, specifically on each and every acre, for building and repairing levees, is not in violation of the constitution, (*Yeatman*, v. *Crandall*, 11 La. Ann. 220, reaffirmed; *Wallace* v. *Shelton*, 14 La. Ann. 498.) The commissioners cannot levy an assessment which does not cover all the land in the reclamation district. *Levee Dist.* 1 v. *Huber*, 57 Cal. 41. It is no valid objection that a part of the taxes to be derived from a portion of the district is directed to be applied to the payment of debts previously contracted by the authorities of that portion of the district. *Alcorn* v. *Homer*, 38 Miss. 652. Although the parish of Concordia may make enactments as to levees and their expenses, its police jury cannot create any valid debt for such purpose unless in the ordinance creating the debt means for its payment are provided. *Young* v. *Concordia Police Jury*, 32 La. Ann. 392. In an action to enforce the assessment, in which it appeared that plaintiff was not originally found according to law, the assessment was unauthorized and void. *Recl. Dist. No.* 3 v. *Kennedy*, 58 Cal. 124. The claim of the levee company for work, etc., is a debt, not against the state, but against the levee construction fund, composed of taxes assessed for levee purposes. *La. Levee Co.* v. *State*, 31 La. Ann. 250.

Equality and Uniformity. The taxing power should be so exercised as to produce as near as possible equality and uniformity in the burdens imposed on the members of the community, (*Smith* v. *Corp. of Aberdeen*, 25 Miss. 458;) but the constitution does not take away the power to make local assessments for local improvements, upon the equitable principle that he who reaps the benefit must bear the burden, (*Yeatman* v. *Crandall*, 11 La. Ann. 220;) nor does it prohibit the legislature from levying a specific tax, nor does it declare that *all* taxes shall be equal and uniform, (*Smith* v. *Corp. of Aberdeen*, 25 Miss. 458.) The uniformity and equality clause in the state constitution applies to general taxes for general, state, county, city, and town purposes, and not to local assessments, where the money raised is expended on the property taxed. *Egyptian Levee Co.* v. *Hardin*, 27 Mo. 495; *Washington* v. *State*, 13 Ark. 752; *McGehee* v. *Mathis*, 21 Ark. 40. It is not necessary that the voters who elected the levee

commissioners should be equally taxed. Equality and uniformity in an inferior jurisdiction is not essential. *Selby* v. *Levee Com'rs,* 14 La. Ann. 434, reaffirmed; *Bishop* v. *Marks,* 15 La. Ann. 147. It is no objection to the constitutionality of an act that it operates injuriously against a party, as it must be submitted to as an individual sacrifice to the general good. *Williams* v. *Cammack,* 27 Miss. 224; *People* v. *Whyler,* 41 Cal. 351. A tax imposed by a corporation is uniform and equal where all persons within its limits share equal benefits ,while imposed uniformly on all property of the description assessed, (*Smith* v. *Corp. of Aberdeen,* 25 Miss. 458;) but the exemption of any private property from its operation is unconstitutional, (*People* v. *Whyler,* 41 Cal. 351.) An act assessing all lands at a uniform rate per acre is not unconstitutional as not being uniform or equal, (*McGehee* v. *Mathis,* 21 Ark. 40;) but taxes levied to pay for local improvements, assessed on parcels of property in the district in proportion to the benefits each parcel receives is unconstitutional; they must be levied on all property in proportion to its value, (*People* v. *Whyler,* 41 Cal. 351.) In point of principle and constitutional power there is no difference between taxes imposed for a general purpose and those imposed for a public local purpose. *Williams* v. *Cammack,* 27 Miss. 210.—[ED.

MASSACHUSETTS MUT. LIFE INS. CO. *v.* CHICAGO & A. R. CO. and others.

(*Circuit Court, N. D. Illinois.* August 15, 1882.)

1. PRACTICE—NECESSARY PARTY—TRUSTEE—ACT MARCH 3, 1875, § 8.

   The successor in a deed of trust is a proper party defendant in a suit to adjudge the lien created by such deed a subsisting lien, and, if a resident of another district than that where the suit is pending, may be brought before the court under section 8 of act of congress of March 3, 1875.

2. SAME—PENDENCY OF PRIOR SUIT—WHEN A BAR—INJUNCTION.

   The pendency of a prior suit will not be a bar to a subsequent suit if the latter embraces more as to parties and subject-matter than such prior suit.

3. SAME—RECEIVER APPOINTED BY ANOTHER COURT NOT MADE PARTY.

   If a receiver appointed by one court is in possession of property he is not amenable to suit in another court in respect thereto, and if the property has passed beyond his control he would not in any event be a necessary party in a proceeding to adjudge a lien on such property still subsisting, notwithstanding the proceedings in the court wherein he was appointed receiver.

HARLAN, Justice. This cause has been argued and submitted upon certain demurrers, pleas, and exceptions to the master's report, and also upon a motion of the defendant John B. Dumont to set aside and discharge all proceedings herein against him.

The court does not find among the papers the answers of the Chicago & Alton Railroad Company and other defendants; but it will be

assumed, for the purposes of the present hearing, that those defendants have put in issue every material allegation of the original and cross-bills. In this view it is apparent that the court is asked to determine, as between the complainant and cross-complainant on one side, and certain defendants on the other side, questions of great moment and difficulty in which some of the defendants who have answered are deeply interested, and which, upon final hearing, must be again considered. It would, therefore, seem proper upon the present hearing that such questions only be disposed of as the parties are entitled to have determined in order that they may proceed intelligently with the further preparation of the case.

1. As to the exceptions by complainant to the master's report sustaining the exceptions of Dearborn and the Chicago Railway Construction Company, filed November 1, 1880, to the original bill.

The exceptions by those defendants to the original bill are 33 in number and are identical. They proceed upon the general ground that the portions of the bill specified are impertinent and ought to be expunged. The master sustained exceptions to 4, 10, 23, 25, and 27.

It would be hazardous for the court to say that the facts set out in the extract from the bill, embodied in exceptions 4, 10, 23, and 25, cannot under any circumstances become material upon the final hearing. There are some aspects of the case, as made by the bill, in which those facts may be of some consequence. The case is of such peculiar and complicated character that the court should not be very rigid in the application or enforcement of the rule that pleadings should aver the substantial facts constituting the cause of action rather than the evidence of those facts. And it may be also remarked that the matters set forth in the original bill, to which the exceptions relate, do not concern Dearborn and the construction company as much as some of the defendants who have answered, and who have made no exceptions to the bill upon the ground of impertinence. Besides, it is difficult to perceive how exceptions 4, 10, 23, and 25 could have been sustained by the master, while others of the like general character were overruled. Under the circumstances, the court has concluded to sustain the objections of complainant to the master's report upon exceptions 4, 10, 23, and 25, but without prejudice to the right of any of the defendants, upon final hearing, to renew the exceptions, or to object to the relevancy of any evidence taken in support of the allegations in the above-mentioned bill.

As to exception 27 the master's report is sustained. The portion of the bill to which it relates is mere argument, or rather an expression of approval of certain views alleged to have been advanced upon a particular occasion by Mr. Blackstone, of the Chicago & Alton Railroad Company.

2. As to the motion of the defendant Dumont for a discharge of all the proceedings againt him.

On the first of April, 1880, the court, upon the complainant's motion, made an order requiring Dumont to appear and answer, plead, or demur within 20 days after the service upon him of a copy of that order. Dumont subsequently appeared only for the purpose of moving, as he did, that the proceedings against him be discharged.

The order complained of proceeds upon the ground that it was authorized by section 8 of the act of March 3, 1875, determining the jurisdiction of the courts of the United States. That section authorizes such an order against a defendant who is not an inhabitant of or found in the district, or who does not voluntarily appear, if the suit be one "to enforce any legal or equitable lien upon, or claim to, or to remove an incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought."

The present suit is certainly embraced by the language just quoted, but the contention of Dumont is that he has no interest in the property to which the suit relates, and therefore, he being a resident of another state and never having appeared in the suit, nor having been found in the district, he cannot be proceeded against in the mode contemplated by the act of March 3, 1875. This contention, however, cannot be sustained. Dumont holds, or rather held, such relations to the property in question that it was proper, if not necessary, to make him a party defendant. He was the successor of Straut as trustee in a deed conveying the railroad and its appurtenances in trust to secure the payment of the bonds therein described, of which those held by complainant constitute a part. The main object of the suit is to have the court adjudge that, notwithstanding certain proceedings in the state court, the lien created by that deed in behalf of the bonds still subsists and can be enforced. Manifestly, therefore, it was proper that the trustee in the deed should be made defendant to a suit instituted for that purpose. The motion of Dumont is denied.

3. As to the demurrer by the defendant John F. Slater.

The bill and the exhibits filed therewith show that Slater was a party to the proceedings in the state court, as the holder of the bonds

numbered from 1 to 474, previously in the hands of Jessup, Paton & Co. It is shown by or may be inferred from the record that Mr. Slater, in completing his purchase of the railroad and appurtenances at the decretal sale, in the state court, had the use of the bonds 1 to 400, inclusive. But since it does not appear that he purchased them from Straut, and since Slater claimed to be and was treated by the state court as their owner, it was proper for the complainant to make him a defendant. But if Slater, by answer or in some other proper mode, should disclaim all interest in the bonds or in the property involved in that suit,(other than as a stockholder, if he be such, in the Chicago & Alton Railroad Company,) the court will entertain a motion that he be dismissed from the cause as a party defendant.

4. The pleas of John J. Mitchell and the Chicago & Illinois River Railroad Company to a part of the original bill.

These pleas relate to the pendency in this court of a prior suit instituted by Bond, as trustee for the present complainant, against these two defendants and others. I am of opinion that the facts averred in those pleas are insufficient to bar this suit. It may be, as it is averred to be, that the Bond suit is for the same matters and for the like relief and purposes against Mitchell and the Chicago & Illinois River Railroad Company as the present suit. But it is not inconsistent with the pleas that the complainant in this suit seeks as against other defendants (some of whom are also defendants in the Bond suit, and some of whom are not parties thereto) relief not asked in or embraced by the Bond suit. If the relief asked in this suit is materially different from, or more comprehensive and extended than, that asked by the Bond suit,—that is to say, if the present suit embraces more as to parties and subject-matter than the Bond suit,—although the relief asked as to Mitchell and the Chicago & Illinois River Railroad may be identical in the two suits, the court does not perceive how the pendency of the first can be a bar to the prosecution of the last suit. So far as the present suit in respect to these two defendants is identical with the former suit, it may be (assuming that the Bond suit is really in the interest or can be controlled by the present complainant) that pending this, the further prosecution of that suit should be prevented by an order of the court. This because it is quite certain, upon the facts alleged in the pleas, that the final decree in this cause will be a conclusive adjudication of the matters involved in the Bond suit. These pleas are, for the reasons given, held to be insufficient to bar this suit.

5. As to the demurrer of the Chicago & Illinois River Railroad Company to the residue of the original bill.

This demurrer raises the objection that Akin, who was appointed by the state court, receiver of the property and assets of the Chicago & Illinois River Railroad Company, is not made a party to the suit. If Akin has in his possession, as such receiver, any of the property and assets of that company, he is not amenable to suit in respect thereof in any other court than that of which he is an officer. He cannot be required to hold such assets subject to the order of this court. This court will not lay hold of or seek to control the management of any property held by Akin as receiver in any other court. But as to the railroad and its appurtenances, upon which complainant claims there still rests the lien created by the trust deed to Straut, they are not in the possession of Akin, nor are they subject to the control of the court under whose orders he acted. His functions as to that property have long since ceased, for it has been sold under the decree of the state court; the sale has been confirmed; a deed to the purchaser has been made and approved; and the Chicago & Alton Railroad Company is in possession under a deed from the purchaser. The fundamental issue made by the present complainant as to the property is that, despite all that took place in the state court, and because, as is claimed, the proceedings of the state court were collusive, fraudulent, and void, the railroad company holds subject to the lien created by the trust deed. And to that issue Akin is not a necessary party, unless it be assumed (which counsel will not insist ought to be assumed) that upon an adjudication that the complainant is entitled to the relief it asks, the property in question will be turned over to the custody of the state court receiver. Nor is Akin a necessary party, so far as this suit relates to the stock standing in the name of Mitchell and others, but really owned, the bill avers, by the Chicago & Alton Railroad Company. That stock was never in the hands of or under the control of Akin, and, so far as is now disclosed, he never asserted any right to its possession. The objection that Aikin was not made a party is not well taken.

6. As to Mitchell's demurrer to the residue of the original bill.

Upon this branch of the case counsel have expended great labor. This demurrer proceeds upon two grounds: *First.* That the complainant could not sue in equity until it had first obtained judgment for the amount of its demand, and exhausted all of its legal remedies. It is sufficient to say that the complainant asserts in this suit a lien upon all the property conveyed by the deed of trust, and now in pos-

session of the Chicago & Alton Railroad Company and other defendants; also that the stock received by that company, and standing in the name of other defendants, created a trust fund for the benefit of the creditors of the Chicago & Illinois River Railroad Company. Upon these grounds the complainant has the right to go into equity without going through the ceremony which would, in this case, have been idle and fruitless, of first obtaining a judgment for the amount of the bonds by it held, and then suing out executions. This view is sustained by *Case* v. *Beauregard*, 101 U. S. 690. *Second.* The remaining ground of Mitchell's demurrer is that he is not liable as a stockholder of the Chicago & Illinois River Railroad Company. While upon the allegations of the bill it would seem to be very difficult, to say the least, to make a case of individual liability upon the part of Mitchell for the par value of the stock standing in his name,—the bill alleging that he does not own it, but holds it simply as agent for the Chicago Alton Railroad Company, of which he is a director,—still, as he holds the legal title to the stock, it was proper, upon the theory of complainant's suit, to make him a party defendant. Whether the Chicago & Alton Railroad Company is liable to account for the par value of the stock to the extent necessary to satisfy the debts of the Chicago & Illinois River Railroad Company, or to any other extent, is a question which ought not to be determined until the cause is fully heard between that company and the complainant. Mitchell, according to the present impression of the court, has no such interest in that question as would justify its conclusive determination at this time.

7. The defendants Beckwith, Straut, Foster, Colebrook, Dearborn, Mitchell, and Slater demur to the cross-bill upon two grounds:

First. That it does not seek any relief against the said defendants or any of them consequent upon any adjudication of any matter or thing in issue between the parties or any of them in the original bill in which the cross-bill is filed; nor does the cross-bill seek any relief against those defendants or any of them consequent upon such decree against the Chicago Railway Construction Company, or against Bulkley, its receiver, who is cross-complainant herein.

Second. That the cross-bill presents no case in equity for relief against the defendant.

This demurrer is overruled. In view of Beckwith's alleged connection with the stock and bonds of the Chicago & Illinois River Railroad Company; Blackstone's relations to the legal title to certain portions of the right of way of the Chicago & Illinois River Railway Company; Straut's connection with the mortgage and the purchase of the railroad and appurtenances at the decretal sale in the state court, and

his possession of the legal title of the 1,400 acres of land; and Foster's, Dearborn's, and Colebrook's apparent ownership of the stock of the Chicago & Illinois River Railroad Company, which the cross-complainant seeks to reach,—it would seem proper that they should be made defendants.

What has been said about Slater as defendant in the original bill is applicable in the cross-bill.

The demurrer to the cross-bill of the before-mentioned defendants is overruled.

In a manuscript brief, filed by one of the counsel for defendants, the point is made that it is not competent for the complainant in this collateral proceeding to assail the validity of the decree and proceedings in the state court. This is one of the questions which must be determined upon the final hearing between the principal parties. It does not fairly arise upon the present hearing. At any rate, it need not now be disposed of, and is reserved for the final hearing.

Counsel will prepare the orders required by the foregoing memorandum.

In re LITCHFIELD.

(*District Court, E. D. Michigan.* October 16, 1882.)

1. BANKRUPTCY—POSSESSION OF ESTATE BY ASSIGNEE—RIGHTS OF ADVERSE CLAIMANTS.

   An assignee in bankruptcy may take peaceable possession of the bankrupt's estate wherever he can find it, but adverse claimants of such property, situated in districts other than the one wherein the bankruptcy proceedings are pending, may assert their rights to the same by bringing suits against the agents of the assignee in the state courts, or by notifying the custodians of such property not to deliver the same to the assignee, without being guilty of a contempt of the court by which the assignee was appointed.

2. SAME—DEFENSE OF TITLE BY ASSIGNEE—REMEDIES—INJUNCTION.

   In such case, however, the assignee may either defend his title in the state court, or may file a bill in the circuit or district court of the United States praying that the rights of the adverse claimants be adjusted, and, as incidental thereto, that the actions in the state courts may be enjoined. The assignee cannot proceed in such case by summary petition.

3. CONTEMPT OF COURT—JURISDICTION OF OFFENSE.

   Quære. Can a contempt of court, being a criminal offense, and therefore local in its nature, be committed except within the jurisdiction of the contemned court?

In Bankruptcy. On petition of the assignee for an injunction, and for an attachment for contempt against Thomas Nestor for unlaw-

fully interfering with the property of the bankrupt. The facts of this case are substantially as follows:

In 1873 Litchfield was adjudicated a bankrupt in the district court for the southern district of New York, and petitioner, who is a resident of the city of New York, was appointed assignee. Among the assets of the bankrupt were about 4,600 acres of pine land and mill property situated in his state, the title to which was vested in Litchfield under a deed made in 1863 from Henry C. Knight, receiver of the property of one Stewart, under a creditor's bill filed in this court. In 1874, one Johnson, who had been appointed administrator of Stewart's estate, he in the mean time having died, filed a bill against the petitioner in the southern district of New York for the recovery of these lands, claiming that the receiver's deed was invalid for want of jurisdiction in the court, and for irregularities in the proceedings; that the conveyance had been made to Litchfield in trust; and that the debt for which it had been deeded to him had been paid. The bill was, in short, a bill to redeem for the benefit of creditors of Stewart's estate, which was insolvent. This suit was afterwards compromised by the payment to Johnson of $15,000. In 1881 these lands were damaged to such an extent, by a fire which swept over that portion of the state, that the preservation of the timber rendered it necessary that it should be immediately cut, and petitioner procured an order from the district court for the southern district of New York to lumber the same, and in pursuance of such order made contracts with Brown & Davidson for stripping these lands. In pursuance of these contracts Brown & Davidson went upon the lands, and cut about 15,000,000 feet of timber, some of which has been manufactured into lumber and shipped eastward, and a portion of which is now in the hands of a boom company in process of floating down to the mill.

It further appears that in February or March, 1882, the heirs of Stewart, with one exception, conveyed all their interest in this property to one Nestor, who claims to be the owner in fee of two-thirds thereof. The petition alleges that this conveyance is made public by Nestor, who claims to have acquired a good title to the property, and to the logs, already cut and of the lumber manufactured from them; that by reason of his claims, and threats to take possession of the logs and lumber, petitioner was compelled, in order to induce purchasers to buy, to indemnify them, and covenant to protect them in the peaceable possession and enjoyment thereof. It appears that Nestor has replevied a portion of this lumber from one Fisher, who had bought the same from the assignee; that he has also brought actions of ejectment in the state courts against Brown & Davidson, and has given notice to the boom company, which now has possesion of a large amount of logs cut from these lands, not to deliver them to the petitioner, and has otherwise endeavored to embarrass him in his lumbering operations. These operations are carried on, not by the assignee personally, but by agents employed by him to manage his property in this state.

The assignee asks for an injunction to restrain Nestor from interfering with the logs cut, and to be cut, either by causing the same to be seized by any legal process, or by giving notice of his claim to them, to any custodian, or persons in possession thereof, and from making any claim to said logs or

lumber, or from slandering the title of the assignee, or from bringing or continuing any action of ejectment against the actual occupants of these lands under the assignee; and also asks for an order requiring Nestor to show cause why he should not be punished as for a contempt of the district court of the southern district of New York, for his interference with the lumber sold to Fisher, by causing the same to be seized by a writ of replevin, by serving notice of his claim to the logs in possession of the boom company, and by slandering petitioner's title to the logs in question,

Nestor claims, as did the administrator of Stewart, that the deed from Henry C. Knight, receiver, was void for several reasons; and further claims that the settlement made with Johnson as administrator of Stewart's estate was in no way binding upon the heirs of Stewart, or upon him as their grantee. He also claims to own the property in question; denies the authority of the district court for the southern district of New York to authorize the assignee to lumber the lands, or continue the business of said Litchfield beyond nine months after he was adjudged a bankrupt, or that said court had any authority to authorize the assignee to enter upon or do any acts upon lands in this state; and insists that the attempt of petitioner to carry on an extensive lumber business for several years, as shown by his petition, is in violation of the letter and spirit of the bankrupt act.

W. Howard Wait and *Ashley Pond*, for assignee.

John Atkinson and *Henry M. Duffield*, for respondent.

BROWN, D. J. The assignee insists that the respondent should be punished for contempt (1) in notifying the boom company not to deliver to the assignee the logs cut from the lands in question under authority of the order of the district court for the southern district of New York; (2) in bringing ejectment suits in the state courts against the parties in possession of these lands under the assignee; (3) in replevying a portion of the lumber cut from the logs from Fisher, who had purchased the same from the assignee.

The respondent insists with great earnestness that the district court for the southern district of New York, in which these bankruptcy proceedings are pending, had no jurisdiction to authorize the assignee to carry on lumbering operations upon lands situated in this district, both because the lands are not within the jurisdiction of that court, and because, under section 5062*a*, the court had no authority to direct the assignee to carry on the business of the debtor for a period exceeding nine months from the time he was declared a bankrupt, which time had elapsed long before the order was made. I find it quite unnecessary, however, to consider this point. In the view I take of the case it appears to me quite immaterial.

It goes without saying that an assignee in bankruptcy may, as soon as he has given bond and qualified, take immediate possession of all the property of the bankrupt found within his district. But if any portion of the property be in the possession of a third person claiming an adverse title thereto, the assignee may not proceed summarily to enforce his right, but is bound to institute a plenary suit at law or in equity to establish his title or recover possession. *Smith* v. *Mason*, 14 Wall. 419; *Marshall* v. *Knox*, 16 Wall. 551; *In re Marter*, 12 N. B. R. 187; *Knight* v. *Cheney*, 5 N. B. R. 305. So, if an assignee has taken peaceable possession of property, the adverse claimant may not take it away from him by force, or by replevin from a state court, but must petition the court of bankruptcy for its delivery to him. This is held to be the "proper action" provided for the relief of such parties. Rev. St. § 5069; *In re Vogel*, 7 Blatchf. 18. An attempt to take possession of property from the assignee by a writ of replevin from the state court is as much a contempt of the bankrupt court as if the plaintiff had endeavored to take it by force, and in such cases the sheriff will be ordered to return the property. *In re Vogel*, 7 Blatchf. 18; *In re Ulrich*, 6 Ben. 483; *In re People's Mail Steam-ship Co.* 2 N. B. R. 552; *In re Kerosene Oil Co.* 2 N. B. R. 538; *In re Atkinson*, 7 N. B. R. 143. The assignee is an officer of the court, and his possession is the possession of the court, and the familiar cases turning upon the relations of marshal and sheriff are applicable with equal force to the protection of an assignee. *Taylor* v. *Carryl*, 20 How. 583; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 324.

The rule is the same in cases of receivers. High, Receiv. § 163; *Noe* v. *Gibson*, 7 Paige, 514; *Albany City Bank* v. *Schermerhorn*, 9 Paige, 377. Indeed, the power of the district court to wind up bankrupt estates, unfettered by the interference of state courts, has been strongly asserted by this court, and I have seen no reason to change my views in that regard. To make a bankrupt law effectual there must be a court specially authorized to administer it. If assignees are bound to go from county to county, defending their rights to different parcels of an estate, the whole administration of the law might as well be vested in the state courts. It is no disrespect to those courts to say that the want of harmony in their decisions which would almost inevitably result, would go far towards destroying the efficiency of the system. It is almost as important that the administration of the law should be uniform, and subject to the guidance of

one supreme court, as that the law itself should conform to the constitutional requirement of uniformity. Hence, an exceptional power is given to the district courts in bankruptcy cases to enjoin proceedings in the state courts,—a power which has never been questioned since the decision of the supreme court in *Ex parte Schwab*, 98 U. S. 240. Not that this power should always be exercised when an assignee is defendant, since cases are numerous in which injunctions have been refused because it appeared that the case could be more conveniently and cheaply tried in the state courts. *In re Cooper*, 16 N. B. R. 178. The power to enjoin as in other cases is largely discretionary.

The proper practice in all cases where the assignee has taken possession of the property not belonging to the bankrupt requires the adverse claimant to go into the bankrupt court and make his claim to the property, or bring a plenary suit against the assignee. As I have already observed, an action of replevin will not lie against an assignee in such cases. Other suits, however, such as trespass or trover, where the property is not taken from the possession of the assignee by mesne process, may be properly begun in the state courts, and carried to a final determination, subject to a discretionary power in the bankruptcy court to transfer the litigation there. *Eyster* v. *Gaff*, 91 U. S. 525; *Sharpe* v. *Doyle*, 102 U. S. 686; *In re Moller*, 14 Blatchf. 207.

Thus far we have discussed the powers and immunities of an assignee within his own district. Other considerations present themselves when the authority of an assignee is sought to be enforced in other districts. I see no reason to question his authority to take peaceable possession of the property of the bankrupt, in whatever state or district he may find it, without application to the bankruptcy court of that district. But third persons, whose rights he may chance to assail, are entitled to protection. The power to punish those interfering with property in the possession of an assignee, or to enjoin the prosecution of suits in the state courts, presupposes that the adverse claimant may go into the bankruptcy court and have his right adjusted. But suppose the assignee, as in this case, sends his agent into another state to take possession of lands and lumber them, the adverse claimant cannot resort to the district court of this district for the assertion of his rights, since there is no case pending here, and no assignee within the district upon whom process can be served. Must he go to the southern district of New York, or, possibly, to the district of Oregon, to substantiate his claim? Clearly

not. A requirement of this kind would be an intolerable hardship. As the process of a bankruptcy court cannot reach into other districts, (*Jobbings* v. *Montague*, 6 N. B. R. 117; *Paine* v. *Caldwell*, 6 N. B. R. 558,) neither can inhabitants of other districts be compelled to resort to courts outside their own jurisdiction. Their only recourse, then, is to the state courts, in which suit may be begun against the persons in actual possession of the property, whether they be agents of the assignee or not. I am, therefore, clearly of the opinion that Nestor was not guilty of contempt in bringing the actions of ejectment, nor in giving notice to the boom company, although such notice would undoubtedly have been a contempt if the transaction had occurred within the district where the bankruptcy proceedings were launched.

The case of *Langford* v. *Langford*, High, Inj. § 170, note, is no authority for the order demanded by the petitioner. In this case the defendant, being in England and within the jurisdiction of the court of chancery there, a receiver was appointed over his estate in Ireland. The defendant instructed his solicitor in Ireland to oppose, as far as the law would permit, the receiver of the rents and profits of such estate from receiving the same. The solicitor accordingly notified defendant's tenants in Ireland that the order of the court of chancery in England appointing a receiver was of no effect in Ireland, and that defendant would still enforce payment of his rents as before. This was held to be a contempt of the court of chancery in England, and such it undoubtedly was. It is no authority, however, for holding that the solicitor in Ireland, who notified the tenants, could be proceeded against for a contempt either in the English or Irish court of chancery, though if he had been found in England he might have been arrested for any act done within that jurisdiction. But still I am of the opinion that Nestor had done nothing here of which the assignee is entitled to complain. Indeed, it is difficult to see how Nestor could be guilty of a contempt of the district court of southern New York for any act whatever done within this district. A contempt of court is a specific criminal offense. *New Orleans* v. *Steam-ship Co.* 20 Wall. 387, 392; *Hayes* v. *Fischer*, 102 U. S. 121; *Crosby's Case*, 3 Wilson, 188; *Williamson's Case*, 26 Pa. St. 24; *Ex parte Kearney*, 7 Wheat. 41; *U. S.* v. *Jacobi*, 1 Flippin, 108.

Whether, like all criminal offenses, it is local in its character, and must be tried in the jurisdiction where committed, which locality must also be within the jurisdiction of the contemned court, it is unnecessary to decide. Clearly one court cannot punish a contempt against

the authority of another. *Ex parte Tillinghast*, 4 Pet. 108; *People* v. *County Judge*, 27 Cal. 151; *Ex parte Chamberlain*, 4 Cow. 49; *Penn* v. *Messinger*, 1 Yeates, 2.

But I do not wish to be understood as saying that the assignee is without remedy. It is now settled that he may sue and collect the assets of the bankrupt within other districts than his own. *Lathrop* v. *Drake*, 91 U. S. 516. Within the same ruling I see no objection to his filing a bill or bills in the circuit or district court of this district, calling upon the respondent to come into such court and have his rights adjusted, and praying that he meanwhile be restrained from further prosecuting his actions in the state courts, or from interfering with the logs in the possession of the boom company. *Davis* v. *Friedlander*, 104 U. S. 570, 575. If the assignee is unwilling to contest his claims in the state court, he must provide a forum and a cause in which the respondent may assert them, as the latter is powerless in this regard. But I think such suit should be plenary in its nature; not only because it involves the title to the property in question, but because a summary petition is obnoxious to the ruling of the supreme court that "strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared and become parties to such a litigation, cannot be compelled to come into court under a petition for a rule to show cause, as in this case; nor is the exercise of such a jurisdiction necessary, as the third clause of the second section of the bankrupt act affords the assignee a convenient, constitutional, and sufficient remedy to contest every adverse claim made by any person to any property or rights of property transferable to or vested in such assignee." *Smith* v. *Mason*, 14 Wall. 419; *Marshall* v. *Knox*, 16 Wall. 551, 557.

The case of *Samson* v. *Burton*, 6 N. B. R. 403, if in point at all, must be deemed to have been overruled by *Marshall* v. *Knox*, 16 Wall. 551, which appears to have been decided somewhat later.

It results that this petition must be dismissed without prejudice.

In re PALMER, Bankrupt.

(District Court, N. D. New York. 1882.)

BANKRUPTCY—PRIVATE SALE BY ASSIGNEE—INADEQUACY OF PRICE.

Where an assignee sells property at private sale, in pursuance of an order of the court allowing him to sell as the register may direct, such sale will be set aside and a resale ordered when it is made to appear to the court that the property is worth a much greater sum than that at which it was sold, and parties are willing to bid it in at its real value, even in cases where there is no actual fraud on the part of those interested in the first sale.

George Gorham, for motion.

W. L. Sessions, opposed.

COXE, D. J. This is a motion by a creditor to set aside a private sale by the assignee of his interest in lot No. 657, Cherry Grove township, Warren county, Pennsylvania, to William W. Welch, and a subsequent sale by Welch to one John L. McKinney. The assignee's sale was made pursuant to an order of the court dated July 18, 1882, allowing him to sell the said interest under the direction and control of the register, and in such manner as he should order and direct. The register took the proof and heard the allegations of the parties. On the twenty-second of July he made an order authorizing the sale, without public notice, for $825. On the nineteenth day of August following, Welch sold the property for $4,500. Petitioner, who is a creditor in the sum of $6,500, had no notice of the sale, and now asks that it be set aside as fraudulent and irregular, alleging that the assignee's interest was worth much more than the amount received. Two affidavits are produced, in which the affiants swear that the said interest was worth at least $3,000, and they offer, upon a resale, to bid that sum for it.

The remedy adopted by the petitioner, though summary, seems to be the proper one.

The act of June 22, 1874, (18 St. at Large, p. 178, § 4,) having reference to *public* sales—and *a fortiori* to private sales—by the assignee, provides: "And the court, on application of any party in interest, shall have complete supervisory power over such sales, including the power to set aside the same and to order a resale, so that the property sold shall realize the largest sum." See, also, *Hale* v. *Clauson*, 60 N. Y. 339; *In re Major*, 14 N. B. R. 71; *Brown* v. *Frost*, 10 Paige, 243; Barb. Ch. Pr. (2d Ed.) 541.

If the reasons which require a resale were not based upon substantially undisputed facts, a reference should be ordered; but it seems to be sufficiently established that the property sold was worth much more than the amount paid. The proceeding was certainly irregular, and out of the ordinary course of judicial sales. The creditors had no notice; the business was transacted privately and in haste. And yet the evidence fails to establish bad faith on the part of the assignee. He was appointed 14 years before, and during all that time he had received no offer for his interest in the land. No assets had come into his hands. No creditor had proved his debt. The land had been sold for taxes, the title was in dispute, litigation was in progress. The offer of $825 was made only upon the condition that it should be accepted at once. In these circumstances, the assignee might well have thought that it was his duty, acting for the best interests of the creditors, to consummate the sale. It is enough to say that he was deceived and misled; that he inadvertently did an act which was detrimental to the interests of the creditors; enough that a resale will doubtless realize $3,000 and upwards, for distribution among them.

In *Re O'Fallon*, 2 Dill. 548, Judge Dillon says:

> "Where a public sale of the real estate is made by the assignee in bankruptcy under the order of the bankruptcy court, and the property is struck off to the highest bidder, such sale is subject to the approval of the court, which has a discretion to refuse to confirm it for a mere inadequacy of price. It is not necessary that there should be fraud, or such gross inadequacy of price as to be evidence of fraud."

The practice in England, almost as a matter of course, is to open the sale on being assured of a fair advance on the amount bid. This is the rule even in public sales. Our courts have hesitated to establish a doctrine so advanced. No case has been found, however, at all approximating the case at bar, where a resale has been refused.

An order may be entered granting the prayer of the petition, but upon the condition that the petitioner procures to be filed in the office of the clerk an offer in writing, accompanied with security, to bid for the assignee's interest in the said property at least the sum of $2,000.

Motion granted.

Mather and others *v.* Nesbit.

(*Circuit Court, D. Minnesota.* October 30, 1882.)

1. State Insolvency Laws—Constitutionality.

   In the absence of congressional action enacting a bankrupt law, states may pass insolvent laws; but such laws have no extraterritorial operation, and do not apply to contracts made within the state between its citizens and citizens of other states. Such laws do not necessarily impair the obligation of contracts within the inhibition of the constitution of the United States.

2. Same.

   The provision of an insolvent law which does not grant a discharge of the debtor on surrender of all his property to an assignee or a receiver, but merely gives a priority to creditors who will release the debtor over those who stand back and do not accept the conditions under which his property passes to the assignee or the receiver, and who alone can receive dividends from the estate, is not in conflict with the constitution of the state or of the United States.

3. Same—Attachment—Dissolution of.

   Section 915 of the Revised Statutes adopts the remedy by attachment provided by state laws; and when a contingency arises whereby the attachment would be dissolved under provisions of a state law, the attachment will be deemed dissolved in a federal court, as provided in section 933 of the Revised Statutes.

In this case, on application of plaintiffs, a writ of attachment issued and the property of defendant was seized by the United States marshal. Subsequently, the defendant, under the insolvency act of Minnesota, (chapter 148, Laws 1881,) made an assignment for the distribution of his property under said law. It is claimed that the attachment is dissolved by virtue of said assignment, and application is made to the court for an order that the United States marshal turn the property over to the assignee. Plaintiff opposes said application and the motion is heard by the court.

Frackelton & Warner, for the motion.

Woods & Hahn, contra.

Nelson, D. J. It is urged that the insolvency law of the state of Minnesota (Gen. Laws 1881, *c.* 148) impairs the obligation of contracts and is unconstitutional, and that each and every part of the same is void; also that the process of attachment issued out of the federal court, and all rights and incidents thereto attaching, cannot be affected by this law. The following principles are well settled: (1) That in the absence of congressional action enacting a bankrupt law, the states may pass insolvent laws, and such laws do not necessarily impair the obligation of contracts. (2) Such insolvent laws have no extraterritorial operation upon the contracts of

other states, and do not apply to contracts made within the state between a citizen of the state and citizens of other states. The rules as above stated have been frequently announced by the supreme court of the United States. 12 Wheat. 213; 6 Pet. 643; 5 How. 295; 1 Wall. 225. See 1 Dill. 515; *Bedell* v. *Scruton*, 26 Alb. Law J. 348.

The insolvent law of Minnesota does not grant a discharge of the debtor on surrender of all his property to an assignee or receiver. The courts are open to any creditor who is not disposed to become a party to the insolvency proceedings, and unless a creditor gives a release to his insolvent debtor he can bring suit and obtain judgment; but a priority is given to creditors who will release the debtor over those who stand back and do not accept the conditions under which the insolvent's property passes to the assignee or the receiver, and they only can receive dividends from the estate. This provision does not conflict with the constitution of the state of Minnesota or United States, for such right of priority is a personal privilege and forms no part of the contract. I do not care to discuss this point, and it is not necessary.

The law certainly does not impair the obligation of plaintiff's contract by giving this priority. True, in terms it dissolves the process of attachment under which the debtor's property was seized, but the federal court can issue such a writ only when the state law permits it. Section 915, U. S. Rev. St., adopts the remedy by attachment which is now provided by the law of the state of Minnesota, and it is by this recognition of the process that the writ issued in this case.

Have the insolvency proceedings dissolved this attachment? The plaintiffs say the writ is not affected by this act. The first section of the insolvency act authorizes an assignment to be made by a debtor whose property has been seized by attachment, and such assignment is an initiatory step to proceeding under the act. When an assignment is made conforming to this section and perfected, the attachment by the terms of the act is dissolved, and the title to the property vests in trust in the assignee. If the attachment had issued from the state court, it would be dissolved. The plaintiff concedes it, and it is clear that a contingency has arisen which is provided for in section 933, Rev. St. This section enacts that—

"An attachment of property upon process instituted in any court of the United States to satisfy such judgment as may be recovered by the plaintiff therein * * * shall be dissolved when any contingency occurs by which, according to the laws of the state where said court is held, such attachment

would be dissolved upon like process instituted in the courts of said state, provided that nothing herein contained shall interfere with any priority of the United States in the payment of debts."

This law is explicit, and puts attachments in the state and federal courts on the same footing. It follows, therefore, that the attachment in this case is dissolved, and the marshal is ordered to turn over the property to the assignee on payment of necessary expenses and legal fees.

NEACY *v.* ALLIS.

(*Circuit Court, E. D. Wisconsin.* August Term, 1882.)

1. PATENTS FOR INVENTIONS—REISSUE—NOT VALID.

   Where the claim in a patent was for "bars, B, B, provided with *interlocking knives, d, d,* and operating substantially in the manner set forth," and the claim in the reissue was "in a saw-mill dog, the *combination* of knives, *d, d,* arranged to move past each other in opposite directions and engage with the log substantially in the manner set forth." *Held,* that the claim in the reissue could not be sustained, as thereby the scope of the original patent was extended to an unauthorized degree.

2. STATE OF ART—RESTRICTION OF INVENTION.

   When the state of the art is such that the field of invention is circumscribed, the invention of a new patentee must necessarily be confined strictly to the description of the article as set forth the specification and claims.

3. INFRINGEMENT—EVIDENCE—SAW-MILL DOGS—PATENTS NO. 134,653 AND NO. 122,215.

   Patent No. 134,653 does not appear to be infringed by the device manufactured by defendant under patent No. 122,215, and the bill should be dismissed.

In Equity.

Flanders & Bottum, for complainant. *W. G. Rainey,* for defendant.

DYER, D. J. This is a suit in equity to restrain the infringement of reissued letters patent No. 6,733, granted to one Henry D. Dann November 9, 1875, for an improvement in saw-mill dogs, and for an account of profits, etc.

The original patent was issued January 7, 1873, is numbered 134,653, and was granted to the patentee by the name of Henry D. Donn. The patent was twice reissued. The first reissue was granted September 29, 1874, is numbered 6,071, and the name of the patentee is therein given as H. D. Dann. This suit is brought upon the second reissue.

The specifications and claims in the second reissue are as follows:

"The nature of my invention consists in the construction and arrangement of a dog for saw-mills, as will be hereinafter more fully set forth. * * * [After reference to annexed drawings, the specifications proceed:] A, represents the case or box in which the knives constituting the dog move out and in. This box or case may either be bolted to the ordinary standard, or may be solid and form the standard; in either case receiving and protecting the knives or parts which form the dog. It guards the knives from the knots and also prevents the last board from springing as the knives draw the logs boards, or scantlings firmly to the standard or box. In the case or box are placed two bars, B, B, which are held in the same by pins, *a*, *a*, passing through the sides of the box, and through inclined slots, *b*, *b*, in the bars. The opposite ends of the bars, B, B, are, by connecting bars, C, C, connected with a cross-head, D, which is pivoted between projecting ears on the back of the box, and provided with a lever, E, for operating the same. By the movement of the lever, E, in one direction one of the bars, B, B, will move up and the other down, and at the same time they will move outward from the front of the box by the action of the inclined slots, *b*, *b*, on the pins, *a*, *a*. By the movement of the lever in the contrary direction, the bars, B, B, will be moved in the opposite direction, and at the same time be moved inwardly from the front of the box. To the front edges of the bars, B, B, are secured the knives, *d*, *d*, the points of which are bent outwardly, and pointed as shown. The knives of the two bars point towards each other, so that when the bars are moved downward the knives will enter the wood and lock together, preventing the log from slipping down or off from the end of the block, which is often the case when the log is rounded on the under side, when it is to be undogged and turned over. The pins, *a*, *a*, may be passed through holes in the bars, B, B, and slide in inclined slots in the bars as above described, or the same movement of the bars may be effected by means of eccentrics.

"Having thus fully described my invention, what I claim as new and desire to secure by letters patent is—*First*, in a saw-mill dog, the combination of the knives, *d*, *d*, arranged to move past each other in opposite directions and engage with the log substantially in the manner set forth; *secondly*, the combination of the box or case, A, bars, B, B, with interlocking knives, *d*, *d*, inclined slots, *b*, *b*, pins, *a*, *a*, connecting bars, C, C, cross-head, D, and lever, E, all constructed and arranged substantially as and for the purposes herein set forth."

The specifications in the original and both of the reissued patents are substantially the same. In the original patent and the first reissue the second claim is the same as the second claim in the reissue sued upon. But the first claim in the original and first reissue is for "the bars, B, B, provided with interlocking knives, *d*, *d*, and operating substantially in the manner and for the purposes herein set forth."

The defendant is making a dog under what is known as the Beckwith patent, which is No. 122,215, and was issued December 26,

1871, a date earlier than the issue of Dann's original patent. The Beckwith invention is described in his specifications as consisting—

"In constructing the standards with wide bearing faces for the logs, and in providing each with a central vertical slot or mortise, through which a series of hooks are projected to grasp the log or cant. The lower hook is curved upward to catch into the lower edge of the log next the standard, and the upper hooks are curved downward to catch into the face of the log. The lower hook, and the series of upper hooks, therefore move in opposite directions to grasp the log between them and prevent it from slipping. The hooks are operated simultaneously by a lever from the back of the standard, and by a suitable system of connecting bars. * * * By this arrangement the upper hooks hold the log securely in contact with the lower hook, while the latter holds it firmly against the standard, and prevents it from slipping until the last board is sawed. By constructing the standards with a wide face, and in arranging the hooks to project through a central slot, a broad bearing is formed for the log upon each side of the hooks, so that when the log is reduced to the thickness of two or three boards, the latter are held securely against bending while being sawed."

The specifications then proceed by reference to accompanying drawings, to designate and point out the different parts of the device. The drawings show several hooks moving downward and but one hook moving upward. The defendant constructs the device which he is manufacturing and selling with several hooks moving upward as well as downward, and herein there is a variation from the form of the device as described in the drawings annexed to the Beckwith patent. But it is plain that the mere addition of hooks, either moving upward or downward, does not constitute invention; and I think that a device made like that invented by Beckwith, with only the variation therefrom of additional hooks moving either way, is protected by the Beckwith patent, if that patent has not been anticipated by inventions claimed to have been earlier in the field. It is contended by the complainant that, although Dann's patent is of a later date than the Beckwith patent, he invented his dog before Beckwith made his invention, hence that the Dann dog must be held to have preceded the Beckwith dog. But I am not satisfied, upon the testimony in this case that such is the fact. On the contrary, I am strongly inclined to the opinion, in the light of the testimony here adduced, that Beckwith was in advance of Dann in this line of invention. Then, admitting the Dann dog to be an improvement upon the Beckwith dog, I am not satisfied that the device made and sold by the defendant, Allis, is an infringement of the Dann mechanism. It is to be noticed that all the several parts constituting these dogs are old. The idea of holding logs or a cant, while in the process of sawing, by means of

hooks or teeth fastened to bars and projected forward into the log or cant, was not new when Dann invented his device. It may, I think, be truthfully stated that the prior state of the art was such that the field of invention was circumscribed, and therefore the invention of a new patentee must necessarily be confined strictly to the description of article as set forth in his specifications and claims.

The mechanism of the Dann device, and that of the dog made by Allis under the Beckwith patent, are in some respects quite similar, but in other material parts are dissimilar. In the Beckwith or Allis dog the teeth are curved in the form of hooks. In the Dann device the teeth have the form of chisels, and are so peculiarly arranged with reference to their connection with the bars, that they pass each other or interlock in entering and taking hold of the log or cant. The hooks in the two devices move upon different angles, and the manner in which they are fastened to their different attachments is dissimilar. The shape of the hooks in the Dann device, and their movement under pressure of the lever, is evidently a vital feature of his invention. While in a certain sense the hooks in the Allis dog may pass each other as they are projected into the log or cant, they do not pass each other, or exhibit the element of interlocking, as do the chisel teeth in the Dann dog.

While the position was taken on the argument that the defendant's dog is an infringement of the second claim of Dann's second reissue, the court did not understand this to be urged with much confidence. And it seems to me very clear that the Allis dog is not an infringement of that claim. The stress of the case really lies in the first claim of that reissue; and in view of the fact that in the prior state of the art Dann and claimants under him must be limited to the specific device for which he obtained a patent, and as there are peculiar and marked variations in the construction of the two dogs in question, I am constrained to think that upon the question of infringement the complainant has failed to establish his case. But, apart from the question of infringement, the court is of the opinion that the first claim of Dann's second reissue is void, as showing an unauthorized expansion of the first claim in his original patent and first reissue. In both the original and first reissue the first claim is: "The bars, B, B, provided with interlocking knives, *d*, *d*, and operating substantially in the manner and for the purposes herein set forth." Thus it will be noticed that the invention here claimed consists of *the bars* provided with interlocking knives and operating as described. The bars described in the specifications, and the knives so adjusted that

when they enter the wood they will lock together, are the elements here claimed.

Now, in the first claim of the second reissue, no reference is made to bars. The word "interlocking" is dropped from the claim, and its language is: "In a saw-mill dog, the combination of knives, *d, d,* arranged to move past each other in opposite directions and engage with the log, substantially in the manner set forth." Here the claim is made to cover a combination of the knives, that combination being arranged so that the knives will move past each other in opposite directions, and engage with the log. Thus it seems to me apparent that in the first claim of the original patent and the first reissue, when considered in connection with the specifications, the means are pointed out by which the interlocking knives are made operative, namely, by means of their connection with bars which are connected with the box or case in the manner set forth in the specifications. But in the first claim of the second reissue bars are dispensed with. What the patentee there claims is merely a combination of knives arranged to move past each other in opposite directions. And this is a claim which certainly covers more ground than the first claim in the original and first reissue. Under the first claim in the second reissue, so far as its language is concerned, any means may be employed by which there may be such an arrangement of the combination of knives as will enable them to move past each other and engage with the log. It is true, at the end of this claim there are the words "substantially in the manner set forth," but I do not think these words are equivalent to the words "by the means set forth." The meaning of the claim, as I understand its true construction, is that the combination of knives shall be so arranged as to enable the knives to move past each other and engage with the log in the manner set forth; that is, that they shall pass each other and engage, etc., in the manner set forth.

It is not necessary under this claim, as it is under the first claim in the original and first reissue, that the combination of knives shall be arranged, in connection with the bars described, to move past each other in their operation. Any means under this claim, as I have before stated, for aught that appears in the claim, may be employed in moving the combination of knives so that they shall pass each other, or, as stated in the specifications, "enter the log and lock together." And I have a strong conviction that this claim was put in this form, not for the mere purpose of avoiding any ambiguity arising from the term "interlocking," which was used in the first

claim of the original patent and first reissue, but to broaden if possible the scope of Dann's invention, and make it cover more than his original patent was intended to cover. It will not be forgotten that the language of the first claim in the first reissue is the same as that of the same claim in the original patent. The original patent was granted in January, 1873, and it was not until November 9, 1875, that the second reissue was obtained; and then the language of the first claim was changed, and thereby I think the scope of the patent was extended to an unauthorized degree, within the latest rulings of the supreme court upon the question. In the second claim the bars are claimed as part of the combination, and their omission from the first claim, and the statement there made, embracing generally and broadly a combination of the knives arranged to move past each other and engage with the log in the manner set forth, I think indicate a purpose by sweeping terms to make any improvements in the structure of saw-mill dogs, occurring after the issue of the original patent, subservient to this second reissue, and this the supreme court has decisively held cannot be done.

I am of the opinion, therefore, that the first claim of the second reissue, upon which this suit is based, is void, and the bill will be dismissed.

ALLIS *v.* BUCKSTAFF and others.

(*Circuit Court, E. D. Wisconsin.* October Term, 1882.)

1. PATENTS—PLEADING PRIOR USE—NAMES OF WITNESSES.

   Only the names of those who have invented or used the machine or improvement alleged to anticipate a patent, and not of those who are to testify touching its invention or use, are required to be set forth in an answer making such a defense.

2. SAME—SAME—TESTIMONY.

   Where an original answer contains no allegation of prior use, but an amended answer does, testimony to establish such prior use, taken before filing the amended answer, under objection of counsel, who afterwards fully cross-examines the witnesses and offers rebutting testimony, may, in the discretion of the court, be allowed to stand.

3. SAME—ANTICIPATING DEVICE.

   In order to defeat a patent on the ground of prior use of the patented invention, it must appear that the anticipating device was embodied in distinct form, and was so far perfected as to have been capable of practical use.

4. SAME—EVIDENCE AS TO INFRINGEMENT—DENIAL IN ANSWER.

   To allow testimony on the part of the defense, to show that the machine used does not infringe the patent of complainant, the answer should deny such

infringement specifically; but if, by stipulation filed by counsel before taking testimony, it is agreed that defendant may put in testimony to show that there was no infringement, the court will not entertain an objection to such testimony.

5. SAME—INFRINGEMENT—INJUNCTION.

Patent No. 233,409, known as the "Gowen dog," as invented and described in the specification, does not infringe patent No. 122,215, but with the addition made and used therewith by defendants, may do so, and they must be enjoined from its further use.

6. SAME—PATENT NO. 122,215 VALID.

Patent No. 122,215 is valid, and was not anticipated by patents No. 20,660, No. 54,177, No. 52,904, No. 99,486, or No. 134,653, nor by the devices known as the "Morse dog" and the "Muzzy dog."

In Equity.

W. G. Rainey, for complainant.

C. W. Felker and *Finch & Barber*, for defendants.

DYER, D. J. This is one of a series of twelve cases, heard together, in which the several defendants are charged with the infringement of letters patent No. 122,215, granted December 26, 1871, to Nelson F. Beckwith, for an improvement in head-blocks, of which the complainant is assignee, and the several bills contain the usual prayer for an injunction and account. Contest is made on the question of infringement, and among other defenses set up in the original answers it is alleged that Beckwith was not the original inventor of the alleged improvement, but that the same was described and represented in a patent, No. 20,660, issued to J. Comly Post, June 22, 1858, for an improved method for clamping and laterally feeding the log in saw-mills; also in a patent, No. 54,177, issued May 15, 1866, to G. W. Rodebaugh, for head-blocks for saw-mills; also in a patent, No. 52,904, issued February 27, 1866, to E. H. Stearns, for head-blocks for saw-mills; and also, in a patent, No. 99,486, issued February 1, 1870, to Selden and Briggs, for an improvement in head-blocks.

It is further alleged in the original answers that the Beckwith invention was, before a patent was issued therefor, invented by and known to John F. Morse, of the city of Oshkosh, Wisconsin, and was also known to John S. Everett and Charles C. Avery, of the same place; further, that before Beckwith made application for a patent, or reduced his alleged invention to practice, or put it into practical use, or had any knowledge thereof, the said invention "was known to, and had been used in public by, the following-named persons at the places following, to-wit: By the firm of James Jenkins & Co., at the city of Oshkosh, Wisconsin; by John F. Morse, of the

city of Oshkosh, Wisconsin; by Lawrence McVicar, at Manistee, Michigan."

There is a further allegation in the original answers that the invention described in the Beckwith patent was known to, and had been previously combined by, one Pond, of Eau Claire, Wisconsin, and John F. Morse, of Oshkosh, in the same state; that each of these parties, at the time Beckwith obtained his patent, was using diligence in perfecting his said invention, and that Beckwith surreptitiously and unjustly obtained the patent upon which this suit is based.

In the amended answers it is alleged that the same device or combination described and claimed as new in the Beckwith patent, or substantial and material parts thereof, were, before the alleged invention thereof by Beckwith, "invented by H. D. Dann, who lately resided in the city of Oshkosh, but who * * * has moved to Waupun, Wisconsin, and now resides there, in the year 1866; and by Franklin B. Muzzy, who resides in the city of Bangor, state of Maine, in the year 1860, and that said mill-dog or head-block, substantially as described in said patent, * * * was used by the firm of Ruddock & Co., in the years 1869 and 1870, at the village of Winneconne, Winnebago county, Wisconsin, which said firm, during said years, was composed of one Ruddock, R. R. Wellington, and one Parmeter, in the year 1869, and of said Ruddock, Parmeter, Wellington, and one Jones in the year 1870;" and the respective places of residence of said parties are stated.

In the specifications forming part of the Beckwith patent the patentee says:

"The principal difficulties encountered in sawing logs into boards are as follows: *First.* When a log has been reduced to such thickness that only sufficient material remains for one or two boards, it is almost impossible to hold it upright upon its edge against the standards upon the carriage during the operation of sawing. The liability of the log to thus turn and slip upon the head-blocks is greatly aggravated if its lower edge, next to the standard, is waney or rounded off from any cause. For this reason it is customary in all saw-mills to leave the last cut in the form of a thick plank, affording sufficient bearing surface to prevent its turning upon the head-block. Two thicknesses of lumber are therefore sawed from the same log or cant. *Secondly.* The standards employed for saw-mill carriages are usually so constructed to hold the log that when the latter is to be sawed entirely into narrow boards of the same thickness the last two or three are liable to bend during the operation of sawing, varying the thickness of each more or less, and producing thereby imperfect boards.

"My invention has for its object to overcome these difficulties; and to this end it consists in constructing the standards with wide-bearing faces for the logs, and in providing each with a central vertical slot or mortise, through which a series of hooks are projected to grasp the log or cant. The lower hook is curved upward, to catch into the lower edge of the log next the standard, and the upper hooks are curved downward, to catch into the face of the log. The lower hook, and the series of upper hooks, therefore, move in opposite directions to grasp the log between them, and prevent it from slipping. The hooks are operated simultaneously by a lever from the back of the standard, and by a suitable system of connecting bars. * * * By this arrangement the upper hook holds the log securely in contact with the lower hook, while the latter holds it firmly against the standard, and prevents it from slipping until the last board is sawed. By constructing the standards with a wide face, and in arranging the hook to project through a central slot, a broad bearing is formed for the log upon each side of the hooks, so that when the log is reduced to the thickness of two or three boards the latter are held securely against bending while being sawed."

In connection with accompanying drawings, the specifications proceed to state in detail the construction and arrangement of the various parts of the device, and the patentee then claims as new:

"(1) In combination with the standards for saw-mill carriages, the hooks, C, D, adapted to be simultaneously projected in opposite directions through the central vertical slot in the face of said standard, substantially as described, for the purpose specified. (2) The combination of the hook, C, and connecting bars, F, I, with the operating lever and the hook, D, substantially as described, for the purpose specified."

There is a further and third claim, which, however, it is unnecessary to refer to.

In the case of *Allis* v. *Stowell*, (unreported,)* this court held the Beckwith patent valid, and not anticipated by either the Post patent, the Rodebaugh patent, the Stearns patent, or the Everett and Avery patent. Further consideration of those patents and the inventions they cover has confirmed the conclusion expressed in *Allis* v. *Stowell* with reference thereto, and I must hold that they do not invalidate the Beckwith patent. That patent must also be held unaffected by the Selden dog, a patent for which was granted to Selden & Briggs, but which, on a rehearing in *Allis* v. *Stowell*, was held to be invalid for the reason that the dog therein described was anticipated by what is known as the Duvall device. Both the Stearns and the Selden dogs exhibit only a series of hooks working downward, while the Beckwith dog, as patented, consists not only of hooks moving downward, but of an upward-working hook, the entire series being operated

*See 9 FED. REP. 304.

by a single movement of one lever, which is connected with the hooks by means of suitable connecting bars. None of the devices referred to, including those covered by the Post patent and the Rodebaugh patent, have the mode of operation of the Beckwith dog, nor are they like it in combination. The Everett and Avery invention consists of dog-blades attached to a horizontal dog-head and shaft, which have a rotating motion communicated by a lever or crank, and are forced forward by the incline of the face of a journal box contiguous to the dog-head. The principle upon which this device works is that of the screw; and it is so unlike the Beckwith dog in construction and operation that the court had little doubt in deciding *Allis* v. *Stowell*, and has no doubt now, that the Beckwith device was patentable, notwithstanding the earlier patent of Everett and Avery.

I have come to the same conclusion with reference to the Muzzy dog, a model or specimen of which is in evidence. This is a device for dogging shingle bolts, and is constructed to be used horizontally. In operation, the bolt is held between two iron jaws, which are moved by a lever. As described by one of the witnesses, "there is a clamp composed of two jaws, having shanks which are connected, and which are operated simultaneously by one lever." The jaws are so connected to the frame that they project a uniform distance beyond the face of the frame, and cannot be drawn back beyond the face of the frame or knee. They do not move outward and downward, or outward and upward, but move directly towards each other, in a right line, parallel with the face of the frame. They are evidently designed to hold a block by engaging in the ends of the block, as is the case in shingle machines, and I am unable to see how it could be successfully used in holding logs or cants while being sawed, without a radical change of construction. Certainly, in its present construction and evident mode of operation, it is wholly dissimilar to the Beckwith device, the only trace of similarity being in the fact that in both devices the dogs are operated by the movement of one lever. Otherwise I see nothing in the Muzzy device to suggest the construction or mode of operation of the Beckwith dog.

It is very earnestly insisted, on the part of the defense, that the Beckwith patent was anticipated by a device for dogging logs alleged to have been made by John F. Morse, of Oshkosh, in 1868, and to have been used in Ruddock & Co.'s mill, at Winneconne, Wisconsin, in 1869. The consideration of this defense has involved a very careful examination of a large mass of testimony, which I shall not here attempt to refer to in detail. Objections were seasonably made by

counsel for complainant, to all this testimony, on the ground that the defense of prior use, at Ruddock & Co.'s mill, or elsewhere, was not sufficiently stated in the answers or amended answers, and also because the answers contained no notice that the several witnesses sworn on the question of the existence and use of the Morse dog would be examined. I think these objections should be overruled. The allegation of the original answers is that the Beckwith invention "was known to, and *had been used in public by, the following-named persons, at the places following, to-wit:*—By the firm of James Jenkins & Co., at the city of Oshkosh, Wisconsin; by John F. Morse, *of* the city of Oshkosh, Wisconsin; by Lawrence McVicar, at Manistee, Michigan." It is very evident that the use of the word "of," after the name John F. Morse, was a clerical mistake of the pleader; and that, as was stated by counsel on the argument, he intended to allege that the invention was used by John F. Morse *at* the city of Oshkosh. This is quite apparent when the whole allegation is considered, and all its words are taken in proper connection. Then the amended answers allege that the mill-dog, substantially as described in the Beckwith patent, was used by the firm of Ruddock & Co. in the years 1869 and 1870, at Winneconne. These allegations are sufficient to let in proof of prior use at Oshkosh and Winneconne by the parties named, within the requirements of section 4920 of the Revised Statutes.

There are reported cases to the effect that the names of the witnesses by whom it is expected to prove the alleged prior use should be stated in the answer. Such is the intimation, if not the positive ruling, in *Richardson* v. *Lockwood*, 6 Fisher, 454. But all cases in which it has been so held are overruled by *Roemer* v. *Simon*, 95 U. S. 219, and *Planing Machine Co.* v. *Keith*, 101 U. S. 479, wherein it is held that only the names of those who had invented or used the anticipating machine or improvement, and not of those who are to testify touching its invention or use, are required to be set forth.

A large part of the testimony tending to show the use of the Morse dog at Ruddock & Co.'s mill was taken before the amended answers alleging such use were filed, and it is insisted in behalf of complainants that this testimony should be disregarded, because there was no allegation of such prior use in the original answers. It was held in *Roberts* v. *Buck*, 6 Fisher, 325, that where evidence of anticipations not set up in the answer had been taken, and a motion was afterwards made to amend the answer, an amendment would not make that evidence admissible which was taken under objection before the amendment. After all, I suppose it to be discretionary with the court

in such a case, especially after the objecting party has fully cross-examined the witnesses and taken rebutting proofs, either to let the testimony stand in the case, or to strike it out and permit the defense to take the testimony anew under the amended answer. So far as the state of the case in *Roberts* v. *Buck* is disclosed, in the opinion of the court there is ground for the inference that the objecting party stood on his objection and elected not to cross-examine the witnesses or to offer rebutting proofs. In the case at bar, objection was made to the examination of the witnesses, but there was full cross-examination, and proofs in rebuttal of that particular evidence were offered, and I think it is a proper exercise of discretion to let the testimony, which is objected to as irregularly taken, stand in the case.

Upon a careful consideration of all the evidence bearing on the question, I am convinced that Morse made a saw-mill dog in 1868 with upward and downward working teeth which could be simultaneously operated by the movement of one lever. I am further satisfied that Morse & Co., in 1869, put the dog in Ruddock & Co.'s mill, and that it was there used, but only for a very limited time, as originally constructed. The device itself is not produced, but a model made by Morse since the commencement of these suits, and said to be similar to the dog put in Ruddock & Co.'s mill, is in evidence.

Some of the witnesses, who testify to the use of a dog made by Morse with upward and downward working teeth in Ruddock & Co.'s mill in 1869, also swear that a dog of precisely the same construction was used in McArthur & Trask's mill, and in Lake's mill, in Winneconne, at some time subsequent to its use in Ruddock & Co.'s mill. But I think it is very clearly shown that these witnesses are mistaken by the testimony of Paige, who was Morse's partner, and of McArthur, who was one of the owners of the McArthur & Trask mill. The testimony of these two witnesses satisfactorily establishes the fact that the dogs used in Lake's mill, and McArthur & Trask's mill, furnished by Morse & Co., had only downward-working teeth; and upon the whole evidence the conclusion is fairly deducible that the only dog made by Morse & Co. with teeth working both ways, which they ever attempted to put in practical use, was that which was placed in Ruddock & Co.'s mill in 1869.

Admitting that Morse was in advance of Beckwith in this line of invention, there is reason for grave doubt whether the Morse dog can be held to have anticipated the Beckwith dog, so different are they in mechanical construction. This doubt is fairly sustainable upon the

testimony of defendants' experts. Wilcox, one of the experts, testifies in his direct examination as follows:

"*Question.* I wish you would state what in your judgment there is in the specifications and claims contained in that patent (the Beckwith) that was new at the time it bears date, if there is anything that was new? *Answer.* There was new, as I understand the state of the art at that time, the application of the lever, connecting rods, and links with a series of hooked dogs pivoted to a bolt and operated by a single action of the lever. * * *

"*Q.* Now, Mr. Wilcox, please examine Exhibit No. 1, (the Morse dog,) and suppose that a dog manufactured upon the same principle as Exhibit No. 1 were in use at the time the Beckwith patent was made, what combination or principle would there be new in the Beckwith dog? *A.* There would be new precisely what I stated before: the simultaneous movement of a pivoted hook, being acted upon by a lever and connecting rods and links.

"*Q.* Well, what difference is there in principle between that movement or power and the eccentric in the model No. 1? *A.* One is an eccentric balance and the other is a lever balance, so far as the action of the lever is concerned. So far as the dog is concerned, one is a dog operating in rotary action, and the other is a dog operating in an inclined plane,—the direct action without any rotation.

"*Q.* In the practical use or working of the dog, what difference, if any, would there be? *A.* One would insert the knives or dogs in a direct line following the line of the slots here, and on entering the log or cant would continue on that same incline until it would pass its full force or extent that the dogs are moved into the log; while the other would strike the log at a certain angle from the pivot from which it worked, and then continue in a curved line into the log. * * *

"*Q.* After an examination of model called Exhibit No. 1, and an examination of the Beckwith dog, are there any results that would be accomplished by the Beckwith dog that might not be accomplished by the Morse dog, or a proper construction of the Morse dog, upon the principle upon which it is made? *A.* There is none.

"*Q.* Then if the Morse dog was in use, or its principle was known, at the time of the construction or patent of the Beckwith dog, there would be no difference in principle, but the difference would be merely failure of mechanical construction, as I understand you? *A.* I think there is no difference in the principle or the object sought in the two; the methods taken to accomplish that object are entirely different, using entirely different mechanical power."

On cross-examination this witness further testified:

"*Question.* Then your opinion, even admitting the prior existence of a dog like the model, Exhibit No. 1, (the Morse,) is that there would have been invention in constructing a dog like the one shown in the Beckwith patent, would there not? *Answer.* There would have been invention in the methods taken to accomplish it —the application of mechanical appliances in different form; and it further takes up an old existing dog known as the spoon dog, and pivots it to a bolt, and operates it with a lever and connecting rods in place of the chisels.

"*Q.* Now, will you tell us whether, in your opinion, it would not be an exercise of invention to take the single spoon hook and duplicate it, and connect them together by means of connecting rods, so that, by the operation of one lever, the hooks may be made to work in opposite directions simultaneously? *A.* Clearly it would.

"*Q.* Even if there was a dog in existence and in use like the one called the Morse dog? *A.* Certainly."

The witness Gowen, another of defendants' experts, testified as follows:

"*Question.* State what, if any, principle would be new in the Beckwith patent, provided the Morse dog was in use as shown by the model, Exhibit No. 1, when the Beckwith patent was patented? *Answer.* There would be no new principle involved; simply difference in mechanical construction. * * *

"*Q.* Now state if the object and purpose of operating dogs in different directions was not in principle as well set forth in the Morse design as it is in the Beckwith dog, as appears from the model marked Exhibit No. 5, and from the claims and specifications in the patent. *A.* The mechanical construction and movements of the dog would be entirely different; while these dogs would move in an oblique line across the face of the jack-head, the dogs entering the cant or log would travel in a parallel line of the slot in which these bars travel.

"*Q.* You misapprehend my question. I asked you if the principle of operating dogs in opposite directions isn't as well shown forth in the Morse design as it is in the Beckwith design? *A.* So far as the lever is concerned, yes.

* * * * * * * * *

"*Q.* Well, is the principle as well shown forth in the Morse design as it is in the Beckwith design? *A.* Well, the principle of connecting these hooks, as represented in this dog, Exhibit No. 5, (the Beckwith,) is that the links here connected by a pivot, either side the pivot, with the lever, forms the direct leverage, of course increasing the direct leverage as you move the lever up and down.

"*Q.* What mechanical term do you apply to the power used in the Beckwith dog? *A.* Some would call it a toggle-joint, and I have always called it a pivot-lever connected by links. If I could be allowed to answer that question here I would state that that principle is an old one.

* * * * * * * * *

"*Q.* In your judgment, then, is there any difference between the Morse design, as shown by Exhibit No. 1, and the design contained in the Beckwith patent, but mere mechanical construction? *A.* Not in the object or result. No, sir.

"*Q.* In your judgment, if the Morse dog was in use, or its design was known, at the time of the construction of the Beckwith dog, would there be anything new in principle in the construction of the Beckwith dog? *A.* There would not."

On cross-examination the witness further testified:

"*Question.* In your opinion, would there not be invention in taking the single spoon hook-dog and duplicating it, so as to work two or more of them down by the stroke of one lever, and having them connected together? *Answer.* It would be a new mechanical construction,—combination of old parts.

"*Q.* And it would require invention to so combine them, would it not? *A.* To a certain extent, yes.

* * * * * * * * *

"*Q.* Now, leaving out the question of principle, would it not take invention to make this new combination, conceding all the elements that enter into the combination, to be old, as shown in the Beckwith patent? *A.* It would be new mechanical combination or construction, and of itself would be an invention.

"*Q.* Now, assuming that there was a dog in existence, and in public use, similar to the dog shown by the Morse model, Exhibit No. 1, when the Beckwith patent was granted, would it not take invention, in your opinion, to have constructed the Beckwith patent and dog? *A.* To a certain extent, yes; in forming the form and making the connections there, it is mechanical construction or invention.

"*Q.* Now, while the results attained may be the same, isn't the manner of attaining these results, in your opinion, such as would require invention? *A.* I think invention of the connections there would be good.

"*Q.* You are speaking of the Beckwith invention? *A.* Yes. I am speaking of that; it is constructing a patent. I think the claims are good.

"*Q.* Even conceding the Morse dog to have been in prior use? *A.* Yes; they are constructed different, but the object sought is the same; the object is to hold the log firmly against the jack-head."

The testimony of these witnesses has been thus quoted from at some length, to show that, even admitting the Morse dog to have been a successfully-working device, and to have been in public use prior to the Beckwith patent, it is by no means clear that the Beckwith dog was not patentable. Although two devices, which consist of a combination of old parts, may attain in their operation substantially the same results, yet the mechanical construction of the two may be so different and may be so far novel that each may be patentable. Whatever the conclusion may be upon this point with reference to the Morse and the Beckwith devices, I am of the opinion, after a very careful consideration of all the evidence, that the Morse dog, having teeth working both ways, and which was put in Ruddock & Co.'s mill in 1869, was a failure, and was so incapable of practical and successful use that it must be regarded as an abandoned experiment. It seems to me that this is clearly shown by the testimony of the witnesses, who testify to its existence and attempted use. The testimony is so voluminous that I shall not attempt to review or analyze it.

Witnesses for the defendants, who were employed in the mills in Winneconne in 1869, testify that as the Morse dog was constructed, the upward-moving hooks crowded the log off, and that this was a serious objection to the utility of the device. Morse, the inventor, himself says that complaint was made that the dog was not satisfactory; that, in operation, it crowded the log off on account of the pitch at which the teeth advanced from the face of the knee. When asked how the difficulty was obviated, Morse answered:

"By taking off some of the under dogs.

"*Question.* Didn't they push it (the cant) off? *Answer.* The less you had of them the less it would lift the cant, and the top dogs penetrated the best.

"*Q.* Did you succeed in avoiding that difficulty? *A.* No, sir.

"*Q.* It always pushed it off? *A.* I don't think it has ever been a success.

"*Q.* You never succeeded? *A.* No, sir; the dogs that come out on a slanting line don't do it, and none have ever been made that would do it."

Paige, Morse's partner, testifies:

"There was some complaint of their crowding away the cant or log from the jack-head.

"*Question.* Didn't work satisfactorily? *Answer.* Not entirely.

"*Q.* Is that a serious objection? *A.* Well, yes; yes, sir.

"*Q.* And you didn't overcome it in the Morse dog? *A.* Well, we didn't try to very much.

"*Q.* Give it up? *A.* It chanced to be just at that time there was no very large amount of sale of anything but a cheap nature of machinery, and the old-fashioned dog that was driven into a log seemed to answer the purpose for most everybody.

"*Q.* And after making these experiments you gave up manufacturing dogs of that kind? *A.* Well, we manufactured a number of dogs, I think those of the down movement,—I won't say how many,—and we sold our head-blocks without any dog.

"*Q.* Then the experiment of having dogs work both ways proved abortive, did it? *A.* Well, pretty nearly so.

"*Q.* Didn't it to such an extent that you quit making them? *A.* Yes; we quit making them with the double movement.

"*Q.* Because it didn't prove successful? *A.* We discovered that the upward movement tended to carry off the log, and the downward movement didn't."

The same witness further testified that the reason why he knows that the teeth in the dog sold to Ruddock & Co. moved both ways is that they did not work, and that Morse & Co. did not get their pay for the dog, and discontinued the manufacture of dogs with double sets of teeth.

Further testimony of this witness, by question and answer, is as follows:

"*Question.* Did John Morse know that that set sent to Ruddock & Co. was a failure? *Answer.* Well, I don't think he hardly called them a failure; I don't think that he did, because he contended there was no necessity of an up dog. * * * During all the time he and I were in company he claimed that, but was willing to try an up-and-down dog.

"*Q.* Just as an experiment? *A.* Yes, sir.

"*Q.* And after he made that trial and failed he didn't try any more, did he? *A.* Well, I don't recollect that he did.

"*Q.* You never heard of any more being made, did you, while you were with him? *A.* No; I don't think that we ever made only that one set with both movements; that is my recollection."

Other testimony in the case is to the effect that this dog, as it was constructed by Morse, was used in Ruddock & Co.'s mill but a very short time; that in order to continue its use the upward-moving teeth were taken off, and that thereafter, and until it was taken out entirely to give place to the Dann dog, it was used with only the downward-working teeth; and when all the testimony on the subject is considered, in connection with the facts that the only set of dogs with teeth working in opposite directions that Morse sold for public use was that which he put into Ruddock & Co.'s mill, that he never attempted to obtain a patent, but abandoned the manufacture of dogs thus constructed after the trial at Ruddock & Co.'s mill,—the conclusion seems unavoidable that his device now claimed to have anticipated Beckwith was but an abortive and abandoned experiment.

The law on this subject is well settled. In *Howe* v. *Underwood*, 1 Fisher, 166, Judge Sprague said:

"A machine, in order to anticipate any subsequent discovery, must be perfected; that is, made so as to be of practical utility, and not to be merely experimental and end in experiment. The terms 'being an experiment' and 'ending in experiment' are used in contradistinction to the term 'being of practical utility.' Until of practical utility the public attention is not called to the invention. It does not give to the public that which the public lays hold of as beneficial. If it is an experiment only, and ends in experiment, and is laid aside as unsuccessful, however far it may have been advanced, however many ideas may have been combined in it, which, subsequently taken up, might, when perfected, make a good machine, still, not being perfected, it has not come before the public as a useful thing, and is therefore entirely inoperative as affecting the rights of those coming afterwards. This is important to be understood, because the idea has been carried all along that if a prior inventor has gone to a certain extent, although he falls short of making a complete machine practically useful, those who come after him have no right to secure to themselves the advantage of their invention. That is not the law."

In *Coffin* v. *Ogden*, 18 Wall. 120, Mr. Justice Swayne, in delivering the opinion of the court, said:

"The invention or discovery relied upon as a defense must have been complete, and capable of producing the result sought to be accomplished, and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him."

Among the many other cases which support the proposition that in order to defeat a patent on the ground of prior use of the patented invention it must appear that the anticipating device was embodied in distinct form, and was so far perfected as to have been capable of practical use, it is sufficient to cite *Union Sugar Refinery* v. *Matthiessen*, 2 Fisher, 625; *Sayles* v. *C. & N. W. R. Co.* 3 Biss. 52; *Washburn & Moen Manuf'g Co.* v. *Haish*, 4 Fed. Rep. 904.

Applying to the facts of this case as they bear on the question under consideration the rule of law laid down in the authorities referred to, there can, I think, be little doubt that the Beckwith patent stands unaffected by the device made by Morse in 1868. It is not an answer to what has been remarked of the Morse dog to say that the Beckwith device was also a failure. The proofs in the case do not show such to be the fact. It was used six years in Webster's mill in Omro. Beckwith obtained a patent. The presumptions of the law are in favor of the patent, and of the novelty and utility of his invention. *Geiar* v. *Goetinger*, 1 Bann. & Ard. 555; *Ricketson* v. *Lockwood*, 6 Fisher, 455.

On the argument, it was claimed, by counsel for the complainant, that the defendants had no right to show, if they could, that they were not infringing the Beckwith patent. This was claimed on the ground that infringement is not denied in the answer. There may be some doubt whether the answers put in issue, in proper form, the question of infringement. But by a stipulation on file entered into between counsel when the taking of testimony was begun, it was expressly agreed that the defendants should be at liberty to disprove infringement if they could, and, in the face of this stipulation, the court will not entertain any objection to the right of the defendants to urge that they do not infringe. The defendants, some or all of them, are using what is known as the Gowen dog, of which William Gowen is the patentee, under letters patent No. 233,409, issued October 19, 1880. As invented by Gowen, and as described in the specifications forming part of the letters patent, this is a device having only downward-working chisel-shaped teeth; and, without entering upon a detailed description of the mechanism, it is sufficient to say that, as constructed by the

inventor and as described in the patent, it does not infringe the Beckwith dog. But the defendants, or some of them, have added to the Gowen dog a lower upward-moving hook, which is of the form of that in the Beckwith dog, and is placed substantially in the same position as that of the upward-working hook in the Beckwith device. The added hook in the Gowen dog is connected with the lever by an arrangement of movable bars or joints, that are very clearly the equivalent of those employed in the Beckwith dog; so that by one stroke of the lever this hook, with the upward movement and the series of teeth having a downward movement, are thrown out or drawn in. While, therefore, the Gowen dog, as constructed by the inventor and as described in the patent, does not infringe the Beckwith, I am of the opinion that the addition of the lower upward-moving hook constitutes infringement, and that the defendants, or such of them as use that hook on the Gowen dog, should be restrained from so doing.

There was put in evidence what is known as the Dann dog, which is described in letters patent No. 134,653, issued January 7, 1873, and in two reissues, one granted September 29, 1874, numbered 6,071, and the other granted November 9, 1875, numbered 6,733. Testimony has been taken on the question of priority of invention as between Beckwith and Dann. I think it is shown by testimony that is competent, within the decision of the supreme court in the case of *Phila. & Trenton R. Co.* v. *Stimpson*, 14 Pet. 448, that, as the inventor of a saw-mill dog, Beckwith was in advance of Dann. Upon the testimony of Morse I think the date of Beckwith's invention must be fixed as early as 1869, while Dann's invention must, in the light of the evidence, be held to have been perfected in 1870. Counsel for complainant admits in his brief that these suits were brought to restrain the use of the Gowen dog, and hence that no proof was made of any other infringing dog in opening complainant's case. But as the proofs on the part of the defendants developed the fact that some of the defendants were using the Dann dog, and as the complainant claims that the Dann dog infringes the Beckwith, counsel asked on the argument that, should the court find such infringement, a decree might be entered accordingly. As the record stands, I am not sure that it is essential or proper for the court now to determine whether the dog constructed by Dann infringes the Beckwith patent. I have given the question of infringement some consideration, and am inclined to the opinion that the mechanical construction of the two devices is so different that the Dann dog should not be regarded as an infringement. My mind tends strongly to that conclusion for

reasons stated in the opinion heretofore rendered in *Neacy* v. *Allis, ante,* 874, in which case it was sought by the assignee of the Dann patent to hold the complainant, Allis, as assignee of the Beckwith patent and manufacturer of the Beckwith dog, liable as an infringer. But this question, whether the Dann dog infringes the Beckwith, was not argued in the cases at bar as fully as its importance would seem to demand; and if it is deemed a question to be necessarily determined here, I shall reserve it for further argument and consideration, and in that case, as the question may be deemed a close one, and is in my judgment of great importance, I shall direct that it be argued before the full bench.

WHITTLESEY and others *v.* AMES and others, and two other cases.

(*Circuit Court, N. D. Illinois.* January, 1880.)

1. PATENTS FOR INVENTIONS—EXPERIMENTAL DEVICES.
   Evidence of similar devices, merely experimental, will not defeat a patent, though prior in point of time.
2. SAME—NOT TO DEFEAT SUBSEQUENT PATENTS.
   Although prior unsuccessful experiments in part suggested the construction which the patentee adopted and perfected, this fact will not defeat the patent.
3. COMBINATIONS IN REISSUES—USE OF A PART.
   Although the owner of a patent had the right to claim a combination in his reissue, the claim cannot be extended to the sole right to the use of a part of the combination.
4. SAME—PROTECTION OF—SUBSTITUTION OF PARTS.
   The court will so protect a patented combination as not to allow it to be defeated by a mere substitution of parts performing the same functions.

In Equity.

Coburn & Thacher, for complainants.

G. L. Chapin, for defendants.

BLODGETT, D. J. These are bills in equity for damages and injunction for alleged infringement by the defendants in each case of reissued letters patent No. 7,704, dated May 29, 1877, for an improvement in bedstead frames, the original patent having been issued November 30, 1869.

The original specifications describe the invention in the following terms:

"This invention relates to a new frame for single and double bedsteads, which are provided with elastic or flexible sheets for the support of the bed-

ding, or with other suitable bed bottom. The invention consists in the use of slotted or double-inclined end-pieces, in which the ends of the fabric are clamped, and in the employment of longitudinal adjustable standards, in which the said end-pieces are secured. By this arrangement the fabric is securely held, and can be stretched or slackened at will."

The claims in this patent were:

"(1) The inclined double end-bars, *c*, of a bedstead frame, arranged substantially as and for the purpose herein claimed and described.

"(2) The standard, B, arranged longitudinally adjustable on the side-bars of a bedstead frame, to permit the inclined side-bars (end-bars) to be set at a suitable distance apart, as set forth."

In the reissue the owner of the patent, the Woven-wire Mattress Company, was allowed to restate the nature and scope of the invention in the following terms:

"My invention relates to a new frame, which is provided with an elastic or flexible sheet or fabric for the support of the bedding. The frame is made of proper size to be inserted within any ordinary bedstead. My invention consists in the combination of the side-bars and end-bars, with the end-bars elevated above the side-bars in such manner that the elastic fabric, stretched from end-bar to end-bar, can extend the entire width of the frame over the side-bars, and an elastic fabric attached to the end-bars only of the frame; and it also consists in the combination of the side-bars and end-bars of the frame, connected together by standards or corner-irons, B. By this arrangement the fabric is securely held. * * * It will be observed that the purpose of this method of attaching the fabric to the frame is to give to the fabric its greatest elasticity by attaching it at its ends only, and at the same time making it as nearly the full size of the frame as could be well done, while it is substantially free from contact with the frame when used, excepting at its ends, where it is rigidly secured to the end-bars."

The description of the parts and the drawings is the same in the reissue as in the original patent.

Two new claims are allowed in the reissue, as follows:

"(1) The combination of the side-bars and end-bars and elastic-coiled wire fabric, D, attached only to the end-bars, with the end-bars of the frame elevated above the side-bars, so that the fabric will be suspended above the side-bars from end to end of the frame.

"(2) The combination, in a removable bed bottom or bedstead frame, of the side-bars, A, standards or corner-pieces, B, end-bars, C, and elastic fabric, D, combined and arranged substantially as and for the purposes specified."

The third and fourth claims are the same in the reissue as in the original patent.

The defendants in these cases are charged with an infringement of the first and second claims under the reissue. No dispute is made as to the complainants' title.

The defenses set up are—

(1) That Farnham was not the original and first inventor of the device covered by the original patent and reissue; (2) that the two new claims allowed in the reissue are not sustainable under the specification and drawings of the original patent, and hence the reissue is void as to those claims; (3) that the defendants do not infringe the Farnham patent, either original or reissue.

It will be noticed that the original Farnham patent only covered the peculiar "inclined double end-bars," as they were arranged and shown in the mechanism described, and the standards, B,—that is, the frame of a bed bottom or bedstead with end-bars made double and inclined, as there shown, and performing the functions shown, and the standard, B, longitudinally adjustable on the side-bars, as and for the purpose shown; and the peculiar characteristic of the frame constructed under the original specifications was that the fabric which was to be used therewith was to be fastened only to the ends of the frame. This peculiarity is not stated in words, but it is manifested from the organization of the mechanism and the relation which the parts bear to each other. No language describing this feature of the mechanism is necessary. It is obvious from inspection alone that the intention of the inventor was to make a bed bottom in which the fabric should be attached only to the ends of the frame, so that the strain upon the fabric by the weight of the occupant or occupants of the bed would be lengthwise of the bed, and not crosswise.

By the reissue a claim is asserted to the combination of these parts and the elastic coiled-wire fabric—that is, the inclined double end-bars and the adjustable standard for holding those end-bars above the side-bars, and the elastic coiled-wire fabric, D, so arranged that the fabric will be suspended above the side-bars from end to end of the frame; while it is insisted on the part of the defendants that the claim is invalid—*First,* because no such combination is shown in the original specification and drawing of the Farnham patent; *second,* for want of novelty in the original device.

As I have already said, it is obvious that Farnham intended that the "elastic or flexible sheet" for the support of the bedding "should be attached only to the ends of the frame." He does not state of what material the "elastic or flexible sheets" were to be made. He does not use the words "elastic coiled-wire fabric" in any part of his specification, nor any terms which would show that he meant that kind of fabric to be used. Any "elastic or flexible" fabric is allowed by the language of the specification; but in the drawing the fabric, D, is shown to be made of coiled wire. It is objected that the draw-

ing shows only a coil, and not an interlocked connected series of coils. But it must be remarked that figure 1 in the drawing is a side view only, while the description in the specification called it a "fabric." Clearly a single coil, or any number of coils not interlaced with each other, would not be a fabric. I think there is enough in the drawing and specification, when taken together, to show that the inventor meant to describe by the word "fabric, D," a fabric made of coiled wire, and he had the right to claim a patent on the combination of these parts if the combination was new.

This brings us to the most seriously contested portions of this case under the proof.

It is conceded that, so far as the inventor is concerned, the woven-wire fabric was old. He did not invent it, and does not claim to have done so. But it is insisted on the part of the complainants that by bringing it into combination with this peculiar frame Farnham was the first to utilize it for domestic purposes as a bed bottom, and make of it a bed bottom acceptable to the public, and which has gone into general use. It appears from the proof that some time prior to January 1, 1969, the Woven-wire Mattress Company, of Hartford, Connecticut, had attempted the manufacture of bed bottoms by the use of a fabric made by weaving or interlocking coiled wires.

They at first made the frames upon which the fabric was stretched of iron, and the mechanism or organization consisted of the iron frame, to which the fabric was in some manner fastened at the ends and sides, so as to make a wire mattress upon which the bedding should rest. This device was unsuccessful. The mattresses so made were not acceptable, and there was no sale or demand for them. About the first of January, 1869, the company employed Mr. Charles E. Billings, of Hartford, to make experiments in getting up a more satisfactory device for utilizing the woven-wire fabric as a bed bottom. During the time he was so employed Mr. Billings was to some extent assisted by Mr. Henry E. Bissell, who was at that time secretary of the company. Mr. Billings was engaged by the company four or five weeks,—say until about February 6th,—and within that time he made four wooden bed-bottom frames, into which the woven-wire fabric was fastened. The general plan of all these Billings frames was that of a box of the width and length required for a bed bottom, into which the woven-wire fabric was fixed in the frame by various devices adopted for attaching it to the end-board. Some of them may have been attached to the sides; but I think the balance of proof shows that two, at least, of these frames had end-boards or end-

pieces higher than the side-pieces, and the fabric was suspended in the frame by attaching it only to the end-pieces. These were all experimental frames. None of them were offered for sale, and all but one were dismembered during the summer of 1869. One of these frames was sold, in the summer of 1869, to a Mr. Prutting, whose testimony is in this record, and the frame itself is produced as an exhibit. It is a box frame, with the sides and ends of equal height, and bears evidence that the fabric was fastened at the ends and sides. Mr. Billings closed his experiments in the forepart of February without producing a frame which was satisfactory to the company, and soon after his discharge Mr. John N. Farnham, to whom the patent in question was granted, was engaged by the company. His statement of the purpose of his employment is given in his own words, in answer to questions 10 and 11 of his deposition:

"*Question.* Who hired you? *Answer.* Stiles D. Sperry. He said: 'We have got a mattress up there that we have been trying to fix and make salable. They can't make it go to suit them.' Wished me to go up and see. I went up there and looked at everything there was in the shop. He wanted to know if I thought it could be made any way, or if I thought it would pay. I told him I presumed it might. He gave me the key to the shop, and told me to go to work then and see what I could do."

Within a few days after being set at work in the manner described, Mr. Farnham made the patterns for the standards, B, and during the month of March he made a bed frame in all respects like that described in his patent. The idea of this frame, substantially as it was afterwards constructed, seems to have been conceived by Mr. Farnham very soon after he commenced work in the shop. He states that for the first three or four days he was engaged in weaving a fabric. Then he made the patterns for the cast-iron standards, B, which were the same as described in his patent; and before he had made the frame he explained to Mr. Sperry and Dr. Hawley, members of the company, how he proposed to make it, and made the frame in the manner explained, (interrogatories 127 to 130,) showing that his completed frame was only the mechanical embodiment of the idea he first formed.

At the time Mr. Farnham entered the shop the four frames made by Mr. Billings were there, and he undoubtedly had the benefit of whatever could be learned from what had been done by his predecessors in the direction in which he was to apply his efforts, which was to make a salable frame or device on which the woven-wire fabric

could be made available for the purposes of a bed; but I think it is abundantly established by the proof that the desired end had not been attained prior to his employment. What Billings and Bissell may have done may have suggested to Farnham the device he finally adopted; but this does not invalidate his patent. He seems to have been the first to achieve success, and that what these others had done should not defeat his patent is shown by the following authorities:

In *Galloway* v. *Bleaden*, 1 Webs. Pat. Cas. 521, the patent being for an improvement on the floats of paddle-wheels, Chief Justice Tindal says, page 529:

"That there had been many experiments made upon the same line, and almost tending, if not entirely, to the same result, is clear from the testimony you have heard, and that these were experiments known to various persons; but if they rested in experiment only, and had not attained the object for which the patent was taken out—mere experiment afterwards supposed by the parties to be fruitless, and abandoned because they had not brought it to a complete result—that will not prevent a more successful competitor, who may avail himself, so far as his predecessors have gone, of their discoveries, and add the last link of improvements in bringing it to perfection. If that is the case, the plaintiffs are entitled to your verdict."

In *Goodyear* v. *Day*, 2 Wall. Jr. 283, Mr. Justice Grier says, page 298:

"It is usually the case when any valuable discovery is made, or any new machine of great utility has been invented, that the attention of the public has been turned to the subject previously, and that many persons have been making researches and experiments. * * * Many experiments may have been unsuccessfully tried, coming very near, yet falling short of, the desired result. They have produced nothing beneficial. The invention, when perfected, may truly be said to be the culminating point of many experiments, not only of the inventor, but by many others. He may have profited indirectly by the unsuccessful experiments and failures of others, but it gives them no right to claim a share of the honor or the profit of the successful inventor."

In *Parker* v. *Stiles*, 5 McLean, 44; see 1 Fisher, Pat. 623, *Leavitt*, J., says, (page 337, Fisher:)

"Proof of the previous use of a structure bearing some resemblance in some respects to the improvement of the plaintiff, and which might have been suggestive of ideas, or have led to experiments, resulting in the discovery and completion of his improvement, will not invalidate his claim under his patent."

In *Whitely* v. *Swayne*, 7 Wall. 685; S. C. 1 Whitman, Pat. Cas. 208, *Nelson*, J., delivering the opinion of the supreme court, says:

"The plaintiff's title rests upon a patent for improvements in a machine for harvesting clover and grass seed, which improvements, after a full and fair trial, resulted in unsuccessful experiments, and were finally abandoned. They never went into any useful or practical operation, and nothing more was heard of them from Steadman, (the patentee,) or any other person, for a period of six years. * * * Clearly, if any other person had chosen to take up the subject of the improvements where it was left off by Steadman, he had a right thus to enter upon it, and, if successful, would be entitled to the merit of them as an original inventor."

See, also, *Union Paper Bag Co.* v. *Pultz & Walkley Co:* 15 O. G. 423.

And this brings me to consider what was done by another experimenter in the same field.

It appears from the proof that about the same time the company employed Mr. Farnham, and gave him the key to its shop, with directions to "go to work and see what he could do," a Mr. E. W. Ellsworth, who seems to have been to some extent a successful inventor of other mechanical devices, was employed "to get up a more portable frame" than the iron one they had been using. Mr. Ellsworth took an unframed fabric to his house, and some time (as he testifies from recollection, without *data*) in March he produced and took to the shop of the company a mattress frame which, like those of his predecessors, Billings and Farnham, was fastened only to the end rails. But I consider it quite clear from the proof—*First*, that Ellsworth's frame was not produced until some time after Farnham's; *second*, that it was not a practicable frame,—not a portable or salable frame,—such as wanted for the trade.

I come, then, to the conclusion that there is nothing in the proof, as to the frames made by Billings and Ellsworth, which anticipates the Farnham frame for want of novelty. He undoubtedly took up the experiment where Mr. Billings left off, and it may be presumed that he profited by what had been done up to that time. The problem all were seeking to solve was to obtain a cheap, portable frame upon which the woven-wire fabric could be stretched, so as to make a comfortable bed bottom, and Farnham seems to have hit the mark at once. Billings had not attained the desired end, and what Ellsworth did was after Farnham. It must be remembered that all these efforts were made in one common interest. The mattress company was the party for whom all were working, and it cannot be supposed that this company would have employed both Farnham and Ellsworth to continue experiments if Billings had attained success.

I will here remark that one difficulty all of them seem to have encountered was in fastening the fabric at the end. The fabric, from its elasticity and strength, would seem to be well adapted to the purposes for which this company was trying to utilize it; yet the difficulty they all met with, and the one they were all trying to surmount, was to make, in the first place, a cheap, light, portable frame, and, in the second place, to secure these ends so they would be firmly held, and at the same time not ragged and rough, and not make an expensive fastening. Ellsworth devised a series of hooks interlocked to the wire fabric, which were, to say nothing else of them, exceedingly awkward and unsightly. Mr. Billings' efforts in that direction were certainly not successful. The fastening which he devised was ragged and liable to tear the clothing, if not to be uncomfortable to the occupants of the bed; and whatever Billings did produce that approximated towards success, seems to have been partly the suggestion of Sperry, because that which was nearest to success was the bottom, which was fastened into the frame with the hook-screws, which were hooked into the iron bar clamped across the webbing, and then fastened into the end pieces with screws on the outside, so as to tighten it up and give the requisite tension to the fabric. The difficulty all encountered up to Farnham was to fasten the ends securely and cheaply.

If the frame produced by Mr. Ellsworth had commended itself as better or more practical than Farnham's, it would undoubtedly have been adopted, because this company, having paid these men for the purpose, would undoubtedly have made arrangements in some manner for the control of the patent, if one was to be issued, for whatever device they should succeed in producing. But Ellsworth not only came later into the field, but he failed to produce a frame which met the demand. None of the manufacturers have adopted the Ellsworth frame, so far as the proofs in this case show.

Mention should also be made of the fact that in the first bed bottom made by Farnham the fabric was fastened to the side rails; but it is clear, from the evidence, that the skirt or curtain which fell from the line of tension between the tops of the end rails down to the side rails was intended only for a finish, to fill up what would otherwise be a vacant space between the fabric and the side rails; it being apparent, as I have already said, that the idea of the Farnham device was to fasten the fabric into the frame, and for all purposes of supporting the weight it was to bear only by the end attachment; and the curtain for fill-

ing the space between the side rail and line of tension was undoubtedly soon abandoned as of no practical utility.

Nor do I find the principle of the Farnham frame in any of the devices referred to in the answers, to-wit, the Dye, Wegman, Rouillion, and Franklin patents, nor in those shown in the proof, outside of the references in the answer, for the purpose of showing the state of the art, such as the Walbridge, Boone & Bell, Payne, Schligman, Merriweather, and Hughes patents. The steam-boat bunk bottom shown in the testimony of Robert E. Campbell, and the Dreusike and Dye patents, must be considered as operating to limit the claim of this patent to the special devices shown.

The Campbell bunk bottom was made of canvas stretched from end rail to end rail, without outside fastenings; and, although canvass may not come within the definition of an "elastic sheet," there can be no doubt that it is a "flexible sheet."

The Dreusike bed was made of coiled wire fabric; and while provision was made for the side fastenings, I think there can be no doubt he intended that the strain of supporting the weight to be borne by the bed was to come upon the end fastenings.

In the light of this evidence I think that while these first two claims in the reissued patent may be sustained for the combination of the side rails, standards, end rails, and elastic coiled-wire fabric, yet it must be limited to the peculiar kind of side rails, standards, and end rails shown, or their manifest equivalents. Side rails, end rails, and elastic coiled-wire fabric were old; but the inclined end rail, made in two parts for the purpose of clamping the fabric and holding it suspended by means of the inclination between the points of attachments, seems, so far as the proof of these cases shows, to have been the invention of Farnham. So, too, his "standards" or corner pieces, B, are not shown to have been anticipated by any prior user or inventor.

I think, therefore, that the owner of the Farnham patent had the right to claim, by the reissue, the combination of the elastic coiled-wire fabric with these parts, whether they were new or old; but he had not the right to claim broadly for Farnham the sole right of suspending the fabric of which the bed bottom is made from "end to end of the frame," because Campbell, Dye, and Dreusike had suspended the flexible sheets of a bed bottom from end to end of the frame before Farnham made his frame. Of course the court will so far protect the combination patented as not to allow it to be defeated by a mere substitution of something for one of the parts which performs

the same, or substantially the same, function, and no other, as the part for which it is substituted.

With these views as to the construction to be given to this patent, I will now examine the evidence as to infringement in each separate case, beginning with that of Ames and Frost.

The mattress shown in the proof in this case (complainants' Exhibit 1) shows a frame with the end rails raised above the side rails, and held in place by corner irons or standards. These standards perform the same function as the standards, B, in complainants' patent. The elements of adjustability on the side rails by means of slots are not shown, but the standards are made adjustable on the side rail by means of a set-screw.

So, too, the recesses in the standards for holding the ends of the end rail are not inclined, but some inclination of the end rail is obtained by purposely, as it seems to me, making the end rail smaller than the recess, so that the tension of the fabric will tip or incline it sufficiently for all practical purposes. Probably some inclination to the end rail is, at least in theory, desirable in this kind of bed, so that the fabric will swing clear from its points of attachment at the ends; but it occurs to me that this is not a feature to which the ordinary buyer would attach much importance.

I conclude, therefore, that all the substantial characteristics of the complainants' frame are used in the Ames and Frost frame. They have standards like Farnham's and an inclined end rail practically like his. Their end rail is double, although they claim the second piece is only used for a finish, and is not intended to clamp and hold the fabric to the end rail. But I think this is a mere subterfuge. It is obvious that if the ends of the fabric are bent over the corner of the end rail, and the second piece, or cleat, fastened to the first piece of the rail over these bent ends, it must aid in holding the fabric to the frame. It makes what sailors call a "bight," and must re-enforce the other fastenings. I have no doubt, therefore, that these defendants must be held to infringe the reissued patent.

In the Zimmerman and Dean frames (complainants' Exhibit 1, Zimmerman, and complainants' Exhibit 1, Dean) I find the Farnham frame in all its distinctive parts, standard B, double end pieces inclined, and, in fact, all the parts covered by the Farnham claims, with hardly an effort to evade or avoid them.

The cases will be referred to a master to take proof and report as to damages.

See, also, *Woven-wire Mattress Co.* v. *Whittlesey*, 8 Biss. 23.

EVANS *v.* KELLY and others.

(Circuit Court, N. D. Illinois. January, 1880.)

PATENTS FOR INVENTIONS—HOW CONSTRUED.

A patent claim must be construed in the light of the specifications, and where the specifications describe the entire article, parts of the description cannot be separately considered, to show an infringement of one of the parts.

In Equity.

Lawrence, Campbell & Lawrence, for complainant.

Charles W. Griggs, for defendants.

DRUMMOND, C. J. I do not think this case is so clear as to warrant the court in allowing the injunction to issue. As I understand the claim set forth in the plaintiff's patent, it is for a covering made of a particular material, being a non-conductor of heat, in sections, so as to be easily put on and off any drum, pipe, steam generator, etc., in the way described. There is a particular description given of the manner in which this covering is applied around the steam-pipe. It is not clear that there is claimed absolutely the mere construction of a covering of a non-conducting material made in sections, so as to be put on and taken off the steam-pipe, drum, etc., easily; but in the particular way which is described. It is not necessary for me to decide here whether a claim for that in itself would be patentable, because, as it seems to me, the claim which is set up here is for the covering of the material, put on in the way described. This is the claim:

"The shells or tiles, A, A, constructed and applied to steam-pipes, drums, or other heated vessels, so as to produce a non-conducting covering, either with or without the confined air space between the said shells and the vessel covered thereby, substantially as and for the purpose hereinbefore set forth."

I admit, in order to properly construe the claim, we have to take the description given in the specifications of the subject-matter of the claim, and apply it to the description therein contained. Adopting that rule here, it seems to me we cannot sever the claim from the description contained in the specifications, and that we must assume that it is co-extensive with that description. If it was intended to claim parts of that which is described in the specifications as a whole, it should have been so stated; but where it claims the whole as described, we cannot sever one part of the description from another; but we must take it in its totality, and apply the description to the claim.

That is the view which now occurs to me in reference to this patent, and it is material for this reason; that while the patent may be sustainable as described in the specifications, and as claimed, it might not be if separated into its various parts; and if we construe the claim in that way there might be so much doubt that I do not think I ought to grant an injunction. Whether the patent can be sustained, and whether, with a more liberal construction, it can be said that there is an infringement by the defendant of the claim set forth in the patent, is the question.

I give these views now, not that they will be absolutely binding upon the court when the case comes to final hearing; but only for the purpose of showing that it is not so free from doubt that the court ought, under the circumstances, to issue an injunction. I think in all cases it ought to be clear to the mind of the court before an injunction is issued.

THE BURSWELL.

(District Court, D. Maryland. October 30, 1882.)

SHIPPING—STOWAGE OF CAUSTIC SODA AND COTTON TIES.

It appeared that caustic soda in iron drums is customarily carried in general cargoes with iron cotton ties, and that such drums are strong, durable, and air-tight, and that breakage is infrequent; and it appeared that on the voyage in question they were safely stowed and secured, but were broken in consequence of violent and continuous storms. It was contended that it was negligence to have stowed the cotton ties below the caustic soda, because the injurious result of the caustic soda falling down upon the cotton ties, if the drums should break, was well known.

Held, that under the circumstances of this case the negligence had not been proved.

In Admiralty.

Libel to recover damage to cotton ties alleged to have resulted from improper stowage.

Marshall & Fisher, for libelants.

John H. Thomas, for respondents.

MORRIS, D. J. The facts as I find them are as follows:

The libelants, Beard & Co., shipped in good order on the British steam-ship Burswell 21,600 bundles of iron cotton ties, (weighing over 500 tons,) to be carried from Liverpool to New Orleans. The steam-ship sailed from Liverpool on the thirteenth of May, 1881, and beginning with the next day encountered on the voyage a succession of storms, with almost continuous gales and heavy seas,

for 10 days. Her after steering wheel was carried away, her starboard quarter boat was smashed, the engine-house and other wood-work on deck was started, her rail was rolled under, large bodies of water were shipped on deck, and the ship rolled and labored heavily. This continued from the fourteenth to the twentieth, after which the rough weather abated, and the ship arrived in New Orleans on June 10th. When the ship arrived in New Orleans, protest was noted in due form by the master, and when the cargo was discharged it was found that about 3,000 bundles of the cotton ties were greatly damaged by coming in contact with caustic soda.

The cargo was a general cargo of miscellaneous merchandise, and those of the cotton ties which were damaged were stowed in the hold under the second hatch. The cargo was stowed by a regular professional stevedore at Liverpool, and in the compartment under the second hatch I understood the goods to have been placed as follows: A quantity of scrap iron occupied more than half of the space of the hold. It was piled against the after bulk-head, the top of the pile reaching to the between-deck and sloping forward. It covered at the bottom about two-thirds of the distance from the after towards the forward bulk-head, and a portion of the forward slope of the pile was leveled to form a platform to place other goods upon. The bundles of cotton ties, which were six or seven feet in length, were placed lengthwise with the ship on the bottom, between the forward end of the bottom of the pile of scrap iron and the forward bulk-head. Resting on the leveled part of the pile of scrap iron, and resting on the cotton ties, and extending up against the forward bulk-head, were placed iron boiler-tubes, about three inches in diameter and twenty feet in length, forming a level platform, and on this platform boards were laid, making a sort of deck. On these boards were placed the one or two tiers of drums of caustic soda which caused the damage. The drums were laid on their sides lengthwise, and the tiers extended from side to side of the ship, and were chocked with wood and with scrap iron. The after ends were against the pile of scrap iron, which was trimmed up against them, and the forward ends were against two tiers of crates of earthenware, which filled up the space between them and the forward bulk-head. Boards were laid over the drums, and the rest of the hold was filled mostly with crates of earthenware and some tin.

On discharging the cargo it was found that some 15 of these drums of caustic soda were broken and their contents out, the platform on which they had rested was disarranged and the remainder of the drums were in great disorder. The contents of the broken drums had got down among the cotton ties and had greatly injured them. The drums in which the caustic soda was shipped are cylinders of sheet iron with sheet-iron heads, and intended to be air-tight. They are about 28 inches long and 18 inches in diameter. The molten caustic soda is poured into them through a hole in one of the heads about two inches in diameter, which is then closed tightly by screwing down an iron cap. When the contents have cooled, it becomes a hard, solid mass, similar to gypsum, which cannot be gotten out without destroying the drum. The caustic soda, when it comes in contact with the air by the breaking of the drums, gradually deliquesces, but it does not leak or sift out. The weight of each package is between 600 and 700 pounds, but the iron cylinders are suffi-

ciently strong to carry the contents with but little risk of breakage, so that it is a rare occurrence to find a broken drum at the end of any ordinary Atlantic voyage. The bill of lading contains the usual exemptions from damages from perils of the sea, breakage, or rust, and from damage from other goods, dangerous or otherwise, by contact, leakage, explosion, or otherwise.

From the pleadings and evidence it is to be presumed that the nature of the contents of the drums was known to the agents of the ship at Liverpool. Caustic soda in iron drums is a well-known article of commerce constantly shipped from that port in general cargoes, and it is not denied that the agents and officers of the ship knew exactly what it was they were taking on board. The destructive character of that chemical being well known, and the damage complained of having arisen from its contact with the cotton ties, the sole question on which the case depends is one of stowage. The manner in which the drums were placed and chocked is detailed in the evidence of the first officer of the steam-ship, under whose supervision the cargo was stowed by the stevedore at Liverpool, and it does not appear to me that there was anything inherently insecure in the manner in which the drums were placed and secured. The ship encountered storms of very unusual duration and severity, which for 10 days caused her to roll and labor to an extent which might well shift some portion of the cargo, although stowed with all the skill and care which experience could suggest. I am satisfied that the tiers of drums were well stowed, and that their breaking was due to the extraordinary rolling of the ship. Being laid in tiers across the ship, when she rolled to such an extent as to submerge her rail the whole weight of all the drums in the tier was brought down upon those which were against the submerged side, and this being repeated as the ship rolled from side to side, it is easy to see how they may have been crushed.

The libelants, however, contend that as it was known to the agents of the ship that if by any chance the caustic soda escaped, it would be destructive to the cotton ties if it came in contact with them, the caustic soda should have been placed in a different part of the ship, or, if placed in the same hold, it should have been placed beneath and not above the cotton ties, in which case it would not have fallen down upon and sifted through them, and the damage would in all probability have been much less. With the evidence before me of the tight and durable character of the iron drums in which the caustic soda was encased, and of the infrequency of their breaking, I do not see that it was want of proper prudence and foresight to have placed them in the same hold with the cotton ties. These iron drums are

altogether different from the light, wooden casks in which soda-ash and bleaching powders are packed for shipment, and from which fumes escape and dust sifts out to the injury of other cargo without any stress of weather. *Mainwaring* v. *Bark Carrie Delap*, 1 FED. REP. 874; *Hamilton* v. *Bark Kate Irving*, 5 FED. REP. 630; *The St. Patrick*, 7 FED. REP. 125. These drums are said to be durable, strong, and practically air-tight, the contents are solid and serve to strengthen and preserve them from injury, and they would seem to make as perfect a package of merchandise for safe shipment as could be devised.

The only remaining question, therefore, is, should the cotton ties or the caustic soda have been placed uppermost, and was it want of reasonable skill and attention to have placed the drums uppermost, as they were placed, knowing the damage that must come to the cotton ties if they were broken? On this point the evidence before me is meager, and a careful consideration of it, and of all the facts, as I understand them, has not convinced me that such stowage was negligence, or that the ship is answerable for the damage that ensued. In such a case as this, where a loss occurs from a peril of the sea, if it is contended that the damage might have been avoided by skill and negligence, the burden is on the party affirming the negligence to make it clearly appear. It is not sufficient if it is left doubtful. *Clark* v. *Barnwell*, 12 How. 280. The testimony which is most directly to this point is that of the witness Umbaugh, the head stevedore, in the port of Baltimore, of the Allen and the Bremen steamship lines. His experience of caustic soda is derived from discharging the ships of those lines, which, he states, constantly bring caustic soda to this port as part of general cargoes. He states that he always finds it put on the bottom of the ship, and by itself, and divided off from other cargo by dunnage of wood. That the drums are usually placed three or four tiers high, with a platform of wood on top, and light cargo on the platform; that the cargo put on top must not be too heavy, as it may burst the drums. In his testimony he seems to fall into some confusion as to the nature of caustic soda, which he says is a liquid which always to some extent leaks out of the drums, and which, when exposed to the air, becomes solid. This error leads me to think that he may in some way have confused caustic soda with some other chemical—perhaps with soda-ash or bleaching powders.

It is apparent, however, I think, that to place the drums where they would have very heavy cargo piled on top of them would be attended with risk of their being crushed, and it does not seem at all

improbable that if the 6,000 bundles of cotton ties which were in this hold, and which weighed 150 tons, had been placed above the drums there would have been a greater risk of damage. Possibly, the damage to the cotton ties might have been less, but as the testimony has satisfied me that the drums were reasonably safe from breakage as they were placed and secured, and would not have broken except from perils of the sea, I am disposed to think that all the cargo in that hold was safer than if the drums had been placed under the weight of the cotton ties. Indeed, as I understand the testimony of the first officer, the drums must have rested in greater part upon the scrap iron, and it was the scrap iron which was in greater part, if not altogether, immediately beneath them; so that, except for the violent and continued rolling which broke up the whole tier of drums into disorder, and broke up entirely the platform on which they were placed, the cotton ties would scarcely have been injured; for if only one or two drums had broken, without the platform being broken up, the contents would hardly have penetrated beyond the scrap iron. The cotton ties being of such weight that they could not with safety be placed on top of other cargo, it would appear that they must take the risk necessarily attending their being put on the bottom of the ship, provided the cargo placed above them is such as is customarily carried in a general ship with them, and is stowed with such reasonable skill, attention, and foresight as to be safe and not injurious to them, except under circumstances of extraordinary peril.

Libel dismissed.

BOYD *v.* CLARK.

(*Circuit Court, E. D. Michigan.* June, 1882.)

ADMIRALTY—APPEAL TO CIRCUIT COURT.

Admiralty causes arising upon the lakes, and tried by jury pursuant to Rev. St. § 566, are not reviewable upon writ of error, but may be re-examined upon appeal to the circuit court.

In Admiralty.

This was a suit by a father to recover damages for the death of his minor son, a deck hand on board the steamer Alaska, who was killed by the explosion of a boiler while she was on her regular trip to the Lake Erie islands. Defendant was the owner of the vessel, and was charged with personal negligence in allowing her to run with a de-

fective boiler. The case was tried by a jury pursuant to Rev. St. § 566, which permits the trial of issues of fact by a jury, when either party requires it, "in causes of admiralty and maritime jurisdiction, relating to any matter of contract or tort arising upon or concerning any vessel of 20 tons burden, and upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes, and navigable waters connecting the lakes." The jury returned a verdict for the plaintiff of $400. Respondent settled a bill of exceptions, and sued out a writ of error from the circuit court under Rev. St. § 631, and also took an appeal under section 633. Complainant moved to dismiss the writ of error because the statute did not allow it in cases of this description, and the appeal, because, under the seventh amendment to the constitution of the United States, which provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, no appeal would lie.

W. L. Carpenter and *Alfred Russell,* for libelant.

F. H. Canfield and *G. V. N. Lothrop,* for respondent.

MATTHEWS, Justice. The writ of error must be dismissed. Section 633, in which a writ of error from the circuit to the district court is allowed in civil actions where the matter in dispute exceeds the amount of $50, applies only to the few common-law actions justiciable in the district courts. *U. S.* v. *Wonson,* 1 Gall. 5; *U. S.* v. *Fifteen Hogsheads,* 5 Blatchf. 106; *Jacob* v. *U. S.* 1 Brock. 520. But all cases in equity and admiralty involving over $50 in amount are reviewable, under section 631, upon appeal to the circuit court. The fact that the case was tried by a jury makes no difference in determining the remedy to which the defeated party is entitled. Even if the seventh amendment to the constitution, providing that no fact tried by a jury should be otherwise re-examined, in any court of the United States, than according to common-law, applied to any other than common-law cases, it is silent in respect to appeals upon matters of law. The rulings of the district courts upon questions of law would still be subject to review. Thus, under the act of February 16, 1875, (18 St. 315,) relating to appeals in admiralty to the supreme court, the facts must be found by the circuit court; and in the review by the supreme court in such cases we are limited to the determination of 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. The act further provides that these facts

may be found by the court, or, if the parties consent, by a jury. But I think the provisions regarding trials by jury in the seventh amendment apply only to common-law juries, and that upon appeal the case stands for trial here precisely as if tried by the court. The introductory words of the amendment, "in suits, at common law," indicate very clearly that the jury spoken of in the amendment is a common-law jury.

In *Parsons* v. *Bedford*, 3 Pet. 433, it was held that suits at common law, within the meaning of this amendment, include not merely modes of proceeding known to the common law, but all suits not of equity or admiralty jurisdiction in which legal rights are settled and determined. In delivering the opinion Mr. Justice Story remarked that "it is well known that in civil causes in courts of equity and admiralty juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. * * * In a just sense, the amendment, then, may be well construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." So, in the *Justices* v. *Murray*, 9 Wall. 274, where it was decided that the amendment prohibiting the facts tried by a jury to be otherwise re-examined than according to the rules of the common law applied to facts tried by a jury in a case in a state court, there was no hint that the clause applied to any other than common-law cases. Whether the jury allowed in this class of admiralty cases is anything more than advisory to the district court, as are juries in chancery cases, I do not deem it necessary to express an opinion.

THE C. B. SANFORD.

(*District Court, D. Massachusetts.* October 26 1882.)

TUG—NEGLIGENCE—LOSS OF TOW.

A tug having two tows on long hawsers, in rounding a dangerous island, for not going further to the eastward, and for allowing her hawsers to slacken so that she lost all control over her tow, was in fault and should be condemned for the loss of the tow, which drifted on a reef and sunk.

C. T. Russell and *C. T. Russell, Jr.*, for libelants.

J. C. Dodge and *E. S. Dodge*, for claimants.

NELSON, D. J. Libel filed against the steam-tug C. B. Sanford for alleged unskillful towage of the barge Metropolis. It appeared that

the tug was engaged by the master of the Metropolis, at New York, on the fourteenth of June, 1881, to tow her from Jersey City to Providence. The tug started on the voyage on the afternoon of the same day, with another barge called the Dunderberg, destined for Fall River, first in tow, and the Metropolis, having on board a cargo of 700 tons of coal, second in tow. The hawser of each barge was 90 fathoms in length. On the afternoon of the 15th, the tug with her two tows entered Mount Hope bay, intending to leave the Metropolis at anchor in Bristol harbor while she proceeded with the Dunderberg to Fall River, and afterwards, to return and take the Metropolis up to Providence. In rounding Hog island, which forms the west side of the entrance to Mount Hope bay, the Metropolis struck on a submerged rock known as Hog island reef, which extends out from the south-easterly point of Hog island, and immediately filled and sunk.

The evidence was clear that the effect of making the circuit round the point of Hog island, after passing the light-ship, was to lessen the headway of the tug in the direction in which the tows were proceeding. The hawsers were thus slackened and the control of the tug over the tows lost. The consequence was that the Metropolis, being left without the support of the tug, was driven by the strong ebb-tide which was then running down from Mount Hope bay and Bristol harbor directly upon the shoal. This is the evidence of the master and mate of the Metropolis; and in this they are supported by the master of the Dunderberg, who saw the whole transaction and was called as a witness by the claimants.

The accident would have been avoided if the tug had kept further on her course after passing the light-ship before turning to the northward; or if she had passed the light-ship further to the eastward, where there was plenty of room, and the depth of water was ample; or if she had shortened the hawsers of the tows before making the turn. The tug was bound under the circumstances to take one or the other of these precautions against this accident, and for failing to do so she was in fault and should be condemned.

Interlocutory decree for the libelants.

HUBERT and others *v.* RECKNAGEL and others.

(District Court, S. D. New York. August 26, 1882.)

1. CHARTER-PARTY—SEAWORTHINESS.
   Under the usual covenants of a charter-party that the vessel is "tight, stanch, and strong," the owners are answerable for *latent* as well as visible defects whereby the cargo is damaged.
2. SAME—LATENT DEFECTS—DAMAGE TO CARGO.
   Where a cargo of coffee was damaged through a leak in the deck of a brig 13 years old on a voyage from Rio, and the evidence showed a "middling passage," with rough seas, but no extraordinary perils for the season, and the vessel on arrival exhibited no signs of general strain, or any material loss of spars or sails, and probable causes of imperfection in the deck appearing, the leakage should be ascribed to the latter causes, and the owners held answerable for the damage, notwithstanding general evidence of thorough repair at the port of departure.

In Admiralty.

This libel was filed to recover $1,274 freight alleged to be due under a contract of affreightment for the carriage of 5,000 bags of coffee on the brig Magnet from Rio de Janeiro to New York. The answer alleged damage by water to 839 bags of coffee, to the amount of $1,300, through the unseaworthiness of the vessel in not being tight, stanch, and strong, as warranted by the charter.

Hill, Wing & Shoudy, for libelants.

Blatchford, Seward, Griswold & Da Costa, and *S. A. Blatchford,* for respondents.

BROWN, D. J. The evidence shows clearly that the damage to the coffee came from leakage through the deck; and the only question is whether this leakage arose from extraordinary perils of the sea after leaving Rio, or from a defective condition of the deck at the time of her departure. The Magnet was a single-decked brig of 283 tons, built in Germany in 1867. In January and February, 1879, she was thoroughly overhauled and repaired at Hamburg, and received a first-class certificate (33 A 11) for six years. It does not appear that her deck was renewed. On her voyage from Liverpool to Rio, immediately preceding the present charter, she met with very heavy weather, during which her maintop-mast was broken off, carrying away all her main yards, and the royal yard in its fall injured the deck. At Rio she was undergoing repairs for six weeks, and her decks were there repaired and recaulked throughout. She sailed from Rio on the fourteenth of December, 1879, and arrived at Hampton Roads on January 30, 1880, where she awaited orders, and thence proceeded

to New York, where she arrived February 28th. By her "protest," dated March 17th, it appears that she encountered heavy seas soon after leaving Rio, and continued to do so during much of her passage, taking in much water upon deck; that she met a "heavy gale" on the night of December 14th, which abated on the 16th, and another "gale with rain squalls" on the 29th of December; another on January 9th; and a hurricane on January 26th, in which two of her top-sails were split. On January 4th the boatswain went below, through the booby hatch, and found some of the seams slack and leaking on the port side near the main hatch. On the seventh of January he found additional leaks on the port side, and some on the starboard side not far from the mainmast. On deck, the source of the leak on the port side could not be discovered; but on the starboard side a split in one of the deck planks was found, which was repaired by the insertion of a "graving piece." The protest also describes the brig as "rolling and pitching terribly" in the heavy seas, and as "strained badly;" and the captain and mate testify to the passage being as severe as the previous one from Liverpool. The libelant relies upon this evidence, and the evidence of the thorough repair and caulking at Rio, as sufficient to show that the leakage was caused solely by the extraordinary perils of the voyage, and that the vessel was seaworthy when she sailed; that the leaks in the deck arose from the extraordinary strain in the rolling and pitching of the vessel, and the split in the deck plank from the leverage and pressure of the mainmast under the same extraordinary strain.

Having covenanted by the terms of the charter that the brig should be "tight, stanch, and strong," the libelants virtually warrrnted her fit to encounter all the ordinary perils of the voyage without damage to the particular cargo contracted for. The leak having occurred through the deck, the burden of proof is upon the libelants to show that the deck, when the brig sailed, was fit to withstand all the ordinary hazards of the vogage at that season, and that it was free from all latent as well as visible defects. *Wilson* v. *Griswold*, 9 Blatchf. 267; *Werk* v. *Leathers*, 97 U. S. 379; *Kepitoff* v. *Wilson*, L. R. 1 Q. B. D. 377, 380; *The Vesta*, 6 FED. REP. 532.

The split in the deck plank on the starboard side was, in my judgment, a latent defect in the deck existing when the brig sailed. It is difficult to believe that it was caused by any extraordinary leverage of the mainmast, for all the gales encountered were from the east; and, as the vessel was coming north, the pressure of the main-

mast must have been against the port side of the deck, and not upon the starboard side. The mate, moreover, ascribes it to the caulking at Rio, though not discoverable at that time and only developed afterwards. The leak from this defect was discovered on the seventh of January, when the voyage was about half completed.

Nor am I satisfied, from the whole evidence taken together, that the vessel encountered any such extraordinary seas or weather as should exempt her from responsibility, and throw the loss upon the freighters or insurers. The first leak was discovered January 4th, and the other January 7th, by which the coffee was already somewhat damaged. Up to that time two easterly gales had been encountered; but there is no evidence that either of them was of an unusual or extraordinary character; they were of brief duration, and the brig went through them without the loss of a sail or spar. In the hurricane, 10 days later, two of her top-sails were split; but on her arrival at New York, upon careful inspection by several experts, her hull was found to be in excellent condition; no signs of general strain were visible; none of the butts or water-way seams had started, and two days' work sufficed for all the repairs thought necessary. The passage was not a long one, and there is no satisfactory evidence that it was more severe and trying than was naturally to be expected at that season. The mate testified that she made a "middling passage," and all the ordinary and substantial indications from the brig herself are wanting to show that the voyage was one of any unusual or extraordinary severity. *Barnewall* v. *Church*, 1 Caines, 217, 247. The evidence also sufficiently indicates the probable causes of the leaks, viz., the age of the deck, and its several repairs; the gradual widening of the seams from repeated caulking; the shrinkage in the hot sun preceding the thorough, and perhaps excessive, caulking at Rio, and the subsequent expansion when wet; the split in the plank attending the last caulking; and the subsequent warping of the deck plank, and, in some places, their springing, from the beams. These are risks which belong to the ship and not to the freighters.

I must, therefore, hold the vessel answerable for the damage to the cargo, and a reference should be taken to ascertain the amount thereof, to be offset against the amount due to the libelants under the charter.

ROBERTS v. SWIFT and others.

(*District Court, D. Massachusetts.* October 23, 1882.)

ADMIRALTY—ADVANCE WAGES—INSURANCE.

Where it is customary to charge seamen with interest and insurance on advances on account of wages, etc., as an idemnity to owners in case of loss, such seamen are not entitled to any part of the insurance paid the owners.

NELSON, D. J. The libelant proceeds for his lay of one-seventieth, as third mate of the ship Cornelius Howland, which sailed from New Bedford on a whaling voyage in July, 1874. In September, 1876, the ship was wrecked and abandoned in the Arctic ocean, and both the ship and the catchings on board were a total loss. Oil and bone, however, had been previously shipped home, and in November, 1876, the voyage was settled. In the settlement the libelant received $392.94, the amount supposed to be due him on his lay after deducting his advances and ship's bill, with certain charges for interest and insurance. He at the same time signed a receipt discharging the ship and owners from all further claims. The shipping articles signed by the libelant at the commencement of the voyage contained the usual clause that the owners and agents might make the customary charges for interest and insurance on advances. Under this clause the libelant was charged in the settlement with 5½ per cent. on his advances, as insurance, being the usual rate charged by the underwriters for one year's insurance in July, 1874.

In March, 1877, the respondents collected of the underwriters $20,105, as insurance on the lost cargo. The libelant now claims that he is entitled to recover his lay of one-seventieth in the whole or some part of this insurance money.

In the case of *The Cleone*, heard by me at the March term, 1879, I held that the term "insurance on advances," as used in this clause, could have no other meaning than that ordinarily given to it, as signifying a policy of insurance effected in the usual way, and that having charged the seaman with a sum of money as insurance, the owners must be deemed to have undertaken to insure the advance for his benefit as well as their own. That case was submitted upon the shipping articles alone, and the court was called upon to construe the contract without the aid to be derived from the usages of the port of New Bedford. But it now appears by the evidence in this case that it has long been the practice in New Bedford to make this charge to the seaman, and that it is intended to be an indemnity for

the risk assumed by the owners in paying advanced wages at the commencement of the voyage, and that this charge has never been understood by the parties to have the effect to give the seaman any interest in the insurance effected by the owners, or to bind the owners to insure for his benefit. Whether the charge is a reasonable and proper one it is unnecessary now to consider. It is clear that the libelant signed the shipping articles without any expectation of deriving benefit from the insurance should any part of the catchings of the voyage be lost. His settlement was therefore made in accordance with his understanding of his shipping contract. As he received all he intended to bargain for, no injustice was done him, and no reason exists for opening the settlement.

Libel dismissed.

THE J. W. FRENCH.

(District Court, E. D. Virginia. October 21, 1882.)

1. ADMIRALTY—PROCEEDINGS IN REM.

   A proceeding *in rem* is one in which the *thing*—the property seized—is itself sued instead of a sentient person, and in which, the property itself being sued, its owner is not recognized until he comes in, claims, and defends.

2. SAME—PROCEEDINGS, WHEN VOID.

   Where the property of libelant was condemned to sale in a proceeding to which he was not a party, and which was not a proceeding *in rem*, nor a proceeding against the vessel in any form, the order of sale is a nullity.

3. JURISDICTION—COLLATERAL EXAMINATION.

   A court may examine collaterally into the jurisdiction of another court to pass upon questions of title to property, and if the other court has done an act *coram non judice*, to disregard it altogether.

4. SAME.

   When a court possesses jurisdiction as to subject-matter and parties, it has a right to decide every question which arises in the case, and whether its decision be correct or otherwise, its judgment, until reversed, is binding upon the parties.

5. TRIAL BY JURY—CONSTITUTIONAL GUARANTY.

   In a proceeding at common law a citizen of the United States cannot be divested of his property except by verdict of a jury, under due process of law, in a proceeding in which he is in some manner a party, having opportunity to be heard, and having a day in court.

6. PENAL STATUTES—FORFEITURE.

   A state statute which provides that "any person" belonging to a steamer who engages in taking fish in violation of its provisions shall forfeit "his vessel," cannot be construed to mean *any* vessel which he employed in committing the offense; it cannot be enlarged by construction to mean that he shall forfeit the vessel of another person.

7. CONDEMNATION—PROCEEDINGS WITHOUT WARRANT OF LAW.

A judgment of condemnation and sale of a vessel, without warrant of law, confers no right upon the sheriff to her custody. His possession in such case is tortious, and as against the process of the federal court he is a mere trespasser.

In Admiralty, on a Petitory and Possessory Libel.

Sharp & Hughes, for libelant.

F. S. Blair, Atty. Gen. of Virginia, *Arthur Segar*, and *James E. Heath*, for respondents.

HUGHES, D. J. This is a petitory suit in admiralty brought to try the title to a vessel (the steamer J. W. French) and to recover possession of it from one who is alleged to have been a tortious holder. This steamer, when process issued from this court, is alleged to have been in the possession of the sheriff of Elizabeth City county, Virginia, under an order for its sale by a judgment of the county court of that county. The libelant has never been a party to any proceeding of that court in which such an order of sale was made. The proceeding there was not one *in rem* which binds all the world, and in which the libelant could have become a party by appearance, and by answer or petition. The proceeding there was a criminal prosecution in which the crew of the steamer J. W. French, were all arrested, and in which her master, W. E. Overton, was indicted and tried, the rest of the crew having been discharged. The law of Virginia allows a steamer to be arrested, and, under the limitations hereafter stated, held by the court while such a prosecution of any person belonging to her is pending; and this vessel was under arrest pending this prosecution, which terminated with a verdict of guilty and a fine of one cent and costs against Overton, and his release from custody. The judgment against Overton in this verdict went on summarily to order a sale of the steamer by the sheriff, although the indictment had not charged that the steamer was the vessel of Overton,—"his vessel." There was no provision of law by virtue of which the libelant, W. R. Polk, could have appeared and become a party to this prosecution of Overton; although the record in the prosecution, pending which the steamer J. W. French was held, shows that W. R. Polk was the owner, and that this fact was in the cognizance of the court, and that the court failed to give Polk, the owner, a day to show cause against the sale of his property.

It may be conceded, in respect to ships and maritime property, that the owner may be bound by a proceeding *in rem*, though he do not appear; and in some cases even though in his physical person it was impracticable for him to appear. See *U. S.* v. *The Malek Adhel*,

2 How. 210, which was a proceeding in admiralty on a libel *in rem*. This results from the peculiar character and circumstances of maritime property and persons—a proceeding *in rem* being one in which a *thing*, *i. e.*, the property seized, is itself sued, instead of a sentient person; and in which, the property itself being sued, its owner is not recognized until he comes in, claims, and defends.

It is also well settled, generally, that every person is bound by the order of a court of competent jurisdiction in a proceeding to which he is a party, although only constructively so. But the case at bar belongs to neither of these classes. The property of this libelant was condemned to sale in a proceeding to which he was not a party, and which was not a proceeding *in rem*, nor a proceeding against the vessel itself, in any form.

The suit here is brought to test the title to a steam-boat; and one of the questions in the case is whether this court can examine into the validity of the proceedings of a court which undertook to divest the libelant of his vessel without a hearing, and to vest it in a purchaser. There is another question in this case. The libelant denies that the court which undertook to divest him of his ship had jurisdiction to make the order directing the sale by which that result might be effected; and he contends that that court was without such jurisdiction, not only because he, the owner, was not before it, and could not get before it, but because that court had no authority under the laws of Virginia, under which alone it could act, to make such an order of sale as it did make, even though he had been a party to the proceeding.

No principle is more thoroughly settled than that any court may examine collaterally into the jurisdiction of another court to pass on questions of title to property, and if the other court has done an act *coram non judice*, to disregard it altogether. When a court possesses jurisdiction as to subject-matter and parties, it has a right to decide every question which arises in the case, and whether its decision be correct or otherwise, its judgment, until reversed, is binding upon the parties.

"But if it act without authority, its judgments are considered as nullities, and form no bar to a recovery which may be sought, even prior to a reversal in opposition to them." Judge LIVINGSTONE in *Fisher* v. *Harnden*, 1 Payne, C. C. 58.

"The power of a court is of necessity examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into, and

its authority to decide questions which it professes to decide must be considered." Chief Justice MARSHALL in *Rose* v. *Himely*, 4 Cranch, 268.

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers. This distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court exercising authority over a subject may be inquired into in every court when the proceedings in the former are relied on and brought before the latter by a party claiming the benefit of such proceedings." Mr. Justice TRIMBLE in *Elliott* v. *Peirsal*, 1 Pet. 340.

In *Windsor* v. *McVeigh*, 93 U. S. 274, it was held that a sentence of a court, pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. See, also, *Underwood* v. *McVeigh*, 23 Grat. 407, where a decree for the sale of property in a proceeding in which the owner had no day or hearing was held a nullity.

In the case of *Greene* v. *Briggs*, 1 Curt. C. C. 311, under a law of Rhode Island authorizing the seizure, condemnation, and destruction of spirituous liquors, certain liquors had been seized on a magistrate's warrant and afterwards condemned and ordered to be destroyed by a court of magistrates of the city of Providence; but previous to the destruction an action of replevin had been brought in the United States circuit court, and the goods had been seized in replevin by the United States marshal. The defendants filed an avowry setting out all the facts in answer to the action, and there was a demurrer to this plea. Mr. Justice CURTIS, in giving judgment for the plaintiff, not only went into a full examination of the validity of the proceedings of the magistrate's court, and its jurisdiction to pass the orders which were entered in the case, but treated them as nullities, holding in regard to the warrant of seizure that "an order by a justice of the peace, concerning a matter not within his jurisdiction, is void; and he, and all ministerial officers who execute that order, are trespassers." He cited *Wise* v. *Withers*, 3 Cranch, 331; Cowper, 140; 7 Barn. & C. 536; 5 Maule & S. 314; 11 Conn. 95; and 8 Wend. 200. He went on to say: "Such an order confers no authority to detain property, and is not a defense to an action of replevin." The proceedings before the magistrate's court were based upon a law of Rhode Island directing

spirituous liquors to be seized, condemned, and destroyed, allowing the owner to appear, but not allowing him the benefit of a trial by jury, except upon paying an onerous tax; and it was principally on that ground that the orders of the magistrate's court (answering to our county court) were treated as nullities by the judge of the United States court. That case is very similar in its leading features to the one at bar, except that Greene, the owner of the property seized, appeared and filed a claim to it before the magistrate's court, and was a party to the proceeding there.

The case of *Wise* v. *Withers*, cited by the judge, decided that a court of law may look into the jurisdiction of a court martial as to an order it had made affecting the rights and property of a citizen. I think it perfectly clear, therefore, that this court, in determining who owns and who has the right to the custody of this steamer, the J. W. French, may look into the legality of the proceedings in the county court of Elizabeth City county, under which the sheriff held custody of the steamer when she was taken by the United States marshal.

There are many cases in which it is held that when one court of general jurisdiction obtains jurisdiction of a controversy and custody of property which is the subject of that controversy, no other can take jurisdiction of either, especially of the property. This general principle is well settled. *Taylor* v. *Carryl*, 2 How. 583, is a leading case on this point. The same was held in *Orton* v. *Smith*, 18 How. 263; *Hagan* v. *Lucas*, 10 Pet. 400; *The Ship Robert Fulton*, 1 Payne, C. C. 620; *The Oliver Jordan*, 2 Curt. C. C. 414; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; and *Windsor* v. *McVeigh*, 93 U. S. 274; but it will be found in all these cases the custody of the officer first in possession of the property in controversy *was conceded to be lawful*. These cases are distinguished by that important fact from the case at bar, in which it is alleged that the sheriff's custody was unlawful, and therefore tortious.

But even in cases where the first custody is lawful, it was held by Mr. Justice MILLER, in *Buck* v. *Colbath*, speaking for the supreme court of the United States, that—

"The rule that among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in it, is subject to some limitation, and is confined to suits between the same parties or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought, and does not extend to all matters which may by possibility be involved in it."

And Mr. Justice FIELD, speaking for the supreme court of the United States, held, in *Windsor* v. *McVeigh*, that—

"The doctrine that when a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds after gaining jurisdiction of the cause according to the established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it."

In this case the court said:

"All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil and criminal, or to particular modes of administering relief, such as legal or equitable, etc. Though the court may possess jurisdiction of a cause of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order the specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned would not be merely erroneous—they would be absolutely void; because the court in rendering them would transcend the limits of its authority."

In the case at bar the court, in a criminal prosecution against one man, proceeded to decree the sale of the property of another man. The owner had no hearing at all, and of course had not the privilege of trying before a jury, on a defense made by himself, the issue of fact on which the condemnation of his property to forfeiture depended. The thirteenth clause of the bill of rights of Virginia provides that, in all controversies concerning property, the right of trial by jury shall be sacred, whether they be between man and man, or between the state and a citizen. Code 1873, p. 69. This guaranty of a jury is to the owner of the property himself, and it were a mockery to say that it was fulfilled by some one other than the owner having had the benefit of it. If the commonwealth obtains a verdict against Jones for a capital offense she cannot hang Smith. Smith has a right to be heard for himself, and to be tried by a jury sworn on the issue between the commonwealth and himself. As Smith's life and liberty cannot be affected by a verdict against another, so his right of property cannot be.

In *Greene* v. *Briggs*, before cited, it was held that a citizen of Rhode Island could not, under the constitution of Rhode Island, be deprived of his property without verdict of a jury, and unrestricted opportu-

nity of making defense even in a proceeding *in rem,* (not in admiralty.) The privilege of appearing and making defense with trial by jury was subjected there to a tax.

In *Woodruff* v. *Taylor,* 20 Vt. 65, quoted approvingly by the United States' supreme court in *Windsor* v. *McVeigh,* the supreme court of Vermont said:

"A proceeding professing to determine the right of property, where no notice written or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."

The mere seizure of property, either on a criminal charge or in a civil action, does not give jurisdiction to condemn it to forfeiture.

"The jurisdiction acquired by the seziure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. * * * The manner of the notification is immaterial; but the notification itself is indispensable." *Windsor* v. *McVeigh,* 93 U. S. 279.

The right of opportunity to appear and be heard is too sacred to be denied, even to one occupying the *status* of an alien enemy.

In *McVeigh* v. *U. S.* 11 Wall. 267, Mr. Justice SWAYNE said, for the United States supreme court:

"The order [to strike from the record the owner's appearance, claim, and answer] in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no *locus standi* in that forum. If assailed there he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact, and of the right administration of justice."

In *Bradstreet* v. *Neptune Ins. Co.* 3 Sumn. 601, Mr. Justice STORY said:

"It is a rule founded on the first principles of natural justice that a party shall have an opportunity to be heard in his defense before his property is condemned, and that charges on which the condemnation is sought shall be specific, determinate, and clear;" and he characterized condemnations without these conditions "as mockeries, and in no just sense judicial proceedings," "to be deemed, both *ex directo in rem* and collaterally, as mere arbitrary edicts, or substantial frauds."

It follows, therefore, that, in order to the validity of its proceedings, the county court of Elizabeth City county must not only have

had jurisdiction of the subject on which it adjudicated, but it must have proceeded according to the mode usual in the condemnation of property, and authorized by law; and it follows further that this court may, in the present collateral proceeding, examine into the jurisdiction of that court and the regularity of its proceedings in ordering the sale of the steamer French by the sheriff of the county. I proceed, therefore, to that examination. The prosecution in the county court in question was commenced against all the crew of the steamer French, but continued only against her master, W. E. Overton. The indictment charged that Overton, captain and commander of a certain vessel, propelled by steam and known by the name of the J. W. French, on the eighth day of July, 1882, in the county of Elizabeth City, did take and catch a certain quantity of fish, by and with the said steamer J. W. French, against the form of the statute, etc., and the peace and dignity of the commonwealth. Other counts in the indictment charged, in the same form, that he caught "floating fish," and that he caught "floating fish known as alewives for the purpose of manufacturing said fish into oil and manure." The indictment nowhere charges that the steamer was the property of Overton, or, in the language of the statute under which he was indicted, was "his vessel." There was no proceeding against the vessel itself, either *in rem* or any other form. There was no charge in the indictment against the vessel herself; she was named only in the incidental manner above shown. On the trial the jury found a verdict in these words: "We, the jury find the defendant, Willis E. Overton, guilty, and assess his fine at the sum of one cent." On this verdict the court entered judgment as follows:

"And thereupon it is considered by the court that the commonwealth recover against the said Willis E. Overton the sum of one cent, the fine by the jurors in their verdict assessed, and the costs of the prosecution. And it is further considered by the court that the steamer J. W. French, described in the indictment, and on which the said defendant was captain, and *which the jury have found was used in taking fish, as charged in said indictment,* in the Chesapeake bay, contrary to law, together with her necessary apparel, the two seines and two small boats belonging to her, [nothing about apparel, seines, or two small boats appear in the indictment,] be condemned and forfeited to the commonwealth of Virginia. And it is further ordered that the sheriff of this county, after giving at least 20 days' notice, posted at the court-house door of this county, and at other public places in said county, sell on the first day of the August term of this court, between the hours, etc., of that day, at public auction, for cash, to the highest bidder, the said steamer J. W. French, and her necessary apparel, and the said two seines and small boats. And it is further ordered that the said sheriff do make report of said sale to this

court, and that the clerk of this court do make return thereof to the auditor of public accounts. And the said sheriff shall account for and pay the proceeds of said sale to the auditor of public accounts in the manner prescribed by law," etc.

It is plain from the terms of this judgment that it was intended to be a final condemnation of this steamer, her apparel, seines, and attendant boats; that it was an order for their sale, and a disposal of the proceeds of sale, in exclusion of all claims on the part of Polk, the owner, upon the property or the proceeds of sale. There is no pretense of a proceeding *in rem* against the steamer. There is no shadow of any proceeding specifically against the steamer or against the owner. She is mentioned only incidentally in the indictment against Overton, and upon a verdict of guilty procured against him alone of an offense so slight as to be condoned by a fine of one cent, the judgment of the court against Overton, after averring contrary to the fact that the jury had found that the steamer had been "used in taking fish," goes on to condemn it as forfeit, and to order its sale for the benefit of the treasury of Virginia.

This was a proceeding at common law; and while it is true that in actions *in rem* in admiralty property in the nature of ships may be divested from an owner without the verdict of a jury, yet I think it can be laid down with perfect truth that in any proceeding at common law, even proceedings *in rem,* a citizen of the United States cannot be divested of his property except by verdict of a jury, under due process of law, in a proceeding in which he is in some manner a party, having opportunity to be heard, and having a day in court. Condemnations and forfeitures are unknown in the practice of the United States courts, except upon specific proceedings against the property, and after the verdict of a jury. See *Union Ins. Co.* v. *U. S.* 6 Wall. 765; *Armstrong's Foundry,* 6 Wall. 769; *Morris' Cotton,* 8 Wall. 507. Proceedings *in rem* were unknown to the common law. 2 Brown, Civil & Adm. Law, 111; *Percival* v. *Hickey,* 18 Johns. 257, 292; 1 Kent, Comm. 378. Common-law courts have jurisdiction of them only by virtue of statutory enactment. If congress gives this proceeding in common-law courts without requiring trial by jury, it violates article 7 of the amendments to the national constitution. If the legislature of Virginia gives this proceeding to its courts, or the right of condemming property without giving to its owner the right of trial by jury, it violates section 13 of the bill of rights. Such, also, was the emphatic, I might almost say indignant, ruling of Mr. Justice CURTIS, one of the ablest of American judges, in *Green* v. *Briggs* already

cited; and may be regarded as a fundamental canon of English and American jurisprudence.

It were a mockery to say that the brief verdict just recited given against Overton, comprehended the steamer of Polk at all, even if it had been charged in the indictment to have been Overton's property; or could work a forfeiture of the property of Polk, the libelant here, in the eye of the great canon of English and American law which has been referred to. When we examine the laws of Virginia, under which alone the proceedings against this steamer could have been had, we shall find that the order of sale which has been recited was even in respect to them, without authority. The fifth section of the one hundredth chapter of the Code of Virginia, as amended by the act of March 6, 1882, (see Acts, 235,) after prohibiting the catching of alewives fish except in certain waters, contains two clauses, in these words:

"No boats propelled in whole or in part by steam shall be used for the purpose of towing or conveying boats that are used for the purpose of taking fish. Any person violating the provisions of this act shall, upon conviction, be deemed guilty of a misdemeanor, and shall forfeit his vessel, boat, or craft, and all purse-nets or seines used in taking or catching fish, and shall be fined not exceeding $1,000—one-fourth of which shall go to the informer."

The forty-sixth section of the same chapter of the Code provides that under the warrant for the apprehension of any person for the violation of this chapter,—

"The officer executing such warrant shall take possession of any vessel, boat, or skiff (with their tackle and appurtenances) which the defendant may belong to, or be using, or have used, in the commission of the offense for which he is prosecuted, and hold the same until the recognizance required be given, or until the defendant be acquitted. But if judgment be given against the defendant it shall be *part of the judgment* of the court, that, if the penalty and costs be not forthwith paid, all the property so seized shall be sold, and the proceeds accounted for as if it were the property of the defendant, seized under an execution for the satisfaction of the judgment."

Learned and industrious counsel have shown nothing in the Code or statutes of Virginia other than the foregoing sections under which the county court of Elizabeth City county could have acted in its condemnation of the steamer J. W. French. There is a section of another chapter (section 29 of chapter 109) which points out what court, and how it shall dispose of property already legally forfeited; but there is no law prescribing the manner of dealing with vessels, boats, and like property which have been used by offenders against law, except the sections which have been quoted. I am to examine,

therefore, whether the county court of Elizabeth City county complied with the law in its condemnation of the steamer of this libelant. The law forbids the catching of fish in certain parts of Chesapeake bay, and forbids the use of steamers anywhere for towing or conveying boats employed in catching fish; declaring that "any person" violating this act shall "forfeit *his vessel*, boat, or craft, and all purse-nets and seines used." This language imposes the inquiry whether it was the intention of the legislature to exact a forfeiture of any property other than that of the offender himself. The language of other acts, probably of all other acts of Virginia but this, in declaring the forfeiture of property employed in the commission of offenses, declares also, in clear and unequivocal terms, that the property employed in committing the offenses shall be forfeited. For instance the oyster act of March 6, 1882, passed contemporaneously with the one under consideration, after prohibiting the act of the offender, goes on to say that "the canoe, vessel, or boat so employed in catching, etc., shall be forfeited and sold." If it had been the intention of the legislature to forfeit the vessel used in catching alewive fish irrespectively of ownership, it would have employed language clearly and explicitly conveying that meaning, and would not have seemed to confine the forfeiture to vessels and property owned by the offender himself—to "his vessel, boat, or craft."

The language of the statute affecting the present case is that "*any* person" belonging to a steamer who engages in taking fish in violation of its provisions shall forfeit "his vessel." If in this phrase the law could be held to mean the vessel to which any offender might belong, then a mere cook on a steamer, who temporarily left his kitchen cabin and went out to engage with strangers in catching fish unlawfully, would thereby work a forfeiture of the steamer on which he was employed. To contend for such a construction of the phrase "his vessel" is to demonstrate its inadmissibility. The law speaks of boats, purse-nets, and seines, and contemplates that these latter may belong to fishermen; while steamers may belong to owners who are not fishermen, and seems to provide, in using the phrase "his vessel, boat, or craft, purse-nets and seines," that each offender against its provisions shall forfeit whatever property employed in the offense may belong to himself personally. This would seem to be a just and reasonable construction of the meaning of the term "his vessel," employed in this act, irrespectively of those canons of construction which all enlightened courts of justice apply to statutes imposing penalties and forfeitures. These latter, however, leave no room for doubt as

to the construction proper to be placed on the statute under consideration.

Forfeitures are odious in the eye of the law, and it is a cardinal principle that statutes of forfeiture shall be construed with the utmost strictness. The forfeiture here is imposed in the penal clause of a penal statute; and Mr. Bishop, (1 Crim. Law, § 250,) using the early English of the old common-law jurists, lays it down, in respect to penal laws, that "no case is to be brought by construction within a statute while it falls not within all its words. If a case is fully within the mischief to be remedied, and is even of the same class and within the same reason as other cases enumerated, still, if not within the words, construction will not be permitted to bring it within the statute." If, therefore, a statute says that W. E. Overton, on conviction of having committed an offense against its provisions, shall be punished by fine and imprisonment, and shall forfeit "his vessel" employed in the commission of the offense, the statute cannot be enlarged by construction to mean that he shall forfeit the vessel of another person. It can be construed to mean that he shall forfeit only the vessel owned by himself. It cannot be construed to mean *any* vessel which he employed in committing the offense.

Forfeitures being odious to the law, if the legislature intends that one man's property shall be forfeited for another man's offense, it should, and, I may add, always does, so declare in express, explicit, and unmistakable language. Neither Overton nor any seaman, fireman, engineer, or cook on board the steamer French could, by violating the fishing laws of Virginia under consideration, do more than forfeit any boat or craft or net or vessel which he himself actually owned, and no verdict of a jury found against Overton under this law could work a forfeiture of another's property.

Independently of this consideration, there was no warrant of law for the particular judgment of condemnation and sale which was rendered against this steamer, the J. W. French. The forty-sixth section of the one hundredth chapter of the Code simply provides for the detention of a vessel which has been employed in committing an offense, as a security for the payment of the fine and costs adjudged against the offender who used her. It directs the vessel to be held until the recognizance required of the defendant be given, or until he be acquitted; and, if judgment be given against the defendant, it requires it to be made "*part of the judgment* of the court that, if the penalty and costs be not forthwith paid," the vessel shall be sold, and the proceeds accounted for as under execution. If this provision

of law had been complied with, the steamer J. W. French would have been instantly released. The judgment against the vessel was void in having been couched in terms wholly unauthorized by the statute, both in respect to the vessel and to the disposal of the proceeds of its sale. It was, as to the owner of the vessel, void in not having employed the alternative words peremptorily directed to be inserted by the statute. No alternative was given to the owner of the vessel or her master to redeem her possession by the payment, even "forthwith," of the fine and costs adjudged against Overton, which, in point of fact, were paid forthwith. Not only was this requirement violated, but, without the warrant of any law known to the statutes of Virginia, this libelant's property was ordered to be sold for Overton's offense—itself pronounced by the jury to have been of the most trivial character.

The judgment of condemnation and sale, being without warrant of law, could confer no right upon the sheriff to the custody of the vessel. His possession was tortious, and he held her against the process of this court only as a trepasser. I will so decree.

In regard to *The Steamer Grace*, heard at the same time with the case of *The French*, I do not think she can be held, under the law of March 6, 1882, liable to forfeiture for the act of one conceded not to have been her owner, and I will so decree in her case.

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ASSIGNMENT. INSOLVENCY, 493; JURISDICTION, 301, 302, note.

ATTACHMENT.

DISSOLUTION.—Section 915 of the Revised Statutes adopts the remedy by attachment provided by state laws; and when a contingency arises whereby the attachment would be dissolved under provisions of a state law, the attachment will be deemed dissolved in a federal court, as provided in section 933 of the Revised Statutes. *Mather* v. *Nesbit*, 872.

See INSOLVENCY, 493; PRIORITIES, 493; TRUST AND TRUSTEES, 423; WRIT OF SEQUESTRATION, 567.

ATTORNEY AND CLIENT.

1. PURCHASE OF PROPERTY IN LITIGATION.—An attorney at law cannot purchase from his client the subject-matter of litigation in which he is employed and acting, if, as a part of his negotiations for the purchase, he advises his client as to the probable outcome of the litigation, and its effect upon the value of the property he is seeking to purchase. *Rogers* v. *Marshall*, 59.
2. CONTRACTS BETWEEN.—Whether a contract between attorneys and the client, whereby, in the event of their success in an action for the recovery of damages, they are to receive, as compensation for their services, one-third of the amount which may be recovered, is champertous, not decided. *Swanston* v. *Morning Star Min. Co.*, 215.

See PRACTICE, 420.

ATTORNEY AT LAW.

1. DISBARMENT OF.—An attorney may be disbarred for participation in an unlawful, tumultuous, and riotous gathering, and advising, encouraging thereto, and taking from the jail therewith and hanging a prisoner, although no complaint

under oath has been filed against him; and he would be liable for the offense, though no indictment has as yet been found. *In re Wall*, 814.

2. AN OFFICER OF COURT.—An attorney is an officer of the court, amenable to it, and liable to have such relations sundered upon satisfactory evidence of dishonest professional conduct, habits of general immorality, or any such single act of crime or vice as may show him unfitted for the trusts and confidence reposed in him as such attorney. *Id.*

3. NOTICE OF CHARGES.—While an attorney is entitled to notice of the charges preferred against him, and an opportunity to answer before being disbarred, such notice is sufficient if it clearly intimates the misconduct with which he is charged. *Id.*

AUXILIARY JURISDICTION. EQUITY, 415.

BANKRUPTCY.

1. BANKRUPT LAW—CONSTITUTIONALITY.—A bankrupt law is not unconstitutional merely because its operations may be wholly different in different states. *Darling* v. *Berry*, 659.

2. ESTATES NOT RELEASED BY ACCEPTANCE OF SECURITY.—The estates of five out of seven sureties on an official bond are not released by the acceptance of the individual bonds of their co-sureties, since become insolvent, but the city might prove against their estates for the whole debt. *In re Blumer*, 623.

3. FAILURE TO KEEP PROPER BOOKS.—A firm, during less than three years prior to their bankruptcy, had received from an individual notes and drafts to the amount of $42,881.79, which they had procured to be discounted. Neither their ledger nor cash-book contained any entries of these transactions, nor did the name of the party from whom the notes were received appear therein. The bill-book contained nothing relating thereto, except some lead-pencil entries in the back of the book. *Held*, that the failure to enter these note transactions in their books was a failure to keep proper books of account, and would prevent their discharge. *In re Williams*, 30.

4. HOMESTEAD EXEMPTION.—By section 5045, Rev. St., congress intended to prescribe, irrespective of state laws, the *conditions* upon which the homestead exemptions should exist, making the provisions of the state laws "existing" in 1871 the *measure* or *criterion* as to the *amount* allowed. *Darling* v. *Berry*, 659.

5. SAME—TIME OF CONTRACTING DEBT.—The exemption is valid against all debts, whether reduced to judgment or not, without regard to the *time* when contracted, and regardless of state constitutions, laws, and decisions. *Id.*

6. JUDGMENT BY CONFESSION.—A confessed judgment for a debt already fully secured by a prior valid lien against the bankrupt's real estate, to which the judgment creditor had the equitable right of subrogation, is not impeachable as a fraudulent preference, for it takes nothing from the general creditors and impairs not the value of the bankrupt's estate. *Reber* v. *Gundy*, 53.

7. LIMITATIONS—CONCEALED FRAUD.—Where the foundation of the bill is fraud of a nature to conceal itself, and the fraudulent scheme charged is continuous, and now actively on foot, in a suit brought by the present assignee of the bankrupts, within two years after his appointment, an averment of the absence of knowledge of the fraud by the former assignee in bankruptcy is sufficient to avoid the bar of the statute of limitations. *Duff* v. *First Nat. Bank*, 65.

8. LIMITATION OF ACTION.—Proceedings instituted more than two years after a foreclosure sale, whereat the assignee of a bankrupt was the purchaser, to set aside the sale, are barred by the limitations of the bankrupt act. *Phelan* v. *O'Brien*, 656.

9. SAME.—Representations made by the assignee, as purchaser for the benefit of the estate, that he would permit a redemption, but without fixing any time for redemption, did not estop him from setting up the statute of limitations. *Id.*

10. POSSESSION BY ASSIGNEE—RIGHTS OF CLAIMANTS.—An assignee may take peaceable possession of the bankrupt's estate wherever he can find it, but adverse claimants of such property, situated in districts other than the one wherein the bankruptcy proceedings are pending, may assert their rights to the same by

bringing suits in the state courts, or by notifying the custodians of such property not to deliver the same to the assignee, without being guilty of a contempt of court. *In re Litchfield*, 863.

11. SAME—REMEDIES.—In such case the assignee may either defend his title in the state court, or may file a bill in a United states court to have the rights of the adverse claimants adjusted, and, as incidental thereto, that the actions in the state courts may be enjoined. The assignee cannot proceed in such case by summary petition. *Id.*

12. PRIVATE SALE BY ASSIGNEE—INADEQUACY OF PRICE.—Where an assignee sells property at private sale, in pursuance of an order of the court, such sale will be set aside and a resale ordered, when it is made to appear that the property is worth a much greater sum than that at which it was sold, and parties are willing to bid it in at its real value, even in cases where there is no actual fraud. *In re Palmer*, 870.

See MISTAKE, 361; PARTNERSHIP, 550, 622, 623; PRINCIPAL AND SURETY, 623; REFERENCE, 550; TRUST AND TRUSTEE, 423.

BENEFICIAL UNION.

1. DEFAULT IN PAYMENT BY MEMBER.—A party to whom a certificate of membership in an aid union had been duly issued, subsequent to a default in payment, and who thereafter had been twice assessed as a member by the union, must be considered as entitled to the benefits of the union, although he had not paid the $1.30 required to be paid within 30 days after the presentation of his application. *Rowswell* v. *Equitable Aid Union*, 840.

2. ESTOPPEL.—The issuing of the certificate and making these assessments estop the union, after his death, from setting up this default. *Id.*

3. UNWARRANTED ASSESSMENT.—A failure to pay an assessment levied on a member for a death which occurred prior to the date of his certificate, the assessment being contrary to the plain provisions of a by-law of the union, will not invalidate the claim of his representatives to benefits. *Id.*

BILL OF EXCEPTIONS.

EXTENSION OF TIME TO FILE.—Where an attorney, through unfamiliarity with the rules of practice, has failed to have a bill of exceptions served, settled, and signed within the prescribed time, or to obtain an extension of time at the trial term, the court may, before judgment is entered and while the case is still pending in the circuit court, in its *sound discretion, to prevent manifest hardship*, relax the rule and allow additional time in which to serve and settle the proposed bill of exceptions. *Coe* v. *Morgan*, 844.

See CRIMINAL LAW, 143, note; PRACTICE, 844.

BILL OF EXCHANGE.

COMPANY DRAFT.—Where a bill of exchange was manifestly a draft of a company and not of the individuals by whose hands it is subscribed, and it purports to be made at the office of the company, and directs the drawees to charge the amount thereof to the account of the company, of which the signers describe themselves as president and secretary, will not bind the agents personally. *Hitchcock* v. *Buchanan*, 143, note.

BILL OF LADING. SALE AND DELIVERY, 22.

BILL OF PARTICULARS. PRACTICE, 386.

BILL OF REVIEW.

1. PROCEEDING CONSTRUED.—A bill of review is a proceeding in the nature of a writ of error, and it may be brought to modify or reverse a decree given in a suit in equity in favor of the United State for errors apparent upon the face thereof. *Bush* v. *United States*, 625.

2. SAME—SERVICE OF SUBPŒNA IN.—Upon a bill of review to correct a decree given in favor of the United States, the subpœna to appear and answer may be served on the district attorney. *Id.*

BOND OF INDEMNITY.

1. SUIT ON—PARTIES.—A party suing alone on a bond of indemnity made to himself and others, must show that he alone has received injury by the breach thereof, and therefore that he brings suit without joining the other obligees as plaintiff. *Percival* v. *McCoy*, 379.
2. COMPLAINT—VARIANCE.—He cannot set out a bond as running to or as made to himself alone, and give in evidence an instrument made to himself jointly with other obligees. *Id.*

BROKER. INSURANCE, 74.

BURLINGAME TREATY. CHINESE IMMIGRATION, 606.

CHAMPERTY.

AS A DEFENSE.—A champertous and illegal contract between plaintiff and his attorney can only be set up by the client against the attorney when the champertous agreement itself is sought to be enforced. *Courtright* v. *Burns*, 317.

See ATTORNEY AND CLIENT, 215.

CHARTER-PARTY.

1. SEAWORTHINESS.—Under the usual covenants of a charter-party that the vessel is "tight, stanch, and strong," the owners are answerable for *latent* as well as visible defects whereby the cargo is damaged. *Hubert* v. *Recknagel*, 912.
2. LATENT DEFECTS—DAMAGE TO CARGO.—Where a cargo of coffee was damaged through a leak in the deck of a brig 13 years old on a voyage from Rio, and the evidence showed a "middling passage," with rough seas, but no extraordinary perils for the season, and the vessel on arrival exhibited no signs of general strain, or any material loss of spars or sails, and probable causes of imperfection in the deck appearing, the leakage should be ascribed to the latter causes, and the owners held answerable for the damage, notwithstanding general evidence of thorough repair at the port of departure. *Id.*

CHATTEL MORTGAGE.

RAILROAD PROPERTY.—A railroad mortgage security, so far as the personalty of the corporation is concerned, is not embraced in the statutes of Illinois relating to chattel mortgages. *Hammock* v. *Farmers' L. & T. Co.*, 189, note.

CHINESE.

1. RESIDENTS—RIGHTS UNDER TREATY.—A Chinese resident, here before the passage of the act of congress restricting immigration of Chinese, has a right to remain and follow any lawful trade or pursuit, and his liberty so to do cannot be restrained by invalid legislation. *In re Quong Woo*, 229.
2. LABORERS—PROHIBITION.—The prohibition of the act of congress upon any master of a vessel bringing into the United States any Chinese laborer from any foreign port or place, means, from bringing any Chinese laborer embarking at a foreign port or place, and does not apply to the bringing of a laborer already on board of the vessel when it touches at a foreign port. *Case of the Chinese Waiter*, 286; *Case of the Chinese Laborers on Shipboard*, 291.
3. ACT OF CONGRESS CONSTRUED.—The object of the act was to prevent further immigration of Chinese laborers, not to expel those already here. *Id.*; *Id.*

4. SAME.—The act provides for the return of such laborers, leaving for a temporary period, upon their obtaining certificates of identification. *Id.; Id.*

5. PROHIBITION IN ACT CONSTRUED.—The prohibition was intended to prevent the importation of Chinese laborers who embarked on the vessel at a foreign port, and does not apply to bringing a Chinese laborer already on board his vessel when touching at a foreign port or place. *Case of the Chinese Laborers on Shipboard,* 291.

6. AMERICAN VESSEL.—While on board an American vessel a Chinese laborer is within the jurisdiction of the United States, and retains his right of residence here previously acquired by treaty with China. *Case of the Chinese Waiter,* 286; *Case of the Chinese Laborers on Shipboard,* 291.

7. CHINESE MERCHANT.—Chinese merchants who resided, on the passage of the act of congress of May 6, 1882, in *other countries than China,* on arriving on a vessel in a port of the United States are not required by said act to produce certificates of the Chinese government establishing their character as merchants as a condition of their being allowed to land. Their character as such merchants can be established by parol evidence. *Case of the Chinese Merchant,* 605.

8. MERCHANT'S, ETC., CERTIFICATE.—The certificate mentioned in section 6 of the act of May 6, 1882, is evidently designed to facilitate proof by Chinese, other than laborers, coming from China and desiring to enter the United States, that they were not of the prohibited class. *Id.*

9. SAME—WHAT TO CONTAIN.—The particulars which the certificate must contain show that it was to be given by the Chinese government to those then residing there, as their place of residence in China is to be stated. *Id.*

10. ACT OF CONGRESS CONSTRUED.—The act of congress of May 6, 1882, was not intended to interfere with the commercial relations between China and this country. Its purpose must be held to be what the treaty authorized—to put a restriction upon the immigration of laborers, including those skilled in any art or trade. *Id.*

11. MERCHANTS, TEACHERS, AND OTHERS.—Whether a Chinese merchant, teacher, etc., arriving from *China* and failing to produce the certificate required by section 6, could by satisfactory evidence of his real character overcome the presumption that he is a laborer raised by the absence of the certificate, and establish the right secured by the treaty to go and come of his own free will and accord, it is not necessary to decide in this case. HOFFMAN, D. J. *Id.*

CIRCUIT COURT.

1. JURISDICTION.—A citizen of another state may sue a municipal corporation, located in the state where suit is brought, upon bonds issued by such corporation, and his right of action does not depend upon the rights of former owners of the bonds to sue thereon under the inhibition in section 1 of the act of March 3, 1875, defining the jurisdiction of the circuit court, as he does not derive his title by assignment. *Farr* v. *Town of Lyons,* 377.

2. PRACTICE IN EQUITY.—The circuit court of the United States is not governed in its practice in equity by the laws of the state in which it sits, but by the rules of practice prescribed by the supreme court, and by the circuit court not inconsistent therewith, and when these are silent by the practice of the high court of chancery in England when the equity rules were adopted. *Russell* v. *Farley,* 300, note.

3. RULES—PROCESS—REV. ST. §§ 913, 918.—The forms of mesne process in equity, and the forms and modes of proceeding therein, are to be according to the usages of courts of equity, except as otherwise provided by statute, or by rules of court made in pursuance of statute. But any circuit court may alter and add to such forms and modes, subject to the right of the supreme court to regulate the matter for such circuit court. *Steam Stone Cutter Co.* v. *Jones,* 567.

CITIZENSHIP.

NATURALIZATION BY MARRIAGE.—Upon the marriage of a resident alien woman with a naturalized citizen, she as well as her infant son, dwelling in this country, become citizens of the United States as fully as if they had become

such in the special mode prescribed by the naturalization laws. ***United States* v. *Kellar***, 82.

See CONSTITUTIONAL LAW, 337; JURISDICTION, 194.

CITY BONDS. MUNICIPAL BONDS, 191, note.

CIVIL-RIGHTS ACT.

POWER OF CONGRESS.—The fourteenth amendment did not of itself give congress power to protect by legislation the rights pertaining to state or national citizenship. Its inhibitions are directed solely against action by the states, and not to actions by individuals; *hence* congress had no power to protect a right claimed by a colored woman to a seat in the ladies' car of a railroad, from which she was forcibly ejected. *Smoot* v. *Kentucky Cent. R. Co.*, 337.

See CONSTITUTIONAL LAW, 337; DAMAGES, 337; JURISDICTION, 337.

CLOUD ON TITLE.

1. REMEDY AT LAW.—Equity will not allow a title to real estate, otherwise clear, to be clouded by a claim which cannot be enforced either at law or in equity, and consequently will interfere in behalf of the holder of the legal title to remove a cloud on the same, or an impediment or difficulty in the way of an effectual assertion of his rights in a court of law; but where in an action of ejectment, possession of the land and damages for wrongful withholding of possession can be recovered under section 723 of the Revised Statutes, the suit in equity cannot extend to such relief, and the decree in this case must be confined to perfecting the title of complainants to the land in controversy. Case stated in the opinion. *Steam Stone Cutter Co.* v. *Jones*, 567.

2. BILL FOR RELIEF—TITLE TO BE SHOWN.—A complainant not in possession, who seeks by bill in equity to enjoin waste and remove a cloud upon his title to land, which at the time is in possession of an adverse claimant, must show a good title in himself or fail in his suit. *Cross* v. *Sabin*, 308.

COLLECTOR'S RECEIPTS. EVIDENCE, 239, note.

COLLISION.

Sailing Rules.

1. DUTY OF STEAMER.—When a sail-vessel and steam-vessel are moving in directions which may involve risk of collision, the latter must keep out of the way of the former. *The Golden Grove*, 700.

2. DUTY OF SAIL-VESSEL.—While it is the duty of a steam-vessel to avoid a sailing vessel, it is no less the duty of the latter to afford the steamer all the means and signals the law, custom, and common prudence prescribe to enable her to make this avoidance; and if in any respect she fails therein and thereby produces the disaster, she must either bear the whole loss, or her share thereof, as her fault was the *sole* or *partial* cause of the collision. *The Golden Grove*, 674.

3. SAME—RIGHT TO HOLD COURSE.—It is the right and duty of the sailing vessel to keep her course, except under "special circumstances" rendering a departure from it necessary to avoid immediate danger. *The Golden Grove*, 700.

4. IN CASE OF FOG.—In case of a fog, and in a place much frequented by vessels, it is as much the duty of a sail-vessel to go at a moderate rate of speed as it is the duty of a steamer. *The Johns Hopkins*, 185.

5. EXCESSIVE SPEED IN FOG.—Where a sail-vessel in a fog was going at twice the speed of an approaching steamer, and neglected to show a torch-light, and the steamer was going as slow as she could go against a head-wind and a head-sea, and as soon as the steamer saw the light of the sail-vessel orders were given to stop and reverse the engine, she is not in fault for a collision which ensues, from the sailing vessel attempting to cross the course of the steamer. *Id.*

Precautions to be Taken.

6. LOOKOUT.—In a case where, besides a man forward, stationed as a lookout, there were two persons on watch in the pilot-house of a large ocean steamer, the lookout was sufficient. *Id.*

7. LOOKOUT—STEWARD.—It is doubtful whether a steward is a competent lookout, but he certainly is not when his attention is divided between such duty and the duties belonging to his employment as steward. *The Bessie Morris*, 397.

8. LIGHTS TO BE EXHIBITED.—Section 4234, Rev. St., which provides that "every sail-vessel shall, on the approach of any steam-vessel during the night-time, show a lighted torch," etc., is as applicable to navigation on the sea as to inland navigation. *The Golden Grove*, 700.

Fault.

9. NEGLECT TO SHOW LIGHTS.—Where a steam-ship in mid-ocean, on a dark night, was approaching a bark from aft in a course that rendered it impossible for her lookouts to see the regulation lights of the bark, but the lights of the steamer were in full view of those on the bark, who knew her to be a steamer approaching the bark on a course crossing her course, so as to involve the risk of collision, yet those on the bark, though having ample time so to do, did not show any light or give any other warning to the steam-ship to notify her in time of the position of the bark, and the steam-ship, immediately on discovering the bark, threw her wheel hard a-port, and, at the same time, backed at full speed, but too late to avoid collision, *held*, that the bark was alone in fault, and that the libel against the steamer be dismissed. *The Oder*, 272.

10. OVERTAKING VESSEL.—A vessel overtaking another is required to keep out of the way, and steps to avoid collision must be taken in season, and the burden of proof, in case of an accident, is on the overtaking vessel to show diligence on her part and negligence on the part of the other vessel. *Simpson* v. *Spreckels*, 93.

11. BURDEN OF PROOF.—Where a vessel having the right of way is injured by a collision, the burden of proof is upon the other vessel to show proper care; and if the testimony of her witness is contradicted, and is in conflict with the probabilities of the case, a decree will be entered against her. *The Bessie Morris*, 397.

12. BURDEN OF PROOF ON LIBELANT.—The libelant must show that the vessels were approaching in the way he describes. *The Wolverton*, 44.

13. AFFIRMANCE OF DECREE.—Where the evidence shows that no fault was to be imputed to the brig, but that the steamer was in fault, the decree against the steamer should be affirmed. *The Golden Grove*, 700.

14. SAME—FAULT IN STEAMER.—The evidence in this case showing that no fault was to be imputed to the brig in regard to her lights, or in not changing her course when approaching the steamer, but that the steamer was in fault (1) because she had not proper and sufficient lookouts; (2) because her officers and men were careless, ignorant, and incompetent; and (3) because when the collision was imminent her speed was not slackened or arrested, or the engine reversed in time to avoid collision,—the entire loss resulting therefrom must be borne by the steamer. *The Golden Grove*, 674.

Damages.

15. REPORT OF COMMISSIONER.—The estimate of damages as reported by the commissioner in a cause of collision adopted by the court. *The City of Troy*, 47.

16. CANAL-BOAT AND CARGO.—In case of a total loss of a canal-boat and her cargo of coal by a collision, the measure of damages is the value of the boat and of the cargo immediately preceding the collision. *The Ant*, 91.

17. LOSS OF FREIGHT—APPORTIONMENT.—In cases of total loss before freight is fully earned by delivery, the owners of the vessel, if not in fault, are entitled to the agreed freight, less costs, charges, and expenses of the remainder of the voyage, from which the accident discharges them. *The Golden Grove*, 674.

18. USE OF VESSEL.—In order to make full compensation and indemnity in a case of collision for what has been lost by the collision,—*restitutio in integrum*,—the owners of the injured vessel are entitled to recover for the loss of her use while laid up for repairs. *The Potomac*, 399, note.

COMMERCE.

Regulation of.

1. BRIDGING NAVIGABLE WATERS.—The paramount power of regulating bridges that affect the navigation of navigable waters of the United States is in congress. It comes from the power to regulate commerce with foreign nations and among the states. *Newport & Cin. Bridge Co.* v. *United States*, 190, note.
2. WITHDRAWAL OF ASSENT OF CONGRESS.—The withdrawal by congress of its assent to the maintenance of a bridge, when properly made, is equivalent to a positive enactment that from the time of such withdrawal the further maintenance of the bridge shall be unlawful, notwithstanding the legislation of the several states upon the subject. *Id.*
3. ALTERATIONS IN STRUCTURE—LIABILITY.—Where congress licensed the erection of a bridge over a navigable stream, and in express terms reserved to itself the power to revoke the franchise or require alterations, it may withdraw its assent, or direct such modification or alterations in its own discretion, and the United States will not be liable for the expenses incurred in making them. *Id.*

Transportation of Passengers.

4. BERTHS ON STEAM-VESSELS.—The provisions of section 4255, Rev. St., relating to the construction and occupation of berths on vessels carrying passengers from foreign ports to the United States, are not deemed applicable to steam-vessels. *The Devonshire*, 39.
5. RE-ENACTMENT OF STATUTE—FORMER CONSTRUCTION OF IT.—Where a statute has received a judicial construction and is afterwards re-enacted by the legislature of the same or another country, it is presumed to have been passed as construed. *Id.*

See CHINESE MERCHANTS, 605.

COMMON CARRIERS.

Carriers of Passengers.

1. EJECTING PASSENGER FROM TRAIN.—Where the legal right of a conductor of a railroad train to eject or remove a passenger from the cars exists, he must effect the removal at a proper place and in a proper manner, and with no more confusion, force, or violence than is reasonably necessary for the purpose. *Gallena* v. *Hot Springs R. R.* 116.
2. DUTY OF CONDUCTOR IN EJECTING PASSENGER.—Before a conductor can require a passenger to get off the cars he should stop the train at a station or depot, or where he could be put off without injury or danger of injury. He has no right to forcibly eject a passenger at such a place and in such a manner as his whim, caprice, or malice may dictate or suggest. *Id.*
3. ACTION—PROVINCE OF JURY.—In an action for damages for violent ejection from a car by the conductor, it is the province of the jury to reconcile difference in the testimony, and to decide as to the credibility of the witnesses, taking into consideration the relation they sustain to the case, their probable motives, their demeanor, and their opportunities of knowing and seeing the facts about which they testify, and the reasonableness or unreasonableness of their testimony, in view of the knowledge of human nature, and the established and undoubted facts in the case. *Id.*
4. ASSAULT ON PASSENGER.—Where a conductor, with a loaded revolver in his hand, approaches a passenger before making any effort to induce him to get off, and when the passenger had not made, or threatened to make, forcible resistance to his authority, the conductor is guilty of a gross outrage. *Id.*
5. SAME—THREATS.—With or without the use of a deadly weapon, a conductor has no right to compel a passenger, by commands or threats, to jump from a moving train. *Id.*
6. RAILROAD COMPANIES—DUTY OF—LIABILITY.—The law makes it the duty of railroad companies to employ competent, safe, and civil men to discharge the duties of a conductor, and for the assaults, injuries, and wrongs inflicted on a passenger by a conductor in the course of his employment as such, the railroad company is responsible. *Id.*

7. Same—Damages—Exemplary Damages.—Where the plaintiff was put off the train in an improper manner and in an improper place, he is entitled to recover a reasonable compensation for bodily injury, and mental suffering and anguish, resulting from the assault; and where the injury has been wanton and malicious, a further compensation by way of punishment or exemplary damages, in the discretion of the jury. *Id.*

Carriers by Land.

8. Railroad Companies—As Carriers.—A railroad company is not bound to undertake the carriage of goods beyond the terminus of its road; but if it does enter into a contract to do so, it is bound by it, and is under the same obligation to furnish means of conveyance beyond the line of its own road as it is upon it. *Bussey* v. *Memphis & L. R. R. Co.*, 330.

9. When may Refuse Freight.—A railroad company may rightfully decline to receive freight offered, when it has not the requisite rolling stock and equipments to carry it without delay; but if it receives goods for transportation, it cannot escape responsibility for delay by a previous accumulation of freight at its depots by acquainting the shipper, when he offers goods for carriage, with the facts, and affording him the option of acquiescing in the delay or seeking some other line of transportation. *Id.*

10. Connecting Lines—Through Bills of Lading.—Through bills of lading impose on the railroad company, as carrier, the obligation to provide means of transportation for the goods shipped to their ultimate destination without delay, and it is no excuse for the non-performance of this duty that it could not procure transportation by boat by reason of a previous accumulation of freight, of which it was advised when it received the goods for transportation. *Id.*

11. Damages for Delay.—The measure of damages for delay by a carrier in the transportion and delivery of goods at their point of destination, is the difference in the market value of the goods at such destination on the day they ought to have been delivered, and the market value on the day they were delivered. *Id.*

12. Bill of Lading.—In accepting a bill of lading with specific stipulations, the shipper or agent of the owner of the property carried expressly accepts and agrees to all the stipulations and conditions. Case stated in the opinion. *Milne* v. *Douglass*, 37.

13. Continuous Lines of Railway.—By the union of tracks, it was intended to make the roads practically continuous for all that may come in the course of business between companies friendly to each other; that the companies are to be brought into harmony when they fail or refuse to agree in the due and proper exercise of their public functions as common carriers; and this court will not hold that a bill that alleges that complainant has connected its road with defendant's road, but that defendant refuses to grant complainant equal facilities in conducting business that it grants to a rival road, does not present a case calling for the consideration of a court of equity, and dismiss such bill on demurrer without first examining such facts as may be developed by proper evidence. *Denver & N. O. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 546.

Carriers by Water.

14. Rivers of the South-West.—The rules regulating the liability of a carrier of goods by water to landings where there are wharves and warehouses, and where the consignee resides or may be found, are not applicable to neighborhood or way landings on the river banks of the south-west, where there is no wharf and no warehouse, and where the consignee does not reside, and is not to be found. *The Mill Boy*, 181.

15. Usage and Custom.—The usage and custom has been uniform that when the boat put goods off at such a landing in good order and condition, and the person living at or near the landing was notified of the fact, and requested to look after them and notify the consignees, the liability of the boat was at an end, and, being reasonable, contracts of affreightment will be presumed to have been made with reference to such usage and custom. *Id.*

16. Duty and Obligations of Consignees.—Where the consignees had notice in fact of the precise character of the landing, and ordered a mill consigned to

such landing, and lived at a distance from it, with no direct or speedy means of communication between the landing and themselves, it was their duty to have been in attendance to receive the mill, or to have had an agent at or near the landing for that purpose, if they did not desire to be bound by delivery in accordance with the usage and custom of the landing. *Id.*

17. NEGLIGENT STOWAGE—LIABILITY FOR LOSS.—In the stowage of drums of glycerine care must be taken to prevent working of the tiers in case of springing of the ship, and the vessel will be liable for loss or damage where the exercise of proper care would have prevented any injury arising from any springing of the ship. *The Cimbria*, 89.

18. STOWAGE OF CAUSTIC SODA AND COTTON TIES.—It appeared that caustic soda in iron drums is customarily carried in general cargoes with iron cotton ties, and that such drums are strong, durable, and air-tight, and that breakage is infrequent; and it appeared that on the voyage in question they were safely stowed and secured, but were broken in consequence of violent and continuous storms. It was contended that it was negligence to have stowed the cotton ties below the caustic soda, because the injurious result of the caustic soda falling down upon the cotton ties, if the drums should break, was well known. *Held*, that under the circumstances of this case the negligence had not been proved. *The Burswell*, 904.

See RAILROAD COMPANIES, 116, 546.

CONDEMNATION. PENALTIES AND FORFEITURES, 216; RAILROADS, 116.

CONDUCTOR. RAILROADS, 116.

CONNECTING LINES. RAILROADS, 546.

CONSIGNEES. CARRIERS, 181.

CONSOLIDATED COMPANY. CORPORATIONS, 522.

CONSTITUTIONAL LAW.

1. GENERAL LAWS OF UNITED STATES.—A bankrupt, revenue, or naturalization law, which by its terms is made applicable alike to *all* the states, without distinction or discrimination, is not unconstitutional merely because its *operations* may be wholly different in one state from another. *Darling* v. *Berry*, 659.

2. STATE INSOLVENT LAWS.—In the absence of congressional action enacting a bankrupt law, states may pass insolvent laws; but such laws have no extraterritorial operation, and do not apply to contracts made within the state between its citizens and citizens of other states. Such laws do not necessarily impair the obligations of contracts within the inhibition of the constitution of the United States. *Mather* v. *Nesbit*, 872.

3. FOURTEENTH AMENDMENT—EQUAL RIGHTS OF CITIZENS.—The declaration in the first section of the fourteenth amendment "that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," did not of itself give congress power to protect, by legislation, the rights pertaining to state or national citizenship. *Smoot* v. *Kentucky Cent. R. Co.*, 337.

4. SAME—INHIBITIONS CONSTRUED.—The inhibitions of that section, which follow the declaration above quoted, are directed solely against action by the states, not to action by individuals; and therefore if a state has not attempted, by its laws, officers, or agencies, to overstep the limitation there imposed, no case arises for the exercise of the protecting power of the national government. Case stated in the opinion. *Id.*

5. EQUAL PROTECTION OF THE LAWS—TAXATION.—The fourteenth amendment of the constitution, in declaring that no state shall deny to any person within its jurisdiction the "equal protection of the laws," imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. *The Railroad Tax Cases*, 722.

6. Unequal Exactions Inhibited.—The "equal protection of the laws" to any one implies not only that he has a right to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also that he is exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. This equal protection forbids unequal exactions of any kind, and among them that of unequal taxation. *Id.*

7. Corporations — As Persons.— Private corporations are persons, within the meaning of the first section of the fourteenth amendment, and are entitled, so far as their property is concerned, to the equal protection of the laws. *Id.*

8. Conflict of Law—Constitutional Guaranty.—Neither the constitution nor the laws of California relating to the assessment of railroads operated in more than one county provide for notice to the owner, or an opportunity for him to be heard at any stage of the proceeding. In this respect both conflict with the guaranty that no one shall be deprived of his property without due process of law. *Id.*

9. Protection of Property Rights—Due Process of Law.—Whatever the character of the proceeding by which one is deprived of his property, whether judicial or administrative, and whether it takes the property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. *Id.*

10. Protection of Corporate Property.—The state possesses no power to withdraw corporations from the guaranties of the federal constitution. Whatever property a corporation lawfully acquires is held under the same guaranties which protect the property of natural persons from spoliation. *Id.*

11. Restriction on Power of State.—Under the reserved power to amend, alter, or repeal the laws under which private corporations are formed, the state cannot exercise a control over the property of a corporation, except such as may be exercised through control over its franchise, and over like property of natural persons engaged in similar business. It cannot divest property or rights which have become vested. *Id.*

12. State Constitution—Conflict of Law.—An assessment made in strict accordance with the provisions of the state constitution relating to the assessment of railroad property which violates the provisions of the fourteenth amendment to the constitution of the United States is void. *San Francisco & N. R. Co.* v. *Dinwiddie*, 789.

13. Trial by Jury—Constitutional Guaranty.—In a proceeding at common law a citizen of the United States cannot be divested of his property except by verdict of a jury, under due process of law, in a proceeding in which he is in some manner a party, having opportunity to be heard, and having a day in court. *The J. W. French*, 916.

14. State Statute—Passage of Bills—Judicial Inquiry.—The constitution of California (section 15, art. 4) provides that "on the final passage of all bills they shall be read at length, and the vote shall be by yeas and nays upon each bill separately, and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of the members elected to each house." Under this provision the court, to inform itself, will look to the journals of the legislature, and if it appear therefrom that the bill did not pass by the constitutional majority, then it will not be regarded as a law. Sawyer, J. *The Railroad Tax Cases*, 722.

15. Connecting Railroads—Colorado Constitution.—The meaning of the last clause of article 15, § 4, of the constitution of Colorado, which provides that "every railroad company shall have the right with its road * * * to connect with * * * any other railroad," is that such roads are to be connected physically, as distinguished from the business connection between roads which have approximate *termini*. It is a union of tracks admitting of the passage of cars from one road to the other, and not a mere meeting of roads which may admit of continuous traffic in some form. The evident object is the protec-

tion of the public, rather than simply to enable corporations to perform their agreement. *Denver & N. O. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 546.

16. Title of Act—Constitution of Pennsylvania.—Under the settled construction of section 3, art. 3, of the constitution of Pennsylvania, where an act of assembly is entitled, a supplement to a former named act, and the subject thereof is germane to that of the original act, its subject is sufficiently expressed. *Second Nat. Bank* v. *Caldwell*, 429.

17. Revision and Amendment of Statute.—The constitutional provision: "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length," is sufficiently complied with if a supplement and amendatory act is set forth and published at length in its amended form. *Id.*

See Railroads, 546; Taxation, 722.

CONTEMPT OF COURT.

1. Violation of Injunction.—In fixing a penalty for contempt in the violation of a temporary injunction in a patent case, the court may ascertain the amount of defendant's profits, together with complainant's costs and expenses, and impose the aggregate sum by way of fine, and direct the same to be paid over to the complainant in reimbursement of his damages. *Searls* v. *Worden*, 716.

2. A Criminal Offense.—But as such contempt is a criminal offense, the fine should bear a just proportion to the magnitude of the offense, and ought not in general to exceed such amount as would ordinarily be imposed as a fine, when paid over to the government. *Id.*

3. Jurisdiction of Offense.—*Quære*: Can a contempt of court, being a criminal offense, and therefore local in its nature, be committed except within the jurisdiction of the contemned court? *In re Litchfield*, 863.

4. Contempt—Rev. St. §§ 725, 1014.—A refusal to obey a subpœna issued by a federal court is an offense against the federal government, within the meaning of section 1014 of the Revised Statutes of the United States. *In re Ellerbe*, 530.

5. Same.—Where a federal court orders the arrest of a witness charged with having failed to obey a subpœna issued by it, and duly served, and the witness departs into another district before he can be arrested, any judge of the United States, having jurisdiction in the district to which the witness has removed, may order his arrest and removal back to the district in which he is charged with the offense. *Id.*

6. Right of Witness to a Hearing.—In such cases the judge ordering the arrest of the witness cannot inquire into his guilt or innocence before ordering his removal. *Id.*

CONTRACT.

1. Between Citizens of Different States.—A citizen of one state may loan money to a citizen of another state, and contract for the rate of interest allowed by the laws of the latter state, although the legal rate of interest allowed is greater in such state than in the state where the contract is made, and in which it is to be performed. *Kellogg* v. *Miller*, 198.

2. Rule as to Law of Place.—Where it appears upon the face of the contract that such was the intention of the parties, it constitutes an exception to the rule that the law of the place where the contract is made must govern in expounding and enforcing it. Case stated in opinion. *Id.*

3. Mutuality of Intent.—A contract which is valid in law cannot be rendered illegal by the mere intention of one of the parties to the contract to do something which, if mutually intended, would render it invalid. *Bartlett* v. *Smith*, 263.

4. Contemporaneous Agreement.—Parol testimony of a contemporaneous agreement is not admissible to contradict or vary the terms of a written contract. *Courtright* v. *Burnes*, 317.

5. NOVATION—CONSIDERATION.—An agreement on the part of a debtor to make five new notes, in accordance with the request of the creditor, for the purpose of enabling the creditor to bring suits on the new notes in the justice's court, which he could not do on the original claim, is an agreement upon sufficient consideration. Such an agreement cancels the original contract, and substitutes for it five new contracts. *In re Dixon*, 109.

6. EXECUTED CONTRACT.—A contract becomes executed when nothing remains to be done by either party, and where the transaction has been completed, or was completed at the time the contract was made. *McNett* v. *Cooper*, 586.

See CORPORATION, 152; MENTAL CAPACITY, 586.

CONTRACT OF SALE.

TERMS OF.—Where a sale of "cured meat" was made by a broker to a merchant at Memphis, that term is to be interpreted according to the understanding of the trade at Memphis, and not according to that where the seller resided, if there be any substantial difference between the two. *Treadwell* v. *Anglo-Amer. Pack. Co.*, 22; *Fowler* v. *Treadwell*, 22.

See SALE AND DELIVERY, 22.

CONVERSION. PUBLIC PROPERTY, 559.

CONVEYANCE. DEED; WILL.

CORPORATION BONDS.

1. GUARANTY.—The holder of bonds issued by a company in which he is a stockholder, and guarantied by another corporation, may recover the full amount due upon the bonds from the latter company, in case of default in payment by the former. *Harrison* v. *Union Pac. R. Co.*, 522.

2. SAME—CONSIDERATION.—Where one railroad company holds stock in another, and the latter's road, when constructed, will become a feeder to the former's line, there is a sufficient consideration for the guaranty by the former of bonds issued by the latter to aid in the construction of its road. *Id.*

3. SAME—CONSOLIDATION—LIABILITY OF CONSOLIDATED COMPANY.—A. and B., two corporations, united and formed a consolidated company, which did business under the name of B. A., at the time of the consolidation, was indebted to X. The consolidated company derived sufficient assets from A. to pay the debt. *Held*, that X. could recover the full amount of his claim against A. from B. *Id.*

CORPORATIONS

1. CONTRACTS OF.—Contracts, which though invalid for want of corporate powers, yet, if fully executed, shall remain as the foundation of rights acquired by the transaction. *Taylor* v. *S. & N. Ala. R. Co.*, 152.

2. RIGHTS OF STOCKHOLDERS.—A stockholder of a corporation will not be allowed, after a reasonable time, to disturb and rescind a contract made by his corporation, after the same has been fully executed, on the ground that it is *ultra vires*, and in excess of the corporate powers granted by the charter of the corporation. *Id.*

3. SAME.—Where a corporation issued preferred interest-bearing stock in excess of its authority, non-assenting stockholders must, within a reasonable time, dissent, and take steps to make their dissent effectual, or they will be held to have tacitly assented to the act of the corporation. *Id.*

4. CORPORATE PROPERTY—CAPITAL STOCK.—The property of a corporation is a trust fund for the benefit of the stockholders in the hands of a corporate body, which is the trustee; but capital stock in the corporation in the hands of its owner, who has paid for it, is neither a trust fund, nor is its owner a trustee, and statutes of repose run to protect such owner in his right to such property. *Id.*

5. Fraudulent Transfer of Assets.—Equity will not permit the stockholders in one corporation to organize another, and transfer all the corporate property of the former to the latter, without paying all the corporate debts. *Hibernia Ins. Co.* v. *St. Louis & N. O. Transp. Co.*, 516.

6. Same—Enforcement fo Obligations.—Where such a transfer is made, the obligations of the old corporation may be enforced against the new to the extent of the assets received by it. *Id.*

7. When Directors may Take Security from.—The directors of a solvent corporation may lawfully pledge its securities to secure individual demands of directors and others, due and to accrue, for money loaned to it. *Stout* v. *Yaeger Mill. Co.*, 802.

8. Same—Pledge—Delivery.—Where the directors of a corporation placed the company's policies of insurance in the hands of two of its directors without any formal assignment, to secure loans made and to be made by such directors and others to the corporation, *held*, that there was a sufficient delivery to sustain the pledge. *Id.*

9. Stockholder's Bill—Equitable Relief.—It is sufficient ground for equitable interference that complainant, who is a stockholder of a corporation, alleges that the officers of the corporation, who are members of one family and own a majority of the stock, have combined to appropriate the profits of the corporation in the form of salaries, and through a contract with a firm of which they are members, and have also combined to keep complainant in ignorance with regard to these transactions. *Sellers* v. *Phœnix Iron Co.*, 20.

See Bill by Stockholder, 20; Constitutional Law, 722; Insolvency, 493; Insolvent Corporation, 802; Insurance, 526.

COSTS.

1. Solicitor's Fees.—Where in an equity case, before any decree is rendered, an order dismissing the bill with costs is obtained, without notice to the defendant, or hearing or consideration of the case by the court, the solicitor's fee of $20 will not be allowed. *Coy* v. *Perkins*, 111.

2. In Equity.—Where the plaintiffs had a fair cause to suppose that separate insolvency administrations would be necessary in each state, on a dismissal of the bill here the defendant was not allowed costs, but each party was required to pay his own costs. *Taylor* v. *Life Ass'n of A.*, 493.

COUNTER-CLAIM. Pleading, 544, 843.

COUNTY BONDS. Municipal Bonds, 120, 192 note, 240, 837.

CREDITORS. Estates of Deceased, 16.

CREDITORS' BILLS.

1. Rights of Creditors.—It is only when the remedy at law has been exhausted that a creditor acquires the right to follow the property of a debtor in the hands of his trustee, and a relaxation of the strict rule requiring a creditor to exhaust his legal remedy before resorting to a creditor's bill will not be justified by the fact of the insolvency of the debtor, or that the debtor has no leviable property. *Walser* v. *Seligman*, 415.

2. Same—Creditors at Large.—Where some of the creditors only had recovered judgments in the state courts where such non-resident corporation existed, and had issued executions thereon, which were returned unsatisfied, the suit will be treated as a creditor's bill, and the complainants as creditors at large. *Id.*

3. To Reach Assets of Estate.—The creditor of a deceased person may go into a court of equity for a discovery of assets and the payment of his debt, and he will not be turned back to a court of law to establish the validity of his claim; and the court being in rightful possession of the cause for a discovery and account, will proceed to a final decree upon all the merits. *Johnson* v. *Powers*, 315.

CRIMINAL LAW.

1. STATUTORY OFFENSE—HOW SET OUT.—In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. *United States* v. *Carll*, 96, note.

2. INTENT OF STATUTE.—The fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging all facts necessary to bring the case within that intent. *Id.*

3. SAME—COUNTERFEITING.—The offense at which the statute is aimed is similar to the common-law offense of uttering a forged or counterfeit bill, and knowledge that the instrument is forged and counterfeited is essential to make out the crime, and the omission to allege that the defendant knew the instrument which he uttered to be false, forged, and counterfeit, fails to charge him with any crime. *Id.*

4. CRIMINAL PROCEDURE—STAY OF PROCEEDINGS.—On an application to the circuit court for a writ of error to the district court, in a criminal case, if the error complained of is a matter about which there may be a serious question, it is the duty of the court or of the judge, not only to grant the writ of error, but to allow a stay of proceedings, to enable the defendant to take the deliberate judgment of the appellate court upon the question involved in the case. *United States* v. *Whittier*, 534.

5. WRIT OF ERROR—WHEN GRANTED.—Where there is a question about which there is a doubt, as whether the defendant is charged in the indictment with a felony or a misdemeanor, and whether it was error to receive the verdict of the jury during the absence from the court of defendant and his counsel, and as to which question defendant has a right to take the opinion of the appellate court, a writ of error and a stay of proceedings should be granted. *Id.*

6. REVOLT ON STEAM-BOAT—MATE—CREW—REV. ST. §§ 5359, 5360.—A statute punishing "any one of the *crew* of an American vessel" for making revolt, or endeavoring to make revolt, on board, within the admiralty and maritime jurisdiction of the United States, embraces the *mate* and all other officers inferior to the master. *United States* v. *Huff*, 630.

7. SAME—MATE DISRATED OR DISCHARGED.—Nor will the fact that the master displaces the mate from his position on the boat and discharges him, release the latter from the operation of these statutes while he remains on board, and certainly not while he is acting, or claiming to act, as an officer. Every member of the crew, while on board, is bound to obedience and subordination to all proper control and discipline. *Id.*

8. ACT APRIL 30, 1790, §§ 8, 12—ACT MARCH 3, 1835.—The act of March 3, 1835, carried into the Revised Statutes as sections 5359-60, enlarges the original act of April 30, 1790, by adding distinct offenses to the "endeavor to make a revolt" contained in it. *Id.*

9. ENDEAVOR TO MAKE REVOLT—DISOBEDIENCE—RESISTANCE.—These statutes do not include every case of simple passive *disobedience* of the master's orders on the part of one of the crew, not participated in by others; but do embrace every case of *resistance* to the free and lawful exercise of the master's authority, when accompanied by force, fraud, intimidation, violence, a conspiracy among the crew, or concerted action in such resistance or disobedience by one of them. *Id.*

10. UNLAWFUL CONFINEMENT OF MASTER.—An unlawful confinement of the master, under section 5359, is not restricted to a physical confinement of his person. If the master is prevented or restrained by force, intimidation, or threats of bodily injury from the free use of every part of the vessel in the performance of his functions as master, it is a confinement within the meaning of this statute. *Id.*

11. CHARGE OF COURT.—Only such parts of the charge of the court should be given as would point the exceptions; and, so, inserting the entire evidence in the record is objectionable practice. *United States* v. *Rindskopf*, 143, note.

CUSTOMS DUTIES.

TORCHON LACES.—"White linen torchon laces and insertings" are "thread lace and insertings," and are liable for duties only to the amount prescribed for articles of that kind; and are not classed as a manufacture of flax, or of which flax is the component material or chief value, "not otherwise provided for." *Henry* v. *Field*, 143, note.

DAMAGES.

1. QUESTION OF FACT.—The fact that the city owned stock, and had advanced money to the corporation which held the title to the bridge, does not make the city responsible for defects in the approaches to the bridge; but whether the city by its action had treated the embankment as a street, or an extension of a street, is a question of fact for the jury. *City of Manchester* v. *Ericsson*, 142, note.
2. FOR DETAINING MAIL MATTER.—In an action for damages for the wrongful detention and conversion of certain letters of the plaintiffs, detained by the postmaster under a regulation of the post-office department requiring him, when he has reason to believe that a fictitious address is used for forbidden circulation in the mails, to report the fact and the reason of his belief, await instructions, and give notice that, pending such instructions, persons claiming the correspondence must call at the general delivery and establish their identity before its delivery—where the meaning or application of the allegations in the answer is not doubtful, the plaintiffs' remedy is to be sought by a bill of particulars, and not by requiring the pleading to be made definite and certain. *Wilson* v. *Pearson*, 386.
3. SAME—BILL OF PARTICULARS.—Where the circumstances are such as can only influence the postmaster's own judgment, it is not to be assumed that the plaintiffs can definitely know what they are, and they are entitled to information to meet the issue tendered by the defendant by a bill of particulars setting forth the facts and circumstances which induced defendant to believe that the address was being used by some person or persons for covering forbidden correspondence in the mail under such fictitious address. *Id.*

See CIVIL-RIGHTS ACT, 337; DISCRIMINATION, 373; INJUNCTION, 300, note; NEGLIGENCE, 69, 394, 591; RAILROADS, 116.

DECREE.

INTERFERENCE WITH.—Courts should judiciously refrain from interfering with the decrees of other courts, except when such interference or impeachment is plainly necessary. *Sahlgaard* v. *Kennedy*, 242.

DEED.

1. RESERVATION—EXCEPTION—DEED.—The clause in the deed "that the grantor corporation excepts and reserves to itself all of the buildings, etc., standing on the granted lands," etc., is an *exception* and not a *reservation;* for a reservation is a clause in a deed whereby the grantor reserves some *new thing* to himself out of that which he granted before, and differs from an *exception*, which is ever a part of the thing granted, and a thing *in esse* at the time. *Washington Mills E. M. Co.* v. *Commercial F. Ins. Co.*, 646.
2. AS EVIDENCE OF INTENTION.—Where, upon the face of the deed, it appears that the grantors intended to convey a fee, and, by mistake, they have failed to carry out their intention, the mistake may be corrected upon the evidence furnished by the deed itself. *Sampson* v. *Mudge*, 260.
3. AS NOTICE OF INTENT OF PARTIES.—When the bill charges defendant with having notice of the true contract and intent of the parties to a deed when he made the levy, he takes by the levy the land of the debtor subject to all equities; and where the deed, on its face, discloses the intention, its record is notice to subsequent purchasers of the equity which that intention creates. *Id.*

See MISTAKE, 260.

DEPOSITION.

ADMISSION IN EVIDENCE.—A deposition duly taken in a civil action because the witness resides more than 100 miles distant from the place of trial, is admissible in evidence, subject to the right of the adverse party to place the deponent on the witness stand if present at the trial. *Whitford* v. *Clark Co.*, 837.

DISCRIMINATION BY RAILROADS.

1. CONTRACT OF RECEIVER OF RAILROAD.—Where the receiver of a railroad company adopted a contract with a third party for the transportation of wheat over the lines of road operated by him contrary to the provisions of the state statute, and at rates less than charged to the plaintiffs, it was a discrimination in freights *Griesser* v. *McIlrath*, 373.
2. DAMAGES.—The rule as to measure of damages stated in the opinion. *Id.*

See RAILROADS, 3.

DISTRICT COURT.

POWER OF.—Where a remedy could be enforced by a state court, this court has power to adopt the same remedy in favor of a non-resident creditor who has obtained a decree against a resident defendant. *Stansell* v. *Levee Board*, 846.

DOCK, INJURY AT. ADMIRALTY, 394.

DOMESTIC COMMERCE.

RAILROADS—REV. ST. § 4386—UNLOADING SHEEP, ETC.—Section 4386 of the Revised Statutes of the United States, imposing a penalty upon railroads carrying sheep, swine, etc., if they allow such sheep, swine, etc., to be more than 28 consecutive hours confined without unloading them for at least five hours for rest, water, and feeding, does not apply to a railroad carrying sheep, swine, etc., *from a point within a state to another point therein*, but only to such as convey swine, sheep, etc., from one state to another. *United States* v. *East Tenn., V. & G. R. Co.*, 642.

DURESS. TAXATION, 789.

EJECTMENT.

PATENT NOT SUBJECT TO COLLATERAL ATTACK.—In an action of ejectment defendant cannot collaterally attack a patent for land issued by the officers of the land department of the government, even upon the ground of fraud. *St. Louis, S. & R. Co.* v. *Green*, 208.

EJECTMENT OF PASSENGER. RAILROADS, 116.

EQUITY.

Jurisdiction.

1. NATIONAL BANK—SERVICE ON.—Where service upon the defendant, a national bank, located and doing business in another state, was made under an order of court pursuant to the act of March 3, 1875, in a suit to relieve the bankrupts' real estate, situated in this district, from the lien of certain judgments, and to remove a cloud upon the title, the bank is an "absent defendant," within the purview of that act, and jurisdiction attaches. *Duff* v. *First Nat. Bank*, 65.
2. ADEQUATE REMEDY AT LAW.—Where some of the matters charged in the bill are peculiarly of equitable cognizance, while allegations of fraud pervade every part of it, the case is one for equitable relief. *Id.*

3. DISMISSAL—REMEDY AT LAW.—Where a cause of action cognizable at law is entertained in equity, on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill and remit the cause to a court of law. *Mitchell* v. *Dowell*, 141, note.

4. DISMISSAL—WANT OF EQUITY.—Bill must still be dismissed for want of equity, on the ground that there is ample remedy at law by a motion to the court to compel the marshal to release his levy on the stock, because not liable to be sold on the execution. *New Orleans* v. *Morris*, 559, note.

5. SAME—Where a mortgage was given to secure the purchase price of personal property sold by defendants to the mortgageors, who were at the time apparently, or supposed by defendants to be, of sound mind, and the contract has become executed by maturity of the debt, foreclosure and sale, and deeding of the premises, the court having no power to restore defendants to their condition before they parted with their property, a bill to have the mortgage and all proceedings taken to foreclose it, including the deed to defendants as purchasers at the foreclosure sale, declared void, will be dismissed for want of equity. *McNett* v. *Cooper*, 586.

6. AUXILIARY JURISDICTION.—Where stockholders are indebted to the corporation on stock subscriptions, the sum due may be reached by a creditor's bill; and where, by any dealings between the corporation and its stockholders, the capital stock which is a fund for the payment of its debts is wrongfully diverted, a creditor can reach it. The court of equity assists him, not in the exercise of its jurisdiction over trusts, but in the exercise of its auxiliary jurisdiction in behalf of creditors. *Walser* v. *Seligman*, 415.

7. TITLE TO PROPERTY.—Where there was nothing to give an equity court jurisdiction, and the only effect of the agreement in question would be to estop the devisees and executor of the deceased husband from asserting title to the property; the parties must proceed at law; and, the real estate having been converted into personal, the administrator of said Clarissa was the proper party to sue at law, and the legal representatives of said Clarissa could only acquire title through administration on her estate. Case stated in opinion. *Strong* v. *Wiggins*, 418.

Pleading and Practice.

8. GENERAL CERTAINTY.—In most cases general certainty is sufficient in pleadings in equity, and where the pleading distinctly apprises the defendant of the precise case the pleading is sufficient. *St. Louis* v. *The Knapp Co.*, 144, note.

9. MULTIFARIOUSNESS.—Where the purpose of the bill and the alleged foundation for relief are not so distinct in their nature as to make their joinder in one bill objectionable, but are intimately related as parts of a fraudulent scheme, and the bill so connects the defendants as to make them proper joint defendants, the bill is not multifarious. *Duff* v. *First Nat. Bank*, 65.

10. SAME.—A bill which seeks to reach the property, and its rents and proceeds, acquired by one of the defendants through alleged conspiracy, and the property acquired by another defendant, also through an alleged conspiracy, is not multifarious. *Johnson* v. *Powers*, 315.

11. DEFENSE OF WANT OF CONSIDERATION.—The defense of want of consideration may ordinarily be made at law; but when a determination of the question of consideration depends upon the settlement of the affairs of a partnership, some of the members of which are not before the court, it is a question for equitable jurisdiction. *Courtright* v. *Burnes*, 317.

12. PARTIES—JOINT INTERESTS.—While it may be that the holder of negotiable securities can at law maintain a suit in his own name, excluding equities under given circumstances, yet when joint parties seek to upset judicial decrees, charge trusts, and fasten supposed liens in consequence of joint interests, all of them should be before the court, that it may be known to what extent and in whose favor a decree may be had. *Sahlgaard* v. *Kennedy*, 242.

13. VARIANCE—AMENDMENT.—Where the facts proved as entitling a party to relief do not correspond with the allegations of the bill, no relief can be granted unless the bill is properly remodeled. *South Park Com'rs* v. *Kerr*, 502.

14. DISCOVERY OF FRAUD A QUESTION OF FACT.—The defense that the plaintiff discovered the fraud more than six years before bringing suit, must be raised by plea or answer, so that the issue on the discovery may be tried as a question of fact. *Johnson* v. *Powers*, 315.

15. APPEAL.—An appeal does not lie from an appeal in equity as to the costs merely. *Russell* v. *Farley*, 300, note.

See CORPORATIONS, 20; INJUNCTIONS, 300, 546; INSOLVENT INCORPORATIONS, 415; MISTAKE, 250, 361; PRINCIPAL AND SURETY, 380; RAILROAD BONDS, 50; RAILROADS, 3; TRUST AND TRUSTEE, 502.

EQUITY RULES Nos. 7, 8, PROCESS, 581; No. 89, CIRCUIT COURT RULES, 581.

ESTATES OF DECEASED.

1. DISTRIBUTION OF ESTATE—LAWS OF DOMICILE TO GOVERN.—The act of congress does not make the duty payable when "the person possessed of such property" dies testate, if it would not be payable if such person died intestate; and if a woman dies intestate her heir takes a distributive share by the intestate laws of the place of domicile of his mother at the time of her death. *United States* v. *Hunnewell*, 617.

2. INVESTMENT BY LEGATEE.—A legatee, being also executor, of the estate of a decedent purchased an interest in a firm, using for that purpose certain funds derived from that estate, one-third of which belonged to him as legatee, one-third to a sister, and one-third to the children of a deceased brother. When he entered the firm he stipulated to become liable with the partners for its debts. He subsequently died, and *his* executor became a member of the same firm, and not only allowed the interest of his testator in that firm to remain, but, upon the basis of certain notes payable to his testator, negotiated loans from Ayer and from a bank for the use of the firm. In an action brought by the personal representatives of the original decedent the supreme court decided that the notes in question, in fact, belonged to the estate of such decedent, and they were accordingly delivered up to his personal representatives by the parties to whom they were passed as collateral security for said loans. *Smith* v. *Harvey*, 16.

3. RECOVERY OF ASSETS.—Thereupon the personal representatives of the original decedent brought an independent suit against the maker of the notes to enforce their payment, and in the progress of the suit the entire amount due on the notes was paid into court. *Held*—

(1) That the judgment of the supreme court deciding that the notes belonged to the estate of the original decedent, and the decree in pursuance of the mandate requiring their delivery to his personal representatives, do not prevent the creditors of the firm, of which his legatee was a member, from asserting in this independent suit any equity they or either of them may have, to have their debts paid out of the proceeds of the notes.

(2) That the parties who had loaned money upon the said notes as collateral, and to the extent such money had been paid by the legatees of the original decedent, are entitled to be subrogated to the rights of the latter, less the sum paid on the notes by the parties originally liable thereon, and interest.

(3) That the legatee and executor of the original decedent, having had no authority to invest in the business of the firm the interest of his sister and the children of his deceased brother in the proceeds of the notes, the latter cannot be held liable for the debts of the firm, and the administrators of the estate of the original decedent are entitled to all the fund in court except the one-third going to the estate of the legatee and partner in the debtor firm, under the will of the original decedent

(4) That the defendants are entitled to subject to their claims against the firm the interest which the estate of T. T. Renick may have in the proceeds of the notes, but to the extent only that the money borrowed on the Harvey notes, as collateral, was applied to debts of that firm for which T. T. Rennick was responsible. *Id.*

See LEGACY TAX; WILL.

ESTOPPEL.

1. DOCTRINE OF.—If the owner of an estate stands by and sees another erect improvements on the estate, in the belief that he has the right to do so, and does not interpose to prevent the work, he will not be permitted to claim such improvements after they are erected; but he is not thereby estopped to claim the title in an action of ejectment. *St. Louis, S. & R. Co.* v. *Green*, 208.

2. SAME—INSUFFICIENT PLEA.—An allegation that after defendants were notified and informed that plaintiff had applied for a patent they had an arrangement with the plaintiff by which plaintiff assured them that he would sell to them for a nominal price, and would not disturb them in their possession, is not a good plea of estoppel. *Id.*

See NATIONAL BANKS, 811.

EVIDENCE.

1. PRESUMPTIONS.—Presumptions are indulged to supply the place of facts, but they are never allowed against ascertained and established facts. When these appear, presumptions disappear. *Lincoln* v. *French*, 48, note.

2. BURDEN OF PROOF.—Where, in a suit for rent, the defendant admits the fact of the tenancy at the rate stated in the petition, the burden of proof is upon him to show that the rent has been paid. *Gay* v. *Joplin*, 650.

3. SHERIFF'S RETURN.—Where A. brings suit against B. by attachment, and the sheriff executing the writ seizes property belonging to C., the sheriff's return is conclusive as to the fact of seizure and the articles seized, in a suit by C. against A. for damages. *Stinson* v. *Hawkins*, 833.

See DEPOSITIONS, 837.

EXECUTIONS.

1. EXEMPTION.—City water-works are held for public use, and are not liable to execution for judgments against the city. *New Orleans* v. *Morris*, 559, note.

2. WRONGFUL LEVY—REMEDY.—In the case of a wrongful levy on property not subject to seizure, the proper remedy is by motion to have the levy discharged. *Id.*, 237.

EXECUTION SALE. INSURANCE, 719.

EXECUTORS.

JOINT LIABILITY.—When two executors settled a joint account, charging themselves jointly with all the assets of the estate and exhibiting a general balance in their hands, but, by a statement appended to the account, it appeared (as the fact was) that they had actually received the assets and held the proceeds individually in stated proportions, *held*, that while jointly liable to the legatees for the general balance, they were not joint debtors *inter se*, and one of them having paid the legatees more than his individual proportion, was entitled to be subrogated to the lien against the real estate of the other, which the legatees had acquired by docketing the general balance. *Reber* v. *Gundy*, 53.

See ESTATES OF DECEASED, 16, 617.

FINDINGS. REFERENCE, 550.

FORECLOSURE.

1. SALE—POSTPONEMENT.—Where the sale of mortgaged premises under a foreclosure decree, appointed for a particular date, would be ultimately detrimental to all interests to all interested, and good cause is shown therefor, the petition of defendants for a postponement of the sale to a future day fixed will be granted. *Farmers' L. & T. Co.* v. *Oxford Iron Co.*, 169.

2. SALE OF LANDS—STATUTE RULE.—The provisions of the statute of Illinois giving the right to redeem as well lands or tenements sold under execution, as mortgaged lands sold under decrees of courts of equity, has no application to the real estate of a railroad corporation which, with its franchises and personal property, is mortgaged as an entirety, to secure the payment of money borrowed for railroad purposes. *Hammock* v. *Farmers' L. & T. Co.*, 189, note.

3. PROPERTY AND FRANCHISE OF RAILROAD.—Its property, real and personal, and its franchises, should be sold as an entirety, and without right of redemption in the mortgageor, or in judgment creditors, as to the real estate. *Id.*

4. PURCHASER OF SALES PROTECTED BY THE RECORD.—Where, in a suit to foreclose a mortgage, brought against a railroad company, third parties intervene and seek to enforce a claim for materials furnished or used in the construction of the roadway, against the earnings of the road in the hands of the receiver, and without claiming a mechanic's lien, the purchaser at the foreclosure sale is not bound to look beyond what appears upon the face of the record, and anticipate a future claim for a mechanic's lien in case the earnings of the road should not satisfy the claim of intervenors. *Hale* v. *B., C. R. & N. R. Co.*, 203.

5. RIGHTS OF PURCHASERS FROM MORTGAGEOR.—A party owning land, subject to a mortgage, conveyed a block thereof to a purchaser, who gave the vendor his note for the purchase money, and executed a deed of trust to secure payment of the note, and afterwards, by warranty deed, the owner conveyed to the present plaintiff another block of said lands, the latter not knowing at the time of the existence of the mortgage. In satisfaction of the mortgage debt the decree in the foreclosure suit required the sale of both blocks in the reverse order in which they had been sold, and the amount realized on the sale of the first parcels sold not being sufficient to pay the mortgage debt, plaintiff was compelled to pay the difference in order to prevent the sale of his block. *Held*, that plaintiff is entitled to be subrogated to the rights of the mortgagee to the extent of such payment, and to an order of sale of the interests of the owner as holder of the trust deed, and of the holders of the note for the unpaid purchase money, —transferred to them by the original owner with knowledge of the existence of the mortgage,—for the purpose of reimbursing plaintiff in the sum paid by him, with interest. *Ricker* v. *Greenbaum*, 363.

FOREIGN CORPORATION. INSOLVENCY, 493; INSURANCE, 526; JURISDICTION, 3, 358, 823; STATUTE OF LIMITATIONS, 827.

FOREIGN JUDGMENTS.

FORCE AND OPERATION OF.—Judgments obtained in another state are in this state only contract debts, and do not authorize the exercise of auxiliary jurisdiction. They do not have the force and operation of domestic judgments, except for purposes of evidence. *Walser* v. *Seligman*, 415.

FOREIGN VESSELS. SALVAGE, 135.

FORMS. WRITS AND PROCESS, 567.

FRAUD. INSURANCE, 526.

FRAUDULENT CONTRACT. NEW TRIAL, 595.

FRAUDULENT CONVEYANCE.

FRAUD—CONVEYANCES TO HINDER AND DELAY CREDITORS.—A mortgage executed to hinder and delay the mortgageors' creditors is void as to such creditors, even when for full value, if the mortgagee is aware of the fraudulent intent. *Stinson* v. *Hawkins*, 833.

FRAUDULENT SALES. PLEADING, 537.

GENERAL AVERAGE. MARITIME SERVICE, 127.

HOMESTEAD.

ON PUBLIC LANDS.—The act of April 21, 1876, (19 St. 35,) passed for the protection of settlers on public lands, by pre-emption and homesteads, does not apply to a case where, prior to such pre-emption or homestead entry, the lands had been specially granted by act of congress, and had fully vested in the grantee. *Taboreck* v. *B. & M. R. Co.*, 103.

INJUNCTION.

1. RESTRAINING JUDICIAL PROCEEDINGS.—The circuit court will not issue an injunction to restrain a party from claiming, using, occupying, incumbering, disposing of, or interfering, or in any manner intermeddling, with property which the state court has directed its officers to place in his hands. *Domestic & F. Missionary Co.* v. *Hinman*, 161.
2. RESTRAINING PROCEEDINGS AT LAW.—Tenants in common are entitled to the aid of a court of equity to restrain proceedings at law until they can perfect their title, upon filing proper bond. Case stated in opinion. *Crellin* v. *Ely*, 420.
3. TERMS IMPOSED.—The courts of the United States, under the general principles and usages of equity, may impose terms or require security for damages before granting an injunction, and this power is independent of any statute, or it may relieve from or modify such terms during the progress or at the termination of the cause, and enforce or carry out the conditions imposed, or the undertakings entered into; but while the court may have the power to assess damages, yet if it has that power it is in its discretion to exercise it, or to leave the parties to their action at law. *Russell* v. *Farley*, 300, note.
4. PRELIMINARY INJUNCTION.—This court will not, however, grant a preliminary injunction in a case like the present, and the motion, therefore, must be denied. *Denver & N. O. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 546.
5. REV. ST. § 720.—Section 720 of the United States Revised Statutes prohibits the granting of injunctions except in bankruptcy cases when the state court has first regularly acquired jurisdiction of the case. *Missouri, K. & T. R. Co.* v. *Scott*, 793.
6. AUTHORITY OF UNITED STATES COURT.—Where the United States court acquires jurisdiction of a case by removal or otherwise, and afterwards parties institute proceedings in state courts that will, if successful, defeat the jurisdiction of the United States court or deprive plaintiffs therein of all benefit of any decree or judgment rendered in their favor, the United States courts may by injunction lay hands on the parties and control their proceedings, although proceedings in a state court may be thus indirectly stayed or ended. *Id.*
7. DISSOLUTION—INDEMNIFICATION—PRACTICE.—Where an injunction has been dissolved, the better practice is for the court which issued the injunction to assess the damages caused by its issuance, and not compel the party injured to resort to an independant action at law to procure indemnification, if he can thus be indemnified. *Lea* v. *Deakin*, 514.

INSANITY. MENTAL INCAPACITY, 586.

INSOLVENCY.

STATUTE CONSTRUED.—The provision of an insolvent law which does not grant a discharge of the debtor on surrender of all his property to an assignee or a receiver, but merely gives a priority to creditors who will release the debtor over those who stand back and do not accept the conditions under which his property passes to the assignee or the receiver, and who alone can receive dividends from the estate, is not in conflict with the constitution of the state or of the United States. *Mather* v. *Nesbit*, 872.

See CONSTITUTIONAL LAW.

INSOLVENT CORPORATION.

1. SUIT ON BEHALF OF CREDITORS AND STOCKHOLDERS. — Creditors and stockholders of an insolvent non-resident corporation may unite in a suit in behalf of themselves, and other creditors and stockholders, to enforce the liability of holders of unpaid shares of the capital stock of such corporation, without making the non-resident corporation a party. *Walser* v. *Seligman*, 415.

2. PRIORITIES—ATTACHMENT—LIEN.—Creditors attaching the assets of an insolvent corporation, for the purpose of winding it up under the statutes of Tennessee, acquire, by the attachment, no lien or right of priority in the assets which are to be distributed *pro rata* among all the creditors residing in the state or elsewhere. *Taylor* v. *Life Ass'n of America*, 493.

3. INTERSTATE OR INTERNATIONAL EFFECT OF INSOLVENCY.—While the state court may seize the assets of an insolvent foreign corporation, and administer them as a trust fund for the benefit of creditors, in the absence of a statute especially declaring a preference or lien in favor of home creditors, the distribution is *pro rata* wherever the creditors reside, and the fund belongs to all the creditors, and not exclusively to those residing in the state of Tennessee. *Id.*

4. ATTACHMENT—ASSIGNMENT—RECEIVER—SITUS OF PROMISSORY NOTES.—Where a mutual life insurance company, in which all the policy-holders are members, becomes insolvent and passes into the hands of a receiver under the decrees of a court at the domicile of the corporation, and by order of the court the company by deed assigns all its assets, wherever situated, to the receiver, the assignment will pass promissory notes of debtors residing in another state held by and in the possession of the company and the receiver, and prevails over an attachment subsequently levied by creditors in the state of the debtors. For this purpose the *situs* of the debt is the domicile of the creditor. *Id.*

5. SAME—FOREIGN CORPORATION—INSURANCE—SEPARATE DAPARTMENTS—LIENS. Where a corporation, by its constitution and by-laws, provided for local control by boards of department directors, and required to be loaned in each department a sum equal to two-thirds of the net present terminal value or premium reserve of all premiums, paying whole life and endowment insurance policies of persons resident within such department, there is nothing in the scheme which gives policy-holders any lien or right of priority in the assets within the particular department. Such a lien or priority can only be created by apt words in the statutes, by-laws, or the contract itself, and will not be implied from that mode of doing business. *Id.*

6. SUIT TO WIND UP IN STATE OF DOMICILE—SUITS IN OTHER STATE. — Where a life insurance company became insolvent, and under the laws of the state of its creation was, by suit instituted for the purpose, placed in the hands of a receiver to wind it up and distribute its assets, a bill filed by creditors in Tennessee, in a state court, to attach its assets in that state, and wind it up and distribute its assets there situated according to the insolvency laws of that state, will be, on removal to the federal court, if the Tennessee creditors are not entitled to any specific lien or right of priority, dismissed, and the creditors must seek satisfaction in the insolvency proceedings of the home state of the insolvent corporation. *Id.*

7. FRAUDULENT PREFERENCE.—Where A., a bank which held stock in B., an insolvent corporation, and which was a representative in B.'s board of directors, took security from B. for money due it from B., and for advances to be made by it on B.'s account, and thereafter made large advances on the faith of the security received, *held*, that A. was bound to account to unsecured creditors for their *pro rata* of the proceeds of such securities. *Stout* v. *Yaeger Mill. Co.*, 802.

See ATTACHMENT, 872.

INSURANCE.

1. BROKER—AS AGENT.—If plaintiffs (the insured) employed an insurance broker to place insurance for them, he was *their* agent, and not that of the insurance company. But if, acting on behalf of an agent of the company, the broker solicited insurance from the plaintiffs, he was the agent of the insurance com-

pany, and it is legally chargeable with his knowledge. *Mohr & M. D. Co.* v. *Ohio Ins. Co.*, 74.

2. WHAT MAKES A GENERAL AGENT.—When an insurance agent, who is assigned by his commission to a certain territory, has placed in his hands the blank policies of the company, signed by the president and secretary, and is on the face of such policies authorized to make contracts of insurance by countersigning the same, he is a general agent to the extent of everything relating to the effecting of insurance within the territorial limits to which he has been assigned; and one seeking insurance is not bound to inquire as to the precise instructions he has received from his company. *Id.*

3. UNAUTHORIZED ISSUE OF POLICY.—Where such an agent, in violation of private instructions given to him, issues a policy covering property in territory outside of his district, the company may either ratify or disavow such a policy; but the disavowal must be prompt, and notice thereof must be brought home to the insured, otherwise the company will be deemed in law to have ratified the policy. *Id.*

4. CANCELLATION OF POLICY.—The burden of proving a cancellation of a policy of insurance is upon the party claiming that the contract has been terminated. Where a policy provided that the company might terminate the insurance "by giving notice to the assured and refunding a ratable proportion of the premiums for the unexpired term of the policy," *held*, that the company must show that it had given the assured notice that the policy was canceled, and that it had paid, or tendered him, such portion of the premium; and notice that the policy would be canceled, or a promise to pay, or a request to call for the premium, is insufficient. *Id.*

5. INTEREST INSURED—MAY BE ENHANCED.—A change of title which increases the interest of the insured, whether the same be by sale under judicial decree or by voluntary conveyance, does not defeat the insurance, as where the interest insured was that of a mortgagee, who afterwards obtains the full title. *Bailey* v. *American Cent. Ins. Co.*, 250.

6. FOREIGN COMPANY.—A foreign insurance company cannot withdraw itself from the operation of the statutes of a state in which it does business, by the insertion of clauses in its policies. *Fletcher* v. *New York L. Ins. Co.*, 526.

7. APPLICATION FOR INSURANCE—FRAUD.—Where, by the terms of a policy of insurance sued on, an application signed by the assured is declared to be the sole basis thereof, evidence is admissible to show that false statements contained in the application were inserted without the applicant's knowledge by an agent of defendant, and that the applicant's signature was procured by such agent by fraud. *Id.*

8. BREACH OF CONDITION.—Plaintiff, a corporation, had conveyed certain ground, on which the buildings insured were situated, to the city of Boston, with the right to remove the buildings within a certain time, or they would be forfeited. *Held*, that until forfeiture it still owned the buildings, and that its not notifying the insurance company of its conveyance to the city was not a breach of the condition in the policy providing that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, or so expressed in the written part of the policy, otherwise the policy shall be void." *Washington Mills E. Manuf'g Co.* v. *Commercial F. Ins. Co.*, 646.

9. MEASURE OF DAMAGES.—In a case like this the measure of damages is the real value of the buildings at the time of the fire, and not their relative value to the assured for the purpose of the removal. *Id.*

10. PAYABLE TO CREDITOR—PURCHASE AT EXECUTION SALE.—Where the owner of property caused it to be insured, and made the policies payable to a creditor, who subsequently brought suit against the owner for the debt secured by the policies, obtained judgment, levied an execution upon the property insured, and bought it in upon the sheriff's sale, and shortly after the sale the property was burned, and the creditor received the proceeds of the insurance, it was *held* that, while the purchase of the property was technically an extinguishment of the debt secured by the policies, yet that the creditor was equitably entitled to retain the proceeds of the insurance, but must credit the same upon

the amount of his bid, in case the debtor saw fit to redeem. *Gleason* v. *First Nat. Bank*, 719.

See EXECUTION, 719.

INTEREST. STATE FUNDS, 508.

INTERNAL REVENUE.

1. ASSESSMENT OF COMMISSIONER.—The assessment of the commissioner of internal revenue is only *prima facie* evidence of the amount due as taxes upon distilled spirits. If not impeached, it is sufficient to justify a recovery; but every material fact upon which liability is asserted is open to contestation. *United States* v. *Rindskopf*, 143, note.

2. SAME—NOT AN ENTIRETY.—An instruction that the assessment is to be taken as an entirety, and that the government is entitled to recover the exact amount assessed, or not any sum, is erroneous, unless an erroneous rate has been adopted by the officer, or where it is impossible to separate from the property assessed the part which is exempt from the tax, or where its validity depends upon the jurisdiction of the commissioner. *Id.*

3. TREASURY TRANSCRIPT.—A treasury transcript is *prima facie* evidence of the fact of indebtedness which it certifies, unless upon the face of the account it necessarily appears to be otherwise. *United States* v. *Hunt*, 239, note.

4. COLLECTOR'S RECEIPTS.—Collector's receipts are admissible in evidence to prove the debit side of his account, and, being part of his official transactions, forming the basis of the account against him upon the books of the treasury department, their exclusion is erroneous. *Id.*

JUDGMENT.

1. BY CONFESSION—IMPEACHMENT.—A judgment to secure the purchase money of real estate consisting of three pieces of land, entered upon a warrant to confess judgment, given about one month after the delivery to the bankrupt of a deed for one of the pieces, but simultaneously with the delivery to him of the deeds for the other two pieces, cannot be impeached, either in whole or part, as an unlawful preference by the assignee in bankruptcy to whom the real estate passed, it appearing that it was substantially one transaction, consummated when the two latter deeds were delivered and the warrant to confess the judgment was given. *Reber* v. *Gundy*, 53.

2. RULE OF PROPERTY—STATE DECISIONS TO GOVERN.—The decision of the supreme court of a state, as to the rule of property, will be followed by the federal courts sitting within the district included in such state. *Burham* v. *Fritz*, 368.

See PENALTIES AND FORFEITURES, 916.

JUDGMENT LIEN.

PRIORITY OF.—Under the laws of Texas the lien acquired by judgment and levy of execution is superior to an unrecorded deed, and the purchaser at the execution sale on judgments antedating the recording of a mortgage, and without notice of it, has a better title than the mortgagee, although the sale was made subsequent to the recording of the mortgage. *Stevenson* v. *Texas & Pac. R. Co.*, 302, note.

JUDICIAL NOTICE.

PUBLIC WAR—HISTORICAL INCIDENTS.—Courts may take judicial notice of the existence of a public war, when it commenced and when it terminated, and all of its historical incidents; but the courts cannot take judicial cognizance of the fact that the courts of a particular county were closed. If the fact exists, and is relied on by either party to a suit, it must be established by extraneous evidence, as other ordinary facts are required to be proven. *Cross* v. *Sabin*, 308.

JUDICIAL SALE.

1. Relief of Purchaser.—A court of equity will relieve the purchaser from complying with his bid made at a judicial sale where the title is defective. *Dunscomb* v. *Holst*, 11.

2. Title under.—A title acquired under the following devise in a will, "I bequeath to my daughter [the land in question] for her and her children's sole and separate use, free from any claim or control of her husband," is not of such clear and indisputable character as the purchaser at a judicial sale has a right to demand. *Id.*

3. Resale.—That under such circumstances, and after an investigation of the title by the master, the court will order a resale of such interest in the land as the defendants to the suit may have. *Id.*

JURISDICTION.

1. Right to Possession of Property.—By the service of a writ of replevin issued from a state court, the property comes into the custody and possession of that court, for all purposes of jurisdiction in that case, and no other court has a right to interfere with that possession, unless it be some court having a direct supervisory control over the court issuing the writ, or some superior jurisdiction in the premises. *Domestic & F. Missionary Co.* v. *Hinman*, 161.

2. Same—Replevin—Right and Title to Property.—The question as to whether the property levied on under the writ of replevin is trust property, belonging to the complainant as trustee, or individual property of the defendant, is for the state court to determine in the replevin suit; and it cannot, therefore, be assumed, in determining the question of jurisdiction, that the property is trust property, and that complainant is entitled to it as trustee. *Id.*

3. Possession of Property.—Where the circuit court of the United States had lawfully acquired possession of property prior to any action in reference to it by the state court, the former had the right to retain possession, for all the purposes of the suit, for foreclosure of the mortgage thereon. *Hammock* v. *Farmers' L. & T. Co.*, 189, note.

4. Necessary Parties—Citizenship.—Where the contract sued on was entered into between plaintiff and defendants, one of whom was a citizen of the same state with the plaintiff, and the other a citizen of a foreign country, and both defendants are not only necessary but indispensable parties to the controversy, as shown from the face of the bill, this court is without jurisdiction. Case stated in the opinion. *Watson* v. *Evers*, 194.

5. Collusive Assignment.—Where various parties transferred negotiable securities to a non-resident for the purpose of conferring jurisdiction on the circuit court, it is the duty of the court to dismiss the case on its own motion as soon as such collusion appeared. *Williams* v. *Nottawa*, 302.

6. Assignee of Chose in Action.—Where the obligation sued on is a negotiable promissory note, it is excepted out of the prohibition contained in section 1 of the act of March 3, 1875, inhibiting the assignee of a chose in action to sue in cases where the assignor could not maintain a suit in the circuit court. *Marine & R. P., etc., Co.* v. *Bradley*, 301, note.

7. Negotiable Bond.—The bond of a corporation subsequently indorsed to bearer is negotiable according to the law merchant, and according to the law of the place of the contract. *Id.*

8. Transfer by Delivery.—Where the delivery of the bond was a transfer of the legal title, and it is nowhere shown that the party transferring could not have maintained action upon the bond, the transfer will not be deemed collusive for the purpose of conferring jurisdiction on the circuit court. *Id.*

9. Dependent on Citizenship.—To confer or oust jurisdiction, when it depends on citizenship, the necessary facts must be distinctly alleged and admitted or proved. *Id.*

10. Concurrent at Law or in Equity.—Where the statute prescribes no form of action, the jurisdiction may be regarded as concurrent at law and in equity, according to the nature of the relief made necessary by the circumstances upon which the right arises. *Id.*

11. Action under Civil-Rights Act.—Whether jurisdiction of a civil action for damages arising out of a violation of the equality guarantied by the first section of the civil-rights act of March 1, 1875, is conferred upon the United States courts by that act, *quære*. But *held* that, if that act is constitutional, jurisdiction is conferred by the act of March 3, 1875, as being a case "arising under the constitution or laws of the United States." *Smoot* v. *Kentucky Cent. R. Co.*, 337.

12. Subject-Matter,—The subject-matter of contracts made in relation to patents, where neither the validity of the patent nor its infringement are concerned in the controversy, does not give the courts of the United States jurisdiction. The rights of the patentee under the patent laws of the United States must be directly and not collaterally brought in issue to give jurisdiction. *Teas* v. *Albright*, 406.

See Circuit Court, 300, note, 377; Service of Process, 3, 358, 823.

LAND GRANTS.

1. Construction of.—Land grants to railroads take effect from the time that the line of the railroad is definitely fixed or located, notwithstanding the lands may not be selected till a later date. *Taboreck* v. *B. & M. R. Co.*, 103.

2. Same.—The land-grant act of July 2, 1864, was a definite and explicit grant of all the land embraced within 10 alternate sections on each side of the line of the road, on the line of the road, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had not attached at the time the line of the road was definitely fixed; and the fact that congress did not prescribe any lateral limit in the selection of lands in lieu of those previously sold or disposed of by government, cannot affect the construction of the grant. *Id.*

3. Pacific Railroad Acts—Construed.—On July 1, 1862, the original Pacific Railroad act was passed, granting a certain portion of the public lands for the construction of railroads; and on July 2, 1864, an amendatory act was passed enlarging the original grant. The lands in controversy were not included in the original grant, but are included in the grant under the later amendatory act, under which complainant claims title. *Held*, that such lands, during the intervening period, were subject to be reserved from sale, pre-emption, or homestead settlement by the proper authority. *Kansas Pac. R. Co.* v. *Atchison, T. & Santa Fe R. Co.*, 106.

4. Title under Intervening Grant.—Where complainant claims title under the amendatory act of 1864, and respondent claims title under an intervening act of congress of March 3, 1863, passed while the lands in controversy were subject to reservation from sale by the government, the title to the lands is in the respondent. *Id.*

5. Priority.—A grant of land by the state of Tennessee, on the eleventh November, 1841, on an entry made in 1840, is paramount to a grant issued in 1845, on an entry made in 1830. *Cross* v. *Sabin*, 308.

6. In Whom Title Vests.—A grant to John H. Jones & Co. vests the legal title in John H. Jones, for himself and in trust for his partners, in proportion to their several interests. *Id.*

See Mexican Grant, 217.

LANDLORD AND TENANT.

Improvements.—In the absence of any agreement, a tenant is not entitled to compensation for improvements voluntarily placed by him upon the leasehold. *Gay* v. *Joplin*, 650.

LEGACY DUTY.

Act of Congress Construed.—Under the provisions of sections 124 and 125 of the act of congress passed June 30, 1864, *c.* 255, the legacy duty imposed thereby is made payable on the estates of those persons only whose domicile at the time of their death is in the United States. *United States* v. *Hunnewell*, 617.

LICENSES. MUNICIPAL CORPORATION, 229; TAXATION, 429.

LIENS. TRUSTS AND TRUSTEES, 423.

MAIL MATTER. DAMAGES, 386; DETENTION.

MARITIME LIEN.

1. STEVEDORE—EMPLOYES.—Where the master of a vessel employs a stevedore to discharge cargo, and the latter employs laborers for that purpose, such laborers have no lien upon the vessel. *The Mark Lane*, 800.
2. LIEN FOR SUPPLIES.—Where family supplies and hay and oats were furnished by a dealer in Buffalo on board a canal-boat lying up there for the winter, and the boat, having departed before the bills were paid and come into the eastern district of New York, was there libeled by the provision dealer, claiming a lien upon the boat as for maritime supplies, and it appeared on trial that the horses and man were employed at work on the streets of Buffalo, and that the captain of the boat had not ordered the supplies, nor the woman who owned the boat, and whose husband was so at work on the streets with his horses, *held*, that the supplies were furnished on personal credit, and no lien on the boat arose out of the transaction. *The T. L. Wadsworth*, 46.

MARITIME SERVICES.

1. ADJUSTING GENERAL AVERAGE.—Services performed by average adjusters, including expenses, disbursements, and charges incidental to ascertaining and adjusting the proportionate share chargeable to the cargo of the expense incurred in saving and discharging the cargo, and delivering it, are maritime in their nature; and an express contract for such services is a maritime contract and cognizable in the admiralty. *Coast Wreck. Co.* v. *Phœnix Ins. Co.*, 127.
2. PERFORMANCE ON REQUEST.—Where, on a vessel discharging, the master was sick, and the mate temporarily in charge brought a cooper, who coopered some casks, and rendered a bill which was not objected to by the mate, except one item, which was corrected, *held*, that the work was performed at request of the mate. *The E. A. Baisley*, 703.

See PILOTAGE, 295.

MECHANIC'S LIEN.

1. WHEN NOT WAIVED BY TAKING SECURITY.—The holder of a claim for labor or materials for a building, erection, or improvements upon land does not waive his right to a mechanic's lien by taking security upon the same contract and upon the same property unless it appear affirmatively that it was his intention to look to such security and not to his mechanic's lien. *Hale* v. *B., C. R. & N. R. Co.*, 203.
2. SECURITY TO BE ON IDENTICAL PROPERTY.—The taking of bonds secured by a a mortgage on "all the franchises, fuel, rolling stock, cars, engines, machinery, and appurtenances appertaining or belonging to" a single division of a railroad line which embraces four different divisions, as collateral security for a mechanic's lien claimed upon "building, erection, or other improvement, including any work of internal improvement" on the entire line of road including the four divisions, is *not* equivalent to taking security upon the identical property upon which the mechanic's lien is sought to be enforced. *Id.*

MENTAL INCAPACITY.

1. BURDEN OF PROOF.—The burden of proof is upon one alleging mental incapacity to make a valid contract, unless it is shown that the party contracting was insane *prior* to the date of the contract, when the burden is shifted, and those claiming under the contract must prove that it was executed during a lucid interval. *McNett* v. *Cooper*, 586.

2. PARTIAL INSANITY.—Partial insanity, in the absence of fraud or imposition, will not avoid a contract unless it exists with reference to the subject of it at the time of its execution; but in cases of fraud it may be considered in determining whether a party has been imposed upon. *Id.*

MEXICAN GRANT.

1. RES ADJUDICATA.—Where the question at issue was determined at a former trial and judgment and became *res adjudicata*, a party is estopped from again litigating the question. Facts stated in the opinion. *Hayner* v. *Stanly*. 217.

2. PATENT FOR LAND—LEGAL TITLE—DERIVATIVE TITLE.—M., a claimant under title derived from the original grantee of a part of the lands embraced in a Mexican grant, obtained a decree of confirmation, on which a patent was issued, and other claimants of the same land, under title also claimed to have been derived from the same original grantee, and whose claim had been confirmed prior to the issue of the patent to M., obtained patents for the same land some years subsequent to the issue of the patent to M. *Held*—

(1) That the issue of the patent to M. vested the entire legal title in him, and left nothing in the United States upon which the subsequent patents could operate, and consequently nothing passed by them. With the issue and delivery of the senior patent all authority or control of the executive department over the land passed away.

(2) That under such circumstances, in an action at law, the senior patent is conclusive as to the title, and cannot be assailed by the holders of the junior patent.

(3) The only remedy of the junior patentees is in equity, to charge the holder of the senior patent, if there are equitable grounds for so doing, with a trust for their benefit.

(4) While, in a proper sense, it may be true that, in acting on a claim for land based on a Mexican grant, the United States has no interest in the derivative title from the original grantee of the Mexican government, yet where one held such a derivative title prior to the transfer of California to the United States, he was one of the parties protected by the stipulations of the treaty, and it would seem was as much entitled to have his deed from the original grantee passed upon, as he was to have the original grant itself passed upon.

(5) The cases in which it has been held admissible, in an action at law between the holders of senior and junior patents for the same land, to examine into the equities for the purpose of attaching a prior equity to the junior patent, are all cases where the parties have sought to acquire lands belonging to the United States *upon different and independent adverse claims*, and have no application to a case where both parties claim under the same original grant or right, though by different derivative titles.

(6) Where two parties claim the same land under different derivative titles from the original grantee of the Mexican government, and one of them obtains a patent for the lands, the right, if any, of the other to relief in equity accrues on the day the patent issues. The cause of suit is full, complete, and perfect on that day, and is not dependent and cannot rest upon any subsequent proceeding or patent.

Semble, where such equitable action is not commenced until a time when by the state statute of limitations it would be barred, the United States circuit court, although a court of equity, and not absolutely bound by that statute, may, in analogy thereto, hold the cause to be stale, and decline on that ground to sustain a bill.

The question whether a patent gives a new cause of action so as to avoid the statute of limitations, where both parties claim under the same grant, *not determined*. *Id.*

MISTAKE.

1. OF LAW.—A mistake of law, made through the representations of an agent, may be corrected in equity. *Bailey* v. *Am. Cent. Ins. Co.*, 250.

2. IN INSURANCE POLICY.—If an applicant for insurance correctly states his interest, and distinctly asks for an insurance thereon, and the agent of the insurer agrees to comply with his request, and assumes to decide on the form of

the policy, and by mistake of law adopts the wrong form, a court of equity will reform the instrument so as to make it insurance upon the interest named. *Id.*

3. OF FACT.—The mistake of a scrivener in one state as to the law of another state, is a mistake of fact. *Sampson* v. *Mudge*, 260.

4. SAME—CORRECTION OF.—The mistake of a scrivener in drawing a deed, whether it be a mistake of law or of fact, whereby he fails to carry out the previous agreement of the parties, may be corrected in equity; and oral evidence is admissible to prove the intention of the parties. *Id.*

5. MONEY PAID—RECOVERY BACK.—Where, by mistake, there is a payment of money, which there is no ground to claim in equity or conscience, it is recoverable back. Case stated in the opinion. *In re Farmers' & Mechanics' Bank*, 361.

See INJUNCTION, 420.

MONEY FOLLOWED INTO LAND, 502.

MORTGAGE.

1. INCOME OF MORTGAGED PROPERTY.—Until the mortgagee of an insolvent corporation takes possession in person or by receiver, the mortgageor is entitled to income derived from operating the same. *Young* v. *Northern Ill. C. & I. Co.*, 806.

2. ASSETS—RIGHTS OF MORTGAGEOR.—A company indebted to its employes prior to the appointment of a receiver assigned to a creditor certain drafts drawn upon various corporations for the approximate amounts of their various indebtedness, and after the appointment of a receiver gave to the said creditor drafts upon the same corporations for the actual amounts due. *Held*, that the mortgageor had the right to pledge or assign such drafts, they being assets of the mortgageor, to secure the creditor, and the assignment of the later drafts was but the consummation of the previous agreement, and was valid and passed the title to the creditor. That the mortgageor company, at the time of the appointment of the receiver, was largely in debt to its employes, and that the mortgagees advanced the sums necessary to pay off these debts, would not give them the right to the proceeds of the drafts as against the creditor. *Id.*

See EQUITY, 586; RAILROAD BONDS, 50.

MULTIFARIOUSNESS. EQUITY, 65.

MUNICIPAL BONDS.

In General.

1. NEGOTIABILITY OF.—Municipal bonds, payable to bearer, are deemed payable to the holder, and the holder is not regarded as the assignee of the contract, but the holder through transfer by delivery. *Farr* v. *Town of Lyons*, 377.

City Bonds.

2. IN AID OF MANUFACTURES.—Where a city council had power, the voters consenting, to issue negotiable securities for certain municipal purposes, if the purchaser, under some circumstances, would have been bound to take notice of the provisions of the ordinances whose titles were recited in the bonds, he was relieved from any responsibility or duty in that regard by reason of the representation upon the face of the bonds that the ordinances provided for a loan for municipal purposes. *City of Ottawa* v. *Nat. Bank*, 191, note.

3. MUNICIPAL PURPOSES—ESTOPPEL.—Such a representation by the municipal authorities of the city would estop the city, as against *bona fide* holders for value, to say that the bonds were not issued for legitimate or proper municipal or corporate purposes. *Id.*

4. BONDS PAYABLE TO BEARER—HOLDER MAY SUE.—By the decisions of the supreme court of Illinois, municipal bonds, payable to bearer or to some named person or bearer, were excepted from the rule that notes payable to a person or bearer could not be transferred or assigned by delivery only, so as to authorize the holder to sue in his own name. *Id.*

County Bonds.

5. PRECINCT BONDS, IN NAME OF COUNTY.—A precinct is a mere subdivision of a county, and not a separate political entity, and bonds issued by authority of a vote of the precinct for public purposes must be issued in the name of the county of which the precinct forms a part; and suit on such bonds must be against the county, the judgment to be paid by a tax levied only on the taxable property of the precinct. *Davenport* v. *Dodge Co.*, 192, note.

6. REMEDY FOR ENFORCEMENT OF.—A suit to obtain such a judgment is maintainable, although the state statute authorizing the issue of the bonds provides the special remedy by *mandamus* for their enforcement; yet inasmuch as a suit to obtain judgment on bonds or coupons is part of the necessary machinery of the federal courts in enforcing the writ of *mandamus*, which is in the nature of an execution, it will not be issued until judgment is obtained. *Id.*

7. INNOCENT HOLDER.—County bonds issued in Missouri by a *de facto* court, sealed with the seal of the court, and signed by the *de facto* president, cannot be impeached in the hands of an innocent holder by showing that the acting president was not *de jure* one of the justices of the court. *Ralls Co.* v. *Douglass*, 190, note.

8. DEFENSE IN ACTION.—It cannot be shown as a defense to bonds issued by counties in Missouri, in payment of subscriptions to the capital stock of a company, and in the hands of innocent holders, that the company to whose stock the subscription was made was not organized within the time limited by its charter. *Id.*

9. VALIDITY OF.—Bonds issued by counties in Missouri during the years 1870 and 1871, in payment of subscriptions to the stock of railroad companies, without a vote of the people, are valid, if the subscription was made under authority of charters granted in 1857, which did not require such a vote to be taken. *Id.*

10. AS EVIDENCE.—Such bonds and coupons issued in those years were admissible in evidence, in an action against the county for the recovery of the amount due thereon, without being stamped as obligations for the payment of money, under the provisions of the internal-revenue law. *Id.*

11. SAME.—It was not necessary to prove the order of the county court authorizing the president of the court to countersign the bonds, where there was no plea or answer sworn to, denying their execution. *Id.*

12. BONA FIDE HOLDER.—Where there was no averment in the petition to that effect, testimony was admissible to prove that plaintiff was a *bona fide* holder and owner. *Id.*

13. DETACHED COUPONS—FRAUDULENT ISSUES.—Where certain county bonds and a number of detached coupons were placed in the hands of an agent of the county to be issued by him conditionally, and the agent issued them fraudulently, and transferred the detached coupons to A., his brother-in-law, and where B., who, while said county was disputing the validity of said bonds and coupons, and negotiating for a compromise with the holders thereof, had, with a full knowledge of the facts, entered into a contract with said county to procure said bonds and coupons for surrender, purchased the coupons transferred to A., in the name of C., and C. brought suit thereon against the county, *held*, that C. was not a *bona fide* holder for value, and could not recover. *Whitford* v. *Clark Co.*, 837.

14. COUPONS—FRAUDULENT ISSUE—RIGHTS OF HOLDER.—A purchaser with notice cannot recover upon detached interest coupons fraudulently issued after maturity. *Whitford* v. *Clark Co.*, 644.

15. NEGOTIABILITY.—The action and certificate of the auditor are conclusive evidence, as between the county and a *bona fide* holder, that bonds unconditional upon their face were regularly and legally issued, and therefore negotiable. *Lewis* v. *County Com'rs*, 240.

Town Bonds.

16. IN AID OF RAILROADS.—Where a statute authorizes a town to make a subscription in aid of a railroad, to be paid in bonds of the town, subject to the conditions that the road be so constructed as to pass through the town, and that a depot be located and maintained in the town, it cannot, after the bonds have

been signed, sealed, and delivered by its constituted authorities to the railroad company, and have passed into the hands of *bona fide* holders for value, escape liability by showing that the conditions, or some of them, imposed by popular vote, have not been complied with upon the part of the railroad company, even though the statute authorizing their issue especially provides that they shall not be valid till such conditions are complied with. *Amer. Life Ins. Co.* v. *Town of Bruce*, 192, note.

See Negotiable Instruments, 301, note.

MUNICIPAL CORPORATIONS.

1. Subscription to Railroad Stock.—An enabling act passed in execution of the powers authorized by the constitution, general in its provisions, conferring power upon any county, city, or town to take stock in, or to loan its credit to, any railroad company duly organized under any law of the state, upon the assent of two-thirds of the qualified voters thereof, does not revoke any previous grants of similar authority. *City of Louisiana* v. *Taylor*, 301, note.

2. Division of Territory—Liability for Debts—Remedy.—When an old corporation is dissolved and a new one created, substantially embracing the same territory, the new municipality becomes liable, as successor, for the debts of the old, although the respective charters differ, and consequently an action at law will lie. *Brewis* v. *City of Duluth*, 334.

3. Power of Legislature—Apportionment of Liability.—Cities, towns, and counties are mere political subdivisions of the state, and are at all times subject to legislative control, and may be divided, subdivided, or abolished. It is competent for the legislature, in making such subdivisions, to apportion the obligations of the divided territory, and in the absence of such legislative apportionment, the old municipality, if still existing, must bear the entire debt; but if a municipality has been abolished, and its territory divided among other municipalities, the creditor may pursue his demand against the latter for their equitable portions thereof. *Id.*

4. Conversion of Public Property.—A statute of a state legislature which, in the act authorizing a city to convert its ownership of a large and valuable property, held for the use of the public, into the shares of a joint-stock corporation, declares that these shares shall be exempt from judicial sale for the debts of the city, is an impairment of the obligation of existing contracts within the meaning of the constitution. *New Orleans* v. *Morris*, 559, note.

5. Power to License Trades.—A city ordinance which makes it unlawful for any person to establish, maintain, or carry on any laundry within certain limits without first having obtained the consent of the board of supervisors, which shall only be granted upon the recommendation of not less than 12 citizens and tax-payers in the block in which the laundry is proposed to be established, and which punishes by fine or imprisonment for a violation of its provisions, is invalid. *In re Quong Woo*, 229.

6. Legislative Power a Public Trust.—Under their authority to license trades and callings, supervisors cannot delegate their power to others, or make its exercise depend upon the consent of others. The legislative power vested in them is a public trust, which can only be executed in consonance with the general purposes of the municipality, and in subordination to the general laws and policy of the state. *Id.*

7. Restriction on Powers.—Licenses for callings, trades, and employments may be required by supervisors where the nature of the business requires special knowledge or qualifications, or where they are issued as a means of raising revenue for municipal purposes; but they cannot be required as a means of prohibiting any of the avocations of life which are not injurious to public morals, offensive to the senses, nor dangerous to public health and safety. *Id.*

NATIONAL BANK.

Transactions—Estoppel.—Where the president of a national bank instructed its correspondent bank to charge up against the bank of which he was president

the amount of a note given by him, in payment of such note, and an account was rendered showing the transaction, the bank was estopped from denying the correctness of the charge in an action by a receiver, subsequently appointed, seeking to set aside the transaction. *Burton* v. *Burley*, 811.

See EQUITY, 65; TAXATION, 429.

NAVIGATION. OBSTRUCTIONS TO, 144, note.

NEGLIGENCE.

1. DEFINED.—Negligence is a failure to do what a reasonably-prudent man would ordinarily do under the circumstances, or in doing what such person under existing circumstances would not have done. *Backus* v. *Start*, 69.
2. DEFINED.—Negligence is the want of that care and prudence which a man of ordinary intelligence would exercise under *all* the circumstances of the case. *Harris* v. *Union Pac. R. Co.*, 591.
3. BURDEN OF PROOF.—In an action for the recovery of money advanced for the purchase and storage of merchandise, where a counter-claim is interposed alleging carelessness and negligence on the part of the plaintiff in storing the property, and claiming damages as a set-off to the claim of the plaintiff, the burden of proof is on defendant to show negligence on the part of the plaintiff *Backus* v. *Start*, 69.
4. BURDEN OF PROOF—PROXIMATE CAUSE.—Negligence is a question of fact to be found by the jury, and in order to recover, the plaintiff must establish by a fair preponderance of proof that the defendant was guilty of negligence, and that the injury complained of was the natural and ordinary result of such negligence, and that the negligence was the proximate cause of the injury which a reasonably-prudent and cautious person ought to have apprehended might result from the act. *Harris* v. *Union Pac. R. Co.*, 591.
5. RAILROAD COMPANY TO KEEP TRACKS CLEAR.—While a railroad company is bound to use great care in order to keep its tracks clear for the safety of its passengers, and for its employes, it is not responsible for the unlawful act of some third party in placing obstructions upon the track without its knowledge or consent, unless it be in a case where it had by its conduct done some act which it might reasonably have anticipated would lead to the placing of the obstruction upon the track. *Id.*
6. MEASURE OF DAMAGES.—In determining the amount of damages, the jury should consider the pain and suffering to which plaintiff has been subjected, both mental and physical, the loss of time and loss of wages which has resulted from his injury, the nature and extent of his physical injuries, their effect upon his ability to earn his living since the accident as compared with his ability to do so before, and the probable effect of those injuries upon his future health and strength. Under all these circumstances, and in view of all these facts, they should estimate the damages. and give him such sum as they think will be a reasonable, not an unreasonable, compensation. *Id.*
7. FAULT OF FELLOW-SERVANT.—Where a workman upon a vessel was injured by falling through an open hatchway negligently left open by the stevedore having charge of the discharging and loading of the vessel, and the actual negligence that caused the accident was the removal of a lamp by a fellow-workman employed at the same job with the libelant, the common employer is not liable for the injury. *The Victoria*, 43.
8. INJURY AT DOCK.—Where a schooner entered a dock between a loaded barge and another schooner, where there was insufficient room, and on the fall of the tide the barge was crushed, the schooner so entering was *prima facie* liable. *The John W. Hall*, 394.

See CARRIERS, 904; TUG AND TOW, 611.

NEW TRIAL.

1. MATERIAL ISSUE.—Where wine was sold to defendants, who were regular wine merchants, upon representations made by the agent of plaintiffs that such wine

had a large sale in the region covered by defendants' trade, an issue as to the truth or falsity of such representations, submitted to a jury upon a suit on an accepted draft drawn for the first installment of such wine delivered to defendants by plaintiffs, is a material issue, and the submission to the jury is not ground for a new trial. *American Wine Co.* v. *Brasher*, 595.

2. OBJECTIONS DEEMED WAIVED.—Where an issue is tendered as to the quality of the article sold upon the representation of the agent of the plaintiffs that it was of good quality and readily salable, and the plaintiffs go to trial upon such issue, and the jury disagree after a jury is impaneled for another trial, although as a matter of law there may be some doubt as to whether such an issue ought to be submitted to a jury upon a question of fraud and deceit in respect to the sale of such article, the plaintiffs must be held to have waived any right to object to such issue. *Id.*

See VERDICT, 595.

NUISANCE.

1. NAVIGABLE STREAMS.—A public navigable stream must remain free and unobstructed, and no private individual has a right to place permanent structures within the navigable channel; and if a proposed run-way, when completed, proves to be a material obstruction to the free navigation of a river, or a special injury to the rights of others, it may be condemned and removed as a nuisance. *St. Louis* v. *The Knapp Co.*, 144, note.

2. THREATENED ACTS.—Where the complaint avers that defendant proposes to do the act, and the averment is accompanied by the general charge that "the driving of piles in the bed of the river and the construction of the run-way will not only cause a diversion of the river from its natural course, but will throw it east of its natural course, from along the river bank north and south of the proposed run-way and piling," it is a sufficiently certain and minute allegation of facts, and not a case of a threatened nuisance only, and is not demurrable on the ground of uncertainty. *Id.*

OFFICIAL BOND. TAX COLLECTOR, 303, note.

PARTIES. EQUITY, 242; PRACTICE, 857; RECEIVER, 857.

PARTITION. INJUNCTION, 420.

PARTNERSHIP.

1. BANKRUPTCY—REMEDY IN STATE COURTS.—Even if by failing publicly to disclaim the printed statement that they were directors, and by allowing their neighbors to believe that they were in some manner interested in a bank, parties are estopped from denying their liability to those who trusted such bank, relying upon their supposed connection with it, an appeal to a court of bankruptcy is not proper; as to declare such parties bankrupt would render them liable, not only to those actually deceived, but to all who had claims against such bank, whether they were deceived or not, and those who were actually deceived have a perfect remedy in the state court. *In re Murray*, 550.

2. GUARANTY BY INDIVIDUAL PARTNER.—Where, after the failure of a firm, and while they are endeavoring to settle with their creditors, one partner, at the request of a holder of a firm obligation, guaranties its payment, such guaranty is without legal effect and does not entitle the holder to prove against the separate estate of the guarantor upon subsequent adjudication of bankruptcy. *In re Blumer*, 622.

See ESTATES OF DECEASED, 16.

PASSENGERS. EJECTION FROM CARS, 116.

PATENTS FOR INVENTIONS.

Claim and Specifications.

1. STRICT RULE OF CONSTRUCTION.--A patentee must be held strictly to the language of his claim. *Delong* v. *Bickford*, 32.
2. STATE OF ART—RESTRICTION.—When the state of the art is such that the field of invention is circumscribed, the invention of a new patentee must necessarily be confined strictly to the description of the article as set forth in the specification and claims. *Neacy* v. *Allis*, 874.
3. CLAIM, HOW CONSTRUED.—A patent claim must be construed in the light of the specifications, and where the specifications describe the entire article, parts of the description cannot be separately considered, to show an infringement of one of the parts. *Evans* v. *Kelly*, 903.

Novelty and Utility.

4. PROCESS FOR MAKING SPOONS AND FORKS.—Where the patentee attained the result of producing a new thing, a silver-plated steel spoon, by a succession of old processes, which, though separately old, had not been practically grouped together in the order in which he used them, it is a patentable novelty in process. *Wallace* v. *Noyes*, 172.
5. IN PROCESS.—Where there is nothing new in the process described in the patent, and all the elements are old and are merely aggregated, and the aggregation brings out no new product, nor does it bring out any old product in a cheaper or otherwise more advantageous way, it is not patentable. *The Packing Co. Cases*, 304, note.
6. WANT OF NOVELTY.—A patent for a dummy to display clothing, in form substantially like the wire dummies in previous use, but made of *papier mache*, a material that had been previously used to make lay figures, representing various personages, many of whom were draped in suitable clothing, cannot be considered as valid because the device is destitute of patentable novelty. *Palmenbing* v. *Bucholz*, 672; *Same* v. *Bauman*, 672; *Same* v. *Hohlweck*, 672.
7. EXPERIMENTAL DEVICES.—Evidence of similar devices, merely experimental, will not defeat a patent, though prior in point of time. *Whittlesey* v. *Ames*, 893.
8. NOT TO DEFEAT SUBSEQUENT PATENTS.—Although prior unsuccessful experiments in part suggested the construction which the patentee adopted and perfected, this fact will not defeat the patent. *Id.*
9. EQUIVALENT.—A device consisting of old elements combined, and practically superseding all other known means of pitching kegs and other small receptacles, is not a mere mechanical equivalent of any other device. *Gottfried* v. *Crescent Brewing Co.*, 479.
10. SUBSTITUTION OF PARTS.—The court will so protect a patented combination as not to allow it to be defeated by a mere substitution of parts performing the same functions. *Whittlesey* v. *Ames*, 893.

Reissues.

11. DEFECTS CURED.—Where, upon inspection and comparison, the lack of definite specifications, which rendered prior reissues inoperative, has been cured by the present reissue, the reissue *prima facie* is good. *Schneider* v. *Bassett*, 351.
12. SCOPE EXTENDED.—Where the scope of the original patent was extended to an unauthorized degree, the claim in the reissue cannot be sustained. *Neacy* v. *Allis*, 874.
13. COMBINATIONS—USE OF A PART.—Although the owner of a patent had the right to claim a combination in his reissue, the claim cannot be extended to the sole right to the use of a part of the combination. *Whittlesey* v. *Ames*, 893.

Foreign Patents.

14. PREVIOUS GRANT.—Section 4887 of the Revised Statutes expressly requires the commissioner of patents, where a foreign patent has been issued for the same subject-matters, to limit the term of the domestic patent to the period of time that the foreign patent has to run; or if there be more than one, then to make it expire at the same time with the one having the shortest term; and the pri-

ority of such patent is to be determined, not by the dates of the applications for the foreign and domestic patents, but by the dates on which the letters patent were granted. *Bate Refrigerating Co.* v. *Gillett*, 553.

15. SAME—CANADIAN PATENT ACT.—Under sections 16 and 18 of the Canadian patent act, a patent takes effect, not from its delivery to the patentee, but when it is signed, sealed, and registered. *Id.*
16. EXTENSION OF FOREIGN PATENT.—An extension of the term of a foreign patent will not operate to extend the term of the domestic patent; such patent expires when the original foreign patent expires. *Id.*
17. VALIDITY OF DOMESTIC PATENT.—Whether the United States patent is void *ab initio* in this case, because the term was not limited on its face to expire with that of the foreign patent, not decided. *Id.*

Validity of Specific Patents.

18. HAY ELEVATORS.—Reissued patents Nos. 2,429, for improvement in hay elevators, and 2,260, for improvement in horse hay-forks, and original patent No. 53,-345, for improvement in horse hay-forks, *held* valid. *Nellis* v. *Pennock Manuf'g Co.*, 451.
19. BUCKETS.—Patents No. 83,117 and No. 58,368 compared with that of plaintiff, and shown not to have anticipated the features of his invention. *Barker* v. *Todd*, 473.
20. PITCHING BARRELS.—The validity of letters patent No. 42,580, for a new and improved mode of pitching barrels, sustained on the authority of *Gottfried* v. *Crescent Brewing Co. ante*, 479. *Gottfried* v. *Stahlmann*, 673.
21. HEAD-BLOCKS FOR MILLS.—Patent No. 122,215 is valid, and was not anticipated by patents No. 20,660, No. 54,177, No. 52,904, No. 99,486, or No. 134,653, nor by the devices known as the "Morse dog" and the "Muzzy dog." *Allis* v. *Buckstaff*, 879.

Suits in Patent Cases.

22. JURISDICTION—OBJECTIONS TO.—Although the question of jurisdiction was not raised in the pleadings or adverted to on the final hearing, it is never too late, during the pendency of the proceedings, for the court to examine into its right and power to make a decree or enter a judgment in a case. *Spring* v. *Dom. S. M. Co.*, 446.
23. WHEN COURTS WILL DECLINE.—In the federal courts, especially, where jurisdiction rests solely upon the facts, which appear in the record of the suits, it has long been the practice of the judges, at any stage of the proceedings, *sua sponte*, to decline jurisdiction, and dismiss the case, when the want of authority to act becomes apparent. *Id.*
24. GROUNDS FOR RELIEF.—In order that the court may have jurisdiction in equity, the complainants not being entitled to an injunction, some other ground for equitable relief must be disclosed in the bill besides a naked account for profits and damages. *Id.*
25. RIGHT OF ASSIGNEE TO SUE IN HIS OWN NAME.—An assignment of "the exclusive right to manufacture and sell my invention in the United States to the full end of the term for which said letters were granted," vests in the assignee the entire monopoly in the patent throughout the United States, and he may bring an action in his own name for an infringement. *Nellis* v. *Pennock Manuf'g Co.*, 451.
26. LICENSE.—The grant by such assignee to a third person of the exclusive right to manufacture and sell a particular machine containing improvements covered by the patent is only a license, and the licensee is not a necessary party to the suit for infringement. *Id.*
27. ASSOCIATION—SUIT AGAINST INDIVIDUAL MEMBERS.—The unauthorized use of a patent by the agents of an association, in its business, for the benefit of its stockholders, must be considered as a use by each of them, from which each of them might be enjoined, notwithstanding the fact that under the laws of New York, there being more than seven shareholders, the association could have been sued as a whole by suing the president, without making all the shareholders parties, and a decree for injunction and accounting, with costs, should be passed. *Tyler* v. *Galloway*, 477.

28. Costs of Dismissal.—Where the evidence does not show that K. was a shareholder, although secretary, of the association, the bill must be dismissed as to him; but, as he answered jointly with D., without costs. *Id.*

Practice and Procedure.

29. Inclusion of Several Patents in Same Suit.—Claims for infringement of several patents may be included in one suit where the subjects of the patents are correlative, and all the inventions covered by them are embodied in the same infringing machine. *Nellis* v. *Pennock Manuf'g Co.*, 451.

30. Pleading Prior Use.—Only the names of those who have invented or used the machine or improvement alleged to anticipate a patent, and not of those who are to testify touching its invention or use, are required to be set forth in an answer making such a defense. *Allis* v. *Buckstaff*, 879.

31. Anticipating Device.—In order to defeat a patent on the ground of prior use of the patented invention, it must appear that the anticipating device was embodied in distinct form, and was so far perfected as to have been capable of practical use. *Id.*

32. Amendment as to Parties.—Plaintiff cannot amend his bill by alleging that defendants were severally president, secretary, and directors of the association, as this is unnecessary in a suit against them individually, and would be improper if intended to make the suit one against the association as a whole. *Tyler* v. *Galloway*, 477.

33. Denial in Answer.—To allow testimony on the part of the defense, to show that the machine used does not infringe the patent of complainant, the answer should deny such infringement specifically; but if, by stipulation filed by counsel before taking testimony, it is agreed that defendant may put in testimony to show that there was no infringement, the court will not entertain an objection to such testimony. *Allis* v. *Buckstaff*, 879.

34. Testimony.—Where an original answer contains no allegation of prior use, but an amended answer does, testimony to establish such prior use, taken before filing the amended answer, under objection of counsel, who afterwards fully cross-examines the witnesses and offers rebutting testimony, may, in the discretion of the court, be allowed to stand. *Id.*

35. Estoppel.—Where the inventor regarded an element as material, those who claim under the patent cannot now be heard to say that it is immaterial. *Le Fever* v. *Remington*, 86.

36. Utility—Evidence of.—If the several features or inventions separately claimed by complainant are admitted to be useful when employed in defendant's machine, it is evidence of their usefulness in the machine of the complainant. *Foye* v. *Nichols*, 125.

37. Patent as Evidence.—A patent, as against a party proved to have infringed it, is *prima facie* evidence of both novelty and utility. *Lehnbenter* v. *Holthaus*, 144, note.

38. Rehearing.—After interlocutory decree and order of reference to a master for an account, rule to show cause why the decree should not be opened and a rehearing ordered, granted. *Spring* v. *Dom. S. M. Co.*, 446.

What an Infringement.

39. Similar Contrivances.—Where defendant's machine employs the same contrivance as the machine of the plaintiff, it is an infringement, although it may be an improvement upon plaintiff's patent. *Foye* v. *Nichols*, 125.

40. Formal Variation.—Where the mechanism used by defendant's shutter hinge is a mere formal variation from that of plaintiff's invention, having the same mode of operation, it is an infringement of the patent. *Lull* v. *Clark*, 456.

41. Responsibility of Manufacturer.—A manufacturer cannot be held responsible for any change in the form of his machine made by third parties after it has left the manufactory. *Delong* v. *Bickford*, 32.

What not an Infringement.

42. Insufficient Divergence.—A departure of one sixty-fourth of an inch from a straight line in defendant's grooves is not a sufficient divergence to constitute an infringement of oblique grooves. *Id.*

43. Slight Variance.—Where the grooves in the machine of the defendants were straight, or nearly so, while those in the machine of complainant were oblique, it is not an infringement. *Id.*

44. Process.—Where defendant's process is not the patented process, but omits a patented step, and in its stead includes one which the patentee intended to avoid, it is not an infringement. *Cotter* v. *New Haven Cop. Co.*, 234.

45. Previous Existence of Features Claimed.—Where certain features have existed before their adoption by an inventor, he can only claim modifications of the form embodying such features, and if other inventions differ in form there will be no infringement. *Barker* v. *Todd*, 473.

46. Reissue—Variance from Original.—Where the error in the original patent was plain and apparent at once to the patentee, and as capable of being promptly corrected then as by a reissue after a lapse of more than nine years, during which the manufacture of wheels substantially the same as those of the defendants had been entered upon, there being no infringement of any claim of the original patent in respect to flanges, and that claim No. 2 of the reissue could not be upheld as covering any flanges but such as were shown in the original patent, the bill must be dismissed, with costs. *Holt* v. *Keeler*, 464.

47. Improvement in Breech-Loading Arms.—Patent No. 205,193, for an improvement in breech-loading fire-arms, not infringed by defendants' fire-arms. *Le Fever* v. *Remington*, 86.

48. Saw-Mill Dogs.—Patent No. 134,653 does not appear to be infringed by the device manufactured by defendant under patent No. 122,215, and the bill should be dismissed. *Neacy* v *Allis*, 874.

49. Same.—Patent No. 233,409, known as the "Gowen dog," as invented and described in the specification, does not infringe patent No. 122,215, but with the addition made and used therewith by defendants, may do so, and they must be enjoined from its further use. *Allis* v. *Buckstaff*, 879.

50. Elastic Bucket.—Plaintiff's claim No. 1 in a patent was for an elastic bucket working by suction in the bore of a chain pump, and having a drip orifice, allowing the water above the bucket to escape down to the source of supply; and his claim No. 2 was for a solid elastic bucket with an elastic bearing edge, and a convex or contracted upper portion, so that the bucket would readily yield and go up, but resist going down. *Held*, that these claims were infringed by the Stowe and Rumsey buckets, used by defendants, as they were both of them solid elastic buckets, having an elastic bearing edge, with the upper portion convex or contracted from said edge so that the bucket readily yields to any irregularities in the pump tube, and is easily drawn up, while it will resist moving downward; and such bucket is adapted to fit and work in the bore of a pump tube to raise water by suction, and is provided with a suitable orifice or outlet, through which the water *above the bucket could escape.* *Barker* v. *Todd*, 473.

Damages for Infringement.

51. Who Liable.—The only persons who can be held for damages for the infringement of a patent, are those who own or have some interest in the business of making, using, or selling the thing which is an infringement; and an action at law cannot be maintained against the directors, shareholders, or workmen of a corporation which infringes a patented improvement. *United Nickel Co.* v. *Worthington*, 392.

52. Damages for Past Infringements.—Actions may be maintained by joint owners of a patent, who have not transferred their claims for damages and profits, to recover past damages for infringement within the period of time of their ownership, though when the suit was instituted neither of the joint owners had any interest in the title to the patent. *Spring* v. *Dom. S. M. Co.*, 446.

53. Master's Report.—In this case the defendants used the combination that gave a peculiar value to the patent faucet of the plaintiffs, and they were chargeable with damages in respect to the entire faucet, and the master's report so charging them should be confirmed. *Zane* v. *Peck*, 475.

54. Measure of Damages.—The measure of damages for infringement of a patent is the profits that the plaintiffs would have made on the sales of the patented article had they supplied the customers to whom the defendants sold such article. *Id.*

55. ESTIMATION OF PROFITS.—In estimating the amount of such profits the cost of manufacture and sale should be deducted, and on sales of a large amount, clerk's hire, storage, freight, etc., should be considered as part of such cost; but in this case, as these expenses would make only a *trifling difference* in amount awarded by master, a reaccounting will not be ordered. *Id.*

56. TREBLE DAMAGES.—In this case, motion of plaintiffs for treble damages should be denied. *Id.*

Remedy by Injunction.

57. IMPROVEMENT ON PATENT.—Although the defendants' structure contains improvements, yet if it involves the patented invention its use may be enjoined. *Frost* v. *Marcus*, 88.

58. PRELIMINARY INJUNCTION.—Where there was a delay of 10 years between the original patent and the reissue; a controversy as to the validity of the reissue and as to the infringement; no decision of any court establishing the validity of the patent; no royalty or license fees paid to the patentee; no general use or public recognition; no present manufacturing or sale of the patented article; and no allegation of irresponsibility on the part of the defendants,—a preliminary injunction will be refused *Tillinghast* v. *Hicks*, 388.

59. REMEDIES—CONCURRENT—AT LAW AND IN EQUITY.—To entertain a suit in equity, when the party has a plain and complete remedy at law, is to deprive the defendant of his constitutional right of trial by jury. Notwithstanding section 723 of the Revised Statutes, there remains a limited range of cases in which equitable jurisdiction continues to be exercised concurrently with that at law. The remedy at law, although existing, seems less practical and less efficient to the ends of justice, and its prompt administration, than the remedy in equity. But where complainants are not entitled to an injunction, having an adequate remedy at law, the court in equity has no jurisdiction, *Root* v. *Lake Shore, etc., R. Co.* 21 O. G. 1112, followed. *Spring* v. *Dom. S. M. Co.*, 446.

60. WHO MAY RECOVER—INJUNCTION.—Section 4919 of the Revised Statutes includes not merely an interest in the title of a patent, but in the damages, and not as patentee only, but as assignee as well. *Semble*, that the assignee of a part interest in a patent and accrued damages may, during the life of the patent, in a suit for damages brought in his own name, obtain an injunction against future infringement. *Id.*

61. WHEN NOT GRANTED.—Where a bill for profits and damages was for a period ending in 1876, complainants were not entitled to an injunction, the bill being filed in 1879, and before the expiration of the patent. *Id.*

ENUMERATED PATENTS.

Reissues.

2,260. Hay-forks, 452
2,429. Elevators, 452
6,071. Saw-mill dogs, 875, 892
6,714. Marking wheels, 464
6,733. Saw-mill dogs, 875, 892
7,511. Shade-holders, 351
7,704. Bedstead frame 893
10,087. Shade-holders, 351
10,477. Shutter hinges, 456

Originals.

20,660. Saw-mill dogs, 880
44,129. Hay elevators, 453
52,169. Marking wheel, 465
52,904. Saw-mill dogs, 880
53,345. Horse hay-forks, 452
54,177. Saw-mill dogs, 880
58,368. Bucket, 474
76,394. Dummies, 672
83,117. Buckets, 474
99,486. Saw-mill dogs, 880
122,215. Saw-mill dogs, 875, 880
134,653. Saw-mill dogs, 875, 892
156,277. Hinges, 459
182,973. Shade-holders, 351
233,409. Saw-mill dogs, 891

English Patents.

4,607. Hinges, 458
9,454. Hinges, 458

PATENT FOR LAND. EJECTMENT, 208; MEXICAN GRANT, 217.

PAYMENT.

DURESS—RECOVERY BACK.—A payment under it is not a payment under duress, but is voluntary and cannot be recovered. *Sonoma Co. Tax Case*, 789.

See TAXATION, 789.

PENALTIES AND FORFEITURES.

1. PENAL STATUTES—FORFEITURE.—A state statute which provides that "any person" belonging to a steamer who engages in taking fish in violation of its provisions shall forfeit "his vessel," cannot be construed to mean *any* vessel which he employed in committing the offense; it cannot be enlarged by construction to mean that he shall forfeit the vessel of another person. *The J. W. French*, 916.

2. CONDEMNATION—PROCEEDINGS WITHOUT WARRANT OF LAW.—A judgment of condemnation and sale of a vessel, without warrant of law, confers no right upon the sheriff to her custody. His possession in such case is tortious, and as against the process of the federal court he is a mere trespasser. *Id.*

See DOMESTIC COMMERCE, 642.

PERSONAL INJURY. NEGLIGENCE, 43.

PILOTAGE.

1. STATE REGULATIONS.—A state may permit or require its pilots to tender their services to inward-bound vessels at a greater distance from the shore than three miles, or the outward limit of the pilot ground. *The Whistler*, 295.

2. SAME—OFFER OF, WHEN SUFFICIENT.—The bark Whistler was approaching the mouth of the Columbia river with intent to enter and load there as soon as one of the three pilot tugs stationed there should come out to her without orders to go elsewhere, and being met by one of said tugs, without such orders, she was taken in tow thereby, and went in; but on the day before, and while she was standing off and on about 30 miles from the bar, she was hailed by an Oregon schooner pilot, who tendered his services to pilot her in, which were refused. *Held*, that the vessel was "bound in the river," within the meaning of the statute giving full pilotage for the offer and refusal of such services, and, having afterwards gone in, the libelant became entitled to such pilotage. *Id.*

PLEADING.

1. REPLICATION—SURPLUSAGE.—Where sufficient probative facts appear, a reply is not demurrable because it also contains allegations as to mere matters of evidence. *Fletcher* v. *New York L. Ins. Co.*, 526.

2. COUNTER-CLAIM.—Where the petition charged the defendant with the conversion of certain personal property, *held*, that an answer which intermingled a seeming defense with a counter-claim, not arising on contract, or out of the transaction set forth in the petition, and unconnected with the subject of the action, was demurrable. *Gentry* v. *Grand View M. & S. Co.*, 544.

3. SAME—REV. ST. MO. § 3522.—Under the Missouri practice act, the defendant in an action for a tort cannot, as assignee, set up as a counter-claim an unliquidated demand against the plaintiff arising on contract, and unconnected with the cause of action set forth in the petition. *Gentry* v. *Grand View M. & S. Co.*, 543.

See ESTOPPEL, 208; VARIANCE, 380.

PRACTICE.

1. ALLEGATIONS TO BE PROVED.—In cases where the answer neither admits nor denies some of the material allegations of the bill, they must be proved upon a final hearing. *Rogers* v. *Marshall*, 59.

2. REHEARING—APPLICATION DENIED.—An application for a rehearing, upon the ground of newly-discovered evidence, where the affidavits filed in support of

the motion show that the newly-discovered evidence is merely cumulative, will be denied. *Id.*

3. PREVIOUS ORDER AFFIRMED.—Upon an examination of this case it was *held* that the order of court previously granted should be affirmed, except in regard to taxes for 1880, which were inadvertently included therein. *Stansell* v. *Levee Board*, 846

4. NECESSARY PARTY—TRUSTEE—ACT MARCH 3, 1875, § 8.—The successor in a deed of trust is a proper party defendant in a suit to adjudge the lien created by such deed a subsisting lien, and, if a resident of another district than that where the suit is pending, may be brought before the court under section 8 of act of congress of March 3, 1875. *Massachusetts Mut. L. Ins. Co.* v. *Chicago & A. R. Co.*, 857.

5. PENDENCY OF PRIOR SUIT—WHEN A BAR—INJUNCTION.—The pendency of a prior suit will not be a bar to a subsequent suit if the latter embraces more as to parties and subject-matter than such prior suit. *Id.*

See INJUNCTION, 514.

PRE-EMPTION RIGHTS. HOMESTEAD, 103.

PRESUMPTIONS. EVIDENCE, 48, note.

PRINCIPAL AND AGENT.

ADVANCES BY AGENT—RECOVERY OF.—If a principal employs an agent to transact a legitimate business for him, and in conducting such business the agent is authorized to advance money on his principal's account, the law protects the agent, and he may recover the money so advanced if the transactions are legitimate. *Bartlett* v. *Smith*, 213.

PRINCIPAL AND SURETY.

LIABILITY OF SURETIES—REMEDY IN EQUITY.—The liability of sureties cannot be enlarged or changed by averment in the pleading, whatever the understanding of the pleader may have been; and where an indemnity bond has been executed by mistake or inadvertence, the proper remedy is by a bill in equity to reform it, and make it conform to the mutual intention of the parties. *Percival* v. *McCoy*, 380.

See BANKRUPTCY, 623.

PROCESS. FORMS OF, 567; SERVICE ON FOREIGN CORPORATION, 3, 358, 823.

PUBLIC LANDS.

WITHDRAWAL FROM SALE.—The withdrawal of public lands from sale by competent authority for the purpose of appropriating them to any lawful purpose, operates to sever such lands from the public domain, and the land department is the proper authority to make the order of withdrawal. *Kansas Pac. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 106.

See HOMESTEAD, 103.

PUBLIC TRUSTS. RAILROADS, 3.

QUI TAM ACTION.

UNDER REVISED STATUTES.—In an action brought by an informer upon sections 3490-3493 of the Revised Statutes, to recover damages and forfeitures for collecting false claims from the treasury, the person who sues represents the United States therein, and also in all suits and proceedings brought or taken in aid of an execution, or to enforce the judgment therein, and is entitled to control the same. *Bush* v. *United States*, 625.

RAILROADS.

1. First-Mortgage Bonds.—When money applicable to the payment of first-mortgage bonds of a railroad company has come into the hands of the trustees for the bondholders, each holder at that time becomes immediately entitled to the share of the money applicable to his bond, and can immediately recover the same. *Dwight* v. *Smith*, 50.

2. Rights of Bondholders.—The question whether the bondholders, who have acquired their bonds since money in the hands of the trustees applicable to the bonds accrued, are entitled to share in that money, depends upon the nature of the right, and of the transaction by which they acquired the bonds. *Id.*

3. Equitable Relief.—The debt for which the bonds issued was a debt of the company, and property in the hands of the trustees is security for that debt, and when the debts pass the securities pass also, unless a contrary intention is shown, and the time when the parties secured their bonds is not material; and where there has accrued a large amount of money applicable and not applied on the bonds after satisfying prior liens, the bondholders are entitled to relief against those having the money. *Id.*

See Constitutional Law, 546; Discrimination by, 373; Domestic Commerce, 642

RAILROAD BONDS. Interest on Coupons, 508; State Funds, 508.

RAILROAD COMPANIES.

1. Public Nature and Duties of.—Railroad corporations are *quasi* public corporations, dedicated to the public use. In accepting their charters they necessarily accept them with all the duties and liabilities imposed upon them by law. Thus a *quasi* public trust is created which clothes the public with an interest in the use of railroads, which can be controlled by the public to the extent of the interest conferred therein. *McCoy* v. *C., I., St. L. & C. R. Co.*, 3.

2. Jurisdiction—Equity.—In the absence of some statute providing another and different remedy, courts of equity have jurisdiction to enforce this *quasi* public trust, and compel railroad corporations to discharge the duties imposed upon them by law; and persons injured by the wrongful action or non-action of such corporations may seek redress by injunction, and are not bound to resort to proceedings in *mandamus* or to an action at law for damages. *Id.*

3. Discrimination in Delivering Live-Stock—Remedy.—A railroad company cannot bind itself to deliver to a particular stock-yard all live-stock coming over its line to a certain point, but it is bound to transport over its road and deliver to all stock-yards at such point, reached by its tracks or connections, all live-stock consigned, or which the shippers desire to consign, to them, upon the same terms and in the same manner as under like conditions it transports and delivers to their competitors; and the performance of this duty may be compelled by injunction at the suit of the proprietor of the stock-yard discriminated against. *Id.*

See Ejecting Passenger from Train, 116; Negligence, 591.

RECEIVERS.

1. Appointment in Vacation.—In Illinois, a judge has no authority to appoint a receiver of a railroad corporation in vacation; such authority is to be exercised by the court while in session. *Hammock* v. *Farmers' L. & T. Co.*, 189, note.

2. Same.—We are not prepared to hold that the power of a judge in vacation to exercise the important judicial function of appointing a receiver of a corporation, charged with public functions, was conferred by the introduction of a comma in the revised statute of a state, where the established doctrine is that no judicial functions can be exercised by a judge in vacation except where expressly or especially authorized by statutes. *Id.*

3. Appointed by Another Court not Made Party.—If a receiver appointed by one court is in possession of property he is not amenable to suit in another court in respect thereto, and if the property has passed beyond his control he would not in any event be a necessary party in a proceeding to adjudge a

lien on such property still subsisting, notwithstanding the proceedings in the court wherein he was appointed receiver. *Mass. Mut. L. Ins Co.* v. *Chicago, etc., R. Co.*, 857.

See INSOLVENCY, 493; TRUST AND TRUSTEE, 423.

REDEMPTION.

JUNIOR LIENHOLDER.—Under the statutes of Iowa the holder of a simple judgment lien has not an equitable right to redeem from a senior lienholder after the execution of a sheriff's deed made pursuant to a sale thereunder. *Burham* v. *Fritz*, 368.

See JUDGMENT LIEN.

REFERENCE.

REFEREE'S FINDING OF FACT.—Upon a consideration of the evidence, *held*, that the finding of the referee that no partnership existed in this case would not be reversed. *In re Murray*, 550.

See TRUSTS AND TRUSTEES, 423.

REHEARING. PRACTICE, 96, 846.

REMANDING CAUSE. TO STATE COURT, 406.

REMOVAL OF CAUSES.

Act of 1866.

1. REPEALED.—The second clause of section 639 of the Revised Statutes is repealed by the act of March 3, 1875. *Connell* v. *Utica, U. & E. R. Co.*, 241.
2. SAME—SPLITTING ACTION.—The act of 1866, providing for the removal of a part of a cause into the federal court, and thereby splitting the action, was repealed by section 2 of the act of March 3, 1875. *Tuedt* v. *Carson*, 353.

Under Act of 1867.

3. PREJUDICE AND LOCAL-INFLUENCE ACT.—It seems that the act of 1867 with regard to removals is still in force, and is not supplanted by the second section of the act of March 3, 1875. *Hobby* v. *Allison*, 401.
4. RIGHT OF REMOVAL.—The conditions of the power of removal under the act of 1867 are a diverse citizenship, a cause of action exceeding $500, an affidavit of prejudice or local influence, and a proper bond; and the restriction in the act of March 3, 1875, as to the assignee of a chose in action, does not apply. *Id.*
5. RELATION OF STATUTORY ENACTMENT.—The restriction in the eleventh section of the judiciary act does not apply to cases transferred under the act of 1867, and that act being designed to amend section 12 of the judiciary act, must be treated as independent of a subsequent act passed to supply the place of section 11. *Id.*
6. RIGHT UNDER JUDICIARY ACT.—The eleventh and twelfth sections of the judiciary act are to be read independently, and a removal may be had although the suit could not originally have been begun in the federal court; but no suit can be removed which might not, so far as the *constitutional* provisions are concerned, have been begun in the federal courts. *Id.*
7. WHO MAY REMOVE—CITIZENSHIP.—A citizen of an Indian territory, not being a citizen of a state, cannot remove a cause into the circuit court from a state court under the act of 1867, (Rev. St. § 639, subd. 3.) *Darst* v. *City of Peoria*, 561; *Clark* v. *City of Peoria*, 561.
8. TIME OF APPLICATION.—An application for the removal of a cause under the act of 1867, (Rev. St. § 639, subd. 3,) made after appeal to the state supreme court, where the decree of the lower court is affirmed, and the cause remanded with instructions to enter a final decree in conformity with the judgment of the supreme court, is too late. *Id.; Id.*

9. PREJUDICE AND LOCAL-INFLUENCE ACT. — It is only where a suit is removed on account of prejudice or local influence, under subdivision 3, § 639, Rev. St., which is not repealed by the act of 1875, that a removal may be had at any time before the final hearing. *Johnson* v. *Johnson*, 193.

Under Act of 1875—*Subject-Matter.*

10. QUESTIONS ARISING UNDER UNITED STATES LAWS. — Where the petition of the plaintiff presents a question which arises under the laws of the United States, the cause is removable under section 2 of the act of March 3, 1875, without regard to the citizenship of the parties. *Lawrence* v. *Norton*, 1.

11. CONDITION OF MARSHAL'S BOND.—Where the condition of a marshal's official bond is in strict conformity with the condition prescribed by section 783 of the Revised Statutes, and the exceptions filed raise the question of what is the proper construction of the condition, and the construction of the language of the section is brought in question, the cause is removable. *Id.*

12. DEFENSE UNDER CONSTITUTION AND LAWS.—It is sufficient, to maintain the jurisdiction of the circuit court in a cause removed from a state court, that the defense necessarily involves a construction of a clause of the federal constitution. *San Mateo Co.* v. *Southern Pac. R. Co.*, 145.

13. DIVORCE.—An action for divorce *a vinculo* and for alimony, removed from the state court, may be remanded by this court of its own motion, on suggestion of the party removing, on the ground of want of jurisdiction in this court over actions of that character. *Johnson* v. *Johnson*, 193.

On Ground of Diverse Citizenship.

14. DIVERSITY MUST EXTEND TO ALL ON A SIDE.—A cause is not removable under the first clause of section 2 of the act of March 3, 1875, unless all the parties on one side are citizens of different states from those on the other, and all the defendants must join in the petition. *Connell* v. *Utica, U. & E. R. Co.*, 241.

15. RIGHT TO REMOVE.—In controversies between citizens of different states the parties may invoke by removal the general principles of equity prevailing uniformly in the federal courts, and in such cases the federal court cannot be governed by state statutes or rules of decision unless they constitute rules of property to be enforced. *Taylor* v. *Life Ass'n of America*, 493.

16. RIGHT NOT DIVESTED BY STATE LAW.—The statutes of Tennessee, authorizing the state equity courts to wind up insolvent corporations and distribute the assets in Tennessee, do not confer on Tennessee creditors any special right to the assets, or constitute rules of property which the federal courts must enforce. They merely enlarge or declare the jurisdiction of the state courts, and do not affect the jurisdiction of the federal court. *Id.*

17. PLAINTIFF CANNOT BE DEPRIVED OF ALL REMEDY.—Where the real cause of action is between citizens of the same state, citizens of another state cannot, by procuring themselves to be substituted for the defendant, procure the removal of the cause into the federal court, and thereby deprive the plaintiffs of their remedy against the original defendant for a trespass committed by him. *Ohlquist* v. *Farwell*, 305.

Controversies between Parties.

18. SUITS OF A CIVIL NATURE.—The terms "*suits* of a civil nature," used in the act of 1875, providing for the removal of causes from the state court into the circuit court, are less comprehensive than the term "cases," in the fourteenth amendment of the federal constitution, as the latter may embrace proceedings not usually nor strictly termed suits, as well as prosecutions of a criminal nature. There can, therefore, be no question as to the validity of the legislation of congress. *Id.; San Mateo Co.* v. *Southern Pac. R. Co.*, 145.

19. SEPARATE CONTROVERSY.—A suit is not removable under the second clause of that section unless it is a separate controversy, wholly between citizens of diferent states. *Connell* v. *Utica, U. & E. R. Co.*, 241.

20. THE WHOLE SUIT TO BE REMOVED.—An action brought by a citizen of the state in which it is brought against citizens of the same state and citizens of another state, cannot be removed from the state court to the federal court by the non-resident defendants, unless the whole suit is removed. *Tuedt* v. *Carson*, 353.

21. SEVERABLE AND INSEVERABLE CONTROVERSY.—Although an action brought by the plaintiff against several defendants is for a tort, in respect to which plaintiff could sue one or all of the tort-feasors, yet if he elects to sue all, it will be deemed so far an inseverable controversy that a part only of the defendants cannot remove the cause into the federal court. *Id.*

Bond and Security.

22. BOND—CONDITIONS IN.—It is essential that the bond contain a provision for the payment of costs, and the objection that it does not may be taken at any time. *Webber* v. *Bishop*, 49.

23. DEFECTIVE BOND—AMENDMENT.—If the removal bond be defective, and omit the condition for the payment of costs required by the act of congress, the omission is not fatal to the jurisdiction of the federal court. The defect may be cured by amendment, either in the state or federal court, or by the substitution of a new bond, containing the proper conditions, filed *nunc pro tunc*. *Deford* v. *Mehaffy*, 481.

Time of Application.

24. AT FIRST TRIAL TERM.—Under the act of 1875 the first term during which the cause might have been tried means the first term when the cause is legally triable, not a subsequent term to which it may have been legally postponed by agreement, or by order of the court, and it has no reference to the presence or absence of witnesses, or the crowded state of the docket. *Johnson* v. *Johnson*, 193.

25. UNDER PRACTICE OF STATE COURT.—According to the Tennessee chancery practice a cause is not for trial until a *pro confesso* has been taken against a party not appearing, and a petition for removal is in time if filed before this has been done. *Deford* v. *Mehaffy*, 481.

26. CAUSE, WHEN TRIABLE.—If there be several defendants, and as to one there is an issue by answer, but as to others no issue by answer or *pro confesso*, the cause is removable until and during the term at which the *pro confesso* is entered. It must be at issue and triable as to all the parties to bar the right of removal as to any of them by the lapse of a trial term; and this, whether the parties as to whom there is no issue be necessary or only proper parties. *Id.*

27. PRO CONFESSO ON FINAL DECREE.—And the foregoing rule is not affected by the fact that the *pro confesso* may, under the practice, be entered in the final decree itself. Nothing but an actual trial commenced will bar the right of removal at the trial term when the case is in that condition. *Id.*

28. SUIT PENDING—APPLICATION TOO LATE.—In a suit pending at the time of the passage of the act of March 3, 1875, and thereafter tried in the state court, wherein judgment was rendered and the cause carried to the supreme court of the state, the application for removal by new parties defendant comes too late, unless the making of the new parties was in effect the institution of a new suit. *Shirley* v. *Waco Tap R. Co.*, 705.

29. TRUSTEES OF DEFUNCT RAILROAD AS PARTIES—TEXAS CODE.—Under the provisions of the Revised Code of Texas, if a party holding a deed in trust of a railroad company sells out the road-bed, track, franchise, and chartered powers and privileges of such company, a suit pending against such company does not thereby abate, and subsequently making the directors of such defunct company parties to such suit is merely a continuance of the original suit, and the application of such directors to remove the cause into the circuit court, made after two trials and judgments, and two appeals, comes too late. *Id.*

Procedure on Removal.

30. PRACTICE.—Where a case is removed into the United States circuit court after it has been put on the calendar and noticed for trial in the state court, it stands ready for trial in the circuit court immediately upon the record being filed therein. *Waldman* v. *Pennsylvania R. Co.*, 801.

31. WAIVER OF RIGHT TO OBJECT.—A party loses his right to object to the removal of an action from a state court when it has been removed on the ground of the diverse citizenship of the parties, by going to trial and trying the cause without raising the objection. *Davies* v. *Lathrop*, 565.

32. JURISDICTIONAL FACTS.—The only essential *jurisdictional* facts are (1) the existence of a controversy between citizens of different states, or arising under the constitution and laws of the United States, of the character and amount described in the statute. (2) The right of removal may be barred by the lapse of time, on failure to commence the proceeding within the time prescribed by the statute, as in other cases of limitation of that nature. (3) But a perfect petition and a perfect bond for removal, or a strict compliance with the practice regulations of the statute, are not absolutely essential as *jurisdictional* requirements, but only directory and not imperative methods of procedure; regulations that should be carefully followed and reasonably enforced by the courts; but, after all, regulations that are protected by the acts of congress authorizing amendments to cure defects and omissions in legal proceedings. (4) These amendments may be made in either the state or federal courts, according to their practice, respectively. *Deford* v. *Mehaffy*, 481.

Remanding Cause.

33. TRESPASS.—Where an action of trespass was commenced in a state court against a sheriff for the wrongful seizure of goods of plaintiffs as the property of an attachment debtor, and the creditors of such debtor, citizens of another state, procured themselves to be substituted as defendants in the state court in place of said sheriff, and removed the cause to the United States circuit court; *held*, on motion to remand, that the cause be remanded to the state court. *Ohlquist* v. *Farwell*, 305.

34. REMAND SUA SPONTE.—Where, after the removal of a cause wherein the requisite citizenship and the amount in controversy do not exist, and it is found by the pleadings that the subject-matter is one in which a statute of the United States is only incidentally brought in question, the court will of its own motion remand the cause. *Teas* v. *Albright*, 406.

35. SECTION 5 OF ACT OF MARCH 3, 1875.—Although section 5 of the act of congress of March 3, 1875, regulating the removal of causes, among other things directs the remanding of a cause if it shall be made to appear at any time that it does not really and substantially involve a controversy within the jurisdiction of the circuit court, it does not apply to such a case, and was intended evidently to apply only to causes which have been collusively removed. *Davies* v. *Lathrop*, 565.

RES ADJUDICATA. MEXICAN GRANT, 217.

RESCISSION OF CONTRACT.

FOR FRAUD.—Where a contract has been induced by fraud, it is not necessary that the party seeking to rescind the contract should absolutely tender what he has received on account of the contract. But it is necessary that he should give notice of his intention to rescind, that he will not abide by the contract, and it is necessary that, upon the trial, he should be in a situation to put the other party in the situation in which he was at the time of the discovery of the fraud. That the contract is partly executed at the time of the discovery of the fraud will not, in itself, prevent a rescission, unless it may be that it has gone so far that the subject-matter of the contract, or the greater part of it, has disappeared. *Amer. Wine Co.* v. *Brasher*, 595.

REVENUE AND TAXATION. RAILROADS, 722.

RULE OF PROPERTY. DECISION OF STATE COURT, 368.

RULES OF NAVIGATION.

RULES FOR PREVENTING COLLISION.—Sections 4233 and 4234 of the Revised Statutes were intended to embrace all classes of vessels, including rafts. *United States* v. *One Raft*, 796.

See SAILING DIRECTIONS. Rule 13, Lights, 693, 695; Rules 17-24, Steamers to Keep Out of Way, 687, 695, 698, 701; British Article No. 15, Steamers, 687.

SALE AND DELIVERY.

1. SALE—DELIVERY TO CARRIER—TITLE, WHEN PASSES.—Where goods are sold and delivered to a carrier, with bill of lading in the name of the shipper indorsed to the purchaser, to be delivered only when the draft is paid, the ownership remains with the seller until the draft shall be paid, and the goods are at his risk. But when the payment is made, the ownership and risk change to the purchaser. *Treadwell* v. *Anglo-Amer. P. Co.*, 22; *Fowler* v. *Treadwell*, 22.

2. TIME CONTRACTS.—The purchase or sale of wheat to be delivered at a future time is a fair contract if the intention of the contracting parties is to deliver the wheat, although it is not in their possession at the time of the contract of sale; but if the intention is not to deliver, but to settle differences between the contract price and the then market price, the transaction is illegal and void. *Bartlett* v. *Smith*, 263.

3. RIGHT TO RECOVER ADVANCES.—Where parties knowingly furnish means for an illegal transaction, and make advances in the settlement of losses under illegal contracts, the court will not aid them to recover moneys thus paid out; but if parties acting as brokers in the sale and purchase of wheat, without disclosing the name of their principal, enter into *bona fide* contracts for the actual sale and delivery of wheat with third parties for defendant's account, and at his request settled the losses, and paid the amount due under the contracts, they are entitled to recover the moneys thus paid out. *Id.*

4. SALE OF PROPERTY NOT ON HAND.—It is not necessary, in case of a sale or purchase of property for future delivery, that the property should actually be on hand at the time. *Id.*

SALVAGE.

1. WRECKING COMPANY.—Services performed by a wrecking company in saving the cargo of a stranded vessel and transporting it in different lots to a place of safety, and there storing it, are continuous services; and every part of the cargo was interested in the whole of it, and should bear its due proportion of the whole expense of saving all that was saved. *Coast Wreck. Co.* v. *Phœnix Ins. Co.* 127.

2. MEASURE OF COMPENSATION.—In estimating the compensation to be made for salvage services, not only is the service in the particular case to be regarded, but the reward is to be looked at, that it may induce aid on future occasions, by competent salvors to other property in distress; and the equipment of the Coast Wrecking Company with steamers and pumps and wrecking material and skilled men, and its readiness to act at a moment's notice, must be considered. *Id.*

3. SUCCESS AN ESSENTIAL ELEMENT.—Where services rendered were not successful, the claim for salvage will not be allowed; success being the essential element of a salvage service, and its absence fatal to a claim for compensation. *Anderson* v. *The Edam*, 135; *Dunscombe* v. *The Edam*, 135.

4. VALUE OF PROPERTY AN ELEMENT.—Although salvage compensation is not awarded by any fixed rate of commission on the value of the property saved, yet the value of the property saved is an element to be taken into account when making up a salvage reward. *Id.*

5. FOREIGN VESSELS—WHAT LAW GOVERNS.—In a case of a salvage service performed by a British vessel in rescuing a Dutch vessel, neither the Commercial Code of the Netherlands, nor the practice of the English courts, furnishes the law for the American courts of admiralty; and those courts, when not fettered by statute, administer the maritime law upon a consideration of those principles which have obtained general recognition among maritime nations and are justly applicable to all ships that sail the seas. *Id.*

6. COMPENSATION—LIBERAL REWARD.—The greatness of the peril from which the salved vessel was rescued; the fact that, if she had not been taken in tow by the salving vessel, she would most likely have drifted into the same dangerous locality from which she had barely escaped; and the facts that the master of the salving vessel had abandoned his own voyage, and that by the service ren-

dered he had brought the salved vessel into her port of destination, and relieved a large number of passengers from peril,—make up up a case meriting a liberal reward. *Id.*

SEAMEN.

1. ON AMERICAN VESSEL—STATUS OF—The *status* of a person employed on an American vessel is not changed by the fact that he is permitted by the captain to land for a few hours at a foreign port or place, and a Chinese laborer on an American vessel cannot be held to lose his residence here, so as to come within the purview of the prohibitory act of congress, by a temporary entry upon a foreign country. *Case of Chinese Laborers on Shipboard*, 291; *In re Ah Tie*, 291.
2. DISCOUNT OF ADVANCE SECURITY.—Where defendant did not ship the seamen, nor employ the shipping agent to ship them, nor was he owner of the vessel, nor did he know of the giving of the agreements sued on, the fact that he was authorized to collect the inward freight, and procure outward freight, and pay the ship's disbursements, upon the master's certificate, does not make him an agent who "authorized the giving of the advance security," although he paid the shipping agent's bill on which the advances were charged. *Greefe* v. *Cortis*, 299.
3. ADVANCE WAGES—INSURANCE.—Where it is customary to charge seamen with interest and insurance on advances on account of wages, etc., as an idemnity to owners in case of loss, such seamen are not entitled to any part of the insurance paid the owners. *Roberts* v. *Swift*, 915.

See CHINESE, 391; AMERICAN VESSELS, 286, 291.

SECURITY. MECHANIC'S LIEN, 203.

SERVICE OF PROCESS.

1. ON FOREIGN CORPORATION.—Where foreign corporations engage in business in a state whose laws provide that they may be summoned by process served upon an agent in charge thereof, they are "found" in the district in which such agent is doing business, and may be served in that manner in suits brought in the United States courts. *Mohr & Mohr Distilling Co.* v. *Ins. Cos.* 12 FED. REP. 474, followed. *McCoy* v. *C., I., St. L. & C. R. Co.*, 3.
2. SAME.—Under the Revised Statutes, § 739, a foreign corporation is "found" in the district where its agent is served when it does business there, and the state laws authorize such a service. *Merchants' Manuf'g Co.* v. *Grand Trunk R. Co.*, 358.
3. CONSENT TO MODE OF SERVICE.—When a foreign corporation avails itself of the privileges of doing business in a state whose laws authorized it to be sued there by service of process upon an agent, its assent to that mode of service is implied; and it consents to be amenable to suit by such mode of service as the laws of the state provide, when it invokes the comity of the state for the transaction of its affairs; and waives the right to object to the mode of service of process which the state laws authorize. *Id.*
4. SAME.—Service of process of the United States circuit court on such an agent is valid, notwithstanding the suit may be upon a cause of action of which the state courts could not take jurisdiction, because of an act of the legislature restricting their jurisdiction, in suits against foreign corporations, to cases where the plaintiff is a citizen, or the cause of action has arisen within the state. *Carstairs* v. *Mechanics' & Traders' Ins. Co.*, 823.
5. SUBSTITUTED SERVICE — NON-RESIDENT DEFENDANTS.—Where attorneys have instituted a suit at law for non-residents of the state where the suit is instituted, and a temporary injunction against such proceeding at law is allowed, a subpœna may be served upon such attorneys, and their clients will be bound thereby, although the attorneys have not been retained, except as to the proceeding at law. *Crellin* v. *Ely*, 420.

SEQUESTRATION. WRIT OF, 567.

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See Constitutional Law, 429, 546, 722; Taxation, 722.

STATE FUNDS.

1. Accounting—Interest Act.—Under the provisions of the act of the general assembly of Missouri of March 26, 1881, it was the duty of the state officials to invest the $3,000,000 paid in by the Hannibal & St. Joseph Railroad Company as soon as practicable in the bonds and securities specified in said act, or some of them, and so save to the state as large a sum as possible, which sum so saved would have constituted, as between the state and complainants, a credit *pro tanto* upon the unmatured coupons now in controversy; and the state, in adjusting its claim against said railroad, must be held liable and chargeable with what could have been saved to the state by the investment of said $3,000,000 within a reasonable time after its payment. *Ralston* v. *Crittenden*, 508.

2. From Sale of Railroad.—The sale of the railroad for the amount of interest due on coupons, which amounts to less than the sum which the company must pay in order to discharge its liability to the state, will be enjoined; and, upon the payment of interest due, such payment will be taken into account by the master to whom the case is referred in adjusting the account. *Id.*

STATE INSOLVENT LAWS. Constitutional Law, 872.

STATUTE OF FRAUDS.

Contract of Sale—Delivery to Carrier.—A delivery of goods by a vendor to a common carrier is a delivery to the vendee, though such carrier was not designated by him, and under the provision of the Iowa statute of frauds that no evidence of any contract for the sale of personal property is competent when no part of the property is delivered, and no part of the price paid, such a delivery is sufficient to take the contract out of the statute. *Bullock* v. *Tschergi*, 345.

STATUTE OF LIMITATIONS.

1. Statute of Limitations—Discovery of Fraud.—In actions seeking relief on the ground of fraud, where the statute of limitations has created a bar, the cause of action is not considered as having accrued until the discovery by the aggrieved party of the facts constituting the fraud complained of; but this does not absolve him from all effort or diligence to obtain such knowledge, and facts of which he might have obtained knowledge had he sought it from its natural sources of information which were at his command, will be deemed within his knowledge. *Taylor* v. *S. & N. Ala. R. Co.*, 152.

2. Suspension by War.—The existence of war suspends the statute of limitations as between citizens of the adverse belligerent powers, but not as between citizens of the same power. *Cross* v. *Sabin*, 308.

3. Effect of War and Closing of Courts.—A public war and the closing of the courts conjointly would suspend the statute of limitations. But if the means provided by law for the issuance and service of process exist, whereby injured parties can commence suit, the court is not "closed," although they are not regularly held at the times appointed by law, and the probabilities are that a suit then brought would not be tried until after the cessation of hostilities. *Id.*

4. ACTIONS EX DELICTO.—Actions *ex delicto* may be brought within six years under the laws of Colorado, section 1686 applying only to actions *ex contractu*. *Shippen* v. *Tankersley*, 537.

5. FOREIGN CORPORATIONS.—A foreign corporation that by the laws of a state within which it comes on business can sue and be sued, is not a *non-resident* in the sense that would prevent it from setting up the statute of limitations as a defense in an action against it; and section 2533 of the Code of Iowa, that provides that "the time during which a defendant is a non-resident of the state shall not be included in computing the period of limitation," has no reference to such a case. *McCabe* v. *Illinois Cent. R. Co.*, 827.

STATUTES.

1. VALIDITY OF—JUDICIAL QUESTION.—Whether a seeming act of the legislature is or is not a law, is a judicial question, to be determined by the court, and not to be tried by the jury. *Amoskeag National Bank* v. *Ottawa*, 559, note.

2. JOURNALS OF LEGISLATURE.—The court may consult the journals of the legislature to decide whether a bill received the constitutional majority to make it become a law. *The Railroad Tax Cases*, 722.

3. CONSTITUTIONALITY OF STATUTES.—Where the constitutionality of a law is a matter of doubt, and the decisions upon the question are conflicting, to set aside such an act as unconstitutional would be presumption in an inferior judge. *Darling* v. *Berry*, 659.

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STATUTORY CONSTRUCTION.

1. PUNCTUATION.—Punctuation is no part of a statute. *Hammock* v. *Farmers' L. & T. Co.*, 189, note.
2. RULE OF CONSTRUCTION.—Courts, in construing statutes or deeds, should read them with such stops as will give effect to the whole. *Id.*
3. LAWS—HOW CONSTRUED.—All laws should be so construed, if possible, as to avoid an unjust or an absurd conclusion. *Case of the Chinese Laborers*, 291; *In re Ah Tie*, 291; *Case of the Chinese Merchant*, 605; *In re Low Yam Chow*, 605.
4. GENERAL TERMS.—General terms are to be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. *Case of the Chinese Merchant*, 605; *In re Low Yam Chow*, 605.
5. WHEN MANDATORY.—Even if the terms of a statute are permissive only, and mean no more than the words generally employed in statutes, importing a grant of authority or power to a public officer to do a certain act, still it is well settled that all such acts are to be construed as mandatory whenever the public interests or *individual rights* call for the exercise of the power conferred. *Ralston* v. *Crittenden*, 508.

See PENALTIES AND FORFEITURES, 916; SUBSCRIPTION TO RAILROAD STOCK, 301.

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STOWAGE. CARRIERS BY WATER, 89, 904.

SUPREME COURT.

REGULATION OF PRACTICE, FORMS, ETC.—The supreme court has the power to prescribe the forms of writs and process, and to regulate the whole practice in suits in equity in the circuit courts; but any circuit court may, in any manner not inconsistent with any law of the United States or any rule prescribed by the supreme court regulate its own practice to advance justice. *Steam Stone Cutter Co.* v. *Jones*, 567.

SUPREME COURT RULE. No. 11, ADOPTION OF STATE LAWS, 575, 576, 583.

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TAX COLLECTOR.

BOND OF.—A bond of a collector of taxes, which does not bind the obligors on its face for the faithful performance by the principal of the duties of his office in any particular district, is not, for that reason, void as to the sureties. A declaration on such a bond must aver that he had been appointed collector of revenue for some district. *United States* v. *Jackson*, 303, note.

TAXES AND ASSESSMENTS.

Collection of.

1. AUTHORITY OF STATE.—The collection of a public tax as much belongs to the authority of the state as its levy and assessment. *Thompson* v. *Allen Co.*, 97.
2. ASSESSMENT FOR SPECIFIC PURPOSE.—The tax, when assessed, although levied for a specific purpose, is not a fund which can be dealt with by a court as an equitable asset or chose in action subject to an implied trust, and United States courts have no power to appoint a receiver to collect such taxes even where there is no state officer to perform that duty; per MATTHEWS, Justice; BAXTER, C. J., dissenting. Case stated in opinion. *Id.*
3. ASSESSMENT OF PROPERTY OF RAILROAD.—The validity of the assessment of the property of a railroad company, and of the provisions of state law discriminating between the assessment for taxation of the property of such companies and the property of individuals; and whether the fourteenth amendment of the federal constitution applies to artificial as well as to natural persons, may depend upon the proper construction of such amendment; and the right of the company to a reduction in the estimated value of its property assessed for taxation, by the amount of the morgtage due thereon, depends upon the construction of said amendment, and constitutes a case for relief arising under the constitution and laws of the United States, and is removable into the circuit court. *San Mateo Co.* v. *Southern Pac. R. Co.*, 145.
4. REVENUE AND TAXATION—STATE CONSTITUTION—CONSTRUCTION.—The provisions of article 13 of the constitution of California, treating of revenue and taxation, are not conditions upon the continued existence of railroad corporations. *The Railroad Tax Cases*, 722.
5. UNIFORMITY IN TAXATION—RULE OF, CONSTRUED.—Uniformity in taxation requires uniformity in the mode of assessment as well as in the rate of percentage charged.
6. RULE APPLIES TO ARTIFICIAL AS WELL AS NATURAL PERSONS.—By the thirteenth article of the constitution of California, "a mortgage, deed of trust, or other obligation by which a debt is secured, is treated, for the purpose of assessment and taxation, as an interest in the property affected thereby;" and, "except as to railroad and other *quasi* public corporations," the value of the property affected, less the value of the security, is to be assessed and taxed to its owner, and the value of the security is to be assessed and taxed to its holder. Section 4. But by the same article "the franchise, road-way, road-bed, rails, and rolling stock of all railroads operated in more than one county" are to be assessed at their actual value, and apportioned to the counties, cities, and districts in which the roads are located, in proportion to the number of miles of railway laid therein, no deduction from this value being allowed for any mortgages on the property. *Held*, that in the different modes thus prescribed of assessing the value of the property of natural persons and the property of railroad corporations as the basis of taxation, there is a departure from the rule of equality and uniformity.
7. NATIONAL BANKS—REAL ESTATE TAXABLE.—Under the Pennsylvania act of June 10, 1881, entitled "A supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June, 1879," the real estate of a national bank is subject to taxation distinct from its other capital. *Second Nat. Bank* v. *Caldwell*, 429.
8. LICENSE TAX ON BANK.—A license tax imposed by city ordinance upon a national bank being a tax upon the operations of the bank, and a direct obstruction to the exercise of its corporate powers, is unconstitutional; but the ordinance not undertaking to make the tax a lien, and giving an action of debt

only for its collection, the bank is not entitled to equitable relief by injunction. *Id.*

9. Recovery Back.—A payment made in accordance with the provisions of a state constitution, which is in conflict with the federal constitution, is not a payment under duress, but is voluntary, and cannot be recovered back. *The Sonoma County Tax Case,* 789.

See Assessment, 789; Constitutional Law, 722; Legacy Tax, 617; Licenses, 429.

TIME CONTRACTS. Sale and Delivery, 263.

TITLE TO LAND.

1. Actual Possession.—An actual, exclusive, continuous, and adverse possession of granted land in Tennessee for seven years, by a party claiming under a color of title, defining boundaries and purporting to convey a fee-simple estate, will vest the possessor with a good title in fee. *Cross* v. *Sabin,* 308.
2. By Both Parties.—Where small quantities of a tract of land adversely claimed by the contending parties have been held by both of them during the same period, the owner of the superior title is, by construction of law, in possession of all the land embraced within his title not in the actual possession of the adverse claimant. Case stated in the opinion. *Id.*
3. Claimant under Junior Title.—A case might arise in which the claimant under the junior title might thus acquire a good title as against the owner of the superior title, who held a contemporaneous possession, as well as the better title. But the court finds, in this case, defendants held under their superior title, claiming the whole, and that their possession neutralized complainant's possession as to all of said land, except such as complainant had in actual possession. *Id.*

See Cloud on Title, 567; Equity, 418; Judicial Sale, 11; Mexican Grant, 217.

TRADES. Municipal Licenses, 229.

TREASURY TRANSCRIPT. Evidence, 239, note.

TREATY WITH CHINA.

Chinese—Rights of Residents.—Under the treaty with China, a Chinese resident of this country is entitled to all the rights, privileges, and immunities of subjects of the most favored nations with which this court has treaty relations; and where he was a resident here before the passage of the act of congress restricting immigration of Chinese, he has a right to remain and follow any of the lawful ordinary trades and pursuits of life, and his liberty so to do cannot be restrained by invalid legislation. *In re Quong Woo,* 239.

See Burlingame Treaty, 606; Supplemental Treaty, 607-613.

TRIAL. New Trial, 595; Reference, 550.

TRUSTS AND TRUSTEES.

1. Priority of Lien.—Where trustees in bankruptcy had a lien on certain bonds for an unpaid balance due them, and also a banker's lien on those not so pledged for the amount of the balance of a current account due from other parties, the latter liens were first to be satisfied out of the interest of such other parties in the bonds, as between such parties and complainants. Facts stated in the opinion. *Dumont* v. *Fry,* 423.
2. Equitable Interest.—Complainants being the equitable owners of a moiety of the bonds in suit, subject, however, to the lien of C. & Son, for any balance existing in their favor in the account relating to the joint purchase of the bonds with the complainants, the trustee could acquire a valid lien by virtue of an attachment upon the interest of complainants for the sum which may ultimately be recovered in his suit against complainants. *Id.*
3. Accounting by Trustee.—In such a case the trustee must account for the amount of all coupons collected. *Id.*

4. Reference to Master—Receiver—Costs.—Where the extent of respective interests of the parties can be arrived at without a reference to the master, such reference may be dispensed with upon counsel filing a stipulation to that effect. Under the circumstances the decree will provide for appointment of a receiver to sell the bonds, and to distribute the proceeds to the parties according to their respective rights. Costs will be allowed to the trustee. *Id.*

5. Money Followed into Land.—Where land is purchased with money advanced by a bank on the faith of an agreement between a board of commissioners and one of the defendants, and in pursuance of such agreement and subject to the conditions thereof the land is conveyed to a trustee, and said board have refunded the money so advanced, *such agreement never having been actually consummated*, the money can be followed into the land; but if the conveyance of the land would work an injury to the defendant, with whom the agreement was made, he should be allowed to refund the money, with interest, and all the parties be placed *in statu quo* as nearly as possible. *South Park Com'rs* v. *Kerr*, 502.

See Equity, 502; Practice, 857; State Funds, 508.

TUG AND TOW.

Negligence — Loss of Tow. — A tug having two tows on long hawsers, in rounding a dangerous island, for not going further to the eastward, and for allowing her hawsers to slacken so that she lost all control over her tow, was in fault and should be condemned for the loss of the tow, which drifted on a reef and sunk. *The C. B. Sanford*, 611.

UNDERTAKING. Arbitration Bond, 707.

UNITED STATES. Territorial Jurisdiction, 286, 291.

USAGE AND CUSTOM. Carrier, 181.

USURY. Contract, 198.

VARIANCE.

1. Misrecital in Pleading.—In an action upon an indemnity bond, given to indemnify the sureties on a prior delivery bond, a misrecital of the amount of the penalty in the delivery bond, of the parties in it to be indemnified, and of the terms and conditions of the delivery to be made under it, is a fatal variance. *Percival* v. *McCoy*, 380.

2. Variance not Cured by Averment of Mistake.—Such variance cannot be cured by an averment that the indemnity bond, sued on, was executed by mistake and inadvertence, without alleging and proving that the mistake was mutual, and that it was the intention of the parties to the indemnity bond to indemnify the sureties on the prior delivery bond. *Id.*

See Equity, 502.

VERDICT.

1. Sustained on Conditions.—In this case, the jury having found a verdict against the plaintiffs, and in favor of defendants, allowing them damages for their expenses for freight, storage, etc., on the wine, it was made a condition of sustaining the verdict that the amount actually received by defendants from the sale of a part of the wine be deducted from the amount of such verdict. *Amer. Wine Co.* v. *Brasher*, 595.

2. Amendment of.—Section 954 of the Revised Statutes of the United States authorizes the amendment of informal verdicts, so as to make them conform to technical requirements. *Gay* v. *Joplin*, 650.

See Amendment, 653; New Trial, 595.

VESSELS.

1. Seamen on American Vessels.—A person shipping on an American vessel as one of the crew is within the jurisdiction of the United States. *Case of the Chinese Cabin Waiter*, 286; *In re Ah Sing*, 286; *Case of the Chinese Laborers*, 291; *In re Ah Tie*, 291.

2. Territorial Jurisdiction.—An American vessel is deemed a part of the territory of the state within which its home port is situated, and as such a part of the territory of the United States. *Case of the Chinese Laborers*, 291; *In re Ah Tie*, 291.

See Lien for Supplies, 46; Maritime Services, 127, 703; Seamen, 291.

WAREHOUSEMEN.

1. Duty and Obligation.—Warehousemen are not required to provide against an unprecedented emergency; but, if they have reason to expect such an emergency, they are bound to take such precautionary measures to prevent loss as prudent and skillful men in the like business and under like circumstances might be expected to use. *Backus* v. *Start*, 69.

2. Same.—They are not bound to have or keep on hand special facilities to meet and overcome possible but unexpected and unprecedented emergencies, which are included in what is called the "act of God;" but, if imminent danger presents itself, to use such appliances and means as the ordinary and safe conduct of their business requires them to possess, and such as are at hand, and to use them with such promptness as would be expected of ordinarily careful and prudent men in regard to their own, or property intrusted to their care under like circumstances. *Id.*

WILL.

Power to Convey Fee.—A bequest, "To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, *the same to remain and be hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper*, so long as she shall remain my widow," gives to the legatee unlimited power to dispose of any or all of the property bequeathed, so long as she remains a widow. *Giles* v. *Little*, 100.

See Estates of Deceased, 16; Judicial Sale, 11.

WRECKING COMPANY. Salvage, 127.

WRIT OF SEQUESTRATION.

1. Rule 11.—Rule 11 of this court, providing that "the creation, continuance, and termination of liens and rights created by attachment of property, or the arrest of a defendant, shall be governed by the laws of this state," is a valid rule, and as the writ of sequestration as a mesne process in an equity suit has always existed in the state of Vermont, such rule authorized the issuing of the writ in this case. *Steam Stone Cutter Co.* v. *Jones*, 567.

2. Service of Writ.—As the writ of sequestration is an attachment to create a lien, rule 11, in adopting the state law as to the creation of the lien, adopts the state law as to the mode of service; and as the acts of the marshal in this case were in accordance with the requirements of the laws of Vermont, the complainants obtained a valid lien. *Id.*

3. Nature of Writ.—The writ of sequestration in Vermont is not the writ known to the English chancery, but is a mesne security, given *pendente lite*, operating in that regard, and to that end, like a provisional injunction, or a temporary receivership, or a writ of *ne exeat*, or the filing of a *lis pendens*. *Id.*

WRITS. Forms Prescribed, 567.